

BETWEEN A ROCK AND A HARD PLACE: ARMY JUDGE ADVOCATES

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Judge advocates (military lawyers) in the United States Army wade through moral and ethical conundrums daily. Unfortunately for both the Army and its judge advocates, these ethical issues most frequently exist within the context of national security law, bringing dire consequences. Not only are judge advocates best served by eliminating these conflicts, but the entire Army can, and should, do more for its judge advocates by removing them from these conflicts to improve the overall moral substructure of its Judge Advocate General's Corps (JAG Corps). Across all branches in the military, judge advocates are in a position many civilian practicing attorneys can relate to: They advise and work for military commanders (their "bosses") who have a disproportionate amount of influence over their careers vis-à-vis officer evaluations. Because difficult ethical decisions confront commanders on the battlefield in the Law of Armed Conflict context, commanders often ask their lawyers to get them to a "yes" at all costs. This creates a tension between ethically hazardous situations and aspirations for continued career progression that leaves judge advocates with few, if any, ways to provide

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principled counsel to battlefield commanders. A lawyer should feel free to give sound, competent, and professional advice without fear of career-limiting ramifications from the very person receiving that advice. Generally, commanders want to take risks and expect their lawyers to show them the legal path to get there—even if it is an ethically or legally gray path. As an institution, the JAG Corps generally expects its lawyers to deliver clear, actionable, ethical and legally sound counsel to its leaders. These two conflicting expectations place judge advocates at the intersection of multiple serious ethical concerns, with their careers and mental health paying the price. Judge advocates should not be faced with the ethically hazardous task of providing sound and professional legal advice that may affect their promotion and career ascension.

INTRODUCTION	289
I. BACKGROUND	291
A. Organizational Structure of the JAG Corps	294
B. The Role of the Army Judge Advocate	295
1. Advisors or Advocates?	296
a. Application to National Security Law	299
C. Duties and Responsibilities of the Army Commander	300
II. ARMY RATING SCHEMES.....	301
A. Special Considerations for Rating JAG Corps Officers.....	305
III. THE PROBLEM: SYSTEMIC ETHICAL CONFLICTS.....	306
A. JAG Corps Leadership Expectations (“The Rock”)	308
B. Stepping Over the “Foul Line” (“A Hard Place”)....	310
IV. SOURCES OF ETHICAL RESPONSIBILITY	314
V. SOLUTIONS: HOW THE ARMY CAN (AND SHOULD) HELP ITS LAWYERS.....	316
A. Other Contexts Revealing Evidence of Potential Solutions	316
1. Within: The Army’s Office of the Special Trial Counsel.....	317
2. Without: Corporate Compliance Officers.....	320
B. Why Solving this Problem Matters	323
C. Recommended Solutions	324
1. Redraft Army Regulations.....	324
2. Restructure the JAG Corps Rating Chain.....	326
CONCLUSION	328

INTRODUCTION

You are an Army¹ judge advocate on your fourth month of a six-month deployment. Three hours into your sleep cycle, the pager next to your pillow rings, and you jump out of bed and rush to the operations center. You have already worked 120 consecutive twelve-hour shifts. And you always need to be ready when your commander needs you in the operations center. Still, those twelve-hour shifts often meld into sixteen-hour marathons. You are happy your commander is unrelenting; it is definitely better than the alternative. If he were lazy—if he did not care about accomplishing his mission—people you know and love might be harmed. After all, your commander is the kind of soldier Americans want—he does everything to win on the battlefield.

However, your commander has another goal in mind: perform well on this deployment and get promoted. Army deployments are often complex, stressful, and extremely dangerous. Defining what “winning on a deployment” looks like is challenging, if not impossible. Was the mission a success? Did we seize enough key terrain from the enemy? Did we bring all our service members home safely? In the world of drone strikes, success is defined by the percentage or number of enemy combatants killed. Even though this mentality is not meant to reduce human life to points on a scoresheet or dots on a graph, quantifying everything is often how the Army evaluates performance. It is not your commander’s fault. He is simply striving towards success as the Army defines it.

After showing your badge to a security officer, you fast-walk into the operations center and look up to the monitor. The monitor resembles a movie theater screen, stretching roughly forty feet long and twenty feet high. You are not quite sure where to focus your attention because the large monitor contains many individual screens. Each screen contains the same semi-blurry, but recognizable, features under the crosshairs of a drone camera thousands of feet in the sky: buildings, people, cars, all the typical markers of people participating in everyday urban life. While the camera’s view strikes you as impressively detailed for a camera so high in the sky, it still feels like you are looking

1. Although the subject matter of this Note may be relevant to other legal practitioners in other branches of military service, this Note focuses on Army judge advocates.

through a straw into the bottom of a drinking cup. From your position in the room, you almost have to crane your neck straight up to fully comprehend what is on the screen. Your commander abruptly draws your attention to screen number three—the top right corner of the larger monitor.

Unlike the others, this screen is relatively empty except a few hundred square feet of sand, a small building, and a man. You have no idea who this man is, where he came from, or even what he did to end up in a drone camera's crosshairs. Your commander, sweating in the air-conditioned room, quickly explains to you in a steady and serious voice what is happening. Rubbing the sleep out of your eyes, you struggle to match their solemn intensity. You are the last person he needs to give him a "thumbs up" before he can give the order to pull the trigger.

Everyone in the room is staring at you when your commander asks: "Can I kill him?" You were not in the room for the last few hours, but you are certainly not blind to the work that went into finding this man. There are well over one hundred people who are personally invested in seeing this man dead. This moment is the product of four months of hard work.

You think you know the right answer: "No." The man looks like he is too close to the building for the air strike to be legal,² and you know that rules governing strikes in the vicinity of structures like this err on the side of caution. You instantly remember the JAG Corps's legal training—that the best legal minds in the Army expect you to follow the letter of the law when you advise your commander.

However, the situation that you are seeing on the screen does not look or feel so black-and-white. The distance between the man and the building is almost "far enough," and your commander insists their team has taken the necessary precautions to ensure the strike can be precise enough to avoid the building. If that is truly the case, the answer could be "yes." And that would be great for you because everyone in the room would immediately think: "Good, the lawyer is one of us." Your boss would utter a quick "thank you" before turning back to the screen to give the order. As a bonus, your boss would certainly

2. Generally, drone strikes are permitted to engage buildings or structures that fit the Law of Armed Conflict definition of "military objective." *See* OFF. OF GEN. COUNS., U.S. DEP'T OF DEF., DEPARTMENT OF DEFENSE LAW OF WAR MANUAL §§ 5.6.5–5.6.6 (2023) [hereinafter *LAW OF WAR MANUAL*] (explaining that a structure may be a "military objective" and may be attacked only after evaluating the building's nature, location, purpose, and use).

remember you delivering the common phrase “no legal objection” when he sits down to write your performance evaluation.

Years of legal training kick in as you prepare yourself to give your boss the answer he does not want to hear. However, with a little creativity, you could legally justify a “yes.” But do you want to?³

I. BACKGROUND

Because of the nature of their job, judge advocates are wedged between an ethical rock and a hard place.⁴

The “rock” is the JAG Corps’s hardline stance on what it expects judge advocates to do: provide principled counsel “in support of a ready, globally responsive, and regionally engaged Army.”⁵ On its face, “principled counsel” may appear to be straightforward, as no lawyer strives to provide “unprincipled” counsel.⁶ However, bodies of law and agency documents, including Army regulations, define “principled counsel” while obscuring the true meaning of the phrase, leaving the judge advocates in the dark.

The “hard place” is battlefield commanders’ expectations for their judge advocates. Commanders assume the risk of every

3. This fictional narrative is loosely based on the experiences shared by Eric Liddick and the first-hand observations of the author. *See, e.g.*, E.M. Liddick, *No Legal Objection, Per Se*, WAR ON THE ROCKS (Apr. 21, 2021) <https://warontherocks.com/2021/04/no-legal-objection-per-se> [https://perma.cc/VY7T-CS7M], *reprinted in* ARMY LAW., no. 2, 2022, at 20.

4. This Note frequently alludes to the colloquial phrase: “caught between a rock and a hard place.” To be caught in such a (metaphorical) scenario “means to be faced with two equally terrible situations, with no favorable option as a realistic scenario, and to be forced to choose one of them despite the terrible consequences.” Shawn Manaher, *What Does “Caught Between A Rock And A Hard Place” Mean?*, THE CONTENT AUTHORITY (2023), <https://thecontentauthority.com/blog/what-does-caught-between-a-rock-and-a-hard-place-mean> [https://perma.cc/Z65L-WFNZ]. The source of this phrase is debated, but one origin may be credited to Greek mythology, where travelers through the Strait of Messina would be confronted with “two fearsome monsters: Scylla and Charbdis, each living at opposite ends of the strait.” *Id.* Even though all waterborne travelers knew these two monsters existed and did everything they could to avoid them, it was impossible for their travel to go unnoticed and avoid the certain deadly consequences of such travel. *See id.*

5. U.S. DEP’T OF ARMY, REG. 623-3, EVALUATION REPORTING SYSTEM 109 app. D-1 (2019) [hereinafter AR 623-3].

6. Brigadier General (Retired) John S. Cooke, *Third Thomas J. Romig Lecture in Principled Legal Practice*, 230 MIL. L. REV. 357, 358 (2023).

operation,⁷ and no risk is more heavily scrutinized than when American lives are at stake. Because commanders' decisions are the product of an all-encompassing team effort at all levels of authority,⁸ Army judge advocates are duty-bound to inject their "principled counsel" into this melting pot of advice that commanders must weigh.

Judge advocates are beholden to both sets of expectations, and sometimes a lawyer cannot satisfy each while acting morally, ethically, and legally consistent.⁹ Squeezed between a rock and a hard place, judge advocates cannot withstand these pressures without suffering adverse consequences to their careers or mental health. Even though judge advocates serve the Army as their client, these lawyers are inherently incentivized to serve the interests of the commander who summoned them to provide "no legal objection" to an airstrike at 3 a.m.¹⁰ This tension plagues lawyers across all areas of practice, but it uniquely impacts national security law judge advocates ("NSL Judge Advocates").¹¹ Their careers hang in the balance because their commanders, who are disproportionately responsible for their career progression, sometimes expect them to act contrary to bedrock legal training. They suffer mental health consequences from striving to meet impossible-to-satisfy expectations placed on them when providing legal advice during

7. See generally U.S. DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY (2020) [hereinafter AR 600-20] (emphasizing that commanders legally and functionally assume operational risk).

8. Liddick, *supra* note 3. ("The commander's decisions represented the sum of all parts, the accumulation of every effort, every insight, every decision, every analysis, every action up and down the chain.").

