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Guardians of Ethics for the Profession of Arms: Judge Advocates Assisting Commanders to Choose the Harder Right Over the Easier Wrong

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GUARDIANS OF ETHICS FOR THE PROFESSION OF ARMS: JUDGE ADVOCATES ASSISTING COMMANDERS TO CHOOSE THE HARDER RIGHT OVER THE EASIER WRONG*

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"Ethics is knowing the difference between what you have a right to do and what is right to do." – Potter Stewart, U.S. Supreme Court Justice[1]

INTRODUCTION

Throughout the history of the Armed Forces, members of the Service Judge Advocate General's (JAG) Corps have supported the operational missions of their military units, providing quality legal services to commanders, staff, personnel, and family members. And they have done so while promoting the legitimacy of the Profession of Arms both in American society and throughout the world. Primarily, Judge Advocates are commissioned officers in one of the Services in the U.S. Armed Forces, serving as legal advisors for their assigned commands. Their responsibilities expand over a myriad of legal fields, practicing in areas such as ethics advisor, legal assistance, claims, administrative law, and military justice (e.g., prosecutors and defense counsel in courts-martial). This article argues that Judge Advocates are in the unique position to guide commanders in many varied situations because, in essence,

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1. *Potter Stewart Quotes*, BRAINY QUOTE, https://www.brainyquote.com/authors/potter-stewart-quotes (last visited Mar. 23, 2024).

lawyers are leaders—responsible to lead or guide others to the right ethical path to "choose the harder right instead of the easier wrong."[2] Furthermore, when they are not present at the table to provide sage, educated, measured, ethical advice—or fail to speak up and address potential ethical issues that arise—or are ignored—things might go awry.

The first half of this article describes the history and establishment of the military as the Profession of Arms, carrying with it the trust and confidence of the American people and ethical obligations. The Armed Forces have an ethical code, and there is a hierarchy of loyalties within each military Service as further explained in this section of the article.

The second half of the article focuses on the role of Judge Advocates to protect and preserve our nation's trust in its military members. Judge Advocates, as commissioned officers, have an ethical obligation as officers and leaders within their Service. As such, they have the responsibility to act ethically and responsibly, and accomplish the task in a manner consistent with the values of our Armed Forces, and ensure commanders do the same. The article describes the legal responsibilities that Judge Advocates take on to support their Service. All areas of their legal practice are critical to the Armed Forces as Judge Advocates provide legal services that support, defend, and represent the interests of the United States of America. The article asserts that Judge Advocates serve as Guardians of Ethics for the Profession of Arms which entails Judge Advocates upholding the ethical and legal foundation of the Armed Forces. Moreover, they assist in ensuring that the military retains the position of special trust as a preeminent institution with the American people.

Particularly in the most difficult and complicated situations, commanders need unbiased and professional judgment they can rely on from their Service Judge Advocates. Judge Advocates must have moral courage, to advocate for their Service and clients, advise commanders, and be ethical advisors in order to ensure the highest respect for the law and ethics. This article highlights recent examples of illegal, immoral, or unethical courses of action that occurred because a Judge Advocate was unable or unwilling to voice concerns, or was ignored by their commander when they did so. Examples of cases when advice from Judge Advocates was not solicited or was ignored include the "Fat Leonard" bribery scandal that revealed a widespread ethics failure up and down the ranks of the Department of Navy. The article closes by reinforcing the observation that Judge Advocates have a weighty responsibility as Guardians of Ethics for the Profession of Arms. Judge Advocates are the ethical and moral compasses for difficult judgment calls, assisting commanders in choosing the

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2. Col. Clayton E. Wheat, *The Cadet Prayer*, WEST-POINT, https://www.west-point.org/academy/malo-wa/inspirations/cadetprayer.html (last visited Feb. 8, 2024). The Cadet Prayer states:

> Make us to choose the harder right instead of the easier wrong, and never to be content with a half truth when the whole can be won. Endow us with courage that is born of loyalty to all that is noble and worthy, that scorns to compromise with vice and injustice and knows no fear when truth and right are in jeopardy.

Id.

"harder right instead of the easier wrong."[3] Furthermore, if Judge Advocates are not present, fail to speak up, are ignored, or are tabled, military leaders will not have the opportunity to make informed and ethical decisions.

I. HISTORY

The history of the establishment of the U.S. Army and the commanders' reliance on Judge Advocates dates back to the American Revolution, with the need for rules and regulations to guide military servicemembers and the enforcement of those rules and regulations with the development of the military justice system. In the 1770s, what were initially acrimonious disputes between the United Kingdom of Great Britain and its North American colonies, due to taxation, self-governance, individual rights, and western expansion, evolved into a full-fledged rebellion. And in 1775 the Second Continental Congress gathered in Philadelphia to address this crisis, creating the Continental Army (now the U.S. Army), on June 14, 1775.[4] The same day, a Congressional Committee which included George Washington, was established to prepare "a dra't [sic] of Rules and regulations for the government of the army."[5] This committee proposed sixty-nine "Articles of War" based on British and colonial military law[6] and those rules, in large part, reflect the current Uniform Code of Military Justice. Six days later, the Congress appointed George Washington as the "General and Commander in chief of the [a]rmy of the [U]nited Colonies and of all the forces raised or to be raised by them."[7]

Then at the Second Continental Congress, only a few days after General Washington took command of the Continental Army in Cambridge, Massachusetts, on June 29, 1775, Washington asked Congress to appoint William Tudor, a Harvard-educated and successful Boston attorney, as the Judge Advocate General of the Continental Army (the top legal officer), and John Marshall (later appointed Chief Justice of the United States), to serve as the Army's Deputy Judge Advocate.[8] During the Revolution, the Army included approximately fifteen or so other Judge Advocates, many of whom subsequently became members of the Senate or House of Representatives and one became a governor.[9] Essentially, Judge Advocates served to enforce

3. *Id*.

4. *See* 2 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, at 89–90 (1905).

5. *Id.* at 90. The Code of 1775 provided for a general and a regimental court-martial, as well as for punishment "by order of the commanding officer." *Id.* at 115.

6. *Id.* at 112–23.

7. *Id.* at 100.

