

# Army Lawyer

U.S. Army Judge Advocate General's Corps

Issue 2 • 2024



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Students of Direct Commissioning Course Class 001-24 work together as a team to navigate obstacles at the Leaders Reaction Course. (Credit: CW2 Levi Ramos)

# Army Lawyer

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Cover: CW2 Norman H. Mininger salutes as he crosses the finish line of the 127th Boston Marathon. (Credit: Boston Athletic Association, Meghan Murphy)

Back Cover: Echo Company cadre conducts hot weather injury training in preparation for the judge advocate direct commissioners course. (Credit: CW2 Nathan L. Ramos)

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(Credit: Brian Jackson-stock.adobe.com)

# Court Is Assembled

## Conversation Curveballs

### A Trauma-Informed Communication Skills Toolkit to Enhance JAG Corps Health & Well-Being

By Elizabeth F. Pillsbury, LICSW

The U.S. Army Judge Advocate General's (JAG) Corps recently created the Wellness Program Director position as a part of the effort to expand holistic health. As the new Wellness Program Director, I learned within the first few months of taking on my role that military legal professionals, particularly those with experience in military justice, regularly handle sensitive and potentially traumatizing information. As a psychotherapist who has been in practice for nearly twenty-five years and specializes

in trauma (to include child abuse, sexual violence, combat trauma and everything in between), I began reflecting on specific characteristics of communication that relate to wellness within the Army Judge Advocate Legal Services (JALS) community.

In this article, I offer some of these reflections as a mini communication skills toolkit with the hope of increasing our trauma-informed practices within the JAG Corps. My goal is to provide real-world applications of practical tools to respond to

everyday situations you may encounter in a way that is compassionate and based on the mental health field's best practices.

#### Trauma-Informed Practice: The Foundation of the Solution

Trauma-informed care is a universal framework that *any organization* can implement to build a culture that acknowledges and anticipates that many people we serve or interact with have histories of trauma, and that the environment and interpersonal interactions within an organization can exacerbate the physical, mental, and behavioral manifestations of trauma.<sup>1</sup>

The term "trauma-informed care" or practice may not be new to you or the JAG Corps. It is a widely accepted framework in the health services, education, and legal professions. An American Bar Association article discusses the concept in the legal context: "Establishing a trauma-informed law practice is a two-fold process: (1) taking steps that help prevent re-traumatization of our clients, and (2) taking steps that protect

lawyers' health and well-being from exposure to trauma.<sup>72</sup> Regarding the second arm of this process in particular, we have room to expand our efforts and further consider ways to be sensitive to the needs of those in our ranks who may have experienced adversity impacting their health, well-being, or ability to perform at their highest level. The following communication skills offer concrete ways to do so.

***Problem 1: Sharing potentially upsetting stories without warning someone of what you are about to say.***

One of the first stories a judge advocate (JA) shared with me involved a child abuse case that several members of our military judiciary were exposed to while preparing for and conducting a court-martial. The individual shared this story to help me understand some of the challenges that JALS personnel face daily and to inform my Wellness Program development efforts. However, he recounted the story immediately after discussion of a completely unrelated topic and without warning. The conversation shifted so suddenly that I was unprepared to hear such information. After he finished the account, the conversation shifted to a different, unrelated topic just as suddenly. The story's content was not the most disturbing aspect of the interaction; rather, it was how abruptly the story was interwoven with an otherwise benign subject matter.

The second incident occurred about a week later at a training session focused on healthy ways to manage work-related stress, such as playing frisbee with a pet dog in the park. We then had a ten-minute break.

When I returned from the break, I inadvertently entered an on-going conversation about crime scene responses. The course attendees casually shared "war stories" about their cases. One individual then launched into a detailed monologue of a recent violent incident. I found myself dealing with a sudden mental shift from the discussion about playful puppies to processing objectively appalling details.

***Solution to Problem 1: Give a "warning shot" before sharing something a listener may perceive as upsetting or traumatic.***

The tricky part about this solution is being aware that what you are going to say may

be upsetting to someone else. Many legal professionals have been in this field for so long and/or have been exposed to so many difficult stories and evidence that they may be desensitized to sensitive content. They may even think these types of things are "normal" and "routine" because it is what they do daily. Despite the alarmingly high rates of adverse childhood events (ACEs) in our country and world, these experiences are not normal, and most people outside of service professions—such as law, healthcare, and education—do not typically see nor hear about these things on a routine basis.

**Sidebar: Adverse Childhood Events**

Adverse childhood events are potentially traumatic childhood events (between zero and seventeen years old).<sup>3</sup> They include abuse, violence, or neglect as well as "aspects of a child's environment that undermine their sense of safety, stability, and bonding," such as growing up with someone who has a mental health or substance abuse problem, experiencing suicide in the family, having a family member incarcerated, living in a community of violence, and experiencing poverty.<sup>4</sup> Additional ACEs include food scarcity, experiencing homelessness or unstable housing, instability related to parental and family separation, and discrimination.<sup>5</sup> Please note the examples above are not a complete list of adverse experiences. Many other traumatic experiences could impact health and well-being.

Two out of three people in the United States have experienced at least one ACE, and those who have are more likely to experience multiple ACEs.<sup>6</sup> That means that if you have not experienced one of these, chances are the person to your right and left have (statistically speaking).

Not all these experiences result in post-traumatic stress disorder, but they do put people at higher risk for a variety of health problems, and they are linked to earlier death rates. In fact,

ACEs are strongly associated, in a dose-response fashion, with some of

the most common, serious, and costly health conditions facing our society today, including nine of the ten leading causes of death in the United States, as well as earlier mortality. [They] can also negatively impact education, job opportunities, and earning potential.<sup>7</sup>

Some people are at greater risk of experiencing one or more ACEs than others. While all children are at risk of ACEs, "numerous studies have shown inequities in such experiences linked to the historical, social, and economic environments in which some families live. [Adverse childhood events] were highest among females, non-Hispanic, American Indian, or Alaska Native adults, and adults who are unemployed or unable to work."<sup>8</sup> Given the disparate exposure to ACEs based on gender and racial and cultural groups, as a JAG Corps, we need to be cognizant of how these factors disproportionately impact our clients and our colleagues from diverse backgrounds.



Ms. Beth Pillsbury. (Image courtesy of author)

Using specific communication tools, including warning someone that you are about to cross into potentially upsetting or traumatic territory, is a specific trauma-informed practice. This is a tool I have taught doctors to use for years. Despite having the best intentions, I have seen far too

many doctors “sucker punch” their patients with bad news. I have seen this happen in “practice” encounters and real-life medical appointments. Once given this tool, they can share potentially life-changing negative news in a way that is compassionate and sensitive to their patients’ needs. This skill can be taught and learned not just in medicine but in the legal profession as well.<sup>9</sup>

The “warning shot” allows the person hearing the story or news to psychologically brace for what is to come. The storyteller sends a signal for the listener to get ready. The listener’s brain responds, “Okay, time to protect myself; something bad is coming.” When we are not given the warning shot, our brains automatically shift into survival mode, which limits our ability to understand the information and process it in a useful and meaningful way.

Here are some lines to try:

*“Unfortunately, . . .”*

*“I need to share something that may be upsetting to hear.”*

*“I’m warning you that I’m going to tell you something that may be unpleasant/disturbing to hear.”*

***Problem 2: Sharing graphic details puts the listener at risk for a negative reaction and, at times, secondary trauma. It can also put the storyteller at risk for a strong physical or emotional reaction.***

Back to my chat on day one with my JA colleague. I have heard thousands of accounts of abuse, neglect, interpersonal violence, and all that can result from these experiences. I am trained to sit with people in pain and tolerate their emotions. Nonetheless, I struggle with the detailed content of their stories, even when I know they are coming. When the colleague started to recount the child abuse, he included vivid, graphic, sensory details to help me understand the situation. In the second story, the course attendee also used graphic details to convey the event’s impact.

Sensory material (sight, sound, taste, touch, and smell) can elicit strong, often involuntary responses in us. The danger in using this type of detail in storytelling is that once you start to describe something using sensory material, a person’s brain can start to fill in the gaps—often inaccurately because of the part of the brain that engages

with this type of information. Then, the brain can get stuck. I have heard many say, “I can’t unsee the things I’ve seen.” This is the same sentiment; the details can remain long after the conversation ends.

I do not believe most people share these types of stories to upset or traumatize the listener. Rather, they are often trying to make sense of the experience, looking for support and empathy, or determining whether they have an accurate account of what happened. However, there are ways to accomplish these tasks without potentially doing more harm.

***Solution to Problem 2: Unless it is necessary and within the correct context (time and place), consider telling stories and sharing information without using vivid sensory descriptions and try to talk more about the impact of the information instead.***

If you are describing something in detail, your listener can likely see/hear/smell/feel/taste it too. That is wonderful if you are talking about an amazing trip you took or a delicious meal someone prepared for you—not so much if you are in a social setting and begin to casually provide details about a difficult case you are working on. It does not have to be that severe; it could seem routine to you but be upsetting to your audience.

This solution may run counter to the legal field’s culture, in which you are trained to provide detailed evidence. While that is appropriate in the context of an investigation, evidence collection, deposition, or courtroom, it is not best practice for everyday conversation.

It is not a good idea to use even when sharing how challenging your work is to someone who cares about you. They can support you without knowing a case’s details, and conversely, you can unload your experiences without risking traumatizing the person listening to you. In group therapy with trauma survivors, one of our ground rules is not to provide so much graphic detail that other people in the group can picture it themselves. The same rule can be applied to legal work.

I am not encouraging people to remain silent about their experiences; rather, I am encouraging people to share them in a way that allows for support without threatening the listener’s well-being. If this feels

inadequate to you, I strongly recommend speaking with someone trained to guide you through this process in a safe setting with scientifically grounded techniques (i.e., a therapist experienced in working with trauma).

***Additional Solution to Problem 2: If you do need to share graphic details on something potentially traumatic, give a warning shot first (and consider asking permission).***

***Here are a few lines you can try:***

*“I need to talk about some of the details of the case to give you an understanding of the severity of what happened. This may be hard to hear. Are you okay with that?”*

*“Unfortunately, I need to tell you something that may be upsetting. Is now a good time to discuss this?”*

#### **Sidebar: Primitive Trauma Response**

The brain responds to real or perceived threats in a way that is designed to help you survive. This happens involuntarily and is completely outside your control. This part of the brain, the amygdala, is very primitive. It is not the part of the brain that processes information, solves problems, or makes decisions—that is the prefrontal cortex. When someone experiences trauma, the sensory details of the memory get stored in the amygdala, and time and sequencing can become distorted or inaccurate. You may see this happen with some of your witnesses or victims who have difficulty organizing the sequence of events in a case. When this distortion in the amygdala occurs, it can interfere with the person’s ability to fully process the events rationally because this primitive part of the brain does not have the capacity for rational thought. We have come a long way in science and now have effective, evidence-based ways to help someone work through the challenges of this trauma response in treatment. While therapy cannot erase these experiences, it can significantly help those memories, images, or videos that you “can’t unsee” become far less vivid and lose impact on your day-to-day life. Check out the resources in the Appendix to explore what may be a good fit for you.



**Problem 3: Someone's expression, body language, or nonverbal communication does not match their story's severity.**

As my colleague recounted his difficult story, he avoided making eye contact, and his gaze looked a million miles away. His face was flat and expressionless. His voice was nearly monotone and steady, with little to no emotion in it. He shared that he was deeply concerned about his colleagues, yet his nonverbal communication did not match.

Similarly, the course attendee told his story about responding to the crime scene from a detached perspective; his tone did not match what he was recounting. He sounded like he was talking about something as mundane as the weather rather than the scene he described.

In the therapy world, we call this an "incongruent affect," or when someone's expression does not match their words. Both are concerning to me as a therapist because they may be experiencing signs of depression or secondary- (or post-) traumatic stress, such as emotional numbness and cynicism. While these can be protective ways to manage hard, overwhelming feelings in the short term, they can be dangerous in the long term. The more detached and numb a person is, the longer it can take them to work through these experiences and the higher their risk for more symptoms of secondary- or post-traumatic stress.

**Sidebar: Comparative Suffering**

The course attendee seemed to share this story as if he was comparing his experiences to those of his colleagues. He may have felt his experiences were not as valid or may be perceived as less (or more) traumatic than theirs. This is called comparative suffering. Comparative suffering is "when we view our painful experiences in terms of what other people are going through in order to determine the level of validity our suffering warrants. Essentially, this is the mindset that we aren't allowed to complain or feel our feelings when someone else has it worse than us."<sup>10</sup> It is ranking our suffering against that of others, which is then used to either deny or give ourselves permission to feel.<sup>11</sup> It is like using your trauma exposure to diminish or, at times,

to justify your own suffering because of your perception of how it compares to someone else's.

Researcher and social scientist Brené Brown talks about this in her book *Rising Strong*:

Comparative suffering is a function of fear and scarcity. Falling down, screwing up, and facing hurt often lead to bouts of second-guessing our judgment, our self-trust, and even our worthiness. I am enough can slowly turn into Am I really enough? If there's one thing I've learned over the past decade, it's that fear and scarcity immediately trigger comparison, and even pain and hurt are not immune to being assessed and ranked. My husband died and that grief is worse than your grief over an empty nest. I'm not allowed to feel disappointed about being passed over for promotion when my friend just found out that his wife has cancer. You're feeling shame for forgetting your son's school play? Please—that's a first-world problem; there are people dying of starvation every minute. The opposite of scarcity is not abundance; the opposite of scarcity is simply enough. Empathy is not finite, and compassion is not a pizza with eight slices. When you practice empathy and compassion with someone, there is not less of these qualities to go around. There's more. Love is the last thing we need to ration in this world. The refugee in Syria doesn't benefit more if you conserve your kindness only for her and withhold it from your neighbor who's going through a divorce... Hurt is hurt, and every time we honor our own struggle and the struggles of others by responding with empathy and compassion, the healing that results affects all of us.<sup>12</sup>

**Solution to Problem 3: If someone's body language and nonverbal communication do not match what they are saying, consider it an opportunity to offer support.**

This may be incredibly challenging in a work setting, particularly with someone with whom you are not close.

If it is a peer or near-peer with whom you do not have a close relationship, consider asking someone who knows them or works closely with them to reach out and check in with them.

Here is an example of how to bring this up:

"Sir/Ma'am, I have some concerns about how one of my peers is doing, but I don't feel it's appropriate (or I don't feel comfortable) for me to talk with them about it directly. Could you please offer some guidance and support? I've noticed that he/she hasn't been acting like his/her usual self, and I'm concerned about his/her well-being. I respectfully ask if you would reach out to him/her to check in on how he/she is doing."

Even if the person is someone you are close with, you may feel awkward about this and not know what to say. Sometimes, it is as simple as telling someone, "I can't imagine what you're going through. I'm here with you."

Other times, it may be more of a discussion about ways you can support them. You can open a discussion with one of these:

"Wow, you just told me about something really powerful, but it was like you were somewhere else. . . . Are you okay?"

"Thanks for sharing that with me. As you were talking about something really upsetting, I noticed that you seemed really calm. What's going on inside?"

"Thanks for telling me about this. I can't imagine what that was like for you. I wish I had the tools to help you more with it. Would you like me to help you find someone who helps people with these kinds of experiences?"

# THE TRUTH ABOUT ACEs

## WHAT ARE THEY?

**ACEs are ADVERSE CHILDHOOD EXPERIENCES**

*The three types of ACEs include*

ABUSE	NEGLECT	HOUSEHOLD DYSFUNCTION	
Physical Abuse	Physical Neglect	Mental Stress	Increased Risk
Emotional Abuse	Emotional Neglect	Mother Treated Violently	Substance Abuse
Sexual Abuse		Divorce	

## HOW PREVALENT ARE ACEs?

*The ACE study\* revealed the following estimates:*

Category	Percentage
<b>ABUSE</b>	
Physical Abuse	28.3%
Sexual Abuse	26.7%
Emotional Abuse	10.0%
<b>NEGLECT</b>	
Emotional Neglect	24.8%
Physical Neglect	3.9%
<b>HOUSEHOLD DYSFUNCTION</b>	
Household Substance Abuse	25.9%
Parental Divorce	23.3%
Household Mental Stress	15.0%
Mother Treated Violently	12.7%
Discarded Household Member	4.7%

*As the number of ACEs increases, so does the risk for negative health outcomes*

**RISK**

0 ACEs   1 ACE   2 ACEs   3 ACEs   4+ ACEs

*Possible Risk Outcomes:*

BEHAVIOR				
Lack of physical activity	Smoking	Alcoholism	Drug use	Wasted work
PHYSICAL & MENTAL HEALTH				
Severe obesity	Diabetes	Depression	Suicide attempts	STDs
Heart disease	Cancer	Stroke	COPD	Broken bones

*Of 17,000 ACE study participants:*

26% (1 ACE)	30% (2 ACEs)	34% (have at least 1 ACE)
10% (3 ACEs)	12.4% (4+ ACEs)	
16.6% (have experienced 0 ACEs)		

percentage of study participants that experienced a specific ACE

rwjf.org/aces

\*Source: <http://www.acestudy.org/publications.htm>

## WHAT IMPACT DO ACEs HAVE?

*As the number of ACEs increases, so does the risk for negative health outcomes*

**RISK**

0 ACEs   1 ACE   2 ACEs   3 ACEs   4+ ACEs

*Possible Risk Outcomes:*

BEHAVIOR				
Lack of physical activity	Smoking	Alcoholism	Drug use	Wasted work
PHYSICAL & MENTAL HEALTH				
Severe obesity	Diabetes	Depression	Suicide attempts	STDs
Heart disease	Cancer	Stroke	COPD	Broken bones

(Credit: Robert Wood Johnson Foundation)

In the case of someone who outranks you, consider reaching out to someone who is a peer to them and respectfully express your concerns. Remember that sometimes, when someone is detached or numb, they may be in a lot of pain. They may or may not be ready to open up to you. Keep an eye on them; they may benefit from extra support, even if it is just casual conversation,

going for a walk, or playing with puppies in the park. One of the greatest gifts we can offer each other is compassion.

### **Solutions for the Listener (and the Storyteller)**

Be prepared for people to tell you all kinds of things at any time, regardless of the setting, relationship, etc. Even if you are caught off guard, told something graphic,

or communicated with in a way that seems completely off, there are some things you can do afterward to calm down.

After hearing or saying something upsetting, here are three proven strategies to help calm and relieve your body and brain. My clinical recommendation is to practice these two to three times daily when you are *not* feeling stressed. That way, it is easier for your brain and body to use these when you *are* stressed, upset, or triggered. If it is hard for you to remember to do something like this, try setting a timer on your phone or link it with something you already do two-to-three times a day, like when you brush your teeth or eat a meal.

For bonus points, consider rating how you feel before and after practicing these. For example, on a scale of zero to ten, where zero is neutral and ten is the highest level of distress you can imagine, how do you feel? (You can think of it in terms of a specific emotion like anxiety, sadness, anger, or just generally speaking.)

### **1. Practice Grounding**

This practice can help prevent upsetting thoughts, nightmares, flashbacks, and body sensations linked to adverse experiences. Use your five senses to stay in or return to the present moment. Use sight, sound, touch, taste, and smell to connect with what is happening around you right now.

- *What do you see?* I see my computer screen, clouds outside, and my favorite coffee mug.
- *What do you hear?* I hear the sound of my keys tapping on the keyboard.
- *What do you feel (tactile/touch)?* I feel the keys under my fingers.
- *What do you taste?* Yuck; I taste coffee brewed about six hours ago.
- *What do you smell?* Not a whole lot, but if I sniff my sleeve, I can smell detergent.

### **Sidebar: The Five Senses**

Smell is one of our most primitive senses, and when it is linked to adverse or traumatic experiences, the response can be especially hard to alleviate. Try smelling a marker, candle, or something strong that does not remind you of the trauma. (For example, hand wipes or



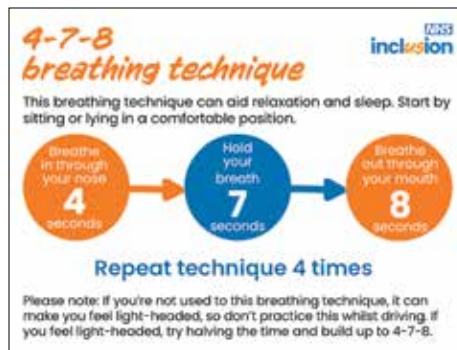
sanitizer are great unless you have had upsetting medical experiences because they can remind you of a hospital smell.) For each of your senses, if you have difficulty finding something around you to feel, taste, hear, etc., you can introduce something instead. For sight, check out your hands, look for vivid colors and patterns, or perhaps a picture of something peaceful. For sound, try some music or an audiobook. For touch, squeeze your toes, have a stone or something you carry in your pocket. And for taste, mints, candy, gum, flavored tea, or coffee do wonders!



(Credit: The Pragmatic Parent)

## 2. 4-7-8 (or Box) Breathing Technique

This technique was originally designed at Harvard University for students with test-taking anxiety. It was very effective at lowering their anxiety and has since been taught and used in all kinds of settings. To correctly practice deep breathing, when you inhale, your abdomen should expand outwards, and when you exhale, your belly should contract inwards. Breathe from your belly, not your chest; otherwise, it is shallow breathing and can lead to hyperventilation. If this is new for you, practice it sitting down for the first few times—you may not be used to getting this much oxygen and I do not want you to get lightheaded!



(Credit: Inclusion, UK National Health Service)

## 3. Peaceful Place Imagery

Now is the time for graphic, vivid, sensory details! Consider a place where you have been or want to go—real or imaginary—that feels peaceful. Paint a sensory portrait of the place: What does it look like? What sounds do you hear? What does it taste like? What do you feel there? Where are you in the scene? What time of year and day is it? What does it smell like?

Consider adding anything that increases your sense of peace and comfort. Do you want cozy slippers? A cool or warm beverage?

Lastly, how will you get there in your mind? Can you just close your eyes and imagine the place? Do you need to imagine walking down a path or count to ten and you will be there?

### Sidebar: Guests in Your Peaceful Place

You may be tempted to bring someone to your imagined peaceful place. Don't! Even if you only have warm, happy thoughts about that person, if you get into an argument or something happens later on in real life, your peaceful place will be tainted. You *can* bring an animal as long as they do not cause you any upset.

The reality is that legal work (and life, for that matter!) is inherently stressful. There is no way to completely avoid upsetting stories, content, and sometimes even trauma exposure, particularly in certain roles and specialties. Best practices and evidence-based treatments can lessen the impact of the work and even help individuals experience post-traumatic growth and compassion resilience.

Even if you do not work in military justice or a supervisory role, we all have a

responsibility to create a trauma-informed organization. As an organization, we have a responsibility to be trauma-informed in a way that meaningfully acknowledges and supports everyone. Consider ways you can empower and be compassionate towards your clients, colleagues, and yourselves. Take a "bite" of each communication skill and see what you like. Maybe you will find you like them all, or they may take some getting used to. Think about ways you may be able to incorporate these into everyday interactions, even if they feel a bit clumsy and awkward at first. With practice, you will be better equipped to help yourself and others. **TAL**

*Ms. Pillsbury is the Wellness Program Director in the Office of The Judge Advocate General at the Pentagon.*

## Notes

1. *Trauma-Informed Care*, TRAUMA POL'Y, <https://www.traumapolicy.org/topics/trauma-informed-care> (last visited Apr. 15, 2024).
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## **Appendix: Resources**

### **Department of Defense Mental Health Resources for Service Members and Their Families:**

<https://www.defense.gov/News/Releases/Release/Article/2737954/department-of-defense-mental-health-resources-for-service-members-and-their-fam>

This Department of Defense website provides descriptions and links to various Department of Defense mental health resources for Service members and their Families.

### **The National Center for PTSD's Treatment Decision Aid:**

<https://www.ptsd.va.gov/apps/decisionaid>

This online resource includes a decision aid on how to select a trauma treatment that best suits you. It's best to use this resource with a skilled therapist to create a tailored treatment plan.

### **Eye Movement Desensitization and Reprocessing International Association (EMDRIA):**

<https://www.emdria.org/>

This online resource offers a database to search for a therapist that specializes in EMDR, one of three treatments that the Department of Defense and Veterans Affairs endorse for secondary and post-traumatic stress.

### **Psychology Today:**

<https://www.psychologytoday.com>

This online database allows users to search for a therapist with various filters, including accepted insurance, types of problem, gender, specialty, etc.





LTG Risch speaks to members of the George Washington University Law School's National Security Law Association. (Image courtesy of authors)

a leadership role, it is vital to develop your own written philosophy to set forth all those things that you have determined are critical for a leader to believe, state clearly, and follow. Your philosophy documents what you expect of yourself as a leader, what others should expect from you, and what you expect from subordinate leaders in *general* terms as opposed to specifics. That last concept is critical to understand because we do not always get to be the leader we want to be; *we must be the leader our people need*, so there must be flexibility built into any leader's philosophy.

This article discusses the concept of lawyers as leaders, servant leadership, and the JAG Corps's emphasis on leadership. It focuses on how the U.S. Army, and specifically our JAG Corps, *grows leaders*. But first, let us proudly and quickly provide some background on our remarkable law firm: what we believe to be the oldest, largest, and best America has to offer.

### Our People

Our Corps has approximately 1,850 uniformed lawyers (i.e., JAs) on active duty, more than 2,800 in the Army Reserve and National Guard, and over 750 Civilian attorneys. We total over 5,000 uniformed and Civilian attorneys who lead, manage, mentor, and work side-by-side with nearly 5,000 uniformed and Civilian paralegals and warrant officers (i.e., legal administrators). In sum, our regiment numbers almost 10,000 personnel and is embedded in every echelon of the Army to provide principled—that is, ethical—and legally precise counsel, advice, and support.

More than 150 JAs are presently deployed worldwide in more than twenty countries. While our deployed numbers have significantly decreased since the end of the wars in Iraq and Afghanistan, our worldwide footprint has actually increased. Last year, JAG Corps personnel supported over 600 legal offices and deployed task forces in over thirty countries. Congress, the Department of Defense, and Army leadership continue to ask us to do more, and our talented people rise to every occasion

# Special Feature

## Lawyers as Leaders

### Servant Leadership and Our Dual Profession

By Lieutenant General Stuart W. Risch and Lieutenant Colonel John E. Swords

*Lawyers should be able to build and lead organizations. They should be able to develop the vision, the values, the priorities, the strategies, the people, the processes, the checks and balances, the resources, and the motivation. Team participation and team leadership are interconnected: leadership today is often not command and control but persuasion and motivation and empowerment of teams around a shared vision.<sup>1</sup>*

The U.S. Army Judge Advocate General's (JAG) Corps is nearly 10,000 strong, spread across our country and the globe. Regardless of rank or mission, as dual professionals—both Soldier and lawyer, working in the profession of arms and the profession of law—judge advocates (JAs) are leaders. Therefore, continued improvement in all aspects of leadership, but particularly

in becoming a true servant leader, is of paramount importance to success in our unique practice.

All JAs will supervise, manage, and lead Civilians, Soldiers, and fellow officers. As such, every member of our Corps, whether in a supervisory role or not, should develop a leadership philosophy—if they have not done so already. Before assuming

and novel challenge. Our personnel successfully achieve all of the innumerable feats because they possess a firm foundation in, and understanding of, servant leadership.

### The Concept of Servant Leadership

The term servant leadership might sound like an oxymoron to many outside of the military service. Yet all of us in the profession of arms understand that a leader must be a servant to their respective Service, unit, and subordinates. True servant leaders use their authority and position to *serve* subordinates and peers—that is, to care for them—rather than expect those individuals to serve the leaders' needs.

The concept of servant leadership is not a recent one borne out of high-profile CEOs leveraging social media over the last decade to become media darlings. Rather, businessman and author Robert K. Greenleaf coined the term “servant leader” in his 1970 essay *The Servant as Leader*.<sup>2</sup> A servant leader “focuses primarily on the growth and well-being of people and the communities to which they belong” and “put[s] the needs of others first and help[s] people develop and perform as highly as possible.”<sup>3</sup> Greenleaf, a thirty-eight-year employee of AT&T who rose to be the director of management development, held the belief—quite unpopular at the time—that “the organization exists for the person as much as the person exists for the organization.”<sup>4</sup>

While Greenleaf is credited with coining the servant leader term, it was used in concept—and certainly practice—much earlier. As just one example, during his reign in the eighteenth century, the autocratic King Frederick II of Prussia famously portrayed himself as “the first servant of the state.”<sup>5</sup> Whether he would be considered a servant leader by Greenleaf's standards is certainly debatable. Yet, America's military history is filled with known and unknown individuals who have undoubtedly been servant leaders, as characterized by Greenleaf. Major (MAJ) Richard “Dick” Winters, the Easy Company Commander of the 506th Parachute Infantry Regiment, 101st Airborne, from World War II and the TV series *Band of Brothers*<sup>6</sup> fame, is one individual who comes to mind for many in the Army as the epitome of a servant leader. The Soldiers from Easy Company during his time in command echo

that opinion.<sup>7</sup> And there are countless more military leaders at all echelons and ranks who are true servant leaders.

In his essay, Greenleaf outlines ten fundamental principles of servant leadership. Current or future leaders should recognize many of the traits on the list and already be diligently working to improve in those areas. They are:

1. listening well;
2. showing empathy;
3. allowing for healing and the building of trust;
4. demonstrating self-awareness;
5. being persuasive;
6. exercising conceptualization (that is, developing direction and looking beyond daily priorities to the big picture);
7. displaying foresight (predicting future outcomes and planning for them);
8. stewardship (accepting accountability, taking responsibility for your actions, and recognizing how your support of your people contributes to overall performance);
9. committing to the growth of people; and
10. building community so all work together toward a common goal.<sup>8</sup>

Although not an official endorsement, Greenleaf's contentions are persuasive; they form the cornerstone for much of the modern basis of leadership in both the military and the private sector. This article will not discuss all ten of his principles in depth; while they are all worthy of further discussion, a few merit highlighting here.

Per Greenleaf, servant leaders must be good listeners to *get to know* their employees. In any profession, it is critical that you know your subordinates and build mutual trust—both personally and professionally. That trust is the lynchpin of all aspects of your future success as a leader. Former U.S. President Theodore Roosevelt is credited with saying, “People don't care how much you know until they know how much you care.”<sup>9</sup> Once your subordinates are convinced that you genuinely care about them and endeavor to take care of them, they will go to the ends of the earth for you and the mission—just ask MAJ Winters.

Stewardship—along with *foresight and conceptualization* (thinking strategically,

predicting future events, and planning accordingly, as defined by Greenleaf<sup>10</sup>)—demands that leaders think long-term for their organizations and act to improve the organization beyond their tenure. For example, as a leader you will undoubtedly be confronted by a situation in which a stellar Civilian, paralegal, noncommissioned officer (NCO), warrant officer, or young officer will have the opportunity to do some form of training that has the potential to significantly progress that individual's career. You may be tempted to deny this opportunity because of the negative impact you believe their absence will have on *your* current formation. However, you must ensure that you do not stand in the way of that person's progress for some *perceived* short-term, and likely relatively inconsequential, gain. That individual could be a future senior Civilian attorney, sergeant major, senior legal administrator, or senior officer, and your actions have potentially stunted their professional growth, or worse yet, caused them to lose faith and leave our ranks. Although at times it is difficult, you must think of decisions in terms of what is best for your organization as a whole and not just the perspective from your own foxhole.

Relatedly, servant leaders must also be *committed to the growth and development* of their people. As an institution, the Army is undoubtedly devoted to this worthwhile and critically important goal. The opportunities for advanced education at all levels in our military are not only plentiful but they are also required for advancement in many instances. As previously discussed in reference to stewardship, you not only need to support developmental opportunities for your subordinates, but you should also actively encourage them to take advantage of available assistance programs. These include, among others, the GI Bill, Tuition Assistance Program, and the Career Intermission Program. It is critical that you not simply give lip service to development opportunities and programs; you should research them yourself on your subordinates' behalf and then develop a plan on how they can accomplish their personal and professional goals. Be invested in them, and they will remain invested in you and your organization.



Lastly, leaders must recognize the importance of building trust and camaraderie with their subordinates: “You’ve got my back, and I’ve got yours.” If you actively listen to get to know your team well, steward your organization, and are committed to the growth of your people, you will build a solid foundation that will permit trust and unity to flourish. However, you must also strive to build bridges between all of your personnel—officers, warrant officers, NCOs, enlisted, and Civilians—so they feel interconnected with the whole.

Being a true servant leader is incredibly rewarding. You will invest in your team, make lifelong connections, and enrich the lives of so many people. However, you will have to constantly work at it because the traits of a servant leader are all ones we must continually refine to perfect. Do not rest on your successes; instead, self-reflect on the areas in which you need the most improvement and practice those at every opportunity. You will need those reps to develop your leadership skills to be able to react to different challenges that will assuredly arise. As lawyers, we have unique opportunities to lead that other professions might lack.

### **The Concept of Lawyers as Leaders**

The modern concept of lawyers as leaders appears to have its roots in former Yale Law School Dean Anthony Kronman’s 1993 book, *The Lost Lawyer*.<sup>11</sup> Kronman sought to refocus the legal profession on leadership by reviving nineteenth-century notions of the “lawyer-statesman ideal.”<sup>12</sup> More recently, the concept was further expanded by Ben Heineman, Jr., General Electric’s senior vice president and general counsel, in a 2007 *Yale Law Journal* article discussing lawyers as leaders.<sup>13</sup> The content of Heineman’s article is prescient, and it has gained significant traction in the American legal academic community over the last few years. Although there is a new focus on this concept, America’s history is rife with examples of lawyers doing *exactly* what Heineman championed: serving as leaders. Despite the fact that lawyers comprise less than one-half of 1 percent of our Nation’s population, our influence is significant and our impact on daily decisions is critically important.<sup>14</sup> In fact, no other profession

accounts for more leaders in every aspect of society.<sup>15</sup>

Some of America’s more famous examples include Thomas Jefferson as the principal author of the Declaration of Independence; James Madison and John Marshall’s central roles in the adoption and establishment of the Constitution and the Supreme Court; pre-Civil War abolitionism by Charles Sumner and many others; Abraham Lincoln and his efforts to both abolish slavery and bring the war to an end; and the Civil Rights Movement, which was led, in great measure, by Thurgood Marshall and many other change-minded lawyers.<sup>16</sup> These are only but a few of the countless critical examples in U.S. history. In each of these instances, the individuals involved utilized their experience and expertise as lawyers to progress important concepts that may not have been widely popular among the American public at the time of their involvement. They did so by exerting strong leadership, which, as you might imagine, takes *many* forms. Because, again, you do not always have the luxury of being the leader you want to be; you must remain flexible enough in your application of leadership principles and experiences to be the leader your people and team need. And it is exactly the same with lawyering, so it should come more naturally for you.

A frequent debate in American culture is whether leaders are made or born.<sup>17</sup> This argument centers on whether genetics determine our leadership abilities, or if experience can hone such skills. We firmly believe that leaders are *made*—forged in the cauldron of life by being forced time and again to make difficult decisions and learn from mistakes through trial and error. Science appears to support this position with some studies suggesting that leadership is 30 percent genetic and 70 percent learned.<sup>18</sup> As a result, individuals may be born with innate leadership tendencies and abilities and, nonetheless, can (and must) learn to lead better. This should give you cause for celebration because everyone has room to learn new skills, techniques, and best practices to grow in leadership competency.