9. See *id.*

10. See *id.*

11. Generally, NSL Judge Advocates advise commanders in situations that require specific knowledge of the Law of Armed Conflict. See LAW OF WAR MANUAL § 18.5.

lethal military operations¹² while in the “pressure cooker of combat.”¹³

The Army can and must solve this problem. And despite the extreme pressures placed on judge advocates, the solutions are relatively simple. First, the Army should rewrite Army Regulation (AR) 27-26: Rules of Professional Conduct for Lawyers¹⁴ to enable NSL Judge Advocates to act in ethical ways that serve their commander and the Army without sacrificing their code of ethics or the Army mission. Second, the Army should amend both AR 27-1: Judge Advocate Legal Services and AR 623-3: Evaluation System Reporting—both of which prescribe policy for the NSL Judge Advocate evaluation scheme¹⁵—by adopting performance-based evaluations like those already adopted for judge advocates in other practice areas¹⁶ within the Army’s legal system.¹⁷ If commanders are removed from the evaluation scheme, then NSL Judge Advocates would be able to provide unbiased legal counsel

12. Craig Jones, ‘Almost Divine Power’: *The Lawyers Who Sign Off Who Lives and Who Dies in Modern War Zones*, CONVERSATION (May 12, 2021), <https://theconversation.com/almost-divine-power-the-lawyers-who-sign-off-who-lives-and-who-dies-in-modern-war-zones-154608> [<https://perma.cc/XMC6-DD69>] (noting that many military lawyers experience moral injury and post-traumatic stress disorder). Generally, lawyers also struggle with substance abuse, drinking, depression, and anxiety more frequently than professionals in other fields. See Elizabeth Olson, *High Rate of Problem Drinking Reported Among Lawyers*, N.Y. TIMES (Feb. 4, 2016), <https://www.nytimes.com/2016/02/05/business/dealbook/high-rate-of-problem-drinking-reported-among-lawyers.html> [<https://perma.cc/3UKW-55AX>].

13. Liddick, *supra* note 3.

14. See U.S. DEP’T OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS (2018) [hereinafter AR 27-26]. “Every Army lawyer subject to these Rules is also subject to rules promulgated by his or her state and other licensing authorities. . . . In the case of a conflict between these Rules and the rules of the lawyer’s licensing authority, . . . these Rules will govern the conduct of the lawyer in the performance of the lawyer’s official responsibilities.” *Id.* at 87.

15. AR 623-3, *supra* note 5, at 1.

16. See E-mail from Major John Loscheider to Captain Zach Cohen, student, Univ. of Colorado L. Sch. (Nov. 28, 2023, 14:20 MDT) (on file with author) [hereinafter Loscheider E-mail]; see also U.S. DEP’T OF ARMY, REG. 27-10, MILITARY JUSTICE 30 (2020) [hereinafter AR 27-10] (describing how military judges are, by regulation, separately rated in line “with rating schemes promulgated by the Chief Judge”).

17. For example, Trial Defense Services Judge Advocates represent criminal defendants, Special Victims’ Counsel Judge Advocates represent victims of crimes that may fall under Art. 120 of the Uniform Code of Military Justice, and Trial Counsel Judge Advocates serve as government prosecutors. See AR 27-10, *supra* note 16. For a discussion of how the Army has responded to ethical conflicts in other practice areas, see *infra* Section V.A.1.

without the pressures of commander expectations¹⁸ typically accompanying high-stakes legal decisions.

A. *Organizational Structure of the JAG Corps*

To fully understand the ethical dilemmas NSL Judge Advocates face, a brief description of the JAG Corps's organizational structure and operational goals is necessary. Congress specified the JAG Corps's structure, composition, and mission in 10 U.S.C. § 7072, established the organization as a unique branch of the Army in 10 U.S.C § 7064(a)(2), and defined its role within the Army in 10 U.S.C § 7037.¹⁹ The JAG Corps somewhat mirrors a “family tree” diagram, where The Judge Advocate General sits atop the JAG Corps, serving as the primary legal advisor to the Secretary of the Army.²⁰ From The Judge Advocate General stems six commonly recognized practice areas within the Army: national security law, trial defense services, military justice, administrative law, fiscal law, and legal assistance.²¹

Generally, the JAG Corps expects legal proficiency and versatility while serving in two primary support roles: First, for soldiers and their family members (providing soldiers trial defense services and family legal assistance); second, for the Army (advising Army leaders on administrative and civil law, contracts and fiscal law, military justice, and national security law).²² The JAG Corps's mission remains consistent regardless of its role: “Provide principled legal counsel . . . in support of a ready, globally responsive, and regionally engaged Army.”²³ Its vision predicts the JAG Corps of 2030 “will be the most highly trained, inclusive, and values-based team of trusted legal Army

18. See Liddick, *supra* note 3.

19. U.S. DEP'T OF ARMY, REG. 27-1, JUDGE ADVOCATE LEGAL SERVICES 12 (2017) [hereinafter AR 27-1]. Although this citation is to the current version of AR 27-1, its references to the U.S. Code are outdated. Congress reorganized Title 10 of the U.S. Code, the JAG Corps's statutory home, in the National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, 132 Stat. 1636 (2018) [NDAA]. Therefore, while citation to AR 27-1 is both relevant and necessary, references to the U.S. Code as mentioned in AR 27-1 are consistent with the NDAA's reorganization.

20. AR 27-1, *supra* note 19, at 1.

21. See, e.g., U.S. ARMY JUDGE ADVOCATE GENERAL'S CORPS 4-6 (2017), https://www.law.edu/_media/ocpd-probono-forms/JAG-Corps-Brochure.pdf [https://perma.cc/AFG5-3B9V] [hereinafter JAG CORPS BROCHURE].

22. AR 623-3, *supra* note 5, at 109.

23. *Id.*

professionals”²⁴ while serving “in an increasingly complex and legally dynamic world.”²⁵

Judge advocates are bound to a code of professional responsibility, codified in AR 27-26, requiring them to provide accurate and competent legal advice.²⁶ Additionally, judge advocates must deliver “principled counsel” to their commanders on the battlefield.²⁷ Ultimately, the JAG Corps must support every aspect of the Army’s mission by providing high-quality legal services meeting the strictest professional standards.²⁸

B. The Role of the Army Judge Advocate

Members of what military legal practitioners sometimes refer to as one of the nation’s largest law firms,²⁹ judge advocates are always expected to provide “principled counsel,” though how that looks and feels differs between practice areas. Generally, judge advocates serve as either advocates or advisors, but the line demarcating an advisory role from an advocacy role is blurry.³⁰ It is blurred even further by the fact that most judge advocates, across practice areas, represent the

24. *Vision*, U.S. ARMY JUDGE ADVOC. GEN.’S CORPS, <https://www.jagcnet.army.mil/Sites/jagc.nsf/homeContent.xsp?open&documentId=DEE613DFEC84B73B852579BC006142CE> [<https://perma.cc/7B5A-JDF6>].

25. *Id.* The Manual for Courts-Martial (“MCM”) nests its definition of “military law” within the overall mission of the JAG Corps, highlighting its purpose as promoting justice to ultimately strengthen the overall national security posture of the United States. U.S. DEP’T OF DEF., MANUAL FOR COURTS-MARTIAL UNITED STATES (2024 ed.) pt. I, § 3, at I-1 [hereinafter MCM].

26. AR 623-3, *supra* note 5, at 109.

27. *See* Liddick, *supra* note 3. “Principled counsel” is formally defined as “professional advice on law and policy grounded in the Army Ethic and enduring respect for the Rule of Law, effectively communicated with appropriate candor and moral courage, that influences informed decisions.” Colonel Russell N. Parsons & Lieutenant Colonel Patrick L. Bryan, *Navigation from the Leadership Center*, 6 ARMY LAW. 9 (2019).

28. AR 27-1, *supra* note 19, at 11.

29. Some view the JAG Corps as one of the country’s “largest firms” due to the substantial number of members that operate within it internationally. JAG CORPS BROCHURE, *supra* note 21.

30. “[W]hile young lawyers . . . often think of themselves primarily as advocates for clients, it is important to note that lawyers often play a much . . . more complicated role in our legal system.” Jamil N. Jaffer, *The Ethics of National Security Lawyering: A Response to Jeh Johnson*, 31 YALE L. & POL’Y REV. 173, 175 (2012).

“Army-as-client,”³¹ like judge advocates serving as trial counsel, a position analogous to that of civilian prosecutors. Some judge advocates do represent individual soldiers,³² although they are in the minority. In nearly any role they occupy, judge advocates “owe[] a greater duty to protect the Army[’s] [interests]—not [those of] any one person—[while] upholding [their] solemn oath[s] as officer[s] and attorney[s] to the Constitution and rule of law in the relentless fight against consequentialism.”³³ Whether serving as advisor or advocate in their given practice area, judge advocates representing the Army-as-client are most susceptible to toeing the blurry line between these roles.

1. Advisors or Advocates?

On paper, judge advocates appear no different from their civilian attorney counterparts in both advisor and advocate roles. As advisors, judge advocates inform clients of their rights and obligations while providing guidance on the practical consequences of those rights and obligations.³⁴ When serving under commanders of their assigned or attached commands, judge advocates act as advisors³⁵ by offering candid, professional, and competent advice.³⁶ As advocates, judge advocates zealously represent their client’s interest.³⁷ But the expectation of zealous representation is not a license to go beyond the bounds of ethical representation. One of the first lessons fledgling lawyers learn is that, while having an ethical duty to be strong and effective advocates for their clients,³⁸ they must not advocate for a legally indefensible course of action.³⁹

31. “The executive agency to which the Army lawyer is assigned (Department of the Army in most cases) is the client served by the Army lawyer.” AR 27-26, *supra* note 14, at 4.

32. See *supra* note 17 and accompanying text for examples.

33. Liddick, *supra* note 3. Special emphasis must be given to the fact that this oath is made to the Constitution, not to any individual. See, e.g., Kathleen Clark, *Ethical Issues Raised by the OLC Torture Memorandum*, 1 J. NAT’L SEC. L. & POL’Y 464–65 (2005). Consequentialism and its adherents, those who believe the ends always justify the means, are directly at odds with the Army and its interest in upholding the Law of Armed Conflict. See *infra* note 41.

34. Clark, *supra* note 33.

35. AR 27-1, *supra* note 19, at 12.

36. See AR 623-3, *supra* note 5.

37. Jaffer, *supra* note 30.

38. *Id.* at 174.

39. *Id.* at 174–75.

Judge advocates are generally not decision-makers. In most practice areas, their job is to advise.⁴⁰ Judge advocates advise commanders in their capacity as counsel for the Army-as-client; they represent the Army's interests in ensuring military action is consistent with the Law of Armed Conflict.⁴¹ When they advise commanders, usually in the mission's final moments, judge advocates often give the final nod of approval needed, ensuring legality before commanders give the order to take action. This is precisely why judge advocates are important to commanders.

While judge advocates and commanders represent similar Army interests, judge advocates unequivocally do not represent their commanders; they are not their commanders' personal counsel. The relationship between judge advocates and their commanders is theoretically akin to that of compliance officers and their parent corporations. But unlike compliance officers, judge advocates are unlikely to face legal liability for failing to ensure consistency with the law.⁴² Judge advocates can be sure that if anyone will be held liable for unlawful command decisions, it would be their commanders.⁴³ Even though commanders would likely be the only ones facing legal

40. Jones, *supra* note 12.

41. At its core, the Law of Armed Conflict primarily concerns itself with "law relating to the conduct of hostilities and the protection of war victims." LAW OF WAR MANUAL at 1. This situates the inherently self-interested concerns of combatants within the broader matrix of nearly universal moral concerns about the hazards of armed conflict. When an actor violates a Law of Armed Conflict, they are acting illegally *and* immorally.

