



# New York International Law Review



ST. JOHN'S  
UNIVERSITY  
SCHOOL OF LAW



NEW YORK STATE  
BAR ASSOCIATION  
INTERNATIONAL SECTION

NEW YORK  
INTERNATIONAL  
LAW REVIEW

Fall 2023  
Vol. 36, No. 2

NEW YORK STATE BAR ASSOCIATION  
INTERNATIONAL SECTION

© 2024 New York State Bar Association  
ISSN 1050-9453 (print) ISSN 1933-849X (online)

## We Are Who We Protect: Encouraging Accessibility in the U.S. Armed Forces with Lessons from the German Bundeswehr and Israeli Defense Force

Liam P. Bradley\*

### Introduction

The Armed Forces of the United States of America is the greatest fighting force the world has ever seen.<sup>1</sup> However, with approximately 75% of the American youth population ineligible for military service,<sup>2</sup> declining recruitment,<sup>3</sup> and a widening civilian-military divide,<sup>4</sup> the future strength of American military power is questionable.<sup>5</sup> Near-peer competitors are eager to take America's place, and the nature of warfighting is changing.<sup>6</sup>

- 
- 1.\* Liam P. Bradley is a Law Clerk (pending admission) for Ruskin Moscou Faltischek P.C. He holds a J.D. from St. John's University School of Law and a B.S. from the United States Military Academy. Liam is also a graduate of the 101st Airborne Division's Sabalauski Air Assault School. Prior to Law School, Liam worked for Enterprise Products Partners as an energy commercial analyst. He was medically retired from the U.S. Army in 2018 and remains a steadfast supporter of service-disabled veterans. The views expressed here are his own and do not necessarily reflect the views of the journal, his firm, the government, or the U.S. Army.  
Gen. David Petraeus (Ret.) & Michael E. O'Hanlon, *America's awesome military*, BROOKINGS INST. (Sept. 30, 2016), <https://www.brookings.edu/research/americas-awesome-military/>.
  2. Robert Longley, *Up to 75 Percent of US Youth Ineligible for Military Service*, THOUGHTCO. (Sept. 2, 2021), <https://www.thoughtco.com/us-youth-ineligible-for-military-service-3322428>. Another report from the Department of Defense has ineligibility as high as 80%. Leroy Triggs, *80% of Americans ages 17 to 24 are unfit for military service*, KSNB (Mar. 19, 2023), <https://www.ksnblocal4.com/2023/03/20/80-americans-ages-17-24-are-unfit-military-service/>.
  3. Barbara Starr & Ellie Kaufman, *US Army to likely miss recruiting goal of new troops by nearly 40,000 over the next two years*, CNN (Jul. 30, 2022, 6:35 PM), <https://www.cnn.com/2022/07/19/politics/us-army-recruiting-numbers-fall/index.html>.
  4. Kate Taylor, *'We are at war and people don't even know': Inside the divide between the military and the rest of America that's wider than it's ever been*, BUS. INSIDER (Jul. 20, 2017), <https://www.businessinsider.com/divide-between-military-civilians-bigger-in-america-2017-7>.
  5. Thomas Spoehr, *The Administration and Congress Must Act Now to Counter the Worsening Military Recruiting Crisis*, HERITAGE FOUND. (Jul. 28, 2022), <https://www.heritage.org/defense/report/the-administration-and-congress-must-act-now-counter-the-worsening-military>.
  6. *National Rankings by Military Strength*, MIL. WATCH MAG., [https://forceindex.militarywatchmagazine.com/national\\_ranking](https://forceindex.militarywatchmagazine.com/national_ranking) (last visited Nov. 11, 2022). See generally DEF. INTEL. AGENCY [DIA], CHINA MILITARY POWER (2019), [https://www.dia.mil/Portals/110/Images/News/Military\\_Powers\\_Publications/China\\_Military\\_Power\\_FINAL\\_5MB\\_20190103.pdf](https://www.dia.mil/Portals/110/Images/News/Military_Powers_Publications/China_Military_Power_FINAL_5MB_20190103.pdf) [hereinafter DIA China]; DEF. INTEL. AGENCY [DIA], NORTH KOREA MILITARY POWER (2021), <https://www.dia.mil/Portals/110/Documents/News/NKMP.pdf>; FORREST E. MORGAN & RAPHAEL S. COHEN, MILITARY TRENDS AND THE FUTURE OF WARFARE: THE CHANGING GLOBAL ENVIRONMENT AND ITS IMPLICATIONS FOR THE U.S. AIR FORCE (2020).

Today, the battlefield is evolving to the domains of space, cyberspace, and robotics.<sup>7</sup> Those that “deploy, fight and win our nation’s wars” may not necessarily be on the frontline.<sup>8</sup> In addition, the soldiers that increase the probability of success in these new domains may not be the same type of soldiers that stormed the beaches of Normandy, waded the jungles of Vietnam, or hiked the mountains of Afghanistan.<sup>9</sup> In today’s emerging battlefield, the swiftness of their keystrokes may be more important than their two-mile run time.<sup>10</sup> In fact, the soldiers that give the U.S. Armed Forces this competitive edge may be everyday Americans who are simply the best at what they do.<sup>11</sup> Therefore, to maintain combat effectiveness, the U.S. Armed Forces must maintain recruitment and cultivate civilian-military relations.<sup>12</sup>

These are issues because “a recruiting shortfall translates directly to understrength units with less combat capability.”<sup>13</sup> Further, a more participatory populace in the military is vital to the preservation of the Republic.<sup>14</sup> As aptly stated in *The Hill*, “[f]ormer Secretary of Defense Robert Gates warned of the risk of ‘developing a cadre of military leaders that politically, culturally, and geographically have less and less in common with the people they have sworn to defend.’”<sup>15</sup> Therefore, the U.S. Armed Forces must mitigate these issues.<sup>16</sup>

So, the question arises: How do today’s armed forces meet the recruitment numbers and close the divide necessary to enhance their combat capability for the evolving battlefield? The