8. *See* THE ARMY LAWYER: A HISTORY OF THE JUDGE ADVOCATE GENERAL'S CORPS, 1775–1975, at 7–8, 23–24 (1975).

9. *Id.* at 23.

military law which was necessary to enforce military discipline[10] and ensure military mobility.[11]

II. THE MILITARY AS THE PROFESSION OF ARMS

America's military—the Armed Forces—is identified by its own members, as well as others, as the "Profession of Arms." General Douglas MacArthur's farewell speech to the West Point Cadets in May 1962, clearly identified this important public service organization as such when he stated, "Yours is the [P]rofession of [A]rms, the will to win, the sure knowledge that in war there is no substitute for victory, that if you lose, the Nation will be destroyed, that the very obsession of your public service must be [D]uty, [H]onor, [C]ountry."[12]

The military is a profession, reflecting traits of all professions. As Justice Louis D. Brandeis of the United States Supreme Court observed:

> The peculiar characteristics of a profession as distinguished from other occupations, I take to be these:
>
> *First.* A profession is an occupation for which the necessary preliminary training is intellectual in character, involving knowledge and to some extent learning, as distinguished from mere skill.
>
> *Second.* It is an occupation which is pursued largely for others and not merely for one's self.
>
> *Third.* It is an occupation in which the amount of financial return is not the accepted measure of success.[13]

Like all professions, military members provide uniquely expert work that requires expertise, study, and practice. And society depends on professionals

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10. Separate military law is necessary because, as the Supreme Court has explained, the military is,

> "a specialized society separate from civilian society" with "laws and traditions of its own [developed] during its long history." . . . To prepare for and perform its vital role, the military must insist upon a respect for duty and a discipline without counterpart in civilian life. The laws and traditions governing that discipline have a long history; but they are founded on unique military exigencies as powerful now as in the past.

Schlesinger v. Councilman, 420 U.S. 738, 757 (1975) (quoting Parker v. Levy, 417 U.S. 733, 743 (1973)).

11. The military must have a legal system that is applicable in air, land, and sea, during peacetime, wartime, in the United States or abroad, and often where civil authority does not exist. Enforcement of law cannot be postponed until servicemembers return to the United States from battle or abroad and disciplinary problems must be addressed expeditiously. As highlighted by the Supreme Court, "Court-martial jurisdiction sprang from the belief that within the military ranks there is need for a prompt, ready-at-hand means of compelling obedience and order." United States ex rel. Toth v. Quarles, 350 U.S. 11, 22 (1955).

12. Gen. Douglas MacArthur, Duty, Honor, Country, Address to the Corps of Cadets U.S. Military Academy at West Point, N.Y., (May 12, 1962), *in* DEP'T DEF. PAMPHLET GEN-1A, at 2 (U.S. Gov't. Printing Off. 1964).

13. Louis D. Brandeis, Business—A Profession, Address at Brown University Commencement Day (June 19, 1912), *in* LOUIS D. BRANDEIS, BUSINESS–A PROFESSION 2 (1914).

for survival—for security the military, for health the medical professionals, and for justice the legal profession. Each carries a deep ethical obligation that requires training, education, and certification. Professionals deal with fundamental human needs (such as treating the sick, resolving disputes, educating students, and protecting citizens); confront complex issues, not easily resolved; and take advantage of current knowledge, including, in some cases, privileged information.[14] A profession, generally, is different from an occupation or a job, and professions have four common characteristics: "expertise, responsibility, corporateness, and a shared ethic and ethos. These are all woven through the U.S. [P]rofession of [A]rms."[15]

The Profession of Arms is a unique vocation—volunteers, professionals with a calling (not working a job) who focus on others and who are bonded with a shared culture of service and sacrifice.[16] Many servicemembers are motivated by the honor of service and camaraderie and not so much by salary and vacation days, and the Profession of Arms is a vocation that involves a higher calling to serve someone above self, to sacrifice self.[17] As former Army Chief of Staff General Edward C. Meyers, said, "Being a Soldier is different—not an occupation, but a profession, a calling."[18] Former Army Chief of Staff, General Carl E. Vuono further highlighted this aspect of military service, stating, "A professional is committed to the [P]rofession of [A]rms—a commitment that must include the willingness to sacrifice personal interests, even risking life itself in the defense of the nation."[19] Moreover, as General Dempsey charged the Army, the Profession of Arms:

> is a calling requiring unique expertise to fulfill our collective responsibility to the American people, "provide for the common defense and secure the blessings of liberty." Our profession is distinguished from others in society because of our expertise in the justified application of lethal military force and the willingness of those who serve to die for our Nation. Our profession is defined by our values, ethics, standards, code of conduct, skills, and attributes. As volunteers, our sworn duty is to the Constitution. Our status as a profession is granted by those whom we are accountable to, our civilian authority, and the American people.[20]

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14. *See Michel de Montaigne: An Unexpected Lens on Professions in the 16th Century and in the 21st Century*, THE GOOD PROJECT (Feb. 28, 2017), https://www.thegoodproject.org/good-blog/2017/2/28/michel-de-montaigne-an-unexpected-lens-on-professions-in-the-16th-century-and-in-the-21st-century.

15. RICHARD M. SWAIN & ALBERT C. PIERCE, THE ARMED FORCES OFFICER 33 (Nat'l Def. Univ. Press 2017).

16. GEN. MARTIN E. DEMPSEY, AMERICA'S MILITARY–A PROFESSION OF ARMS: WHITE PAPER 4 (2012).

17. *See* SWAIN & PIERCE, *supra* note 15, at 17.

18. THE CHIEFS OF STAFF, UNITED STATES ARMY, ON LEADERSHIP AND THE PROFESSION OF ARMS 13 (2016).

19. *Id.* at 57.