42. See *infra* Part III.

43. See *id.* There are additional sources of law that suggest commanders are held responsible for violating laws of war, although they may be ultimately excused from such mistakes of fact. See, e.g., Nobuo Hayashi, *Honest Errors, The Rendulic Rule, and Modern Combat Decision-Making*, LIEBER INST.: ARTICLES OF WAR (Oct. 24, 2023), <https://lieber.westpoint.edu/honest-errors-rendulic-rule-modern-combat-decision-making> [<https://perma.cc/DB8W-YL4U>] ("Where a commander acts reasonably given the information available at the time, an IHL violation cannot be established even if the commander errs in his or her assessment of the situation. Nor, where acting reasonably in the sense just described negates culpability or the mental element of an offence, can individual criminal responsibility be established."). The "Rendulic Rule" arose from this line of reasoning, which "assesses the actions of [commanders] through their perspective at the time they were forced to make the decision[,] . . . not with the benefit of hindsight." See John Cherry & Michael Rizzotti, *Understanding Self-Defense and the Law of Armed Conflict*, LIEBER INST.: ARTICLES OF WAR (Mar. 9, 2021), <https://lieber.westpoint.edu/understanding-self-defense-law-armed-conflict> [<https://perma.cc/3WLE-E4UL>] ("[T]his type of mistake of fact would not be a violation of LOAC, assuming the mistake was both honest and reasonable.").

consequences for unlawful military actions, this accountability mechanism does not absolve judge advocates of moral culpability.⁴⁴

A single command decision represents the collective efforts of, and complex inputs from, various advisors, consultants, and staff members.⁴⁵ And because of this, judge advocates do not assume the legal risks of command decisions.⁴⁶ Commanders, “not the staff officers, not the machinery, and least of all, not the judge advocate—determine[] when and where life would be extinguished.”⁴⁷ But any judge advocate insisting that commanders alone are morally culpable is merely coping, attempting to ease their conscience, falsely absolving themselves of individual responsibility.⁴⁸ While a judge advocate’s advice ensures legality, it does not defend legality; command decisions are not consistent with Law of Armed Conflict just because judge advocates deem them so. Judge advocates are not meant to defend the lawfulness of command decisions on behalf of their commanders. They are representatives of the Army-as-client, provided to commanders to assess the legality of command decisions.

Regardless of the theoretical and practical lines one could draw between the advisor and advocate roles, and regardless of whether policy defines judge advocates’ roles in a particular practice area as either advisor or advocate, judge advocates do feel pressure to fill both roles. The JAG Corps expects judge advocates to provide neutral advice, representing the Army-as-client’s interests in compliance with the Law of Armed Conflict. Sometimes commanders expect judge advocates to advocate, representing the commanders’ personal interests in mission success. To make matters worse, Army regulations

44. Liddick, *supra* note 3.

45. “The commander’s decisions represent[] the sum of all parts, the accumulation of every effort, every insight, every decision, every analysis, every action up and down the chain.” Liddick, *supra* note 3.

46. See generally AR 600-20, *supra* note 7 (emphasizing commanders legally and practically assume operational risk).

47. Liddick, *supra* note 3.

48. *Id.* This appears to be especially true when the general public is “much more likely to give deference to tough decisions if ‘the lawyer said it was ok.’” Loscheider E-mail, *supra* note 16.

provide little clarity for how to proceed when these competing interests collide.⁴⁹

a. Application to National Security Law

The “clearly” defined role of advisor is further complicated by the role NSL Judge Advocates fill as policy counselors.⁵⁰ As policy counselors, NSL Judge Advocates are expected to provide guidance to commanders on where the “foul line” separating lawful from unlawful military action sits. They are also expected to advise their client on how close to the “foul line” they can or should play, as well as the relative risks of possible plays.⁵¹ This role is not dissimilar to the role civilian practitioners play when weighing “moral, economic, social, and political factors[] that may be relevant to [their] client’s situation.”⁵²

However, NSL Judge Advocates represent the Army-as-client, a nebulous, non-tangible entity, and this “foul line” analogy does not help NSL Judge Advocates best serve the Army’s interests. They have no practical way to directly advise or even speak to the Army-as-client on, for example, how to best execute an air strike. This is an impossible task. The people who can best understand the nuances of the “foul line”—commanders making decisions in real time—are, like judge advocates, Army agents. Both judge advocates and commanders prioritize representing Army interests, compliance with the Law of Armed Conflict, and mission success, respectively. Ultimately, these interests can be in opposition, even if both are Army interests. The more judge advocates are relegated into positions as agents of commanders, the more compliance with the Law of Armed Conflict becomes subordinate to mission success. Often, in

49. “On the ethical responsibilities of a lawyer as an advisor, the rules simply state that a lawyer ought to render candid advice and exercise independent, professional judgment in a way that considers the moral, economic, social, and political factors relevant to the client’s situation.” Jaffer, *supra* note 30. See *infra* Section V.A, Part VI.

50. *Id.* at 177.

51. *Id.* Former U.S. Secretary of Defense James Mattis coined the American baseball-analogical phrase “ethical midfield” to demarcate an area that is far enough from the “foul line” to prevent any risk of stepping “out of bounds.” He warns that “even one misstep” will lead a Judge Advocate to be “out of bounds” and commit ethically hazardous actions. Memorandum from James Mattis, U.S. Sec’y of Def. (Aug. 4, 2017) [hereinafter Mattis Memorandum] (on file with author).

52. MODEL RULES OF PRO. CONDUCT r. 2.1 (AM. BAR ASS’N 2023), https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_2_1_advisor [<https://perma.cc/9QWV-63FX>].

moments of extreme pressure, neither NSL Judge Advocates nor commanders properly consider both Army interests as they should, that is, as two aspects of a singular interest: achieving mission success in a manner consistent with the Law of Armed Conflict.

The “foul line” demarcates the point where the JAG Corps’s expectations collide with a commander’s expectations. The essential role of judge advocates in the national security law practice area is that of advisor—advising their commander on what military action the law allows and prohibits, “provid[ing] advice on exactly where the proverbial ‘foul line’ sits and what actions a[] [national security] operator might permissibly take within those boundaries.”⁵³ In this context, NSL Judge Advocates may be the last line of defense protecting Army interests, the only individuals capable of preventing military actions violating the Law of Armed Conflict. It is true that judge advocates “interpret the myriad rules of war [and] weigh the legal risk of a proposed action,” synthesizing these considerations into candid and professional advice outlining the spectrum of lawful combat options.⁵⁴ However, this advice often involves highly technical and sometimes subjective judgments in recommending legally deployable munition types, attack timing, casualty risks, and even whether, before committing to high-risk action, to exercise tactical patience and opt to wait for more detailed intelligence.⁵⁵ This advice borders on the edge of advocacy.

Although there may be a distinction between advisor and advocate roles without an obvious difference, there is no denying the fact that commanders ask their NSL Judge Advocate advisors whether they may legally kill an enemy combatant.⁵⁶ Representing the Army-as-client, judge advocates, relative to commanders, should be like judges.⁵⁷

C. Duties and Responsibilities of the Army Commander

Commanders, on the other hand, are prosecutors, juries, courts of appeals, and executioners.⁵⁸ They are responsible for

53. *Id.*

54. Jones, *supra* note 12.

55. *Id.*

56. Liddick, *supra* note 3.

57. *Id.*

58. *Id.*

all aspects of unit readiness, everything their unit does or fails to do.⁵⁹ They train, equip, and lead their units to “fight and win our Nation’s wars.”⁶⁰ Great deference is given to their decision in part because they are responsible for and accountable to risk at all levels of command.⁶¹ They are “duty-bound to exact their subordinates’ obedience to law and disciplinary standards, also referred to as the duty ‘to control,’ an obligation that is criminally enforceable in both war and peace.”⁶² Judge advocates, however, “have no such duty, but they do have an obligation that squarely aligns with military law’s purpose to ‘promote justice.’”⁶³ From the JAG Corps’s perspective, “this means establishing and enforcing high standards, ensuring [commanders’] soldiers are fully aware of those standards and properly trained to comply with them.”⁶⁴ Commanders similarly have a responsibility to ensure their soldiers are “well-versed in the Army Values and able to apply those values to real-world situations, which will usually keep them well within legal bounds.”⁶⁵

II. ARMY RATING SCHEMES

In accordance with AR 623-3, commanders are required to establish and publish “rating chains,” hierarchical evaluation schemes defining how officers rate and are rated by subordinate and superior officers and soldiers.⁶⁶ Administrative staff catalog ratings into the Army’s Evaluation Entry System, creating

59. AR 600-20, *supra* note 7, at 2.

60. *Who We Are*, U.S. DEP’T OF THE ARMY, <https://www.army.mil/about> [<https://perma.cc/RJL6-5RJD>].

61. AR 600-20, *supra* note 7, at 71.

62. Lieutenant Colonel James T. Hill, *Command Prosecutorial Authority and the Uniform Code of Military Justice—a Redoubt Against Impunity and a National Security Imperative*, 228 MIL. L. REV. 473, 476 (2020). Essentially, authority and responsibility are key to all commanders successfully leading their units. *See* AR 600-20, *supra* note 7, at 2. Total authority is best understood as a “byproduct of authority that all formal leaders possess to varying degrees.” *Id.* This “total authority” consists of two components: the legal right to give orders’ to subordinates and the practical power to demand and exact obedience. *Id.* at 476–77 (quoting HENRI FAYOL, *GENERAL AND INDUSTRIAL MANAGEMENT* 21 (Constance Storrs trans., 2d prtng. 1955) (1916)). Responsibility, by contrast, is a consequence of that authority. *See id.* at 477.

63. Hill, *supra* note 62, at 476.

64. COMMANDER’S LEGAL HANDBOOK, J. ADVOC. GEN.’S LEGAL CTR. & SCH. 1 (2019).

65. *Id.*

66. AR 623-3, *supra* note 5, at 7.

“Army resumes” (formally titled Officer Evaluation Reports, or “OERs”) that remain with officers for their entire career.⁶⁷ Bottom line: OERs are the primary sources used to identify promotion potential.⁶⁸

There are three individuals in a rating chain: a “rated” officer receiving an evaluation, a “rater” evaluating the “rated” officer’s *objective performance*, and a “senior rater” evaluating the “rated” officer’s *subjective potential*.⁶⁹ The rating chain connects a rated soldier’s performance evaluation to a specific senior or subordinate, encouraging all links in the chain to engage in meaningful professional relationships that further develop the rated soldier and accomplish the mission.⁷⁰ Ideally, rated officers serve directly under their rater, giving them regular opportunities to showcase their day-to-day performance to their raters.⁷¹

Raters are expected to develop relationships with rated officers through counseling sessions.⁷² During counseling sessions, raters explain their expectations to rated officers, but sessions also are often the first opportunity raters and rated officers have to professionally converse.⁷³ Counseling sessions must occur within a rating period’s first thirty days, kicking off the regulation-established time period during which raters evaluate rated officers.⁷⁴ Initial discussion focuses on duties, responsibilities, and performance objectives,⁷⁵ with raters establishing specific goals for rated officers that contribute to a productive workplace environment that promotes their development.⁷⁶ Ideally, raters will have ample opportunity to

67. See *id.* at 68 (explaining how the Evaluation Entry System permanently catalogs and stores completed officer evaluations).

68. “Promotion boards exacerbate flaws in the evaluation system by almost exclusively considering OER box checks while scoring promotion candidates.” See David J. Tier, *Loss of Confidence: The Failure of the Army’s Officer Evaluation and Promotion System and How to Fix It*, SMALL WARS J. (Aug. 30, 2015, 3:41 PM), <https://smallwarsjournal.com/jrn/art/loss-of-confidence-the-failure-of-the-army-s-officer-evaluation-and-promotion-system-and-ho> [https://perma.cc/3JPD-7MRV].

69. See AR 623-3, *supra* note 5, at 7.

70. See *id.*

71. See *id.*

72. *Id.* at 37.