7. DIA China, *supra* note 6, at 20-21, 79.
8. *The Army’s Vision and Strategy*, U.S. ARMY, <https://www.army.mil/about/> (last visited Nov. 28, 2022); *see, e.g.*, W.J. Hennigan, *Drone pilots go to war in the Nevada desert, staring at video screens*, LA TIMES (Jun. 17, 2015), <https://www.latimes.com/nation/la-na-drone-pilots-20150617-story.html>.
9. *See* VIN, *Remember our veterans today and every day*, DAILY J. (May 26, 2014), <https://www.thedailyjournal.com/story/opinion/editorials/2014/05/26/remember-our-veterans-today-and-every-day/9575559/>; *see also* Colin Demarest, ‘Secure, survive, strike’: The Navy’s new approach for cyber dominance, C4ISRNET (Oct. 31, 2022), <https://www.c4isrnet.com/cyber/2022/10/31/secure-survive-strike-the-navys-new-approach-for-cyber-dominance/> (noting that the U.S. Navy is deterring China and Russia in cyber environments to have “our adversaries to be every bit as nervous looking down the barrel of our non-kinetic capabilities . . .”).
10. *See, e.g.*, Annie Kate, *The U.S. Army is changing its fitness standards. Here’s why*, CENT. ILL. PROUD (Mar. 29, 2022), <https://www.centralillinoisproud.com/digital-originals/the-u-s-army-is-changing-its-fitness-standards-heres-why/> (noting the Army’s physical fitness test changes, ranging from those focusing on brute strength to functionality).
11. *SEE* DEP’T OF DEF. [DOD], PRESERVING OUR COMPETITIVE ADVANTAGE: PERSONNEL AND READINESS STRATEGY FOR 2030 9 (2020), [https://prhome.defense.gov/Portals/52/Documents/Strategy/PR\\_Strategy\\_FINAL\\_.pdf?ver=KY6Vacn3kT1Gd9fNxnR34w%3D%3D](https://prhome.defense.gov/Portals/52/Documents/Strategy/PR_Strategy_FINAL_.pdf?ver=KY6Vacn3kT1Gd9fNxnR34w%3D%3D).
12. Ian Thomas, *The U.S. Army is Struggling to find the recruits it needs to win the fight over the future*, CNBC (Oct. 26, 2022), <https://www.cnn.com/2022/10/26/us-army-struggles-to-find-recruits-its-needs-to-win-fight-of-future.html>.
13. Spoehr, *supra* note 5.
14. Marybeth P. Ulrich, *Mind the civil-military gap: The Republic depends on all citizens*, THE HILL (Jan. 29, 2019, 11:00 AM), <https://thehill.com/opinion/national-security/427385-mind-the-civil-military-gap-the-republic-depends-on-all-citizens/>.
15. *Id.*
16. *See* Thomas, *supra* note 12.

answer lies in expanding the U.S. Armed Forces' mission to reflect the population they serve.<sup>17</sup> Looking to Germany and Israel for guidance,<sup>18</sup> the Department of Defense ("DoD") should modify its eligibility requirements to open uniformed service to Americans with disabilities.<sup>19</sup> One in every four Americans has a disability;<sup>20</sup> barring them from uniform service denies them full participation in a revered part of society and hinders military recruitment.<sup>21</sup> By opening the armed forces to Americans with disabilities, the military can attain both the recruitment boost experienced by the German Bundeswehr and the societal cohesion experienced by the Israeli Defense Force ("IDF").<sup>22</sup>

This note advocates for the modification of current DoD policies to enable Americans with disabilities to serve in the U.S. Armed Forces. Part I of this note will define terms and discuss the current law regarding disability in the United States and eligibility for uniformed service in the U.S. Armed Forces. Part II of this note will explore the role of uniformed service in the German Bundeswehr and IDF for those with disabilities. Part III will argue for modifications to current DoD policy regarding eligibility to reflect elements from the Bundeswehr and IDF. Finally, Part IV will conclude with a summary of policy differences and how incorporating lessons learned from the Bundeswehr and IDF will sustain America's preeminent combat capability.

## I. Background

### A. Terminology

The term "armed forces" refers to "all organized armed forces, groups and units which are under a command responsible to that party for the conduct of its subordinates" of a party in a conflict.<sup>23</sup> The U.S. Armed Forces include "the Army, Navy, Air Force, Marine Corps, Space Force, and Coast Guard."<sup>24</sup> Furthermore, the phrase "uniform service" refers to either "(A) the armed forces; (B) the commissioned corps of the National Oceanic and Atmospheric Administration; or (C) the commissioned corps of the Public Health Service."<sup>25</sup> Essentially, these indi-

---

17. *How the Military Supports Diversity and Inclusion*, MIL. ONE SOURCE (Jan. 25, 2021, 6:49 PM), <https://www.militaryonesource.mil/military-life-cycle/friends-extended-family/military-diversity-and-inclusion/> [hereinafter *Diversity and Inclusion*].

18. *See infra* Part II.

19. *See infra* Part III.

20. *CDC: 1 in 4 US adults live with a disability*, U.S. CTRS. FOR DISEASE CONTROL & PREVENTION (Aug. 16, 2018, 1:00 PM), <https://www.cdc.gov/media/releases/2018/p0816-disability.html> [hereinafter CDC].

21. *See generally* Kristin M. Duquette, *The Disabled Soldier: A Case for Disabled Americans in the U.S. Armed Forces* (Mar. 2022) (M.A. thesis, Naval Postgraduate School).

22. *See, e.g., Diversity in the Bundeswehr*, BUNDESWEHR (2022), <https://www.bundeswehr.de/en/about-bundeswehr/identity-of-the-bundeswehr/equal-opportunities/diversity-bundeswehr> (last visited Nov. 15, 2022); IDF Editorial Team, *The IDF's Disability Inclusion Program*, ISRAELI DEF. FORCE (Nov. 3, 2020), <https://www.idf.il/en/mini-sites/our-soldiers/pvt-ori-is-using-her-disability-to-teach-others-about-tolerance/>.

23. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3, Art. 43(1).

24. 10 U.S.C. § 101(a)(4).