20. DEMPSEY, *supra* note 16, at 4 (emphasis omitted).

III. THE MILITARY HAS THE TRUST OF THE AMERICAN PEOPLE

The American public grants the Profession of Arms significant autonomy, bestowing its trust and confidence in this ethical profession to exercise "the disciplined initiative critical to accomplishing missions under diverse conditions around the world."[21] Annual public polls have consistently confirmed that the military is the most respected societal institution in the country. A 2018 Gallup Poll revealed that Americans have the most confidence in the military of the fifteen institutions tested.[22] One writer said:

> Americans admire the military as they do no other institution. Through the past two decades, respect for the courts, the schools, the press, Congress, organized religion, Big Business, and virtually every other institution in modern life has plummeted. The one exception is the military. Confidence in the military shot up after 9/11 and has stayed very high. In a Gallup poll last summer, three-quarters of the public expressed "a great deal" or "quite a lot" of confidence in the military. About one-third had comparable confidence in the medical system and only seven percent in Congress.[23]

This reflects our nation's public trust in military members—and Judge Advocates protect that trust and ensure it is preserved. The success of the U.S. Armed Forces depends:

> on a web of trust beginning with that between them and the American people and their government. The President expects the officer to live up to the expectations expressed in the commission. The people depend upon the Armed Forces for their security in a dangerous world. They provide their sons and daughters as Soldiers, Marines, Sailors, Airmen, and Coastguardsmen, in trust that their lives will be risked reluctantly and expended parsimoniously only as required for important tasks.[24]
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> . . . .
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> The defining mission of the Armed Forces is the preparation for and the conduct of war, which includes securing the military victory until peace is restored politically. It is the warfighting mission that determines how forces are organized, equipped, and trained. Whatever its particular forms, this unique and specialized service to

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21. ADP 6-22: ARMY LEADERSHIP AND THE PROFESSION 1-1 (Army Pub. Directorate 2019).

22. *See* Lydia Saad, *Military, Small Business, Police Still Stir Most Confidence*, GALLUP (June 28, 2018), https://news.gallup.com/poll/236243/military-small-business-police-stir-confidence.aspx (finding that, among the American institutions listed in the poll, the military engenders the highest public confidence, with seventy-four percent of Americans having a "[g]reat deal" or "[q]uite a lot" of confidence in the military).

23. James Fallows, *The Tragedy of the American Military*, THE ATLANTIC (Jan./Feb. 2015), https://www.theatlantic.com/magazine/archive/2015/01/the-tragedy-of-the-american-military/383516/.

24. SWAIN & PIERCE, *supra* note 15, at 2.

> the Nation gives the military profession its own nature and distinctive status.[25]

IV. ARMED FORCES ETHICS AND HIERARCHY OF LOYALTY FOR EACH SERVICE

Military members are not without ethical codes and should have internalized these standards without requiring the active role of a Judge Advocate. Through an executive order in 1955, President Dwight D. Eisenhower established professional ethical standards for military members while in combat or captivity in the Code of Conduct for Members of the Armed Forces of the United States.[26] Descriptions of criminal conduct are provided in United States Code, Chapter 47, Title 10, the Uniform Code of Military Justice.[27]

Additionally, baseline ethics requirements, generally, are established in each Service for line officers as well as Judge Advocates. Every branch of Service in the U.S. Armed Forces:

> has a set of institutional core values that aim to describe and define what it means to be a Soldier, a Marine, a Sailor, an Airman, or a Coastguardsman. . . . Each Service expects its members both to exhibit these virtues and to demand them from members who may become lax in their performance. This is what is meant by corporateness in a profession or *esprit de corps* in a military unit. . . . [T]hese virtues . . . take on a . . . profound meaning in the profession of arms.[28]

The table below provides the different institutional core values for each branch of Service.

25. *Id.* at 16.

26. Exec. Order No. 10,631, 3 C.F.R., 1954-1958 Comp., p. 266 (1955); Exec. Order No. 12,017, 3 C.F.R., 1977 Comp., p. 152 (1977) (amended Article V of the Code of Conduct which U.S. military forces have faced; the first change came about in 1977 when President Carter made it more "reasonable" by taking out the verbiage that would imply only one suitable course of action); Exec. Order No. 12,633, 3 C.F.R, 1988 Comp., p. 561 (1988) (amended Articles II and VI).

27. UCMJ, arts. 1–134, 10 U.S.C. §§ 801–934 (2020).

28. SWAIN & PIERCE, *supra* note 15, at 30.

Service Values[29]

U.S ARMY	U.S. NAVY & MARINE CORPS	U.S. AIR FORCE	U.S. COAST GUARD
LOYALTY	HONOR	INTEGRITY FIRST	HONOR
DUTY	COURAGE	SERVICE BEFORE SELF	RESPECT
RESPECT	COMMITMENT	EXCELLENCE IN ALL WE DO	DEVOTION TO DUTY
SELFLESS SERVICE			
HONOR			
INTEGRITY			
PERSONAL COURAGE			

Each Service also promotes a hierarchy of loyalties. For example, the Army's hierarchy entails a responsibility to the Constitution, Service, unit, and other Soldiers; for the Navy, it's the Constitution, mission, Service, and "ship-shipmate-self"; for the Air Force, it's Service before Self. [30] But for each Service, there is a higher calling rather than the individuals themselves because military service is about others—"fellow citizens and fellow military members."[31]

V. JUDGE ADVOCATES HAVE RESPONSIBILITIES AS OFFICERS IN THEIR MILITARY SERVICE

In addition to being members of the Profession of Arms and individual Services, Judge Advocates are commissioned officers in every military branch. Moreover, in addition to being attorneys with an ethical obligation to the legal profession, Judge Advocates are officers who have an ethical obligation as leaders (i.e., commissioned officers) within their Service. And for every Judge Advocate and officer appointed, the President of the United States reposes "special trust and confidence in the patriotism, valor, fidelity, and abilities" of those leaders who have responsibilities as the custodians of the Profession of

29. *Id.* at 30 tbl. Service Values.

30. *See id*. at 17 ("Like the priesthood, the profession of arms is a *vocation*, a higher calling, to serve others, to sacrifice self, to be about something larger than one's own ambitions and desires, something grander than one's own contributions and even one's own life.").