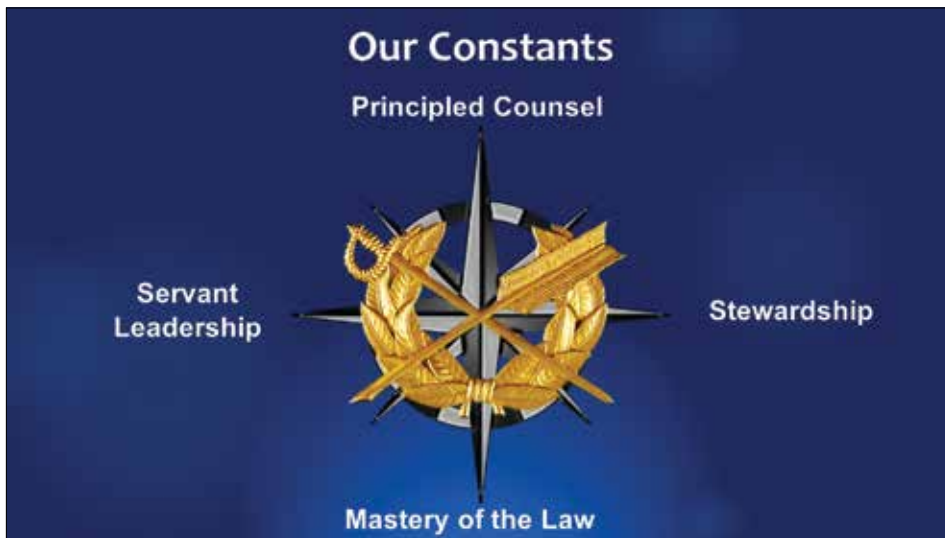
The Army and its sister Services have long been thought to be an incubator for strong leaders. Returning to the point above, you might wonder whether

that is because people born with natural leadership abilities are drawn to military service. There may be some validity to that contention. However, the Army has created publications that are especially adept at teaching leadership skills to its personnel. Numerous CEOs and other renowned leaders laud Army Doctrine Publication (ADP) 6-22, *Army Leadership and the Profession*,<sup>19</sup> as one of the preeminent texts on effective leadership. If you want to improve as a leader of diverse groups and individuals and learn how to bring them together while motivating and inspiring them to work as one toward a common cause or goal, you must read, study, and put into practice that which is contained in ADP 6-22.

### **The U.S. Army JAG Corps and Leadership**

The U.S. Army JAG Corps is committed to leadership and growing future leaders. At the end of the day, we are in the people business. Our regiment’s top priority, as well as that of the Army, is our people. We strive to take great care of our people—the Judge Advocate Legal Services community and their Families—so they, in turn, may provide exceptional advice and counsel to our clients. We firmly believe that if we take care of the people, they will take care of the mission. Of all the impressive multi-billion-dollar weapons systems the U.S. Army has in its arsenal, our greatest system is unequivocally our people. As they say in our special forces community: “humans over hardware.”<sup>20</sup> People, not equipment, make the critical difference in virtually all endeavors—especially ours. Caring for our people extends well beyond pay, benefits, and healthcare; it principally involves leadership, mentorship, and wellness, helping them to sustain themselves and grow personally and professionally. The U.S. Army JAG Corps lives that ethos every day.

In recent years, civilian law firms in the United States have stressed the importance of lawyers being “layered”; that is, they possess the requisite legal expertise, strategic thinking, and disciplined planning combined with the ability to build powerful relationships, take ownership, and give back with empathy, authenticity, and commitment to a cause.<sup>21</sup> In ADP



The four constants of the Army legal profession. (Image courtesy of authors)

6-22, leadership is defined as “influencing people by providing purpose, direction, and motivation to accomplish the mission and improve the organization.”<sup>22</sup> You can see how those two concepts from completely different entities mesh quite well. Yet, it is quite different to *ask* or *expect* your people to possess a specific skill set than to provide them with the education, training, experience, and examples/role models for them to know exactly what is expected, why, and how to achieve it. This is precisely why the U.S. Army JAG Corps opened the Leadership Center at The Judge Advocate General’s Legal Center and School in June 2019.<sup>23</sup>

The “layered” concept is one the U.S. Army JAG Corps has valued for decades. We are dual professionals—Soldiers and lawyers—each of which requires a unique set of skills. In Mr. Heineman’s article, he asserts that lawyers should “work cooperatively and constructively on teams composed of members from other disciplines, vocations, and cultures.”<sup>24</sup> Our attorneys do that daily; they work with infantrymen planning operations, budget analysts determining how to fund requests, field artillery personnel looking to put steel on a target, military intelligence personnel capturing and analyzing intelligence, and countless more. This provides our personnel with a different perspective on how to best address issues and insight into their individual clients’ backgrounds. When our JA majors attend the Army Command and

General Staff College and our JA lieutenant colonels and colonels attend the Army War College or sister Service equivalent, they conduct joint education with those other officer branches from the Army and its sister Services. They learn how the other military branches and Services conduct planning by performing duties in these different roles. This affords our lawyers a perspective that many attorneys in the United States lack—*understanding precisely what our clients do and how they do it.*

Our Corps’s focus on leadership as dual professionals begins with a foundation of ethics and character rooted in the Army Values,<sup>25</sup> Soldier’s Creed,<sup>26</sup> Warrior Ethos,<sup>27</sup> Army Civilian Corps Creed,<sup>28</sup> and/or professional rules of ethics.<sup>29</sup> As Soldiers, we live by the seven Army Values (loyalty, duty, respect, selfless service, honor, integrity, and personal courage).<sup>30</sup> As lawyers, we honor our professional code of ethics, integrity, character, and moral courage to provide principled counsel to commanders and other clients, directing them toward legally, ethically, and morally correct decisions or actions. Our adherence to those standards yields mutual trust between our personnel and our clients. Mission success ultimately requires trust among all involved—Service members, Army senior leaders, Families, and the American people—and we must earn and maintain the trust and confidence of those we serve *and* serve alongside. Without a doubt, trust is the coin of the realm in leadership,<sup>31</sup>

and that could not be any more true in the Army and its JAG Corps.<sup>32</sup>

The U.S. Army JAG Corps is America’s oldest and largest law firm and is engaged in the most consequential practice of law there is. We have attained those distinguished statuses through resolute adherence to the Army Values. Consistent therewith, we have four constants that guide our practice: principled counsel, servant leadership, stewardship, and mastery of the law.<sup>33</sup> Together they serve as the north star that always keeps us on the correct azimuth and are the bedrock upon which the foundation of our practice endures.

Principled counsel means providing candid professional advice on law and policy that is grounded in the Army ethic and enduring respect for the rule of law. We must be honest brokers with the moral courage to say no when required, but we must also have the knowledge and experience to find a way to accomplish the client’s desired intent or end state in a legal, moral, and ethical manner. As discussed above, servant leadership entails our leaders placing the needs of those they lead before themselves—recognizing that they are there to serve those they lead, not the reverse. Again, stewardship demands that leaders act to improve the organization beyond their own tenure—thinking long-term for our Corps and our Army. In essence, the members of any organization, and particularly ours, must have the foresight to “plant trees in whose shade they know they shall never sit.”<sup>34</sup> Finally, mastery of the law is the in-depth knowledge, competence, and skill in our practice areas, which is formed through training, experience, and lifelong learning.

To symbolize these constants, we use one of the most critical instruments in navigation: the compass. A compass not only indicates the direction in which you are traveling but also provides the proper bearing toward where you need to go. It also orients to true north, which, to us, is principled counsel. These constants provide our Corps the direction we, at times, require and help us maintain a proper bearing, regardless of the environment in which we are operating as we pursue our service to our Nation and her Army.



Our Corps takes great pride in the stellar leadership displayed by all of our personnel—Civilians, enlisted, legal administrators, and officers—on a daily basis. However, there is always more work and self-reflection that can occur to ensure growth and improvement in this critical area. And for precisely that reason, we continue to internally expand leadership education and access in addition to all the fantastic resources the Army provides to its personnel. Since its creation in 2019, the Leadership Center has grown in both assigned personnel and reach. In recognition of its importance, it is now included in all aspects of our legal education. The reinforcement of our bedrock values will ensure our personnel remain vigilant to always do what is right, speak truth to power, prepare for the future, and care for our people, because *that* is leadership.

## Conclusion

It is an exciting time to serve in our ranks. We have increased emphasis on leadership, mentorship, diversity, and wellness to continue growing the leaders our Army and Nation will need in the twenty-first century. Our people remain the resilient, steadfast professionals the Army requires, and those nearly 10,000 personnel provide unrivaled legal support to our clients—commanders, Soldiers, and victims—every single day. While our clients and core practice areas remain relatively unchanged, our missions will continuously expand and evolve. Through that change, our personnel must be servant leaders who are ready to do what is right, speak truth to power, prepare for the future, and care for our people—because *that* is leadership. If that occurs, our Corps will remain the trusted professionals they have always been, ready to operate on the cutting edge of the law, policy, and social change to achieve mission success.

As always, we'll meet you on the high ground! **TAL**

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21. Jennifer O'Neill, *Lawyers as Leaders: Tips to Perfect Your Leadership Style*, N.J. L.J. (Oct. 7, 2021), <https://www.law.com/njlawjournal/2021/10/07/lawyer-as-leader>.

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## **AROUND THE CORPS**

CPT Grayson Haws, 7th Army Training Command administrative law attorney, runs the Army Ten-Miler in Washington, D.C. (Photo courtesy of CPT Grayson Haws)





(Credit: powerstock-stock.adobe.com)

# News & Notes

## A Case for Confetti

### Workplace Celebration Is Key to Team-Building

By Major Elizabeth N. Strickland

In twenty years of reading about leadership at the direction of supervisors and commanders, not one book or article I have come across has explored the nexus between confetti and leadership. Yet, I have found confetti—and celebration, in general—to be one of the greatest tools for leading subordinates, building positive cultures, and using celebration to enhance team-building.

I use confetti in many of the workplace celebrations I plan. No, I do not weaponize confetti cannons or impossible-to-clean glitter bombs; I utilize a tablespoon or two of festively colored bits of paper or foil. I have mailed confetti, enlisted the help of friends to deliver a handful of confetti,

and have hidden confetti for people to find later. I once talked a general into dumping a coffee cup of confetti on my boss's head to celebrate her milestone fiftieth birthday. I have used confetti to celebrate birthdays, promotions, farewells, completing races or other extracurricular feats of strength, awards, thesis defenses, expressions of gratitude, weddings, and retirements.

While my favorite celebration tool is well-timed confetti, the true lesson for leaders is that recognizing, publicly acknowledging, and celebrating people and their milestones create a bond among those celebrating together. Not every leader is a “confetti ninja,” and it might not feel natural for a leader to congratulate a teammate on

their Army ten-miler personal record with confetti. However, I encourage leaders to borrow this method or discover another form of celebration to use as a leadership tool among their teams. Celebrating our people and their accomplishments is pivotal in building trust, increasing candor, and sky-rocketing morale in any environment.

#### Confetti Builds Trust

Students of leadership are generally familiar with the importance of trust in team-building. An article in *Society for Human Resource Management* posits that leadership begins with trust and offers ways for leaders to build trust.<sup>1</sup> *Sigma* similarly addressed this in an article describing integrity as a leadership imperative and listing different ways to demonstrate integrity as a leader.<sup>2</sup> *Forbes* published a list of ways to build trust, including, among other suggestions, trying to gather teams in informal settings and being transparent.<sup>3</sup> Virtually every article on leadership emphasizes the need for trust in a leader to create a positive culture.

Leadership tips in publications often cite the famous tenets of the Trust Triangle: authenticity, logic, and empathy.<sup>4</sup> The *Harvard Business Review* (HBR) describes empathy as caring about others and their success and offers tips for demonstrating this level of care to team members.<sup>5</sup> Further, HBR advises leaders not to be distracted by their phones and to focus on the team instead of solely on their own interests.<sup>6</sup> It is great basic advice, but it is only a small start.

This advice to be honest and transparent and put down the phone while someone is talking should be common sense. These basic principles do not delve far enough into leader actions to show a person they are cared about on a deeper level. An effective leader should strive to not only demonstrate honesty as a basic standard but also make subordinates understand they are valued in the workplace, which, in turn, motivates those subordinates to work hard and contribute to their team.

Leaders can build personal trust by investing their time to better understand the people in their professional environment; a good first step is looking someone in the eye and talking about creative endeavors outside of the assigned legal work. For

instance, knowing that a teammate has been working hard at competitive ballroom dance and celebrating their milestones in this area, although wholly unrelated to the military mission, demonstrate a leader's investment in them and their lives. This level of deeply understanding a person's pursuits and celebrating their passions builds personal trust above and beyond baseline demonstrations of competence and integrity.

Talking about these passion projects and keeping updated on progress establish space to have personal conversations with each member of the team. If a leader only talks to their team about work tasks, suggested edits to products, and formation times, Soldiers are much less inclined to come to that leader to seek help with personal problems like divorce, financial problems, or sick children. This is important because these issues weigh heavily on people's minds and impact their behaviors, attitudes, and performance at work. It is natural that if someone's personal life is in turmoil, they may have difficulty performing at the level expected or previously exhibited. Good leaders want to know this information. Great leaders find ways to help and provide resources.

If leaders talk to their team about their hobbies and goals and follow through with interest in and celebration of their progress, Soldiers will be encouraged to talk with their leadership more. They will trust that bringing personal issues to their leadership teams will be addressed with humanity, humility, and compassion.

### **Confetti and Candor**

Kim Scott became famous for her leadership expertise after developing the concept of radical candor and transforming this idea into a leadership philosophy, book series, podcast, and leadership consulting firm.<sup>7</sup> To sum up this philosophy in the briefest way possible, leaders will have the best impact on their team if they demonstrate that they care personally about their team members and also challenge them directly when providing constructive feedback. Further, if this effect can take hold in an office culture, everyone can make each other better through the same balance of personal care and direct feedback. Where this type

of directness is part of the office culture a leader sets, negative feedback is not perceived as hurtful. Rather, it is perceived as helpful and in line with the leader's intent of candor and honest communications.<sup>8</sup>

Beyond just improving personal and organizational performance, candor has many more benefits. When a leader demonstrates personal care about a subordinate's successes, they will know that the leader also (still) cares when they provide constructive criticism or correction. A person who feels constructive feedback comes from a place of concern will be more likely to take feedback to heart and action it, and they will be invested in the mission instead of trying to work just hard enough to avoid negative counseling statements and charges for dereliction.

Celebrating teammates' individual and collective accomplishments and milestones demonstrates that a leader cares about each person as a human and is in their corner. Distributing a welcome letter/command philosophy memo is a common leadership practice that puts a team on notice about a leader's general philosophy. In addition to employing these tools, getting to know people well enough to understand their personal goals and celebrate their success is an impactful way for leaders to show they are putting people first in their minds as well as their actions. One tablespoon of confetti says that a leader knows their people's goals, sees their hard work, supports their endeavors, and wants everyone else to celebrate it, too.

If a leader shows they care about a person, their future, and their achievements, it sets a foundation for the entire team to embody the same mentality. With time and reinforcement, this culture will extend to those in the organization and among peers at the same leadership level. Modeling these behaviors and normalizing positive culture to junior leaders has the long-term effect of replacing any potentially toxic practices of the past with a far more effective alternative. When everyone knows the team comes from a place of support and care, they are empowered to have difficult conversations about professional challenges and ways to improve; they are empowered to support the good ideas of their peers rather than view innovation

as a threat. This sets the stage for the team to listen to feedback from one another in an atmosphere and culture of support that celebrating others creates.<sup>9</sup> Perhaps most importantly, it sets the foundation for the team to give the leader proactive, helpful, candid feedback because of the emphasis on and invitation for dialogue when it comes to showing care and appreciation. In short, showing care and empathy is the foundation for candor to thrive. The right combination of empathy and candor triggers peak conditions for adaptive, healthy teams to blossom.

### **Confetti Meets Morale**

High morale is important for any work culture, but this is especially true in a warfighting culture. A positive environment helps attract new talent, retain current talent, and foster productivity.<sup>10</sup> High morale is also associated with greater attention to detail, creative problem-solving, and increased teamwork.<sup>11</sup> In most civilian work environments, it is enough to treat people with a basic level of respect and dignity, capped off with an annual barbecue and holiday party. At the end of each day, employees go home to their friends, family, and community. However, the morale mission in the military is inherently different from most jobs in corporate America. Unlike in most civilian work environments, Service members spend extended stretches of time around their coworkers during exercises, mobilizations, and deployments—all periods with increased importance on workplace community, support, and morale.

Confetti is a morale force multiplier. It is unexpected and tells the recipient they are seen, celebrated, and, most of all, they matter. By prioritizing morale, a leader can watch the workplace become more fulfilling and happier for their team. This is a benefit that makes the daily routine more enjoyable and is a game changer for longer missions away from home. Finding joy in the small things and celebrating together can keep a team thriving and cohesive. Focusing on celebrating people and the team itself is a way to see them and show them how they matter even when they are far from their home support structure.

Adopting a morale mindset early and celebrating often must also happen in garrison and as part of the unit culture. A leader who does not invest in their team at home station may seem disingenuous if they suddenly start to rally the team during a deployment. The confetti culture of celebrating people and their individuality that begins at physical training on a regular workday will carry to and through any mission.

### A Call to Confetti

For those persuaded to build trust and morale through confetti or other celebration, the question becomes this: As a leader, what can I do to get started?

Find out what your people are up to. Set aside distractions or work that can wait a bit and get out from behind your desk. What are their interests and passions? What kinds of things are their family members getting into? No rule says you are limited to only celebrating your teammates: their families are important, too. Whether their hobbies are ultra marathons, competitive Irish dancing, or writing *Star Wars* fanfiction, take a minute to wonder at their dedication and ask how they stumbled into that hobby.

Remember that confetti should be a joyful recognition, not a nightmarish prank. It should be used in quantities, locations, and constructions that are easy to clean up, or you should have a plan to clean it up after celebrating. Confetti cannons or confetti of any sort in a public space where a cleaning staff is tidying it up is inconsiderate. Confetti “at scale” is easy to do, and your knowledge of the celebrated teammates’ personalities and preferences will help you decide how to scale the celebration.

While I love to use confetti in my practice, celebrations do not have to include it. Know yourself and your audience. A celebration for some might just be a nice note recognizing hard work. Get to know your people well enough to celebrate them in a way that honors them and their life events or achievements.

Celebrations can and should also happen in conference rooms or areas where your team congregates, even if the celebrated person is not present. If you are

briefing your section’s actions to “the boss,” do not be afraid to mention the person who just got married, completed their first half marathon, or performed exceptionally on a work project. “The boss” might not have known about these accomplishments, but notifying senior leaders will encourage leadership to acknowledge the success and will only stand to extend the environment of care and trust.

Streamers and confetti are available in large quantities and at low prices. A carefully spent \$20 could probably last a career. Alternatively, hole punches can be used to make confetti out of any paper.

Before exercises or deployments, consider your celebration needs. Birthdays and holidays in the field or on a deployment are great opportunities to engage as a team. At the very least, acknowledge the day and try to find a small, joyful way to celebrate. Whether the person gets the TV remote for the rec room, the first place in line at the dining facility during surf n’ turf night, or someone’s MRE pound cake with a lit match sticking out of it in place of a candle, there is always a way to find joy.

### A Confetti Conclusion

Though there are thousands of references to building trust and increasing morale in helpful leadership guides, articles, and books, the advice for cultivating these important characteristics in a workplace generally does not mention celebration as a leadership tool. Celebrating personal, professional, and team achievements in small ways builds a culture of trust and joy. Trust builds a better, more efficient, and highly adaptable team. Positive morale makes working at a high operating tempo more fun because people get along better, trust each other, want to be around each other, and have a higher tolerance for teammate mistakes, quirks, or shortcomings. In a profession that relies on the service of a tiny fraction of the population eligible and willing to volunteer, maintaining ways to bring joy and fulfillment is key to retaining talent.

A handful of confetti is festive, is a proclamation of joy, can be deployed at a moment’s notice, and—unlike its uncouth cousin, glitter—can be wiped up with a single swipe of a lint roller. While the

cleanup takes less than a minute, the effect on individuals and teams can last a lifetime.

Leaders should look at their office dynamics and ask themselves if they have dedicated enough energy to the pursuit of trust and morale through celebration. If they do not have confetti and thank you cards on hand, ask around to see who knows where the confetti stores are.<sup>12</sup> **TAL**

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*MAJ Strickland is an Administrative Law Attorney in the Office of The Judge Advocate General at the Pentagon.*

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### Notes

1. Stephen M. R. Covey, *How the Best Leaders Build Trust*, SOC’Y FOR HUM. RES. MGMT. (Feb. 9, 2009), <https://www.shrm.org/resourcesandtools/hr-topics/organizational-and-employee-development/pages/leadersbuildtrust.aspx>.
2. Sharon Van Duynhoven, *Great Leaders Have Integrity*, SIGMA ASSESSMENT SYS., <https://www.sigmaassessment-systems.com/integrity-in-leaders> (last visited Apr. 29, 2024).
3. Liz Ryan, *Ten Ways to Build Trust on Your Team*, FORBES (Mar. 17, 2018), <https://www.forbes.com/sites/lizryan/2018/03/17/ten-ways-to-build-trust-on-your-team/?sh=6d04b2f22445>.
4. Frances X. Frei & Anne Morriss, *Begin with Trust*, HARV. BUS. REV., May-June 2020, at 112, 116.
5. *See id.*
6. *Id.* at 117.
7. *See* RADICAL CANDOR, <https://www.radicalcandor.com> (last visited Apr. 29, 2024); KIM SCOTT, RADICAL CANDOR: BE A KICKASS BOSS WITHOUT LOSING YOUR HUMANITY (2017). Radical Candor is a guide to leaders and students of leadership in how to have difficult conversations, offer constructive criticism, and why this candor is essential to the effectiveness of a leader and teams. *See* SCOTT, *supra*.
8. *See generally* ED CATMULL, CREATIVITY, INC.: OVERCOMING THE UNSEEN FORCES THAT STAND IN THE WAY OF TRUE INSPIRATION ch. 5 (2014).
9. *Id.*
10. *See* Jessica Everitt, *Why Employee Morale Plays a Big Part in Productivity*, WRIKE (May 11, 2021), <https://www.wrike.com/blog/employee-morale-and-productivity>.
11. Stuart Hearn, *7 Reasons to Care About Employee Morale*, TLNT (Oct. 7, 2019), <https://www.tlnt.com/124997-2>.
12. It’s me. Hi. I’m the one, it’s me. I know where all the confetti stores are. Email me for help.



# News & Notes







**Photo 1:**

Mr. Adam Stoffa, a labor and employment attorney advisor at U.S. Army South, donates blood in the Akeroyd Blood Donor Center’s mobile blood unit outside the U.S. Army South headquarters at Joint Base San Antonio - Fort Sam Houston, TX. Mr. Stoffa has been consistently donating blood since he began working for U.S. Army South ten years ago. (Credit: SSG ShaTyra Cox)

**Photo 2:**

BG Karen Monday-Gresham, Commanding General of the 7th Mission Support Command, poses with newly promoted COL Jason Frankenfield, her staff judge advocate, following his promotion ceremony at the command headquarters in Kaiserslautern, Germany. (Credit: SSG Jessica Forester)

**Photo 3:**

Members of Direct Commission Course (DCC) Class 002-24 commission into the U.S. Army during their DCC graduation in McGinnis-Wickham Hall at Fort Moore, GA. (Credit: Patrick A. Albright)

**Photo 4:**

MAJ Teisha B. Barnes (left), civil affairs officer with Civil Military Operations (G39, CMO), U.S. Army Southern European Task Force, Africa (SETAF-AF), and CPT Linda Atiase (right), operational law attorney, Office of the Staff Judge Advocate, SETAF-AF, pose for a photo at the final planning event for Justified Accord 24 in Nairobi, Kenya. Led by SETAF-AF and hosted in Kenya, Djibouti, and Rwanda, this year’s exercise incorporated personnel

and units from twenty-three nations and five observer countries. This multinational exercise increases multinational interoperability in support of humanitarian assistance, disaster response, and crisis response. (Credit: MAJ Joe Legros)

**Photo 5:**

CPT Laura Bernier (seated right, opposite video camera), administrative law attorney at 1st Infantry Division, Fort Riley, KS, serves as a national security law attorney and participates in a mock-interview with the media to discuss rules of engagement and civilian protection in large-scale combat operations during a Warfighter exercise at Fort Riley. (Credit: LTC Craig M. Scroggum)



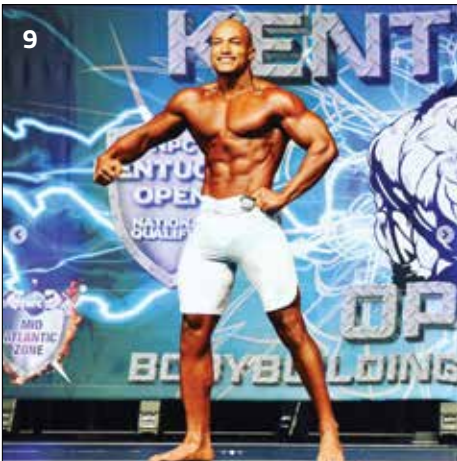
8



**223rd Officer Basic Course**  
 The Judge Advocate General's Legal Center and School  
 Charlottesville, Virginia  
 04 March - 16 May 2024



9



**Photo 6:** CPT Brennan Vazquez (left), brigade judge advocate, Allied Forces South Battalion, U.S. Army NATO Brigade, engages in conversation with his spouse, Ms. Yuna Vazquez (center), and LTC Benjamin Steichen, division head, exercise production at Joint Warfare Center, Stavanger, Norway, during

the Senior Army Leaders Meeting XXII in Garmisch, Germany. The U.S. Army NATO Brigade hosted the meeting to give leaders from eighty-two locations in twenty-two countries the opportunity to meet face-to-face and share knowledge and ideas on NATO operations and how best to support the roughly 800 Soldiers and their Families serving within NATO organizations in the United States and twenty-one NATO member nations in Europe. (Credit: Troy Darr)

**Photo 7:** The 108th Training Command (TC) – Initial Entry Training (IET) Office of the Staff Judge Advocate hosted their first ever legal workshop to coincide with BG Gerald R. Krimbill's Article 6 inspection of the 108th TC IET, which included a leader professional development event at Kings Mountain National Military Park in Blacksburg, SC. Members of the legal teams from the 104th Training Division (LT), 98th Training Division IET, 95th

Training Division IET and the 134th Legal Operations Detachment – Charlotte Team attended and are pictured in front of the battlefield monument from 1880, which commemorates the fifty citizen Soldiers who died during the battle of Kings Mountain. (Photo courtesy of COL Kevin C. Frein)

**Photo 8:** 223d Officer Basic Course. (Credit: Billie Suttles, TJAGLCS)

**Photo 9:** SSG Cyril Peters, paralegal and administrative law NCOIC, Office of the Staff Judge Advocate, 1st Theater Sustainment Command, competes at the National Physique Kentucky Open Amateur Body Building Competition in Lexington, KY. (Credit: Barbara Gersna)





MAJ D'Aurelio does a handstand while thirty-seven weeks pregnant at the summit of Flattop Mountain, Alaska. (Credit: Tyler Struss)

# What's It Like?

## Staying Army Strong while Growing a Warrior

By Major Jeri L. D'Aurelio

I am neither a doctor nor a person with specialized medical training that informs the opinions I share in the following paragraphs. Therefore, if the views in this article contradict the medical advice of licensed medical providers, *listen to your medical provider!*

As a postpartum Army judge advocate (JA) who recently gave birth, I have

a pregnancy-informed viewpoint of the Army's new Holistic Health and Fitness (H2F) program. Simply put, the H2F program seeks to improve all-around Soldier readiness while decreasing injuries by focusing on training in five domains: physical readiness, nutritional readiness, mental readiness, sleep readiness, and

spiritual readiness.<sup>1</sup> This article provides my perspective on the physical and nutritional readiness domains and emphasizes my approach to them while pregnant. I must note that I have been blessed with "easy" pregnancies, free from complications, so the opinions below are from that perspective and are not intended to judge or in any way pressure women who face different challenges that limit what they can do during pregnancy.

### Physical Readiness

Despite the emergence of the JA's critical role in combat operations during the Global War on Terrorism, it is possible for JAs to hear, from Soldiers and civilians alike, that "being physically fit doesn't make you a better attorney" or "if we find ourselves relying on the JA to engage an enemy, things have gone terribly wrong." While being fit may not be critical to a JA's immediate mission, it plays an essential role in the second half of a JA's dual profession as Soldiers and officers. As physical readiness is a crucial aspect of being a Soldier, respecting it reflects your respect for what it means to wear the uniform and be a part of the greater Army team. Similarly, while no one desires to be in a situation where all members of the staff are needed to engage an enemy, you do not want to be viewed as a liability to your fellow Soldiers. Thus, it is critical to be proficient in Soldier tasks, in the operation of your assigned weapon system, and be physically fit.

For female Soldiers, this responsibility can be significantly challenging throughout the various stages of pregnancy. Despite the challenge that is pregnancy, maintaining a focus on physical fitness throughout pregnancy will not only make it easier to meet the Army standards in body composition and physical fitness upon return to duty, it also better prepares individuals both mentally and physically for birth and postpartum.<sup>2</sup> While there are policies in place to relieve pregnant women from meeting fitness standards during the pregnancy and the year following the birth, they must meet all standards as soon as that time concludes.

The H2F program has a specific Pregnancy and Postpartum Physical Training (P3T) methodology intended to keep Soldiers physically fit during pregnancy.<sup>3</sup> A key principle of the P3T methodology encourages Soldiers to participate in “the highest level of physical fitness they are comfortable with,”<sup>4</sup> which has been the center of gravity for my prenatal and postpartum fitness approach during both my pregnancies.

Fundamentally, perspective is critical to any fitness journey. I view pregnancy as an opportunity to challenge oneself in new and different ways. To be clear, I am not advocating for increasing or wildly changing one’s fitness routine while pregnant. Instead, I consider pregnancy a new way to challenge myself by seeing what physical feats I can safely achieve throughout the pregnancy. For example, during my first pregnancy, my husband and I went for a hike every weekend, and I took handstand pictures to gradually record our child’s growth over time (comically, my final handstand picture was in the operating room minutes before I gave birth to our oldest child). During my second pregnancy, I recorded a pull-up once a week to document our child’s growth over time. This time, my final pull-up video was right before we headed to the hospital to have our second son. Little things like this were not detrimental to my nor my babies’ health, and they kept me motivated to get in the gym every day. Throughout my recent pregnancy, my goal was to complete at least thirty minutes on the stationary bike and thirty minutes of functional fitness Monday through Friday—nothing extremely hard, just consistent.

As mentioned briefly above, JAs are more effective at advising and impacting their commanders’ decision-making process when they prioritize being *both* Soldiers and lawyers. Continuing to “get after it” in the gym during pregnancy—though in a far less arduous manner than in my pre-pregnancy routine—enabled me to maintain my physical fitness, thereby making it much easier to resume physical training after the birth of my child.

### Nutritional Readiness

In addition to physical exercise, nutrition is crucial to your all-around health and longevity. You can exercise routinely and

still end up with diabetes, heart disease, or a slew of other ailments if you maintain a poor diet long-term. The Army’s H2F program provides evidence-based guidance on the types of food Soldiers should consume as well as some healthy eating patterns.<sup>5</sup>

While there are some cardinal truths about what makes a healthy/unhealthy diet, everyone is different and a healthy diet for me may not be a healthy diet for you. Once I became a competitive athlete, I began experimenting with diet to find what worked best for me. I started by trying an elimination diet—I removed many foods from my diet, waited thirty days, and then began reintroducing them to see how my body reacted.<sup>6</sup> One unintended benefit that resulted was that I became a far better cook, as it takes more skill to make food taste good when you cannot have gluten, dairy, or sugar. As I added foods back into my diet, I settled on a routine that includes a heavier amount of meat, vegetables, and fruit and a lighter amount of grains and pasta. My husband, on the other hand, has found that his body is closer to peak performance with a diet resembling the carnivore diet. One general rule that can be applied to achieve a more nutritional diet, regardless of the food-group ratios, is to make as much of your food at home as possible. If you buy all the base ingredients and make the meals, you know what is in the food you are eating, and you can avoid the detrimental ingredients contained in ultra-processed foods.

Regarding nutrition during pregnancy, a misconception is that a pregnant person should eat twice as much as they did previously because they are “eating for two.”<sup>7</sup> In fact, eating twice as much is just a sure way to pack on extra weight that will be difficult to lose after the pregnancy (and could even lead to complications during the pregnancy).<sup>8</sup> According to the American Pregnancy Association, the pregnant body burns roughly 300 more calories a day during the second and third trimesters.<sup>9</sup> The Centers for Disease Control and Prevention recommends 340 additional calories during the second trimester and 450 additional calories during the third.<sup>10</sup> These increased calories are in addition to the recommended caloric intake based on height and weight. Therefore, if you already

normally consume more calories than the recommended amount, you may not need to increase caloric intake at all during pregnancy. For reference, a measuring cup of diced chicken is 230 calories (with no seasoning or dip).

It is important to make a nutritional diet and physical exercise regimen habitual. Once that is the case, it will feel less and less like you are faced with hard decisions, such as whether to go to the gym, because it will just be part of the routine. Then, if you become pregnant, you can more easily continue those healthy lifestyle routines with slight modifications based on your specific situation. This routine approach will not only lead to a healthier you year-round, but it will also keep you in a healthier state through pregnancy and make it easier to meet the Army standards after giving birth. **TAL**

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*MAJ D’Aurelio is a Battalion Judge Advocate for 1st Special Forces Group at Joint-Base Lewis-McChord, Washington.*

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### Notes

1. See U.S. DEP’T OF ARMY, FIELD MANUAL 7-22, HOLISTIC HEALTH AND FITNESS, at xiv (26 Oct. 2012) (C1, 8 Oct. 2020) [hereinafter FM 7-22].

2. See *Exercise During Pregnancy*, ACOG: AM. COLL. OF OBSTETRICIANS & GYNECOLOGISTS, <https://www.acog.org/womens-health/faqs/exercise-during-pregnancy> (last visited Apr. 8, 2024); CTRS. FOR DISEASE CONTROL & PREVENTION, PHYSICAL ACTIVITY GUIDELINES FOR AMERICANS 44-45 (2d ed. 2018).

3. FM 7-22, *supra* note 1, at 12-10.

4. *Id.*

5. *Id.* ch. 8 (Nutritional Readiness).

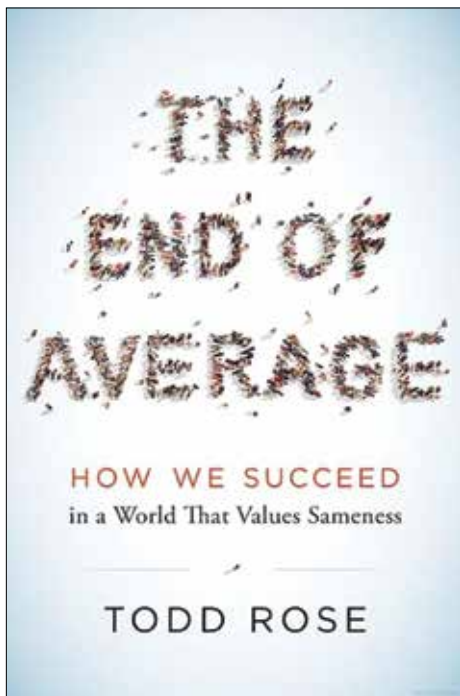
6. While not an endorsement, the elimination diet I tried was Whole30.

7. See *Pregnant Nutrition*, AM. PREGNANCY ASS’N, <https://americanpregnancy.org/healthy-pregnancy/pregnancy-health-wellness/pregnancy-nutrition> (last visited Apr. 8, 2024).

8. See *Weight Gain During Pregnancy: Why Is It Important to Gain the Recommended Amount of Weight During Pregnancy?*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/reproductivehealth/maternalinfanthealth/pregnancy-weight-gain.htm> (last visited Apr. 8, 2024).

9. *Pregnant Nutrition*, *supra* note 7.

10. *Weight Gain During Pregnancy*, *supra* note 8.



# Book Review

## The End of Average How We Succeed in a World That Values Sameness

Reviewed by Major Zach C. Simons

*You have to lead men in war by requiring more from the individual than he thinks he can do. You have to lead men in war by bringing them along to endure and to display qualities of fortitude that are beyond the average man's thought of what he should be expected to do.<sup>1</sup>*

From the outset of *The End of Average*,<sup>2</sup> author Larry “Todd” Rose makes no effort to hide the ball. He unambiguously states

his thesis: “[N]o one is average.”<sup>3</sup> Rather than classifying his theory as a philosophical one, Rose declares it “a scientific fact with enormous practical consequences that [we] cannot afford to ignore.”<sup>4</sup> In *The End of Average*, Rose teaches his readers about the origin and rise of modern society’s use of averages, gives examples of how often the application of averages has gone awry, and provides insight into how embracing individuality will enhance the effectiveness of any organization.

