



# National Security Law Report

*Editor's Note: In this issue, we are pleased to present a wide variety of essays, beginning with a pair of contributions that present a comparative perspective on antiterrorism law from the United Kingdom. **Brice Dickson** begins with a discussion of the debate regarding detention-without-charges in U.K. terrorism-related cases, and **Clive Walker** follows with a review of the pros and cons of the U.K.'s "control orders" system. The remainder of the issue returns to a focus on U.S. law (though we hope in future issues to provide additional comparative perspectives). **Philip Carter** and **Karri Garrett** analyze the recent expansion of UCMJ jurisdiction over civilians accompanying forces in the field, and **Lt. Col. Mike Ryan** surveys the role of Army JAGs in the operational context. **Gene Matthews** concludes with a legislative proposal designed to improve disaster preparedness through the extension of Good Samaritan liability protection.*

## U.K. Perspectives: Detaining Suspected Terrorists

Brice Dickson

Britain's government is at odds with its Parliament as to how long the police should be allowed to detain suspected terrorists before having to charge them. When the matter was debated in 2005, the government pushed for a maximum detention period of 90 days. Parliament, however, would tolerate only 28 days (now provided for in section 23 of the Terrorism Act 2006). This was still twice as long as the previous maximum, which was imposed in 2003, just three years after the Terrorism Act 2000 had stipulated that seven days should be the limit.

None of these periods breaches the requirements of the European Convention on Human Rights. This is because all detainees in Britain must be brought before a judge or a designated magistrate within, at the latest, 48 hours of the arrest so that a decision can be taken on whether longer detention is justified. The European Court in Strasbourg has said that once detention is judicially authorized (which in its view must occur within no less than four days), it can endure for months if needs be. In France, where defendants are processed by an "investigating

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## Anti-Terrorism Orders Out of Control?

Clive Walker

Five years after the cataclysmic events of September 11, 2001, two dynamics have emerged in the patterns of terrorism which should shape our legal responses. The first was identified from the outset and relates to the growing emphasis on anticipatory risk-criminal justice resolutions or executive-based alternatives which facilitate prevention or even pre-emption. The second, more recent, dynamic concerns the changing perception of who is the "terrorist." There was at first some solace in the convenient outlaw figure of Osama bin Laden, with his acolytes also externalised to Guantánamo. But these personal and legal distinctions are breaking down with the complications over the rendition of foreign suspects and because of the emergence of "neighbour terrorism," as illustrated by the London bombings of the 7 July 2005. In this changing landscape, what legal mechanisms might allow us to allay the fear of terrorism risk and the paranoia that our neighbour may be a suicidal terrorist? One possible device is the system of "control orders" in the United Kingdom.

The history of control orders resides in the prior regime of detention without trial under Part IV of

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judge,” it is not uncommon for detentions to endure for years, even though no precise charges have been laid against the suspect. This is because the French system is deemed by the European Court to be comparable to the British system of “remands in custody.” The concept of a ‘charge’ is not as determinative in civil law countries as it is in common law jurisdictions.

The British Government wanted detention of up to 90 days because it was persuaded by police suggestions that this kind of period is required in order to complete the satisfactory interrogation of a large number of detainees suspected of conspiring together, the examination of numerous computers, the de-encrypting of electronic files and the translation of documents from lesser known languages. The police actively campaigned for the longer period. Due to opposition from not just Conservatives and Liberal Democrat MPs, but also from many Labour backbench MPs, the government in the end had to compromise with 28 days. But Gordon Brown, the likely successor to Tony Blair as Prime Minister in 2007, has said that he thinks the government should again try to have the limit extended.

Whatever the appropriate limit for pre-charge detention, Britain has taken some time to learn the lesson that internment – *indefinite* detention without charge – is not an effective way to combat terrorism. Internment was used in Northern Ireland from 1971 to 1975, but proved to be counter-productive as well as unjust. Those who were interned were overwhelmingly from the nationalist or republican side of the community, for they were the people against whom the authorities had amassed incriminating “intelligence.” Unionist or loyalist “terrorists” were hardly touched. Despite attempts to dress up the detentions as being within the rule of law (e.g., by requiring the detention orders to be approved by “judicial commissioners”), they were clearly not. The policy acted as a recruiting

sergeant for young men who wanted to be seen to be contributing to their people’s struggle. The last internees were released in 1975 but the policy remained on the statute book – and could be implemented by order of a government minister – until 1998.

Oddly enough, the very first case to come before the European Court of Human Rights in 1960 (a court which now delivers some 750 judgments each year), was one taken by an internee in the Republic of Ireland, a Mr. Lawless, for there too, internment was used in the 1950s as a means of combating the IRA. In what is widely seen as a judgment that would not be mirrored today, the European Court held that Ireland had legitimately “derogated” from its duties under the European Convention because it was facing what Article 15 of the European Convention calls “a public emergency threatening the life of the nation.” In *Brannigan and McBride v UK* in 1993, the European Court effectively came to the same conclusion regarding a provision in the law of Northern Ireland which permitted the police to hold a suspected terrorist for up to seven days without bringing him or her before a judge.

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When the “emergency laws” for Northern Ireland were recast in the wake of the Good Friday Agreement, through the Terrorism Act 2000, the government conceded that all detainees, no matter what they were suspected of, should be brought before a judge within 48 hours of being arrested. This enabled the government to lift its derogation from the European Convention (which had been expressly endorsed by Parliament when the Convention was incorporated into UK law by the Human Rights Act 1998). Within two years, however, given events in the US on September 11, 2001, the British government again moved to introduce what amounted to internment. By section 23 of the Anti-terrorism, Crime and Security Act 2001 the police were permitted to detain indefinitely non-British nationals who were reasonably suspected of involvement in terrorism, and who could not be deported because they would be at risk of ill-treatment in their home country. The Council of Europe was notified that Britain was derogating from Article 5 of the European Convention to that extent.

