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Gill P. Beck Maj. Gen.

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A TEN-YEAR RETROSPECTIVE ON THE LAW AND THE WAR ON TERRORISM: THE ROLE OF ARMY RESERVE CITIZEN-LAWYERS

*Major General Gill P. Beck, United States Army Reserve **

I. INTRODUCTION

September 11, 2011 marked the tenth anniversary of the terrorist attacks on the United States and provides an appropriate occasion to reflect on our Nation's response. This article will focus on the response of U.S. Army Reserve (USAR) Judge Advocates, citizen-lawyers who have demonstrated their value as an integral part of the Army's Judge Advocate General's Corps ("JAG Corps" or "JAGC"). They are "One team of proactive professional[s], forged by the warrior ethos, delivering principled counsel and mission-focused legal services to the Army and to our Nation."¹ In this article, I will discuss the role that USAR Judge Advocates have performed in the past decade, placing special emphasis on the role of company-grade Army Reserve Judge Advocates. I will argue that the future requires renewed emphasis on the development of agile and adaptive Army Reserve Judge Advocates who can leverage civilian legal skills and leadership abilities as part of One JAG Corps Team of professionals to meet our Nation's future challenges.

II. THE IMPACT OF 9/11

On September 10, 2011, a memorial ceremony was held in Albany, New York, for Lieutenant Colonel (LTC) William Pohlmann, an Army Reserve Judge Advocate assigned to the 4th Legal Support Organization, USAR, who, on September 11, 2001, was on the seventy-ninth floor of the World Trade Center's South Tower when terrorists attacked America by flying aircraft into the World Trade Center.² Although ten years had passed

* The opinions and conclusions expressed in this article are solely those of the author. They do not necessarily reflect the views of the United States Army, Department of Defense, or United States Government.

¹ Captain Anthony John, *Army Reserve Legal Command Conducts Military Justice and Trial Advocacy Training Conference for Legal Administrators*, ARMY RESERVE (Apr. 7, 2011), <http://www.usar.army.mil/arweb/NewsAndMedia/storiesfromthefront/Pages/ArmyReserveLegalCommandConductsMilitaryJusticeandTrialAdvocacyTrainingConference.aspx> (quoting Major General Gill P. Beck describing the JAG Corps One Team vision and quoting the JAG Corps Vision Statement).

² Katherine Underwood, *Reserves Remember 9/11, Honor a Fallen Soldier*, FOX23 NEWS (Sept. 11, 2011), <http://www.fox23news.com/news/local/story/Reserves-remember-9-11->

since the loss of LTC Pohlmann, the pain his family felt was as palpable during the memorial ceremony as if their loss had occurred the day before. Members of the Pohlmann family related the following events:

On September 11, 2001, not long after 8:46 a.m., when terrorists crashed American Airline Flight 11 into the North Tower of the World Trade Center, LTC Pohlmann called his wife, Linda Pohlmann, to say that he was "OK." Within minutes, LTC Pohlmann's son Chris, who worked on Wall Street, called to check on his father. After reassuring his son that he was "OK," LTC Pohlmann again called his wife but before they could renew their conversation, at 9:03 a.m., United Airlines Flight 175 struck the World Tower Center's South Tower killing LTC Pohlmann.

Shortly after 10:00 a.m., Chris Pohlmann called his brother Darren Pohlmann, who reported that he had been in the vicinity of the Pentagon shortly after 9:37 a.m. when American Airlines Flight 77 crashed into the Pentagon. At that moment Chris Pohlmann thought to himself that "[t]he gates of hell had opened." He later said that "[t]he hardest thing to do was to look back at Ground Zero and see the smoke and know that your dad could still be there."³

III. THE RESPONSE TO 9/11

President Obama has said that "[l]ike every American, I'll never forget how I heard the terrible news"⁴ Like all Americans who are parents, he recounted the difficulty of telling his children about the 9/11 terrorist attacks but said "[o]ne of the things we've told them is that the worst attack in American history also brought out the best in our country."⁵ This article will address how the worst attack on America brought out the best in our uniformed USAR Judge Advocates, citizen-lawyers who, during the past decade, have served with distinction while mobilized in the United States and deployed throughout the world. This article cannot do justice to the incredible contributions of the entire JAG Corps—Active Component, Army National Guard, and Army Reserve—nor to all of the dedicated paralegals, civilian personnel, and legal administrators. Instead, this article will focus on the leadership provided by Army Reserve company-grade officers, who have time and time again excelled as highly skilled legal practitioners and leaders.

honor-a-fallen-soldier/MuSWeS7SukGQA-pHDuX5Yg.cspcx (last visited Jan. 27, 2012) (describing the memorial service for LTC William Pohlmann).