It is difficult to argue against Rose’s position. While *The End of Average* is a quick read at only 196 pages, or approximately six hours in audio format,<sup>5</sup> it is supported by 417 footnotes containing extensive citations to scientific writings, historical vignettes, and modern-day examples that support his argument.<sup>6</sup> While not all lessons in this book will be universally applicable to judge advocates (JAs) in their professional capacity, with the closing chapters advocating for new business hiring models and educational reform,<sup>7</sup> there remain several valuable lessons and takeaways throughout. All Army leaders are responsible for seeking professional development for both themselves and their subordinates.<sup>8</sup> For a small investment of time, *The End of Average* is a worthwhile read that will yield significant returns for JAs in better understanding how embracing individuality can positively impact their profession.<sup>9</sup>

### ***The End of Average and the Emerging Science of Individuality***

#### ***Todd Rose: Author, Educator, and High School Dropout***

Rose is an accomplished writer and graduate-level educator with a unique and even more surprising background as a high school dropout.<sup>10</sup> He earned a bachelor of science in psychology from Weber State University in 2000, followed by a master’s degree and doctorate in education from Harvard University in 2001 and 2007.<sup>11</sup> After earning his doctorate, Rose joined Harvard University’s Graduate School of Education faculty, where he worked for twelve years from 2008 to 2020.<sup>12</sup> During that time, Rose established the Laboratory for the Science of Individuality, and from 2015 to 2020, he was the director

of Harvard’s Mind, Brain, and Education program.<sup>13</sup>

Rose’s extensive work and reputation in the science of individuality strengthen his credibility. After publishing *The End of Average*, Rose authored two additional books advocating for the science of individuality: *Dark Horse*<sup>14</sup> and *Collective Illusions*.<sup>15</sup> In addition to these books, Rose continually promotes the science of individuality through publishing academic papers,<sup>16</sup> engaging with traditional news media,<sup>17</sup> participating in Ted Talks,<sup>18</sup> and utilizing various other mediums to share his ideas including YouTube videos with millions of views.<sup>19</sup>

#### ***The Principles of Individuality***

In part one of his book, Rose takes the reader through the history of when and how averages became the standard by which we often measure people today.<sup>20</sup> Part three, titled “The Age of Individuals,” shows how organizations will benefit from rejecting averages and embracing individuality.<sup>21</sup> At the heart of Rose’s argument, contained in part two, he explains the three guiding principles of the science of individuality: (1) the jaggedness principle, (2) the context principle, and (3) the pathways principle. Understanding these principles will enhance one’s ability to understand subordinates’ personalities, which is critical to providing leadership.<sup>22</sup>

#### ***The Jaggedness Principle***

The jaggedness principle is the idea that we cannot judge talent, which is innately complex, by one-dimensional measures.<sup>23</sup> Rose defines a quality as being “jagged” if it meets two criteria: “[I]t must consist of multiple dimensions” and “[t]hese dimensions must be weakly related to one another.”<sup>24</sup> Rose uses the 2003 New York Knicks basketball team as an example. After the Knicks hired Isiah Thomas as president of basketball operations for the team in 2003, he set out to assemble a roster with the sole focus on acquiring players with the highest scoring averages; he succeeded when the Knicks started the 2003 season with a roster boasting the highest combined scoring average of all teams in the National Basketball Association (NBA) that year.<sup>25</sup> Basketball fans familiar with



## **Embracing individuality will only help your organization accomplish the mission, and in doing so, Army leaders will be better equipped to develop our Judge Advocate Legal Services personnel and provide the stewardship we owe our Corps.**

the Knicks' history will not be surprised to hear that Thomas's new team experienced four straight losing seasons with a winning average of approximately 33 percent.<sup>26</sup> In hindsight, Thomas's one-dimensional talent management was flawed, and front offices throughout the NBA now recognize the necessity of building teams that emphasize several dimensions of the game.<sup>27</sup>

Lessons learned about leadership throughout the highest levels of sports and industry support Rose's position; organizations cannot succeed without recognizing and valuing the multi-dimensional individual.<sup>28</sup> Despite the ongoing transition throughout corporate America to hire and evaluate employees using multi-dimensional factors consistent with Rose's jaggedness principle,<sup>29</sup> Army JAs know all too well that on every evaluation report, they will be assigned a one-dimensional "block check" ranking among their peers in their officer evaluation reports. The senior rater can only award the highest ranking—most qualified—to less than 50 percent of their senior-rated officers, which would make them the mathematical definition of "above average."<sup>30</sup> However, this does not suggest the military places no emphasis on individuality. The Department of Defense recently directed all components to conduct diversity and inclusion messaging to emphasize the importance of "[p]ersonnel with diverse backgrounds, experiences, outlooks, and ways of thinking."<sup>31</sup> Recent Army doctrine also reinforces the need for leaders to focus on understanding their subordinates as individuals.<sup>32</sup>

### *The Context Principle*

Rose credits University of Washington Professor Yuichi Shoda with establishing the basis for his context principle in the 1980s.<sup>33</sup> Before Shoda's work, psychologists existed in two camps: trait psychologists

and situation psychologists.<sup>34</sup> Trait psychologists believed behavior was determined by "well-defined personality traits, such as introversion and extroversion."<sup>35</sup> This contrasted with situation psychologists, who argued that "culture and immediate circumstances" dictate behavior.<sup>36</sup> Shoda proposed the following alternative: Behavior is not determined by either traits *or* situations; rather, it is determined through the constant interaction of both.<sup>37</sup>

A key takeaway for JAs relates to the practical application of the Myers-Briggs Type Indicator (MBTI) test. Myers-Briggs touts its type of indicator as a way for an individual to "use self-awareness to unlock [their] potential" and for an organization to "build people development strateg[ies]."<sup>38</sup> The MBTI sorts individuals into one of sixteen personality types,<sup>39</sup> with each accompanied by a two- or three-sentence summary of the individual's personality.<sup>40</sup> The use of the MBTI is common throughout corporate America and government agencies.<sup>41</sup> However, Rose identifies flaws in the MBTI and how its trait-based averages will fail to predict an individual's behavior in *specific* conditions.<sup>42</sup> Rose explains how MBTI results merely provide insight into the *averages* of how an individual behaves; leaders must supplement this data point by applying the "if-then" approach.<sup>43</sup>

Rose proposes the "if-then" approach to understanding personalities by utilizing Shoda's findings: An individual's behavior is only predictable and understandable when both traits and situations are considered *together*.<sup>44</sup> Military leaders will understand from experience that every subordinate requires differing approaches when providing purpose, motivation, and direction; a one-size-fits-all approach to leadership will rarely yield success.<sup>45</sup> Furthermore, Rose points out that leaders must also

be cognizant that their interactions with subordinates are limited to a narrow set of circumstances.<sup>46</sup> For example, a subordinate's "if-then" analysis might show them to be extremely introverted in an office setting, while their MBTI typing result of extroversion was a product of extroverted behavior in numerous other contexts.<sup>47</sup> Rose's assertion comports with Army Doctrine Publication (ADP) 6-22's view that attributes and characteristics must be framed "within certain conditions."<sup>48</sup> The lesson is simple: [I]f you rel[y] on averages, then you miss[] out on all the important details of a person's behavior."<sup>49</sup>

### *The Pathways Principle*

In describing the pathways principle, Rose explains how averages, even when meticulously and accurately calculated, simply cannot forecast a specific outcome for an individual.<sup>50</sup> The very first vignette in *The End of Average* shows how the application of averages dramatically failed the military. In the 1950s, the newly-established U.S. Air Force was struggling to figure out why so many pilots were crashing its new jets.<sup>51</sup> There were 198 aircraft accidents in February of 1952 alone, and the Air Force determined the overwhelming majority of these resulted from pilot error.<sup>52</sup> These new jets contained standardized cockpits, which were designed using averages calculated from several specific measurements taken from thousands of pilots to determine average body dimensions.<sup>53</sup> Rose describes how Lieutenant Gilbert Daniels discovered the fatal flaw in this decision to build the "perfect cockpit" based on averages.<sup>54</sup> After Daniels collected new measurements from over 4,000 pilots and calculated the averages for ten distinct body dimensions, he shockingly discovered that *no individual pilot* from that population fell within the average range for all ten measurements.<sup>55</sup>

This discovery completely changed the U.S. Air Force's approach to cockpit design, and soon, every jet came with adjustable seats and foot pedals, tailored flight suits, and customizable helmets.<sup>56</sup> This also ushered in a new era in the U.S. military's approach to ensuring individual fit.<sup>57</sup> It would be abnormal today to expect a Soldier to accept ill-fitting gear,<sup>58</sup> and when Soldiers cannot be fitted properly from

existing stock, current regulations prescribe requests for special measurement clothing.<sup>59</sup>

## An Opportunity for Stewardship: Applying the Science of Individuality

Leaders act to improve the organization beyond their own tenure. Improving the organization for the long-term is deciding and taking action to manage people or resources when the benefits may not occur during a leader's tour of duty with an organization.<sup>60</sup>

In ADP 6-22, stewardship is defined as "the responsibility of Soldiers . . . to strengthen the Army as a profession"<sup>61</sup> and adds that individual stewardship requires that all Soldiers "*strive continuously for excellence* in the performance of duty, to pursue lifelong learning, and to accomplish every mission."<sup>62</sup> The U.S. Army Judge Advocate General's Corps emphasizes the importance of stewardship by including it as one of the four constants of the Army legal profession.<sup>63</sup>

Except for appearing in an excerpt from General George C. Marshall's testimony to the U.S. Senate Committee on Military Affairs,<sup>64</sup> the word "average" does not appear anywhere else throughout ADP 6-22.<sup>65</sup> The concept that our military Services do not embrace "being average" should not be surprising. One need only look to the current recruiting slogans for the Army ("be all you can be")<sup>66</sup> and the Air Force ("aim high").<sup>67</sup> On the U.S. Coast Guard's recruiting website, the slogan "make an impact" is immediately followed up by "there's no such thing as *an average day* in the Coast Guard."<sup>68</sup> These mottos underpin the notion that serving in the military demands a constant pursuit of excellence.<sup>69</sup>

Army Doctrine Publication 6-22 charges Army leaders to provide motivation to inspire others to accomplish the mission.<sup>70</sup> In Field Manual 3-84, staff judge advocates (SJAs) are explicitly charged with the responsibility to professionally develop all subordinate legal personnel.<sup>71</sup> Similarly, deputy staff judge advocates (DSJAs) are responsible for ensuring their offices receive the "mentorship, training, equipment, and support to meet mission requirements."<sup>72</sup> These endeavors can greatly benefit from understanding Rose's three principles of individuality. Regardless of whether the

context is in professional sports or the military, "the mission is crucially important. But your team's people are the ones who are going to accomplish that mission."<sup>73</sup>

Beyond SJAs and DSJAs, JAs of all ranks and positions can gain insight into how understanding individuality can enhance their office's performance. Junior JAs will benefit most from a better understanding of how their unique traits and personalities impact their actions. For instance, they can move beyond the four simple letters assigned to them under the MBTI and apply the "if-then" model to better understand their personality and behaviors.

Field-grade JAs will also benefit from this same understanding of themselves. Moreover, they can better understand and employ their subordinate JAs and paralegals based on this information combined with the knowledge of their subordinates' nuanced "if-then" factors (instead of simply assuming the four-letter MBTI results dictate a subordinate's behavior, interests, and motivation).

## Conclusion

*The End of Average* is a worthwhile expenditure of time for all Judge Advocate Legal Services (JALS) personnel. It is captivating, well-supported by dozens of examples, and a quick read. "Good leaders create conditions where subordinates know they are valued for their individual talents, skills, and perspectives . . ."<sup>74</sup> Embracing individuality will only help your organization accomplish the mission, and in doing so, Army leaders will be better equipped to develop our JALS personnel and provide the stewardship we owe our Corps. **TAL**

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## Notes

1. *Promotion of Promotion-list Officers of the Army: Hearing on S. 3712 Before the S. Comm. on Mil. Affs.*, 76th Cong. 13 (1940) (statement of General George C. Marshall, U.S. Army).
2. TODD ROSE, *THE END OF AVERAGE: HOW WE SUCCEED IN A WORLD THAT VALUES SAMENESS* (2016).
3. *Id.* at 11.
4. *Id.*

5. See TODD ROSE, *THE END OF AVERAGE* (Harper Audio 2016) (narrated by Fred Sanders) (downloaded from Audible).
6. See generally ROSE, *supra* note 2, at 197–231 ("Notes").
7. See *id.* at 165–96.
8. U.S. DEP'T OF ARMY, DOCTRINE PUB. 6-22, ARMY LEADERSHIP AND THE PROFESSION para. 6-3 (31 July 2019) (C1, 25 Nov. 2019) [hereinafter ADP 6-22] ("It is the individual professional responsibility of all leaders to develop their subordinates . . .").
9. See *id.* para. 1-87 (defining attributes as "characteristics internal to a leader" that "affect how an individual behaves, thinks, and learns *within certain conditions*") (emphasis added).
10. Sarah Sweeny, *A Wild Rose in Bloom*, HARV. GAZETTE (Mar. 15, 2013), <https://news.harvard.edu/gazette/story/2013/03/a-wild-rose-in-bloom> ("When L. Todd Rose dropped out of high school, he had a 0.9 GPA. He had a pregnant girlfriend, was living in small-town Utah, was making less than \$5 an hour, and was subsisting on welfare checks.").
11. *Todd Rose*, LINKEDIN, <https://www.linkedin.com/in/todd-rose-94700367> (last visited Mar. 19, 2024).
12. *Id.*; see also TODD ROSE, <http://www.toddrose.com/about> (last visited Mar. 19, 2024).
13. Sarah Sweeny, *'Average' Gets His Ire Up*, HARV. GAZETTE (Mar. 21, 2016), <https://news.harvard.edu/gazette/story/2016/03/average-gets-his-ire-up>.
14. TODD ROSE & OGI OGAS, *DARK HORSE* (2018).
15. TODD ROSE, *COLLECTIVE ILLUSIONS* (2022).
16. E.g., L. Todd Rose et al., *The Science of the Individual*, 7 MIND, BRAIN, & EDUC. 152 (2013).
17. See, e.g., *Is College Necessary for Success? Todd Rose and Mike Rowe Discuss*, FORBES (Sept. 5, 2023, 3:19 PM), <https://www.forbes.com/sites/stand-together/2023/09/05/is-college-necessary-for-success-todd-rose-and-mike-rowe-discuss/?sh=4688ffde66f2>.
18. E.g., TEDx Talks, *The Myth of Average: Todd Rose at TEDxSonomaCounty*, YOUTUBE (June 19, 2012), [https://youtu.be/4eBmyttcfU4?si=ul9C\\_3v1mPUyyWC5](https://youtu.be/4eBmyttcfU4?si=ul9C_3v1mPUyyWC5) (953,332 views as of Mar. 19, 2024).
19. See, e.g., Big Think, *Psychologist Debunks 8 Myths of Mass Scale | Todd Rose*, YOUTUBE (Dec. 4, 2022), [https://www.youtube.com/watch?v=BD\\_Euf\\_CBbs](https://www.youtube.com/watch?v=BD_Euf_CBbs) (1.7 million views as of Mar. 19, 2024).
20. ROSE, *supra* note 2, at 11 ("Our modern conception of the average person is not a mathematical truth but a human invention, created a century and a half ago by two European scientists to solve the social problems of their era."); see also *id.* at 36 ("By the dawn of the twentieth century, a majority of social scientists and policymakers were making decisions about people based on the average.").
21. See generally *id.* at 147–96.
22. See ADP 6-22, *supra* note 8, para. 5-40 ("Many leaders connect at a personal level with their subordinates, which helps leaders to anticipate and understand individual circumstances and needs.").
23. ROSE, *supra* note 2, at 82.
24. *Id.*
25. *Id.* at 84 & n.21 (citing DAVID BERRI & MARTIN SCHMIDT, *STUMBLING ON WINS* ch. 2 (2021)).

26. *See id.* at 84 (citing David Berri, *Bad Decision Making is a Pattern with the New York Knicks*, HUFF POST (May 14, 2016), [https://www.huffpost.com/entry/bad-decision-making-is-a\\_b\\_7283466](https://www.huffpost.com/entry/bad-decision-making-is-a_b_7283466)).
27. *Id.* at 85 (“The most successful basketball teams are composed of players with complimentary profiles of basketball talent.”) (citing DEAN OLIVER, BASKETBALL ON PAPER: RULES AND TOOLS FOR PERFORMANCE ANALYSIS 63–64 (2004)).
28. *See* MIKE KRZYZEWSKI, THE GOLD STANDARD: BUILDING A WORLD-CLASS TEAM, at 34:52 (Hachette Audio 2009) (downloaded using Audible) (“Great teams start with a base of talent but consist of a mixture of experienced people who bring instant credibility and institutional understanding, and young players who bring energy and keep you fresh.”).
29. *Compare* ROSE, *supra* note 2, at 78 (“[A]n estimated 60 percent of Fortune 500 firms still used some form of single-score ranking systems to evaluation employees in 2012.”), *with id.* at 79 (“At Deloitte, by 2014 they were also beginning to realize that its single-score employee evaluation method was not working as well as they expected.”), *and id.* at 80 (“Meanwhile, at Microsoft, stack ranking was an unmitigated disaster. . . . In late 2013, Microsoft abruptly jettisoned [that performance rating system].”).
30. *See* U.S. DEP’T OF ARMY, REG. 623-3, EVALUATION REPORTING SYSTEM para. 3-9(a)(3)(c)(1)(b) (14 June 2019).
31. U.S. DEP’T OF DEF., INSTR. 1020.05, DoD DIVERSITY AND INCLUSION MANAGEMENT PROGRAM para. 4.1(a) (9 Sept. 2020) (emphasis added).
32. *See* ADP 6-22, *supra* note 8, para. 4-12 (“Understanding the different backgrounds, qualifications, experiences, and potential of each of the individuals in an organization is an important part of being an effective leader. It is fundamental to knowing your people and harnessing their diverse skills and perspectives to build cohesive teams.”).
33. *See* ROSE, *supra* note 2, at 103.
34. *See id.* at 99.
35. *Id.*
36. *Id.*
37. *Id.* at 103; *see also id.* at 106 (defining the context principle to mean “individual behavior cannot be explained or predicted apart from a particular situation, and the influence of a [particular] situation cannot be specified without referencing the individual experiencing it”).
38. THE MYERS-BRIGGS CO., <https://www.themyers-briggs.com> (last visited Mar. 19, 2024).
39. *See* Myers & Briggs’ 16 Personality Types, TRUITY, <https://www.truity.com/blog/page/16-personality-types-myers-briggs> (last visited Mar. 19, 2024).
40. *See, e.g., id.* (describing ENTJs as “the commander[s]” who “are strategic leaders, motivated to organize change. They are quick to see inefficiency and conceptualize new solutions, and enjoy developing long-range plans to accomplish their vision. They excel at logical reasoning and are usually articulate and quick-witted”).
41. *See* ROSE, *supra* note 2, at 100–01.
42. *See generally id.* at 100–03.
43. *See, e.g., id.* at 106–07 (“IF Jack is in the office, THEN he is very extroverted. IF Jack is in a large group of strangers, THEN he is mildly extroverted. IF Jack is stressed, THEN he is very introverted.”).
44. *Id.* at 103 (“Shoda thought there was a third way to think about personality, not in terms of traits or situations, but in terms of the ways in which traits and situations interacted.”); *see also* discussion *supra* at notes 29–32 and accompanying text.
45. This assertion is based on the author’s recent professional experience as the Acting Chief, Military Justice, Combined Military Justice Office, Fort Knox, Kentucky, from 1 May 2023 to 1 July 2023.
46. *See* ROSE, *supra* note 2, at 119 (“Other people’s personalities seem stable to us, however, for a different reason: we tend to interact with most people within a narrow range of contexts.”).
47. *See id.* (“We simply do not see the diversity of contexts in the lives of our acquaintances or even those closest to us and, as a result, we make judgments about who they are based on limited information.”).
48. *See supra* note 9.
49. ROSE, *supra* note 2, at 105.
50. *See id.* at 10 (describing how the application of averages to measure or predict individuals is “almost always wrong”).
51. *Id.* at 1–2.
52. *See id.* at 1 & n.1 (citing USAAF Aircraft Accidents: February 1950, ACCIDENT-REPORT.COM, <http://www.accident-report.com/Yearly/1950/5002.html> (last visited Mar. 19, 2024)).
53. *Id.* at 2 & n.2 (citing AIR MATERIAL COMMAND, U.S. ARMY AIR FORCES, TECHNICAL REP. 5501, HUMAN BODY SIZE IN MILITARY AIRCRAFT AND PERSONAL EQUIPMENT 5 (1946)).
54. *See id.* at 4.
55. *Id.*
56. *Id.* at 8–9.
57. *See id.* at 8–9 (“By discarding the average as their reference standard, the [Air Force] initiated a quantum leap in its design philosophy, centered on a new guiding principle: *individual fit*. Rather than fitting the individual to the system, the military began fitting the system to the individual.”).
58. U.S. DEP’T OF ARMY, REG. 700-84, ISSUE AND SALE OF PERSONAL CLOTHING para. 2-5(a) (22 July 2014) (“[U]niforms will not be sold or issued until they have been tried on and checked by trained clothing fitters. . . . This is very important since garments of a given size may vary and all persons have different physical features.”).
59. *Id.* para. 1-6(h).
60. U.S. DEP’T OF ARMY, FIELD MANUAL 3-84 LEGAL SUPPORT TO OPERATIONS 1-2 fig.1-1 (1 Sept. 2023) [hereinafter FM 3-84] (defining “Stewardship,” one of the “[f]our constants of the Army legal profession”).
61. ADP 6-22, *supra* note 8, para. 1-32.
62. *Id.* para. 1-37 (emphasis added).
63. *See* FM 3-84, *supra* note 60, at 1-2 fig.1-1.
64. *See supra* text accompanying note 1.
65. *See* ADP 6-22, *supra* note 8.
66. U.S. ARMY, <https://www.goarmy.com> (last visited Mar. 19, 2024).
67. U.S. AIR FORCE, <https://www.airforce.com> (last visited Mar. 19, 2024).
68. U.S. COAST GUARD (emphasis added), <https://www.gocoastguard.com> (last visited Mar. 19, 2024).
69. *But see* U.S. DEP’T OF NAVY, <https://www.navy.com> (last visited Mar. 19, 2024) (containing “get up to \$140K now”; “enrich your life”; and six hyperlinks titled “earn 4+ years college tuition,” “30 days annual paid vacation,” “paid rent & housing,” “money for books, meals & living expenses,” “purchase a home with 0% down,” and “free health care for Sailors and Families”).
70. ADP 6-22, *supra* note 8, para. 1-79.
71. FM 3-84, *supra* note 60, para. 3-7.
72. *Id.* para. 3-9.
73. *See* KRZYZEWSKI, *supra* note 28, at 35:41.
74. ADP 6-22, *supra* note 8, para. 4-12.





SGT Brianna J. Shairs-Amore, a student of the Advanced Leader Course Class, 27D Noncommissioned Officer Academy participates in an Army Combat Fitness Test at The Judge Advocate General's Legal Center and School in Charlottesville, VA. (Credit: SFC Maria Green)

Staff Sergeant (SSG) Jones embodied dedication.<sup>1</sup> A star paralegal in the U.S. Army Judge Advocate General's (JAG) Corps, she thrived in the fast-paced world of military justice as a special victims' paralegal. While on a run at the end of a busy workday to decompress, she stepped in a pothole and twisted her ankle; it threatened to sideline her. The pain was excruciating, and doubt ensued. Could she bounce back and continue serving effectively?

This is where the Holistic Health and Fitness (H2F) program<sup>2</sup> stepped in. The H2F program is a significant investment in the well-being and readiness of Army professionals. It includes the intertwined aspects of readiness across five domains: physical, mental, spiritual, nutritional, and sleep. The H2F program promotes Army personnel's overall health and resilience, and it is pivotal in ensuring that judge advocates (JAs), paralegals, and legal administrators are equipped to meet the demands of their dual roles as Soldiers and legal professionals. The H2F program aims to enhance the JAG Corps's combat capability, decision-making, and overall effectiveness by addressing key aspects of individual and team readiness.

Holistic Health and Fitness is about more than just physical fitness; it is a comprehensive approach to well-being. Staff Sergeant Jones was facing a physical setback, which produced potential emotional and mental challenges. She could not be away from work for a long time. She worried about the special victim clients, her JA, and others who depended on her. She did not want to disappoint anyone. She started to spiral out of control. Staff Sergeant Jones attended a mandatory unit briefing on H2F, and the program offered a beacon of hope.

One of the cornerstones of H2F's success is education. Like all Soldiers, JAG Corps personnel need to understand the program's philosophy and how it can help them. Incorporating H2F briefings into training events as opportunities to

# Azimuth Check

## The Power of H2F Resilience, Implementation, and Education

*By Command Sergeant Major Shellyann M. Corbin*



The Advanced Leader Course Class, 27D Noncommissioned Officer Academy, attends physical training at The Judge Advocate General's Legal Center and School in Charlottesville, VA. (Credit: SFC Maria Green)

interactively learn about the five domains of H2F, rather than check-the-box exercises, will enable personnel to do so. Through H2F education, SSG Jones understood the program's comprehensive approach. She connected with physical therapists who devised a rehabilitation plan that not only addressed the ankle injury but also emphasized injury prevention through targeted exercises. In tandem with physical therapy, she also explored the program's mental health resources. Techniques for stress management and building resilience helped her navigate the emotional rollercoaster of recovery. Spiritual practices like meditation and mindfulness fostered a sense of inner peace and purpose. These mental and spiritual exercises helped keep her motivated throughout the recovery process. Staff Sergeant Jones learned that prioritizing quality sleep was crucial. It fueled the healing process, strengthened her body's resilience, and aided her injured ankle's recovery while also helping her fight off potential illnesses.

A clear link exists between H2F participation and positive outcomes. Soldiers who actively engage with H2F programs report reduced stress and anxiety, improved sleep quality, enhanced physical fitness, increased resilience, an ability to cope with

challenges, and a stronger sense of purpose and well-being. These benefits translate into a more effective fighting force. Soldiers who are well-rested, mentally sharp, and emotionally balanced can make sound decisions, perform better under pressure, and contribute significantly to unit success.

Using a multi-pronged approach to spread information about H2F is as important as educating the force. Ensuring easy access to resources and services, integrating principles of H2F into a unit's battle rhythm, and tailoring support to a unit or section further emphasizes H2F's importance.

Staff Sergeant Jones's story is a testament to the power of H2F education and implementation. Imagine the impact on the entire JAG Corps when every member actively participates in the program. Our JAG Corps personnel can utilize H2F tools to support mental well-being, build strong team relationships, and make sound ethical decisions in stressful situations. Personnel working in military justice—particularly those specializing in sensitive areas like special victim prosecution, special victim counsel, and trial defense services—face significant challenges that can affect their well-being. The H2F program offers a framework to promote resilience in these demanding roles, which ensures the JAG Corps remains a robust and resilient force within the Army.

In conclusion, the H2F program invests in Soldier well-being and readiness, mission success, and, ultimately, national security. By educating the force, implementing a comprehensive approach, and demonstrably improving Soldier resilience, H2F will empower JAG Corps personnel to best meet mission demands in service to the Nation's defense. **TAL**

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*CSM Corbin is the Command Sergeant Major of The Judge Advocate General's Legal Center and School and Commandant of the Noncommissioned Officer Academy in Charlottesville, Virginia.*

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### Notes

1. This is a composite vignette based on the author's professional experiences.
2. U.S. DEPT OF ARMY, FIELD MANUAL 7-22, HOLISTIC HEALTH AND FITNESS (26 Oct. 2012) (C1, 8 Oct. 2020).





Then-CPT Borch in Aviano, Italy, in 1984. (Image courtesy of Fred L. Borch)

# Lore of the Corps

## An Interview with Fred L. Borch

By Nicholas K. Roland, Ph.D.

*Colonel (Retired) (COL (Ret.)) Fred Borch retired from his Army Civilian role on 17 November 2023, after almost eighteen years as the regimental historian of the U.S. Army Judge Advocate General's (JAG) Corps. The following interview, conducted by the new regimental historian, Dr. Nick Roland, captures some of Fred's thoughts about his time as a Soldier and Army Civilian, the history of the JAG Corps, and the value of history to the practice of military law. For an additional retrospective on his career, readers can consult The Quill & Sword podcast, FredTalks episode 19, A Farewell to Fred.<sup>1</sup>*

**Dr. Roland:** You spent five decades in the Army, either as a Soldier, a judge advocate (JA), or an Army Civilian. What are the biggest changes you have seen over that time?

**Mr. Borch:** I'll give you three. When I enlisted in 1972 (required as a four-year

Reserve Officers' Training Corps scholarship cadet), the Army was a very different organization. The draft was still on, most Soldiers were draftees, and many did not want to be in uniform. Almost all Soldiers were male—only one percent female in that era—and we had a gender-segregated force.

If you were a female, you could not join the Army. Rather, you could join the Women's Army Corps, and most military occupation specialties (MOSs) were closed to women. Want to drive a tank? Too bad if you were a woman. Be a combat engineer? Nope.

So, first, a huge change I witnessed was fully integrating women into our Army and giving females the opportunities to serve in all MOSs, which made our Army better.

Second, when I joined our Army, we were struggling with race relations. Black Soldiers were not being treated fairly and did not have equal opportunities in the Big Green Machine. In the 1980s and 1990s, the Army worked hard to ensure that Black men and women in uniform had the same opportunities as white Soldiers and were treated with dignity and respect. Today, while the Army remains committed to equal opportunity regardless of race or ethnicity, formalized organizational initiatives reflect that the Army wants every Soldier to be a valued teammate.

Third, the Army was pretty much broken after the unpopular war in Vietnam; our noncommissioned officer ranks were in especially bad shape, and morale and esprit de corps were very low. The draft was gone—never to return—and we were completely reliant on volunteers. But through hard work, the Army has rebuilt esprit de corps and created the most professional force in world history. No army is better staffed, equipped, or trained today.

Bottom line: I have seen a lot of change, and today we have a very different Army. It is better in almost all respects. Yes, we still have problems that need solving, but the Army of 2024 is a great organization.

**Dr. Roland:** Who had the biggest impact on your career, either in or out of uniform?

**Mr. Borch:** In uniform, probably COL (Ret.) Earle F. Lasseter, whose leadership at Fort Moore convinced me to stay in the Corps after my initial assignment more than forty years ago. Colonel (Ret.) Lasseter was a fabulous leader. He emphasized that being a Soldier was key to success as a lawyer in uniform, and he was right. But COL (Ret.) Lasseter also made it fun to





COL Borch participates in a press briefing regarding military commissions at the Pentagon in 2003. (Image courtesy of Fred L. Borch)

work in his office with sports, social activities, and so on. That is why I stayed after my initial tour as an Army lawyer. We worked hard and supported commanders but also had fun.

Later in my time as a JA, Major General (MG) (Ret.) John D. Altenburg greatly impacted my career. It was then-Brigadier General (BG) Altenburg who convinced me to write *Judge Advocates in Combat*,<sup>2</sup> which propelled me into the study of our regimental history. The fact that I had written the book must have been a key factor in my being hired as the first regimental historian and archivist in our Corps's history.

Out of uniform, there is no question that MG (Ret.) Thomas J. Romig had the biggest impact; it was he who decided that the Corps needed a full-time historian to preserve our history and educate members of our Corps about our achievements. While serving as The Judge Advocate General from 2001 to 2005, MG (Ret.) Romig created the regimental historian position and placed it at The Judge Advocate General's Legal Center and School (TJAGLCS). Had it not been for MG (Ret.) Romig's vision that we have a historian, I would have never had the opportunity to be the first person in the job.

**Dr. Roland:** What spurred your interest in history, and especially JAG Corps history?

**Mr. Borch:** I have always been interested in history. I was a history major at Davidson College, and after I joined the JAG Corps in 1980, I realized that our Corps had a rich and varied history that deserved to reach the widest possible audience. That is why, even before I retired from active duty, I was writing about JAG Corps history. I was a lieutenant colonel when I started writing *Judge Advocates in Combat*, and I was still on active duty and on the faculty at the Naval War College when the Army's Center of Military History (CMH) published the book.

**Dr. Roland:** From your historical perspective, what are the most important trends in the JAG Corps and military law since World War II?

**Mr. Borch:** There is no doubt about this answer. For more than 200 years, the Corps focused on military justice as its reason for being. In the 1980s and 1990s, however, the JAG Corps shifted away from a courts-martial practice to today's operational law focus. This metamorphosis is a key historical development because it moved the Corps—and the practice of military law—from the periphery of the Army to its center. That commanders and their staffs now depend on the JAG Corps to provide 24/7, 365 days advice and counsel on all military operations is the most important development of the last seventy-five years. Military justice is still important (and is our mission under the Uniform Code of Military Justice<sup>3</sup>), but the Corps exists today to support commanders in achieving mission success.

**Dr. Roland:** What is the most interesting thing you encountered in your years of research into Army legal history?

**Mr. Borch:** When I was doing research at the National Archives, I discovered biographical sketches of every lawyer who had served as a JA in World War I. This is a unique record that no other branch can duplicate, and it resulted in the publication of *Judge Advocates in the Great War*.<sup>4</sup>

**Dr. Roland:** If you could go back in time and interview one JA from history, who would it be and why?

**Mr. Borch:** Probably BG (Ret.) Joseph Holt, who served as President Abraham Lincoln's Judge Advocate General. Not only was Holt the longest-serving Judge Advocate General in history (he served from 1862 to 1875), but he also led the team that prosecuted the seven men and one woman who conspired to murder Abraham Lincoln in 1865. Holt also worked with Francis Lieber in promulgating General Orders No. 100,<sup>5</sup> which hugely impacted the evolution of the law of armed conflict. Holt was a remarkable lawyer, and his service was exemplary in our Army.

**Dr. Roland:** More history is always being made. What do you see as future areas of study in JAG Corps and military legal history?

**Mr. Borch:** We need to be capturing the history of the Corps's legal operations in Afghanistan and Iraq. Because both these conflicts began more than twenty years ago, they are already passing from our institutional memory, and many of the men and women who served in the early years of Operations *Enduring Freedom* and *Iraqi Freedom* have already left active duty and returned to civilian life. We need to capture this history while it is still within our reach.

Perhaps a better question is *why* we should study our history. First, history is an explanation of the present; you cannot understand why we do things the way we do in today's Corps unless you understand how we did it in the past. Second, history is like memory. If you lack memory, you would not know what do to when you got up in the morning, what you already did, and what you need to do today and tomorrow. The same is true of history. We need to study the history of our Corps to understand why we practice law the way we do today and how we should conduct legal operations in the future.

Third, some professional historians hate to talk about "lessons learned," but a study of history provides insights into making good decisions today and better decisions tomorrow. Lessons from history can help both our present and our future.



Dr. Nicholas K. Roland. (Image courtesy of author)

**Dr. Roland:** How have you seen the study of history benefit the JAG Corps or the Army?

**Mr. Borch:** More than anything, I think our Regimental History Program has built *esprit de corps*. Judge advocates, legal administrators, and paralegals have done some really cool things in the past, and when Soldiers now serving in the Corps read and hear about these things, it makes them proud to serve in the military legal profession.

**Dr. Roland:** What was the most rewarding aspect of being the regimental historian?

**Mr. Borch:** Easy answer—working with people who have served or are serving in the Corps.

**Dr. Roland:** What is your proudest achievement as the regimental historian?

**Mr. Borch:** I will mention three. First, prior to my selection as the regimental historian and archivist, there was no such thing; the Corps had no full-time historian. Consequently, I am very proud to have been a part of developing the Regimental History Program that we have today.

Over my almost eighteen years as the regimental historian and professor of legal history and leadership, the program has evolved to include:

- teaching JAs, legal administrators, and paralegals at TJAGLCS and other locations;
- writing and researching articles, monographs, and books;
- establishing a collection of historical artifacts at TJAGLCS;
- creating a website with information about the JAG Corps that is available to the general public;
- establishing a Regimental Archive of documents, photographs, and related material; and
- creating the annual George S. Prugh Lecture in Military History, in which a scholar comes to TJAGLCS to speak about military legal history.

I am proud to have spearheaded the creation of a history program that is now viewed as an important part of our Corps.