In December 2003, in what is destined to become a landmark decision, Britain’s top court, the House of Lords, held that section 23 was incompatible with the European Convention because (a) it was discriminatory on grounds of national origin and (b) it was disproportionate to the mischief being dealt with. The Law Lords could not declare the legislation to be unconstitutional, or in any way invalid, but they sent a clear message that it needed to be amended. In the absence of any such amendment the case could have proceeded to the European Court and if the same result had been reached there, the government would have come under an international obligation to reform the law.

The reform it chose to introduce was the Prevention of Terrorism Act 2005, which allows for “control orders” to be imposed on persons who might otherwise have been indefinitely detained (as well as on British nationals). As Clive Walker shows in his neighbouring article, these control orders have themselves been condemned by senior judges as incompatible

with the Convention and have had to be reduced in severity as a result. The 2005 Act permits the government to issue control orders which derogate from the right to liberty protected by Article 5 of the European Convention, but to date they have not taken that option.

It is noteworthy that, for all its bravado in undermining the 2001 Act, the House of Lords was not prepared to second-guess the government’s assessment that there was indeed an emergency threatening the life of the nation. The House just felt able to adjudicate upon the reaction to that threat. Only Lord Hoffmann, not normally known for his anti-government rhetoric, was brave enough to say that he would have held the derogation to be incompatible with the Convention because there was no emergency in the first place. In words which are reminiscent of Lord Atkin’s famous comments in the war-time case of *Liversidge v Anderson*, Lord Hoffmann said: “This is a nation which has been tested in adversity, which has survived physical destruction and catastrophic loss of life. I do not underestimate the ability of fanatical groups of terrorists to kill and destroy, but they do not threaten the life of the nation. Whether we would survive Hitler hung in the balance, but there is no doubt that we shall survive Al-Qa’ida.”

Its experience in Northern Ireland should also have taught the British government that creating special holding centres for terrorist detainees is not a sensible idea. The moment one distinguishes between the way that different categories of detainees are treated, one risks being accused of discriminatory behaviour contrary to Article 14 of the European Convention. Britain ran non-statutory “police offices” in Northern Ireland (most notoriously at Castlereagh in East Belfast) for years; local judges did not speak out against the regime there but, eventually, the European Court did so (in *Magee v UK*, 2001). The conditions were condemned as austere and intimidating, “intended to be psychologically coercive and conducive to breaking down any

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resolve [the detainee] may have manifested to remain silent.”

Some people, including some lawyers, will reckon that that is precisely the sort of environment which detainees *should* be subjected to. But such is the definition of “inhuman or degrading treatment” – outlawed by a variety of international human rights instruments including “common Article 3” of the 1949 Geneva Conventions – not to mention the iconic status of the right to remain silent, that no democracy can now afford to tolerate such conditions. Whether evidence obtained as a result of a detainee’s exposure to those conditions should therefore be automatically inadmissible in court proceedings is a different matter altogether – and none of the international instruments actually goes that far, as yet. The challenge for interrogators who want to be effective while remaining within the law is to devise a regime for detainees which is humane but ‘productive.’ Research suggests that productivity is not a function of the length of detention but rather of the nature of the detention regime.

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the Anti-terrorism, Crime and Security Act 2001. That measure was delivered a terminal blow in *A and others v Secretary of State for the Home Department* ([2004] UKHL 56), which (as discussed in Brice Dickson’s article in this volume) held that its concentration upon foreign suspects was disproportionate and discriminatory. This condemnation deepened the difficulties of maintaining the existence of an “emergency” and enforcing bleak and possibly “inhuman” conditions of detention. The Prevention of Terrorism Act 2005 (“PTA”)

repealed Part IV and provides instead for “control orders” which can apply to citizens as well as foreigners and can operate without a declaration of “emergency.”

A control order is “an order against an individual that imposes obligations on him for purposes connected with protecting members of the public from a risk of terrorism” (section 1(1)). The obligations can include: the prohibition or restriction on using specified articles (such as a computer) or specified services (banks or telephones); restrictions on association, communications or place of residence; prohibitions and conditions on movements; and obligations to comply with searches, checks and demands for information. Breaches of obligations amount to offences (section 9).

There are two complex processes by which control orders are made and reviewed. The distinction depends on whether the order involves obligations that are incompatible with article 5 of the European Convention (as defined by *Guzzardi v Italy*, App. no.7367/76, Ser.A vol.39, (1981)). For non-derogating orders (sections 2, 3), which last for 12 months, the Home Secretary writes the order but must make an *ex parte* application to the High Court or (for Scotland) the Court of Session to allow issuance. Special procedures, replicating those under the Special Immigration Appeals Commission Act 1997, will apply, including closed hearings and the appointment of special advocates with security clearance. If the Court concludes that the Ministerial thought processes were not “obviously flawed,” directions will be given for a full confirmatory hearing (subject to SIAC-type restrictions) as soon as reasonably practicable. For derogating control orders (section 4), which last for just six months at a time, the order is issued by the Court after a preliminary hearing on an application from the Secretary of State, followed by a full hearing. A higher standard of review prevails here. The preliminary stage test is suggestive of a *prima facie* case, while the full hearing demands proof on the balance of probabilities. At both stages, the court must

positively satisfy itself rather than asking negatively whether the Secretary of State was obviously wrong-headed. Such an order must be accompanied by a designation order under section 14(1) of the Human Rights Act 1998 (which relates to article 15 of the European Convention on Human Rights). The government intends only to issue non-derogating orders.