25. *Id.* § 101(a)(5).

viduals wear a uniform, are subject to Title 10, and are considered to be in the military, notably different than DoD civilians.<sup>26</sup>

In addition, for the purposes of this Note, those that are eligible to join the armed forces are those who are presently civilians seeking to join uniformed service for the first time. Notably, the U.S. Armed Forces has different criteria for the retention of uniformed service personnel injured during military service.<sup>27</sup> Therefore, the eligibility requirements discussed here are those for joining the armed forces as opposed to retention.

Finally, the term “combat effectiveness” is vague and has multiple different meanings.<sup>28</sup> Traditionally, military leaders have focused on either how much firepower or how many people are needed to accomplish a given mission.<sup>29</sup> The reality, however, is that there are a multitude of factors that determine combat effectiveness, including “the nature of the enemy, the combat environment, and the mission.”<sup>30</sup> Nevertheless, combat effectiveness is a probability of success on the battlefield.<sup>31</sup> Logically, an adaptive and innovative armed force that is well-trained will have the greatest probability of success.<sup>32</sup>

## B. U.S. Disability Law

The governing law for disability law in the United States is the Americans with Disabilities Act (“ADA”) of 1990 and the ADA Amendments Act of 2008.<sup>33</sup> The purpose of the ADA was to:

(1) to provide clear and comprehensive national mandates for the elimination of discrimination against individuals with disabilities;

- 
26. KATHRYN A. FRANCIS & RAMONA J. DIAZ, CONG. RSCH. SERV., IF11131, DEFENSE PRIMER: DOD APPROPRIATED FUND CIVILIANS (2019); ALAN OTT, CONG. RSCH. SERV., IF11510, DEFENSE PRIMER: DEPARTMENT OF DEFENSE CIVILIAN EMPLOYEES (2020). Civilian employees support governmental functions within the Department of Defense and are governed under Title 5. *See* 10 U.S.C. §§ 1567a(a), (b); 10 U.S.C. § 1580(d). A civilian employee is one that is “(1) appointed in the civil service by one of the following acting in an official capacity . . . (2) engaged in the performance of a Federal function under authority of law or an Executive act; and (3) subject to the supervision of an individual named by paragraph (1) of this subsection . . .” 5 U.S.C. § 2105(a) (2011). *Compare* 10 U.S.C. § 101(a)(5) *with* 5 U.S.C. § 2105(a).
27. *See generally* OFF. OF THE UNDER SEC’Y OF DEF. FOR PERS. & READINESS, DoDI 1332.45, RETENTION DETERMINATIONS FOR NON-DEPLOYABLE SERVICE MEMBERS (2021).
28. *See* Philip Hayward, *The Measurement of Combat Effectiveness*, 16 OPERATIONS RSCH. 314, 315 (1968).
29. *Id.* at 314.
30. *Id.*
31. *Id.*
32. *See, e.g.*, Jim Greer, *Training: The Foundation for Success in Combat*, HERITAGE FOUND. (Oct. 4, 2018), <https://www.heritage.org/military-strength-topical-essays/2019-essays/training-the-foundation-success-combat>.
33. *See generally* Department of Justice ADA Responsibilities, ADA.GOV, [https://archive.ada.gov/doj\\_responsibilities.htm](https://archive.ada.gov/doj_responsibilities.htm) (last visited Nov. 17, 2022); *Introduction to the Americans with Disabilities Act*, ADA.GOV, [https://www.ada.gov/ada\\_intro.htm](https://www.ada.gov/ada_intro.htm) (last visited Nov. 17, 2022); *Americans with Disabilities Act of 1990, as Amended*, ADA.GOV, <https://www.ada.gov/pubs/adastatute08.htm> (last visited Nov. 17, 2022); *see generally* 42 U.S.C. § 12101 et seq.

- (2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;
- (3) to ensure that the Federal Government play a central role in enforce the standards established in this Act on behalf of individuals with disabilities; and
- (4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.<sup>34</sup>

Essentially, the act was designed to protect disabled Americans from discrimination “in several areas, including employment, transportation, public accommodation, communications, and access to state and local government[s]’ programs and services.”<sup>35</sup>

A person is protected under the Act if they have a disability.<sup>36</sup> A disability “means . . . (A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such impairment; or (C) being regarded as having such an impairment . . .”<sup>37</sup> Section 12102 of the Act further defines “major life activities” to include walking, standing, speaking, and hearing, among many others.<sup>38</sup> Therefore, the Act incorporates the majority of disabilities under its umbrella of protection.<sup>39</sup>

Additionally, the Act requires employers to take action.<sup>40</sup> Specifically, an employer must make a “reasonable accommodation” for an individual with a disability.<sup>41</sup> A reasonable accommodation may include either accessibility to facilities or modification of an employment position to accommodate a disabled individual who otherwise would be able to carry out the essential functions of the position.<sup>42</sup> However, an employer does not have go to extremes to accommodate an individual with a disability.<sup>43</sup> If a person is otherwise unqualified or if the

34. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 328 (codified as amended at 42 U.S.C. § 12101(b)).

35. *Americans with Disabilities Act*, U.S. DEP’T. OF LAB., <https://www.dol.gov/general/topic/disability/ada> (last visited Nov. 17, 2022).

36. *Your Rights Under the Americans with Disability Act*, U.S. DEP’T. OF HEALTH & HUM. SERV. (June 2006), <https://www.hhs.gov/sites/default/files/ocr/civilrights/resources/factsheets/ada.pdf>.

37. 42 U.S.C. § 12102(1).

38. *Id.* § 12102(2).

39. See Andrew M.I. Lee, *What is the Americans with Disabilities Act (ADA)?*, UNDERSTOOD, <https://www.understood.org/en/articles/americans-with-disabilities-act-ada> (last visited Nov. 17, 2022).

40. 42 U.S.C. § 12112(a). Note that it only applies to employers that meet a specific threshold. *Id.* § 12111(5)(A).

41. *Id.* § 12111(9); see also *id.* § 12112(b)(5) (describing “discrimination” by not making reasonable accommodation).

42. *Id.* § 12111(9); see also *id.* § 12111(8). (“The term ‘qualified individual’ means an individual, who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.”).