Second, I am proud of *Judge Advocates in Combat*. It took me almost five years to write it and then get it published because the book is a co-print with the CMH. Any Army branch can publish a monograph, but getting CMH to co-imprint a book is a big deal, because it demonstrates that the book is up to the highest professional standards.

Third and finally, I am proud of the many *Lore of the Corps* articles that have appeared in every issue of *The Army Lawyer* since 2010. These have brought our great history to JAs, legal administrators, paralegal specialists, and Department of Army Civilian teammates who otherwise would know very little about our glorious history!

I guess I should also add that I am simply proud to have continued my service as an Army Civilian after retiring from active duty and continued to contribute in a small way to our Corps.

*Dr. Nick Roland is now serving as the JAG Corps regimental historian and professor of legal history and leadership. A native of Knoxville, Tennessee, he is a graduate of Virginia Tech (B.A., History, 2007) and The University of Texas (Ph.D., U.S. History, 2017). He worked as a Navy historian at the Naval History and*

*Heritage Command in Washington, D.C., from August 2018 to November 2023. His publications include Galvanic: Beyond the Reef – Tarawa and the Gilberts, November 1943<sup>6</sup> (with S. Matthew Cheser) and Violence in the Hill Country: The Texas Frontier in the Civil War Era.<sup>7</sup> A U.S. Army veteran, he currently serves as an infantry officer in the Virginia Army National Guard. He enjoys a wide array of outdoor activities, live music, college sports, and he is thrilled to be back home in the Army!*

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*Dr. Roland is the Regimental Historian, Archivist, and Professor of Legal History and Leadership at The Judge Advocate General's Legal Center and School in Charlottesville, Virginia.*

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## Notes

1. FredTalks, *Ep. 19: A Farewell to Fred*, QUILL & SWORD (Oct. 25, 2023), <https://www.dvidshub.net/audio/77056/quill-sword-fredtalks-ep-19-farewell-fred>.
2. FREDERIC L. BORCH, JUDGE ADVOCATES IN COMBAT: ARMY LAWYERS IN MILITARY OPERATIONS FROM VIETNAM TO HAITI (2001).
3. 10 U.S.C. ch. 47.
4. FRED L. BORCH III, JUDGE ADVOCATES IN THE GREAT WAR 1917-1922 (2021).
5. Headquarters, U.S. War Department, Gen. Orders No. 100 (24 Apr. 1863).
6. S. MATTHEW CHESER & NICHOLAS ROLAND, GALVANIC: BEYOND THE REEF, TARAWA AND THE GILBERTS, NOVEMBER 1943 (2020).
7. NICHOLAS KEEFAUVER ROLAND, VIOLENCE IN THE HILL COUNTRY: THE TEXAS FRONTIER IN THE CIVIL WAR ERA (2021).



The USS *Chung-Hoon* observes People's Liberation Army (Navy) LUYANG III DDG 132 execute unsafe maneuvers while conducting a routine south-to-north Taiwan Strait transit alongside the HMCS *Montreal* on 3 June 2023. (Credit: MC1 Andre T. Richard, U.S. Navy)

## Practice Notes

# Countering Lawfare of the People's Republic of China Starts with “PRC,” Not “China”

*By Lieutenant Colonel Richard J. Connaroe II*

Every time an American or a potential partner nation refers to the People's Republic of China (PRC) as “China,” the PRC is winning strategic legal warfare—or lawfare.<sup>1</sup> Every quip and offhand reference about “China” unwittingly yields to PRC lawfare tactics and furthers the PRC's agenda. Not only do we legitimize the PRC's “One-China Principle,”<sup>2</sup> but we also delegitimize strategic ambiguity while we otherwise strive to compete internationally.<sup>3</sup> We are helping the PRC to win.

This article explains how commanders, Service members, citizens of the United States, and partner nations everywhere can counter PRC lawfare by using proper terminology. First, this article introduces the concept of lawfare. It then provides a common scenario of lawfare in action. Critical to understanding the scope

of PRC lawfare is the historical context of the word “China,” which is at the heart of one of PRC's most prevalent lawfare tactics. After understanding the PRC's method and scope of its lawfare, this article describes how properly referring to the PRC as “the PRC,” not as “China,” is essential to countering PRC lawfare.

### What Exactly Is Lawfare?<sup>4</sup>

While not explicitly defined in Department of Defense doctrine, lawfare is commonly defined as the use of the law to achieve a policy objective.<sup>5</sup> Academics postulate overlapping types of lawfare.<sup>6</sup> First, “battlefield exploitation lawfare is the exploitation of an adversary's law-abidingness.”<sup>7</sup> Second, instrumental lawfare is the use of legal tools, like sanctions or bans, to achieve effects similar



to conventional military actions.<sup>8</sup> Third, proxy lawfare is legal action against an adversary's proxy, such as a PRC or Russian corporation.<sup>9</sup> Fourth, "information lawfare is the use of law to control the narrative" of competition or conflict or the use of misleading legal positions to justify coercion or aggression.<sup>10</sup> Fifth, institutional lawfare is the creation of domestic law to achieve strategic efforts, such as asserting sovereignty or jurisdiction.<sup>11</sup> The PRC, however, has clearly defined lawfare.<sup>12</sup>

The PRC has implemented three reinforcing warfares: legal warfare, public opinion warfare, and psychological warfare.<sup>13</sup> The PRC views lawfare as an offensive weapon to seize the initiative—a form of combat.<sup>14</sup> The PRC lawfare involves "arguing that one's own side is obeying the law, criticizing the other side for violating the law, and making arguments for one's own side in cases where there are also violations of the law."<sup>15</sup> Conversely, public opinion warfare is the struggle over media dominance, and psychological warfare involves erosion of political will.<sup>16</sup>

As demonstrated in the commonplace example below, lawfare is part of the PRC's daily operations, which necessitates U.S. counter-lawfare—activities that preserve legitimacy, build legal consensus, and oppose unlawful action and misinformation that threatens the rules-based international order.<sup>17</sup> The PRC regularly shadows and confronts vessels in the South China Sea<sup>18</sup> because the PRC asserts sovereignty over it.<sup>19</sup> Nearly one-third of global maritime trade—or \$5.3 trillion of trade—passes through these waters each year, and the PRC portrays U.S. navigation in these waters as a violation of international law.<sup>20</sup> Throughout these engagements, the PRC asserts that it is obeying—even enforcing—the law and the United States is aggressively violating the law, specifically PRC sovereignty, even when the PRC is operating its own vessels in an unsafe manner.

**"Haven't We Had this Conversation Before?"<sup>21</sup>**

*PRC: "U.S. Navy Warship eight nautical miles off my starboard beam, this is PRC<sup>22</sup> Warship. You are approaching [indiscernible] Reef and Chinese sovereign waters. Remain clear of our*



The battle at Cho-Yan-Men, Nanking, in the Revolution of 1911. (Credit: T. Myano, Wellcome Collection)

*contiguous zone. Please alter course and leave immediately."*

Aboard the U.S. ship, the junior officer of the watch (JOOW) picks up the bridge-to-bridge radio, sighs, and responds.

*U.S. Navy: "PRC Warship, this is U.S. Navy Warship. I am a sovereign, immune U.S. Navy vessel conducting lawful military operations beyond the territorial seas of any coastal state. In exercising my rights as guaranteed by international law, I am operating with due regard for the rights and duties of all states."*

As the U.S. Navy ship continues through international waters, transiting through the Luzon Strait and into the South China Sea, the JOOW knows this will be a continuous, repetitive back and forth with the PRC vessel.

*PRC: "U.S. Navy Warship, this is PRC Warship. You are in Chinese sovereign waters. Please alter course and leave immediately."*

*U.S. Navy: "PRC Warship, this is U.S. Navy Warship. I am a sovereign, immune U.S. Navy vessel. I will not respond again to this incorrect assertion. Request you keep this channel open*

*for communications necessary for safety of navigation."*

The JOOW sees the PRC vessel altering its course towards his vessel's course on a collision course.

*PRC: "U.S. Navy Warship, this is PRC Warship. You are on a collision course. I am the stand-on vessel.<sup>23</sup> Alter your course and speed and maintain a safe distance in accordance with the rule."*

*U.S. Navy: "PRC Warship, this is U.S. Navy Warship. I am a sovereign, immune U.S. Navy vessel conducting lawful military operations beyond the territorial seas of any nation. I am operating in a safe and professional manner with due regard for the safety of my crew and all other vessels in the area. Your unsafe actions create a serious risk of collision and put our crews' safety at risk. Cease your unsafe and unprofessional actions."*

In this example, though the PRC ship set a collision course and blamed the United States for the same, the PRC ship does not actually seek a collision. It aims to intimidate, raise doubts, and encourage second-guessing. In line with Sun Tzu's teaching, through lawfare, the PRC pursues



In 1945, on what would become known as Retrocession Day, Chief Executive of Taiwan Province Chen Yi (right) accepting the surrender of Taiwan from Rikichi Andō (left), the last Japanese Governor-General of Taiwan, on behalf of the Republic of China Armed Forces at Taipei City Hall. (Credit: POWWII)

“breaking the enemy’s resistance without fighting.”<sup>24</sup> The PRC is pushing a narrative that they are legitimate and the United States is in the wrong. However, this false narrative is historically inaccurate.

### A Tale of Two<sup>25</sup>

China,<sup>26</sup> which has referred to itself as *Zhōnghuá guó*—the “Middle Kingdom” or “Central Nation”—since 220 BC,<sup>27</sup> is the longest-running continuous civilization.<sup>28</sup> For at least two millennia, a succession of Chinese dynasties<sup>29</sup> ruled over *tian xia*—“all under heaven.”<sup>30</sup> Chinese principles of governance and precepts of culture endured through periods of unity, collapse, autonomy, and reunification.<sup>31</sup> The imperial era closed with the Revolution of 1911; Chinese revolutionaries overthrew the Qing Dynasty and established the Republic of China (ROC), which they called *Zhōnghuá Mínguó*.<sup>32</sup>

Division and foreign intervention plagued the ROC’s rule of mainland China.<sup>33</sup> At the outset, Mongolia declared independence in Outer Mongolia during the Revolution of 1911.<sup>34</sup> The Mongolian People’s Republic became a Soviet satellite state,<sup>35</sup> and the ROC signed a treaty with Russia over Mongolia in 1915, regained control of it by force from Russia in 1919, and then lost control again in 1921.<sup>36</sup> Russia

also colonized Tannu Tuva (Tyva), a region between Russia and Mongolia.<sup>37</sup> Further, civil war erupted in the late 1920s between the ruling Kuomintang (KMT or Nationalist) Party and the Soviet-backed Chinese Communist Party (CCP), which calls itself the *Zhōngguó Gòngchǎndǎng*, or Central Committee of the Chinese Communist Party (CCCC).<sup>38</sup>

The ROC initially suppressed the CCP’s rebellion and forced the retreat known as the Long March, but the 1931 Japanese invasion eventually unraveled the ROC’s control of mainland China.<sup>39</sup> Japan launched a full-scale invasion in 1937, resulting in Japanese control of Manchuria and most of the larger cities of eastern China, including Hong Kong.<sup>40</sup> An intermission in the civil war between the ROC and the CCP enabled the ROC to prioritize focus and revenue on fighting Japanese forces, but ROC forces failed to prevent destruction and stop Japanese atrocities.<sup>41</sup> Meanwhile, the CCP focused on the “battle for the hearts and minds of the peasants,” distributing landlord lands to laborers.<sup>42</sup>

After World War II, the CCP enjoyed popularity, with many Chinese people having a stake in the CCP’s success, while the ROC autocracy felt hostile towards the Chinese people.<sup>43</sup> Ultimately, after an

agreement to govern a united China failed, fighting broke out between the ROC and CCP in 1948.<sup>44</sup> In 1949, the ROC and 1.2 million Chinese nationalists fled to Taiwan, which Japan returned to the ROC at the end of World War II.<sup>45</sup>

Since 1949, the CCP has exercised control over mainland China under an autocratic socialist system.<sup>46</sup> Mao Zedong, CCP chairman,<sup>47</sup> initially planned on using the name *Zhōnghuá Mínguó* (Republic of China) for his new government but assessed the people wanted a new, more appropriate title.<sup>48</sup> On 1 October 1949, Mao declared the creation of the People’s Republic of China (PRC)—or *Zhōnghuá Rénmín Gònghéguó*.<sup>49</sup> The United Nations, however, continued to recognize the ROC as “China” until 1971.<sup>50</sup> Then, in 1979, the United States recognized the CCP’s PRC<sup>51</sup> has a “One China” principle—without agreeing with the PRC position—and committed domestically to unofficial relations with and defensive assistance of Taiwan via the U.S.-PRC Shanghai Communiqué and the Taiwan Relations Act.<sup>52</sup> The CCP and the CCP’s PRC have never exercised control over Taiwan or its outlying islands, including Kinmen Island, the Matsu Islands, or the Penghu Islands.<sup>53</sup>

### “You’ll Remember You Belong to Me”<sup>54</sup>

The PRC has been waging and winning lawfare from its founding.<sup>55</sup> Today, the CCP’s PRC argues that, in 1949, the Chinese people proclaimed the PRC’s replacement of the ROC as the only government of “the whole of China.”<sup>56</sup> Further, the CCP asserts that it represents the “entire Chinese People” and that foreign forces are “interfering with the reunification of China”—a domestic issue.<sup>57</sup> The PRC’s lawfare has achieved some success. For example, in 1971, the United Nations recognized the PRC as “China” and expelled the ROC, which was a founding member and a member of the Security Council since 1945.<sup>58</sup> Additionally, the majority of the international community refers to the PRC as “China,” despite the PRC’s increasingly expansive definition of its borders and claims.<sup>59</sup> We simply are not using the word “China” the same way. However, the PRC’s vagueness and inaccuracies enable counter-lawfare on two core issues: its people and its borders.





The Qing Dynasty complete map of “all under heaven,” essentially depicting all land as Chinese. (Credit: Library of Congress)

**Chinese Is a Worldwide Ethnicity Separate from the PRC State**

First, not all ethnic Chinese people living across the globe are residents of the PRC. Han Chinese represent 95 percent of the Taiwanese population, 74 percent of the Singaporean population, and 20 percent of the Malaysian population.<sup>60</sup> Additionally, 5.4 million Chinese Americans live in the United States.<sup>61</sup> The PRC refers to these Chinese people as “overseas Chinese” and has a government office for outreach to them.<sup>62</sup> Therefore, when we refer to the PRC as “China” and to the people of the PRC as “Chinese,” we alienate ethnic Chinese from their nationality, pushing them towards siding with the PRC, and lose the hearts and minds of potential partner nations.

Conversely, not all residents of the PRC are Chinese. Of the PRC’s population of 1.4 billion people, 91 percent are Han Chinese and 6.7 percent were members of the CCP as of 2021.<sup>63</sup> However, 9 percent of the PRC population—about 130 million people—are fifty-six other ethnicities, including Manchu, Tibetan, Mongol, and

Korean.<sup>64</sup> A simplistic attitude towards PRC residents overlooks potential domestic division.

**The PRC’s Borders Do Not Include “All Under Heaven”**

Second, the PRC’s borders include only the land it controlled in 1949 as well as Hong Kong and Macau, which it subsequently acquired via treaties with the United Kingdom and Portugal, respectively.<sup>65</sup> Neighboring nations, including Mongolia, India, Nepal, and Vietnam<sup>66</sup> are sovereign—regardless of Han Chinese populations—with their own territorial waters and exclusive economic zones in accordance with the United Nations Convention on the Law of the Sea.<sup>67</sup> The PRC’s release of its 2023 “standard map” to include portions of Bhutan and India and its creation of settlements in those newly claimed portions of “China” violate international law.<sup>68</sup> To prevent the normalization of the use of force to move international boundaries, the United States and its partners must publicize obedience to international law and criticize its violations.<sup>69</sup>

**Conclusion**

The PRC’s basic lawfare, which is part of its daily operations, includes arguing that the PRC is obeying the law and the opposing side is violating international law. When the international community conflates “Chinese” with “resident of the PRC,” they alienate ethnic Chinese globally. Moreover, referring to the PRC as “China” risks signaling the conveyance or acquiescence of PRC authority over territories the PRC claims or with Chinese populations, and it plays into the PRC’s lawfare tactics. To avoid these unintended implications, the international community should loudly criticize international law violations, particularly the use of force to move international boundaries. In addition, officials, military, academics, and citizens of the United States and partner nations can counter PRC lawfare of expansive “Chinese” claims by simply referring to the PRC as “the PRC.” **TAL**

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*LTC Connaroe is the Deputy Staff Judge Advocate for 8th Theater Sustainment Command at Fort Shafter, Hawaii.*

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## Notes

1. *Lawfare*, CAMBRIDGE DICTIONARY, <https://dictionary.cambridge.org/us/dictionary/english/lawfare> (last visited Feb. 13, 2024).
2. The Chinese Communist Party (CCP) People's Republic of China's (PRC) "one-China principle has a clear and unambiguous meaning, i.e. there is but one China in the world, Taiwan is an inalienable part of China, and the Government of the [PRC] is the sole legal government representing the whole of China." *Questions and Answers Concerning the Taiwan Question (2): What is the one-China principle? What is the basis of the one-China principle?*, MISSION OF THE PEOPLE'S REPUBLIC OF CHINA TO THE EUR. UNION (Aug. 15, 2022), [http://eu.china-mission.gov.cn/eng/more/20220812Taiwan/202208/t20220815\\_10743591.htm](http://eu.china-mission.gov.cn/eng/more/20220812Taiwan/202208/t20220815_10743591.htm); cf., *The U.S. "One China Policy" vs. the PRC "One China Principle," U.S.-TAIWAN BUS. COUNCIL* (Jan. 1, 2022), <https://www.us-taiwan.org/resources/faq-the-united-states-one-china-policy-is-not-the-same-as-the-prc-one-china-principle> (distinguishing the United States' "One China Policy" as merely acknowledging that the PRC holds the position that Taiwan is part of the PRC).
3. Joint Communique on the Establishment of Diplomatic Relations Between the United States of America and the People's Republic of China, 2 PUB. PAPERS 2264, 2264-65 (Dec. 15, 1978) (establishing what is commonly referred to as the United States' "One China" Policy); see also Michael J. Green & Bonnie S. Glaser, *What Is the U.S. "One China" Policy, and Why Does it Matter?*, CTR. FOR STRATEGIC & INT'L STUDS. (Jan. 13, 2017), <https://www.csis.org/analysis/what-us-one-china-policy-and-why-does-it-matter> (distinguishing the United States' "One China Policy" as recognizing that the CCP's PRC has a "one-China principle" without agreeing that the PRC has sovereignty over Taiwan or even stating what "China" means).
4. A similar version of the first two paragraphs of this section appear in Lieutenant Colonel Richard Connor's article, *Lawfare and Counter Lawfare from the 2024 Taiwan Earthquake*, NAT'L SEC. L.Q., no. 2, 2024, at 34 (explaining what lawfare and counter-lawfare are using the 2024 Taiwan earthquake as an example).
5. In 2001, Jill Goldenziel provided two expansive definitions of lawfare. See Jill Goldenziel, *Law as a Battlefield: The U.S., China, and the Global Escalation of Lawfare*, 106 CORNELL L. REV. 1085, 1094 (2021).
6. See, e.g., Goldenziel, *supra* note 5, at 1099 (posing five bins of lawfare: "battlefield exploitation lawfare," "instrumental lawfare," "proxy lawfare," "information lawfare," and "institutional lawfare"); ORDE F. KITTRIE, *LAWFARE: LAW AS A WEAPON OF WAR* 11 (2016) (suggesting two types of lawfare: "instrumental lawfare" and "compliance-leverage lawfare").
7. Goldenziel, *supra* note 5, at 1099.
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.* at 1100.
12. See DEAN CHENG, HERITAGE FOUND., No. 2692, *WINNING WITHOUT FIGHTING: CHINESE LEGAL WARFARE* (2012), [https://www.heritage.org/asia/report/winning-without-fighting-chinese-legal-warfare#\\_ftnref3](https://www.heritage.org/asia/report/winning-without-fighting-chinese-legal-warfare#_ftnref3).
13. *Id.* at 1-2.
14. *Id.* at 1.
15. *Id.* (quoting Han Yanrong, *Legal Warfare: Military Legal Work's High Ground: An Interview with Chinese Politics and Law University Military Legal Research Center Special Researcher Xun Dandong*, LEGAL DAILY (PRC) (Feb. 12, 2006)).
16. *Id.* at 1-2.
17. See *J06 Office of the Staff Judge Advocate*, U.S. INDO-PAC. COMMAND, <https://www.pacom.mil/Contact/Directory/J06-Staff-Judge-Advocate> (last visited Apr. 26, 2024).
18. The United Nations refers to the sea to the south of the People's Republic of China (PRC) as the "South China Sea," whereas the PRC refers to it as the "South Sea" (*Nan Hai*), Vietnam refers to it as the "East Sea," and the Philippines refers to it as the "West Philippine Sea." Bryan Lynn, *What's in a Name? South China Sea Claimants Seek to Remove 'China,'* LEARNING ENG. (July 24, 2017), <https://learningenglish.voanews.com/a/whats-in-a-name-south-china-sea-claimants-seek-to-remove-china/3953830.html>.
19. Hannah Beech, *Just Where Exactly Did China Get the South China Sea Nine-Dash Line From?*, TIME (July 19, 2016), <https://time.com/4412191/nine-dash-line-9-south-china-sea> (explaining that the Republic of China first asserted a U-shaped, 11-dash line through the South China Sea on a Chinese map in 1947 to assert maritime claims, but it later removed two dashes around the Gulf of Tonkin under an agreement with Vietnam to create the 9-dash line).
20. Uptin Saiidi, *Here's Why the South China Sea Is Highly Contested*, CNBC (Feb. 7, 2018), <https://www.cnbc.com/2018/02/07/heres-why-the-south-china-sea-is-highly-contested.html>.
21. *Seinfeld: The Finale (2)* (NBC Network May 14, 1998). In the closing lines of the series finale, Jerry Seinfeld and George Costanza repeat the opening lines from the pilot episode. *Compare id.*, with *Seinfeld: Pilot* (NBC Network July 5, 1989). After Jerry asks about button placement on a jacket, George asks, "Haven't we had this conversation before?" and the pair agree that "maybe we have." *Seinfeld: The Finale (2)* (NBC Network May 14, 1998).
22. Naval vessels of the PRC may also identify themselves as "People's Liberation Army Navy (PLAN) Warship." See, e.g., Xavier Vavasasseur, *US DoD's 2021 China Military Power Report: PLAN Is the Largest Navy in the World*, NAVAL NEWS (Nov. 5, 2021), <https://www.navalnews.com/naval-news/2021/11/us-dods-2021-china-military-power-report-plan-is-the-largest-navy-in-the-world>.
23. The "stand-on vessel" is the vessel with the right of way, and other vessels are to give way. Convention on the International Regulations for Preventing Collisions at Sea, Oct. 20, 1972, 28 U.S.T. 3459, 1050 U.N.T.S. 16. In this scenario, the PRC vessel is incorrectly asserting to be the stand-on vessel. See *id.*
24. SUN TZU, *THE ART OF WAR* 8 (Lionel Giles trans., Allandale Online Pub., 2020) (n.d.).
25. CHARLES DICKENS, *A TALE OF TWO CITIES* (1859).
26. The name "China" comes from a pronunciation of "Qin"—said "Cin" or "Cinese"—during foreign trade with the Qin dynasty. Joshua J. Mark, *Ancient China*, WORLD HIST. ENCYC. (Dec. 18, 2012), <https://www.worldhistory.org/china>.
27. *Explore All Countries – China*, THE WORLD FACTBOOK: CIA.GOV (Feb. 13, 2024), <https://www.cia.gov/the-world-factbook/countries/china>; see also, *Origin of the Name of Zhongguo*, CHINACULTURE.ORG, [http://en.chinaculture.org/library/2008-02/11/content\\_22969.htm](http://en.chinaculture.org/library/2008-02/11/content_22969.htm) (last visited Feb. 20, 2024) (discussing the origin of the word *zhongguo*).
28. See HENRY KISSINGER, *ON CHINA* 2-7 (2011).
29. See *List of Rulers of China*, MET MUSEUM (Oct. 2004), [https://www.metmuseum.org/toah/hd/chem/hd\\_chem.htm](https://www.metmuseum.org/toah/hd/chem/hd_chem.htm).
30. KISSINGER, *supra* note 28, at 7, 10 (explaining that China appears to understand borders between societies as not based on geographic or political demarcations but instead on cultural distinctions).
31. *Id.* at 6-7.
32. *History*, GOV'T PORTAL OF REPUBLIC OF CHINA (TAIWAN), [https://www.taiwan.gov.tw/content\\_3.php](https://www.taiwan.gov.tw/content_3.php) (last visited Feb. 20, 2024); *Explore All Countries – China*, *supra* note 27.
33. See *Explore All Countries – China*, *supra* note 27; see also Beech, *supra* note 19 (explaining that the ROC first asserted a U-shaped, eleven-dash line through the South China Sea on a Chinese map in 1947 to assert maritime claims but later removed two dashes around the Gulf of Tonkin under an agreement with Vietnam to create the nine-dash line).
34. Mongolia was known as "Outer Mongolia" throughout the Qing Dynasty. See *Mongolia: Independence and Revolution*, BRITANNICA, <https://www.britannica.com/place/Mongolia/Independence-and-revolution> (last visited Feb. 20, 2024). Inner Mongolia, which attempted to declare independence at the same time as Outer Mongolia, is a province of the PRC today. *Id.*
35. *Explore All Countries – Mongolia*, THE WORLD FACTBOOK: CIA.GOV (Feb. 6, 2024), <https://www.cia.gov/the-world-factbook/countries/mongolia>.
36. *China/Mongolia (1911-1946)*, UNIV. OF CENT. ARK., <https://uca.edu/politicalscience/dadm-project/asiapacific-region/chinamongolia-1911-1946> (last visited Feb. 20, 2024).
37. *Mongolia: Independence and Revolution*, *supra* note 34.
38. *Explore All Countries – China*, *supra* note 27; *Chinese Communist Party*, BRITANNICA (Feb. 18, 2024), <https://www.britannica.com/topic/Chinese-Communist-Party>.
39. *Who Lost China?*, HARRY S. TRUMAN LIB. & MUSEUM, <https://www.trumanlibrary.gov/education/presidential-inquiries/who-lost-china> (last visited Feb. 20, 2024).
40. *Id.*; *Explore All Countries – China*, *supra* note 27; *Chinese Civil War 1945-1949*, BRITANNICA, <https://www.britannica.com/event/Chinese-Civil-War/The-tide-turns-1947-48> (last visited Apr. 26, 2024).
41. *Who Lost China?*, *supra* note 39; see also CONST. RTS. FOUND., *WHY DID THE COMMUNISTS WIN THE CHINESE REVOLUTION?* (2016), <https://www.crf-usa.org/images/t2t/pdf/WhyDidCommunistsWinChineseRevolution.pdf>.
42. CONST. RTS. FOUND., *supra* note 41, at 2 (explaining that the CCP distributed landlords' lands to the peasants, who then felt a stake in CCP success).
43. *Who Lost China?*, *supra* note 39; *The Chinese Civil War: Why Did the Communists Win?*, BILL OF RTS. IN ACTION, Summer 2014, at 1, 3-4, <https://www.crf-usa.org/images/pdf/gates/chinese-civil-war.pdf>.



44. *Chinese Civil War 1945-1949: The Tide Turns (1947-48)*, BRITANNICA, <https://www.britannica.com/event/Chinese-Civil-War/The-tide-turns-1947-48> (last visited Feb. 20, 2024).
45. *Id.*; *History*, *supra* note 32. The Qing dynasty ceded Taiwan to Japan at the end of the First Sino-Japanese War in 1895. *History*, *supra* note 32. The ROC's forces accepted the Japanese surrender in 1945, and the ROC, the United States, and the United Kingdom issued the Potsdam Declaration, which carried out the Cairo Declaration of returning the island of Formosa (Taiwan) to the ROC. *Id.*
46. *See Explore All Countries – China*, *supra* note 27.
47. Currently, “Xi Jinping is the general secretary of the Chinese Communist Party (CCP), chairman of the CCP Central Military Commission, president of the People’s Republic of China (PRC), and the chairman of the PRC Central Military Commission” in that order of priority. *Chinese Government Leadership*, U.S.-CHINA BUS. COUNCIL, <https://www.uschina.org/resources/chinese-government-leadership> (last visited Apr. 26, 2024) (listing CCP position as primary and president of PRC as third in priority).
48. *See* Richard C. Bush, *Thoughts on the Republic of China and Its Significance*, BROOKINGS (Jan. 24, 2013), <https://www.brookings.edu/on-the-record/thoughts-on-the-republic-of-china-and-its-significance>.
49. *Who Lost China?*, *supra* note 39.
50. *History*, *supra* note 32; G.A. Res. 2758 (XXVI) (Oct. 25, 1971).
51. The CCP is the essence of the PRC as much as the Nazi Party was the essence of Nazi Germany in that the CCP leaders are the PRC leaders. *See* Kerry Gershaneck, *To Win without Fighting*, MARINE CORPS UNIV. (June 17, 2020), <https://www.usmcu.edu/Outreach/Marine-Corps-University-Press/Expeditions-with-MCUP-digital-journal/To-Win-without-Fighting> (defining the PRC’s political warfare); *see also Chinese Government Leadership*, *supra* note 47.
52. Joint Communique on the Establishment of Diplomatic Relations Between the United States of America and the People’s Republic of China, 2 PUB. PAPERS 2264 (Dec. 15, 1978); *U.S. Relations With Taiwan*, U.S. DEP’T OF STATE (Aug. 31, 2018), <https://www.state.gov/u-s-relations-with-taiwan>; 22 U.S.C. § 3301 (noting that the United States recognized Taiwan as the ROC prior to 1979). The United States has no obligations to Taiwan directly, as the Taiwan Relations Act is a domestic commitment. *See* 22 U.S.C. § 3301.
53. *See History*, *supra* note 32 (noting ROC victory in the 25 October 1949 Battle of Kunmingtou on Kinmen Island); Alan Taylor, *Taiwan’s Kinmen Islands, Only a Few Miles From Mainland China*, ATLANTIC (Oct. 8, 2015), <https://www.theatlantic.com/photo/2015/10/taiwans-kinmen-islands-only-a-few-miles-from-mainland-china/409720> (noting Kinmen is a few miles away from the mainland and to the west of Taiwan); *Quemoy Island*, BRITANNICA (Feb. 20, 2024), <https://www.britannica.com/place/Quemoy-Island> (explaining that Kinmen Island is one of twelve Quemoy Islands); *Matsu Island*, BRITANNICA (Feb. 8, 2024), <https://www.britannica.com/place/Matsu-Island> (noting nineteen Matsu Islands 130 miles north of Taiwan and off the mainland coast); *P’eng-hu Islands*, BRITANNICA (Feb. 17, 2024), <https://www.britannica.com/place/Peng-hu-Islands> (noting sixty-four Penghu Islands 30 miles west of Taiwan); *see also* Masahiro Kurosaki, *Reformulating Taiwan’s Statehood Claim*, LAWFARE (Sept. 14, 2023), <https://www.lawfaremedia.org/article/reformulating-taiwan-s-statehood-claim> (discussing Taiwan statehood to deter PRC invasion).
54. HAMILTON (Walt Disney Studios Motion Pictures 2022). In the song “You’ll Be Back,” King George III erroneously fantasizes that the U.S. colony is his “forever and ever and ever and ever and ever.” *Id.*
55. *See, e.g.*, Huizhong Wu, *For Taiwan’s Olympics Team, Everything Is in a Name*, AP (Feb. 2, 2022), <https://apnews.com/article/winter-olympics-sports-beijing-taiwan-taipei-13f0f-1769874557dad489b0675605096> (discussing the Olympic Committee decision to prevent athletes from competing as Republic of China or Taiwan in 1981 as a result of PRC efforts).
56. *See, e.g.*, *The One-China Principle and the Taiwan Issue*, CHINA.ORG, <http://www.china.org.cn/english/taiwan/7956.htm> (last visited Feb. 20, 2024).
57. *Id.*
58. James Carter, *When the PRC Won the ‘China’ Seat at the UN*, CHINA PROJECT (Oct. 21, 2020), <https://thechinaproject.com/2020/10/21/when-the-prc-won-the-china-seat-at-the-un>; *see* G.A. Res. 2758 (XXVI) (Oct. 25, 1971).
59. The PRC’s 2021 Land Borders Law purports to “standardize and strengthen” border control and communicates the PRC’s intent to “resolutely defend territorial sovereignty and land border security”; its 2023 “standard map” expands PRC boundaries to include disputed areas and sovereign territory of other nations—notably Bhutan. *See* Jill Goldenziel, *How to Decode China’s Imperial Map—and Stop It from Becoming Reality*, FORBES (Sept. 5, 2023, 2:11 AM EDT), <https://www.forbes.com/sites/jillgoldenziel/2023/09/05/how-to-decode-chinas-imperial-map-and-stop-it-from-becoming-reality/?sh=639dc6ef5a2d> (discussing the 2023 standard map of China and its inclusion of the “Nine-Dash Line” among other controversial features); U.S. INDO-PAC. COMMAND J06, SJA TACTICAL AID SERIES, THE PRC’S LAND BORDERS LAW (2023) [hereinafter PRC’S LAND BORDERS LAW], <https://www.pacom.mil/Portals/55/Documents/Legal/J06%20TACAID%20-%20PRC%20LAND%20BORDERS%20LAW%20-%20FINAL.pdf?ver=zb6y0p-fpaAWoL5KOv0KDYg%3D%3D> (a counter lawfare piece originally by Major Jayne Leemon that exposes PRC malfeasance/lawfare in the PRC’s 2023 Land Borders Law and its “standard map” and establishes why the international community must reject it).
60. *Explore All Countries – Taiwan*, WORLD FACTBOOK: CIA.GOV (Feb. 13, 2024), <https://www.cia.gov/the-world-factbook/countries/taiwan>; *Explore All Countries – Singapore*, WORLD FACTBOOK: CIA.GOV (Jan. 31, 2024), <https://www.cia.gov/the-world-factbook/countries/singapore>; *Explore All Countries – Malaysia*, WORLD FACTBOOK: CIA.GOV (Feb. 13, 2024), <https://www.cia.gov/the-world-factbook/countries/malaysia>; *Explore All Countries – China*, *supra* note 27.
61. Abby Budiman & Neil G. Ruiz, *Key Facts about Asian Americans, a Diverse and Growing Population*, PEW RSCH. CTR. (Apr. 29, 2021), <https://www.pewresearch.org/fact-tank/2021/04/29/key-facts-about-asian-americans>.
62. *See, e.g.*, *President Hu Calls for More Role of Overseas Chinese*, EMBASSY OF THE PEOPLE’S REPUBLIC OF CHINA IN THE UNITED STATES OF AMERICA (Mar. 8, 2008), [http://us.china-embassy.gov.cn/eng/ywzn/lsyw/oca/200803/t20080308\\_4904531.htm](http://us.china-embassy.gov.cn/eng/ywzn/lsyw/oca/200803/t20080308_4904531.htm); *Overseas Chinese Affairs*, EMBASSY OF THE PEOPLE’S REPUBLIC OF CHINA IN THE UNITED STATES OF AMERICA, <http://us.china-embassy.gov.cn/eng/ywzn/lsyw/oca> (last visited Feb. 20, 2024).
63. *Explore All Countries – China*, *supra* note 27; Yew Lun Tian, *Factbox: A Hundred Years on, How the Communist Party Dominates China*, REUTERS (June 29, 2021), <https://www.reuters.com/world/asia-pacific/hundred-years-how-communist-party-dominates-china-2021-06-30>.
64. *Explore All Countries – China*, *supra* note 27.
65. Joint Declaration on the question of Hong Kong (with annexes), China-U.K., Dec. 19, 1984, 1399 U.N.T.S. 33; Joint Declaration of the Government of the People’s Republic of China and the Government of the Republic of Portugal on the Question of Macao, China-Port., Apr. 13, 1987.
66. The PRC invaded Vietnam in 1979 for its alleged alignment with the Soviet Union. Nguyen Minh Quang, *The Bitter Legacy of the 1979 China-Vietnam War*, THE DIPLOMAT (Feb. 23, 2017), <https://thediplomat.com/2017/02/the-bitter-legacy-of-the-1979-china-vietnam-war>. The invasion failed after less than a month of fighting. *Id.*
67. United Nations Convention on the Law of the Sea, arts. 3, 55-57, Dec. 10, 1982, 1833 U.N.T.S. 397 (stating a state has the right to establish a territorial sea up to 12 nautical miles and an exclusive economic zone up to 200 nautical miles from the territorial sea); *see also* Goldenziel, *supra* note 5, at 1103 (discussing coastal states’ entitlements of 12 nautical miles of territorial sea and 200 nautical miles of exclusive economic zone).
68. *See* PRC’S LAND BORDERS LAW, *supra* note 59.
69. As analogues, in 2022, the world witnessed Russia invade Ukraine, which Russia had for years called “the Ukraine” and its capital Kiev instead of Kyiv, allegedly to protect native Russians and Russian-speaking people; these acts are similar to Hitler’s goal of uniting German-speaking people in the 1930s. *See, e.g.*, Patrick Donahue & Daryna Krasnolutska, *Understanding the Roots of Russia’s War in Ukraine*, BLOOMBERG (Mar. 2, 2022), <https://www.bloomberg.com/news/articles/2022-03-02/understanding-the-roots-of-russia-s-war-in-ukraine-quicktake>; Mark Rice-Oxley, *How to Pronounce and Spell ‘Kyiv’, and Why It Matters*, GUARDIAN (Feb. 25, 2022), <https://www.theguardian.com/world/2022/feb/25/how-to-pronounce-and-spell-kyiv-kiev-ukraine-and-why-it-matters>.



