

The DoD Times (Redacted)



The “Course of Performance” in the DoD: When No Law Becomes the Law of the Land

Lt Col (Ret) Ryan Sweazey (Retired, Air Force – United States Air Force Academy), President and Founder of the [Walk the Talk Foundation](#), authored this article. (Published July 25, 2024)

Check out our Podcast, *The Star Chamber*, on: [Apple](#) | [Spotify](#) | [YouTube](#)

If I were to walk up to you and slap you in the face, you would probably take exception to it. You may respond in kind, you may report me, you may do both. You may call the police as I have, in this hypothetical scenario, committed battery. But what if you did nothing? What if you just took it? And what if you took it because you didn't know any better – you didn't know you had rights and avenues for recourse? You, for whatever reason, didn't know that being slapped in the face was both wrong and illegal.... Now, let's take it a step further – what if I did this to you every day...you walk into the office, greet everyone cheerfully and I walk up to you and blam-o! Slap in the face! And you with your smarting cheek and spilled coffee take it and carry on with your day. Over time, we eventually establish what lawyers call a “course of performance,” defined as:

A sequence of conduct between two parties with respect to a particular transaction, existing if:

- The transaction involves multiple occasions for performance, and,
- The other party, with knowledge of the nature of the performance and opportunity for objection to it, accepts the performance or **acquiesces** in it without objection.

Using our battery example above, you and I have established a course of performance by you allowing me to slap you every morning, without objection, aka “acquiescing.” And by establishing this course of performance, I am absolved of any punishment or accountability.

What occurs every day in today's military are thousands of courses of performance. One party abuses, harasses, wrongs, and/or denies the rights of another party and that party acquiesces. And without any entity to hold the

The DoD Times (Redacted)

perpetrators accountable, these courses of performance have steadily usurped the laws and Constitution of our country. After all, what's the point of laws if the transgression of them is not enforced? Title 10, Title 32, Title 50, FOIA, HIPAA, The Privacy Act, The Equal Employment Opportunity Act, and on and on – all routinely violated, all with impunity. Why? Because on a macro scale, our government has established a de facto course of performance vis-à-vis the Department of Defense.

Our Legislative and Judiciary systems witness and/or know of the constant violation of laws occurring in the military and they allow it to happen. i.e. they have *acquiesced*. And instead of the military institution following the rule of law, instead of the DoD leadership cabal ensuring their members are afforded rights and due process derived from the laws of our great nation, it has now become a veritable free-for-all. Abusive leaders dictate policy, rules, and regulations and the individual who questions them and/or challenges them does so at their peril, regardless how egregiously the ad hoc rules violate American principles of justice. And the military's typical response / excuse for their now excessive abuses of authority? "In the name of good order and discipline!" Tacitly put: "We'll do whatever the F we want – we know you, U.S. Government, can't and won't stop us."

Recently, a law commonly referred to as "Chevron deference" was overturned in the Supreme Court. Simply put, [Chevron deference](#) is the latitude federal judges give agencies over how to interpret the statutes they administer when a dispute arises. [Loper Bright Enterprises v. Raimondo](#), which overturned Chevron this past June, has opened the door for ambiguity as well as opportunity. If the Judicial system asserts now that other branches can / should intervene in agencies' administration of policy, it can potentially be inferred that this also applies to affairs within the Department of Defense. Does that equate to hope for all Service members metaphorically getting slapped in the face on a daily basis? Time will tell...

If you feel that you have been a victim of these types of concerns, feel free to reach out privately at francescagraham@walkthetalkfoundation.org, or share your story in the comments.

If you would like to help us fight these issues, please consider donating to the [Walk the Talk Foundation](#) via either [Venmo](#) or [PayPal](#). We greatly appreciate your support.

Also, [SIGN THIS PETITION](#) demanding that our leaders in Congress change the DoD's unjust administrative investigatory system, and [SIGN THIS PETITION](#) demanding real anti-harassment reform in the Military and Coast Guard now!

Lt Col (Ret) Ryan Sweazey (Retired, Air Force – United States Air Force Academy), President and Founder of the [Walk the Talk Foundation](#), authored this article.