# The Role of Judge Advocates in Preserving Democracy

## INTRODUCTION

Modern democratic erosion rarely happens through dramatic means.[1] Instead, it unfolds gradually, as the Constitution, and the institutions that support it, are manipulated and weakened.[2] This slow erosion has been coined "constitutional retrogression."[3] The American military is critical to both the success and downfall of an authoritarian regime. Judge Advocates (JAGs) occupy an especially consequential role. The Judge Advocate General's Corps serves as the conscience of the military. This article argues that the JAG Corps, through its guardianship of the oath, ethical use of advisory power, role in upholding accountability, and ultimate duty to principled patriotism, serves as a critical safeguard against authoritarian drift. The role of a JAG can be laid out in four pillars: honoring the Oath to the Constitution, understanding the courage within advisory power, committing to holding members accountable, and acting as a patriot.

### *A. Honoring the Oath*

Honor is a foundational virtue within military service, and it begins with unwavering dedication to the Constitution. Every service member, enlisted or commissioned, begins their career by raising their right hand and swearing "to support and defend the Constitution of the United States." This Oath is the foundation of American military service and the central safeguard that differentiates the U.S. armed forces from militaries in states where loyalty is pledged to a single leader or regime rather than to a constitutional order. The Oath embodies a constitutional hierarchy: allegiance is owed to the Constitution above any individual, including the President, and above any institutional interest, including the military itself. This structure

[1] Huq & Ginsburg at 83, https://www.uclalawreview.org/wp-content/uploads/2019/09/Huq-Ginsburg-65-1.pdf.
[2] *Id*.
[3] *Id*.

reflects a deliberate design choice by the framers to prevent the military from becoming a tool of personal power used in democratic breakdown.[4] As Timothy Snyder cautions in his book *On Tyranny*, institutions do not protect themselves; they require people willing to defend the underlying norms and legal constraints that give them democratic meaning.[5] The Oath is the mechanism through which service members commit to being those defenders.

Understanding the Oath is essential because constitutional retrogression often occurs through the slow corrosion of institutions by political actors.[6] Aziz Huq and Tom Ginsburg, two legal scholars who focus on comparative constitutional law, describe this process as one in which "interbranch checks are deliberately and systematically dismantled," often driven by an executive empowered by partisan support in Congress.[7] In such moments, the military becomes both vulnerable to political misuse and crucial in preventing further decline. A military whose members understand their constitutional obligations is far less susceptible to exploitation for antidemocratic ends.

For JAGs, this constitutional commitment carries particular weight. JAGs are both officers sworn to the Constitution and legal professionals entrusted to interpret and uphold its constraints. Recognizing that no service member is forced to follow an unlawful order is foundational; even further, it is an affirmative duty to disobey unlawful orders.[8] A JAG's first

[4] See The Posse Comitatus Act, https://www.law.cornell.edu/uscode/text/18/1385.
[5] Snyder in *Chapter 2: Defend institutions* in *On Tyranny*, https://ia601505.us.archive.org/11/items/on-tyranny-twenty-lessons-from-the-twentieth-century-by-timothy-snyder-z-lib.org/On%20Tyranny%20Twenty%20Lessons%20from%20the%20Twentieth%20Century%20by%20Timothy%20Snyder%20%28z-lib.org%29.pdf.
[6] Huq & Ginsburg at 126.
[7] *Id*.
[8] See *U.S. v Calley* (holding that a service member is liable for executing an unlawful order), https://www.famous-trials.com/mylaicourts/1634-myl-uscma; see also *U.S. v. Medina* (outlining command responsibility by holding that a commander who orders their subordinates to commit an unlawful act is also liable), https://caselaw.findlaw.com/court/us-1st-circuit/116851998.html.

responsibility is to internalize that duty, and their second is to ensure that every service member understands these limits as well.

Ultimately, remembering the Oath means remaining vigilant about the possibility that the military itself can be used in ways that undermine the Constitution it is sworn to protect.[9] To support and defend the Constitution is to refuse to allow the armed forces to be exploited for purposes that are antithetical to its mission or inconsistent with constitutional values. The Oath is not simply a beginning, it is an ongoing ethical commitment to place constitutional loyalty at the center of military service.