The government claimed from the outset that prosecution is preferable. Therefore, section 8 requires the Home Secretary to consult with the police about whether there is evidence sufficient for a prosecution. More practicable ideas for the facilitation of prosecutions were not adopted. Most prominent has been the proposal that evidence from the interception of communications should be available in court (currently inadmissible under the Regulation of Investigatory Powers Act 2000, section 17). Arrays of other proposals were examined by the Joint Committee on Human Rights (Counter-Terrorism Policy and Human Rights: Prosecution and Pre-Charge Detention (2005-06 HL 240, HC 1576)).

To ensure Parliamentary review, section 13 provides for renewal after 12 months, subject to the Secretary of State consulting with the independent reviewer appointed under section 14, plus the Intelligence Services Commissioner and the Director-General of the Security Service. The first review called for the regular monitoring of extant orders and more detail and disclosure in the police review of prosecution viability. The subsequent (non-statutory) review by the Joint Committee on Human Rights (Counter-Terrorism Policy and Human Rights: Draft Prevention of Terrorism Act 2005 (Continuance in force of sections 1 to 9) Order 2006 (2005-06 HL 122, HC 915) highlighted the possibility that non-derogating order obligations were so extensive as to breach article 5 and that the processes might breach article 6. It also called for greater judicial involvement and for a higher standard of proof.

The judges have also been forthright in their scrutiny. In *Re MB* ([2006] EWHC 1000 (Admin), [2006] EWCA Civ 1140), the limited

grounds for challenge of a non-derogating control order did not breach article 6(1) of the European Convention, but the Court of Appeal interpreted the legislation as allowing a tougher standard of review than apparent from the face of the Act. The second case, *Re JJ* ([2006] EWHC 1623 (Admin)) found excessive under article 5(1) the obligations in several non-derogating control orders, inter alia, that the controlled persons be subject to a curfew for 18 hours per day. The orders were reissued with a 12 hour curfew period.

As for implementation in general, the Part IV detainees were the initial subjects of control orders, but, following the July 2005 bombings, nine were detained pending deportation and their orders were revoked. By the end of 2005, 18 control orders had been made, but just nine subsisted (one alone relating to a British citizen). The current position (12 July 2006) reveals 15 orders, with six against British citizens.

The assessment of control orders must query whether the system is consistent with fundamental constitutional principles, as well as critically analysing its details. As for principle, a deprivation of liberty without a fair and open trial (traditionally with a jury) does contravene a legal thread going back to Magna Carta in 1215 (para. 39). This hallowed tradition has been compromised by many emergency laws, and articles 5, 6 and 15 set less than absolute standards, albeit ones which control orders have struggled to meet.

Moving to the details of the system, there are again limits to be observed if substantive and procedural fairness is to be delivered. First, intelligence must be properly tested, so decision-makers should be able to review the original data. Next, what is counted as “intelligence” or “valid” intelligence or “quality” intelligence is not sufficiently structured. Intelligence obtained by torture has been ruled out (*A v Secretary of State for the Home Department* [2005] UKHL

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71), but what about data derived from unlawful searches or unlawful capture into the jurisdiction? Processes should reflect an enhanced role for the judiciary and a higher standard of proof for non-derogating orders. Outcomes must be proportionate. In particular, no control order should last for more than 12 months, without the possibility of renewal on the same grounds. A deadline could transform control orders into either a provisional charge detention or a provisional deportation detention, putting the emphasis on more acceptable forms of ultimate resolution.

Societies such as the United Kingdom and USA would be well advised to emphasise a criminal justice approach as the core response to terrorism. Expedients such as control orders should only be considered as short-term abeyances so as to allow a longer term resort to criminal justice solutions. If the U.S. is to learn anything from this experience, then it is that the termination of derogation from wholly exceptional laws and legal systems is both desirable and inevitable. Control orders can assist, but the U.K. model should not be replicated since it has failed to keep faith with constitutional values.

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### Civilians Accompanying Forces in the Field Now Subject to UCMJ

Phillip Carter  
Karri Garrett

A little-noticed, five-word provision in section 552 of the *John Warner National Defense Authorization Act for Fiscal Year 2007* (Pub. L. 109-364) (FY07 NDAA) expanded the jurisdiction of U.S. military law to include

persons, including civilian employees, employees of contractors, and private journalists, “accompanying the force” under the Uniform Code of Military Justice (UCMJ). The practical effect of this change is enormous, because persons supporting the armed forces who were not subject to military law during previous military operations (*e.g.*, Vietnam, the first Gulf War, and Bosnia) may now be subject to the UCMJ.

### Background on the Amendment

Sen. Lindsay Graham (R-SC) inserted Section 552 into the FY07 NDAA at the last minute to subject civilian contractors to the same justice system as the soldiers they work alongside. This expansion of the jurisdiction of military law comes on the heels of amendments to the *Military Extraterritorial Jurisdiction Act* (MEJA) in 2004 and to federal Special Maritime and Territorial Jurisdiction (SMTJ) in 2001, which together enlarged federal criminal jurisdiction over broader circumstances in overseas locations where government contractor employees may work. *See* 18 U.S.C. §§ 3261-3267; 18 U.S.C. § 7.

### Legal Effects of the New Law

Previously, the UCMJ’s jurisdiction covered “[I]n time of war, persons serving with or accompanying an armed force in the field.” *See* 10 U.S.C. § 802(a)(10) (hereinafter Article 2(a)(10)). The amendment substituted “declared war or a contingency operation” for “war,” thus expanding UCMJ jurisdiction over civilians to now include any zone designated as “contingency operations,” a term of art under federal law. *See* 10 U.S.C. § 101(13). Unlike war, which may only be declared by Congress, a military operation becomes a “contingency operation” either by 1) declaration by the Secretary of Defense or 2) operation of law.