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## Practice Notes

# Fiscal Implications of Court and Administrative Orders, Settlement Agreements, and Civil Consent Decrees

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Constitutionally, Congress possesses the power of the purse.<sup>1</sup> Congress provides budget authority to agencies to incur obligations and make expenditures through appropriations acts,<sup>2</sup> which the President signs into law.<sup>3</sup> These acts dictate the permissible purpose, period of availability, and amount of appropriations available to agencies to obligate and expend.<sup>4</sup> Although not directly involved in the appropriations process, the judiciary and various administrative bodies exercise authority that directly impacts purpose, time, and amount restrictions on appropriations. Further, various fiscal constraints limit the executive branch's ability to settle litigation before these same bodies. This article will review some of the fiscal implications of court and administrative orders

as well as restrictions on entering into settlement agreements and consent decrees.

### **Time**

As a general rule, a court order or administrative award serves as a new obligational event for the purpose of determining the fiscal year from which to pay the judgment or award.<sup>5</sup> The legal rationale for this rule is that "the court or administrative award 'creates a new right' in the successful claimant, giving rise to new Government liability."<sup>6</sup> Accordingly, an agency must use appropriations available for the fiscal year in which a claim becomes a legal liability, including when a settlement agreement establishes that liability.<sup>7</sup>

This rule applies when an agency must reimburse the Judgment Fund. Codified at 31 U.S.C. § 1304,<sup>8</sup> the Judgment Fund is a permanent, indefinite appropriation available to pay most monetary court judgments against the United States, including compromise settlements.<sup>9</sup> Agencies must reimburse the Judgment Fund for payments they make that are subject to the Contract Disputes Act (CDA)<sup>10</sup> and for discrimination-related payments in accordance with the Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002 (No FEAR Act).<sup>11</sup> The CDA requires the agency to reimburse the Fund “out of available funds or by obtaining additional appropriations for such purposes.”<sup>12</sup> The timing of the judgment determines availability.<sup>13</sup> The No FEAR Act requires reimbursement “out of any appropriation, fund, or other account . . . available for operating expenses of the Federal agency to which the discriminatory conduct involved is attributable.”<sup>14</sup> Based on the general rule, availability should be determined as of the time of judgment for No FEAR Act litigation.

Agencies must reimburse the Judgment Fund promptly, typically within forty-five days of receiving notice that the Judgment Fund has made a payment on the agency’s behalf.<sup>15</sup> Alternatively, the agency may establish a reimbursement or payment plan with the Fiscal Service.<sup>16</sup> Even when an agency defers reimbursement to the Judgment Fund, the appropriate source of reimbursement continues to be funds available at the time of judgment rather than when the agency actually reimburses the Judgment Fund.<sup>17</sup>

In an unpublished 1987 memorandum opinion, the Government Accountability Office (GAO) determined that any agency enjoys discretion regarding when it reimburses the Judgment Fund.<sup>18</sup> Reasoning that Congress did not require an “agency to disrupt ongoing programs or activities in order to find the money,” the GAO posited that an agency would not violate the CDA if it did not reimburse the fund in the same fiscal year in which the award was paid, or even if reimbursement were delayed into the subsequent fiscal year.<sup>19</sup> As part of its analysis, the GAO did not disturb its earlier holding in *Bureau of Land*

*Management—Reimbursement of Contract Disputes Act Payments* “that CDA reimbursements are chargeable to appropriations current as of the date of award,”<sup>20</sup> merely noting that the holding did not preclude deferred reimbursement.<sup>21</sup>

Although court orders and most administrative awards serve as obligational events for determining the availability of funds, some administrative awards are chargeable to an earlier appropriation.<sup>22</sup> For example, the GAO has opined that administrative back pay awards and related interest “should be charged to, and paid from, the agency appropriation covering the fiscal year or years to which the award relates.”<sup>23</sup> The GAO has determined that, as a general matter, administrative payment of claims for compensation and associated allowances are charged to the fiscal year in which the employee performed the work.<sup>24</sup>

A board of contract appeals decision serves as an obligational event, but a contracting officer’s purely administrative resolution of a contract claim does not. Contracting officer resolutions of in-scope contracting disputes that are enforceable under the original contract are chargeable to the fiscal year in which the agency entered into the contract because the agency’s liability arises when it enters into the contract.<sup>25</sup> The agency pays claims for out-of-scope modifications or work not involving an enforceable antecedent liability from funds available in the fiscal year in which the contracting officer grants relief.<sup>26</sup>

### **Purpose**

Court orders may clarify the permissible purposes for which an agency may obligate funds, particularly when determining the appropriate source of funds to remedy violations of the law. *Bureau of Engraving and Printing (BEP)—Currency Reader Program* recounts how a Federal court determined that BEP, which designs and produces Federal Reserve notes, violated Section 504 of the Rehabilitation Act of 1973<sup>27</sup> “by failing to provide meaningful access to [U.S.] currency for blind and visually impaired persons.”<sup>28</sup> The court ordered the Department of the Treasury to “take such steps as may be required to provide meaningful access to [U.S.] currency for blind and visually impaired persons.”<sup>29</sup>

Seeking to comply with the court’s order, BEP requested an advance decision from the GAO as to whether BEP appropriations were available to give away currency readers to the blind and visually impaired.<sup>30</sup> The GAO posited that the distribution of the readers was “in furtherance of BEP’s statutory mission *as clarified by the court.*”<sup>31</sup> Notwithstanding the “personal nature” of the readers, the GAO determined that they constituted a reasonable expense in support of BEP’s now-clarified statutory mission.<sup>32</sup>

In addition, the GAO has indicated that the appropriation responsible for a violation of the law is an appropriate source of funding for subsequent remedial efforts. In *United States v. Garney White – Funding of Judgment*, the Farmers Home Association (FmHA) issued a rural housing loan to Mrs. and Mr. White to purchase a home under construction.<sup>33</sup> The house was defectively built, so the Whites refused to make payment, resulting in the United States purchasing the home at a foreclosure sale and seeking to evict the Whites.<sup>34</sup> Eventually, the court set aside the sale and ordered the FmHA to repair the house.<sup>35</sup> The GAO determined that the “funds appropriated to meet administrative expenses of the program may be used to comply with the court order because the necessity for expending these funds arose as a result of the Secretary’s conduct of the rural home loan program.”<sup>36</sup>

Unless otherwise authorized by statute, the general principle that the appropriation responsible for a violation of the law is an appropriate source of funding for any subsequent remedial effort may be limited to funding injunctive relief.<sup>37</sup> The GAO has repeatedly articulated a “long-standing rule” that, generally, “an agency’s operating appropriations are not available to pay judgments unless provided by statute.”<sup>38</sup>

### **Amount**

#### ***Avoiding Antideficiency Act Violations***

The Antideficiency Act (ADA) prohibits “an officer or employee of the [U.S.] Government” from making or authorizing an obligation exceeding, or in advance of, an appropriation “unless authorized by law.”<sup>39</sup> However, the GAO has appeared to adopt a blanket rule that when exceeding





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an appropriation is the result of a judicial award, no ADA violation occurs.<sup>40</sup> Further, in *Bureau of Land Management—Reimbursement of Contract Disputes Act Payments*, the GAO extended this rule to a “quasi-judicial judgment or award,” such as judgments issued by agency boards of contract appeals.<sup>41</sup> The rationale for this exception to the ADA is that the agency lacks options to avoid the over-obligations and the actions of a court are beyond the agency’s control.<sup>42</sup>

### ***A Lapse in Appropriations***

In addition, court orders may provide an exception to ADA violations by unfunded agencies during a lapse in appropriations, such as when a court denies the Government’s motion to stay and orders the case to continue. Generally, during a lapse, an agency may not incur obligations, including the salaries of its employees.<sup>43</sup> In the event of a lapse, the Department of Justice’s (DOJ) contingency plan envisions that all civil litigation “will be curtailed or postponed to the extent that this can be done without compromising to a significant degree the safety of human life or the protection of property.”<sup>44</sup> Attorneys at the DOJ are instructed to request that the courts postpone most active cases until the DOJ receives an appropriation.<sup>45</sup> However, “[i]f a court denies such a request and orders a case to continue, the Government will comply with the court’s order, which would constitute

express legal authorization for the activity to continue.”<sup>46</sup>

It is unclear why the judiciary enjoys such unbridled authority to require the executive branch agencies to incur obligations during a lapse in appropriations in the absence of a clear and narrowly tailored exception to the ADA. If an agency lacks budget authority during a lapse, the ADA prohibits an agency from incurring obligations unless one of several narrow exceptions apply.<sup>47</sup> This obligational prohibition has constitutional implications.<sup>48</sup> Further, whenever an executive branch agency incurs civil-litigation-related obligations pursuant to a court order, such obligations become legal liabilities of the Government that “Congress must cover by enacting appropriations.”<sup>49</sup>

At least one appellate judge has raised concerns about the courts’ rationale for authorizing Government attorneys to continue to litigate civil cases during a lapse in appropriations.<sup>50</sup> In *Kornitzky Group v. Elwell*, the Federal Aviation Administration unsuccessfully moved to stay oral arguments because of a lapse in appropriations.<sup>51</sup> Denying the motion as being consistent with how the court handled motions to stay during similar lapses, a panel of the U.S. Court of Appeals for the District of Columbia Circuit reviewed the ADA’s prohibition on voluntary services contained in 31 U.S.C. § 1342, the DOJ’s lapse contingency

plan, and then pointed to the DOJ’s practice of acquiescing to the court during an earlier lapse.<sup>52</sup> Two concurring panel judges noted that “when [Federal] appropriations lapsed in 2013, resulting in a ‘shutdown’ from [1 to 17 October] 2013, the court received Government motions to stay oral argument in at least sixteen cases. Every one of these motions was denied; and every time, the Government then participated in oral argument.”<sup>53</sup>

Grounding his opinion in the Appropriations Clause and § 1342 of the ADA, the dissenting judge questioned the court’s rationale for denying the motion.<sup>54</sup> First, the dissent noted that the ADA “emergency” exception was inapplicable because oral argument in a case during a lapse in appropriations did not implicate an imminent threat to human life or property.<sup>55</sup> Judge Randolph noted further that the ADA’s constitutionality was “beyond doubt,” and the court, therefore, is not “free to disregard the restrictions of § 1342.”<sup>56</sup> Denying the “authorized by law” exception that the majority applied in this case, the dissent opined that the court could not circumvent the ADA’s statutory restrictions simply by authorizing Federal employees to appear in court, and it characterized the majority’s use of such a rationale as “blatant bootstrapping.”<sup>57</sup> The dissent reasoned that § 1342’s “authorized by law” language does “not confer a license on the [judiciary]” but rather “requires legal authority for the obligation of public funds, either from appropriations or other relevant statutes, or—in the case of [executive] authority—from the Constitution itself.”<sup>58</sup>

During past lapses, the DOJ’s motions for stays in litigation have been met with uneven responses; some judges grant them, some do not.<sup>59</sup> Some courts analyze lapse-related motions to stay like routine motions,<sup>60</sup> while in others, there appears to be no uniform standard.<sup>61</sup>

Despite the lack of uniformity in how courts address agencies incurring obligations during a lapse in appropriations, Office of Legal Counsel (OLC) opinions provide reasoning that may serve as a standard for permissible court-authorized activity in civil cases during these lapses. Authored by Attorney General Benjamin R. Civiletti, *Authority for the Continuance of Government Functions*



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During a Temporary Lapse in Appropriations, serves as the cornerstone of executive branch lapse law.<sup>62</sup> This opinion reasoned that the “authorized by law” exception to the ADA included not only the use of multi- or no-year funding, statutes specifically permitting the obligation of funds in the absence of an appropriation, and obligations necessarily incident to the exercise of the President’s constitutional authorities, but also activities that were “authorized by necessary implication from the specific terms of duties that have been imposed on, or of authorities that have been invested in, an agency.”<sup>63</sup> In August 1995, the OLC authored *Government Operations in The Event of a Lapse in Appropriations*,<sup>64</sup> which discussed various exceptions to the ADA’s prohibition on incurring obligations during a lapse in appropriations. The discussion covered the necessarily implied exception to the ADA, noting that the act “contemplates that a limited number of [Government] functions funded through annual appropriations must otherwise continue despite a lapse in their appropriations because the lawful continuation of other activities necessarily implies that these functions will continue as well.”<sup>65</sup>

In December 1995, the OLC issued *Effect of Appropriations for Other Agencies and Branches on the Authority to Continue Department of Justice Functions During the Lapse in the Department’s Appropriations*.<sup>66</sup> Again citing its 1981 Civiletti opinion, the OLC posited that certain agency functions and activities could continue during a lapse “when authorization for their continuation was a valid inference from other funding decisions of the Congress,” such as “functions that are ‘authorized by necessary implication from the specific terms of duties that have been imposed on, or authorities that have been invested in’ an agency.”<sup>67</sup> These functions include “unfunded functions that enable other funded functions to be executed.”<sup>68</sup>

The opinion continued to articulate what may be an appropriate standard for an unfunded agency’s participation in civil court proceedings of a funded judiciary or in the administrative proceedings of a funded agency. The OLC stated:

To the extent that any of the department’s functions are necessary to the effective execution of functions by

an agency that has current fiscal year appropriations, such that a suspension of the department’s functions during the period of anticipated funding lapse would prevent or significantly damage the execution of those funded functions, the department’s functions and activities may continue.<sup>69</sup>

However, the same necessarily implied justification would not apply to orders issued by an unfunded judiciary or administrative entity.<sup>70</sup> In *Continuation of Federal Prisoner Detention Efforts During United States Marshals Service Appropriation Deficiency*, the U.S. Marshal Service (USMS) sought guidance on how it could continue to perform its mission in the event of a funding deficiency, that is, “after having expended all appropriated funds.”<sup>71</sup> Cognizant of its “relevant” lapse appropriations opinions and the statutory mission of the USMS, which included a mandate “to obey, execute, and enforce all orders of the [U.S. district courts], the [U.S. courts of appeals], and the Court of International Trade,” the OLC nevertheless opined that it was doubtful that the “authorized by law” exception



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to the ADA would permit the USMS to continue operating during a deficiency in appropriations.<sup>72</sup> The OLC opined that, “[i]n our view, the ‘authorized by law’ exception must refer to congressional, as opposed to judicial, authorization to expend funds. The [ADA] was intended to reaffirm congressional control of the purse.”<sup>73</sup> In other words, the necessarily implied exception assumes that Congress intended that an unfunded agency be able to incur obligations critical to the continued functioning of a funded agency. If Congress has failed to fund both agencies, no such implication can be found.

When the judiciary itself was unfunded, the Administrative Office of the U.S. Courts (AOUSC) previously indicated that once its fee balances were depleted, the judiciary would comply with the ADA.<sup>74</sup> This would mean limiting itself to “essential work,” including exercising its Article III constitutional powers; the scope of these powers extends to “activities to support the exercise of the courts’ [Article III constitutional powers], specifically the resolution of cases and related services.”<sup>75</sup> Each court possesses the discretion to determine which functions are essential.<sup>76</sup> In view of the ADA’s prohibitions, AOUSC’s 2013 guidance provided that “‘essential work’ in this context is interpreted very narrowly,” and the only permissible judicial activities were the following:

1. activities necessary to support the exercise of Article III judicial power, i.e., the resolution of cases in which there is a constitutional or statutory grant of jurisdiction;
2. emergency activities necessary for the safety of human life and the protection of property; and
3. activities otherwise authorized by law, either expressly or by necessary implication.<sup>77</sup>

The guidance noted that with few exceptions, “no distinctions or priorities should be drawn between criminal and civil cases,” but that judges should be “sympathetic” to executive branch requests for continuances.<sup>78</sup>

The GAO does not appear to have weighed in on whether the judiciary possesses the blanket authority to order agencies to incur obligations during a lapse, nor has it articulated a standard by which the judiciary may order unfunded agencies to do so. However, it has taken a narrow view of lapse-related exceptions to the ADA generally, and it has acknowledged, without endorsing, a singular application of the necessarily implied exception to the ADA.<sup>79</sup> In *U.S. Department of the Treasury—Tax Return Activities during the Fiscal Year 2019 Lapse in Appropriations*,<sup>80</sup> the GAO pointed out that the Civiletti opinion applied the “authorized by law” exception “to only one situation: the

administration of Social Security payments.”<sup>81</sup> The GAO accepted the attorney general’s application of the exception, which “has become entrenched in practice for almost [forty] years,” with congressional awareness, and it opined that “[t]o revisit that position now would be tumultuous.”<sup>82</sup> However, the GAO has consistently declined to extend the Civiletti opinion’s rationale to other factual situations and has elected not to follow the August 1995 OLC opinion that relies on it.<sup>83</sup>

## Other Fiscal Limitations

### *The Appropriations Clause and Sovereign Immunity*

A court’s authority to order an agency to incur obligations and make expenditures is not without limitation, including the Appropriations Clause.<sup>84</sup> As the GAO has noted: “The Appropriations Clause of the [U.S.] Constitution . . . applies with equal force to payments directed by a court.”<sup>85</sup> To illustrate, in *Source of Funds for Payment of Awards under 26 U.S.C. § 7430*, the GAO determined that neither the Judgment Fund nor IRS appropriations were available to satisfy litigation awards by the U.S. Tax Court because Congress had failed to appropriate any funds for that purpose.<sup>86</sup>

Additionally, the doctrine of sovereign immunity is rooted in the Appropriations Clause<sup>87</sup> and broadly “bars any action against the United States if ‘the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration, or if the effect of the judgment would be to restrain the Government from acting, or to compel it to act.’”<sup>88</sup> The constraints of “sovereign immunity principles ‘apply with equal force to agency adjudications’” and may be waived only by Congress.<sup>89</sup>

The doctrine of sovereign immunity applies to the orders of courts and administrative bodies.<sup>90</sup> To illustrate, in *Foreman v. Dep’t of the Army*, the U.S. Court of Appeals for the Federal Circuit held that the doctrine of sovereign immunity precluded the Merit System Protection Board from awarding money damages against the Army for its alleged breach of a settlement agreement.<sup>91</sup> Similarly, in *Equal Employment Opportunity Commission Authority to Order a*



*Federal Agency to Pay for Breach of a Settlement Agreement*, the OLC posited that the doctrine of sovereign immunity precluded the Equal Employment Opportunity Commission from ordering an agency to pay a monetary award for breach of a settlement agreement governing its future conduct.<sup>92</sup>

#### Settlement Agreements and Civil Consent Decrees

The executive branch enjoys wide latitude when settling a case or administrative complaint, and the decision to compromise often reflects judgment calls concerning litigation risk and what is in the best interests of the United States or the agency.<sup>93</sup> Flowing from the statutory authority to supervise litigation, the attorney general's settlement authority is broad.<sup>94</sup> Although the attorney general's discretion is broader than the agencies that the DOJ represents in litigation, the terms of any DOJ settlement must be traceable "to a discernable source of statutory authority," which may include "the governing statutes of the agency involved in the litigation."<sup>95</sup> Generally, an agency may agree to terms that a court or administrative body could independently order the agency to comply with, absent the settlement agreement.<sup>96</sup> In addition, the Supreme Court has opined that a consent decree<sup>97</sup> may provide relief beyond that which a court could have awarded absent the agreement of the parties, so long as the resolved dispute falls within the court's subject matter jurisdiction, the agreement is within the scope of the complaint as evidenced by the pleadings, the agreement furthers the purposes of the underlying law, and the terms of the consent decree do not otherwise violate the law.<sup>98</sup>

However, there are several constitutional and statutory constraints on the executive branch's ability to settle a matter in litigation, including fiscal constraints. When agreeing to the terms of a settlement agreement or a consent decree, members of the executive branch may not disregard legal constraints on permissible relief.<sup>99</sup> Further, the executive branch may not agree to a legally infirm consent decree merely because the court acquiesces to the terms of the agreement. In this vein, the OLC has posited that neither the executive nor judicial branches may waive "without statutory authorization . . . the conditions

upon which Congress consents to suits against the Government," including any applicable statute of limitations.<sup>100</sup> Further, DOJ and agency settlement agreements are subject to other fiscal constraints, such as the Purpose Statute, 31 U.S.C. § 1301(a).<sup>101</sup>

The GAO has issued opinions highlighting fiscal constraints on settlement agreements. For example, in *John W. Rensbarger*, the GAO determined that an agency Title VII-related settlement agreement, which included a provision for the nonreimbursable detail of a Government Printing Office employee to the Library of Congress, violated both the Purpose Statute and the ADA.<sup>102</sup> The GAO's analysis included a reminder that an agency may "only provide benefits in a settlement agreement which it otherwise has the authority to provide."<sup>103</sup>

#### *Miscellaneous Receipts Statute and "Donations"*

The Miscellaneous Receipts Statute (MRS)<sup>104</sup> provides that "an official or agent of the Government receiving money for the Government from any source shall deposit the money in the Treasury as soon as practicable without deduction for any charge or claim."<sup>105</sup> In *Commodity Futures Trading Commission – Donations under Settlement Agreements*, the GAO found the Commission's proposed policy permitting a charged party to donate funds directly to a nonvictim educational institution as part of a settlement agreement problematic.<sup>106</sup> Concerning the MRS, the GAO noted that the donation resulted from the commission's enforcement activities and was made in lieu of other sanctions or penalties, and the GAO admonished that the commission "may not circumvent the receipt of a penalty to accomplish a separate objective."<sup>107</sup>

Similarly, in *Nuclear Regulatory Commission's Authority to Mitigate Civil Penalties*, the GAO evaluated a proposal to allow licensees who had violated Nuclear Regulatory Commission regulations to pay nonvictim universities or nonprofit institutions to engage in various nuclear-related safety research projects in lieu of a penalty, and it found that the proposal violated the MRS.<sup>108</sup> Subsequently, in *The Honorable John D. Dingell*, the GAO emphasized the importance of the MRS in the settlement context when it reiterated the following:

[A]llowing alleged violators to make payments to an institution other than the [Federal Government] for purposes of engaging in supplemental projects, in lieu of penalties paid to the Treasury, circumvents 31 U.S.C. § 3302, which requires monies received for the Government by Government officers to be deposited into the Treasury.<sup>109</sup>

Accordingly, the GAO considers it an MRS violation when, in the settlement context, an agency, after assessing some form of fine or penalty, permits the violator to direct the payment to some third party other than the Government without statutory authority.<sup>110</sup>

The OLC has discussed the MRS in the settlement context as well. In *Effect of 31 U.S.C. § 484 on the Settlement Authority of the Attorney General*, the OLC determined that a settlement permitting a company that had caused an oil spill to donate to a waterfowl preservation organization in lieu of paying a penalty would violate an earlier version of the MRS.<sup>111</sup> Rejecting the proposed settlement, the OLC noted, "[T]he fact that no cash actually touches the palm of a Federal official is irrelevant for purposes of § 484, if a Federal agency could have accepted possession and retains discretion to direct the use of the money."<sup>112</sup> "[M]oney available to the United States and directed to another is constructively 'received' for purposes of [the MRS]."<sup>113</sup> However, because the Commonwealth of Virginia—the co-plaintiff in the case—had an independent claim to damages, and because the United States had not incurred any expense or loss associated with the oil spill, the OLC had no objection to a settlement agreement in which Virginia was solely entitled to damages and could direct the donation to a waterfowl preservation organization.<sup>114</sup>

Subsequently, in *Application of the Government Corporation Control Act and the Miscellaneous Receipts Act to the Canadian Softwood Lumber Company Settlement Agreement*,<sup>115</sup> the OLC again acknowledged that the MRS constrains the terms of settlement agreements but determined that the Government could avoid "constructively" receiving money for MRS purposes if two criteria were met:



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(1) the settlement be executed before an admission or finding of liability in favor of the United States; and (2) the United States not retain post-settlement control over the disposition or management of the funds or any projects carried out under the settlement, except for ensuring that the parties comply with the settlement.<sup>116</sup>

The OLC briefly addressed and distinguished earlier GAO opinions by pointing out that, in the instant case, the United States had the authority to mitigate civil penalties, and under these specific facts, the OLC did not believe the settlement violated the MRS.<sup>117</sup>

In 2016, Members of Congress concerned about the DOJ's settlement

practices proposed legislation in the House and Senate entitled the "Stop Settlement Slush Funds Act of 2016."<sup>118</sup> Although not enacted, the legislation would have prohibited any officer or agent of the United States from entering into or enforcing a settlement agreement that required a donation to any person by any party to the agreement other than the United States.<sup>119</sup> An accompanying House report noted that the DOJ was responsible for third-party groups receiving approximately \$880 million in the prior two years through the donation settlements, which was accomplished "entirely outside of the congressional appropriations and grant oversight process."<sup>120</sup> Regardless of the worthiness of the charitable institutions receiving donation settlements, once actual victims were compensated, the law

requires that Congress—not the DOJ—determine how to use any other funds obtained from defendants.<sup>121</sup> In addition, the report accused the DOJ of using its broad settlement authority to circumvent the MRS.<sup>122</sup> Also, criticism of the DOJ's settlement practices appeared in the press.<sup>123</sup>

The following year, the attorney general issued a memorandum prohibiting the DOJ from continuing the practice of entering into settlement agreements that included, as a condition of settlement, payments to non-governmental, third-party organizations that were neither victims nor parties to the lawsuit.<sup>124</sup> The memorandum contained three exceptions to the prohibition: (1) victim restitution or payments directly remedying redressable harm, (2) "payments for legal or other professional

services rendered in connection with the case,” and (3) payments otherwise expressly authorized by statute, “including restitution and forfeiture.”<sup>125</sup>

However, in 2022, the attorney general rescinded the 2017 memorandum articulating the DOJ’s present settlement position. In *Guidelines And Limitations for Settlement Agreements Involving Payments to Non-Government Third Parties*, the attorney general determined that the earlier memorandum was overly restrictive and noted that settlement agreements could be structured such that payments to non-governmental third parties would not violate the MRS.<sup>126</sup> In addition to the conditions articulated in the *Canadian Softwood Lumber Settlement Agreement* opinion, the following conditions apply: settlement agreements providing relief to nonparties must define with specificity defendant-funded projects that must also have a strong connection to the underlying law being enforced, the DOJ and client agencies may not recommend any particular third party to receive project-related payments, and the settlement agreement may not augment executive branch appropriations, meet a statutory obligation of those agencies, or be too general in application.<sup>127</sup>

## Conclusion

The fiscal principles of time, purpose, and amount are all implicated by court and administrative orders and litigation settlements in those fora. Much of the law in this area is well-settled, but issues still linger and merit further discussion.

As discussed above, during a lapse in appropriations, the executive branch acquiesces to court orders to incur litigation-related obligations. However, the courts have neither articulated a uniform standard nor exhibited a common practice when deciding whether to grant or deny a lapse-related motion to stay civil litigation.<sup>128</sup> Under existing OLC opinions, an unfunded executive branch agency should be able to incur obligations in support of a funded judiciary under a necessarily implied-by-law rationale when the failure to do so would “prevent or significantly damage the execution of those funded functions.”<sup>129</sup> When the judiciary is unfunded, the executive branch should be able to

incur those obligations necessary to the courts’ exercise of their core constitutional authority.<sup>130</sup> Given the obvious tension between incurring such obligations during a lapse in appropriations and Congress’s constitutional power of the purse, any such exception to the prohibition on incurring an obligation during a lapse in appropriations should be exercised narrowly. **TAL**

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## Notes

1. See U.S. CONST. art. 1, § 9, cl. 7.
2. See, e.g., Consolidated Appropriations Act, 2023, Pub. L. No. 117-328, 136 Stat. 4459.
3. See U.S. CONST. art. 1, § 7, cl. 2; Erica L. Green, *Biden Signs Stoppag Spending Bill, Averting Partial Shutdown*, N.Y. TIMES (Jan. 19, 2024), <https://www.nytimes.com/2024/01/19/us/politics/biden-spending-bill.html>.
4. See, e.g., Consolidated Appropriations Act, 2023, div. C, 136 Stat. at 4566 (providing \$49,628,305,000 for military personnel and Army expenses in fiscal year 2023).
5. See Bureau of Land Mgmt.—Reimbursement of Cont. Disputes Act Payments, 63 Comp. Gen. 308, 310 (1984) [hereinafter BLM].
6. *Id.*
7. See Nat’l Endowment of the Arts – Dep’t of Just. – Appropriations Availability – Payment of Settlement, B-255772, 1995 WL 500331, at \*1 (Comp. Gen. Aug. 22, 1995) (requiring the use of “appropriations current at the time of the settlement agreement”); Fiscal Year Chargeable for Compensatory Damages Under Section 102 of the C.R. Act, B-272984, 1996 WL 576967, at \*1 (Comp. Gen. Sept. 26, 1996) (discussing a “compromise settlement of an employee discrimination claim”).
8. 31 U.S.C. § 1304.
9. 31 C.F.R. § 256.1(a) (2024); U.S. DEP’T OF DEF., 7000.14-R, DoD FINANCIAL MANAGEMENT REGULATION vol. 3, ch. 8, para. 4.1 [hereinafter DoD FMR] (explaining that “[t]he Judgment Fund is available for court judgments and Justice Department compromise settlements of actual or imminent litigation against the government”).
10. 41 U.S.C. § 7108(c); 31 C.F.R. § 256.40 (2024); DoD FMR, *supra* note 9, vol. 3, ch. 8, para. 4.2 (Reimbursement of Contract Dispute Act Judgments). Congress originally passed the law in 1978. See Contract

Disputes Act of 1978, Pub. L. No. 95-563, 95 Stat. 2383 (codified as amended at 41 U.S.C. §§ 7101–7109).

11. 5 U.S.C. § 2301 note; 31 C.F.R. § 256.40 (2023); DoD FMR, *supra* note 9, vol. 3, ch. 8, para. 4.3 (Reimbursement of No FEAR Act Judgments). Congress, somewhat unusually, codified the whole of the No Fear Act of 2002 as a note to 5 U.S.C. § 2301. See Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002, Pub. L. No. 107-174, 116 Stat. 566.

12. 41 U.S.C. § 7108(c).

13. “The Judgment Fund must be reimbursed with funds available for the same purpose that was current at the time of judgment provided by 41 U.S.C. § 7108.” DoD FMR, *supra* note 9, vol. 3, ch. 8, para. 4.2.2.; BLM, *supra* note 5, at 311 (“[R]eimbursements under [the CDA] should be treated as new obligations.”).

14. Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002, Pub. L. No. 107-174, 116 Stat. 566, 568–69; see also DoD FMR, *supra* note 9, vol. 3, ch. 8, para. 4.3.2 (“using the appropriation, fund, or other account available for operating expenses of the DoD Component to which the No Fear Act judgment or discriminatory matter stemmed”).

15. 5 C.F.R. § 724.104(b) (2024); 31 C.F.R. § 256.41 (2024).

16. “If the agency is unable to timely reimburse Fiscal Service, the agency must contact Fiscal Service to establish a reimbursement plan.” 31 C.F.R. § 256.41. *Cf.* DoD FMR, *supra* note 9, vol. 3, ch. 8, para. 4.3.3 (noting that a DoD Component may “establish a payment plan with BFS”).

17. See notes 19–22 *infra* and accompanying text.

18. Reimbursements to the Permanent Judgment Appropriation under Cont. Disp. Act, B-217990.25-O.M. (Comp. Gen. Oct. 30, 1987) [hereinafter Reimbursements], <https://www.gao.gov/assets/b-217990.25-o.m.pdf>.

19. *Id.* at 3–4.

20. *Id.* at 3 (citing BLM, *supra* note 5, at 312).

21. Reimbursements, *supra* note 18, at 3.

22. See, e.g., Veterans Admin.—Appropriation Chargeable for Back Pay Claims, 69 Comp. Gen. 40 (1989) [hereinafter VA].

23. *Id.* at 41; see also Payment of Interest Under the Back Pay Act, B-242277, 1991 WL 211359, at \*2 (Comp. Gen. Sept. 12, 1991).