43. See *id.* § 12113(a).

accommodation would create an undue hardship<sup>44</sup>—“an action requiring significant difficulty or expense”<sup>45</sup>—the employer will not be liable for disability discrimination.<sup>46</sup>

In addition, there are various exemptions under the ADA. For example, some employers are exempt from the ADA entirely.<sup>47</sup> Furthermore, the statute carves out non-labor related 501(c) tax-exempt organizations as well as additional exemptions for the U.S. government.<sup>48</sup> Therefore, the federal government and its agencies are not covered by the ADA.<sup>49</sup> Nonetheless, federal employees are protected by Title V of the Rehabilitation Act of 1973.<sup>50</sup>

Title V of the Rehabilitation Act of 1973 “prohibits discrimination based on disability in any program or activity operated by recipients of federal funds.”<sup>51</sup> One of the stated goals of this statute is to “ensure that the Federal government plays a leadership role in promoting the employment of individuals with disabilities . . . .”<sup>52</sup> Another is to “empower individuals with disabilities to maximize employment . . . and inclusion and integration into society . . . .”<sup>53</sup> Similar to the ADA definition, disability in Title V is defined as “a physical or mental impairment that constitutes or results in a substantial impediment to employment”<sup>54</sup> and incorporates the definitions from section 12102 of Title 42.<sup>55</sup> Likewise, Title V protects qualified individuals with disabilities provided they “meet normal and essential eligibility requirements.”<sup>56</sup>

Therefore, although federal employees with disabilities are protected by Title V of the Rehabilitation Act,<sup>57</sup> employment eligibility is determined by the regulations proscribed by the relevant federal entity.<sup>58</sup> Consequently, a person with a disability seeking to join the U.S.

---

44. *Id.* § 12111(8), (10).

45. *Id.* § 12111(10).

46. *See* 42 U.S.C. § 12113(a); *see, e.g.*, *US Airways, Inc. v. Barnett*, 535 U.S. 391 (2002) (noting that a disabled employee’s requested accommodation would not be reasonable because it would conflict with the employer’s seniority system).

47. *The ADA: Your Responsibilities as an Employer*, U.S. EQUAL EMP. OPPORTUNITY COMM’N, <https://www.eeoc.gov/publications/ada-your-responsibilities-employer> (last visited Nov. 17, 2022).

48. *See* 42 U.S.C. § 12111(5)(B).

49. *Is the Federal government covered by the ADA?*, ADA NAT’L NETWORK (Nov. 2022), <https://adata.org/faq/federal-government-covered-ada>.

50. *Id.*; *see generally* 29 U.S.C. § 794.

51. *Disability Discrimination: Overview of the Laws*, U.S. DEPT. OF ED. (Feb. 11, 2022), <https://www2.ed.gov/policy/rights/guid/ocr/disabilityoverview.html>; *see also* 29 U.S.C. § 701.

52. 29 U.S.C. § 701(b)(3).

53. *Id.* § 701(b)(1).

54. *Id.* § 705(9)(A).

55. *Id.* § 705(9)(B).

56. *Your Rights Under Section 504 of the Rehabilitation Act*, U.S. DEP’T OF HEALTH & HUM. SERV. (June 2006), <https://www.hhs.gov/sites/default/files/ocr/civilrights/resources/factsheets/504.pdf>.

57. *See generally* 29 U.S.C. § 794.

58. *See* Timothy M. Cook, *Nondiscrimination in Employment Under the Rehabilitation Act of 1973*, 27 AM. U. L. REV. 31, 42 n.65 (1977-78) (noting that federal agencies incorporate individuals with disabilities under Section 501 and that the Section is somewhat ineffective). *See also* 29 U.S.C. § 791(b).



Armed Forces will be limited to the eligibility regulations set forth by the Department of Defense and its subordinate departments.<sup>59</sup>

### C. U.S. Armed Forces' Eligibility Regulations

The eligibility requirements to join the U.S. Armed Forces are proscribed generally by the DoD.<sup>60</sup> Furthermore, each branch—including the U.S. Army—has its own specifications for eligibility.<sup>61</sup> Interestingly, the U.S. Armed Forces have rather lax eligibility requirements. For example, they require varying age ranges for each branch of service, do not require U.S. citizenship status, and only require a GED or high school diploma.<sup>62</sup> There is, however, a requirement that each candidate pass a military entrance medical exam,<sup>63</sup> which includes “a physical exam, hearing test, vision test, and height and weight measurements.”<sup>64</sup> Finally, “each service has its own physical requirements and fitness standards.”<sup>65</sup>

As Michael Schwartz points out, “[w]ith a few exceptions in the Civil War, the United States armed forces have barred people with disabilities . . . .”<sup>66</sup> The present recruitment policy of the DoD is the “undifferentiated soldier.”<sup>67</sup> Such an individual must be “combat-ready, that is, someone who can serve on the front line of fighting even if ultimately the soldier never enter the theater of war in his or her military career.”<sup>68</sup> Therefore, there are a variety of conditions that will prevent an individual from being able to join the armed forces.<sup>69</sup> The conditions range from heatstroke and motion sickness to severe anxiety, skeletal conditions, and hearing loss.<sup>70</sup> For example, the U.S. Army rejected a cadet that had successfully completed all his training requirements to become a commissioned officer because he was disqualified for being deaf.<sup>71</sup>

---

59. See 29 U.S.C. § 791(b); Memorandum from the Office of Diversity Management and Equal Opportunity, Department of Defense Narrative Summary Report on Disability Employment Data Fiscal Year 2013 1 (2013) (stating that “[i]n 1987 DoD established a goal that 2% of the DoD *civilian* workforce should consist of IWTD [(individuals with targeted disabilities)].”) (emphasis added).

60. See generally OFF. OF THE UNDER SEC'Y OF DEF. FOR PERS. & READINESS, DODI 6130.03, VOLUME 1: MEDICAL STANDARDS FOR MILITARY SERVICE: APPOINTMENT, ENLISTMENT, OR INDUCTION (2022) [hereinafter DOD MEDICAL STANDARDS].