31. *Id.*

Arms.[32] Each officer must be appointed by the President and confirmed by the Senate—every selection, every promotion. That oath of office and commission give officers a sense of responsibility, an expectation of right action which "demands that officers develop the courage to act—to decide, to direct, to follow through—*and* to accept accountability for the consequences of the outcomes of their decisions and actions."[33]

Military senior leaders oftentimes remind officers of their responsibility to act ethically and the importance of the public's trust and confidence. As former Army Chief of Staff General Gordon Sullivan stated:

> As leaders, we do not simply take action to achieve an end. We must act responsibly. We must accomplish our tasks in a manner consistent with our values. The importance of those values to the nation and to us as leaders cannot be overstated. For the nation, the Army rooted in values is the surest defense against tyranny from within and defeat from without.[34]

In 2012, faced with a string of scandals, Secretary of Defense Leon E. Panetta in a memo to the Chairman of the Joint Chiefs of Staff, General Martin E. Dempsey, wrote "when lapses occur, they have the potential to erode public confidence in our leadership and in our system for the enforcement of our high ethical standards. Worse, they can be detrimental to the execution of our mission to defend the American people."[35] In a subsequent interview shortly thereafter, General Dempsey said:

> We, as the senior leaders of the military, should fundamentally take charge of our own profession, and overcome the challenges that have been posed to us . . . . If we really are a profession—a group of men and women who are committed to living an uncommon life with extraordinary responsibility and high standards—we should want to figure it out . . . .[36]

VI. LEGAL PRACTICE AS MEMBERS OF THE JUDGE ADVOCATE GENERAL'S CORPS

Attorneys in the Armed Forces are responsible for providing a myriad of legal services to support their Service, as well as servicemembers and their families. For example, the legal responsibilities of Army lawyers for the Army itself include Administrative and Civil Law (i.e., Environmental Law; General Statutory, Regulatory, and Policy Compliance; Investigations; Labor Law; Army Institutional Claims; and Real Property Law), Contract and Fiscal Law, Military Justice, and National Security Law (i.e., Constitutional Law;

32. *See id*. at 1, 26 (The President's commission for officers of the United States).

33. *Id.* at 33.

34. ON LEADERSHIP AND THE PROFESSION OF ARMS, *supra* note 18, at 82.

35. *Leon Panetta Orders Military Ethics Review in Wake of David Petraeus Sex Scandal,* CBS NEWS (Nov. 15, 2012), https://www.cbsnews.com/news/leon-panetta-orders-military-ethics-review-in-wake-of-david-petraeus-sex-scandal/.

36. Thom Shanker & Elisabeth Bumiller, *Pentagon to Review Ethical Standards*, THE TECH (Nov. 16, 2012), https://thetech.com/2012/11/16/long3-v132-n54.

Cyberspace Law; Intelligence Law; International Law; Operational Law; and Special Operations Support).[37] Army attorneys also provide legal support to soldiers and their family members and in some cases, Department of the Army Civilians. This may include adjudicating harm, damage, or destruction to persons or property claims; assisting soldiers facing medical evaluations or disability issues; providing special victim counsel services;[38] and acting as legal counsel as a member of the Trial Defense Service.[39]

"Legal professionals are involved in all aspects of the issues confronting a rapidly changing [military] force. . . . All are critical to the [Armed Forces] as a profession and a values-based institution as it supports, defends and represents the interests of the United States of America."[40]

VII. JUDGE ADVOCATES AS GUARDIANS OF ETHICS FOR THE PROFESSION OF ARMS

Service Judge Advocates are seen by many line officers[41] (i.e., non-JAG officers) as the Guardians of Ethics for the Profession of Arms. As U.S. Army Major General (Ret.) Mari K. Eder, a non-JAG officer, explained, "[t]he JAG Corps serves to uphold the moral and legal foundation of the Profession of Arms. They are our Army's true legal guardians. Commanders and their leaders, committed and dedicated to the Profession of Arms, have a moral and legal obligation to heed the advice of their legal advisors."[42]

So, how do Judge Advocates uphold the ethical and legal foundation of the Profession of Arms? How do they help ensure that the military retains that position of special trust as a preeminent institution with the American people?

Essentially, commanders need unbiased, professional judgment and they rely on the experienced, professional reasoning, of Judge Advocates particularly in the most difficult and complicated situations—in all areas of military law—military justice, legal assistance, contract and fiscal law, administrative law, international law, and operational law. Judge Advocates have a second profession within the Profession of Arms, in addition to their responsibilities as officers and as attorneys. Judge Advocates have specialized training, are law school graduates, have taken state bar exams, and are members of a bar in good standing. No matter what area of the law, Judge Advocates are bound by the ethics of both the military Service and the legal profession, and they must adhere to the highest of military values and ethics. And commanders know that. The

37. U.S. DEP'T OF THE ARMY, FM 1-04: LEGAL SUPPORT TO OPERATIONS vii (June 8, 2020), https://irp.fas.org/doddir/army/fm1-04.pdf [hereinafter FM 1-04].

38. *Id.* at 5-1.

39. *Id.* at 5-4.

40. Mari K. Eder, *Military Ethic and the Judge Advocate General's Corps: Legal Guardians of the Profession of Arms*, ASS'N U.S. ARMY, at 4 (Apr. 15, 2013), https://www.ausa.org/sites/default/files/LPE-13-1-Military-Ethic-and-the-Judge-Advocate-Generals-Corps-Legal-Guardians-of-the-Profession-of-Arms.pdf.

41. *See id.*

42. *Id.* at 5.

title Judge Advocate evolved from seventeenth century Britain and was founded on the dual role of court advisor and command prosecutor.[43] Now in the twenty-first century, as military doctrinal publications reflect, Judge Advocates are military officers who perform as lawyers, advisors, and counselors to support Service missions, service, and legitimacy.[44] They support the Service mission, protecting and promoting command authority, preserving resources, and ensuring a fair military justice system. As mentioned previously, Judge Advocates also provide legal services to clients and legal support to commanders, staff, personnel, family members, and individual servicemembers.[45] Judge Advocates support military operations, providing operational law advice and legal services in all areas of military law, during peacetime, war, and operations other than war. "Military commanders often consult their staff judge advocates (SJAs) [chief counsel], especially in the escalation of conflict."[46] Judge Advocates are responsible for supporting the "legitimacy" of the Armed Forces, engendering public respect and support by promoting justice and ethical behavior.[47] They do so by being confident, caring, courageous, and integrated into their Service.[48] In supporting these functions, Judge Advocates perform the roles of judge, advocate, ethical advisor, and command counselor, while acting as Guardians of Ethics for the Profession of Arms.