### *B. Courage in Counseling: The Power of the Advisory Role*

Constitutional retrogression can also present as the subtle consolidation of authority through strategic reinterpretations of the law.[10] Democratic decline frequently proceeds through strategic rewrites of the rules, especially when the executive and military leadership become perfectly aligned.[11] In such conditions, even a civilian president can produce outcomes indistinguishable from outright military rule yet offensive to its mission (i.e. deploying the armed forces against civilians as instruments of repression to further a personal political agenda).[12] The Constitution warns against military usurpation and president exploitation of military power for political gain.

This is where the JAG Corps' advisory function becomes vital. It is obvious that the chain of command is important to military order, but it should not be treated as an absolute, unquestionable, sacred hierarchy that overrides constitutional limits or legal judgment.

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[9] See Snyder, *Chapter 7: Be reflective if you must be armed.*
[10] Huq & Ginsburg at 143.
[11] *Id*.
[12] See The Posse Comitatus Act, which prohibits using federal troops for domestic law enforcement, as the mission of the military is to defend the Constitution not a political regime/power/entity.

"Democratic stability hence depends on the preferences of particular leaders and the dynamics of their political coalition."[13] But how do these preferences form? Commanders rely heavily on legal advisors precisely because they do not possess the requisite legal expertise. Still, as the saying goes, "JAGs advise, commanders decide," meaning JAGs lack formal approval power.[14] However, that advisory posture creates a surprising form of power. While a commander can choose whether or not to accept legal advice, the commander's entire understanding of lawful authority is shaped by the JAG's advice. As a result, a JAG's interpretation of the law can profoundly influence military decision-making, even without formal command authority.

The law explicitly protects the independence of senior judge advocates, providing that "no officer or employee of the Department of Defense may interfere with the ability of the Judge Advocate General to give independent legal advice" to the Secretary or Chief of Staff of each branch.[15] But independence on paper means little without ethical discipline in practice. JAGs must consciously resist the temptation to "weaponize" legal ambiguity by stretching interpretations to accommodate questionable actions or political preferences. Democratic decay doesn't always start with soldiers or elected leaders; it can start with immoral yet creative lawyers willing to bend the legal order in service of power. Snyder illustrates this danger through the example of Hans Frank, Hitler's personal lawyer, who abandoned professional ethics to rationalize atrocities.[16] "Had lawyers maintained basic norms (i.e. refusing execution without trial) the Nazi regime would have faced significantly more resistance in implementing its

[13] Huq & Ginsburg at 116.
[14] *The Role of the Judge Advocates General and of Judge Advocates: A Primer* at 6 (5 Aug 25), https://www.americanbar.org/content/dam/aba/administrative/law_national_security/tjag-and-jag-paper.pdf.
[15] 10 U.S.C. § 7037 (army), https://www.law.cornell.edu/uscode/text/10/7037, 8046 (Marine Corps), 8089 (Navy), and 9037 (Air Force).
[16] Snyder in *Chapter 5: Remember professional ethics*.

crimes."[17] The significance of a JAG's role is heightened by the stakes. Some of the legal questions JAGs address determine matters of life and death. Decisions involving the use of force, rules of engagement, and human rights hinge on a JAG's legal advice.

Courage in a JAG's role rarely manifests as defiance in public view. Instead, it appears in quiet rooms, during (a short amount of time), when legal advice conflicts with urgency. In moments where the use of force is contemplated outside traditional battlefields, a JAG's willingness to speak clearly and assertively about legal limits becomes an act of bravery. Recent history demonstrates how such situations arise outside of formally declared hostilities, and under intense executive pressure to act quickly and decisively. These incidents often occupy legal gray zones, where the line between lawfull defense and unlawful offense is thin. In these moments, commanders rely heavily on legal advice. It is here that this advisory role must be exercised with relentless caution and unwavering constitutional commitment, and never as a means to facilitate political ambition.

### *C. Commitment to Accountability*

Commitment to democratic governance requires accountability when the law is violated. Constitutional retrogression accelerates when institutions responsible for enforcing the laws are weakened.[18] In the civilian context, accountability gaps are common as there are an array of doctrinal carve-outs that protect federal officials even when constitutional norms are violated.[19] Even when no specific carve-out applies, qualified immunity protects our highest officials.[20] These structural protections create an environment where gross violations of the Constitution are constantly overlooked.

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[17] *Id*.
[18] Huq & Ginsburg at 125-26.
[19] *Id*. at 147.
[20] *Id*.