61. See *Eligibility and Requirements*, U.S. ARMY (Apr. 27, 2022), <https://www.goarmy.com/how-to-join/requirements.html>.

62. See *Join the Military*, USA.GOV, <https://www.usa.gov/join-military> (last visited Nov. 17, 2022).

63. *Id.*

64. *Id.*

65. *Id.*

66. Michael Schwartz, *Admission of Deaf Soldiers to the Military: Rethinking the Undifferentiated Soldier Paradigm*, 71 ARK. L. REV. 297, 297 (2018-19).

67. *Id.*

68. *Id.* at 297-98.

69. For a discussion of some of the specific medical conditions, see *Medical Conditions That Can Keep You from Joining the Military*, MILITARY.COM, <https://www.military.com/join-armed-forces/disqualifiers-medical-conditions.html> (last updated 2023).

70. *Id.*

71. See Schwartz, *supra* note 66, at 298-300.

Unfortunately, persons with disabilities in the United States are subject to the eligibility requirements of the respective federal agency they are seeking to join.<sup>72</sup> For the DoD and the uniformed armed services, those eligibility requirements disqualify disabled Americans.<sup>73</sup> Ultimately, “an American citizen does not have a constitutional or statutory right to join the United States armed forces, and the military reserves the right to deny applicants for reasons it deems appropriate.”<sup>74</sup>

Nevertheless, in the face of changing realities of the global environment with recruitment shortages and an isolated class of soldiery, the U.S. Armed Forces can incorporate lessons from other nations to reinvigorate their combat effectiveness. Two such nations are some of our closest allies: Germany and Israel.

## II. Disability in The German Bundeswehr and Israeli Defense Force

### A. Germany

#### 1. German Disability Law

“The most essential statements of equality contained in the Universal Declaration of Human Rights were included within the Basic Law of the Federal Republic of Germany (German: *Grundgesetz*).”<sup>75</sup> Germany has a comprehensive set of protections for persons with disabilities under the *Allgemeines Gleichbehandlungsgesetz* (General Equal Treatment Act) and further protections for those with severe disabilities under the *Sozialgesetzbuch IX* (German Social Code).<sup>76</sup> The *Allgemeines Gleichbehandlungsgesetz* (“AGG”) was entered into force on August 18, 2006, and “incorporates four Anti-Discrimination Directives of the EU [(European Union)] into German law.”<sup>77</sup> With regard to disability, the particular EU Directive is Council Directive 2000/78/EC which “establish[es] a general framework for equal treatment in employment and occupation.”<sup>78</sup>

The ADS states that “[i]n the field of employment and profession, the protection of the AGG covers both self-employment and gainful employment,” as well as the “access to supply of

72. See Cook, *supra* note 58.

73. See DOD MEDICAL STANDARDS, *supra* note 60.

74. Schwartz, *supra* note 66, at 300.

75. ANTIDISKRIMINIERUNGSSTELLE DES BUNDES, GUIDE TO THE GENERAL EQUAL TREATMENT ACT: EXPLANATIONS AND EXAMPLES 1 (2019) [hereinafter ANTIDISKRIMINIERUNGSSTELLE DES BUNDES].

76. Annegret Müller-Mundt, *Disability – what protection from discrimination do disabled employees have in Germany?*, GLOB. WORKPLACE INSIDER (Oct. 30, 2014), <https://www.globalworkplaceinsider.com/2014/10/disability-what-protection-from-discrimination-do-disabled-employees-have-in-germany/>.

77. *Allgemeines Gleichbehandlungsgesetz [AGG] [General Equal Treatment Act]*, ANTIDISKRIMINIERUNGSSTELLE DES BUNDES [ADS] [FED. ANTI-DISCRIMINATION AGENCY] (Ger.), <https://www.antidiskriminierungsstelle.de/EN/about-discrimination/order-and-law/general-equal-treatment-act/general-equal-treatment-act-node.html> (last visited Nov. 17, 2022).

78. Council Directive 2000/78, 2000 O.J. (L 302) 16, 22 (EC).

goods and services.”<sup>79</sup> Similar to the ADA, under the AGG, “a person is considered disabled when bodily functions, mental capacity or mental health are impaired for a long period of time and negotiation with barriers in the person’s surroundings substantially limits their ability to participate in society.”<sup>80</sup> Likewise, there is an exemption for disabled persons that cannot carry out their work despite attempts at accommodation.<sup>81</sup> The threshold factor is a *sachlicher Grund*, or objective reason.<sup>82</sup> Therefore, unlike the ADA, there is no hardship exception because “a disabled person cannot be treated as unfit for the job if it is possible to equip the workplace with the appropriate facilities.”<sup>83</sup> In essence, there is an affirmative duty for German employers to provide supportive measures to persons with disabilities.<sup>84</sup>

Finally, the AGG extends protection “to all types of contracts for goods, services, and accommodation[s].”<sup>85</sup> This obligation to not discriminate applies to all employers.<sup>86</sup> Furthermore, “private and public employers with 20 or more employees are obliged to fill five percent of their workplaces with severely disabled persons.”<sup>87</sup> The consequence for failing to meet this requirement is an equalization fee, which funds social enterprises employing disabled persons.<sup>88</sup> Therefore, the German government and its agencies are held to this same quota and “cannot refrain from hiring the disabled applicant because of his or her disability.”<sup>89</sup>

Overall, the German government has extremely inclusive laws regarding disability and workplace discrimination. The German government holds private and public employers to the same standards and provides little room for employers to escape accommodating disabled

---

79. *What is Discrimination?: Frequently Asked Questions*, ANTIDISKRIMINIERUNGSSTELLE DES BUNDES, <https://www.antidiskriminierungsstelle.de/EN/about-discrimination/what-is-discrimination/what-is-discrimination-node.html;jsessionid=BF794DC795A97421A588D9057B8891E2.intranet221> (last visited Nov. 17, 2022).

80. ANTIDISKRIMINIERUNGSSTELLE DES BUNDES, *supra* note 75, at 13.

81. *Id.* at 19 (noting that a trucking company may discriminate against visually impaired drivers if they are unable to meet the requirements to drive the vehicle).