73. “Documentation of counseling is critical, particularly when the rated Soldier is not meeting performance standards. The support form becomes a source document and, through its use, can assist in altering substandard performance into performance that meets established standards.” AR 623-3, *supra* note 5, at 35.

74. *Id.* at 38.

75. *Id.*

76. *Id.*

assess performance through regular interactions with rated officers.

Senior raters, on the other hand, provide rated officers an overall “grade” on their OERs.⁷⁷ This grade symbolizes a senior rater’s judgment of a rated officer’s *potential*.⁷⁸ Ultimately, “[i]f the potential assessment is consistent with the majority of officers in that rank, the senior rater will place an ‘X’ in the ‘Highly Qualified’ box” and “[i]f the rated officer’s potential exceeds that of the majority of officers in the senior rater’s population, the senior rater will place an ‘X’ in the ‘Most Qualified’ box.”⁷⁹ The “Highly Qualified” and “Most Qualified” boxes are used to identify the upper tertile of officers for each rank.⁸⁰ These boxes are “the single most—and probably only—important section of the OER,”⁸¹ granting disproportionate weight to a senior rater’s subjective judgment in the overall evaluation scheme.⁸²

The OER evaluation scheme is simpler on paper than in practice. OERs determine promotions, and officers do not have the privilege to idly wait for their next evaluations if they receive poor OER marks.⁸³ The Army will force officers without a “Most Qualified” OER box check or multiple “Highly Qualified” OER box checks into retirement the next time they are up for promotion.⁸⁴ The OER evaluation scheme’s risks are clear yet daunting: either get fantastic OERs or get out.

Due to the disproportionate impact OERs have on careers,⁸⁵ OERs are one of the primary sources, if not *the* primary source, of pressure forcing judge advocates to bend to their commanders’ wills. This may uniquely be an Army problem, systemic and cultural in nature given the Army’s “long-standing penchant for

77. *See id.* at 42.

78. To arrive at an ultimate determination of *potential*, the “senior rater will obtain, through a variety of means (for example, personal observation and/or various forms of communication from the rater, rated officer, and/or others) information regarding the rated officer’s duty performance and *potential*.” (emphasis added). *Id.*

79. The “Most Qualified” box is the highest potential evaluation a rated officer can receive. *Id.* at 39.

80. *Id.*

81. Tier, *supra* note 68.

82. *See id.*

83. *Id.*

84. *See generally id.* (explaining how OERs pressure officers to perform according to Army standards and how a failure to meet those standards may force that officer to leave the Army).

85. *See* Tier, *supra* note 68.

promoting bureaucratically savvy officers apt at pleasing their superiors at the expense of officers that increased their organization's combat effectiveness."⁸⁶

The OER evaluation scheme rewards judge advocates who succumb to pressures from superior officer expectations while effectively punishing those who adhere to the JAG Corps's professional expectations. Its very structure incentivizes appeasing superior officer demands rather than adhering to ethical standards. Discussing OERs generally, Retired U.S. Army Col. Douglas Macgregor once observed that OERs more often represent how well officers get along with those in their rating chain rather than actual performance.⁸⁷ Unfortunately for rated officers, senior raters have "the power of God over their subordinates,"⁸⁸ transforming the OER evaluation scheme from a performance-based ratings system into a mechanism that "too often turns men of conviction into moral eunuchs."⁸⁹

On the heels of several high-profile critiques of the OER evaluation scheme in 2015, then U.S. Army Maj. David Tier, writing in *Small Wars Journal*, noted that, both at the time of writing and historically, raters used the Army's evaluation schemes "to reward the same behaviors" in rated officers that raters "undertook to achieve success."⁹⁰ These same raters would "actively block the advancement of high-potential officers advancing behind them that seemingly [didn't] pay enough reverence to their seniors."⁹¹ In other words, the pressures the OER evaluation scheme places on rated officers is neither hypothetical nor the result of subconscious rater preferences for yes-men—raters actively reward subservience and actively punish non-conformance.

Rather than account for these raters' behaviors, the OER evaluation scheme enables them, creating an incentive structure that rewards judge advocates who recommend or approve military actions in furtherance of their commanders' interests while punishing judge advocates playing in the "ethical midfield."⁹² Like commanders striving for mission success as a means of career advancement, judge advocates have legitimate

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. Mattis Memorandum, *supra* note 51.

personal and career interests; with their futures on the line, it is no surprise that judge advocates fall into an Army culture valuing appeasement over professionalism.⁹³ Judge advocates' raters hold the key to their promotion, not the enemy on the battlefield.⁹⁴ Misaligned incentive structures may say more about the system than its actors: The system rewards selfish behavior that ultimately hurts the organization.⁹⁵ The OER evaluation scheme makes it too easy for—if not outright encourages—judge advocates to tell commanders everything they want to hear rather than what national security interests require them to advise.

A. Special Considerations for Rating JAG Corps Officers

The inequities and inconsistencies in the OER evaluation scheme are exacerbated by irregularities in the JAG Corps's organizational structure. A "Staff Judge Advocate" is the most senior (by rank and experience) judge advocate on the most senior commander's staff.⁹⁶ Like any judge advocate, Staff Judge Advocates provide installation commanders with independent and professional legal advice.⁹⁷ Generally, installation commanders are the highest-ranking officers with command authority on any given military base. This structure makes sense: The most senior military attorney advises the highest-ranking commander within a geographically centralized area. However, Staff Judge Advocates also oversee judge advocates across the vast pool of Army units at a given installation. They basically wear two hats: one as advisor to the installation commander and one as the leader of the installation's judge advocates, including NSL Judge Advocates. But NSL Judge Advocates functionally serve their respective commanders, and only occasionally interact with JAG Corps leadership.

93. Tier, *supra* note 68.

94. *Id.*

95. "Rating chains have been absolved to playing favorites, and raters have become absolutely powerful since their subjective judgments weigh so heavily in the promotion system. Officers advancing in this system exacerbate problems when they seek to reward the same behaviors they undertook to achieve success or, worse yet, when they actively block the advancement of high-potential officers advancing behind them that seemingly don't pay enough reverence to their seniors." *Id.*

96. AR 623-3, *supra* note 5, at 109.

97. Staff Judge Advocates are also "normally . . . rated and senior rated by the General Court-Martial Convening Authority." *Id.*

AR 623-3 labels this JAG Corps-specific phenomenon as “dual supervision.”⁹⁸ In the OER evaluation scheme for NSL Judge Advocates, Staff Judge Advocates are raters, and unit commanders are senior raters.⁹⁹ AR 27-1 further complicates this evaluation scheme by insisting that NSL Judge Advocates should not “function wholly independent” of their Staff Judge Advocates and other installation legal leadership.¹⁰⁰ While Army regulations might provide a technical answer to these ethical dilemmas, they do not address the issue NSL Judge Advocates experience when placed between the proverbial rock and a hard place.

Additionally, the phrase “dual supervision” establishes a false dichotomy, signaling to NSL Judge Advocates that two supervisors are looking over shoulders and judging performance. This phrasing would naturally lead any well-meaning judge advocate to do their best to impress both their commander and their Judge Advocate superior. This is a practical impossibility when the incentives and goals of commanders and judge advocate superiors are misaligned. For example, commanders may expect their judge advocates to endorse an aggressive risk-taking course of action on the battlefield, while judge advocate superiors frequently caution the same judge advocates to deliver impartial, unbiased, and risk-averse advice.¹⁰¹

III. THE PROBLEM: SYSTEMIC ETHICAL CONFLICTS

Under the OER evaluation scheme, commander comments have a disproportionate impact on judge advocate careers. Although judge advocates represent the Army-as-client, commanders sit atop their rating chain while the JAG Corps maintains high expectations for ethical judge advocate conduct. Judge advocates must weigh these three parties’ varied expectations when providing “impartial” advice. In an ideal world, these parties’ interests are completely aligned without conflicting expectations. When they are not, judge advocates pay the price.

98. *Id.*

99. *Id.*

100. AR 27-1, *supra* note 19, at 13.

101. *See generally* Mattis Memorandum, *supra* note 51 (insinuating legal advisors must not give their commanders advice that would hurt the country’s strong moral and ethical international reputation).

A judge advocate's duties and responsibilities change when moving between practice areas,¹⁰² with every judge advocate subject to the pressures of competing expectations, but no judge advocate feels these pressures more acutely than NSL Judge Advocates. Because judge advocates shift between practice areas, it is unusual for NSL Judge Advocates and the Army to outright determine which responsibility or duty ought to apply in any given scenario.¹⁰³ Army institutions¹⁰⁴ do not “organize themselves in ways that cleanly divide up these roles and responsibilities so as to ensure that it is clear which ethical responsibilities apply in particular circumstance [*sic*].”¹⁰⁵ Judge advocates are precariously positioned within the Army's complex organizational structure.

When either the Army, commanders, or the JAG Corps set expectations for judge advocates, there invariably is conflict with one of the others' expectations. For example, AR 27-26 requires judge advocates in need of ethical assistance to ask for help from “technical” legal superiors,¹⁰⁶ but commanders may view judge advocates seeking ethical assistance as subversive, acting to undermine their command authority. Or, worse: commanders may start to fear their most trusted advisors, thinking their judge advocates went behind their backs to second-guess command decisions.

To its credit, the JAG Corps is, in limited ways, addressing some of the ethical dilemmas NSL Judge Advocates encounter in practice. Judge advocates are required to complete a minimum of three hours of professional responsibility training per year.¹⁰⁷ Training sessions provide a forum for enhancing judge advocates' legal practices, “focus[ing] on ethical issues relevant to [a judge advocate's] practice” to teach the JAG Corps's ethical standards.¹⁰⁸ However, training sessions are only effective to the extent trainers—typically other judge advocates—can effectively plan and lead training sessions; but

102. See Jaffer, *supra* note 30, at 177.

103. See *id.*

104. Institutions referenced in this Section include the JAG Corps and rating chains. See *e.g.*, AR 623-3, *supra* note 5.

105. See Jaffer, *supra* note 30, at 177–78.

106. See AR 27-26, *supra* note 14.

107. OFF. OF THE JUDGE ADVOC. GEN., JUDGE ADVOC. LEGAL SERV. PUBL'N 1-1: PERSONNEL POLICIES, at 87 (May 31, 2024).

108. *Id.*

typically, trainers just relate anecdotal experiences.¹⁰⁹ These training sessions are unlikely to fully illuminate meaningful escape routes for judge advocates wedged between a rock and a hard place.

This training session example is just an aspect of a larger problem: Judge advocates, wedged between a rock and a hard place, lack clear ethical guidance on how to escape. Judge advocates must prevail, either by escaping on their own or through routes provided to them. As Retired U.S. Army Brig. Gen. John S. Cooke said to a room full of young judge advocates, “[t]oday, even the tiniest issue can go viral. . . . With the complexity of the law and the operations that the military is engaged in now, there is just more pressure on you.”¹¹⁰

A. JAG Corps Leadership Expectations (“The Rock”)

The Department of Defense (DoD) and the JAG Corps expect legal personnel to “play the ethical midfield,”¹¹¹ placing the burden on individual judge advocates to determine the bounds of ethical conduct. However, the JAG Corps still expects judge advocates to maintain ethical standards regardless of practice area. For NSL Judge Advocates, this means delivering impartial advice while never forgetting that “true discipline is doing the hard thing, knowing what the right thing is, and doing [the right thing] when it is very hard to do, or when it may put [themselves] at some risk.”¹¹² The JAG Corps expects judge advocates to provide “principled counsel and premier legal

109. In 2018, the Secretary of the Army allowed commanders to exercise discretion over which “mandatory” trainings all soldiers must complete. Meghann Myers, *The Army Just Dumped a Bunch of Mandatory Training to Free Up Soldiers’ Time* (Apr. 24, 2018), <https://www.armytimes.com/news/your-army/2018/04/24/the-army-just-dumped-a-bunch-of-mandatory-training-to-free-up-soldiers-time> [<https://perma.cc/37MW-5ZH8>]. This may be indicative of institutional acknowledgement that the training certain Army departments require of its leaders may not be as effective. *Id.* (“[Mandatory trainings are the] type of burdensome requirement that unnecessarily weigh[] down our Army from focusing on its core mission.”).