Assuming that a military operation is either a declared war or a contingency operation, determining whether an individual would be

subject to the UCMJ requires a fact-intensive application of two key phrases: “accompanying the force” and “in the field.” (*See generally* Colonel Lawrence J. Schwarz, *The Case for Court-Martial Jurisdiction Over Civilians Under Article 2(a)(10) of the Uniform Code of Military Justice*, *THE ARMY LAWYER*, Oct./Nov. 2002 at 31. *See also* Department of Defense (DOD) Instruction 3020.41, Contractor Personnel Authorized to Accompany the U.S. Armed Forces, October 3, 2005, and DOD Instruction 5525.11, Criminal Jurisdiction Over Civilians Employed By or Accompanying the Armed Forces Outside the United States, Certain Service Members, and Former Service Members, March 3, 2005.)

The phrase “serving with or accompanying an armed force” has been construed to require that the civilian’s “presence [must be] not merely incidental to, but directly connected with or dependent upon, the activities of the armed forces or their personnel.” *United States v. Burney*, 21 C.M.R. 98 (1956) (concluding that contractor employee’s connection with the military was sufficient to constitute “serving with or accompanying” an armed force). Contractors in contingency operation areas today work side-by-side with DOD personnel, but may not be DOD contractors, and may not be performing a DOD mission, such as firms contracted by the State Department with Iraq Relief and

Reconstruction Fund money to perform reconstruction work. Therefore, the determination of jurisdiction will depend on the specific facts, including the government policies, of that project.

The phrase “in the field” means serving “in an area of actual fighting” at or near the “battlefront” where “actual hostilities are under way.” *Reid v. Covert*, 354 U.S. 1, 35 (1957). Whether an armed force is “in the field” is “determined by the activity in which it may be engaged at any particular time, not the locality where it is found.” *Burney*, 21 C.M.R. at 109. Although most operations in the Iraq and Afghanistan conflicts occur in those countries, missions may occur throughout the world under the auspices of these contingency operations.

### **Implications for Civilians on the Battlefield**

The implications of this change for contractors and other civilians accompanying the force are far reaching:

1) Military Offenses. Civilians in contingency operations may now be subject to unique military offenses in addition to crimes such as murder and larceny; *e.g.*, Article 88, Disrespect Toward a Superior Officer and Article 92, Failure to Obey Order or Regulation. Contractor employees may also face the restraints on free speech imposed

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on members of the armed force, such as the law prohibiting disrespect toward a superior officer, but it is not clear how a court will apply existing First Amendment jurisprudence regarding the military to civilians on the battlefield. (See *Goldman v. Weinberger*, 475 U.S. 503 (1986); *Parker v. Levy*, 417 U.S. 733 (1974).)

2) Contractual Issues. Contractors will now face myriad contractual issues, including defining the authority and responsibilities of contracting officers, military officers, and commanders (a term of art for an officer with lawful command authority). Contractor employees may also be subject to one or more military chains of command and be required to obey orders given by military personnel. However, the application of the military's chain of command to traditional contracting procedures will likely result in confusion, contractual disputes, and possibly criminal exposure.

Commanders may generally issue lawful orders that must be obeyed by all military personnel under their command. However, commanders may not unilaterally direct contractors to do something outside the scope of the contract requirements. Instead, the commander must direct the contracting officer to modify the contract, and, if necessary, obtain additional funds to implement the change. Saving any discussions of fiscal law for another article, DOD could include a clause empowering commanders or specific military officers to order such modifications, subjecting this new contractual authority to the UCMJ. DOD will likely also need to clearly establish chains of command for contractors, either through the policy or contracting processes.

Currently, commanders and other officers frequently give contractors guidance on methods of performing the contract requirements, such as the number of vehicles to include within a convoy and the best routes of travel. Although the

guidance may have been optional for contractors, that guidance may now be considered to be a lawful order that must be obeyed by the contractor employees under the UCMJ but not an authorized modification under the contract. In this type of situation, the contractor faces four possibilities: 1) follow the order and request a ratification and equitable adjustment from the contracting officer; 2) follow the guidance and incur the additional costs without seeking a ratification; 3) attempt to resolve the conflict through discussions with the commander and the contracting officer; and 4) ignore the guidance and risk a decision by the commander to prosecute the employee(s) for failure to obey an order.

3) Investigative Jurisdiction. Military investigative agencies like the Army's Criminal Investigative Division and Navy's Criminal Investigative Service have the power to conduct law enforcement investigations on military bases, in contingency operation zones, or involving personnel subject to the UCMJ. The investigatory power over civilians has greatly expanded from actions on military bases to violations of the UCMJ regardless of location. Further, this statutory change may subject contractors to the military's administrative investigation processes, such as the Army's commander's inquiry process under Army Regulation 15-6, Procedures for Investigating Officers and Boards of Officers, November 2, 2006.

4) Rights of Defendants. Generally, the rights of defendants under the UCMJ mirror those in the federal criminal justice system. A few key differences involve the equivalent procedures for the Miranda rights, right to counsel, and grand jury proceedings. Under the UCMJ, persons are entitled to the military's equivalent of Miranda rights, found in Article 31 of the UCMJ. All defendants are entitled to a military defense counsel even if the defendant opts to hire a civilian defense counsel at his/her own expense. The procedures for an Article 32 hearing, roughly analogous to a civilian grand jury proceeding,

also differ in that the defendant is entitled to be present and has the right to question witnesses.

