Of "Independence" and "Guardrails"…the Military Left's Lamentable Response to SecDef's Firing of Service TJAGS

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On February 24, SecDef Hegseth fired the Army and Air Force's top uniformed lawyers (The Judge Advocates General or "TJAG" for short). Immediately thereafter, two retired Air Force JAG Major Generals, Charles J. Dunlap and Steven J. Lepper, published their unified outrage online. Their well-timed writings were aimed to stoke the political left's faux furor occasioned by President Trump's firing of JCS Chairman Brown and CNO Franchetti.

The comments of both retired generals should be rejected for the simple reason that they ignore the most basic qualification for being an attorney, military or otherwise--an attorney must have the confidence and trust of the client. This qualification applies doubly to senior military officers. And it is very clear that the dismissed TJAGs did not enjoy the confidence of their clients--the SecDef and the President--and for good reasons. Their embrace of the pernicious and anti-merit DEI initiatives, which violate US law and are inimical to good order, morale, and discipline, mark them as unreliable counselors. Add to that their failure to properly manage and correct the disastrous DoD mandatory COVID vaccination program, leading to its unprecedented wholesale withdrawal and extension of reinstatement to those unfairly forced out of the service, and it's no wonder the leadership wanted different lawyers.

Both former JAG Generals, with whom I had previously served, essentially claimed, indignantly, that SecDef Hegseth had overstepped his legal/moral authority and, by his action, imperiled the *Constitution*, the Department of Defense, and the rule of law.

In the Feb 22 online edition of "Lawfire,"[1] retired USAF Deputy TJAG, now Duke Law Professor Dunlap, complained that "military legal officers…are never expected to be replaced on a change of Administration" and that, "stripping the armed forces of its senior uniformed legal advisors tasked by law to provide <u>independent</u> (emphasis added) advice sends all wrong messages throughout the military legal community, not to mention to commanders and their troops." General Dunlap went on to champion the (aspirationally) "nonpartisan, <u>independent</u> (emphasis added) legal advice from its judge advocates that current law demands and that America's security needs." A quick look at recent history proves that irony is apparently dead at Duke.

[1] https://sites.duke.edu/lawfire/2025/02/22/is-independent-nonpartisan-legal-advice-from-military-lawyers-on-the-chopping-block/

The General was correct when he wrote that military lawyers have a unique responsibility in the armed forces in that they (are supposed) to serve as decidedly nonpartisan guardians of the rule of law. For instance, he wrote, that 10 U.S.C. § 9037 mandates that in the Air Force, no officer or employee of the Department of Defense may interfere with the ability of the Judge Advocate General to give independent (emphasis added) legal advice to the Secretary of the Air Force, the Chief of Staff of the Air Force, or the Chief of Space Operations or the ability of officers of the Air Force who are designated as judge advocates who are assigned or attached to, or performing duty with, military units to give independent legal advice to commanders.

Likewise, on Feb 23, Major General (retired) Lepper upped the rhetorical ante, by disrespectfully unloading on "Trump" (his usage) in an on-line, bellicose blog rant.[2] He claimed that the "Friday Night Massacre" (his quote; a neon-bright dog whistle popular in the leftist media) firings were driven by "reckless motives that should scare every American" and hyperbolically ascribed to POTUS and SecDef, secret motives designed "to remove the only remaining guardrails preventing military personnel from following unlawful orders," to violate international laws of war. Such is the hysteria of modern political dialogue.

He passionately added that General Brown, and the other senior officers whom the President and SecDef relieved, altruistically lived the principles of duty, honor, country; but that their "decades of experience and education, into the effective and proper use of our nation's military power," together with their "successes, both as individuals and as leaders, are now being ridiculed as woke."

General Lepper's observations were those of an astonishingly tone deaf social justice warrior when he wrote: "What no one seems to realize is that [General Brown and others'] successors, whoever they may be, will still have to embrace, respect, and encourage diversity or else the military will truly fall apart."