24. VA, *supra* note 22, at 42; 3 U.S. GOV’T ACCOUNTABILITY OFF., GAO-08-978SP, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW ch. 14, sec. C(2)(c) (3d ed. 2008) [hereinafter GAO RED BOOK]. As of early 2024, the Government Accountability Office (GAO) is completing a major revision of its Red Book, whereby they publish completed chapters in the new fourth edition as they become available. See *The Red Book*, U.S. GOV’T ACCOUNTABILITY OFF., <https://www.gao.gov/legal/appropriations-law/red-book> (last visited Mar. 19, 2024). This means that portions of the fourth and third editions are simultaneously the most recent edition of the Red Book, depending on the particular chapter. See *id.*

25. See BLM, *supra* note 5, at 311 (“[W]e do not disturb this concept as it relates to agency settlements at the contracting officer level. . . .”); Dep’t of the Army, Fort Carson—Application of Bona Fide Needs Rule to Cont. Modification, B-332430, 2021 WL 4439454, at



- \*4 (Comp. Gen. Sept. 28, 2021) (“Because this liability arises under the original contract, it is also known as an ‘antedecedent liability.’”) (citing Recording Obligations Under EPA Cost-Plus Fixed-Fee Cont., 59 Comp. Gen. 518, 522 (1980)).
26. Proper Fiscal Year Appropriation to Charge for Cont. and Cont. Increase, 65 Comp. Gen. 741, 744 (1986).
27. 29 U.S.C. § 794(a).
28. Bureau of Engraving and Printing (BEP)—Currency Reader Program, B-324588, 2013 WL 2468740, at \*1 (Comp. Gen. June 7, 2013).
29. *Id.* (quoting Am. Council of the Blind v. Paulson, 581 F. Supp. 2d 1 (D.D.C. 2008)).
30. *Bureau of Engraving and Printing*, 2013 WL 2468740 at \*3–4 (discussing whether transferring currency readers to the blind and visually impaired would violate the necessary expense rule). Currency readers “are portable electronic devices capable of speaking the denomination of a bill out loud.” *Id.* at \*2.
31. *Id.* at \*3 (emphasis added).
32. *Id.* at \*4.
33. *United States v. Garney White—Funding of Judgment*, B-193323, 1980 WL 17186, at \*1 (Comp. Gen. Jan. 31, 1980).
34. *Id.*
35. *Id.* at \*2.
36. *Id.* at \*4.
37. *See* Source of Funds for Payment of Awards under 26 U.S.C. 7430, 63 Comp. Gen. 470, 472 (1984).
38. *Id.* (emphasis added); *see also* VA, *supra* note 22, at 42 (“Appropriations provided for regular governmental operations or activities, even though these operations or activities give rise to a cause of action, are not available to pay court judgments in the absence of specific authority.”).
39. Antideficiency Act, 31 U.S.C. § 1341(a)(1) (enumerating the exceptions to the Antideficiency Act (ADA)).
40. Availability of Funds for Payment of Intervenor Att’y Fees—Nuclear Regul. Comm’n, 62 Comp. Gen. 692, 700 (1983). (“A judicial award would not be viewed as violating . . . the [ADA].”); Major Paul D. Hancq, *Violations of the Antideficiency Act: Is The Army Too Quick to Find Them?*, ARMY LAW., July 1995, at 30, 37 (“Judicial awards, even if they exceed available appropriations, do not violate the [ADA].”) (citing 62 Comp. Gen. at 700).
41. BLM, *supra* note 5, at 312.
42. GAO RED BOOK, *supra* note 24, ch. 6, sec. C(2)(f).
43. Authority for the Continuance of Government Functions During a Temporary Lapse in Appropriations, 43 Op. Att’y Gen. 293, 301 (1981) [hereinafter Continuance].
44. U.S. DEP’T OF JUST., FY 2024 CONTINGENCY PLAN 3 (2023), <https://www.justice.gov/jmd/page/file/1015676/download>.
45. *Id.*
46. *Id.* During a lapse in appropriations, many courts grant motions to stay in civil litigation. *See* IDA BRUDRICK ET AL., CONG. RSCH. SERV., RL34680, SHUTDOWN OF THE FEDERAL GOVERNMENT: CAUSES, PROCESSES, AND EFFECTS 32 (2018) (“Some civil cases were postponed, in part due to continuance requests from the Department of Justice.”). *See, e.g.,* Lee v. United States, 361 F. Supp. 3d 1306, 1308 n.1 (S.D. Ga. 2019) (“[T]he Court entered an [o]rder staying the case due to the lapse in appropriations for the [DOJ].”).
47. Testimony Before the Subcomm. on Interior, Env’t, and Related Agencies, Comm. on Appropriations, House of Representatives—Application of the Antideficiency Act to a Lapse in Appropriations, B-330720, 2019 WL 459186, at \*3–4 (Comp. Gen. Feb. 6, 2019) (including “emergencies involving the safety of human life or the protection of property,” performing “core constitutional powers,” and conducting “an orderly shutdown of agency activity,” among others).
48. U.S. Dep’t of the Treasury—Tax Return Activities During the Fiscal Year 2019 Lapse in Appropriations, B-331093, 2019 WL 5390179, at \*7 (Comp. Gen. Oct. 22, 2019), (“Because the [ADA] is central to Congress’ constitutional power of the purse, we interpret exceptions narrowly and in the manner to protect congressional prerogative.”); *see also* Continuation of Fed. Prisoner Det. Efforts During U.S. Marshals Serv. Appropriation Deficiency, 24 Op. O.L.C. 47, 48 (2000) [hereinafter Marshals] (“[T]he [ADA] reinforces the prohibition in Article 1, Section 9 of the Constitution . . .”).
49. U.S. Dep’t of the Treasury, 2019 WL 5390179, at \*7 (referring to agencies that incur obligations by validly asserting an ADA exception).
50. Kornitzky Grp. v. Elwell, 912 F.3d 637, 639–41 (D.C. Cir. 2019) (Randolph, J., dissenting).
51. *Id.* at 638.
52. *Id.* at 638–39.
53. *Id.* The dissent criticized the court’s opinion as lacking legal analysis and relying on other orders denying motions to stay that also lacked any legal analysis. *Id.* at 640–41.
54. *Id.* at 640.
55. *Id.*
56. *Id.* at 639–40.
57. *Id.* at 640.
58. *Id.* (citing Continuance, *supra* note 43, at 295–301).
59. *See, e.g.,* *Judiciary to Continue Funded Operations Until January 25*, U.S. COURTS (Jan. 16, 2019), <https://www.uscourts.gov/news/2019/01/16/judiciary-continue-funded-operations-until-jan-25> (“[S]ome Federal courts have issued orders suspending or postponing civil cases in which the Government is a party, and others have declined to do so.”).
60. *See, e.g.,* Klamath-Siskiyou Wildlands Ctr. v. Grantham, No. 2:18-cv-02785-TLN-DMC, 2019 WL 7374626, at \*1 (E.D. Cal. Jan. 4, 2019) (denying a motion for a stay without engaging in analysis related to a lapse in appropriations).
61. *See* Airplane Transp. Assoc. of America v. FAA, 912 F.3d 642, 643 (D.C. Cir. 2019) (Randolph, J., dissenting) (“It is obvious that our circuit has not settled upon any principled way of deciding these stay motions.”).
62. Authority for the Continuance of Government Functions During a Temporary Lapse in Appropriations, 5 Op. O.L.C. 1 (1981) [hereinafter 1981 Opinion].
63. *Id.* at 5.
64. Government Operations in The Event of a Lapse in Appropriations, 1995 OLC LEXIS 57 (Aug. 16, 1995), <https://www.justice.gov/sites/default/files/olc/opinions/attachments/2014/11/10/1995-08-16-lapse-in-appropriations.htm>.
65. *Id.* at \*8–9 (citing 1981 Opinion, *supra* note 62). Examples included disbursing social security benefits and “contracting for the materials essential to the performance of the emergency services,” and shutdown activities. *Id.*
66. Effect of Appropriations for Other Agencies and Branches on the Authority to Continue Department of Justice Functions During the Lapse in the Department’s Appropriations, 19 Op. O.L.C. 337 (1995).
67. *Id.* at 337 (quoting 1981 Opinion, *supra* note 62, at 5).
68. *Id.*
69. *Id.* at 338.
70. In the event the judiciary were unfunded, the courts could continue to operate for a limited time by relying on fees and no-year appropriations. BRUDRICK ET AL., *supra* note 46, at 20 (explaining that the judiciary could continue to operate approximately ten business days to three weeks).
71. Marshals, *supra* note 48, at 47.
72. *Id.* at 49.
73. *Id.* at 50.
74. *Judiciary Operating on Limited Funds During Shutdown*, U.S. COURTS (Jan. 7, 2019) [hereinafter U.S. COURTS], <https://www.uscourts.gov/news/2019/01/07/judiciary-operating-limited-funds-during-shutdown>.
75. *Id.*; *see also* Memorandum from Judge John D. Bates, Admin. Off. of U.S. Courts, to All United States Judges et al., subject: Status of Judiciary Funding and Guidance for Judiciary Operations During a Lapse in Appropriations (IMPORTANT INFORMATION) 3 (Sept. 24, 2013) [hereinafter 2013 Bates Memo]; BRUDRICK ET AL., *supra* note 46, at 20.
76. U.S. COURTS, *supra* note 74; 2013 Bates Memo, *supra* note 75, at 3.
77. 2013 Bates Memo, *supra* note 75, attach. 1, at 1–2.
78. *Id.* attach. 1, at 3.
79. *See infra* note 80 and accompanying text.
80. B-331093, 2019 WL 5390179, at \*9 (Comp. Gen. Oct. 22, 2019).
81. *Id.* at \*10. The Civiletti opinion determined “that Social Security payments could continue even though the appropriation for salaries of those who made the payments had lapsed.” *Id.*
82. *Id.*
83. *See, e.g.,* U.S. Dep’t of Agriculture—Operations of the Farm Serv. Agency During the Fiscal Year 2019 Lapse in Appropriations, B-331092, 2020 WL3501349, at \*11–13 (Comp. Gen. June 29, 2020) (noting that the GAO had declined to extend the logic of the 1981 Civiletti opinion to cases of other agencies involved in 2019 appropriations lapse and declining to do so in the case of the Farm Services Agency).
84. *See supra* notes 1–3 and accompanying text.
85. GAO RED BOOK, *supra* note 24, ch. 14, sec. C(2)(b); *see also* Gov’t Emp. Ret. Sys. of the Virgin Islands v. Gov’t of the Virgin Islands, 995 F.3d 66, 119 (3d Cir.

- 2021) (Matey, J., concurring in part and dissenting in part).
86. Source of Funds for Payment of Awards Under 26 U.S.C. § 7430, 63 Comp. Gen. 470, 473 (1984) (“An appropriation of funds from the Treasury cannot be inferred. It must be explicitly stated.”). The GAO recommended that the IRS seek a specific appropriation to pay all prior litigation awards. *Id.* at 474.
87. Waiver of Statute of Limitations in Connection with Claims Against the Dep’t of Agric., 22 Op. O.L.C. 127, 129 (1998).
88. Payment of Back Wages to Alien Physicians Hired Under H-1B Visa Program, 32 Op. O.L.C. 47, 48 (2008) (quoting *Dugan v. Rank*, 372 U.S. 609, 620 (1963)).
89. 32 Op. O.L.C. at 49 (quoting Auth. of the Equal Emp. Opportunity Comm’n (EEOC) to Impose Monetary Sanctions Against Fed. Agencies for Failure to Comply with Orders Issued by EEOC Admin. Judges, 27 Op. O.L.C. 24, 27 (2003)).
90. See Statute of Limitations and Settlement of Equal Credit Opportunity Act Discrimination Claims Against the Dep’t of Agric., 22 Op. O.L.C. 11, 16 (1998) (“A court can award damages against the United States only where there has been a waiver of sovereign immunity.”).
91. *Foreman v. Dep’t of the Army*, 241 F.3d 1349, 1352 (Fed. Cir. 2001).
92. Equal Employment Opportunity Commission Authority to Order a Federal Agency to Pay for Breach of Settlement Agreement, 38 Op. O.L.C. 22, 38 (2014).
93. See 22 Op. O.L.C. at 140; see also Authority of the United States to Enter Settlements Limiting the Future Exercise of Exec. Branch Discretion, 23 Op. O.L.C. 126, 138 (1999) (“[C]onsiderations, such as litigation risk, are inherent in a settlement power itself . . .”).
94. 23 Op. O.L.C. at 135.
95. *Id.* at 137–38.
96. See 38 Op. O.L.C. at 34 (“As long as the intended relief does not exceed the scope of remedies available in court, the Government’s consent to be sued for violations of Title VII ordinarily permits voluntary settlement of a complaint alleging such violations.”); Proposed Settlement of *Diamond v. Dep’t of Health & Hum. Servs.*, 22 Op. O.L.C. 257, 261 (1998) (“[A]n agency settlement may include any relief that a court could award . . .”).
97. The principal distinction between consent decrees and settlement agreements is that consent decrees are agreements that are entered as court orders enforceable through contempt, whereas settlement agreements are contracts between the parties that are judicially enforceable if breached. 23 Op. O.L.C. at 133. Cf. *United States v. Bd. of Cnty. Comm’rs*, 937 F.3d 679, 688 (6th Cir. 2019) (“[A] consent decree is a settlement agreement subject to continual judicial policing.”) (quoting *Vanguards of Cleveland v. City of Cleveland*, 23 F.3d 1013, 1017 (6th Cir. 1994)); *Fed. Trade Comm’n v. Enforma Nat. Prods.*, 362 F.3d 1204, 1218 9th Cir. 2004) (“A consent decree is ‘no more than a settlement that contains an injunction.’”) (quoting *In re Masters Mates & Pilots Pension Plan*, 957 F.2d 1020, 1025 (9th Cir. 1992)).
98. 23 Op. O.L.C. at 149 (citing *Local 93, Int’l Ass’n of Firefighters v. City of Cleveland*, 478 U.S. 501, 525–26 (1986)).
99. See Waiver of Statutes of Limitations in Connection with Claims Against the Dep’t of Agric., 22 Op. O.L.C. 127, 140 (1998) (The Attorney General’s “settlement authority does not allow her to discard a statutory requirement and determine that, on the basis of her own view of the equities, a claim should be paid, notwithstanding its legal invalidity”); see also 23 Op. O.L.C. at 135 (“[T]he Attorney General must still exercise her discretion in conformity with her obligation to enforce the Acts of Congress”) (internal quotations omitted).
100. 22 Op. O.L.C. at 129 (citing *Finn v. United States*, 123 U.S. 227, 229 (1887)).
101. Auth. of U.S. Dep’t of Agric. to Award Monetary Relief for Discrimination, 18 Op. O.L.C. 52, 53 & n.4 (1994) (noting that the comptroller general had applied the principle in a number of opinions). Cf. U.S. DEP’T OF JUST., JUSTICE MANUAL § 3-8.130 (“[E]nsure that the terms of the consent decree DO NOT obligate the Government to expend funds beyond the purpose, time, or amount of the office’s available resources.”).
102. *John W. Rensbarger*, B-247348, 1992 W.L. 152986, at \*1 (Comp. Gen. June 22, 1992). The detail also violated 44 U.S.C. § 316, which provided that Government Printing Office “employees may not be detailed to duties not pertaining to the work of public printing and binding.” *Id.* at \*2.
103. *Id.* at \*5. In addition, the OLC has recognized the ADA as a limitation on settlement authority. See 23 Op. O.L.C. at 156 (“[T]he express terms of the [ADA] . . . mean[] that there must be an identifiable source of statutory authority to incur an obligation in advance of an appropriation before a settlement may be entered that would incur one.”).
104. While the session law establishing this provision does not refer to it as the “Miscellaneous Receipts Statute,” that is how practitioners commonly refer to it. See CONT. & FISCAL L. DEP’T, THE JUDGE ADVOC. GEN.’S LEGAL CTR. & SCH., U.S. ARMY, FISCAL LAW DESKBOOK para. X(a)(2)(c) (2023).
105. 31 U.S.C. § 3302(b).
106. Commodity Futures Trading Commission – Donations Under Settlement Agreements, B-210210, 1983 WL 197623, at \*2–3 (Comp. Gen. Sept. 14, 1983).
107. *Id.* at \*2.
108. Nuclear Regul. Comm’n’s Auth. to Mitigate Civ. Penalties, 70 Comp. Gen. 17, 19 (1990).
109. The Honorable John D. Dingell, B-247155.2, 1993 WL 798227, at \*2 (Comp. Gen. Mar. 1, 1993). The opinion addressed the Environmental Protection Agency’s authority to allow violators to settle cases by funding public awareness projects in lieu of paying administrative penalties. *Id.* at \*1.
110. Whether the Fed. Comm’n Comm’n’s Ord. on Improving Pub. Safety Commc’ns in the 800 MHz Band Violates the Antideficiency Act or the Miscellaneous Receipts Statute, B-303413, 2004 WL 2515818, at \*10 (Comp. Gen. Nov 8, 2004), at 14 (citing the GAO’s earlier Nuclear Regulatory Commission and Commodity Futures Trading Commission opinions approvingly).
111. Effect of 31 U.S.C. § 484 on the Settlement Auth. of the Att’y Gen., 4B Op. O.L.C. 684, 687–88 (1980).
112. *Id.* at 688.
113. *Id.*
114. *Id.* at 688–89.
115. Application of the Gov’t Corp. Control Act and the Miscellaneous Receipts Act to the Canadian Softwood Lumber Co. Settlement Agreement, 30 Op. O.L.C. 111 (2006). This case involved a proposed settlement that would authorize the United States to distribute duties in its possession to a private foundation, which would then fund various “meritorious initiatives.” *Id.* at 113.
116. Under circumstances where a settlement satisfies the two conditions above, “the governmental control over settlement funds is so attenuated that the Government cannot be said to be receiving money for the Government.” *Id.* at 119.
117. *Id.* at 121.
118. S. 3050, 114th Cong. (2016); H.R. 5063, 114th Cong. (2016). The legislation passed the House. *H.R.5063—Stop Settlement Slush Fund Act of 2016*, CONGRESS.GOV, <https://www.congress.gov/bill/114th-congress/house-bill/5063/actions> (last visited Mar. 22, 2024).
119. S. 3050, 114th Cong. § 2(a) (2016); H.R. 5063, 114th Cong. § 2(a) (2016); see also H.R. REP. NO. 114-694, at 2 (2016) (“[The Act] prohibits terms in Department of Justice (DOJ) settlements that direct or provide payments to non-victim third-parties.”).
120. H.R. REP. NO. 114-694, at 2. The report noted that in some cases, the donations restored funding previously cut by Congress. *Id.* at 2, 8–9.
121. *Id.* at 9.
122. *Id.* at 4; see also *id.* at 5 (criticizing the OLC’s opinion in Application of the Gov’t Corp. Control Act and the Miscellaneous Receipts Act to the Canadian Softwood Lumber Settlement Agreement, 30 Op. O.L.C. 111 (2006)).
123. See, e.g., George F. Will, ‘Slush Fund’ by Any Other Name, WASH. POST, Sept. 1, 2016, at A15.
124. Memorandum from the Att’y Gen., to All Component Heads and U.S. Att’ys, subject: Prohibition on Settlement Payments to Third Parties (June 5, 2017), <https://www.justice.gov/opa/press-release/file/971826/download>.
125. *Id.* at 1.
126. Memorandum from the Att’y Gen. to All Component Heads and U.S. Att’ys, subject: Guidelines and Limitations for Settlement Agreements Involving Payments to Non-Governmental Third Parties 1–2 (May 5, 2022), <http://www.justice.gov/ag/page/file/1499241/download>.
127. *Id.* at 3.
128. See *supra* section titled “A Lapse in Appropriations.”
129. Effect of Appropriations for Other Agencies and Branches on the Auth. to Continue Dep’t of Just. Functions During the Lapse in the Dep’t’s Appropriations, 19 Op. O.L.C. 337, 338 (1995).
130. See *supra* notes 74–78 and accompanying text.



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## Practice Notes

# Implementing Quality of Life Initiatives for a People First Focus

*By Major Thomas J. Travers*

*In organizations all around the world, leaders sally forth with inspiring messages of change. Everyone congratulates them on a presentation well delivered, admires the slogan, tucks the brand book into their briefcase[s], and then goes back to their desks and does nothing. . . . Vision without action is a dream.<sup>1</sup>*

### **The Army People Strategy**

In October 2019, the Army released The Army People Strategy as part of a broad effort to manage talent more effectively at a local and strategic level, improve Soldiers' overall quality of life, and build inclusive and cohesive teams.<sup>2</sup> That broad strategy is officially and colloquially known simply as "People First."

Nonetheless, to accomplish "the mission," hardworking Soldiers still often feel pressure to work long days and be connected even in their off-duty hours to the point that exhaustion feels

common.<sup>3</sup> Especially in light of the People First strategy, leaders should look beyond a one-size-fits-all leadership model and be mindful of the continuous erosion of boundaries made easier by twenty-first-century communication devices.<sup>4</sup> Even before People First, in confronting challenges presented by the increasingly complex twenty-first-century operating environment, General (Retired) Stanley McChrystal wrote, "We're not lazier or less intelligent than our parents or grandparents, but what worked for them simply won't do the trick for us now. Understanding and



adapting . . . isn't optional . . .<sup>75</sup> Therefore, for the long-term benefit of the Army's mission, status quo leadership must firmly shift toward a culture that prevents Soldier burn-out, develops more inclusive teams, and allows Soldiers to harmoniously integrate their military duties with their personal lives.

This article will offer a subordinate's perspective on how supervisory leaders at various echelons in the U.S. Army Judge Advocate General's (JAG) Corps can cultivate a People First culture to energize the workforce and improve work-life balance without changing regulations or requiring additional funding. The specific initiatives fall into two broad themes: 1) Leaders should depart from a traditional hierarchical leadership style in favor of "the web of inclusion," and 2) Leaders should adopt internal business practices that consistently encourage a more sustainable lifestyle.

This article will then define the web of inclusion and explain how it can work within an Office of the Staff Judge Advocate (OSJA). Next, it will outline how leaders can set the conditions for their subordinates to enjoy sustainable lifestyles over the long term. Finally, it will conclude by offering a vision for how adopting these measures will change the standard OSJA culture.

### The Web of Inclusion

In its broadest terms, the web of inclusion is "a pattern, a model for coherently ordering people and their tasks" as well as "a process, a way of thinking and acting, of behaving and solving problems as they arise."<sup>76</sup> Unlike traditional hierarchical leadership models with the organization's leader at the top of a pyramid, within the web of inclusion, the leader is at the center of a web with lines interweaving, integrating, reinforcing, and connecting each of the other points within the web.<sup>7</sup> The leader's job is to articulate organizational purpose, mission, and goals and then look outward, allowing those outside the center of the web to leverage their creativity in meeting the end state.<sup>8</sup> Hoarding information at the top of a hierarchical pyramid so the leader can be in control and the smartest person in the room is antithetical to successfully implementing the web of inclusion.<sup>9</sup>



Fostering an environment throughout the year that encourages subordinates to take leave and pass has tangible benefits. (Credit: JeromeMaurice-stock.adobe.com)

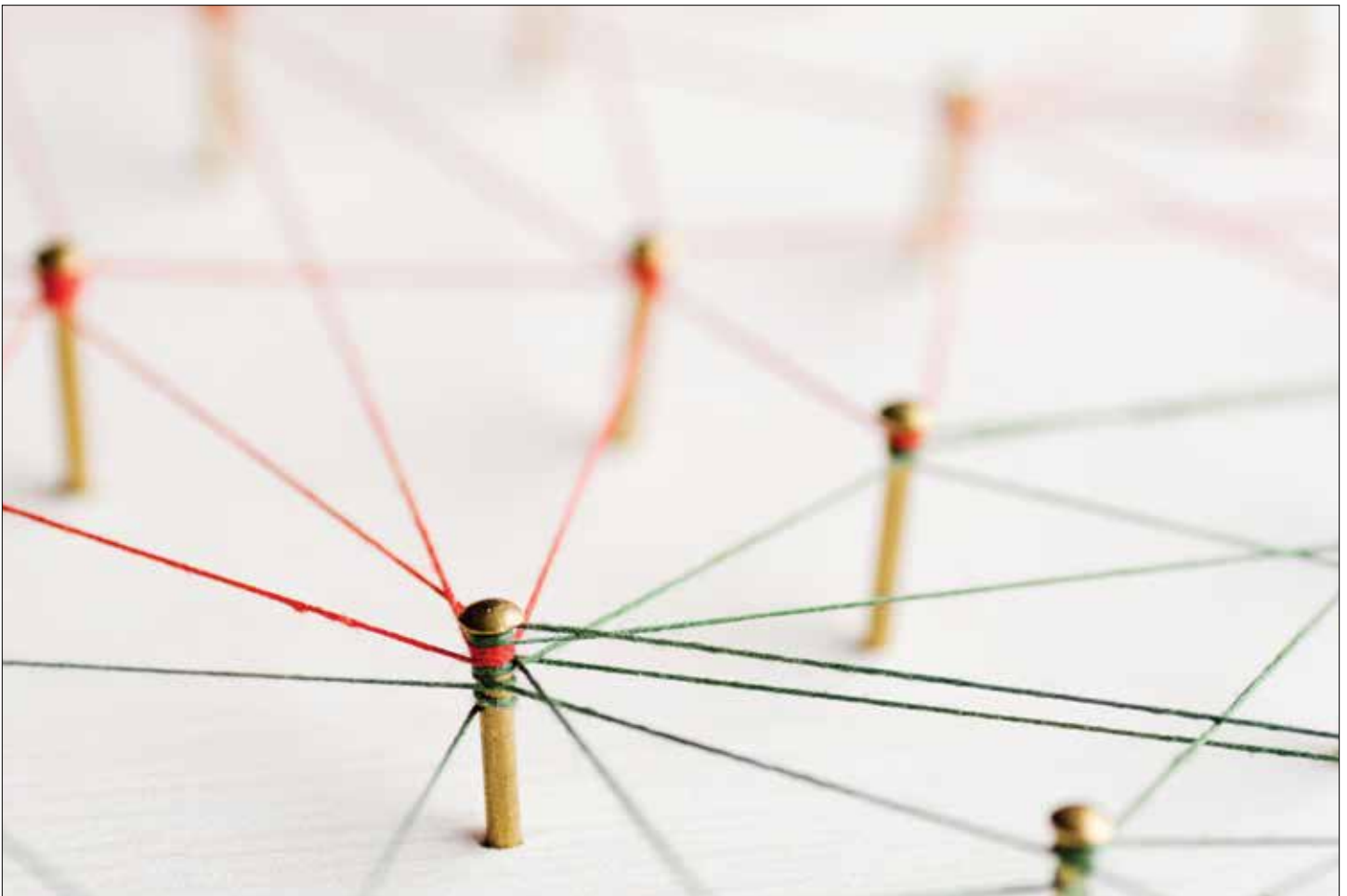
When implemented fully, the web of inclusion models the Army value of servant leadership because managers increase their impact as support personnel as opposed to simply supervising.<sup>10</sup> In this model, the supervision is more focused on facilitating connections to others within the web and guiding wayward efforts back on course. Consider the case study at Beth Israel Deaconess (BID) Medical Center in Boston, Massachusetts. The center redistributed power to individual nurses to make decisions for patients because the nurses interact most directly with those patients compared to a head nurse or the doctor in charge.<sup>11</sup> The successful experiment turned BID's nursing model into a "classic example[] of front-line empowerment in business or industry today . . . that a vast number of organizations could learn from."<sup>12</sup> This framework is tailor-made for judge advocates (JAs) interacting with clients directly and the Army doctrinal concept of "mission command."<sup>13</sup>

Like the nurses at BID, the JA directly interfacing with the client is best positioned to help the client chart the legal course. The JA may be a junior captain interacting with a company commander on potentially preferring charges on Soldiers for a drug distribution ring in the commander's footprint. The JA may also be the staff

judge advocate (SJA) interacting with the commanding general (CG) on a proposed general order. Either way, in keeping with the principles of "mission command," the attorney directly engaging with the client is to be empowered, and the rest of the organization supports that attorney.<sup>14</sup>

The challenge for more experienced JAs and organizations higher in the technical chain is to yield control to subordinates. A leader may understand the need to trust their action officers but still reconsider an acceptable end product because it is not what the leader expected. This harms the action officers' confidence and does not empower them to take charge in the future. Leaders may and should still question subordinates, offer suggestions, and test their legal reasoning; while focusing solely on how the leader would do something is counterproductive, allowing room for differing approaches to a correct outcome is empowering.

For example, consider a battalion commander navigating a legitimately gray legal issue in a regulation. One way to assist this battalion commander would be for the action officer JA to provide advice, answer any questions, and prepare them to assume the risk of decision-making. This JA should be prepared to justify their research, have others test their conclusions, and to



Within the web of inclusion, the leader is at the center of a web with lines interweaving, integrating, reinforcing, and connecting each of the other points within the web. (Credit: Vladyslav Bashutsky-stock.adobe.com)

receive suggestions from leaders based on relevant experiences. And, if the JA's advice is thorough and both legally and ethically defensible, the organizational leadership should support the JA in their role as the action officer and primary advisor for that issue. Alternatively, the SJA can advise the CG to issue a division-wide policy to fill the gap. A well-coordinated organization may recognize opportunities to assist commanders at various echelons and through multiple approaches.

Departing from the hierarchical style of leadership upon which the military is based may seem radical. However, as discussed below, senior leaders like General (Retired) McChrystal and Army publications on mission command already recognize this need. Moreover, the entire system does not need to change to fully implement this idea. Leaders can incorporate the web of inclusion within their offices by democratizing

the workplace, training their teams using peer coaches, and implementing a decentralized leader development program (LDP) to guide and empower subordinates.

#### **Democratization**

Democratization means fostering a workplace that emphasizes and rewards action rather than position.<sup>15</sup> *The Web of Inclusion* outlines a real-world military example of a naval aircraft carrier's response to non-combat emergencies. Despite military rank disparity, when crises erupted, crewmembers worked on equal footing because too much was happening too quickly for senior leaders to know and process it all; they had to be comfortable trusting their subordinates.<sup>16</sup>

Emergencies should not be the only predicate to trust and empower subordinates. In more steady-state operations, leaders can consciously implement

measures to accomplish that same end. First and foremost, for all permissible instances, leaders should explain the "why" to their subordinates.<sup>17</sup> Explaining why nurtures good relationships within the office, helps subordinates see the bigger picture, and disseminates perspective and information to the edges of the web.<sup>18</sup> It also signals that everyone is entitled to understand the reasons behind orders, which avoids the pitfalls of relegating those not in the know to second-class status.<sup>19</sup> Even if something may not seem relevant to a subordinate or another section, including others coalesces the organization, encourages bigger thinking, and facilitates common understanding.<sup>20</sup>

Second, being mindful of potential subliminal signals that create barriers to feedback from all organization members will help leaders better receive feedback. For example, in a meeting, people seated

at the table may feel more empowered to contribute to the conversation than those seated along the wall.<sup>21</sup>

Third, creating communal spaces beyond a conference room encourages congregation and free exchanges so people can hear what others in the office think.<sup>22</sup> Even if the office's physical layout is fixed, transforming the conference room into a communal lunch table creates the "hearth" effect.<sup>23</sup> The hearth effect is the principle that "[e]ating or drinking with others cements an elemental bond and implies a basic trust."<sup>24</sup> Team members should seek to take advantage of available communal spaces to share meals and further develop relationships within the organization.

Fourth, supervisors should encourage individuals to take control of their environments.<sup>25</sup> Individuals should be encouraged to decorate their offices fairly and freely—aside from legally, ethically, or professionally objectionable décor.<sup>26</sup> Encouraging this small level of creativity helps promote autonomy and self-expression in the workplace, which contributes to overall job satisfaction.<sup>27</sup>

### ***Training the Team to Be Empowered with Peer Coaches***

The key to empowering subordinates is to ensure they are trained and equipped to wield that power. One way to do this beyond formal training efforts is to assign peer coaches immediately upon a new JA or paralegal's arrival to the office, especially if the new arrival is coming straight from initial entry training. Peer coaching is similar to existing sponsorship programs, but the peer coach would also be required to do on-the-job training with the new office member.<sup>28</sup> To ensure this training is useful, peer coaches and first-line supervisors would have a checklist of tasks. In a fixed timeframe, likely a few weeks or months, new teammates would have to complete various actions with the peer coach's guidance in the regular course of business.<sup>29</sup> In a brigade legal section, for example, a new paralegal would have to complete three Article 15s<sup>30</sup> (summarized, company grade, and field grade), two separation packets (one in which the respondent is entitled to a board), and a charge sheet; serve as a reporter at a board; be assigned as the

paralegal for a court-martial; brief a battalion commander; demonstrate the ability to update a case file in Military Justice Online; and draft a memorandum of reprimand before the peer coach program concludes.

Once new teammates have completed their coaching program, they should feel more confident with the routine tasks their coach has guided them through and emboldened to operate more independently as they have earned some level of trust. Greater confidence in one's position as a trusted asset benefits team members of all ranks. Team members who feel trusted will also feel empowered in their roles, leading to greater professional satisfaction, increased collegiality throughout the organization, and deeper personal investment.<sup>31</sup> "Those who feel ownership in their work tend to take a broad view of the potential and problems of their organization, rather than viewing everything from the perspective of their own department or division."<sup>32</sup>

### ***Using a Decentralized LDP to Guide and Empower the Workforce***

One problem that leaders at BID experienced when implementing the web of inclusion was getting subordinates to accept the responsibility and autonomy that came with their empowerment.<sup>33</sup> The BID leaders overcame this obstacle by being readily available and in consistent contact with subordinates to provide guidance, but not constant contact, which would have defeated the subordinates' empowerment.<sup>34</sup>

In the military context, the use of LDP sessions is a common tool for building responsibility and autonomy.<sup>35</sup> In the JAG Corps specifically, LDP sessions create a forum to conduct continuing legal education and mandatory training, cross-train the force, share knowledge and experiences, and improve weaknesses. Many OSJAs achieve positive results through effective, yet mindful, use of the LDP. A leader's mindfulness of the form LDP sessions take ensures subordinates have maximum time and freedom to accomplish their duties. In-person communication is important because it forces immediate attention to the topic at hand, allows participants to hear a speaker's tone, and presents an opportunity to be generally familiar with one's colleagues.<sup>36</sup> However, it is not the only tool

to empower subordinates through training. Rather than conducting in-person LDP sessions for all training, many OSJAs have successfully decentralized LDP sessions to empower subordinates and provide more flexibility. There are several techniques for conducting a decentralized LDP.

#### *White Papers*

Tasking a junior officer or paralegal to write a white paper on a topic has several benefits. People can read it and digest it as their schedules permit, the subordinate tasked with writing the paper can learn new information or share their expertise, it gives subordinates a chance to shine in front of the whole office, it provides the whole office with a reference tool, and leaders can use it to evaluate the subordinate's writing.

#### *Discussion Boards*

The widespread implementation of Microsoft Teams offers another option; offices may circulate materials (such as articles, podcasts, movies, books, and slide decks) in their team's digital space and create a discussion board, inviting individuals to comment. Requiring everyone to post at least one question or comment is a forcing function for reviewing the materials. This option also enables subordinates to conveniently engage with the material; it fosters a dialogue as opposed to a traditional LDP, in which relevant information often flows one-way (speaker to audience).

#### *Cohort Groups*

Third, rather than conducting the LDP as an entire OSJA, individual sections may be given a discussion topic or training material to complete when it is most convenient for the smaller cohorts. This allows more individuals to lead training, allows mid-level leaders to choose the best time, and increases the chance of meaningful dialogue given the smaller group size and the group's increased familiarity with one another.

### ***Fostering a Sustainable Lifestyle***

Beyond implementing the web of inclusion, which only covers office culture during the duty day, leaders should also be mindful of policies affecting subordinates' lives outside of the office. Whether that means work-life





The hearth effect is the principle that “[e]ating or drinking with others cements an elemental bond and implies a basic trust.” (Credit: Dajahof-stock.adobe.com)

balance, integration, or harmony, a leader’s business practices can ensure that Soldiers are able to enjoy sustainable lifestyles.<sup>37</sup>

Most leaders beginning a new job encourage some semblance of work-life balance or harmonizing family and career. As leaders immerse themselves into the position, the daily rigors and the pressure often increase; the balance becomes increasingly difficult to maintain and encourage others to maintain. Former Sergeant Major of the Army Michael Grinston once tweeted, “Predictability and training management: two things that are easy to say, harder to do.”<sup>38</sup> However, leaders’ mindfulness in delivering a consistent message throughout their tenure is important to remain as true to their initial ideals as possible. Two specific ways leaders can foster a sustainable lifestyle include consistently encouraging the use of leave and passes and reassessing what qualifies as an after-hours emergency.

#### ***Consistently Encourage Taking Leave and Pass***

Army regulations encourage Service members to use an annual average of thirty days of leave.<sup>39</sup> Barring reasonable mission demands, generalized taboos to taking leave outside of a permanent change of station (PCS) or holiday block leave, or any negative perceptions about leave that a leader

perpetuates, can be harmful. Frequently, PCS moves involve what may seem like a zero-sum situation between the outgoing and the incoming stakeholders in a billet. The members of the Judge Advocate Legal Services are required to make prudent decisions that best care for the needs of the individual, the family, and the Army organization, which all compete for limited resources of time during transition periods.

Adhering to the *Leaves and Passes* regulation and empowering subordinates to make sensible schedules and PCS plans are beneficial approaches to help personnel keep mentally fit and give Soldiers and families the time to keep life as orderly as possible during stressful PCS moves.<sup>40</sup>

Pressure to cut leave short may also arise regarding the Department of Defense’s new secondary caregiver policies authorizing twelve weeks of leave for all parents.<sup>41</sup> The most senior Army leaders recognized the potential consternation over this policy and withheld denial of the maximum amount of leave authorized to the first general officer in the chain of command.<sup>42</sup> However, junior supervisors explicitly or implicitly discouraging this authorized leave is perilous due to its larger message regarding work-life harmony. Fostering an environment throughout the year that encourages subordinates to take leave and

pass has tangible benefits. Namely, it boosts health and morale.<sup>43</sup>

Life events do not always occur during the summer PCS season or around the holidays, and supporting leave and pass privileges so Soldiers can recharge or be with their families should be an easy decision absent a major operational event. Encouraging leave and pass even when it seems inconvenient also forces cross-training, and the whole office emerges more capable. Leaders who readily approve leave and pass also show they trust their subordinates to manage their workload, boosting morale even further. Finally, when leaders take leave and pass, the benefits increase because they prepare their subordinates to step into the boss’s shoes. This develops subordinates to serve in the position full-time in the future and allows leaders to better assess subordinates’ potential for their next evaluation report.

Some leaders may be concerned about a consistently shorthanded office, but data from companies that have implemented unlimited paid time off (UPTO) or open leave policies shows these organizations have not experienced a flood to the door.<sup>44</sup> “[Former] Netflix CEO Reed Hastings detailed in his 2020 book that while nailing down UPTO took years, he eventually found that ‘the freedom signals to employees that we trust them to do the right thing, which in turn encourages them to behave responsibly.’”<sup>45</sup> Similarly, a “2018 survey showed workers with UPTO took fewer holidays than those with a fixed allocation.”<sup>46</sup> Though a culture of liberally approving leave is not the same as UPTO, civilian open leave policies demonstrate that paternalistic demands are not what keep subordinates on task. Rather, the workplace culture drives individuals to work, underwork, or overwork.<sup>47</sup> Aside from planned leave or pass, daily consideration of subordinates’ downtime also has tangible benefits, and leaders should be judicious about interrupting Soldiers after the duty day.