5) Summary Proceedings. Under the UCMJ, serious crimes are adjudicated by “general courts-martial,” convened by specifically-designated commanders usually in the rank of two-star general or above. These proceedings resemble civilian criminal trials, and have many similar procedural protections for defendants. However, many smaller offenses are heard through summary proceedings such as “special courts-martial” and “non-judicial punishment” under Article 15 of the UCMJ, where defendants do not enjoy the same procedural rights as in a general court-martial. It remains unclear whether civilians could be subjected to Article 15 proceedings.

### **DOD Implementation of Section 552 of the FY07 NDAA**

The DOD Joint Service Committee for Military Justice is reviewing the UCMJ, the Manual for Courts-Martial (MCM), and the individual service regulations to determine whether changes need to be made to implement the expanded jurisdiction. Any changes to the MCM are subject to public notice and review. (DOD Directive 5500.17, Role and Responsibilities of the Joint Service Committee (JSC) on Military Justice, May 3, 2003.)

### **Constitutional Challenges**

Any prosecutions under this extension of the UCMJ are certain to produce a constitutional challenge. The Supreme Court has held that Article 2(a)(11) cannot apply to civilians during peacetime. See e.g., *Toth v. Quarles*, 349 U.S. 949, (1955). Although the holdings in these opinions did not address the constitutionality of Article 2(a)(10), the Court noted in *Reid* that Article 2(a)(10) “sets forth the maximum historically recognized extent of military jurisdiction over civilians under the concept of ‘in the field.’” For a variety of reasons, today’s Supreme Court may be more willing to apply the

UCMJ to civilians. Numerous procedural and institutional changes, such as the creation of the Court of Appeals for the Armed Forces, have been made to the military justice system since *Reid*. The Court has also recognized a general trend of convergence between the military and civilian criminal justice systems. See *United States v. Scheffer*, 523 U.S. 303 (1998). Further, the Court signaled in *Reid* that it might recognize Congress’ authority to apply the UCMJ to civilians in an area of actual combat, a different scenario than presented by the prosecution underlying that decision. Finally, the current Supreme Court has shown a willingness to embrace the application of military justice to certain civilians in two of its recent terrorism cases. See *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (finding right of U.S. citizen enemy combatant to some procedural protections, citing military justice as a possible source of those rules); *Hamdan v. Rumsfeld*, No. 05-184 (2006) (favorably describing the UCMJ’s system of justice and comparing it to the system of military commissions at Guantanamo).

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## **Army Is Maximizing Lawyers’ Skills in Contemporary Operations**

Lt. Col. Mike Ryan

Legal issues are an indelible part of modern military operations. Accordingly, Army lawyers – members of the Judge Advocate General’s (JAG) Corps – are assigned to combat units at

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## Maximizing Army Lawyers

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almost every level of command. The Army's decision to place judge advocates close to action is no accident. In today's complex operational environment, battlefield decisions often have far-reaching legal and policy implications. As such, it makes good sense for combat commanders to have their legal advisors close at hand.

While the legal intensity of military operations is a relatively recent phenomenon, lawyers in uniform are not new. In June 1775, Boston attorney William Tudor was selected as the first Judge Advocate of the Continental Army. Tudor was assigned to Washington's staff where he advised on force discipline and military justice. In this regard, the Army lawyer's role has remained unchanged. Judge advocates still advise on military justice and the good order and discipline of the force. What has changed significantly is the judge advocate's role in support of military operations.

### ***Journal of National Security Law & Policy***

**Issue 2 Volume 1 soon to be published** with articles by Lou Fisher (Law Library of Congress), David Vladeck (Georgetown Law Center), Mark Ellis (International Bar Association), Steven Vladeck (University of Miami), and Michael Kelly (Creighton University).

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Today, Army JAG officers routinely serve at the "tactical" level; that is, they are assigned to Brigade-level organizations and below. In this capacity, they advise commanders on operational legal issues and serve on their unit's battle staff. JAG officers provide operational legal advice and expertise in a wide variety of areas, including: the law of war, rules of engagement, the treatment of detainees, the conduct of investigations, and mission-related military justice, just to name a few.

### **The Evolution of "Operational Law"**

For most of the Army's history, the judge advocate's role centered on the prosecution of crimes committed in violation of the Uniform Code of Military Justice (UCMJ). This paradigm began to shift somewhat in 1964, when Colonel George Prugh, Staff Judge Advocate for Military Assistance Command Vietnam (MACV), expanded the scope of his JAG officer's duties. In addition to purely criminal matters, Prugh's JAG officers also began to focus on issues such as the status and treatment of captured enemy personnel and the investigation of war crimes. As U.S. troop levels in Vietnam expanded, attorneys were assigned to tactical-level headquarters. In a precursor to what would one day be common practice, JAG officers in Vietnam sometimes plied their trade in harm's way, traveling to forward outposts and fire bases to provide legal assistance and try courts-martial.

In the post-Vietnam era, the Department of Defense (DOD) implemented the DOD Law of War Program. This initiative – a result of the My Lai massacre – mandated that, henceforth, military lawyers would review all operations plans (OPLANs) for compliance with the law of war. Based on this requirement, judge advocates became members of planning staffs for the first time in the Corps' history.

In 1983, judge advocates participated in Operation *Urgent Fury* – the U.S. invasion of Grenada. During the operation, Army lawyers confronted several issues of first impression. In a

1987 *Army Lawyer* article, Colonel David Graham recalled: “[t]he expertise required of a judge advocate [in Grenada] went far beyond...the Law of War [and involved] interpretation of the applicable provisions of the Hague Regulations and the Geneva Conventions.... contracting requirements, the treatment of foreign nationals, the taking of war trophies, and a wide range of civil affairs issues.”