The military will fall apart if it doesn't embrace "diversity?"

Nonpartisan? Independent Guardians of the Rule of Law? Guardrails?

Codswallop.

Recent history proves that the current crop of military Judges Advocate is anything but apolitical, pristine, independent servants of the law. Indeed, the objective record demonstrates that the various Judges Advocate have failed to serve as independent, neutral and detached counselors and advocates of the law. In many instances, their "advice," if it can be called that, reflects sycophantic acquiescence and support of often illegal and political whim rather than the actual rule of law. Their new clients don't have to accept this performance and now don't.

[2] https://medium.com/@steven.lepper/the-warrior-ethos-means-knowing-more-than-just-how-to-use-a-hammer-26a3400f4202

Presidential Authority 101

Let's start with the basics and respond to the harrumphed notion that the President or his SecDef have violated some altruistic principle that a general officer (particularly a JAG) cannot be fired.

General officers serve at the pleasure of the Commander-in-Chief and there was absolutely nothing novel or improper about President Trump or SecDef Hegseth's recent moves. The President's authority to fire general officers is not explicitly defined in a single statute, but it is derived from the *Constitution* and the framework of military command established by federal law.

For instance**,** *Article II, Section 2* of our *Constitution* grants the President the title of Commander in Chief of the Army and Navy of the United States. Thus, the President has the inherent authority to command the military and, by extension, to hire or remove general officers.

The National Security Act of 1947 organized the Department of Defense and created the office of Chairman of the Joint Chiefs of Staff. The law empowers the President to appoint the Chairman and other top military leaders. While the Act does not directly address the firing of general officers, it reinforces the President's broad authority over the military.

Likewise, Title 10 of the U.S. Code outlines the duties and responsibilities of the military, including the President's role in military appointments and dismissals. The CinC can remove generals in accordance with military law and policies, as their appointments are made by him, with the advice and consent of the Senate.

Taken together, the *Constitution*, the National Security Act of 1947, and Title 10 U.S. Code grants the President the power to dismiss military officers, including generals, if deemed necessary for national security, policy reasons, or other grounds. Historical precedent also guarantees the right of the President to fire general officers as he chooses. Let's review:

President Lincoln relieved Generals Pope, Burnside, Hooker, Meade and the politically popular George B. McClellan (twice) for their failures during the Civil War.

In 1951, President Truman fired perhaps the most prestigious general of his era, Douglas MacArthur, during the Korean War. The President did so because the President believed General MacArthur was insubordinate in his public disagreements with President Truman's policy on China and the conduct of the Korean War. General MacArthur's apologists even called, loudly, for President Truman's impeachment.

President Eisenhower dismissed the august statesman-warrior General Omar Bradley from his role as Chairman of the Joint Chiefs of Staff in 1959 to the public consternation of many.

President Johnson replaced General William Westmoreland as the Commander of U.S. forces in Vietnam in 1968. Westmoreland's strategy in Vietnam had come under significant criticism, which led to the change in leadership.

President Nixon removed several generals during the Vietnam War, including firing then-retired General William Westmoreland from his post-war role and others involved in the conflict as it escalated and the strategy shifted.

Recent JAG Failures: Anthrax

As to the more salient issue of supposed JAG "independence" and "guardrail" integrity, one need only look at major failures by the service Judges Advocate to see the gaping flaw in Generals Dunlap and Lepper's laments.

On 30 September 1999, President Bill Clinton signed Executive Order 13139, entitled *Improving Health Protection of Military Personnel Participating in Particular Military Operations.* That EO stipulated that before an "Investigational New Drug" or "IND" (FDA term of art) could be administered to individual military service members, those members must first have provided their "informed consent." In other words, no consent – no IND vaccine. But that didn't stop the Department of Defense from ruining the health and the careers of hundreds, perhaps thousands of military members who, beginning in 1998, were subjected to a mandatory vaccination program without those members' consent. Back then, refusal to give "informed consent" meant an Art 15 or a court-martial and a discharge.