#### ***Reassessing the After-Hours Emergency***

Individuals serving in the JAG Corps are generally comfortable with and capable of working hard. If a strong work ethic was not part of their ethos, they would not have met the standard to be an attorney or

paralegal in the JAG Corps in the first place. With that conscientiousness comes the tendency, especially for young officers and paralegals, to stay at the office when there is still work to be done. However, leaders with more Army experience should put the relative importance of a task in perspective for the subordinate. They can do this by being deliberate about when they task subordinates, making an executive decision about what is worth a call to a subordinate at home, and leaving the office close to 1700 hours as a matter of routine.

Because leaders hold positional power, their subordinates will not only do what they ask but also make it their highest priority. With this power comes great responsibility, because if a leader emails their subordinate a question at 1700 hours, it does not matter that the leader wrote “no rush”; subordinates will be tempted to answer that question as soon as possible. One way around this is for the leader to schedule that email to send the next morning at 0900, write a note to self, or set a phone reminder to ask the subordinate tomorrow.

Similarly, Soldiers have all means of communication technology on them at any given time, such as personal smartphones, work smartphones, smart watches, and tablets. Such ubiquitous technology makes people available to others like never before. This creates unreasonable expectations in the workplace, even if they are unintentional. Consider that in the early 2000s, when many of today’s JAG Corps senior leaders entered the Army or were still early in their careers, cell phones were just starting to be widely available.<sup>48</sup> Before cell phones, if a leader needed to talk to a subordinate on a Saturday, that leader would have to call the subordinate’s house, maybe leave a voicemail, and wait for the subordinate to return home, receive the message, and return the call. Delay was built into the communication process due to technology’s limitations.

Today, it is assumed people own a cell phone and can answer calls and texts quickly. Soldiers interviewed by Military.com in 2022 expressed “that senior non-commissioned officers and commanders are notorious for last-minute or late phone calls or texts, mostly with nonurgent updates or demanding information that could easily



Today, it is assumed people own a cell phone and can answer calls and texts quickly. The SJA is in the best position to assume the risk that a low-level problem can wait until morning. (Credit: PBXStudio-stock.adobe.com)

wait until the next day.”<sup>49</sup> While serving as the commander of the 10th Mountain Division, Major General Milford Beagle Jr. recognized this, referring to it as “a constant digital leash” and restricted after-hours calls.<sup>50</sup> In short, our collective expectation that others are available at any given moment has significantly changed. However, many individuals have not adjusted their mindset to the idea that just because our ability to reach others has changed does not mean the call’s level of importance has changed.

Being thoughtful about whether something is immediately necessary prevents the threat of mentally exhausting the force through the inability to unplug.<sup>51</sup> Such prevention benefits subordinates’ efforts to be the spouse, parent, family member, and friend they wish to be by protecting their schedule and impacting their presence at home.<sup>52</sup> Improving perspectives and attitudes in the JAG Corps must begin at every level of leadership because all members influence the office’s culture. Trust that a leader consistently and appropriately gauges the relative importance of a potential office emergency is invaluable for an effective team.

Ultimately, fostering this culture plays the long game for the benefit of both individual OSJAs and the JAG Corps as a whole.

Encouraging Soldiers to push themselves to the brink of clinical fatigue with the hope that they can take a less demanding assignment after a tough one is an irrational concept. First, there is no guarantee any Soldier’s follow-on assignment will be less demanding. Second, it only makes that person less productive in the less demanding assignment because the Soldier knows this is their chance to recharge. Third, it becomes so engrained in Soldiers that they must sustain this unsustainable pace that many do not take opportunities to recharge when they are present. These reasons demonstrate why cultural shifts are necessary to begin and sustain among members and leaders in the OSJA.

## Conclusion

While implementing these changes may be challenging, sticking firmly to techniques that create a workplace in which employees are mentally and physically primed to be more productive during the duty day will reap the benefit of a sustainable operations tempo.

Admittedly, units enjoying successful teamwork and leadership are likely to already reflect one more of the positive approaches discussed above; members of these teams have maximized their capability to contribute and boost morale, and they

are stewarding the profession according to a sustainable and resilient battle rhythm. For others, this is a reminder and a discussion point that junior officers and paralegals face common stressors that leaders can alleviate with the tools outlined above. These team members can achieve greater satisfaction and a more sustainable lifestyle if their leaders empower them, employ a decentralized LDP, limit after-hours calls, and encourage leave or pass requests to recharge.

Leaders must assess success on a scale that is more global than daily survival. Employing these tools is within a leader's authority, and doing so will increase JAs' and paralegals' quality of life and nest directly with the Army's broader People First effort. The Army has recognized that doing so will bolster mission accomplishment over the long term—leaders in our Corps who also put people first will enjoy leading a sharper and healthier organization. **TAL**

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## Notes

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7. *Id.* at 20.
8. *Id.* at 261, 279.
9. *Id.* at 216; see also McCHRISTAL, *supra* note 5, at 69, 83, 100, 111–12, 120.
10. HELGESEN, *supra* note 6, at 145.
11. *Id.* at 137.
12. *Id.* at 132.
13. See U.S. DEP'T OF ARMY, DOCTRINE PUB. 6-0, MISSION COMMAND: COMMAND AND CONTROL OF ARMY FORCES para. 1-13 (31 July 2019) [hereinafter ADP 6-0].
14. *Id.* at vii, para. 1-14 (defining mission command as the Army's "approach to command and control that empowers subordinate decision making and decentralized execution appropriate to the situation").
15. HELGESEN, *supra* note 6, at 280.
16. *Id.* at 40–42.
17. See ADP 6-0, *supra* note 13, para. 1-50 ("Commanders write and communicate their commander's intent to describe the boundaries within which subordinates may exercise initiative while maintaining unity of effort."); *id.* para. 1-51 ("Empowered with trust, shared understanding, and commander's intent, [subordinates] can develop the situation, adapt, and act decisively in uncertain conditions.").
18. See HELGESEN, *supra* note 6, at 10.
19. See *id.* at 114–15.
20. *Id.* at 208, 210; see also McCHRISTAL, *supra* note 5, at 120, 163, 167, 174–75.
21. HELGESEN, *supra* note 6, at 114–15, 208, 210.
22. See *id.* at 255, 260; McCHRISTAL, *supra* note 5, at 160–61.
23. See HELGESEN, *supra* note 6, at 256.
24. *Id.*
25. See *id.* at 271.
26. Intentional Leader with Cal Walters, #41: Brigadier General Joe Berger — *On Empathy, People First Leadership, and Being a Beginner*, at 1:09:55–1:10:21 (June 29, 2020) (downloaded using iTunes) [hereinafter Intentional Leader #41] (noting that when individuals have been in a job for more than a year but still do not have tokens or pictures on their wall or desk, it is often a signal that something is "not quite right").
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28. *Id.* at 166–67.
29. See *id.* at 189.
30. UCMJ art. 15 (2022).
31. See HELGESEN, *supra* note 6, at 20–22, 31–32.
32. *Id.* at 94.
33. *Id.* at 156.
34. *Id.* at 158.
35. See U.S. DEP'T OF ARMY, REG. 350-1, ARMY TRAINING AND LEADER DEVELOPMENT para. 1-16(b)–(c) (10 Dec. 2017) [hereinafter AR 350-1] (describing "a robust leader development program" as "a shared responsibility between the institutional Army (education or training institution), the operational force (organization and unit), and the individual").
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39. See U.S. DEP'T OF ARMY, REG. 600-8-10, LEAVES AND PASSES para. 2-2(c)(2) (3 June 2020) [hereinafter AR 600-8-10] (Leaders will "[e]ncourage and assist all Soldiers to use, on the average, 30 days of accrued leave each year.").
40. *Id.* para. 4-7(c)–(d) ("Soldiers will usually be authorized not less than 30 days of leave in conjunction with PCS movement . . . Soldiers should not be asked to take less than 30 days of leave between duty stations except for military operational requirements."). See generally PATRICIA K. TONG ET AL., RAND CORP., RR-2304-OSD, ENHANCING FAMILY STABILITY DURING A PERMANENT CHANGE OF STATION: A REVIEW OF DISRUPTIONS AND POLICIES (2018), [https://www.rand.org/pubs/research\\_reports/RR2304.html](https://www.rand.org/pubs/research_reports/RR2304.html).
41. Memorandum from Under Sec'y of Def. to Sr. Pentagon Leadership et al., subject: Directive-type Memorandum 23-001 – "Expansion of the Military Parental Leave Program" (4 Jan. 2023); *DOD Expands Military Parental Leave Program*, DEFENSE.GOV, (Jan. 4, 2023), <https://www.defense.gov/News/Releases/Release/Article/3259259/dod-expands-military-parental-leave-program>.
42. All Army Activities Message, 018/2023, 061245Z Mar. 23, U.S. Dep't of Army, subject: Expansion of the Military Parental Leave Program (MPLP) Implementation Guidance, para. 4.G.(2).
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49. Beynon, *supra* note 3.
50. *Id.*
51. See *id.*
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## AROUND THE CORPS

MAJ Tamika Lipford (right) and MAJ Trevor Waliszewski (left) participate in a friendly game of intramural basketball while attending the 72d Graduate Course at The Judge Advocate General's Legal Center and School in Charlottesville, VA. (Credit: MAJ Jonathan L. Kopecky)



MAJ Amanda B. Baylor, USAR SVC Deputy Program Manager, briefs attendees at the active/Reserve component integrated SVC Regional Training held 5-7 December 2023 at the USARLC in Gaithersburg, MD. In this photo, MAJ Baylor specifically addresses active component SVCs and paralegals about the uniqueness of the USAR (especially part-time support) within the context of the SVC Program. (Credit: 1LT Amber Lamb, USARLC)



## No. 1

# Sources and Limitations of Command Authority over the Army Reserve Component

By Major Amanda M. Baylor

*The joint force staff judge advocate (SJA) has a pivotal role in assisting the operational planners to anticipate, understand, and pursue necessary authorities. Joint force commanders rely heavily on their legal advisors for accurate, timely advice concerning authorities and limits that impact planning and execution. Their recommendations also help shape the commander's guidance and intent.<sup>1</sup>*

The total U.S. Army is organized into the Regular Army and Reserve component, which is comprised of the Army National Guard of the United States (ARNG) and the U.S. Army Reserve (Reserve).<sup>2</sup> Across all components, the Army chain of command consists of commanders who exercise discrete authority.<sup>3</sup> Command authority is “the authority a commander in the [Army] lawfully exercises over subordinates by virtue of rank or assignment.”<sup>4</sup> Command authority for the Reserve component is different from command authority for the Regular Army. Recently, the frequency and duration of Reserve component activations have increased exponentially;<sup>5</sup> commanders must address important issues unique to this operational force multiplier.

Despite the increases in frequency and duration of Reserve component activations, some commanders treat their Reserve and ARNG Soldiers just like their Regular Army counterparts.<sup>6</sup> Commanders must acknowledge that there are differences between these populations both in the source of the command authority over them and in the unique circumstances that come with leading these Soldiers effectively. Whether limiting or permissive, com-

mand authority outlines the type of action(s) commanders may take and how they may act.<sup>7</sup> Although commanders have broad authority to timely meet their significant responsibilities, they must know of and operate within specific limitations on the various mechanisms through which these powers are conferred. Operating within the bounds of command authority is woven into the very fabric of our national defense strategy; leaders who assume command must understand and appreciate that disregarding or misinterpreting applicable authorities can lead to injury, financial mistakes, and even criminal proceedings.<sup>8</sup>

The proper exercise of command authority expands well beyond formal authority in law or regulation,<sup>9</sup> where duties include both express and inherent command and control over subordinates.<sup>10</sup> Command and control is, therefore, the conduit through which commanders exercise their authority and direction over Soldiers assigned and attached to their command<sup>11</sup> and over assigned resources and equipment.<sup>12</sup> Commanders must plan and effectively use all available resources to complete their missions through the “employment of, organizing, directing, coordinat-





BG Gerald R. Krimbill, Commanding General, U.S. Army Reserve Legal Command (USARLC), addresses special victims' counsel (SVCs) and SVC paralegals attending the first active/Reserve component integrated SVC Regional Training held 5-7 December 2023 at the USARLC in Gaithersburg, MD. (Credit: 1LT Amber Lamb, USARLC)

ing, and controlling military forces” while ensuring their “health, welfare, morale, and discipline.”<sup>13</sup> No other military role matches the totality of express command duties coupled with ethical and legal obligations inherent in command.<sup>14</sup>

Because commanders cannot rely solely on express authority given through written or oral instruction, they must know and understand what decisions and actions are within their discretion (implied authority). They must know of any restrictions or withholdings that impact their authority to act to determine whether they should request new or additional authority through their technical chain.<sup>15</sup> This requires a fundamental understanding of two separate yet distinct chains of command authority as it flows from the U.S. Constitution to the President and to Congress.

This article explains the Constitution’s grant of broad military authority to the President to serve as “Commander in Chief”<sup>16</sup> and to Congress to “make rules for the Government and Regulation of the land and naval Forces,”<sup>17</sup> as well as delegated command authority from this highest level. Through law codified in the U.S. Code, command authority flows from the President through

the Department of Defense’s (DoD) Service Secretaries, such as the Secretary of the Army (SECARMY), down to commanders of each Service and through multiple command echelons (“theater army, corps, division, brigade, battalion, and company”).<sup>18</sup> Combatant commands (COCOMs) are key components of this delegation chain, as combatant commanders (CCDRs) exercise command authority over assigned Reserve component members mobilized to Federal active duty.<sup>19</sup>

Lastly, this article explores how decentralized mission command requires commanders to exercise inherent command authority. It highlights key differences between Reserve component and Regular Army duty statuses and identifies sources of Reserve component<sup>20</sup> command authority. It discusses how the ARNG operates primarily under title 32 U.S. Code authority and the Reserve operates under title 10 U.S. Code authority. It also explains how National Guard Soldiers in a title 10 status outside the United States operate under CCDR command authority separate from a title 32 chain of command. Finally, it addresses key differences in applicable law, subject to duty status, with which commanders should be familiar.

This article will aid senior judge advocates (JAs) (such as staff judge advocates) in understanding important challenges and limitations Regular Army and Reserve component commanders face while executing their command authority. Although JAs provide commanders with legal advice on a multitude of issues unique to the Reserve component,<sup>21</sup> “the judgment of the commander is paramount.”<sup>22</sup> Accordingly, JAs must advise commanders to exercise their inherent command authority and operate among the gray space within black-and-white authority to make timely decisions and take effective action.

## Background

### *Command Authority under the U.S. Constitution*

The Constitution grants Congress legislative power “to declare War,” “raise and support Armies,” “provide and maintain a Navy,” “make Rules for the Government and Regulation of the land and naval Forces,” call forth “the Militia to execute the Laws of the Union, suppress Insurrections, and repel Invasions,” and “provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States.”<sup>23</sup> The Uniform Code of Military Justice (UCMJ) and Servicemembers Civil Relief Act<sup>24</sup> (SCRA) are primary examples of legislation Congress passed with its constitutional powers to regulate military operations. Congress can also legislate limits on the President’s authority to conduct military operations, creating a fluid balance of war powers between Congress and the President.<sup>25</sup> Thus, the line of demarcation between the legislative and executive branches’ constitutional authority is not absolute. For example, Congress can limit funding to control the President’s ability to carry out military operations.<sup>26</sup>

The Constitution grants the President executive power to serve as the Commander in Chief of the U.S. Army and Navy as well as militia “when called into the actual Service of the United States.”<sup>27</sup> It also grants executive authority to make treaties, provided two-thirds of the Senate concurs and ratifies them.<sup>28</sup> Congress cannot match the President’s broad military authority

where the President specifically exercises command authority over the U.S. Armed Forces.<sup>29</sup> The President can manage the executive branch's operations,<sup>30</sup> including the Army's command authority, by issuing executive orders (EOs). This is a critical separation of power between the executive branch and the legislative branch, as command authority requires both a "grant of authority [(power in law)] and necessary freedom of action."<sup>31</sup>

The President's authority and freedom of action to pursue military operations includes "inherent or implied power" that does not always require congressional authorization (unless a statutory bar exists).<sup>32</sup> Executive order legal and regulatory authorities are vested in law (such as the UCMJ, DoD directives, and Army regulations) and enhanced through "specific powers granted under the authority of immediate commanders."<sup>33</sup> As such, EOs are directives that help define and confer military command authority as a source of law that does not require congressional legislation.<sup>34</sup>

Through EOs, presidential power has expanded over time; Commanders in Chief have influenced both foreign and domestic affairs over which the DoD has exercised significant command authority—all without asking for congressional approval or encountering restrictions by Congress.<sup>35</sup> Because the Constitution limits Congress's ability to regulate or restrict the President's constitutional command authority, Congress should have less control over how the President employs executive authority.<sup>36</sup> Without this separation of powers, Congress could fundamentally hinder the President's ability to carry out the duties of our Nation's Commander in Chief. This could create unnecessary confusion over sources of command authority over the Armed Forces and cause leadership concerns to grow.

Through its power to raise and support armies and declare war, Congress cannot enact legislation that interferes with command authority over forces and military campaigns; that power belongs to the President.<sup>37</sup> Absent any court rulings on point, it is unclear whether Congress can regulate military deployments without overstepping presidential authority.<sup>38</sup> In March 2011,

President Obama directed U.S. Armed Forces overseas to conduct limited military operations to aid United Nation member states in protecting civilians from attacks.<sup>39</sup> Afterward, he reported to Congress that he had "constitutional authority, as Commander in Chief and Chief Executive and pursuant to his foreign affairs powers" to act without legislative authorization.<sup>40</sup>

Other Presidents have sent troops into battle without Congress's official declaration of war.<sup>41</sup> Such action underscores the importance of establishing command authority on the executive side of a clear line of demarcation.<sup>42</sup> Sometimes, this line between congressional and presidential war power is blurred.<sup>43</sup> Nonetheless, it remains clear, and Congress and the U.S. Supreme Court agree with the executive, that not all presidential and congressional military authority is retained at the top.

#### ***Delegated Command Authority***

Military authority within the executive and legislative branches does not exclusively rest with the President and Congress, respectively.<sup>44</sup> Both branches have delegated command authority in some respect.<sup>45</sup> Just as military powers flow from both the legislative and executive branches, command authority originates from several sources, including law, regulation, and policy.<sup>46</sup> By law, military functions are vested in the President and are delegable to the Secretary of Defense (SECDEF).<sup>47</sup> By EO, President George H.W. Bush delegated to the SECDEF complete military authority to assign commanders.<sup>48</sup> Consequently, most military power and authority flows from the President, as Commander in Chief, through the SECDEF, to COCOMs and the Services, and down to subordinate commands.<sup>49</sup> The President and SECDEF exercise command authority over the Army through two separate chain-of-command branches.<sup>50</sup>

Command authority flows through two chains of command among all Army components: the operational chain of command and the administrative chain of command.<sup>51</sup> Operational control (OPCON) of forces is the authority to "perform those functions of command over subordinate forces involving organizing and employing commands and forces, assigning tasks, designating objectives, and giving authori-

tative direction necessary to accomplish the mission."<sup>52</sup> Operational control for missions flows from the President to SECDEF and down to the CCDRs who exercise COCOM authority over missions and forces that SECDEF assigns to them.<sup>53</sup> Specific to the Army command structure, the chain of command flows through one of three major commands (four Army Commands, eleven Army Service Components Commands that support COCOMS, and thirteen Direct Reporting Units) down to subordinate commanders.<sup>54</sup> The President assigns CCDRs and approves SECDEF's assigned missions and forces.<sup>55</sup> Upon consulting the Chairman of the Joint Chiefs of Staff (CJCS), SECDEF further delineates CCDRs' authority to ensure they have the requisite authority to "exercise effective command over those commands and forces."<sup>56</sup> As such, command authority over COCOMs for operational missions is extensive and includes assigning subordinate commanders their command functions.<sup>57</sup> In these assignments, however, CCDRs' authority to issue orders is limited.

A COCOM's authority is not wholly transferable; certain functions cannot be delegated, such as "giving authoritative direction over all aspects of military operations, joint training, and logistics necessary to accomplish the missions assigned to the command."<sup>58</sup> As further discussed below, this is important because when the President mobilizes ARNG units to Federal active duty, they fall under COCOM authority (outside the title 32 ARNG command chain) over the theatre in which they operate.<sup>59</sup> Operational control, which can be delegated to subordinate commanders, is an integral component of the COCOM's authority.<sup>60</sup> It includes the authority to perform command functions necessary to complete assigned missions but generally does not include "matters of administration, discipline, internal organization, or unit training,"<sup>61</sup> otherwise known as administrative control (ADCON).<sup>62</sup> Combatant commanders have ADCON authority to carry out their Federal statutory (title 10, U.S. Code) responsibilities for administration and support over subordinate units.<sup>63</sup> They can delegate ADCON authority to subordinate commanders but should document this in writing to avoid having their CCDR command authority usurped.<sup>64</sup>

Within COCOMs, SECDEF manages Armed Forces and military operations across seven geographic combatant commands (GCCs) and four functional combatant commands with designated areas of responsibility.<sup>65</sup> The Secretary of Defense directs the Service Secretaries to assign or allocate military forces to GCCs and exercise certain command authority over their respective units and fill different Service component command roles (such as U.S. Army Central Command).<sup>66</sup> To prioritize their key role of planning and oversight, COCOM headquarters delegate authority to execute OPCON and tactical control (TACON) missions to Service component commands and subordinate commands.<sup>67</sup> Yet, only COCOM commanders have the authority to deploy forces from every Service.<sup>68</sup>

Much like COCOMs combine forces across the different military departments for a joint war-fighting role, the Army combines its distinct troops among the Regular Army and Reserve component to provide a unified federalized force to which Federal command authority equally applies.<sup>69</sup> Just like CCDRs are responsible for total force structure integration, Regular Army commanders must integrate the Reserve component into its ranks operationally to “help meet both steady state peacetime engagement and contingency requirements of the [CCDRs] . . . at home and abroad.”<sup>70</sup> Because joint operations are generally conducted through decentralized execution,<sup>71</sup> Regular Army commanders must understand that differences exist between Regular Army and Reserve component command authority.

### ***Decentralized Command Authority***

After the Civil War, American commanders began decentralizing command execution by using mission orders to achieve a desired end state.<sup>72</sup> This developed into mission command authority, which is a type of ad hoc authority commanders have over “the conduct of military operations through decentralized execution based upon mission-type orders.”<sup>73</sup> It is best described as the “creative and skillful use of authority, instincts, intuition, and experience in decision-making and leadership to enhance operational effectiveness.”<sup>74</sup> Commanders use mission command to empower subordinates to make disciplined decisions through

command and control, without a direct order, and accept the risk of interpreting commander’s intent.<sup>75</sup>

Balancing delegation of authority against manageable risk requires trust, experience, and a solid understanding of command authorities.<sup>76</sup> This is critical, as commanders must always have a lawful mission (assigned duty and function) and authority.<sup>77</sup> They must know what their unit function and mission are and where their authority comes from. They cannot just say, for example, EO 12333<sup>78</sup> allows intelligence collection. They must trace their authority through orders (concept of operations, operations order, etc.).<sup>79</sup> Commanders must further balance express mission command with inherent command authority.<sup>80</sup> They do this through command and control, which gives commanders broad authority to manage all aspects of forces to accomplish the mission.<sup>81</sup>

Commanders have inherent authority to regulate good order and discipline and support the health, safety, and morale of troops.<sup>82</sup> For Regular Army commanders, inherent command responsibility also includes providing “consultation and liaison with the ARNG and USAR to ensure interaction and synchronization among [Regular Army] and USAR concerning Family assistance and readiness issues.”<sup>83</sup> Judge advocates must advise commanders on express and inherent command authority, including all delegated authority, authority withheld, and authority to exercise discretion to ensure readiness, good order, and discipline. This will help achieve harmony across Army components, wherein some Soldiers have multiple duty statuses.

### **Commanders Must Be Aware of Reserve Component Roles and Duty Statuses**

#### ***Reserve Component Command Authority (Title 32 versus Title 10 Status)***

The Army National Guard primarily operates in a title 32, U.S. Code, duty status while the Reserve solely performs missions while in a title 10 status—just like the Regular Army.<sup>84</sup> The Regular Army and Army Reserve are always under the command and control of the President.<sup>85</sup> The Regular Army consists of full-time units ready to

employ land power,<sup>86</sup> and it relies heavily on the Reserve component as a total force multiplier.<sup>87</sup> The Reserve provides half of the Army’s sustaining units and a good portion of mobilization capability.<sup>88</sup>

#### ***The Reserve***

The Army Reserve originated in the twentieth century from Congress’s constitutional authority “to raise and support Armies.”<sup>89</sup> Reserve component Soldiers receive the same initial basic and advanced training as the Regular Army.<sup>90</sup> After completing initial training, however, Reserve component Soldiers return to their civilian jobs (and lives) and conduct military duty and training one weekend a month and two weeks annually.<sup>91</sup> The Reserve is under the military command and control of a three-star commander who has single, unified command authority both as the commanding general, U.S. Army Reserve Command (USARC), and the chief of the Army Reserve (CAR). While USARC is a direct reporting unit to the U.S. Forces Command, the CAR reports directly to the Secretary and Chief of Staff of the Army.<sup>92</sup>

This dual mission ensures the Reserve achieves its purpose: to supplement the Regular Army and joint force in an operational role by providing “trained units and qualified persons available for active duty in the Armed Forces, in time of war or national emergency” and filling “the needs of the Armed Forces whenever more units and persons are needed.”<sup>93</sup> While the ARNG shares this same mission, it has a second unique mission: provide trained and equipped Soldiers and units to the states and territories to protect people and property.<sup>94</sup>

#### ***The ARNG***

The ARNG has the same unit structure and equipment as the Regular Army.<sup>95</sup> Yet, a key distinction between the ARNG and Regular Army, relevant to command authority, is their title 32 and title 10 status, respectively.<sup>96</sup> The ARNG originated from colonial-era militias, which predate the Constitution.<sup>97</sup> It is a dual-hatted institution wherein citizen-Soldiers are primarily mobilized by a state governor to active-duty status to perform a state military mission or, as discussed more below, are in a title 32 status with Federal pay and benefits.<sup>98</sup>





SVCs and SVC paralegals from all three Army components (active component, Army National Guard, and Army Reserve) take a break from their SVC Regional Training to pose for a group photo outside the USARLC in Gaithersburg, MD. (Credit: 1LT Amber Lamb, USARLC)

Under state sovereignty, both statuses are under the command and control of the state governor,<sup>99</sup> who appoints an adjutant general (TAG)—a general officer—over each ARNG state and territory as its uniformed leader.<sup>100</sup> Each state or territory’s laws prescribe the TAG’s command authority and duties.<sup>101</sup> This authority is frequently used to respond to domestic emergencies.<sup>102</sup> The law provides Federal funding to the ARNG under state authority while decentralizing and leveraging its sovereignty to conduct domestic operations.<sup>103</sup>

Separate and apart from the ARNG, state defense forces organized under 32 U.S.C. § 109(c) are generally a state guard or militia unit wearing military-type uniforms indistinguishable from standard Army uniforms.<sup>104</sup> Because militia members remain under the governor’s command authority, they are not ARNG forces and cannot be federalized.<sup>105</sup> However, under applicable state laws, governors can lawfully issue orders to state defense forces to conduct law enforcement missions.<sup>106</sup> Within all the types of military status, command authority

is executed at all levels of command, to various degrees.<sup>107</sup>

Title 32 is a “middle ground” status between state and Federal operations where, despite being paid with Federal funds at the President’s request, the ARNG is under the governor’s control.<sup>108</sup> However, command authority over the ARNG changes when units are lawfully federalized,<sup>109</sup> like Reserve forces, ARNG Soldiers can also be mobilized in a title 10 status to perform Federal active duty (such as Reserve component training or a Regular Army operational mission) under the sole command and



Active and Reserve component attendees discuss their unique experiences during the integrated SVC Regional Training held 5–7 December 2023 at the USARLC in Gaithersburg, MD. In this photograph, CPT Aldavina DosSantos, Army SVC (XVIII Airborne Corps, Fort Liberty) (front-right) exchanges ideas with MAJ Keith A. McCarthy, USAR SVC Northeast regional manager (139th Legal Operations Detachment (LOD)) (left) and SFC Jessica F. Nolan, USAR SVC paralegal (139th LOD) (right). (Credit: 1LT Amber Lamb, USARLC)

control of the President and CCDRs by delegation.<sup>110</sup> By statute, the President “shall prescribe regulations, and issue orders necessary to organize, discipline, and govern the National Guard” forces mobilized in this status.<sup>111</sup> This statutory grant of authority mirrors the authority in the second militia clause, which states that Congress shall “provide for organizing, arming, and disciplin[ing] the Militia, and for governing such Part of them as may be employed in the Service of the United States.”<sup>112</sup> These similarities and the unique balance of power between the executive and legislative branches were underscored in the recent debate over the Justice Department’s Office of Legal Counsel claims that the Constitution authorizes the President to order a military attack on another country, without congressional authorization, for self-defense of an imminent attack or other important but limited interests.<sup>113</sup>

Title 10 status is an important role for the Reserve component due to the increasing number of times the Federal Government has involuntarily activated it for contingency operations.<sup>114</sup> There have been nine such activations since 1990, “including large-scale mobilizations for the Persian

Gulf War (1990–1991) and the aftermath of the September 11, 2001, terrorist attacks (2001–present), as well as for Coronavirus Disease 2019 (COVID-19) pandemic response.”<sup>115</sup> Yet command authority over Reserve component Soldiers on Federal missions is limited by its very nature (title 10, U.S. Code). For example, Federal military forces cannot assist law enforcement except in limited circumstances.<sup>116</sup> Therefore, ARNG Soldiers participating in law enforcement missions in a title 32 status fall under a unique command authority.<sup>117</sup>

#### *Dual-Status Commanders*

The requisite command authority in this title 32 situation is achieved through the President and governor approving a dual-status commander (DSC) role, where the commanding military officer serves as both a state National Guard officer under the governor’s control and a Federal Army officer under the control of the President, SECDEF, and supported COCOM—all at the same time.<sup>118</sup> This authority to simultaneously serve in a state and Federal status provides dual command authority over non-federalized National Guard forces and federalized forces through two chains of

command.<sup>119</sup> The commander of the U.S. Northern Command and the chief of the National Guard Bureau share joint management over DSCs.<sup>120</sup> The DSC command authority is specifically utilized to unify and support state and Federal forces responding to disasters and national events.<sup>121</sup> To operate within state law prohibitions and limits of command authority within each state National Guard, each state is appointed a DSC to respond to situations that cross state lines.<sup>122</sup> However, this structure (unique command authority) is lost in a deployed environment, where CCDRs only command Service members federalized in a title 10 status under the President’s chain of command.

#### ***In a Title 10 Status, the National Guard Operates under COCOM Authority***

When mobilized solely to Federal active duty, such as Defense Support to Civil Authorities, ARNG Soldiers operate under the COCOM authority of CCDRs.<sup>123</sup> Under the Goldwater-Nichols Act, CCDRs were granted the control and authority under OPCON that the Services’ respective chains of command previously possessed.<sup>124</sup> By assigning all combat forces to unified CCDRs, the Goldwater-Nichols Act removed the Joint Chiefs of Staff from the operational chain of command.<sup>125</sup> While CCDRs have OPCON over Reservists, they must coordinate with ADCON commanders (e.g., the ARNG title 32 commander with whom they share ADCON responsibility) on all discipline issues. This is important because, since fiscal year 2014, the Services have been involuntarily activating Reservists to provide global support to COCOMs for planned missions.<sup>126</sup> ADCON is not part of the command relationship; therefore, discipline matters do not fall within operational missions under OPCON.<sup>127</sup>

To support COCOMs, the President can involuntarily activate Reserve units for 365 or fewer consecutive days for operational missions to respond to “weapon[s] of mass destruction” or “a terrorist attack in the [U.S. resulting] in significant loss of life or property.”<sup>128</sup> Since September 11, 2001, “more than 420,000 Army Reserve Soldiers were mobilized. [As of 2022], nearly 8,000 Soldiers are deployed to [twenty-three] countries in direct support of [GCCs]



...<sup>129</sup> Sufficient Reserve component mobilizations under the Federal chain of command is important to CCDRs who rely heavily on the Reserve component to provide “combat ready resources”<sup>130</sup> and “build[] global partnerships” worldwide.<sup>131</sup>

### **Commanders Must Know the Key Differences in Law Applicable to Duty Status**

One important limitation on command authority is the bar to using Federal active Service members for civilian law enforcement (domestic police force) and other domestic operations without express legal authority in accordance with the Posse Comitatus Act.<sup>132</sup> However, the Posse Comitatus Act does not cover ARNG members in a title 32 status reporting to their governor.<sup>133</sup> Although the Posse Comitatus Act prevents the military from being “a threat to both democracy and personal liberty,”<sup>134</sup> statutory exceptions give the President command authority to direct Service members to suppress rebellion and civil rights violations.<sup>135</sup> Even though the DoD has established policy assigning responsibilities for defense support of civil authorities,<sup>136</sup> the courts have not determined whether the Constitution expressly grants or confers inherent “emergency authority” on military commanders to use Federal troops “to quell large-scale, unexpected civil disturbances” when “necessary” where presidential authorization is impossible.<sup>137</sup>

Whether the Posse Comitatus Act is deemed a source of command authority or limitation depends on whether the governor ordered the support or the request as part of a larger Federal mission.<sup>138</sup> In 2020, the President asked governors to send ARNG members in a title 32 status (under their respective state’s command and control) into Washington D.C. to police protests.<sup>139</sup> In 2021, the President’s Acting Defense Secretary authorized thousands of ARNG members to secure the U.S. Capitol area and help ensure a “peaceful transition of power” to the President-elect.<sup>140</sup> This is an unconventional command authority not typically conferred on the President under the Posse Comitatus Act because, except for the Washington D.C. National Guard, the ARNG “generally operate under the command of their state or territorial governor” when not federalized.<sup>141</sup> By contrast,



Active and Reserve component attendees discuss their unique experiences during the integrated SVC Regional Training held 5-7 December 2023 at the USARLC in Gaithersburg, MD. In this photograph, MAJ Amanda M. Baylor, USAR SVC deputy program manager (left), enjoys a light-hearted exchange between MAJ Daphne A. Trombley, USAR SVC Southwest regional manager (1st LOD) (middle) and CPT Gabrielle D. Bloodsaw, Army SVC (Maneuver Center of Excellence, Fort Moore) (front-right). (Credit: 1LT Amber Lamb, USARLC)

when mobilized to active duty, command and control over ARNG members shifts to Federal commanders.<sup>142</sup>

Falling under a federalized chain of command can expose Reserve component citizen-Soldiers to unique problems for which they are afforded protections under the Uniformed Services Employment and Reemployment Rights Act<sup>143</sup> and SCRA.<sup>144</sup> These laws, while applicable to duty status, do not directly affect command authority over federalized Service members. However, the issues they are designed to address can negatively impact Reserve component members’ morale and overall effectiveness as a force multiplier. Therefore, inherent command authority includes the responsibility to manage problems these Soldiers encounter because of their dual status. Judge advocates can help commanders ensure Soldiers receive the assistance they need to protect their civil rights and balance their Federal military duty with their civilian lives. For example, a comprehensive RAND study found that the four most reported issues Reserve component Families encounter post deployment are the Service member’s “mental or emotional

health, health care or medical issues, . . . civilian employment, and relationship with a spouse or partner.”<sup>145</sup> Leaders and JAs should learn about and recommend reintegration resources (ranging from informal to Federal resources) for Reserve component Families.<sup>146</sup>

### **Conclusion**

Both the President and Congress govern and regulate the Armed Forces. The President delegates command authority to Service Secretaries, down to commanding officers and subordinate commanders. This delegation structure includes CO-COMs, which have command authority over ARNG Soldiers on Federal active duty. Significant differences in command authority exist among the Regular Army, ARNG, and Reserve. Reserve component mission command authority stems from Congress’s legislative framework of training, funding, and personnel law unique to these two components. Congress funds and equips the Reserve component and can “adjust Reserve activation authorities,”<sup>147</sup> but its broad power over the



Armed Forces should not unduly restrict the President's command authority.