Grenada changed military legal practice forever. As JAG Corps historian, Fred Borch has observed: “Grenada proved that Army lawyers could no longer focus on performing traditional peacetime legal functions in what had become a contingency oriented Army.” The recognition of this fact gave rise to what is now known as “operational law,” that is, military legal support to combat and contingency operations.

Based, in part, on lessons learned during *Urgent Fury*, the Army’s Judge Advocate General’s School created a formalized operational law curriculum. This initiative, first begun in 1986, was followed two years later by the creation of the Center for Law and Military Operations (CLAMO), a directorate within The Judge Advocate General’s Legal Center and School that is solely dedicated to collecting and disseminating lessons learned by judge advocates and paralegal soldiers who have participated in combat and contingency operations.

Operational law continued to mature throughout the 1980’s as judge advocates took part in military operations, to include 1989’s Operation *Just Cause* in Panama. During this operation, Lieutenant Colonel James Smith, Staff Judge Advocate for the 82<sup>nd</sup> Airborne Division, became the first Army JAG to participate in a combat parachute assault. In 1990, a significant number of judge advocates deployed in support of Operations *Desert Shield* and *Desert Storm*.

Legal support was also an important aspect of politically sensitive “operations other than war” in the 1990s. In support of such operations, judge advocates deployed to Somalia, Haiti, the

Balkans, Turkey, and Northern Iraq. Recognizing their importance, more legal issues were injected into Army training exercises, and in 1995, the first judge advocate observer/controllers (O/Cs) were assigned to the Army’s Combat Training Centers (CTCs) to teach, coach, and mentor judge advocates participating in large scale training exercises. More were soon to follow.

In the post-September 11 era, Army lawyers have deployed in large numbers, most notably to Afghanistan and Iraq. Because these operations continue to give rise to high-profile legal issues, judge advocates remain in high demand.

### **Maximizing The Judge Advocate’s “Lawyer” Skills**

By and large, combat commanders have a resoundingly positive view of military attorneys. For example, Lieutenant General David Petraeus, who commanded the 101<sup>st</sup> Airborne Division in Northern Iraq during the initial invasion, expressed his appreciation for his legal staff in a note to the Judge Advocate General of the Army, stating, in part:

*“I have repeatedly credited some of the 101st Airborne’s most important successes in Iraq to [our] legal team. At the height of stability operations, we had twice the number of Judge Advocates that we were authorized...and frankly, I could have used more.”*

While commanders clearly value their judge advocates’ knowledge of law, policy, and regulation, since JAGs have become part of the operational team, commanders have increasingly come to depend on their lawyers’ talents in *other* areas. For example, commanders at all levels consistently use their lawyers as “sounding boards” or “sanity checks” when making important decisions. Similarly, many rely on their

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## Maximizing Army Lawyers . . .

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lawyers' analytical skills and their ability to render objective, rational advice on issues.

Another "lawyer specific" trait that judge advocates bring to the table is the lawyer's ability to analyze proposed courses of action, and predict their second and third order effects. Commanders find this trait exceedingly useful, just as they enjoy their lawyers' ability to write well and speak confidently in public. The former is especially important. Commanders habitually task their judge advocates with drafting and editing important written products. Indeed, many a judge advocate's evaluation report includes high praise for his or her writing skills. Finally, commanders have found the attorney's ability to mediate disagreements fairly to be a genuine asset, especially when dealing with disputes between factions, tribes, and sects in their area of operations.

Interestingly, the skills referred to above - ones that most would agree are common to all lawyers - help make judge advocates well-suited for the irregular challenges of the contemporary operating environment. In particular, the lawyer's mental agility and ability to approach problems free from preconceived notions is an important skill, one which the Army would like to develop in *all* of its leaders. In its *2006 Army Posture Statement*, for example, the Army's senior leadership noted: "Intellectual change precedes physical change. For this reason we are developing qualities in our leaders, our people...that enable them to respond effectively to...ambiguous situations in a constantly evolving environment."

This sentiment was echoed by Lieutenant General Peter Chiarelli, who recently commanded the Multi-National Corps in Iraq. In what many consider the seminal article on counterinsurgency, General Chiarelli notes: "[c]ritical thinking, professionally grounded in the controlled application of violence, yet exposed to a broad

array of expertise not normally considered part of traditional military functions will help create [officers with] a capacity to rapidly shift cognitively to a new environment." Given the Army's emphasis on mental agility as a desirable trait for 21<sup>st</sup> century leaders, it is no wonder that today's commanders find their lawyers' abilities so important.

### Emerging Trends in Operations and The Judge Advocate's Many Roles

The current situation in Iraq proves the existence of what used to be referred to only theoretically as the "three block" war. This term, used in scholarly articles about modern war, refers to a situation in which a military commander must fight three different kinds of battles simultaneously in a three block area. What once was theory is now an everyday occurrence, meaning contemporary commanders must grapple with multiple missions and rapidly changing situations at every level of command.

In another clear trend, the battlefield is becoming increasingly urban. Indeed, some of the fiercest fighting in Iraq has taken place in Baghdad and its suburbs. From the commander's perspective, fighting in cities is incredibly challenging. Urban warfare generally involves complex rules of engagement (ROE), and leaders at all levels struggle to minimize civilian deaths and collateral damage. As a result, commanders conducting urban operations often face difficult, time-sensitive decisions regarding target selection and the use of certain weapons systems.