Where were the brave, independent guardrail Judges Advocate when they were needed to prevent overzealous Pentagon officials from proceeding with an illegal vaccination program that clearly violated a direct order from the Commander—in—Chief?

It took a team of *pro bono* civilian attorneys to stop the madness. In *Doe v. Rumsfeld*, 341 F. Supp. 2d 1 (D.D.C. 2004), the United States District Court for the District of Columbia enjoined the DoD from requiring the administration of the unlicensed IND anthrax vaccine to personnel pursuant to EO13139. That injunction remained in place until the Food and Drug Administration administratively ruled that the then-in-use anthrax vaccine was no longer an IND drug. But before that, any order forcing a military member to take the shots was an illegal one.

And the JAG response? Pretzel logic twisted in favor of an ill-conceived Pentagon pet project, including threats from senior JAG leadership to military defense counsel not to raise the vaccine's status in courts-martial.

Recent JAG Failures: DEI

More recently, the service Judges Advocate (at best) stood ominously silent as then CSAF Quincy Brown published his infamous August 9, 2022, Directive entitled *Officer Source of Commission Applicant Pool Goals*. There, the Chief of Staff directed the Air Force to "develop a diversity and inclusion" outreach plan to ensure illegal racially-defined quotas were enforced, toward the questionable goal of "leveraging…diversity to enhance the Air and Space Force's ability to deter, and, if necessary, deny our Nation's competitors." (Our "competitors?")

In addition to its word salad insanity, the document violated every precept of the Civil Rights Act of 1964, the Military Equal Opportunity Program, DoD Directive 1350.2, Arts. 133,

134, Uniform Code of Military Justice, Executive Order 9981of 1948 and more federal court cases than can be counted.

Query: Where were the legal "guardrails preventing military personnel from [writing, publishing, or] following" General Brown's clearly illegal and badly advised order?

There were none. Likely because the TJAG and his subordinates either actively supported and rationalized the Chief of Staff's DEI posture or because they were too career conscious or afraid to speak up. Either way, the imagined "guardrails" were, in fact, a badly designed off-ramp into the legal abyss.

Other JAG Failures: A Cornucopia

The bar license that every attorney proudly hangs on her or his wall bears the title: "Attorney and Counselor at Law." Sometimes, (in fact, more times than not), the "counselor" part is far more important than the "attorney" part. That means a truly independent Knight Templar of the bar will stridently "counsel" his or her client to reject the politically expedient and follow the rule of law instead.

That's particularly important when you realize that every baby JAG is taught that, "The service branch is your client, not any person or particular organization."

Recent events clearly reveal that the service Judges Advocate failed miserably in their roles as legal ***counselors*** (i.e., the people who are supposed to bring common sense to the conversation) to the military writ large. Witness the following which should not, would not have occurred had those JAGs actually been the professionals General Dunlap and General Leper claim exist:

• Where were the independent JAGs when, in 2021, then General Mark Milley reportedly spoke to a Chinese military official behind President Trump's back and promised our Chinese "competitor" he would provide advance warning in the event of a U.S. attack. If that indeed happened, where were the JAGs before the General took that meeting or when it was time to investigate or prepare court-martial charges against the General for treason or insubordination?

Clearly evident in this sad scenario was the acquiescent silence of the JAGs, who apparently impliedly endorsed the notion that high ranking military officials have a right to subvert the Commander-in-Chief if they feel compelled to do so. None dare call it treason, but did any uniformed JAG even ask if the General's conduct warranted criminal investigation?

I doubt it.

•Where were the guardrails when, during the Biden administration, the Navy Professional Reading Program added books to their reading list that openly promoted Marxist creeds. Included on the list, *How to Be Antiracist*, a tome by prominent leftist scholar Ibram X. Kendi which explicitly argues that "the only remedy to past discrimination is present discrimination"

and “capitalism is essentially racist?” Did any Navy JAG/counselor suggest to her/his client that leftist propaganda might be the teeniest bit antithetical to our national values?