82. Christoph Kuhmann, *German Parliament Passes General Equal Treatment Act, Which Will Have a Considerable Impact on German Employment Practice*, GIBSON DUNN (Jul. 20, 2006), <https://www.gibsondunn.com/german-parliament-passes-general-equal-treatment-act-which-will-have-a-considerable-impact-on-german-employment-practice/>.

83. ANTIDISKRIMINIERUNGSSTELLE DES BUNDES, *supra* note 75, at 19.

84. *Id.* at 13.

85. *Id.* at 10. (emphasis omitted). Note that the AGG is more expansive than is required under EU law. *Id.*

86. See Kuhmann, *supra* note 82 (noting “employers located in Germany must be prepared for these new rules”).

87. SOZIALGESETZBUCH IX [SGB] [Social Code], § 154, [https://www.gesetze-im-internet.de/sgb\\_9\\_2018/\\_154.html](https://www.gesetze-im-internet.de/sgb_9_2018/_154.html) (Ger.).

88. MICHAEL SCHEER, WORKING OPPORTUNITIES FOR DISABLED PERSONS IN GERMANY: LAWS, PRACTICES, AND EXPERIENCES 6 (2015), [https://gjb-bremen.info/downloads/report\\_bulgaria.pdf](https://gjb-bremen.info/downloads/report_bulgaria.pdf).

89. Martin Kock, *Disability Law in Germany: An Overview of Employment, Education and Access Rights*, 5 GER. L. J. 1373, 1379-80 (2004).

applicants.<sup>90</sup> Likewise, because German disability law permeates so deep into the societal fabric, even the German Armed Forces are impacted.<sup>91</sup>

## 2. Disability in the Bundeswehr

The Armed Forces of Germany, the Bundeswehr, are legally bound to employ persons with disabilities.<sup>92</sup> In addition, Germany's Federal Ministry of Defense ("FMoD") "has made an explicit commitment to supporting minorities" which, under the Diversity Charter, includes people with severe disabilities.<sup>93</sup> Further, the Bundeswehr recognizes the importance of equal opportunity to all Germans while also taking advantage of the resilience and unique problem-solving capabilities of persons with disabilities.<sup>94</sup> Presently, the Bundeswehr employs 9,500 people with severe disability, approximately 1,300 of which are military personnel.<sup>95</sup>

Prior to 2011, Germany had compulsory military service.<sup>96</sup> When the German Bundestag implemented the volunteer service model, the Bundeswehr recognized that the majority of military service volunteers were able-bodied males.<sup>97</sup> However, the switch to an all-volunteer force resulted in a precipitous drop in military recruitment.<sup>98</sup> Following the implementation of diversity programs, though, the Bundeswehr gained an additional 5,000 military personnel.<sup>99</sup> Overall, the German Bundeswehr recognized the opportunity to serve as an example for accommodating disabled Germans and normalizing disability in German society.<sup>100</sup>

Although the Bundeswehr permits people with disabilities to join the German military,<sup>101</sup> a person's limitations and capabilities are taken into consideration for their assignments.<sup>102</sup> Therefore, depending on their disability, disabled Bundeswehr soldiers are either (1) "exempted from field service and from arms service," (2) "not obliged to fulfill the physical fitness requirements which are defined in the military sport provisions," and/or (3) "not obliged to maintain

90. *Inclusion in the Bundeswehr*, BUNDESWEHR, <https://www.bundeswehr.de/en/about-bundeswehr/identity-of-the-bundeswehr/equal-opportunities/inclusion-bundeswehr> (last visited Nov. 17, 2022) ("Private companies with more than 20 employees must recruit at least five percent of their staff from those with severe disabilities. For the public service, the required rate is six percent.").

91. *Id.*

92. *See id.* (noting that "Germany has legally required employment rate for people with disabilities").

93. *Id.*

94. *Id.*

95. *Id.* Note that the 8,100 others are civilians and would be similar to DoD civilians. *Compare Id. with* 10 U.S.C. § 1580.

96. *Diversity in the Bundeswehr*, *supra* note 22.

97. *Id.*

98. *Id.* In 2009, the Bundeswehr had 250,000 military personnel, but by 2015, the number had dropped to 177,000. *Id.*

99. *Id.*

100. *See Inclusion in the Bundeswehr*, *supra* note 90.

101. *See* Kurzinformation: Involvement of People with Disabilities in National Defence, Deutscher Bundestag: Wissenschaftliche Dienste [WD] 005/18 (Feb. 15, 2018), <https://www.bundestag.de/resource/blob/551624/2372c51cc55cf879947dacd799a72cde/WD-2-005-18-pdf-data.pdf> (Ger.) [hereinafter Kurzinformation].

102. *Id.* at 1.

and improve their individual military basic skills as proscribed in the directive on training and maintenance of basic skills.”<sup>103</sup> By fulfilling indoor activities of the Bundeswehr, disabled Bundeswehr soldiers enable combat capable soldiers to fulfill their role on the battlefield.<sup>104</sup>

Overall, the Bundeswehr permits individuals with disabilities to serve in the uniformed armed service.<sup>105</sup> Despite applying some restrictions and making the necessary accommodations,<sup>106</sup> the Bundeswehr have benefitted from incorporating persons with disabilities into the German military. By integrating disabled soldiers into society and increasing recruitment,<sup>107</sup> the Bundeswehr’s policies have resulted in increased combat effectiveness.<sup>108</sup>

## B. Israel

### 1. Israeli Disability Law

The “cornerstone of governmental policy on the matter of disability rights in Israel” is the Equal Rights for Persons with Disabilities Law.<sup>109</sup> Prior to the Law’s passage, disabled Israelis—constituting approximately 21% of the population—suffered from debilitating discrimination in all aspects of society.<sup>110</sup> In essence, Israelis were being denied their human dignity.<sup>111</sup> With the passage of the Equal Rights for Persons with Disabilities Law, the Israeli government sought to “advance[] substantive equality that includes an active obligation for society and each of its members, to eliminate barriers limiting people with disabilities, and not just a passive obligation to avoid discrimination.”<sup>112</sup>