In this milieu, commanders often rely on their judge advocates' analytical abilities. Not only do military lawyers proffer advice on ROE, the use of force, and other operational law matters, they also help the commander and staff craft courses of action that will, hopefully, accomplish the mission and minimize unnecessary civilian casualties and collateral damage.

If recent operations are any indication, future wars are likely to involve a short period of high

intensity combat followed by a protracted “stability operations” phase. In such situations, unit commanders are bound to find themselves acting as the *de facto* authority in their areas of operations. In this role, they must attempt to maintain civil order—a job that sometimes entails arbitrating disputes among the local populace. Because part of the lawyer’s skill set is the ability to broker disputes and devise equitable solutions, judge advocates are likely to find themselves helping commanders arbitrate disagreements and devise policies and practices designed to maintain order.

### Conclusion

In a recent e-mail message to the Army JAG Corps, the Judge Advocate General of the Army, Major General Scott Black, stated:

*“Our personnel must be adaptive and capable of rapidly transitioning between complex tasks with relative ease...[w]e must encourage and reward innovative problem-solving, stay abreast of current events and always be situationally aware...understand the cultural context in which US Forces operate, anticipate and articulate the second- and third-order effects of military operations and decisions, [and] actively assist commanders in positively influencing public opinion - both at home and abroad.”*

Major General Black’s direction to the JAG Corps is an apt description of what contemporary commanders expect from operational lawyers. No longer solely dedicated to military justice and force discipline, the modern judge advocate brings a wide array of training, experience, and ability to the team. Based on their ability to adapt, overcome, and excel, the list of duties assigned to judge advocates in contemporary operations continues to grow.

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## Improving Disaster Preparedness Through Good Samaritan Legislation

Gene Matthews

With funding from the Alfred P. Sloan Foundation, the North Carolina Institute for Public Health at the University of North Carolina has embarked on a two-year initiative to improve emergency preparedness by removing the legal barriers that hinder effective collaboration among the private, nonprofit, and public sectors. The project is initially focused on extending state Good Samaritan liability protection to business and non-profit entities that assist their community in preparing for, and responding to, public health emergencies.

Most state “Good Samaritan” laws primarily protect individuals and leave significant gaps of liability exposure for both business entities and non-profit organizations that are willing to assist in an emergency posed by a natural disaster, emerging infection, or terrorist event. This gap can result in key private sector entities hesitating to volunteer at the earliest moment when assistance would be most effective. In addition, liability concerns create an incentive for private entities only to provide financial assistance, rather than their service and expertise, which may be even more valuable in an emergency.

### The Need For Immediate Legislative Action

The following examples illustrate the pressing need for legislative change.

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## Good Samaritan Legislation . . .

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*Distribution of Strategic National Stockpile Material.* Government officials are seeking better procedures to coordinate with the private sector in the distribution and management of resources in the federal Strategic National Stockpile (SNS). In a serious emergency situation, there will not be enough government workers to widely distribute SNS materials to large population cohorts. Collaboration with the private sector will be needed, for example, in a flu pandemic to distribute anti-viral medicines to key service workers and then to other employees, family members, and larger segments of the population. Businesses and non-profits voluntarily assisting in such distribution are potentially exposed to civil liability under state law for adverse events relating to the administration of such SNS materials.

*Logistical Support of Food and Services During an Emergency.* In a shelter-in-place or voluntary quarantine situation, current just-in-time supply chains for food and other necessities will be severely challenged. It is important that businesses and non-profit organizations not hesitate, due to liability concerns, from developing new, flexible arrangements in coordination with governmental agencies to ensure that life-saving supplies reach those persons who should not or cannot leave their residences in a health emergency.

*Facilities Made Available to Provide Shelter During an Emergency.* The recent experiences with persons displaced by Hurricane Katrina demonstrated the value of the surge capacity of non-profit organizations, such as churches, to shelter and provide support to individuals in need. In planning for a pandemic flu scenario, churches have realized their potential liability if, for example, a disease spreads within a group of persons being temporarily sheltered on their premises.

## Elements of the Legislative Proposal

Currently, most state laws leave corporations, partnerships, associations, and non-profit organizations exposed to potential civil liability for negligence in the event that individuals are injured in the course of such emergency preparedness and response activities. To remedy this, the following provisions are needed:

*Extend Good Samaritan protection to business and non-profit entities acting in good faith during an emergency.* As a policy matter, this simple change puts businesses and non-profits on the same footing as individuals, who are encouraged by the law to act in good faith to help during an emergency. Note that, in general, Good Samaritan protection provides only qualified immunity from negligence liability; Good Samaritan laws do not normally extend liability protection to cover wanton, reckless, or intentional conduct.

*The extended coverage would be triggered by a Governor's emergency declaration.* Coverage for businesses and non-profits would be automatically activated when the Governor of the state declares an emergency. It would not require any federal declaration.

*The coverage would apply only to those emergency activities conducted in coordination with the state agency.* The liability protection would not extend to businesses and non-profits acting unilaterally and without coordination with the state government. It would require the activity to be conducted pursuant to the order or request of the state government or a political subdivision of the state. This provision encourages the desired coordination between the public and private sectors.

*The coverage would also include pre-event planning and training activities that take place prior to the declared emergency.* Once the Governor declares an emergency, the liability protection for businesses and non-profits would extend retroactively to also cover the pre-event

planning and training activities that took place prior to the emergency. This provision is designed to encourage the development of pre-event memoranda of understanding between public and private entities, as well as training and practice events.

### **State Pilot Projects**

While this important issue requires change at both the state and federal legislative levels, this initiative focuses attention on the state level. Many private sector leaders will feel more comfortable with the coverage being triggered by a governor-declared emergency, rather than waiting for a federal declaration. If leadership coming from the states results in a series of state legislative enactments, then such success can make the eventual option of federal legislation easier to achieve.