During a separate congressional hearing, then General Milley justified the inclusion of such reading materials, saying that the wanted to “understand white rage,” thus lending credence to Marxist Critical Race Theory. Did a JAG even THINK about counseling the General beforehand that discretion is often the better part of valor?

•Where were the independent lawyers when, in June 2022, the U.S. Navy forced new recruits to watch training videos on “proper pronoun usage?” The four-minute-long video, posted to the Defense Visual Information Distribution Service website, declared, “Using someone’s pronouns is a simple way to affirm someone’s identity” and emphasized the need to create “a safe space for everybody” through the use of “inclusive language,” including using gender-neutral language when uncertain of someone’s “gender identity.”

And where were the incorruptible JAGS when the Marine Corps announced that it was considering banning usage of “sir” and “ma’am” by recruits in order to avoid “misgendering” someone? Or when the Air Force Academy discouraged cadets from calling their parents “mom” and “dad?”

Even a first year law student knows that speech codes, even in the military, violate our most precious *First Amendment Constitutional* Right. Apparently, the men and women wearing JAG emblems and stars didn’t.

•Perhaps it was above the pay grade of a two-or-three star JAG, but one wonders whether any uniformed attorney-counselors objected when the DoD announced it would pay for “gender transition surgeries” for military members. This, apparently, in support of the Army’s stated ideal that, “Transgender soldiers can openly serve in the Army and the force will provide hormone therapy, mental health care, and surgeries they might require, according to a force-wide memo.”

•Same question in regard to the issue raised when Biden National Security spokesman John Kirby declared that abortion is a “sacred obligation” of the U.S. military, implying that abortion access is vital to military readiness. Did a JAG attempt to intervene when Mr. Kirby pronounced from the White house podium, “Our policies, whether they are diversity, inclusion, and equity, whether they’re about transgender individuals who qualify, physically and mentally to serve, to be able to do it with dignity, or whether it is about female service members, 1 in 5, or female family members being able to count on the kinds of health care, reproductive care specifically, that they need to serve, that is a foundational sacred obligation of military leaders?”

•Did ANY Air Force Judge Advocate raise so much as an eyebrow when, in 2023, the Air Force permitted Air and Space Force commanders to use unit funds to pay for members to “travel to and participate in … pride events if approved by their individual supervisory authority?”

Regardless of one’s personal feeling about LGBTQ+ issues, paying for service members to attend pride parades is inherently political, likely violative of the Hatch Act and in no way contributory to military readiness. Did even one JAG even think about that?

Likewise in 2023, the Air Force issued a separate memo that that "empowered" Air Force officials to "plan and conduct" activities" related to "rainbow month," including drag shows, like the 2022 drag show at Joint Base Langley-Eustis. (I may be a few revisions out of currency, but I seem to recall that a slew of Air Force Instructions, like 34-223 and 51-902, to name just a couple, specifically task JAGS to ensure military members don't spend federal dollars in support of private organizations or to ensure military members don't overtly support partisan political causes.) In addition to the fact that active financial support for pride events was illegal (which it was)…it was also divisive and destructive of morale.

It also seems that no seagoing JAG stood in the way as the Navy announced its employment of a "drag queen" as a "Navy Digital Ambassador."

Apparently, in every such instance, the guardrails were under repair at the time of those events.

•Finally, I ask, "Where was General Lepper, a '79 USAFA grad, when, in 2022, his alma mater established a Stasi-like system of cadet political officers charged with enforcing racial and gender biases throughout the cadet leadership chain?"

I endorse my former mentor General Dunlap's insistence that Congress vigorously demand a full explanation and use its *Constitutional* authority "to do whatever it takes to ensure that America's defense establishment will have unfettered access to independent legal judgement." I, too, welcome a full examination of the roles that the various Judges Advocate played in the litany of recent legal, ethical, and disciplinary failures and embarrassments.

But I caution my old boss to be careful about what he asks for…we all might be forced to confront or confess what is uncovered.