Commanders' powers and responsibilities are based on whether their Soldiers are serving in a title 32 versus title 10 status; each status comes with its own set of command authority. Senior JAs must help commanders acknowledge the differences between these populations both in the source of the command authority over them and in the concerns they bring with them on Federal active duty. This is important given that the Reserve component will likely continue to mobilize in large numbers for Federal operations,<sup>148</sup> as it has been transformed since the Cold War Era from a last-resort force to an integral force multiplier.<sup>149</sup> Commanders need legal advice on matters requiring their exercise of discretion, judgment, inherent authority, and assumption of risk while making decisions. They must know the designated command roles to determine applicable legal authorities and responsibilities.<sup>150</sup> Judge advocates from all components must be prepared to advise commanders in operational environments that will include federalized ARNG and Reserve members transitioning from citizen-Soldier roles to active duty.<sup>151</sup> **TAL**

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## Notes

1. DEPLOYABLE TRAINING DIV., JOINT STAFF J7, INSIGHTS AND BEST PRACTICES FOCUS PAPER: AUTHORITIES 2 (2d ed. 2016) [hereinafter *AUTHORITIES*].

2. National Defense Act Amendments, Pub. L. No. 66-242, 41 Stat. 759, 759 (1920) (codified in scattered sections of 10 U.S.C.). These are commonly referred to as: Regular Army – COMPO 1; U.S. Army National Guard – COMPO 2; and U.S. Army Reserve – COMPO 3. ARMY NAT'L GUARD BUREAU, REG. 71-1, ARMY NATIONAL GUARD FORCE PROGRAM REVIEW para. 2-1(c) (5 Apr. 2022) (C1, 27 Feb. 2023).

3. See U.S. DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY para. 1-4(i) (24 July 2020) [hereinafter *AR 600-20*].

4. U.S. DEP'T OF ARMY, DOCTRINE PUB. 6-22, ARMY LEADERSHIP AND THE PROFESSION para. 1-95 (31 July 2019) (C1, 25 Nov. 2019) [hereinafter *ADP 6-22*].

5. David R. Graham et al., *Tailoring Active Duty Commitments for Reserve Component Service Members*, in U.S. DEP'T OF DEF., THE ELEVENTH QUADRENNIAL REVIEW OF MILITARY COMPENSATION 647 (2012); U.S. DEP'T OF DEF., MILITARY COMPENSATION BACKGROUND PAPERS: COMPENSATION ELEMENTS AND RELATED MANPOWER COST ITEMS,

at i (8th ed. 2018); see also LAWRENCE KAPP & BARBARA SALAZAR TORREON, CONG. RSCH. SERV., RL30802, RESERVE COMPONENT PERSONNEL ISSUES: QUESTIONS AND ANSWERS 7, 29 (25th ed. 2021) [hereinafter *PERSONNEL ISSUES*] (describing the large mobilization of reservists that has occurred since 2001 and explaining that, due to increased mobilizations of the Reserve component in past years, Congress enacted new laws allowing reservists to retire before age sixty).

6. This assertion is based on the author's recent professional experiences as the U.S. Army Reserve Special Victims' Counsel Program Manager from 3 June 2023 to 12 June 2024.

7. *AUTHORITIES*, *supra* note 1, at 2.

8. See *id.*

9. See *ADP 6-22*, *supra* note 4, para. 1-96.

10. See RICHARD M. SWAIN & ALBERT C. PIERCE, *THE ARMED FORCES OFFICER 77* (2017) (quoting U.S. WAR DEP'T, FIELD SERVICE REGULATIONS, UNITED STATES ARMY (1923)).

11. U.S. DEP'T OF ARMY, FIELD MANUAL 6-0, COMMANDER AND STAFF ORGANIZATION AND OPERATIONS, at vii (16 May 2022).

12. 10 U.S.C. § 164(c).

13. *ADP 6-22*, *supra* note 4, para. 1-95.

14. See *id.* para. 1-97.

15. *AUTHORITIES*, *supra* note 1, at 4; see also 10 U.S.C. § 164(c)(3) ("If a commander of a combatant command at any time considers his authority, direction, or control with respect to any of the commands or forces assigned to the command to be insufficient to command effectively, the commander shall promptly inform the Secretary of Defense.").

16. U.S. CONST. art. I, § 2, cl. 1.

17. *Id.* art. I, § 8, cl. 14 (original style retained).

18. Thomas W. Stone, *Military Command Authority: A Phenomenological Study of How U.S. Army Company-Grade Leaders Experience Insubordination* 18, 45, 49 (2022) (Ph. D. dissertation, Liberty University) (on file with Liberty University). By authority derived from title 10, U.S. Code, the Secretary of the Army directly delegates command authority over Army installations. See *AR 600-20*, *supra* note 3, para. 2-5.

19. See U.S. DEP'T OF ARMY, DOCTRINE PUB. 1, THE ARMY para. 1-9 (31 July 2019) [hereinafter *ADP 1*].

20. Although "Reserve component" includes seven Reserve components of the Armed Forces (Army Reserve, Air Force Reserve, Navy Reserve, Marine Corps Reserve, Coast Guard Reserve, Army National Guard of the United States, and Air National Guard of the United States), *PERSONNEL ISSUES*, *supra* note 5, at Summary, this paper will focus solely on the Army National Guard of the United States and the Army Reserve.

21. See *id.* (discussing unique Reserve component training, funding, and personnel policies).

22. JOINT CHIEFS OF STAFF, JOINT PUB. 1-0, JOINT PERSONNEL SUPPORT, at i (1 Dec. 2020).

23. U.S. CONST. art. I, § 8 (original style retained).

24. Servicemembers Civil Relief Act of 2003 (SCRA), Pub. L. No. 108-189, 117 Stat. 2835 (codified at 50 U.S.C. §§ 3901-4043).

25. JENNIFER K. ELSEA ET AL., CONG. RSCH. SERV., R41989, CONGRESSIONAL AUTHORITY TO LIMIT MILITARY

OPERATIONS 2 (2d ed. 2013) [hereinafter *MILITARY OPERATIONS*]. Congress recently enacted a major limitation on command authority by removing the power of commanders to exercise authority over sexual assault, sexual harassment, and other covered offenses. See National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, sec. 533, 135 Stat. 1541, 1695 (2022). The Secretary of the Army was directed to stand up a new division of special trial counsel. *Id.* The Lead Special Trial Counsel supervises the Office of Special Trial Counsel as a direct report to the Secretary of the Army. Headquarters, U.S. DEP'T of Army, Gen. Order No. 2022-10 (6 July 2022); see also UCMJ art. 824a (2022). This takes prosecuting sexual assault and all covered offenses out of the operational chain of command. Another example of limitations on command authority is the Army directive barring commanders from disciplining sexual assault victims for minor collateral misconduct. U.S. DEP'T OF ARMY, DIR. 2022-10, SAFE-TO-REPORT FOR VICTIMS OF SEXUAL ASSAULT para. 4 (6 July 2022); see also William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, sec. 539A, 134 Stat. 3388, 3607 (2021) (codified in scattered sections of 10 U.S.C.).

26. *MILITARY OPERATIONS*, *supra* note 25, *passim* (explaining that Congress could use its war powers or powers of the purse to restrict or terminate U.S. participation in operations or hostilities).

27. U.S. CONST. art. II, § 2 (original style retained).

28. *Id.*

29. See *id.* The President's broad authority includes commissioning U.S. officers. *Id.* art. II, § 3.

30. See *generally id.* art. II, § 1.

31. SWAIN & PIERCE, *supra* note 10, at 83.

32. *MILITARY OPERATIONS*, *supra* note 25, at 22.

33. SWAIN & PIERCE, *supra* note 10, at 83.

34. See ABIGAIL A. GRABER, CONG. RSCH. SERV., R46738, EXECUTIVE ORDERS: AN INTRODUCTION (5th ed. 2021). As a prime example of EO action, the President implements statutory military law (UCMJ) through the *Manual for Courts-Martial* (MCM). MANUAL FOR COURTS-MARTIAL, UNITED STATES (2024). First promulgated as Exec. Order No. 12473, 49 Fed. Reg. 17149 (Apr. 13, 1984), the MCM contains five parts and twenty-two appendices.

35. Recent examples of how Presidents have commanded the Armed Forces both illustrate how they have viewed and exercised their command authority and carry the separation of powers debate into modern-day scenarios. JENNIFER K. ELSEA, CONG. RSCH. SERV., IF10534, DEFENSE PRIMER: PRESIDENT'S CONSTITUTIONAL AUTHORITY WITH REGARD TO THE ARMED FORCES (10th ed. 2022) [hereinafter *PRESIDENTIAL AUTHORITY*]. In 2011, President Obama "ordered U.S. military forces to take action as part of an international coalition to enforce U.N. Security Council Resolution 1973"; in 2018, President Trump "ordered airstrikes against three chemical weapons facilities in Syria, where U.S. troops were engaged in armed conflict against the Islamic State"; in 2020, President Trump "ordered a strike against an Iranian target in Iraq, killing Qasem Soleimani, the head of the Islamic Revolutionary Guard Corps-Quds Force"; and in 2021, President Biden "ordered airstrikes against Iran-backed militia targets in Iraq and Syria in response to rocket attacks against U.S. targets in Iraq." *Id.* at 2. President Clinton argued he had constitutional authority as Commander

in Chief to use military force to protect the Nation and national interests, and President Biden argued he had the same authority to conduct foreign relations and did not need Congress's authorization to use military force. *Id.*; see also Robert Dallek, *Power and Presidency, from Kennedy to Obama*, SMITHSONIAN, Jan. 2011, at 36.

36. *Executive Orders*, HERITAGE EXPLAINS, <https://www.heritage.org/political-process/heritage-explains/executive-orders> (last visited Mar. 6, 2024).

37. See Zachary S. Price, *Congress's Power over Military Offices*, 99 TEXAS L. REV. 491, 504, 541 (2021) (discussing how Congress has recognized the President's command authority under the Constitution).

38. MILITARY OPERATIONS, *supra* note 25, at 34, 36.

39. See PRESIDENTIAL AUTHORITY, *supra* note 35, at 2.

40. *Id.*

41. *The Executive Branch*, POL'Y CIRCLE, [https://www.thepolicycircle.org/brief/the-executive-branch/#section\\_3](https://www.thepolicycircle.org/brief/the-executive-branch/#section_3) (last visited Mar. 6, 2024) [hereinafter POL'Y CIRCLE].

42. This concept applies similarly at the state level when, during times of crisis (such as natural disasters or public health emergencies), governors with already sweeping powers temporarily exercise expanded executive powers into roles typically reserved for legislatures (e.g., waiving statutory requirements). See *id.*

43. *War Powers Resolution of 1973*, RICHARD NIXON PRESIDENTIAL LIBR. & MUSEUM (July 27, 2021), <https://www.nixonlibrary.gov/news/war-powers-resolution-1973> (discussing the War Powers Resolution of 1973, "a congressional resolution designed to limit the U.S. [P]resident's ability to initiate or escalate military actions abroad").

44. See U.S. CONST. arts. I, II.

45. See *Delegation of Legislative Power*, JUSTIA, <https://law.justia.com/constitution/us/article-1/04-delegation-legislative-power.html> (last visited Mar. 6, 2024) (detailing the legislature's ability to delegate its power).

46. See AUTHORITIES, *supra* note 1, at 1.

47. 3 U.S.C. § 301.

48. Exec. Order No. 12765, 56 Fed. Reg. 27401 (June 11, 1991). While the President can also effectively use EOs for policymaking, regular turnover across the executive branch can disrupt the exercise of delegated command and prevent high-level commanders from tackling major challenges facing the Department of Defense and Services. See POL'Y CIRCLE, *supra* note 41 (describing how a sitting President can overturn a previous President's EO with "the stroke of a pen").

49. 10 U.S.C. § 164.

50. See 10 U.S.C. § 162; *Chairman of the Joint Chiefs of Staff (CJCS)*, JOINT CHIEFS OF STAFF, <https://www.jcs.mil/About/The-Joint-Staff/Chairman> (last visited May 22, 2024).

51. U.S. DEP'T OF ARMY, FIELD MANUAL 3-94, ARMIES, CORPS, AND DIVISION OPERATIONS para. 1-87 (23 July 2021) [hereinafter FM 3-94].

52. DEPLOYABLE TRAINING DIV., JOINT STAFF J7, INSIGHTS AND BEST PRACTICES FOCUS PAPER: JTF C2 AND ORGANIZATION 2 (2017).

53. *Id.* For purposes other than OPCON, the President's chain of command runs through the SECDEF to the SECARMY who has administrative control (ADCON) of all Department of the Army members for institutional (support) missions. *Id.*; *Understanding the*

*Army's Structure*, U.S. ARMY, <https://www.army.mil/organization> (last visited Mar. 6, 2024).

54. See 10 U.S.C. § 164(c)-(e); ANDREW FEICKERT & BARBARA SALAZAR TORREON, CONG. RSCH. SERV., IF10544, DEFENSE PRIMER: DEPARTMENT OF THE ARMY AND ARMY COMMAND STRUCTURE (11th ed. 2024); *Combatant Commands*, U.S. DEP'T OF DEF., <https://www.defense.gov/About/Combatant-Commands> (last visited May 22, 2024).

55. 10 U.S.C. § 164(a)-(b); U.S. DEP'T OF DEF., DIR. 5100.01, FUNCTIONS OF THE DEPARTMENT OF DEFENSE AND ITS MAJOR COMPONENTS para. 4(b)(3) (21 Dec. 2010) (C1, 17 Sept. 2020).

56. 10 U.S.C. § 164(c)(2)(A). The Secretary of Defense assigns the CJCS to oversee COCOM operations. See JOINT CHIEFS OF STAFF, JOINT PUB. 3-35, JOINT DEPLOYMENT AND REDEPLOYMENT OPERATIONS, at II-2 (31 Mar. 2022).

57. 10 U.S.C. § 164(c)(E).

58. JOINT CHIEFS OF STAFF, DoD DICTIONARY OF MILITARY AND ASSOCIATED TERMS 33 (2024) (defining "combatant command (command authority)").

59. U.S. DEP'T OF ARMY, DOCTRINE PUB. 3-28, DEFENSE SUPPORT OF CIVIL AUTHORITIES para. 4-24 (31 July 2019) [hereinafter ADP 3-28].

60. AUTHORITIES, *supra* note 1, at 3.

61. *Id.* "These matters normally remain within the title 10 authorities of the various armed [S]ervice branches." *Id.* Within OPCON, tactical control (TACON) of assigned or attached forces is delegable to subordinate commanders and limited to the "detailed and, usually, local direction and control of movements or maneuvers necessary to accomplish missions or tasks assigned." *Id.*

62. See FM 3-94, *supra* note 51, para. 1-87 ("The [ADCON] chain of command runs from the President to the Secretary of Defense, to the secretaries of the Military Departments, and, as prescribed by the secretaries to the service commanders of U.S. forces. Each Military Department operates under the authority, direction, and control of the secretary of that Military Department.").

63. U.S. DEP'T OF ARMY, FIELD MANUAL 3-0, OPERATIONS, at 4-60 (1 Oct. 2022) [hereinafter FM 3-0]; U.S. DEP'T OF ARMY, REG. 10-87, ARMY COMMANDS, ARMY SERVICE COMPONENT COMMANDS, AND DIRECT REPORTING UNITS para. 1-1(f)(4) (11 Dec. 2017) [hereinafter AR 10-87].

64. AR 10-87, *supra* note 63, para. 1-1(f), (g).

65. *Unified Commands, CENTCOM & Components*, U.S. CENT. COMMAND, <https://www.centcom.mil/ABOUT-US/COMPONENT-COMMANDS> (last visited May 21, 2024).

66. See U.S. DEP'T OF ARMY, FIELD MANUAL 3-84, LEGAL SUPPORT TO OPERATIONS paras. 2-33 to 2-35 (1 Sept. 2023) [hereinafter FM 3-84].

67. U.S. GOV'T ACCOUNTABILITY OFF., GAO-16-652R, DEFENSE HEADQUARTERS: GEOGRAPHIC COMBATANT COMMANDS RELY ON SUBORDINATE COMMANDS FOR MISSION MANAGEMENT AND EXECUTION 2 (2016).

68. Ufot B. Inamete, *The Unified Combatant Command System*, MARINE CORPS UNIV. PRESS (Jan. 7, 2022), <https://www.usmcu.edu/Outreach/Marine-Corps-University-Press/Expeditions-with-MCUP-digital-journal/The-Unified-Combatant-Command-System>.

69. See ANDREW FEICKERT & LAWRENCE KAPP, CONG. RSCH. SERV., R43808, ARMY ACTIVE COMPONENT (AC)/RESERVE COMPONENT (RC) FORCE MIX: CONSIDERATIONS AND OPTIONS FOR CONGRESS 2 (3d ed. 2014) [hereinafter AC/RC]. Reserve component units called to active duty or Federal service in the continental United States fall under their relative U.S. Army command (e.g., FORSCOM). FM 3-84, *supra* note 66, app. B, para. B-1.

70. RSRV. FORCES POL'Y BD., RFPB REPORT FY17-01, IMPROVING THE TOTAL FORCE USING THE NATIONAL GUARD AND RESERVES 54 (2016).

71. JOINT CHIEFS OF STAFF, JOINT PUB. 3-30, JOINT AIR OPERATIONS, at I-3 (17 Sept. 2021).

72. ADP 1, *supra* note 19, para. 2-37.

73. DEPLOYABLE TRAINING DIV., JOINT STAFF J7, INSIGHTS AND BEST PRACTICES FOCUS PAPER: MISSION COMMAND 1 (2d ed. 2020).

74. *Id.*

75. U.S. DEP'T OF ARMY, DOCTRINE PUB. 6-0, MISSION COMMAND: COMMAND AND CONTROL OF ARMY FORCES para. 1-14 (31 July 2019) [hereinafter ADP 6-0].

76. AUTHORITIES, *supra* note 1, at 7.

77. ADP 6-0, *supra* note 75, para. 1-77.

78. Exec. Order No. 12333, 46 Fed. Reg. 59941 (Dec. 4, 1981).

79. See U.S. DEP'T OF ARMY, DOCTRINE PUB. 5-0, THE OPERATIONS PROCESS para. 1-37 (31 July 2019) (explaining that "[c]ommanders describe their visualization in doctrinal terms" through OPORDs and FRAGORDs). As a tool for mission planning and execution, commanders can use an authorities matrix to identify authorities granted and required. AUTHORITIES, *supra* note 1, at 8.

80. See AR 600-20, *supra* note 3, para. 2-1.

81. ADP 6-0, *supra* note 75, at vii (explaining that "[t]hrough command and control, commanders provide purpose and direction to integrate all military activities towards a common goal—mission accomplishment").

82. See AR 600-20, *supra* note 3, para. 2-5. This includes taking corrective measures such as directing a deficient Soldier to undergo more training or instruction. See *id.* para. 4-6; Memorandum from Sec'y Def. to Senior Pentagon Leadership et al., subject: Rescission of August 24, 2021 and November 30, 2021 Coronavirus Disease 2019 Vaccination Requirements for Members of the Armed Forces (10 Jan. 2023).

83. AR 600-20, *supra* note 3, para. 5-2(b)(2)(d).

84. FM 3-84, *supra* note 66, para. 2-36.

85. ADP 1, *supra* note 19, paras. 1-8, 1-11.

86. See FM 3-94, *supra* note 51, para. 3-2.

87. See U.S. ARMY RSRV., 2012 POSTURE STATEMENT, AN ENDURING OPERATIONAL ARMY RESERVE: PROVIDING INDISPENSABLE CAPABILITIES TO THE TOTAL FORCE 5 (2012).

88. FM 3-84, *supra* note 66, para. 2-36.

89. U.S. CONST. art. 1, § 8, cl. 12; PERSONNEL ISSUES, *supra* note 5, at 6.

90. *Army Reserve*, TODAY'S MIL., <https://www.todaysmilitary.com/ways-to-serve/service-branches/army-reserve> (last visited Mar. 11, 2024).

91. See PERSONNEL ISSUES, *supra* note 5, at 1-3.

92. 10 U.S.C. § 7038; Headquarters, Dep't of Army, Gen. Order No. 2011-02 (4 June 2011) ("Redesignation and Assignment of the United States Army Reserve

Command as a Subordinate Command of the United States Army Forces Command”).

93. 10 U.S.C. § 10102.

94. See *About the Guard*, NAT’L GUARD, <https://www.nationalguard.mil/About-the-Guard> (last visited May 21, 2024).

95. FM 3-84, *supra* note 66, para. 2-36. “Unlike the active component’s two-year cycle, the transitional cycles for the Army Reserve consist of one year of modernization and three years of training, followed by a one-year mission.” U.S. ARMY RSRV., 2022 POSTURE STATEMENT, AMERICA’S GLOBAL OPERATIONAL RESERVE FORCE 8 (2022) [hereinafter 2022 POSTURE STATEMENT].

96. *Supra* note 84 and accompanying text.

97. PERSONNEL ISSUES, *supra* note 5, at 6.

98. ADP 1, *supra* note 19, para. 1-9. A state military mission example is civil disorder response. See *id.*

99. *Id.*

100. *Id.*; 32 U.S.C. § 314.

101. See 32 U.S.C. § 314.

102. PERSONNEL ISSUES, *supra* note 5, at 1.

103. Jeffrey W. Burkett, *Command and Control of Military Forces in the Homeland*, 51 JOINT FORCE Q., 4th Quarter, 2008, at 130, 131. The Secretary of Defense can “provide funds to a [g]overnor to employ National Guard units or members to conduct homeland defense activities.” 32 U.S.C. § 902.

104. 32 U.S.C. § 109(c); ADP 3-28, *supra* note 59, para. 3-20; see also U.S. DEP’T OF DEF., DIR. 5105.83, NATIONAL GUARD JOINT FORCE HEADQUARTERS – STATE (NG JFHQS-STATE) (5 Jan. 2011) (C2, 31 Mar. 2020).

105. ADP 3-28, *supra* note 59, para. 3-20.

106. *Id.*

107. See, e.g., AR 600-20, *supra* note 3, para. 2-1.

108. Joseph Nunn, *The Posse Comitatus Act Explained*, BRENNAN CTR. FOR JUST. (Oct. 14, 2021), <https://www.brennancenter.org/our-work/research-reports/posse-comitatus-act-explained>. This issue is explored later in this article. When non-federalized members of the ARNG participate in joint training or maneuver with Regular Army or Reserve members in a Federal status, command authority remains only with applicable Federal officers, regardless of any higher rank of participating ARNG members. 32 U.S.C. § 317.

109. ADP 3-28, *supra* note 59, para. 2-54.

110. *Id.*; see also 10 U.S.C. §§ 10105, 12406. This is an important distinction between the Regular Army as a pure Federal entity and the ARNG as both a Federal and state entity. See PERSONNEL ISSUES, *supra* note 5, at 15.

111. 32 U.S.C. § 110.

112. U.S. CONST. art. I, § 8, cl. 16 (original style retained).

113. See Charlie Savage, *Presidential War Powers: Ordering Military Attacks without Congress*, N.Y. TIMES (Sept. 9, 2019), <https://www.nytimes.com/interactive/2019/us/politics/presidential-war-powers-executive-power.html>.

114. U.S. GOVT ACCOUNTABILITY OFF., GAO-09-688R, MILITARY PERSONNEL: RESERVE COMPONENT SERVICEMEMBERS ON AVERAGE EARN MORE INCOME WHILE ACTIVATED 1 (2009) (explaining that because of the Reserve component’s increased contingency operations, Congress

directed a review of the Reserve component’s compensation while serving on active duty); see also PERSONNEL ISSUES, *supra* note 5, at Summary; 10 U.S.C. § 12301.

115. PERSONNEL ISSUES, *supra* note 5, at Summary.

116. See 18 U.S.C. § 1385.

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119. *Id.* (explaining that a DSC is a member of the Army National Guard and a commissioned officer in the Regular Army and must receive specialized training to become certified for the role).

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143. Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), Pub. L. No. 103-353, sec. 2(a), 108 Stat. 3149, 3149 (codified at 38 U.S.C. §§ 4301-4334).

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## AROUND THE CORPS

Students in the 72d Graduate Course participate in a game of ultimate frisbee at The Judge Advocate General's Legal Center and School in Charlottesville, VA. (Credit: MAJ Jonathan L. Kopecky)







U.S. Army Reserve Soldiers assigned to the 81st Readiness Division and 4th Battalion Army Reserve Careers Group complete a fitness challenge organized by the Army Reserve H2F team and the 81st Readiness Division at Fort Jackson, SC. (Credit: SFC Crystal Harlow)

# Closing Argument

## Counsel for Wellness

### A Strategic Imperative for Reservists

By Colonel William D. Ward

At any one time, the Army has employed the equivalent of thirteen brigade combat teams of non-deployable Soldiers.<sup>1</sup> In 2016, I became part of a significant cohort of this group as a Soldier with a preventable musculoskeletal injury.<sup>2</sup> It was 0645 on Monday, 17 February 2016, at Schofield Barracks when I fell while running. I lay on the ground, bewildered, unable to feel my right foot. As a young major, I believed I

could muscle my way through any challenge. But that morning, I had fallen hard, my toes were numb, and my back throbbed relentlessly. Mind racing, I could not figure out what had happened or how I had injured myself. I limped back to Brigade Headquarters, seeking medical attention at the clinic. Within forty-eight hours, my situation escalated to requiring emergency back surgery.

During recovery, I discovered that a few days prior to my fall, during a half marathon trail race in the Oahu mountains, I had torn a disc in my lower back. The inflammation had pinched the nerves in my foot. I would later learn that stretching better and engaging in specific core exercises could have prevented this injury. But I was still very lucky. Because I fell so close to the time of my initial injury, I found the time to go to the clinic that same morning, and, with many thanks to an exceptional brigade surgeon and the Tripler Medical Center team, I was able to fully recover and return to duty. Many Soldiers are not so fortunate. My injury opened my eyes to the importance of fostering both physical and mental health across our enterprise.

My hope is that this article will serve as a call to action for Judge Advocate General's (JAG) Corps leaders, specifically those in the Reserve component (RC) (the Army



U.S. Army Reserve Soldiers receive training during the inaugural Holistic Health and Fitness Summit held at the 81st Readiness Division's headquarters in Fort Jackson, SC. (Credit: SFC Crystal Harlow)

Reserve and National Guard), to counsel our Soldiers and make their holistic health our priority—to help them make better choices and avoid my mistakes and the mistakes of so many others. Aiding in this effort, the Chief of the Army Reserve knows that the Holistic Health and Fitness (H2F) program is crucial to Soldier readiness; a robust program to support the priority is coming to the RC. But full implementation of this initiative will take years, and this is not a priority that can wait. Therefore, leaders must take the first step by integrating holistic health into their routine counseling and engagements with our people now.

### **Strategic Environment: Why Reserve H2F Matters**

*“Lawyers in the Army Reserve were to become the muscle of Corps strength in the several great mobilizations of forces during [the twentieth century] . . . but there was never enough when the Army expanded.”<sup>3</sup>*

Holistic Health and Fitness is the Army's primary investment in Soldier readiness and lethality, and it offers the potential to improve Soldiers' lives and increase the readiness across the Army.<sup>4</sup>

Tired or overwhelmed Soldiers retain little to none of the lessons of even the most excellent training. Likewise, any advantage gained by having an available senior judge advocate (JA) with years of prior deployments is futile if their blood pressure is so high that a doctor will not medically clear them to support the Joint Force. The challenge for the RC to meet this worthy objective becomes, how? How does the RC find the time and resources required to make it happen with only thirty-eight training days per year to meet the same standards as the Regular Army?

Even the most steadfast supporters of the H2F initiative may wonder whether this initiative can realistically fit into the resource-constrained organizations comprising our RC, which already has so many competing obligations. However, rather than detracting from the mission, H2F is critical to generating healthy, deployable Soldiers. As the adage goes, 80 percent of success is showing up.<sup>5</sup> Reserve Component personnel *must* be healthy in mind *and* body in order to show up and meaningfully contribute as a force multiplier in our Nation's upcoming wars.

The RC's readiness has crucial strategic implications far beyond that of Soldier well-being. Currently, the RC comprises the majority of the Army's total operational force.<sup>6</sup> In contrast, during the Cold War, the RC existed as a strategic reserve, employed as a last-resort force and deterrent against the Soviet Union simply by existing.<sup>7</sup> During that era, training, equipment, and readiness for Army Reserve units at that time were often consciously, if not deliberately, well below active component levels of readiness.<sup>8</sup> When the Army attempted to quickly operationalize 24,500 strategic Reserve Soldiers in response to the 1968 Tet Offensive in Vietnam, the consequence was units incapable of meeting “minimum combat readiness standards.”<sup>9</sup> This situation highlights both how different the Army of that time was and the critical role the RC fills in today's more resource-constrained total force.

This strategic reserve paradigm of the RC ended more than a generation ago. National security scholar Dr. Jacquelyn Schneider aptly notes that the Army Reserve transformed into an “active-duty light” operational force generator after



9/11.<sup>10</sup> This shift meant “reservists had to meet active-duty training standards, and subsequently spent more time on duty and less time as civilians.”<sup>11</sup> In fact, the operational Reserve became—almost overnight by Department of Defense (DoD) standards—so important that by 2005, the Government Accountability Office found that the DoD could not “meet its global commitments without sizable participation from among its current 1.2 million [RC] members.”<sup>12</sup> This need continues today; the consensus among Army leadership is that “the [active] Army is too small to execute the National Defense Strategy at less than significant risk.”<sup>13</sup> The JAG Corps is not immune from this paradigm shift. Thus, any future uptick in the operational demands of our JAG Corps, when coupled with a smaller active component population, will require significant support from the JAG Corps RC.

Today, the RC is integral to the JAG Corps and greater Army’s mission success, but figuring out how to maintain our citizen Soldiers’ readiness when the available resources and time are limited compared to the active components is still a work in progress.<sup>14</sup> Reserve component Soldiers are often older, have a higher body mass index, and are less physically fit than their active counterparts.<sup>15</sup> These issues are arguably more acute for legal professionals, who may face more well-being challenges than other professionals.<sup>16</sup> Add professional civilian stressors to the requirements of their Reserve duties and subtract time available to focus on individual wellness, and burn-out is a calculable risk to the force.

Adding H2F should not be considered from the risk-averse calculation of adding to an already full Reserve plate. The RC has nearly 90 percent less time in uniform annually than its active component counterparts, and a large portion of that time is far away from active-duty resource centers where H2F services are widely available.<sup>17</sup> Additionally, many RC units drill at locations without the health professionals, tracks, gyms, and cordoned-off roads available to our active component partners. As a result, H2F in the RC should be considered, when meaningfully embraced, to offer an innovative and efficient service model that reduces and reallocates resources to

contribute to gains in readiness; an ounce of prevention is worth a pound of cure down the road.

A recent pilot study by the Army Reserve proves that units that provide high-value training on H2F are doing better than those that continue to do the same physical training we have seen for the last twenty years.<sup>18</sup> In 2019, the Headquarters of the Department of the Army directed the RC to conduct independent pilots considering RC-specific challenges, such as prolonged training timelines for part-time Soldiers, geographically dispersed populations, and competing civilian job priorities.<sup>19</sup> The Army Reserve pilot program at this Readiness Division ran for two years. The program employed various implementation strategies, such as virtual and face-to-face engagements, access to H2F training materials, and access to training and education programs along with H2F professionals for individual support. Moreover, an annual health summit was organized as part of the this program, which drew over 800 attendees during its last iteration. The summit trained Soldiers to implement the initiative better within their units. The findings of the Army Reserve’s pilot program revealed significant improvements over the control groups. As a result, the RC plans to create twenty-eight H2F programs to expand the pilot across the force.

The challenge is that these pilot programs may not be completely implemented across the RC for years to come, and, for many of our people, getting to an active-duty H2F facility may only happen a few times a year.<sup>20</sup> However, encouraging RC members to take advantage of the H2F resources that already exist and self-implementing concepts can start today.

### **Systematize Wellness through Counseling: A Tiny but Mighty Step**

*“You do not rise to the level of your goals. You fall to the level of your systems. Your goal is your desired outcome. Your system is the collection of daily habits that will get you there.”<sup>21</sup>*

Judge advocates’ supervisors have a critical role in creating time and space within their offices and commands to support H2F, improve the health of their people, and ultimately make the Army more ready to fight and win our Nation’s wars.

Given the compelling benefits of H2F and a formal RC H2F program still under development, RC leaders must act in the interim. However, with drill weekends already filled with competing requirements, leaders need to take an efficient first step to move beyond acknowledging H2F as important. A simple and immediately actionable first step is adding H2F into leader counseling.

Reserve component leaders should incorporate H2F SMART (specific, measurable, achievable, relevant, time-bound) goals with their Soldiers through the formal counseling process.<sup>22</sup> Indeed, the Army Reserve’s H2F pilot program includes helpful developmental counseling focused on this topic as part of its H2F starter kit.<sup>23</sup> While this type of formal officer evaluation report counseling is preferred, it often does not happen regularly enough to support the H2F process. But, counseling does not always have to be formal.

### **Make Counseling Tiny**

Leaders can still get a lot of mileage out of micro counseling. In his amazing book, *Tiny Habits*, BJ Fogg reveals the remarkable impact of making small, deliberate changes to your daily routine.<sup>24</sup> Instead of setting the goal of flossing daily, users of this method are encouraged to consider flossing one tooth a success. In the realm of counseling, the goal for supervisors could be to have a five-minute check-in with everyone on their team once a month. In my experience, asking our Soldiers’ open-ended questions about stress, sleep, support networks, and fitness, and listening generate amazing results. By doing this regularly, supervisors can create a self-reinforcing battle rhythm where their team comes to expect this after-action review on their holistic health, which generates more engagement by these teammates in taking care of themselves over the month and helps the supervisor identify when they need outside resources. Even if all a leader does is listen and create an expectation that holistic health will be discussed regularly, positive results can follow because of the observer effect.

### **Make It a Priority You Track**

As described in the *Harvard Business Review*, people are motivated to work harder when

others are watching.<sup>25</sup> People run faster, are more creative, and think harder about problems when observed.<sup>26</sup> We intuitively know this is the case because, prior to our transition from the Army Physical Fitness Test to the Army Combat Fitness Test (ACFT), leaders focused on push-ups, sit-ups, and running. Soldiers performed well in these physical tasks; no one focused on their shuttle run skills until the ACFT appeared. However, Soldiers now know that these new events will be observed and tracked and, as a result, are focusing on improving in them. Thus, broadening our health goals would enable a JA supervisor to effectively manage and prioritize health and provide Service members with better tools to improve and maintain their overall wellness.

## Conclusion

*“The Army Reserve has this fundamental imperative to be ready enough for the next fight, . . . but not so ready that we can’t keep meaningful civilian jobs and a healthy family lifestyle.”<sup>27</sup>*

In conclusion, H2F prioritizes our people’s health and is a strategic imperative. Neither mission requirements nor leadership imperatives afford the luxury of letting Soldiers learn this lesson the way I did as a young major in the mountains of Hawaii. All supervisors of JAG Corps personnel have a vital role in creating a culture of fitness. Counseling is one tool within our offices and commands to support this goal via H2F, improve the health of our people, and ultimately make the Army more ready. Through engaged coaching, which emphasizes the importance of health and helps Soldiers find and utilize the resources that improve it, we can build a more ready and healthier RC. Do not wait for H2F to find you or your Soldiers limping along after a preventable injury or health issue; take the first step and start the conversation with your people. **TAL**

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*COL Ward is the Chief of Reserve Personnel Management in the Office of The Judge Advocate General at the Pentagon.*

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## Notes

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## AROUND THE CORPS

Students of Direct Commissioning Course Class 001-34 work together as a team to navigate obstacles at the Leaders Reaction Course. (Credit: CW2 Levi Ramos)





## AROUND THE CORPS

MAJ LeBuria (LB) Johnson completes the sprint-drag-carry event during an Army Combat Fitness Test in Charlottesville, VA. (Credit: MAJ Jonathon L. Kopecky)



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