Judge Advocates take on the role of judge and are often asked to provide "opinions or rulings on whether a law is applicable, a legal obligation exists, or a legal right must be respected."[49] They must not rely on "personal views or policy preferences" to interpret the law, but must carefully read the "authoritative rule and [use] objective reasoning," and must be independent, impartial, and diligent.[50] Judge Advocates must have moral courage, know the facts, use their "wisdom, care, [and] sound judgment," and maintain "a judicious temperament."[51]

Judge Advocates advocate for their Service and for clients—requiring them to persuade and argue about how a statute should be interpreted and

43. *An Ordinance for the Speedy Establishing of a Court Martiall, within the Cities of Lonon, Westminster, or Lines of Communication, Together with the Names of such Commissioners as Are Appointed for the Execution Thereof* (1644), *in*, 1 ACTS & ORDS. INTERREGNUM, 1642–1660, at 486–88 (Eng.) (C. H. Firth & R. S. Rait eds. 1911); *Judge Advocate*, OXFORD ENGLISH DICTIONARY, https://doi.org/10.1093/OED/9736320624 (last visited Aug. 12, 2019).

44. *See generally* FM 1-04, *supra* note 37.

45. *Id.* at 1-8.

46. A. Edward Major, *Law and Ethics in Command Decision Making*, 92 MIL. REV. 61, 61–74 (2012).

47. Maj. Gen. Walter B. Huffman, *Address at the Judge Advocate General's Corps World Wide Continuing Legal Education Plenary Session* (Oct. 1997). See U.S. DEP'T OF THE ARMY, FM 27-100: LEGAL SUPPORT TO OPERATIONS (Mar. 1, 2000) [hereinafter FM 27-100].

48. FM 27-100, supra note 47 at 1-2.

49. *Id.* at 1-4.

50. *Id.*

51. *Id.*

whether it should be applied.[52] This ethically "requires zealousness, but also candor and fairness."[53] Judge Advocates are ethics advisors, evaluating conduct in "light of laws and regulations governing the conduct of government officials," as well as considering other ethical principles, including officer ethics and Service values.[54]

Judge Advocates advise commanders—as command counselors—advising commanders whether proposed actions while legal and ethical, are prudent. Judge Advocates must gain the trust of their commanders, all the while maintaining military ethics and teaching and enforcing military values and ethics. They must be proactive and provide advice early in the decisionmaking process to enable the command to accomplish the mission. Judge Advocates and commanders, together, can maintain and improve standards and discipline.

The roles and responsibilities of Judge Advocates—as judges, advocates, ethical advisors, and command counselors in sustaining the Profession of Arms require promoting, supporting, and defending good order and discipline, including maintaining a fair and functioning military justice system.[55] As military justice professionals—as with all areas of military law—Judge Advocates must maintain the highest respect for the law and the legal profession's strict requirements for technical knowledge, capabilities, standards, and ethics.

In every role, Judge Advocates must ensure our nation's trust in the Profession of Arms is preserved, bearing in mind lapses in judgment and leadership lead to the erosion of public confidence in the military and are detrimental to executing the mission of defending American citizens. Performing as judges, advocates, ethical advisors, or command counselors, Judge Advocates methodically "identify issues; formulate courses of action and evaluate their strengths, weaknesses, and legal consequences; anticipate potential legal attacks; consider ethical and prudential concerns; provide their personal recommendations to decision[]makers; and frequently execute command decisions."[56]

Retired Army Major General Mari K. Eder (a line officer, non-JAG) advised:

> Commanders and their leaders, committed and dedicated to the Profession of Arms, have a moral and legal obligation to heed the advice of their legal advisors. The staff judge advocate (SJA) [chief counsel] is the advisor who is bound by the ethics of both his [S]ervice and his profession to adhere to the highest of military values and ethics. While commanders may not want legal advice at

52. *See e.g.*, MODEL CODE OF JUD. CONDUCT Canons 1-4 (AM. BAR ASS'N 2020).

53. FM 27-100, *supra* note 47, at 1-5; *see* U.S. DEP'T OF THE ARMY, ARMY REGULATION 27-26: RULES OF PROFESSIONAL CONDUCT FOR LAWYERS 58–74 (June 28, 2018), https://milreg.com/File.aspx?id=192.

54. FM 27-100, *supra* note 47, at 1–5.

55. *Id.*

56. *Id.*

> times or may avoid seeking advice, that does not absolve the ethics counselor from his duties. Every legal professional who serves a commander looks at an action from the following perspectives:
>
> - Is a course of action legal, moral, and ethical?
> - Could a course of action give the appearance of being illegal, immoral, or unethical?
> - Is there an underlying cultural or systemic problem?
> - What are the potential second and third-order effects of a commander's chosen course of action?[57]

Using this method of analysis, Judge Advocates not only can evaluate legal issues but can also break down other issues facing commanders.

VIII. PROBLEMS WHEN JUDGE ADVOCATES ARE NOT AT THE TABLE, DON'T SPEAK UP, OR ARE IGNORED

Judge Advocates have a high moral duty to defend—the more heinous the crime, the greater the duty. Oftentimes, the ethical compass of the Profession of Arms comes down to whether a Judge Advocate has the moral fortitude to confront a commander and tell them—no, *that* is the wrong thing to do, instead you could do *this*. This is true for legal advice regarding ethical matters, criminal issues, and operational decisions. Judge Advocates must be present at the table, speak up, and be heard.

One recent example of instances where Judge Advocates were either not consulted, ignored, or complicit is the criminal investigation and subsequent sanctions in 2013 resulting from the "Fat Leonard" scandal, a widespread ethics failure, that implicated hundreds of officers, enlisted, and civilian personnel up and down the ranks of the Department of the Navy and persisted for nearly a decade.[58] The scandal involved a Malaysian defense contractor, Leonard Glenn Francis, nicknamed "Fat Leonard" who bribed Navy officers with lavish gifts, including cash, travel, hotel stays, concert tickets, and illicit relationships with prostitutes in exchange for classified information and multi-million-dollar defense contracts.[59] U.S. Attorney for the Southern District of California, Laura Duffy, stated in a press release that:

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57. Eder, *supra* note 40, at 5.