³ *Id.*

⁴ President Obama, Op-Ed, *Obama: Let's Regain the Post-9/11 Unity*, USA TODAY, Sept. 9, 2011, at A11, available at <http://www.usatoday.com/news/opinion/forum/story/2011-09-08/Obama-Lets-reclaim-the-post-911-unity/50318994/1>.

⁵ *Id.*

Since 9/11, the Army JAG Corps, under the strong leadership of The Judge Advocate General,⁶ has successfully adapted to the requirements of a demanding operational environment.⁷ A measure of the success of the JAG Corps can be found in how Army commanders view the JAG Corps. One of the leading Army warriors of the past decade, Brigadier General H.R. McMaster, has stated:

Judge Advocates . . . have taken on a broad range of responsibilities, far beyond what anybody would have anticipated prior to the current wars. I believe that our judge advocates, more than anybody else, have adapted extraordinarily well to these increased demands. . . . There is so much we have taken on in terms of assistance, training host nation security forces, rule of law missions, detention operations, and working within an indigenous law system that relies upon legal expertise. Who would have thought that our military would be at this nexus of war fighting and the law? I believe our judge advocates have done a brilliant job adapting to this new reality and have been a primary reason for the successes we have had in Iraq as well as Afghanistan.⁸

Army Reserve Judge Advocates have been part of the One JAG Corps Team that has adapted to the challenges of supporting commanders engaged in full spectrum operations in Iraq and Afghanistan. During the past decade, hundreds of Army Reserve Judge Advocates have deployed or mobilized.⁹ They have brought their unique civilian skill sets and leadership

⁶ The Judge Advocate Generals – Major General (MG) Walter Huffman, MG Thomas Romig, Lieutenant General (LTG) Scott Black, and LTG Dana Chipman – have led the effort to integrate the Active Component, Army National Guard, and Army Reserve into a seamless team of proactive legal professionals. Their efforts, supported by their deputies – MG John Altenburg, MG Michael Marchand, MG Dan Wright, and MG Clyde J. (“Butch”) Tate -- have profoundly changed the JAG Corps, and it is fitting in an article about leadership to underscore that our Nation has been well served by these senior Judge Advocate leaders who had the vision to transform a legacy Cold War model of Reserve Component Judge Advocates as part of a second-tier strategic reserve into One JAG Corps Team integrated and synchronized as part of an operational force. Setting the conditions for this seamless integration of JAG Corps capabilities was the Chief of the Army Reserve, LTG Jack Stultz, whose exceptional vision and leadership transformed the Army Reserve from a legacy strategic reserve force to an operational Army Reserve force.

⁷ See, e.g., Elizabeth L. Hillman, *Mission Creep in Military Lawyering*, 43 CASE W. RES. J. INT’L L. 565, 570 (2011) (“Overall, the scholarly response to the post 9/11 action of judge advocates has portrayed them as agile and principled in adapting to a remarkably difficult legal climate.”).

⁸ Brigadier General H.R. McMaster, *Lecture to the U.S. Army 58th Judge Advocate Graduate Course: The Role of the Judge Advocate in Contemporary Operations: Ensuring Moral and Ethical Conduct During War*, ARMY LAWYER, May 2011, at 35, 35.

⁹ *Hearing To Receive Testimony on Providing Legal Services by Members of the Judge Advocate General’s Corps: Hearing Before the S. Comm. on Armed Services & the Subcomm. on Personnel*, 111th Cong. 2 (2011) (statement of Lt. Gen. Dana K. Chipman, Judge Advocate General, U.S. Navy) (“Currently, there are 142 Army Judge Advocates deployed to

skills as part of an operational Army Reserve that has become an indispensable part of the JAG Corps.