110. Cooke, *supra* note 6, at 357. Retired U.S. Army Brig. Gen. John S. Cooke is the Director of the Federal Judicial Center. His last assignment from 1995 to 1998 was as Chief Judge for the U.S. Army Court of Criminal Appeals. From 1993 to 1995, he was the senior Army Judge Advocate in Europe who was responsible for delivering legal advice top Army commanders in Europe. During his career, he served as a trial counsel (prosecutor), defense counsel, and military (trial) judge. *Id.* at n.†.

111. Mattis Memorandum, *supra* note 51.

112. Cooke, *supra* note 6, at 359.

services, as committed members and caring leaders in the legal and Army professions, in support of a ready, globally responsive, and regionally engaged Army.”¹¹³ Because judge advocates are “dual professionals,” legal professionals and military professionals, the JAG Corps’s four guiding principles—principled counsel, stewardship, servant leadership, and mastery of the law¹¹⁴—uniquely synthesize civilian and military ethical standards.

The JAG Corps’s expectations for ethical conduct mirror the DoD’s generalized ethical guidance established in a 2017 memorandum published by then U.S. Sec. Def. James Mattis.¹¹⁵ Secretary Mattis’s memorandum introduced the phrase “ethical midfield” to the DoD lexicon, establishing the policy basis through which the JAG Corps guides judge advocates in pursuit of providing “principled counsel.” Notwithstanding the JAG Corps’s expectations for ethical conduct, ethical dilemmas still exist.¹¹⁶ As a practical matter, neither the JAG Corps nor any rulemaking body could comprehensively prescribe the ethical course of action for every possible situation judge advocates may find themselves in.¹¹⁷ In moments of extreme pressure, judge advocates must determine for themselves the ethical course of action. In an ideal world, judge advocates could both look to the JAG Corps for ethical guidance while relying on their own legal training. However, turning to JAG Corps guidance is fraught with peril for judge advocates when JAG Corps’s guidance conflicts with commander expectations.

113. *Mission*, U.S. ARMY JUDGE ADVOC. GEN.’S CORPS, <https://www.jagcnet.army.mil/Sites/jagc.nsf/homeContent.xsp?open&documentId=DEE613DFEC84B73B852579BC006142CE> [https://perma.cc/7B5A-JDF6].

114. STRATEGY OF THE JUDGE ADVOCATE GENERALS CORPS 2022, U.S. ARMY JUDGE ADVOC. GEN.’S CORPS (2022) at 1. “As its vision, this strategy seeks an end state where the JAG Corps of 2028, the most highly trained, inclusive, and values-based team of trusted Army legal professionals, is ready, regionally engaged, and globally responsive while providing principled counsel and premier legal services in support of Army and Joint force missions of all types and across all spectrums of competition and combat in a complex and legally dynamic world.” *Id.*

115. See Mattis Memorandum, *supra* note 51.

116. Cooke, *supra* note 6, at 366. When lecturing on moral hazard and the opportunity for conflicting pressures to impact legal decision-making, BG (Ret.) Cooke openly acknowledged the haziness of this conflict: “[S]ometimes you have a couple of principles, and they may be in tension with each other.” *Id.*

117. Liddick, *supra* note 3.

B. Stepping Over the “Foul Line” (“A Hard Place”)

When JAG Corps expectations conflict with commander expectations, judge advocates face a tough choice: “play the ethical midfield” consistent with JAG Corps expectations or provide ethically dubious advice consistent with commander expectations.

When NSL Judge Advocates “give advice that commanders don’t want to hear,” commanders often respond by telling them to “stay in their lane.”¹¹⁸ Although judge advocates should advise in a way that “maximize[s] the space for the commander to make a decision,”¹¹⁹ that advice sometimes falls on deaf ears.¹²⁰ The highly specialized organizations NSL Judge Advocates serve are often “unstoppable train[s]” that pressure judge advocates to gain acceptance by “bowing unquestionably” to the organization’s interests in executing lethal missions.¹²¹ Commanders do not “want to hear ‘no’”; in fact, “[t]hey want[]—demand[]—that [NSL Judge Advocates] find a way to say ‘yes.’”¹²² Commanders, like other organizational leaders, also face pressures from their own commanders. Performing in an emotionally intense environment, commanders expect judge advocates to bend to, not subvert, their desires for success.

The pressures NSL Judge Advocates face are easy to identify but difficult to fully appreciate. Incomprehensible and immeasurable decision-making variables affect these pressures—accomplishing the mission, protecting unit members, advancing national interests, quickly providing accurate legal advice, complying with and respecting the rule of law, being a team player, and exercising moral courage. Political, organizational, leadership, and personal interests all influence judge advocates, who all the while must respect the Army’s rank-based hierarchy.¹²³ This melting pot of interests and decision-making variables wedge judge advocates between a rock and a hard place.

Civilian and military leaders in the broader national security sphere have a history of encouraging ethically dubious conduct. For example, Retired U.S. Air Force Gen. Mike Hayden,

118. Jones, *supra* note 12.

119. *Id.*

120. *See id.*

121. Liddick, *supra* note 3.

122. *Id.*

123. *Id.*

former director of both the Central Intelligence Agency and the National Security Agency, once stated his role in the top ranks of national security operations was to “play as close to the foul line as possible, while always remaining in fair territory.”¹²⁴ He “liked to argue that he wasn’t really doing his job well enough if there wasn’t ‘chalk dust on [his] cleats.’”¹²⁵ In situations like this, “the ethical responsibility to be a forceful advocate is largely sidelined, while the ethical responsibility to paint a detailed picture of where the specific legal lines sit and to explain how . . . [to] stay within those boundaries is maximized.”¹²⁶ While some judge advocates may not intend to get any “chalk” on their cleats when “pointing out where the line is and how to play the game within the lines,”¹²⁷ national security leaders typically “just shrug and let [the] lawyer[] figure it out.”¹²⁸ This expectation directly contrasts with JAG Corps expectations. The JAG Corps expects judge advocates to deliver principled and unbiased counsel *in* the “ethical midfield,”¹²⁹ not to dance *around* the “foul line.”

Technological advancements in warfare have lowered operational barriers, placing additional pressures on NSL Judge Advocates who may be the only impediment to mission success. This is particularly the case in missions involving drone strikes, devastating and powerful mechanisms for enacting foreign policy solutions in a post-9/11 world.¹³⁰ Drone strikes are tactical, used to achieve military or political objectives as part of a broader battlefield strategy.¹³¹ Subject to various Law of Armed Conflict provisions,¹³² at least in theory, commanders head drone-strike

124. Jaffer, *supra* note 30, at 179.

125. *Id.* at 179–80.

126. *Id.*

127. *Id.* at 180.

128. Loscheider E-mail, *supra* note 16.

129. See Mattis Memorandum, *supra* note 51.

130. See MICAH ZENKO, COUNS. ON FOREIGN REL. REFORMING U.S. DRONE STRIKE POLICIES (2013), <https://www.cfr.org/report/reforming-us-drone-strike-policies> [<https://perma.cc/Z3WN-TM4S>].

131. Paul Lushenko & Sarah Kreps, *What Makes a Drone Strike “Legitimate” in the Eyes of the Public?*, BROOKINGS (May 5, 2022), <https://www.brookings.edu/articles/what-makes-a-drone-strike-legitimate-in-the-eyes-of-the-public> [<https://perma.cc/CZT2-TERB>].

132. See LAW OF WAR MANUAL.

operations where life-or-death command decisions are made in a matter of minutes.¹³³

Commanders leading drone-strike operations have ultimate decision-making authority.¹³⁴ However, before any final decision is made, commanders must check certain “boxes” to order a strike. One of those boxes asks for an NSL Judge Advocate’s legal approval. Commanders look to judge advocates at this operational stage “for something approximating permission, or even psychological and moral support, as well as . . . legal advice,”¹³⁵ with judge advocates facing the weighty task of potentially giving advice out-of-sync with their commanders’ opinions, risking their careers in the process.

Difficulties choosing between these options diminish whenever judge advocates sideline ethical standards in favor of career advancement, decreasing the force of JAG Corps expectations for ethical conduct, while reinforcing commanders’ expectations their judge advocate advice leads only to mission success. In recent years, there have unfortunately been high-profile instances of government attorneys subordinating ethical standards to their superiors’ goals. In the early days of the “War on Terror,” for example, Department of Justice (DoJ) and DoD lawyers failed to play the “ethical midfield,”¹³⁶ stepping “out of bounds”¹³⁷ by inventing legal justifications for the executive branch’s torture program, establishing policy that freed executive branch officials and their foreign black site interrogators from any legal consequences despite their inhumane actions.¹³⁸ This policy built off the DoJ Office of Legal

133. See Craig Jones, *‘Almost Divine Power’: The Lawyers Who Sign Off Who Lives and Who Dies in Modern War Zones*, CONVERSATION (May 12, 2021, 10:20 AM), <https://theconversation.com/almost-divine-power-the-lawyers-who-sign-off-who-lives-and-who-dies-in-modern-war-zones-154608> [https://perma.cc/XMC6-DD69].

134. Jones, *supra* note 12.

135. *Id.*

136. Mattis Memorandum, *supra* note 51.

137. *Id.*

138. Seth F. Kreimer, “Torture Lite,” “Full Bodied” Torture, and the Insulation of Legal Conscience, 1 J. NAT’L SEC. L. & POL’Y 187, 188 (2005). After 9/11, the Central Intelligence Agency established “black sites,” secret prisons used to detain and interrogate high-level suspected terrorists utilizing inhumane techniques like waterboarding to obtain intelligence. Julie Hoban, *What Are ‘Black Sites’? 6 Key Things to Know About the CIA’s Secret Prisons Overseas*, WASH. POST (Jan. 25, 2017), <https://www.washingtonpost.com/news/checkpoint/wp/2017/01/25/what-are-black-sites-6-key-things-to-know-about-the-cias-secret-prisons-overseas> [https://perma.cc/F9DA-CAEB].