The preamble of the Law asserts that the “legislation is part of a society-wide endeavor to effect maximal inclusion of people with disabilities in society.”<sup>113</sup> The Law begins by affirming a disabled person’s right to make decisions regarding their own life and by excluding discrimination of affirmative action efforts which seek to “advance the equality of people with disabilities.”<sup>114</sup> Ultimately, the Israeli government imposes not only a moral obligation on its society,

103. *Id.*

104. *Id.*

105. *Id.*

106. See Kurzinformation, *supra* note 101.

107. See *Diversity in the Bundeswehr*, *supra* note 22; *Inclusion in the Bundeswehr*, *supra* note 90.

108. See Kurzinformation, *supra* note 102.

109. Michael Decker, *Disability Rights in Israel – A Summary*, DECKER & PEX, <https://lawoffice.org.il/en/disability-rights-in-israel/> (last visited Nov. 17, 2022); see generally Arie Rimmerman et al., *Israel’s Equal Rights for Persons with Disabilities Law: Current Status and Future Directions*, 25 DISABILITY STUD. Q. 1 (2005).

110. See *The Equal Rights for Persons with Disabilities Law Explained*, MINISTRY OF JUST.: COMM’N FOR EQUAL RTS. OF PERS. WITH DISABILITIES (Dec. 20, 2021), [https://www.gov.il/en/departments/general/equality\\_law\\_explained](https://www.gov.il/en/departments/general/equality_law_explained).

111. *Id.*

112. *Id.*

113. Pmbl., Equal Rights for People with Disabilities Law, 5773-2012, SH 2388 (1998) (Isr.).

114. *Id.* ch. A § 4; see also *id.* ch. A § 3.

but also a divine imperative to treat persons with disabilities as equals, because all human beings are “created in God’s image.”<sup>115</sup>

Similar to both the ADA and the AGG, Israel defines a “person with disabilities” as one “with a physical, mental, or intellectual, including cognitive, impairment, whether permanent or temporary, which substantially limits his functioning in one or more of the central spheres of life.”<sup>116</sup> Seemingly borrowed from the ADA, Chapter D of the Law prohibits employers from discriminating based on disability provided “that [the disabled individuals] are qualified for the job or position in question . . . .”<sup>117</sup> In addition to prohibiting discrimination, an employer is required to provide an accommodation for a disabled individual where it does not provide an “undue burden” on the employer.<sup>118</sup>

Further, the law qualifies what entities must abide by the legislation.<sup>119</sup> Here, “an employer employing more than 25 employees” must guarantee the protections afforded in the Equal Rights for Persons with Disability Law or face sanction by the Labor Court.<sup>120</sup> On the other hand, State entities are expressly excluded.<sup>121</sup> Rather, “the provisions of section 15A of the Civil Service (Appointments) Law, 5719-1959 are applicable.”<sup>122</sup>

Article 15A of Israel’s Civil Service Law states that “among civil service employees, including all ranks and professions, each transmitter and unit will be given appropriate expression, under the circumstances, the representation of . . . people with disabilities . . . .”<sup>123</sup> The purpose of this representation is twofold.<sup>124</sup> First, the “government attempts to remedy injustices and increase social consolidation by combatting stereotypes and other barriers.”<sup>125</sup> The second “bears a more communal character” because “its beneficiaries enjoy it according to the decision of their group . . . .”<sup>126</sup> Overall, the Israeli government’s goal is to break down barriers and stereotypes by incorporating individuals with disabilities, among others, into government employment in accordance with the Israeli Declaration of Independence.<sup>127</sup>

115. *Id.* ch. A § 1.

116. *Id.* ch. B § 5.

117. *Id.* ch. D § 8.

118. Ch. D § 8(e)(2), Equal Rights for People with Disabilities Law, 5773-2012, SH 2388 (1998) (Isr.) (“An Undue Burden means an unreasonable burden in the specific circumstances, taking into consideration . . . the cost and nature of the accommodation, the size and structure of the business, the scope of activity, number of employees, composition of the staff and the existence of external or State sources of financing to perform the accommodation.”).

119. *See id.* ch. D § 9(d).

120. *Id.* ch. D § 9(d), (12)-(15).

121. *See id.* ch. D § 9(d).

122. *Id.*

123. JOHN HANNA BITAR, ARTICLE 15 OF THE CIVIL SERVICE LAW (APPOINTMENTS) 1959 – HAVE WE REACHED THE INHERITANCE? 4 (Katie Rothman, ed. 2017).

124. *Id.* at 5.

125. *Id.*

126. *Id.*

127. *Id.* at 4 (“The Israeli Declaration of Independence guarantees social and political equality to all citizens of Israel.”)

Notably, Israel's Civil Service Law only applies to civil service jobs.<sup>128</sup> However, Israel has also enacted the Defense Service Law.<sup>129</sup> Because Israel's general disability laws do not apply to military service and Israel's Civil Service Law is silent on the subject matter,<sup>130</sup> pursuant to the doctrine of *Lex Specialis*,<sup>131</sup> the more specific law governing service in the IDF must apply.<sup>132</sup>

## 2. Disability in the IDF

As stated, the governing law for military service in Israel is the Israeli Defense Service Law.<sup>133</sup> Notably, Israel has a compulsory service model;<sup>134</sup> therefore, each military age person is required to report for registration in the IDF.<sup>135</sup> Upon registration, candidates are given medical and physical screenings to determine their fitness for military service.<sup>136</sup> Each candidate is assigned a specific profile, which limits their opportunities for service.<sup>137</sup> However, Israelis determined to be unfit for military service are still provided with an opportunity to volunteer.<sup>138</sup>

Service in the military is a major part of Israeli society. Therefore, the opportunity to volunteer provides many disabled Israelis with the ability to participate in a critical sphere of Israeli life.<sup>139</sup> For example, Pvt. Ori, a current member of the IDF, plans to become an Education Non-Commissioned Officer—despite the fact that she is entirely blind.<sup>140</sup> The IDF has also developed volunteer units for those with certain conditions, such as down-syndrome, allowing many Israelis the ability to participate in some form of uniformed service if they so choose.<sup>141</sup> Although Israel does limit the ability of persons with disabilities to serve in the IDF,<sup>142</sup> the IDF

---

128. *Civil Service Law (Appointments) – Amendment (Affirmative Action) Bill*, ADALAH (Jun. 2011), <https://www.adalah.org/en/law/view/545> (last visited Nov. 17, 2022).