Within the military, courts-martial serve as a crucial counterweight to this dynamic. They are one of the few mechanisms in the United States capable of imposing real consequences on certain federal actors, including in the context of armed conflict, when they violate the law. Recent structural reforms have strengthened the Uniform Code of Military Justice (UCMJ) as a constitutional safeguard. The Office of Special Trial Counsel (OSTC), is an independent legal organization from the JAG Corps, though solely made up of JAGs, responsible for investigating and prosecuting certain "covered offenses"[21] under the UCMJ[22]; these offenses historically carried a high risk of command influence or underenforcement. More importantly, OSTC falls outside the traditional chain of command and reports directly to the Secretary of their respective branch. This reform matters because it protects accountability where it is most vulnerable. Commanders retain their operational authority, but they no longer possess discretion in prosecuting serious crimes. By insulating prosecutorial discretion from the chain of command, OSTC becomes one of the only ways (and arguably the *only* way) we can prosecute these high commanding authorities that were otherwise untouchable before.

When commanders ignore a JAG's advice or act outside their lawful authority, the military justice system, now strengthened by OSTC, ensures their misconduct is not quietly swept under the rug. JAGs have always had the responsibility to enforce the law within the ranks, but now OSTC provides a more effective mechanism through which that duty can be carried out; it is imperative that the JAG Corps makes full and deliberate use of this mechanism.

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[21] The covered offenses are as follows: Wrongful broadcast/distribution of intimate visual images (Art. 117a); Murder (Art. 118); Manslaughter (Art. 119); Death/injury of an unborn child (Art. 119a); Rape and sexual assault (Art. 120); Mails: Deposit of obscene matter (Art. 120a); Rape and sexual assault of a child (Art. 120b); Other sexual misconduct (Art. 120c); Kidnapping (Art. 125); Domestic violence (Art. 128b); Stalking (Art. 130); Retaliation (Art. 132); Child pornography (Art. 134); Sexual harassment (Art. 134, effective 1 January 2025). National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, § 533(17)(A) (2021), https://www.congress.gov/117/plaws/publ81/PLAW-117publ81.pdf.

[22] https://www.afjag.af.mil/OSTC/OSTC-FAQ/.

### *D. The Final Act of a Patriot*

To be a patriot in a constitutional democracy is to embody honor, courage, and commitment at once. Honor anchors loyalty to constitutional principles; courage sustains resistance to unlawful pressures; and commitment ensures that integrity is preserved even when institutions are weakened. Tyranny takes root when individuals stop thinking for themselves and cease standing up for what they know to be right. Constitutional democracy depends not only on institutional and legal frameworks, but on the moral courage of the people who operate within them. As Snyder warns, "if none of us is prepared to die for freedom, then all of us will die under Tyranny."[23] Freedom endures because individuals choose to act, or refuse to act, when the conscience and principle demands it. For JAGs, this requires a particular kind of courage. Their role is to uphold the Constitution even when doing so creates friction with powerful individuals or internal pressures.

History shows that principled resistance can shape the trajectory of entire nations. Snyder uses Churchill as an example to show how resisting appeasement helped the British define themselves as people who calmly resisted evil, and that his refusal to concede forced Hitler to alter his plans.[24] Moral clarity, even when exercised by a single actor, can shift the path of an institution or a country. Ethical advising, lawful decision-making, and the use of courts-martial are all safeguards, but there are times when they are not sufficient. There may come moments when every remedy has been exhausted without effect. In such circumstances, the most powerful statement a JAG, or anyone in a position of leadership, can make is to refuse to legitimize unlawful conduct. Withdrawal is not abandonment; it can be the final means of refusing to

[23] Snyder, *Chapter 20: Be as courageous as you can* in *On Tyranny.*
[24] Synder, *Chapter 8: Stand out* in *On Tyranny*.

participate in conduct that betrays the Oath. Sometimes, someone's principled absence speaks louder than their continued presence.

In the end, preserving democracy might require more than professional competence. Instead, it might require personal bravery. To be a patriot is to align loyalty with constitutional values, even at personal cost.

## Conclusion

In sum, the JAG Corps plays an important role in protecting democracy and the constitutional order. By upholding the Oath, exercising sound judgment, enforcing accountability, and demonstrating moral courage, JAGs help ensure that the military remains a guardian to democracy, as opposed to a threat. Their work reaffirms that American democracy depends not only on the fortitude of institutions, but on the character and conviction of those entrusted to serve within them.