Counsel's (OLC) prior determination that the Geneva Conventions did not apply to al-Qaeda and Taliban prisoners captured in Afghanistan.¹³⁹ Atty. Gen. John Ashcroft championed the OLC's legal reasoning while insisting that a "forward leaning" approach to interrogation minimizing "the legal risks of liability, litigation[,] and criminal prosecution" required this determination.¹⁴⁰ And when the government's principal legal advisors speak on a matter, government lawyers listen. Indeed, the DoD Working Group on Detainee Interrogations in the Global War on Terror's¹⁴¹ lawyers heeded Attorney General Ashcroft's call to "lean forward" with advice to the DoD on the issue of inhumane treatment of prisoners of war, representing a shocking departure from "principled counsel" expectations. Working Group lawyers made "calculated effort[s] to create an atmosphere of legal ambiguity" without "disapprov[ing]" the United States' foreign interrogation techniques.¹⁴² Without any reservation, Working Group lawyers openly acknowledged their conclusions "may produce an adverse effect on support for the war on terrorism."¹⁴³

Like judge advocates, the lawyers who justified the United States' foreign torture program serve an organizational-entity-as-client—the United States government (or, specifically the executive branch)—not individual officeholders.¹⁴⁴ However, the "legal reasoning" behind the OLC's determination that the Geneva Convention did not cover prisoners captured in Afghanistan illuminates the impact a judge advocate's advice may have when commanders request

139. Kreimer, *supra* note 138, at 189.

140. *Id.* (citing Letter from John Ashcroft, U.S. Att'y Gen., to George W. Bush, U.S. President (Feb. 1, 2002) (on file with the Nat'l Sec. Archive).

141. Secretary of Defense Donald Rumsfeld created the Working Group in response to complaints from Judge Advocates concerning morally and legally objectionable interrogation techniques in January 2003. The Working Group generated various reports that included its legal conclusions on the matter. See OFF. OF THE SEC'Y OF DEF., WORKING GROUP REPORT ON DETAINEE INTERROGATIONS IN THE GLOBAL WAR ON TERRORISM: ASSESSMENT OF LEGAL, HISTORICAL, POLICY, AND OPERATIONAL CONSIDERATIONS (Apr. 4, 2003) [hereinafter WORKING GROUP REPORT], https://www.esd.whs.mil/Portals/54/Documents/FOID/Reading%20Room/Detainee_Related/working_grp_report_detainee_interrogations.pdf [<https://perma.cc/SD66-7WUV>].

142. Kreimer, *supra* note 138, at 193–94 (quoting John Berry, *The Roots of Torture*, NEWSWEEK (Mar. 13, 2010, 7:39 PM), <https://www.newsweek.com/roots-torture-128007> [<https://perma.cc/9GMR-3N2L>]).

143. *Id.* at 194 (quoting WORKING GROUP REPORT, *supra* note 141, at 69).

144. Kathleen Clark, *Ethical Issues Raised by the OLC Torture Memorandum*, 1 J. NAT'L SEC. L. & POL'Y 455, 464 (2005).

legal cover: lawyers representing organizations-as-clients are uniquely empowered to issue legal opinions built on legal reasoning used to set organization policies.¹⁴⁵ In the case of War on Terror detainees, DoD lawyers also faced public and emotional pressure to justify government action. In some ways, their legal reasoning was responsive to the still-healing wounds inflicted by September 11, 2001, justifying torture at the cost of ethical consistency.

Ethical flexibility is dangerous. The consequences of delivering legal advice under pressure are truly dire; sometimes, lawyers and commanders are wrong.¹⁴⁶ Commanders, eager to succeed, caught up in the adrenaline of battle, can too easily ignore even the most key of operational considerations, whether the target in a drone's crosshairs actually is the "target." One need not look far to see the consequences of heavily influenced legal advice approving lethal combat decisions without regard for ethical standards.

IV. SOURCES OF ETHICAL RESPONSIBILITY

In theory, NSL Judge Advocates confronted with high-stakes ethical dilemmas could look to a variety of sources for guidance. Three major sources purport to guide ethical decision-making: AR 27-26; Rules of Professional Conduct for Lawyers, state codes of professional conduct, and statutory and regulatory provisions.

Although AR 27-26 is a judge advocate's primary source for ethical guidance, it "simply provide[s] a framework for the ethical practice of law."¹⁴⁷ AR 27-26's rules "do not . . . exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules."¹⁴⁸ For more detailed guidance, AR 27-26 points judge advocates to the codes of professional conduct governing legal practice in their licensing states.¹⁴⁹

145. *See id.*

146. Jones, *supra* note 12.

147. AR 27-26, *supra* note 14, at 3.

148. *Id.*

149. *See id.* at 87 ("Every Army lawyer subject to these Rules is also subject to rules promulgated by his or her state and other licensing authorities, and may be subject to the disciplinary authority of the appropriate Senior Counsel in the Army and another licensing authority for the same professional misconduct.").

All but two states require aspiring lawyers to pass the Multistate Professional Responsibility Examination, certifying their understanding of the legal profession's ethical standards as a condition for bar membership.¹⁵⁰ State codes of professional conduct could be useful sources for judge advocates seeking ethical guidance, but when AR 27-26 conflicts with a relevant state code, AR 27-26 merely advises judge advocates to seek "the assistance of a supervising lawyer."¹⁵¹ If judge advocates are unable to resolve conflicts after seeking assistance, then AR 27-26 "govern[s] the conduct of the [judge advocate] in the performance of [their] official responsibilities."¹⁵² However, a conflicted judge advocate's supervising lawyer is almost always their rater, and, in many cases, an advisor to their commander. The relationship between judge advocates, supervising judge advocates, and commanders is not only circular but also problematic, particularly when commander expectations are the source of the ethical dilemmas judge advocates face.

Various statutes and regulations add to the antiquated body of ethical rules judge advocates must sift through. The DoD's Joint Ethics Regulation of 2024 attempts to provide a consolidated source for ethical standards and guidance for all DoD members.¹⁵³ However, the Supplemental Standards of Ethical Conduct for Employees of the Department of Defense,¹⁵⁴ Ethics of Government Act of 1978,¹⁵⁵ and Executive Order 12674, "Principles of Ethical Conduct for Government Officers and Employees,"¹⁵⁶ do not add clarity to the body of institutional ethical knowledge the DoD and Army claim to possess and transmit to its judge advocate advisors. Rather, these ethics rules promote greater tension when commanders apply undue pressure to judge advocates.

A judge advocate's personal interests may be too strong to allow them to competently advise their commander. AR 27-26 Rule 1.7 prohibits judge advocates from representing the Army-as-client "if the representation involves a concurrent

150. *Multistate Professional Responsibility Examination*, NAT'L CONF. OF BAR EXAMINERS, <https://www.ncbex.org/exams/mpre/about-mpre> [https://perma.cc/SL4J-PCL9].

151. AR 27-26, *supra* note 14, at 87.

152. *Id.*

153. See U.S. DEPT OF DEF., JOINT ETHICS REGULATION 5 (2024).

154. U.S. Dep't of Def. Supplemental Standards of Ethical Conduct for Employees of the Department of Defense, 5 C.F.R. pt. 3601 (2023).

155. Ethics in Government Act of 1978, 5 U.S.C. §§ 101-505.

156. Exec. Order No. 12,647, 5 C.F.R. § 2635 (1989).

conflict of interest,” which exists if “there is a significant risk that the representation . . . will be materially limited by the lawyer’s responsibilities to another client, a former client, or a third person or by a *personal interest of the lawyer*.”¹⁵⁷ Comment 12 underscores the effects personal interests have on ethical conduct: “Rule 1.7 has always prohibited a lawyer from representing a client when the lawyer’s ability to represent the client competently may be impaired by the lawyer’s personal or professional commitments.”¹⁵⁸ These commitments certainly include, but are not limited to, serving the best interests of the Army, performing all duties in an ethical fashion, and not risking a career in exchange for delivering unethical advice.

V. SOLUTIONS: HOW THE ARMY CAN (AND SHOULD) HELP ITS LAWYERS

Working in a system rife with perverse incentives and defined by conflicting interests, NSL Judge Advocates need stronger regulatory protections to actually maintain their commitment to providing “principled counsel.” Judge advocates are often isolated with limited JAG Corps support: Their risk assessments of a commander’s proposed actions are usually subjective and they are expected to “toe the ethical line,” though JAG Corps senior leaders’ opinions on how to do so vary. Importantly, their actions have far greater strategic consequences than one may initially realize.¹⁵⁹ The following sections showcase similar ethical dilemmas in legal practice both within and without the Army, explain the present necessity for alleviating pressures commanders place on lawyers, and suggest solutions aimed toward resolving this ethical dilemma for NSL Judge Advocates.

A. Other Contexts Revealing Evidence of Potential Solutions

While the ethical dilemmas NSL Judge Advocates face may be unique in their consequences, the dilemmas themselves are not unique, and steps have been taken in other legal practice areas to avoid them entirely. Although not wholly analogous to

157. AR 27-26, *supra* note 14, at 28 (emphasis added).

158. *Id.* at 30.

159. See Loscheider E-mail, *supra* note 16.

the body of NSL Judge Advocates, the Office of Special Trial Counsel (OSTC), a new entity within the Army's legal "family tree,"¹⁶⁰ exists to prevent potential ethical dilemmas, similar to those NSL Judge Advocates face, in other legal practice areas. In the American corporate context, proposed reforms to structurally separate legal practitioners from business leadership highlight the necessity for linking career prospects to objective performance evaluations rather than subjective views of key decision-makers.

1. Within: The Army's Office of the Special Trial Counsel

The Army has already taken steps to address ethical dilemmas arising from commander expectations of judge advocates practicing within the military justice system. The military justice system is built around statutes governing the military establishment, the constitutional powers of the President, and the inherent authority of commanders.¹⁶¹ Its purpose "is to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States."¹⁶² In this system, judge advocates fill roles akin to those of legal professionals practicing in civilian trial and appellate courts. Judge advocates practicing within the OSTC are part of the military justice system prosecuting violations under Article 120 of the Uniform Code of Military Justice,¹⁶³ which prohibits sexual misconduct, domestic violence, and child abuse.¹⁶⁴

The OSTC's mission "is to provide expert, specialized, independent, and ethical representation of the United States . . . in the investigation and trial-level litigation" of

160. See *supra* Section I.A.

161. MCM, *supra* note 25.

162. *Id.* at I-3.

163. See *FACT SHEET: President Biden to Sign Executive Order Implementing Bipartisan Military Justice Reforms*, THE WHITE HOUSE (July 28, 2023) [hereinafter *Fact Sheet*], <https://www.whitehouse.gov/briefing-room/statements-releases/2023/07/28/fact-sheet-president-biden-to-sign-executive-order-implementing-bipartisan-military-justice-reforms> [https://perma.cc/2BY4-FNWQ]; see also MCM, *supra* note 25.

164. *Fact Sheet*, *supra* note 163.

Article 120 offenses.¹⁶⁵ President Joe Biden's Executive Order 14103¹⁶⁶ established the OSTC rules¹⁶⁷ that shift prosecutorial authority away from commanders and to judge advocates as independent prosecutors.¹⁶⁸ Without the influence of commander expectations, independent prosecutors are now the sole decision-makers in the prosecution of Article 120 offenses.¹⁶⁹

Alongside these reforms, U.S. Sec. Def. Lloyd Austin, in 2021, established the Independent Review Commission on Sexual Assault in the Military to "provide[] the [DoD] a set of comprehensive and actionable recommendations to improve . . . the military justice process governing the handling of sexual assault and sexual harassment cases."¹⁷⁰ The Commission noted that "too many commanders have failed to" fairly respond to allegations of sexual misconduct while demonstrating compassion for victims.¹⁷¹ Victims of sexual misconduct, servicemembers, and the public at-large reported a lack of trust in Army commanders to achieve justice in sexual misconduct cases.¹⁷² Each group cited perceived conflicts of interest as a primary factor contributing to their waning trust: they do not understand how commanders, with little or no legal training and while balancing non-legal responsibilities, could justly make probable cause determinations for charging alleged offenders or evaluate the strength of evidence to be used at trial.¹⁷³

These widely shared concerns demonstrate that stakeholders have little tolerance for even the potential for

165. Memorandum from Lloyd Austin, U.S. Sec'y of Def. 1 (Mar. 11, 2022) [hereinafter Austin Memorandum] (on file with author).