Army Reserve Judge Advocates have followed the lead of their active duty counterparts and found ways to add value to Army Commanders in operational environments, characterized by “uncertainty, complexity, and ambiguity.”¹⁰ This operational environment places “a premium on decentralization of authority and on the distribution of combined arms capabilities that enable leaders to develop the situation through action, consistent with their commander’s intent.”¹¹ One of the greatest tributes to the value added by Judge Advocates was made by then Major General David H. Petraeus:

Military lawyers were true combat multipliers in Iraq. They were not only invaluable in dealing with a host of operational law issues, they also made enormous contributions in helping resolve a host of issues that were more than a bit out of the normal legal lanes. In essence, we “threw” lawyers at very difficult problems and they produced solutions in virtually every case—often under very challenging circumstances and in an uncertain security environment. . . . I tried to get all the lawyers we could get our hands on—and then sought more.¹²

General Petraeus re-enforced that strong endorsement of the value of Judge Advocates by writing a letter to the Winchester Sun where he highlighted the contribution of Major Dave Ward, USAR:

To The Sun:

I happened to see the excellent article in your paper about Maj. Dave Ward, who recently returned home following a tour with the 101st Airborne Division (Air Assault) in Iraq. And I wanted to add my personal confirmation that Dave was an absolute “franchise player” for the 101st.

Dave is the total package, one of those rare individuals who is exceptionally bright, tremendously hard working, a true team player and a phenomenal problem solver. (He’s also a terrific runner and great guy.)

We used our military lawyers to resolve a host of thorny problems and they always came through. Dave was one of the very best of this great group (we had 27 lawyers with us in Iraq, and they were worth their

Afghanistan and 113 Army Judge Advocates still serving in Iraq. In addition, there are 304 Judge Advocates serving in more than 19 other countries in support of our Army deployed overseas.”)

¹⁰ DEP’T OF THE ARMY, OPERATIONS, FM 3-0, at vii, Feb. 22, 2011 (originally published in February 2008).

¹¹ *Id.*

¹² Michael L. Kramer & Michael N. Schmitt, *Lawyers on Horseback? Thoughts on Judge Advocates and Civil-Military Relations*, 55 UCLA L. REV. 1407, 1434 (2008) (citing JOINT CHIEFS OF STAFF, LEGAL SUPPORT TO MILITARY OPERATIONS, JOINT PUB. 1-04, at II-9, Aug. 17, 2011).

weight in gold), and I cannot say enough great things about him. Your community should be very proud of him.

With all best wishes from Fort Campbell, Kentucky, Air Assault,
Maj. Gen. Dave Petraeus, CG, 101st Airborne Division.¹³

General Petraeus, by taking time to send a letter to the editor to recognize Major David Ward, an Army Reserve Judge Advocate, sent a strong leadership message that the Army is best when it seamlessly integrates all of its capabilities—Active and Reserve Component—as part of one team, which is one of the most important lessons the Army has learned from the past ten years since 9/11.¹⁴

While Army Reserve Judge Advocates have excelled at all grade levels, the JAG Corps has produced an exceptionally talented group of Captains, who have demonstrated by their selection as General Douglas MacArthur Leadership Award winners that the JAG Corps has adapted its leadership development program to meet the demands of the new operational environment.¹⁵ Each year, the Army selects approximately six Army Reserve Captains as the best company-grade leaders to receive the General MacArthur Leadership Award.¹⁶ During the past four years, the JAG Corps has produced five of the twenty-four best Army Reserve company-grade lead-

¹³ Major General David Petraeus, *101st Soldier a 'Franchise Player,'* WINCHESTER SUN, Apr. 14, 2004, at A4.

¹⁴ Colonel Rich Hatch, former Staff Judge Advocate of the 101st Airborne Division, observed:

Several Army Reserve Judge Advocates were fully integrated into the operations of the Office of the Staff Judge Advocate, 101st Airborne Division (Air Assault) during our deployment in support of Operation Iraqi Freedom I in 2003–2004. Indeed, there was no way to distinguish Army Reserve and Active Component Judge Advocates. By way of illustration, when our Bastogne Brigade Combat Team Judge Advocate was seriously injured during the attack by Hassan Akbar that killed Army Captain Christopher Seifert and Air Force Captain Gregory Stone on March 23, 2003, an Army Reserve Judge Advocate, Major Roger Nell, was called in and physically linked up with our Bastogne Brigade combat team within hours. The transition was seamless and Major Nell provided Bastogne Brigade exceptional leadership and high-quality legal support through demanding conflict and post-conflict operations.

Telephone Interview with Colonel Richard O. Hatch (Ret.), former Staff Judge Advocate of the 101st Airborne Division (Air Assault) (Mar. 5, 2012).