58. Plea Agreement, *United States v. Glenn Defense Marine Asia PTE.*, No. 3:13-cr-03781-JLS-3 (S.D. Cal. 2015); *see also* Craig Whitlock*, 'Fat Leonard' Probe Expands to Ensnare More than 60 Admirals*, WASH. POST (Nov. 5, 2017), https://www.washingtonpost.com/investigations/fat-leonard-scandal-expands-to-ensnare-more-than-60-admirals/2017/11/05/f6a12678-be5d-11e7-97d9-bdab5a0ab381_story.html ("The Justice Department has filed criminal charges against twenty-eight people, including two admirals, since Francis was arrested in an international sting operation four years ago. . . . The Navy recently confirmed that it has been reviewing the conduct of 440 other active-duty and retired personnel—including sixty current and former admirals—for possible violations of military law or federal ethics rules in their dealings with Francis and his company.").

59. Plea Agreement, *Glenn Defense Marine Asia*, *supra* note 58, at 22:

> hundreds of thousands of dollars in the services of prostitutes and associated expenses; hundreds of thousands of dollars in travel expenses, including airfare, often first or

> It is astounding that Leonard Francis was able to purchase the integrity of Navy officials by offering them meaningless material possessions and the satisfaction of selfish indulgences. In sacrificing their honor, these officers helped Francis defraud their country out of tens of millions of dollars. Now they will be held to account.[60]

The consequences of these corrupt activities were far-reaching and involved misconduct ranging from intentional corruption to a lack of adherence to "bedrock standards of ethical conduct expected of all Government personnel."[61] The subsequent review and adjudication of cases of individuals implicated raised questions regarding the role and involvement of designated ethics counselors.[62] The investigation revealed documented instances of Judge Advocates failing in their responsibilities to provide timely, effective advice.[63] According to multiple news media outlets, Navy records showed that in many cases Navy Judge Advocates had actually informed officers they were authorized to attend lavish dinners Francis Leonard hosted.[64]

In some instances, Judge Advocates were ignored or marginalized by their superior chain of command who were implicated in this widespread scandal. One example is when, in February 2007, the Seventh Fleet Judge Advocate General circulated an ethics memorandum to all senior officers in the Fleet, advising personnel of the "ethics regulations pertinent to receiving gifts in foreign ports," including those regulations specific to "receiving gifts from a defense contractor" like Francis Leonard, who was a prohibited source.[65] Just two weeks later, Fleet Marine Officer Colonel Enrico Deguzman, accompanied by his wife and other officers, allegedly ate at Jaan Restaurant and accepted a

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> business class, luxurious hotel stays, incidentals, and spa treatments; hundreds of thousands of dollars in lavish meals, top-shelf alcohol and wine, and entertainment; and hundreds of thousands of dollars in luxury gifts, including designer handbags and leather goods, watches, fountain pens, fine wine, champagne, Scotch, Kobe beef, Spanish suckling pigs, designer furniture, Cuban cigars, consumer electronics, ornamental swords, and hand-made ship models.

Id.; Steve C. Morang, *U.S. Navy Corruption on the High Seas*, FRAUD MAGAZINE (Sept./Oct. 2018), https://www.fraud-magazine.com/article.aspx?id=4295003093.

60. *Press Release, Malaysian Defense Contractor Leonard Francis Pleads Guilty to Corruption Conspiracy Involving "Scores" Of Navy Officials; A Navy Captain–The Highest Ranking So Far–Admits He Was One of Them*, U.S. ATTORNEY'S OFF., S. DIST. CAL. (Jan. 15, 2015), https://www.justice.gov/usao-sdca/pr/malaysian-defense-contractor-leonard-francis-pleads-guilty-corruption-conspiracy.

61. U.S. DEP'T NAVY, COMPREHENSIVE REVIEW OF THE DEPARTMENT OF THE NAVY'S UNIFORMED LEGAL COMMUNITIES 2 (Dec. 9, 2019).

62. *Id.*

63. *Id.*

64. Andrew Dyer, *Admiral Who Oversaw Gallagher Prosecution Implicated in 'Fat Leonard' Probe, Navy Documents Indicate*, SAN DIEGO UNION-TRIB. (Aug. 5, 2019), https://www.sandiegouniontribune.com/news/military/story/2019-08-05/admiral-that-oversaw-gallagher-prosecution-implicated-in-fat-leonard-probe-navy-documents-indicate.

65. Indictment at 17, 23, United States v. Newland et. al., No. 17CR0623JLS (S.D. Cal. 2017).

hotel bill in Singapore that cost $30,000.[66] Even more egregious, the Chief of Staff to the commander of the Seventh Fleet, Captain David Newland, told Lieutenant Commander Edmond Aruffo to forward a previous Seventh Fleet Judge Advocate ethics memorandum to Francis Leonard so "that [he] would know to keep their relationship a secret."[67] When Judge Advocates provide ethical and legal restrictions and responsibilities to commanders and they are blatantly ignored—even provided to bad actors in an attempt to evade punishment—the hands are tied for those Judge Advocates attempting to act as Guardians of Ethics for the Profession of Arms.[68] By ignoring the input of Judge Advocates, these high-ranking Navy officers set a tone of unethical behavior and created a culture of corruption within the Navy.

Another example of ignoring Judge Advocates that raised the warning flags occurred in September 2008, when Commander Steven Shedd sent Francis Leonard an email attaching an internal U.S. Navy Judge Advocate General memorandum concerning the U.S. Navy's improper payment of an excessive port fee.[69] Not only did Commander Shedd provide the internal advice from the Judge Advocate to bad actors, but he also added that he had spoken with the Assistant Chief of Staff for Logistics for the Seventh Fleet and Seventh Fleet's Assistant Deputy Logistics Officer about the matter and that they advised Francis Leonard to "send a reply letter to [the U.S. Navy Fleet and Industrial Supply Center Official] and invite him to [his] office for an 'informal tour.'"[70] Even when Judge Advocates identified improper and excessive payments going to Leonard Francis's business, their advice was ignored and again shared with bad actors in an attempt to corrupt and influence the officers trying to hold those accountable.