166. Exec. Order No. 14,103, 88 Fed. Reg. 50535 (July 23, 2023).

167. *Fact Sheet*, *supra* note 163.

168. *Id.*

169. *Id.* "Offenses covered by the punitive articles of the UCMJ can range from minor disciplinary infractions to serious criminal offenses. The 11 covered offenses are Murder, Manslaughter, Rape, Sexual Assault, Rape of a Child, Sexual Assault of a Child, Other Sexual Misconduct, Kidnapping, Domestic Violence, Stalking, Retaliation, Child Pornography and Wrongful Broadcast." *Army Establishes Two New Incentives to Combat Harmful Behaviors*, U.S. ARMY PUB. AFFS. (July 14, 2022), https://www.army.mil/article/258422/army_establishes_two_new_initiatives_to_combat_harmful_behaviors [<https://perma.cc/K3AV-QLH9>].

170. Austin Memorandum, *supra* note 165.

171. INDEP. REV. COMM'N ON SEXUAL ASSAULT IN THE MILITARY, HARD TRUTHS AND THE DUTY TO CHANGE: RECOMMENDATIONS FROM THE INDEPENDENT REVIEW COMMISSION ON SEXUAL ASSAULT IN THE MILITARY 18 (2021).

172. *Id.*

173. *Id.*

unlawful command influence. Given this, the DoD's goal with the OSTC is "to further remove the barriers on combating harmful behaviors and sustain positive command climates."¹⁷⁴ Previously, commanders were "judge, jury, and executioner," forcing judge advocates to adopt the courses of action their commanders requested.¹⁷⁵ However, the JAG Corps leadership's view of the OSTC is nuanced, holding that it was established "because commanders were perceived rightly or wrongly, to be too lenient or too lax in exercising the prosecutorial function."¹⁷⁶ If Executive Order 14103 did not exist, "[t]he Pentagon, politicians, and others may have continued to fight and argue over whether this was a good change or a bad change."¹⁷⁷

Functionally, the OSTC "[e]stablishes that prosecutorial decisions made by the special trial counsel are binding and are fully independent from the military chain of command"¹⁷⁸ and "delineates the relationship and authorized interactions between special trial counsel and commanders to protect the independence of the special trial counsel."¹⁷⁹ By removing commanders from the prosecutorial chain, judge advocates in military justice practice may now prosecute criminal activity without commander influence or pressure.

Although it is too early to judge the OSTC's effectiveness, these military justice system reforms should inform any approach to resolving the ethical tensions NSL Judge Advocates experience. The Army now insulates military justice judge advocates from commander decisions because permitting otherwise is a fundamentally ineffective way to administer criminal justice.¹⁸⁰ Prior to the OSTC's creation, commanders and judge advocates did not always see eye-to-eye on prosecutorial decisions: Where commanders may have wanted to "make an example" with prosecutions to "send[] a message" to their units, judge advocates may not have gathered enough evidence, in their view, to justify prosecution. Only time will reveal if the OSTC is a success, but it illustrates how the Army

174. U.S. ARMY PUB. AFF., *supra* note 169.

175. See INDEP. REV. COMM'N, *supra* note 171, at 18.

176. Cooke, *supra* note 6, at 365.

177. *Id.*

178. C. Todd Lopez, *Executive Order Changes How Military Handles Sexual Assaults*, DOD NEWS (Aug. 1, 2023), <https://www.defense.gov/News/News-Stories/Note/Note/3479106/executive-order-changes-how-military-handles-sexual-assaults> [<https://perma.cc/5EGK-ECZC>].

179. *Id.*

180. See *Fact Sheet*, *supra* note 163; see also MCM, *supra* note 25.

is already addressing structurally-enabled ethical tensions between commanders and lawyers.

While these tensions are similar for NSL Judge Advocates, commander influence over their careers must be eliminated; otherwise, when advising commanders on the battlefield, that influence may be too difficult to ignore. As the next Section demonstrates, addressing this influence is critical to forming a better, more professional JAG Corps.

2. Without: Corporate Compliance Officers

Influence problems are not unique to the Army's legal professionals. Reforms preventing organizational leaders from wielding excessive influence over their legal advisors' careers are not to be restricted to contexts. Like NSL Judge Advocates, America's chief compliance officers (CCOs) also find themselves wedged between a rock and a hard place, balancing the conflicting interests of themselves, corporate leadership, and government regulatory agencies.

CCOs must ensure corporate compliance with both external, government-imposed rules and internal, self-imposed systems of organizational control.¹⁸¹ They help corporations manage legal risks while maintaining a positive public reputation.¹⁸² Like judge advocates, CCOs are beholden to the expectations of two different entities: their corporate-employer-as-client and the government.¹⁸³ The tension here should be obvious. Corporate officers expect CCOs to keep their hands clean while serving as "yes-men"; meanwhile, government regulators, expecting rigid rule-conformity, peer over their shoulders. CCOs feel pressure from their accountability to both governmental regulators and the company paying their salaries.¹⁸⁴ CCOs, like judge advocates, operate in a system designed to generate ethical conflicts.

In this dual-supervision context, a CCO's first responsibility is not to "maximize shareholder wealth," "but rather to

181. *The Role of a Compliance Officer*, ROBERT WALTERS (Aug. 2, 2022), <https://www.robertwalters.us/insights/hiring-advice/blog/the-role-of-a-compliance-officer.html> [<https://perma.cc/4ESY-NK9A>].

182. *Id.*

183. Sean J. Griffith, *Agency, Authority, and Compliance* 7 (Eur. Corp. Governance Inst., Working Paper No. 516, 2020).

184. *Id.* at 7–8.

maximize compliance”¹⁸⁵ efficiently and effectively. Adhering to this responsibility may, of course, increase shareholder wealth, but as far as the government is concerned, CCOs exist to ensure compliance “full stop, without regard to efficiency.”¹⁸⁶ It is not difficult to imagine a world where zealous and risk-averse CCOs take precautionary measures, avoiding legal liability while sometimes acting contrary to interests in corporate profit. But the regulatory agencies CCOs strive to please do not pay their salaries, or consider them for promotions, or serve as professional references.

CCOs, like judge advocates, are subject to a two-track incentive structure forcing them to choose between career advancement and legal compliance.¹⁸⁷ CCOs must choose one of these two options and either: get regulatory “chalk” on their cleats in service to corporate profit interests—maximizing shareholder wealth while taking their chances with regulatory agencies—or play the ethical midfield, siding with the government while avoiding liability if laws are broken.

The retributive-response potential for either option is neither academic nor theoretical. It is also not cheap. For example, the Financial Crimes Enforcement Network, a Treasury Department office, leveled a \$1 million penalty against a CCO and barred him from future industry employment for failing to ensure corporate compliance with money laundering prohibitions.¹⁸⁸ In perhaps the most iconic example of a CCO suffering negative consequences from the impossible-to-balance relationship between government and corporate officer expectations, the government fined a CCO for failing to ensure corporate actions complied with law.¹⁸⁹ Perhaps he lost his job because he made mistakes or failed, but there is little government interest in imposing such punitive measures just to make an example out of a CCO who “made a mistake.” CCOs—all legal professionals—make mistakes every day, but most do not make million-dollar, career-ending mistakes. Likely, this

185. *Id.* at 8.

186. *Id.*

187. *Id.*

188. See Press Release, U.S. Dep’t of the Treasury Fin. Crimes & Enf’t Network, FinCEN Assesses \$1 Million Penalty and Seeks to Bar Former MoneyGram Executive from Financial Industry (Dec. 18, 2014), <https://www.fincen.gov/news/news-releases/fincen-assesses-1-million-penalty-and-seeks-bar-former-moneygram-executive> [<https://perma.cc/K6RT-6BV3>]; Griffith, *supra* note 183.

189. See, e.g., Press Release, U.S. Dep’t of the Treasury Fin. Crimes & Enf’t Network, *supra* note 188.

CCO was crushed between a rock (corporate officer expectations) and a hard place (regulatory agency expectations). He fought a losing battle, and only he paid the price.

Although the issue of competing expectations is complicated by the government's third-party status, CCOs, like judge advocates, serve an organizational-entity-as-client. However, their corporate evaluation schemes look nothing like the OER evaluation scheme.¹⁹⁰ Unlike judge advocates, who report to commanders, most CCOs report directly to their board of directors, the closest a legal advisor can get to interfacing directly with an organizational-entity-as-client.¹⁹¹ While this reporting structure does not prevent all ethical conflicts, it does incentivize CCOs to serve the organizational-entity-as-client first and corporate officers second. Corporations recognize that, at least informally, for legal professionals to effectively serve their organizational-entity-as-client, they must be free from the pressure of corporate officer expectations. There is no Army equivalent to this corporate-board reporting framework. The Army-as-client is more nebulous and decentralized than a corporation; nothing like a board of directors exists for the Army.

However, the Army could adopt something like the CCO evaluation scheme formulated by Sean Griffith, T. J. Maloney Chair in Business Law at Fordham University, which goes beyond the corporate-board reporting framework. Professor Griffith argues that CCOs should report to the general counsel for evaluation to avoid potential ethical conflicts.¹⁹² Placing CCOs under a legal professional enables CCOs to more effectively provide principled legal counsel while balancing corporate and government expectations.¹⁹³ An equivalent scheme for NSL Judge Advocates would have them reporting to their JAG Corps superiors. Although they would still interface with commanders daily, NSL Judge Advocates would be directly accountable to and receive evaluations from only their JAG Corps superiors.¹⁹⁴

190. About half of compliance officers report to their board of directors (the physical embodiment of the corporation), not their CEO. SOC'Y OF CORP. COMPLIANCE & ETHICS & HEALTH CARE COMPLIANCE ASS'N, THE RELATIONSHIP BETWEEN THE BOARD OF DIRECTORS AND THE COMPLIANCE AND ETHICS OFFICER 2 (2018).

191. *Id.*

192. Griffith, *supra* note 183.

193. *Id.*

194. See discussion *infra* Section VI.B.2.

Corporate evaluation schemes may not impact the corporate legal professional in the same way the OER evaluation scheme impacts judge advocates. But there are clear reasons for removing corporate officers from the evaluation scheme: legal professionals must be able to serve their organizational-entity-as-client without fear of professional repercussions. Corporate America may not be the ideal model for ethical behavior; but the Army should consider the structural benefits that arise from this CCO reporting framework.

This framework can serve as the foundation for reforming the structural placement of judge advocates in the Army, allowing judge advocates to advise commanders without ethical conflict with JAG Corps leaders evaluating their performance. As these opportunities for structural improvement in corporate America reveal, there are practical benefits to separating leaders from legal advisors: unconflicted lawyers, knowing their careers are safe, better contribute to organizational compliance and success.

B. Why Solving this Problem Matters

Resolving the ethical conflicts NSL Judge Advocates face is critical to preserving national security.¹⁹⁵ If uncorrected, these conflicts “will continue to lead to increased physical danger to the United States as well as a decline in the freedom of its citizens.”¹⁹⁶ These solutions operate on the underlying assumption that judge advocates would give better advice if the commanders they advise did not dictate their careers. After all, judge advocates ultimately serve the Army-as-client. If the Army wants to keep its best legal professionals, it must stop telling judge advocates to “play the ethical midfield”¹⁹⁷ when advising commanders who demand slanted and aggressive, policy-driven recommendations.

