



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.

117. Christopher M. Schnaubelt, *The National Guard Can Do It, but That Doesn’t Mean It’s a Good Idea*, MIL. TIMES (Mar. 18, 2021), <https://www.militarytimes.com/opinion/commentary/2021/03/18/the-national-guard-can-do-it-but-that-doesnt-mean-its-a-good-idea>.

118. NAT’L GUARD, DUAL STATUS COMMANDER (DSC) FACT SHEET (n.d) [hereinafter DSC FACT SHEET], [https://www.nationalguard.mil/Portals/31/Resources/Fact%20Sheets/DSC%20Fact%20Sheet%20\(Nov.%202020\).pdf](https://www.nationalguard.mil/Portals/31/Resources/Fact%20Sheets/DSC%20Fact%20Sheet%20(Nov.%202020).pdf).

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).

120. *Id.*

121. ADP 3-28, *supra* note 59, para. 3-57.

122. DSC FACT SHEET, *supra* note 118.

123. ADP 3-28, *supra* note 59, paras. 2-51, 3-48, 4-24.

124. See Goldwater–Nichols Department of Defense Reorganization Act of 1986, Pub. L. No. 99-433, § 211, 100 Stat. 992, 1011 (1986).

125. See *The Joint Staff*, THE JOINT STAFF, <https://www.jcs.mil/About> (last visited Mar. 11, 2024).

126. PERSONNEL ISSUES, *supra* note 5, at Summary; see also FM 3-0, *supra* note 63, para. B-5.

127. Andre M. Coln, *Command Authority: A Guide for Senior Enlisted Leaders*, NCO J., Oct. 2022, at 1; AR 10-87, *supra* note 63, para. 1-1(f)(4)(a); see also U.S. DEP’T OF DEF., 8260.03-V2, GLOBAL FORCE MANAGEMENT DATA INITIATIVE (GFM DI) IMPLEMENTATION: THE ORGANIZATIONAL AND FORCE STRUCTURE CONSTRUCT (OFSC) encl. 3, fig.1 (14 July 2011).

128. 10 U.S.C. § 12304(a)-(b).

129. 2022 POSTURE STATEMENT, *supra* note 95, at 2.

130. *U.S. National Guard’s Domestic and Global Engagement: FPC Briefing: General Daniel R. Hokanson, Chief of the National Guard Bureau*, U.S. DEP’T OF STATE (Sept. 8, 2022), <https://www.state.gov/briefings-for-foreign-press-centers/national-guard-domestic-and-global-engagement>.

131. Jim Greenhill, *Combatant Commanders: National Guard Builds Global Partnerships, Proven on Battlefield*, NAT’L GUARD (Mar. 7, 2014), <https://www.nationalguard.mil/News/Article/575557/combatant-commanders-national-guard-builds-global-partnerships-proven-on-battle>.

132. JENNIFER K. ELSEA, CONG. RSCH. SERV., R42659, THE POSSE COMITATUS ACT AND RELATED MATTERS: THE USE OF THE MILITARY TO EXECUTE CIVILIAN LAW (8th ed. 2018) [hereinafter POSSE COMITATUS]; see also 18 U.S.C. § 1385.

133. Nunn, *supra* note 108.

134. *Id.*

135. See Joseph Nunn, *The Insurrection Act Explained*, BRENNAN CTR. FOR JUST. (Apr. 21, 2022), <https://www.brennancenter.org/our-work/research-reports/insurrection-act-explained>.

136. See U.S. DEP’T OF DEF., DIR. 3025.18, DEFENSE SUPPORT OF CIVIL AUTHORITIES (DSCA) (29 Dec. 2010) (C2, 19 Mar. 2018).

137. *Id.* para. 4(k); see also Nunn, *supra* note 108.

138. POSSE COMITATUS, *supra* note 132.

139. Nunn, *supra* note 108.

140. Jim Garamone, *DoD Details National Guard Response to Capitol Attack*, NAT’L GUARD (Jan. 8, 2021), <https://www.nationalguard.mil/News/Article/2466077/dod-details-national-guard-response-to-capitol-attack>.

141. Elizabeth Goitein & Joseph Nunn, *DC’s National Guard Should Be Controlled by Its Mayor, Not by a President Like Trump*, BRENNAN CTR. FOR JUST. (Dec. 3, 2021), <https://www.brennancenter.org/our-work/analysis-opinion/dcs-national-guard-should-be-controlled-its-mayor-not-president-trump>.

142. See *supra* notes 110-112 and accompanying text.

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).

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

145. LAURA WERBER ET AL., RAND CORP., SUPPORT FOR THE 21ST-CENTURY RESERVE FORCE: INSIGHTS TO FACILITATE SUCCESSFUL REINTEGRATION FOR CITIZEN WARRIORS AND THEIR FAMILIES 56-57 (2013).

146. See *id.* at 119-20.

147. AC/RC, *supra* note 69, at 2.

148. See U.S. ARMY RSRV., 2012 POSTURE STATEMENT, AN ENDURING OPERATIONAL ARMY RESERVE: PROVIDING INDISPENSABLE CAPABILITIES TO THE TOTAL FORCE 5 (2012); MICHAEL E. LINICK ET AL., RAND CORP., RR-1516-OSD, A THROUGHPUT-BASED ANALYSIS OF ARMY ACTIVE COMPONENT/RESERVE COMPONENT MIX FOR MAJOR CONTINGENCY SURGE, at ix (2019).

149. See KATHRYN R. COKER, U.S. ARMY RSRV., THE INDISPENSABLE FORCE: THE POST-COLD WAR OPERATIONAL ARMY RESERVE, 1990-2010, at 360 (Lee S. Harford, Jr. et al. eds., 2013); James M. Inhofe National Defense Authorization Act for Fiscal Year 2023, Pub. L. No. 117-263, 136 Stat. 2395 (2022) (authorizing the President’s requested end strengths for the Reserve component and limiting two exceptions to FY2022 levels).

150. See AUTHORITIES, *supra* note 1, at 2.

151. See FM 3-84, *supra* note 66, para. 2-12.

## 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)