129. *See generally* Defense Service Law, 5719-1959, SH 296 (1959) (Isr.).

130. *See* ch. D § 9(d), Equal Rights for People with Disabilities Law, 5773-2012, SH 2388 (1998)(Isr.); § 15A Civil Service (Appointments) Law, 5719-1959 SH 279 (1959) (Isr.).

131. *See Lex Specialis Law and Legal Definition*, USLEGAL, <https://definitions.uslegal.com/l/lex-specialis/> (last visited Nov. 17, 2022) This doctrine for interpreting laws states that “. . . a law governing a specific subject matter overrides a law that only governs general matters.” *Id.*

132. *See generally* Defense Service Law, 5719-1959, SH 296 (1959) (Isr.).

133. *Id.*

134. *Our Soldiers*, ISR. DEF. FORCES, <https://www.idf.il/en/mini-sites/our-soldiers/> (last visited Nov. 17, 2022).

135. Ch. 2 § 3, Defense Service Law, 5719-1959, SH 296 (1959) (Isr.).

136. *Id.* §§ 4-7.

137. *See The Medical Profile*, ISR. DEF. FORCE, <https://www.mitgaisim.idf.il/כתבות/english/tzav-rishon/the-medical-profile/#/> (last visited Nov. 18, 2022).

138. *See id.*

139. *See* Leiba Chaya David, *Israel – A model of inclusivity*, THE TIMES OF ISRAEL (Dec. 2, 2021), <https://www.timesofisrael.com/spotlight/israel-a-model-of-inclusivity/>.

140. IDF Editorial Team, *Pvt. Ori Is Using Her Disability to Teach Others About Tolerance*, ISRAELI DEF. FORCES (Dec. 3, 2017), <https://www.idf.il/en/mini-sites/our-soldiers/pvt-ori-is-using-her-disability-to-teach-others-about-tolerance/>.

141. *See* Yossi Kahana, *The IDF Has Room for All*, THE ISRAEL FOREVER FOUND., [https://israelforever.org/interact/blog/the\\_idf\\_has\\_room\\_for\\_all/](https://israelforever.org/interact/blog/the_idf_has_room_for_all/) (last visited Nov. 18, 2022).

142. *See Medical Profile*, DRAFT IDF, <http://draftidf.co.il/profile/> (last visited Nov. 18, 2022).

fosters civilian-military relations by opening access to military service, a common aspect of Israeli life.<sup>143</sup>

### III. Implementing Lessons Learned from BW and IDF into DoD Policy

Turning back to the U.S. Armed Forces, the lessons learned from the German Bundeswehr and Israeli IDF demonstrate promise for resolving the two main issues facing combat effectiveness: recruitment and bridging the civilian-military divide.<sup>144</sup> By implementing several practical elements from both the Bundeswehr and the IDF, the U.S. Armed Forces can effectively tackle combat effectiveness issues. Notably, this can be accomplished through incorporation of individuals with disabilities into the U.S. Armed Forces.

First, the DoD can open the U.S. Armed Services by implementing a profiling system similar to the IDF.<sup>145</sup> The days of the perfect soldier are antiquated; this model provides a meaningful way for citizens with a disability to serve their country, which presently comprise 25% of the American population.<sup>146</sup> Foremost, this system would assist with recruitment numbers in the military by opening up the population pool of those eligible to join. Further, it would allow the armed forces to acquire resilient and adaptive individuals that succeed in non-kinetic military environments.<sup>147</sup> In addition, this system would allow the U.S. Armed Forces, albeit in a utilitarian manner, to position their most physically capable soldiers on the battlefield while reserving other less intensive but necessary positions for its disabled soldiers.<sup>148</sup> Overall, by implementing the IDF's medical profiling system and applying the Bundeswehr's utilitarian process, the U.S. Armed Forces can become a more effective combat force.

Second, the DoD can institute regulations similar to the Bundeswehr<sup>149</sup> that make disabled soldiers a vital component of the armed services. Military service in the United States is a revered aspect of American society,<sup>150</sup> and such initiatives can serve to destigmatize and promote disabled Americans in other professions as well.<sup>151</sup> Further, programs such as those employed by the IDF, if implemented by the DoD, can ensure that every American forms the bond of shared military service and promote positive civilian-military relations.<sup>152</sup> Overall, these initiatives promote returning to the military's mission of reflecting those that they serve. In doing so they can help America avoid the developing soldier caste.<sup>153</sup>

---

143. See David, *supra* note 139.

144. See *supra* Part II.

145. See *The Medical Profile*, *supra* note 137.

146. CDC, *supra* note 20; Schwartz, *supra* note 66.

147. Duquette, *supra* note 21, at xiii, xiv, xv, 61.

148. See Kurzinformation, *supra* note 101.

149. See *Inclusion in the Bundeswehr*, *supra* note 90.

150. Stephen M. Walt, *Do Americans love the military too much?*, FOREIGN POL'Y (Nov. 6, 2012, 3:01 PM), <https://foreignpolicy.com/2012/11/06/do-americans-love-the-military-too-much/>.

151. See *Diversity in the Bundeswehr*, *supra* note 22.

152. See Kahana, *supra* note 141.

153. See *Diversity and Inclusion*, *supra* note 17; Ulrich, *supra* note 14.



**Conclusion**

The DoD is facing a challenging issue: maintaining its combat effectiveness in today's rapidly changing, global environment. The nature of warfare is evolving; combat no longer requires soldiers to be on the battlefield in every circumstance. Ultimately, by implementing the elements of the Bundeswehr and IDF that enable disabled citizens to serve in the armed forces, the United States can expand recruitment and improve civil-military relations, effectively enhancing its combat capabilities. Disabled Americans can play a unique and vital role in the service of their country through their resilience and adaptability, and the DoD should strongly consider creating a pathway to enable these Americans to do so in uniform.