Eliminating the potential for ethical conflict is essential: “A moral, ethical command climate in combat that inculcates and maintains U.S. values despite the difficulties of the mission or the particular area of operations is the single most important factor in preventing civilian casualties, ensuring civilian

195. “[T]he Army must correct its errors for the sake of the national defense.” Tier, *supra* note 68.

196. Tier, *supra* note 68.

197. See Mattis Memorandum, *supra* note 51.

casualty reporting, and appropriately addressing reported incidents.”¹⁹⁸ Consider the following from an individual judge advocate who confronted these issues on the battlefield: “Given the implications of their work, accounts are beginning to emerge—perhaps unsurprisingly—that some military lawyers are haunted by moral injury and post-traumatic stress disorder.”¹⁹⁹

Fixing this problem is also necessary to preserve the integrity of the Law of Armed Conflict’s guiding principles. While judge advocates wear the U.S. Army uniform and are sworn to “support and defend the Constitution,”²⁰⁰ embedded in that oath is the obligation to ensure compliance with the rule of law. For NSL Judge Advocates, this obligation includes ensuring compliance with the Law of Armed Conflict. The impacts of Law of Armed Conflict violations—avoidable civilian casualties and loss of allied power, to name a few—are too grave to ignore.²⁰¹

C. *Recommended Solutions*

The solutions are clear. The Army must rewrite regulations governing judge advocates’ professional conduct and restructure the OER evaluation scheme by removing commanders from judge advocates’ rating chains.

1. Redraft Army Regulations

Redrafting Army regulations, particularly AR 27-26, will guide judge advocates toward ethical decision-making consistent with national security interests. AR 27-26, and most sources of ethical guidance,²⁰² do not promote independent decision-making. Any new language should mirror language in the Military Justice Act of 1968, barring commanders from

198. SUBCOMM. ON MIL. JUST. IN COMBAT ZONES, DEF. LEGAL POL’Y BD., MILITARY JUSTICE IN CASES OF U.S. SERVICE MEMBERS ALLEGED TO HAVE CAUSED THE DEATH, INJURY, OR ABUSE OF NON-COMBATANTS IN IRAQ OR AFGHANISTAN 60 (2013).

199. Jones, *supra* note 12.

200. *Oath of Commissioned Officers*, U.S. DEP’T OF THE ARMY, <https://www.army.mil/values/officers.html> [<https://perma.cc/95P5-F33C>].

201. See LAW OF WAR MANUAL (explaining the foundational principles that guide the creation of and adherence to the Law of Armed Conflict).

202. See OFF. OF GEN. COUNS., U.S. DEP’T OF DEF., DOD DIRECTIVE 5500.07: ETHICS AND STANDARDS OF CONDUCT (2024); U.S. DEP’T OF DEF., JOINT ETHICS REGULATION.

rating Military Judges: “[N]either the [commander] nor any member of his staff shall prepare or review any report concerning the effectiveness, fitness, or efficiency of the [*judge advocate*] . . . which relates to his performance of duty as a [*judge advocate*].”²⁰³ This would formally restructure the relationship between commanders and judge advocates, reminding both parties that judge advocates serve the Army-as-client first and advise commanders second.

This proposed revision is admittedly not without its flaws. While it might incentivize NSL Judge Advocates to provide principled counsel in service to the Army-as-client, it might also disincentivize dedicated service to their commanders as advisors. Knowing commanders are no longer rating them, NSL Judge Advocates might be less responsive to commanders when advice is needed most. This would irreparably harm the relationship between commanders and judge advocates, affecting people’s lives in the Joint Operations Center and on the battlefield. However, NSL Judge Advocates are both military and legal professionals who, regardless of who rates them, should and will want to perform at the “highly” and “most” qualified levels, striving to accomplish the mission while protecting human life. Any suggestion that NSL Judge Advocates would suddenly abandon duties to commanders simply because commanders no longer rate them fails to give judge advocates credit for the work they already do.

NSL Judge Advocates should not only be able to operate under statutory protection from the OER evaluation scheme’s perverse incentive structure. AR 27-26 should define what constitutes “personal interest”²⁰⁴ to provide clear guidance for resolving conflicts of interest. As currently written, AR 27-26 only prohibits judge advocates from representing clients if a “personal interest” creates conflict.²⁰⁵ AR 27-26’s new language should define “personal interest” to include “rating scheme-driven or career incentives,” laying a strong, clear ethical foundation for NSL Judge Advocates to resolve conflicts while consistently striving to provide “principled counsel” for their commanders.

203. Military Justice Act of 1968, Pub. L. No. 90-632, § 826, 70A Stat. 37, 1336 (1968) (emphasis added).

204. AR 27-26, *supra* note 14, at 28.

205. *See Id.* at 30.

Defining “personal interest” this way may overly broaden its application. For example, NSL Judge Advocates, confident that AR 27-26 frees them from negative career consequences, may still act solely on their career interests. They might view this language as express permission to deliver black-and-white, non-nuanced legal advice. However, this was never the problem. Every client expects their legal advisors to provide the legal justifications for and consequences of a given action. Any chance judge advocates might start delivering risk-free advice solely to protect their career interests is slim to none. Judge advocates may make decisions with their careers in mind—as would professionals in any field. Adopting new language in AR 27-26 explicitly defining non-consentable conflicts of interest to include potential career threats would grant them freedom to give better, not worse, advice.

2. Restructure the JAG Corps Rating Chain

AR 623-3’s “dual supervision” rating structure is misguided and functionally inadequate. Commanders should not rate NSL Judge Advocates. In fact, the Army should remove the “dual supervision” rating structure entirely, amending AR 623-3 to put JAG Corps leadership raters and senior raters in the OER evaluation scheme, without regard to their position relative to commanders. This will force JAG Corps leadership to be more involved in the development of their more junior judge advocates while freeing them from fear of evaluative retribution in their positions as advisors to commanders.

This solution does have drawbacks. Lacking incentives to please their commanders, judge advocates operating independent of commander influence over OERs may lean toward providing strict advice, potentially casting judge advocates in a negative light in their team’s eyes. They may be viewed as less of a team player or even as a subversive outsider undermining commander authority. However, this risk is inherent to the legal profession, and judge advocates providing principled counsel should always strive to do the right thing regardless of social consequences.

With respect to the broader OER evaluation scheme,

the Army must reduce its emphasis on the subjective evaluations rendered by an officer’s chain of command, and add more objective evaluations that better measure the

performance and potential of its officers . . . [to] mitigate the impact of flawed human judgment and lessen the practice of playing favorites.²⁰⁶

Implementing these changes for NSL Judge Advocates will align the practice area with others in the Army legal system, creating a more “stove-piped” rating structure that holds NSL Judge Advocates accountable to JAG Corps leadership rather than to commanders.²⁰⁷ This is not a novel idea. The Army has already removed commanders from the evaluation scheme for judge advocates.

The OSTC is a model example of this.²⁰⁸ The Secretary of the Army’s initial OSTC guidance expressly separated Trial Counsel from commanders they served prior to the OSTC’s establishment.²⁰⁹ Even though NSL Judge Advocates currently operate in a system lacking the luxury of “starting from scratch” like OSTC, they should receive the same freedom from command pressure as OSTC Judge Advocates.

Military Judges, members of the Army Trial Judiciary, perform similar functions to those of trial judges in the American legal system.²¹⁰ Statutory law insulates them from both command and external pressures that may push them to perform their jobs in certain ways.²¹¹ The Military Justice Act of 1968 explicitly forbids commanders at any level from evaluating Military Judges,²¹² incentivizing Military Judges to perform their duties as legal professionals in service of justice first and military officers in service of commanders second.

Special Victim’s Counsel and Trial Defense Services Judge Advocates serve servicemembers as individual clients within the

206. Tier, *supra* note 68.

207. See Loscheider E-mail, *supra* note 16.

208. See *supra* Section V.A.1.

209. “OSTC will operate under the supervision of the Lead Special Trial Counsel, who reports directly to the Secretary of the Army, *without intervening authority*.” U.S. DEP’T OF THE ARMY, GENERAL ORDER NO. 2022-10, ESTABLISHMENT OF THE UNITED STATES ARMY OFFICE OF SPECIAL TRIAL COUNSEL (2022) (emphasis added).

210. *The U.S. Army Trial Judiciary*, U.S. ARMY, <https://www.jagcnet.army.mil/sites/trialjudiciary.nsf> [<https://perma.cc/3F6F-X2CP>].

211. As it pertains to the proceedings over which Military Judges preside: “neither the convening authority nor any member of his staff shall prepare or review any report concerning the effectiveness, fitness, or efficiency of the military judge so detailed, which relates to his performance of duty as a military judge.” Military Justice Act of 1968, Pub. L. No. 90-632, § 826, 70A Stat. 37, 1336 (1968).

212. *Id.*

military criminal justice system, protecting client rights and interests. Since 2016, Special Victim's Counsels serve as confidential liaisons between investigative authorities, prosecutors, and defense counsel on behalf of alleged sexual assault victims and victims of similar offenses, ensuring they are treated fairly during the legal process.²¹³ Special Victim's Counsels serve clients first, even if client interests "do not align with the interests of the government"²¹⁴ or the client's commander. Similarly, Trial Defense Services Judge Advocates defend soldiers in the military criminal justice system. They are "completely independent from local commanders and their legal advisors"²¹⁵ to ensure objectivity and fairness throughout their client's prosecution. Both practice areas protect judge advocates through structural incentives that permit them to truly act in their client's interests without jeopardizing their careers.²¹⁶

CONCLUSION

Again, picture yourself in the shoes of the NSL Judge Advocate, awoken at 3 a.m. by your bedside pager. Your commander asks you for legal permission to kill the man on the screen. Your adrenaline is pumping, and you wonder if your legal training is enough to guide you through this tense moment. You have no less than a million questions in your head, but everyone in the room looks to you for an answer.

213. See Memorandum from Jessica L. Wright, U.S. Under Sec'y of Def. (Dec. 15, 2016) (on file with author).

SVCs ensure that their clients know that, regardless of the outcome of the judicial or administrative process, the military justice and administrative system supports them and gives them the opportunity to be heard. It is vital that the military justice process proceed in a fair and just manner, protecting both the rights of the victim and the Constitutional rights of the accused.

Army Special Victims' Counsel, U.S. ARMY, <https://www.jagcnet.army.mil/Sites/SVCounsel.nsf/home.xsp> [<https://perma.cc/J2JW-F5UH>].

214. *Army Special Victims' Counsel*, *supra* note 213.

215. *U.S. Army Trial Defense Service*, U.S. ARMY, <https://www.jagcnet.army.mil/TDS> [<https://perma.cc/FE4H-X5E9>].

216. The MCM already prohibits commanders from adversely rating a Judge Advocate who, in their eyes, does not represent their client (the commander's soldier, in the military justice context) well. See MCM, *supra* note 25, at II-8. Although that does automatically mean Judge Advocates will not feel the ethical pressure to conduct themselves in a way that reflects favorably on their next OER, at least the military criminal justice system provides regulatory protection against such perverse incentives.

This time, however, you are operating under less pressure. Your commander is not completing your OER or evaluating your performance in any way. You both know that, and it helps. Your client is the Army, but you still owe a duty to your commander to provide impartial and effective advice. This does not alleviate all your concerns, yet you sleep soundly at night knowing your career prospects do not hinge on what you are about to tell your commander. So, what do you tell him?