While Judge Advocates played an important role in investigating and prosecuting the cases that followed the scandal, serving as prosecutors, defense counsel, and advisors to the Navy leaders involved, the scandal highlights the need for a strong ethical culture and effective oversight mechanisms to prevent corruption within our military and defense contracting industries. According to the Comprehensive Review of the Department of the Navy's Uniformed Legal

66. Kirstin Downey, *Fighting Back: This Former Navy Officer Isn't Rolling Over in the Fat Leonard Bribery Case*, CIVIL BEAT (Aug. 2, 2017), https://www.civilbeat.org/2017/08/fighting-back-this-former-navy-officer-isnt-rolling-over-in-the-fat-leonard-bribery-case/.

67. Indictment, *supra* note 65, at 17.

68. *See also* Craig Witlock, *Navy Repeatedly Dismissed Evidence that 'Fat Leonard' was Cheating the 7th Fleet*, WASH. POST (Dec. 27, 2016), https://www.washingtonpost.com/investigations/navy-repeatedly-dismissed-evidence-that-fat-leonard-was-cheating-the-7th-fleet/2016/12/27/0afb2738-c5ab-11e6-85b5-76616a33048d_story.html?nid=top_pb_signin&tid=nav_sign_in ("[S]taffers at the U.S. Pacific Fleet Headquarters were so worried about the potential for trouble that they drafted a new ethics policy to discourage Navy personnel from accepting favors from Francis . . . [b]ut their effort was blocked for more than two years by admirals who were friendly to the contactor . . . .").

69. Indictment, *supra* note 65, at 45.

70. *Id.*

Communities, a particular concern to "senior leadership was the lack of systemic Navy JAG Corps response to the issues raised by [the scandal]."[71]

Commanders also should heed legal advice from Judge Advocates in a criminal setting when making pretrial, trial, and post-trial decisions to ensure the rights of servicemembers are protected. The U.S. Air Force Court of Criminal Appeals noted one such case in *United States v. Williams*.[72] In that case, Bossier City, Louisiana, police officers arrested and confined Air Force Staff Sergeant Anthony Williams in the local jail, and his commander, Lieutenant Colonel Eaves was notified.[73] The commander, in turn, called her Judge Advocate to discuss placing Staff Sergeant Williams, the accused, in pretrial confinement upon his release from civilian custody.[74] Although the Judge Advocate advised against it, Lieutenant Colonel Eaves placed the accused in pretrial confinement. Staff Sergeant Williams argued, and the trial and appeals courts held, that Lieutenant Colonel Eaves did not have reasonable grounds to believe that the circumstances warranted pretrial confinement.[75] The Air Force military judge who presided over the court-martial (trial level court) found that, although the commander's unwillingness to follow her Judge Advocate's legal advice did not render her incompetent to decide the pretrial confinement issue, it weighed against her in determining whether she had a substantial basis to reach the decision she did.[76] Although the accused was granted post-confinement relief for his time spent in illegal pretrial confinement, the commander's failure to follow the advice of the Judge Advocate resulted in the infringement on the accused's rights and the positive urinalysis being suppressed.[77]

And, although an extensive discussion on this issue is beyond the scope of this article, it is important to note that Judge Advocate advice in a battlefield or operational setting is extremely important and has become vital to adhere to as well.[78] Reliance on legal advice in the operational setting involves applying and interpreting the laws of war, such as appropriate targeting, rules of engagement, international law, domestic law limitations, detainee treatment and operations,

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71. U.S. DEP'T NAVY, *supra* note 61, at 2.

72. United States v. Williams, 54 M.J. 626 (A.F. Ct. Crim. App. 2000).

73. *Id.* at 628.

74. *Id.*

75. *Id.*

76. *Id.* at 632 ("While Lt Col Eaves' unwillingness to follow [her servicing] judge advocate's advice did not render her incompetent . . . to decide the issue, it certainly weighs against her in determining whether she had a substantial basis to reach the decision she did."); *see also* Mil. R. Evid. 311(b)(3), 315(d).

77. *Williams*, 54 M.J. at 635.

78. *See* FREDERIC L. BORCH, JUDGE ADVOCATES IN COMBAT: ARMY LAWYERS IN MILITARY OPERATIONS FROM VIETNAM TO HAITI (2d ed. 2008) (describing the development of operational law in the Army Judge Advocate General's Corps); Yoram Dinstein, *Legal Advisers in the Field During Armed Conflict*, 97 INT'L L. STUD. 930, 936 (2021).

and war crimes.[79] In an article explaining the vital role military lawyers play in lethal and non-lethal targeting operations through their legal advice, author Craig Jones describes an instance in which a commander did not heed the advice of a Judge Advocate.[80] The scenario described by this author involved a commander in Afghanistan who ignored legal advice from his Judge Advocate advisor who clearly asserted that a planned strike should not be executed because the target had not been positively identified and children were present.[81] The commander executed the strike on a convoy that included vehicles carrying civilians, "who were in no way participating in hostilities."[82]

Craig Jones specifically describes this incident in his book, *The Kill Chain*, and includes a section of Chapter 6 entitled "Time to Ask the JAG?," where he explores the role Judge Advocates play in dynamic targeting.[83] He recounts scenarios from the campaigns in Afghanistan and Iraq and asserts that, "If there is doubt about the validity of the target, then the battalion battle captain should refer up to the JAG."[84]

Jones describes the incident mentioned above involving a strike on a convoy as "one of the most extensively documented and discussed civilian casualty incidents in Afghanistan."[85] He explains that an Army investigation led by Major General Timothy McHale found this strike was faulty for, among other reasons, patchy and provisional involvement of military lawyers.[86] According to Jones, a Judge Advocate named Major Cowan was "[t]he only JAG *actually* involved in this strike" and this Judge Advocate told Army investigators that "during the course of the operation, he made his legal recommendation 'crystal clear'" when he advised the battalion commander not to proceed with the strike.[87] Jones also states that Major Cowan's advice was not passed on to the Combined Joint Special Operations Commander (CJSOC) who made the decision to launch the strike.[88] Further, "at no point in the lead up to the attack did any JAG have direct contact with the CJSOC who ordered the attack."[89] In this instance, the Judge Advocate's advice was ignored or not provided to the key decisionmaker, and civilian lives were lost.