¹⁵ See, e.g., Gill P. Beck, *Commander's Corner*, LC TIMES, Mar. 2010, at 1, 9, available at <http://www.usar.army.mil/arweb/organization/commandstructure/USARC/OPS/USARJSTS/C/Commands/Legal/News/Documents/Legal%20Command%20Newsletter.pdf> (“The 12th LSO has produced two General MacArthur Leadership Award recipients as the best company grade leaders in the Army in the past two years.”).

¹⁶ DEP'T OF THE ARMY, GENERAL DOUGLAS MACARTHUR LEADERSHIP AWARD PROGRAM, ARMY REG. 600-89, para. 6(c), Sept. 20, 2007 (detailing the selection criteria for the U.S. Army Reserves).

ers. This example underscores how successfully the JAG Corps has adapted to the new operational environment, and it highlights the need to continue developing citizen-lawyers in the USAR as leaders for the future.

In 2007, Captain (CPT) David Green—who also serves as a Vice-President for Verizon in Dallas, Texas, and is responsible for operations involving millions of dollars and hundreds of employees—deployed to Afghanistan, where he was assigned to train members of the Afghan Army on the Hague principles of the law of war. When he arrived in Afghanistan, CPT Green discovered that the Afghan Army's training had been essentially nonexistent: it had turned into a "pencil-drill" where certifications were provided even though the training was not completed to Army standards. Even under pressure, CPT Green refused to certify the training and insisted that it be done to Army standard. He assumed a leadership role in the process, demonstrated the Army values of personal courage and integrity, and ensured that law-of-war training was conducted to standard. For his demonstrated leadership in that situation and in many others in Afghanistan and Iraq, CPT Green received the General MacArthur Leadership Award in 2008.

In 2008, CPT Cal Cunningham—an attorney from Winston-Salem, North Carolina, who was President of the Student Body at the University of North Carolina, a graduate of the London School of Economics, and a former State Senator—provided military justice support to twenty-four separate brigades and task forces while serving as Senior Trial Counsel, Office of the Staff Judge Advocate (OSJA), Multi-National Corps-Iraq (MNC-I). CPT Cunningham pioneered MNC-I's approach to civilian contractor felony misconduct, and he was selected by LTG Lloyd J. Austin, III, Commanding General, MNC-I, to be a member of the MNC-I Congressional Delegation Team responsible for assisting LTG Austin in briefing congressional delegations. CPT Cunningham demonstrated the importance of Judge Advocates being agile and adaptive leaders, with broad academic and professional experience, able to function effectively in multiple roles to support the command. For his demonstrated leadership excellence, CPT Cunningham received the General MacArthur Leadership Award in 2009.

In 2008, CPT Andrew Culbreath—an attorney from Simpsonville, South Carolina—served as an operational law attorney for OSJA, MNC-I. In April of that year, in an ambiguous, complex, and volatile operational setting, CPT Culbreath advised the Basrah Task Force Commander who provided military support to the no-notice Iraqi-led operation against Shia Special Group terrorists located in Basrah, Iraq. In doing so, he demonstrated that Judge Advocates must be prepared at a moment's notice to assume a leadership role in a high-profile military operation. For his actions, CPT Culbreath received the General MacArthur Leadership Award in 2010.

On May 19, 2011, CPT Irvin Drummond—an attorney from Baltimore, Maryland—and CPT Jason Trigger received the General MacArthur

Leadership Award. CPT Drummond served as Chief, Operational Law, Combined Joint Task Force (CJTF)-101, Afghanistan. Commenting on CPT Drummond's leadership, LTC Pat Huston, Deputy Staff Judge Advocate, said that "[t]he [Task Force Staff] challenged CPT Drummond every day with tough issues, and he handled every issue perfectly." By doing so, CPT Drummond demonstrated that he is indeed a competent, agile, and adaptive leader able to leverage his civilian legal skills in a tough operational environment in Afghanistan. CPT Trigger served as the Rule of Law Advisor to the Deputy Commanding General, 25th Infantry Division, in Iraq. His supervisor in Iraq stated that CPT Trigger was "a proven leader" and "[t]he best company grade officer with whom I have served in my 19 years of service." Of CPT Trigger's performance, his Senior Rater, Major General Robert Brown, stated that "[h]e is precisely the sort of officer that commanders seek: adaptable, team- and mission-oriented, hard-working, and brimming with initiatives that bring value to military operations. CPT Trigger moved easily within the nuances of law and policy, guiding commanders and staff . . . One of our Army's finest leaders."