Pilot projects are currently underway in North Carolina and Georgia. Since the needed technical changes are going to be quite specific and unique for each state's code, a "one-size-fits-all" model state law may not apply in all situations and may not resolve individual state law complexities. Instead, two examples of how these technical changes may be constructed have been identified.

One approach, developed to fit North Carolina's legislative text, has been to insert the necessary technical changes into the emergency management chapter of the existing NC General Statutes. A second approach, developed with the assistance of a class at the Georgia State University College of Law, has been to make changes to the Good Samaritan provisions in the Georgia code.

Ultimately, to implement the four legislative policy elements described above, each state will likely need to make technical changes either to the existing Good Samaritan statute or to existing emergency management legislation.

### **Decreasing State Liability Exposure**

Ultimately, Good Samaritan protection has the potential to decrease state liability exposure. Lawsuits based upon a "failure to prepare" theory have been brought against government agencies following the 2003 Toronto SARS and the 2005 Hurricane Katrina emergency events. The public/private partnerships contemplated under this initiative can both decrease the risk of harm to individuals and serve as evidence that state agencies have taken prudent steps to prepare for emergency situations. The normal principles of sovereign immunity are not altered by this initiative.

### **Strong Support by Public Health Leadership**

This initiative was introduced to public health leaders at the American Public Health Association's (APHA) 2006 annual conference in November. The leadership group strongly supported this partnership initiative, urging that it be expanded to all fifty states immediately. As a result, overview materials for a national audience were quickly developed for extending state Good Samaritan liability protection to cover business and non-profits assisting in emergencies.

These new materials, now available on the project web site (<http://www.sph.unc.edu/nciph/law>), were subsequently distributed by APHA, the Association of State and Territorial Health Officials (ASTHO), the National Association of City and County Health Officials (NACCHO), and the U.S. Chamber of Commerce. Several states have expressed an immediate interest in pursuing this important preparedness initiative.

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## In Case You Missed It . . .

*Staying current in the field of national security law is never easy. Every week there are significant new opinions, statutes, indictments, reports, articles, and any number of other developments. Many of these items prompt coverage in the major media outlets, but some fly beneath the radar. In an effort to assist practitioners and scholars in keeping up to date with these events – and in particular to provide ready access to primary sources in electronic format – Professor Robert Chesney of Wake Forest University School of Law maintains a listserv for professionals and academics working in this area. “In Case You Missed It . . .,” featuring selected posts from that listserv, will be a recurring item on the back page of the National Security Law Report. Those interested in subscribing to the listserv may do so by contacting Professor Chesney at [robert.chesney@wfu.edu](mailto:robert.chesney@wfu.edu).*

- *United States v. Maldonado* (S.D. Tex.) – Criminal complaint against U.S. citizen charging him with receiving military-type training from al Qaeda in violation of 18 U.S.C. § 2339D (the first prosecution under this provision, so far as I am aware) and conspiracy to use explosives overseas in violation of 18 U.S.C. § 2332a(b). Maldonado was captured by Kenyan authorities in the aftermath of the fighting in Somalia, and was rendered to the United States in early February. The complaint and supporting affidavit are posted here:  
<http://news.findlaw.com/hdocs/docs/terrorism/usmaldonado21307cmp.html>
- *Omar v. Harvey* (D.C. Cir. Feb. 9, 2007) – The D.C. Circuit has affirmed in *Omar v. Harvey*, holding that: (a) federal courts have habeas jurisdiction over the claims of a U.S. citizen held in Iraq in the custody of the Multi-National Force-Iraq (MNF-I) (distinguishing *Hirota* and *Flick* on the ground that, unlike that case, Omar is not mounting a collateral attack on the decision of an international tribunal, and dismissing very quickly the argument that the MNF-I rubric precludes a determination that Omar is in U.S. custody; as the partial dissent by Judge Brown notes, the majority did not place express emphasis on the citizenship distinction); (b) Omar’s challenge does not present a political question; and (c) the district court’s order preliminarily enjoining the government from transferring Omar to Iraqi custody was proper (rejecting the argument that he in fact faces no irreparable injury since he is liable to be arrested by Iraqi authorities the moment he may be released from U.S. custody) (Judge Brown dissented on this point). The opinion is posted here:  
<http://pacer.cadc.uscourts.gov/docs/common/opinions/200702/06-5126a.pdf>
- *United States v. Hassoun* (11<sup>th</sup> Cir. Jan. 30, 2007) – The 11<sup>th</sup> Circuit has reinstated the 18 USC § 956(a) charge against the defendants in *Hassoun*, the criminal prosecution involving former enemy combatant Jose Padilla. The most recent indictment had charged, among other things, that Hassoun, Padilla, and another defendant had violated: (i) § 956(a) (conspiracy to commit violent acts outside the United States); (ii) § 2339A (providing material support in connection with an anticipated violation of § 956(a)); and (iii) § 371 (conspiring to violate § 2339A as described above). The district judge had concluded that these charges violated the rule against multiplicity, and dismissed the § 956(a) charge on that basis. The 11<sup>th</sup> Circuit reversed, holding that the proper multiplicity analysis under *Blockburger v. United States*, 284 U.S. 299 (1932), usually is to focus on the abstract elements of the crimes charged rather than the underlying facts alleged in the indictment. (slip op. at 8-9) Applying that rule here, the 11<sup>th</sup> Circuit concluded that each of the three counts entails at least one distinct element. The opinion is posted here:  
<http://www.ca11.uscourts.gov/opinions/ops/200615845.pdf>