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79. Michael F. Lohr & Steve Gallotta, *Legal Support in War*: *The Role of Military Lawyers*, 4 CHI. J. INT'L L. 465, 473 (2003); FM 1-04, *supra* note 37, at 4–8.

80. Craig Jones, *Legal Advice in Modern Aerial Warfare*, LIEBER INST. WEST POINT (Nov. 22, 2021), https://lieber.westpoint.edu/legal-advice-modern-aerial-warfare/.

81. *Id.*

82. *Id.* ("In my book (Chapter 6), I document a case in Afghanistan where a commander disregarded legal advice despite the legal adviser making it 'crystal clear' . . . that the strike should not go ahead on the grounds that the target had not been positively identified (PID) and that there were children (civilians) present.").

83. CRAIG JONES, THE WAR LAWYERS: THE UNITED STATES, ISRAEL, AND JURIDICAL WARFARE 273–80 (2021).

84. *Id.* at 274.

85. *Id.* at 275.

86. *Id.* at 276.

87. *Id.* at 277.

88. *Id.*

89. *Id.*

Moreover, as one legal scholar observed, "[t]he [J]udge [A]dvocate must have the ear of her commanding officer in order to be effective, yet we know that legal advice is not always welcome by commanders whether in the field or in garrison."[90] Of course, commanders who ignore legal advice and commit war crimes in all likelihood will face legal consequences.[91]

IX. CONCLUSION: LAWYERS AS LEADERS

U.S. Supreme Court Justice Brandeis wrote that lawyers are valued for their training. He told the Harvard Ethical Society in 1905:

> The whole training of the lawyer leads to the development of judgment. His early training—his work with books in the study of legal rules—teaches him patient research and develops both the memory and the reasoning faculties. He becomes practised [sic] in logic; and yet the use of the reasoning faculties in the study of law is very different from their use, say, in metaphysics. The lawyer's processes of reasoning, his logical conclusions, are being constantly tested by experience. He is running up against facts at every point. Indeed it is a maxim of the law: Out of the facts grows the law; that is, propositions are not considered abstractly, but always with reference to facts.
>
> Furthermore, in the investigation of the facts the lawyer differs very materially from the scientist or the scholar. The lawyer's investigations into the facts are limited by time and space. His investigations have reference always to some practical end. Unlike the scientist, he ordinarily cannot refuse to reach a conclusion on the ground that he lacks the facts sufficient to enable one to form an opinion. He must form an opinion from those facts which he has gathered; he must reason from the facts within his grasp.[92]

And one commentator points out that training for lawyers

> sharpen[s] their memories and their reasoning faculties. . . . [And] legal practitioners [are] always tested by experiences and invariably geared toward practical ends. Lawyers have to operate in real time—

90. Elizabeth L. Hillman, *Mission Creep in Military Lawyering*, 43 CASE W. RES. J. INT'L L. 565, 576 (2011) (citing, *e.g.*, P.W. SINGER, WIRED FOR WAR: THE ROBOTICS REVOLUTION AND CONFLICT IN THE TWENTY-FIRST CENTURY 390–91 (2009) (detailing the resistance of some commanding officers to the advice of judge advocates as "Monday-Morning Quarterbacking")).

91. Dinstein, *supra* note 78, at 930–31 (2021) ("A military commander who ignores professional remonstrance *in flagrante* should not be surprised by the ensuing criminal consequences. Indeed, if war crimes charges lead to a verdict of conviction, a military commander's refusal to follow professional legal advice will inescapably be considered an aggravating circumstance affecting the sentence to be determined.").

92. Louis D. Brandeis, *The Opportunity in the Law*, *in* BUSINESS—A PROFESSION, 313, 315–16 (1931).

> they cannot put off a decision until they have obtained "more data" or had more time to contemplate or consult. . . . They should be judicial in attitude, learn to see issues from various sides, and observe human beings even more keenly than they observe objects. Because of these skills and attitudes, they [are] best equipped to become advisers—and so naturally gravitated to positions of power and influence in their community and in the government.[93]

Members of the Profession of Arms should appreciate those skills Judge Advocates, as lawyers, bring to the table. And Judge Advocates must use those skills, and when present voice their concerns, and act as leaders and "Guardians of Ethics." In a recent speaking event at the George Washington University Law School, the Army's forty-first Judge Advocate General, Lieutenant General Stuart Risch provided the same message when he stressed that "leadership as a lawyer requires identifying and embodying important core values that guide one's vocation, including integrity."[94]

Judge Advocates have a weighty responsibility as "Guardians of Ethics for the Profession of Arms." Servicemembers can sleep well at night knowing that Service Judge Advocates are in the Profession of Arms, serving as advocates, ethics advisers, and command counselors, and acting as ethical and moral compasses for difficult judgment calls and assisting commanders in choosing the harder right over the easier wrong. But if Judge Advocates are not present, silent, or ignored, military leaders are unable to make informed and ethical decisions.

The key question, as Major General (Ret.) Eder stated, is whether a Judge Advocate

> has the moral fortitude to confront a commander and say, "No, sir. That is the wrong thing to do." [Commanders] depend on our legal professionals to do just this. We need their unbiased, professional judgment as commanders and we rely on their seasoned, professional reasoning, particularly in the most difficult and complex of situations.[95]

93. *The Professions of America a Century Ago: Views of Louis Brandeis*, THE GOOD PROJECT (Mar. 21, 2017), https://www.thegoodproject.org/good-blog/2017/3/21/the-professions-in-america-a-century-ago-views-of-louis-brandeis.

94. *The 41st Judge Advocate General of the Army Discusses Lawyers as Leaders*, GW LAW (Dec. 16, 2022), https://www.law.gwu.edu/41st-judge-advocate-general-army-discusses-lawyers-leaders.

95. Eder, *supra* note 40.