The leadership demonstrated by CPTs Green, Cunningham, Culbreath, Drummond, and Trigger has arisen as part of the JAG Corps' response to 9/11. These Judge Advocates have, through their actions, demonstrated that Citizen-Lawyers, as part of an operational Army Reserve, are making a difference in a complex operational environment. They provide examples to be emulated, but they also underscore the need to continue developing leaders for the future who will ably serve Army Commanders and our Nation.

Looking to the future, I would propose that continued emphasis be placed on the development of Army Reserve lawyers as leaders. Army Reserve Judge Advocates are drawn from communities throughout the United States. They possess a broad set of civilian-acquired skills and a breadth of mind and experience that makes them uniquely suited to advise commanders and work in joint and interagency processes. By recognizing the importance of developing leadership skills, the Army Reserve can leverage those civilian-acquired skills to great advantage. "Lawyer as Leader" training programs must take a broad view of leadership.¹⁷ Building on the JAG Corps core competencies, but recognizing, as former General Counsel for General Electric, Ben W. Heineman, Jr., has stated:

Leadership demands important qualities of mind that go beyond the core competencies taught in law schools. We need lawyers who can create and build, not just criticize and deconstruct. Lawyers must be able to ask and answer "what ought to be" questions, not only "what is" questions—and in

¹⁷ See generally Ben W. Heineman, Jr., *Lawyers as Leaders*, 116 YALE L.J. POCKET PART 266 (2007), <http://yalelawjournal.org/images/pdfs/102.pdf> (arguing that law schools should more directly train aspiring lawyers to seek roles of responsibility and accountability).

their answers they must respect the tensions between competing values that are inherent in most important decisions. Lawyers should consider ethics in addition to law when making recommendations or decisions; lawyers should learn inter-disciplinary risk assessment and how to take considered risks; and lawyers should work cooperatively and constructively on teams composed of members from other disciplines, vocations, and cultures.¹⁸

Army Reserve Judge Advocates now and in the future must be able to work cooperatively and constructively as members of joint, interagency, intergovernmental, and multinational teams of lawyers and non-lawyers. Today, technical knowledge of the JAG Corps' core competencies is not enough. Army Reserve Judge Advocates must be able to apply the law in a complex and uncertain operational environment. They must leverage their civilian experience to create options for Army commanders, to build consensus among organizations over which the Army has no direct authority, and to ensure absolute compliance with the Constitution, federal law, and international law. They must rely on their ability to influence and persuade, skills that Citizen-Lawyers are especially adept at employing.

The demands of the new operational environment require that we develop USAR Judge Advocates who "understand the methods of thinking and analysis taught in business and public policy schools."¹⁹ We need Citizen-Lawyers like CPT Cunningham, a graduate of the London School of Economics and former State Senator, as well as CPT Green, a senior executive with a Fortune 500 company, who can draw from their civilian training and experience for the benefit of the JAG Corps, the Army, and the Nation. "Breadth of mind is needed more than ever today because many young lawyers will have more careers than their predecessors, often as part of multi-disciplinary teams."²⁰ The USAR's Citizen-Lawyers provide "breadth of mind" and experience to the JAG Corps, which empowers it to do even more for the Army and the Nation.

While we look back over the past decade and cannot eliminate the pain felt by families such as the Pohlmanns for the loss of their loved ones on September 11, 2001, we can observe that the worst attack on America brought out the best in our Army. The examples of leadership excellence demonstrated by the five JAG Corps Captains demonstrate that we are better today, as an Army Jag Corps, than we were on September 10, 2001. As we look into the future, and as the JAG Corps aspires to develop the most capable legal professionals in the world, we recognize that continued focus on leadership training is essential. Professional excellence requires Judge

¹⁸ *Id.* at 267.

¹⁹ *Id.*

²⁰ *Id.* at 268

Advocates who are not only technical legal experts, but also who are capable of assuming leadership roles in a wide variety of circumstances in joint, interagency, intergovernmental, and multinational operations to ensure absolute fidelity to the Constitution, federal law, and international law, while creating options for operational commanders and national leaders that will ensure “in a changing world that demands our leadership, the United States of America will remain the greatest force for freedom and security the world has ever known.”²¹

²¹ President Barack Obama, *Introduction* to U.S. DEP’T DEFENSE, SUSTAINING U.S. GLOBAL LEADERSHIP: PRIORITIES FOR 21ST CENTURY DEFENSE 3–4 (2012), *available at* http://www.defense.gov/news/Defense_Strategic_Guidance.pdf.