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CHALLENGES AND CONSIDERATIONS FOR EMPLOYING MILITARY CHAPLAINS IN THE HOMELAND IN SUPPORT OF US NORTHERN COMMAND

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ABSTRACT

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In 2002, the Department of Defense (DoD) established U.S. Northern Command (USNORTHCOM) for the missions of homeland defense (HLD) and support to civil authorities (CS). With the rest of the Department focused solely on the Global War on Terrorism (GWOT), USNORTHCOM is the combatant command dedicated to defense of the homeland. In that capacity, USNORTHCOM has identified numerous policy and doctrinal shortcomings. Failure to rectify these shortcomings complicates USNORTHCOM mission accomplishment. The USNORTHCOM Chaplain's Directorate has identified similar shortcomings that impede religious support to service members during HLD and CS.

The most significant problem facing the effective employment of military chaplains in support of USNORTHCOM is deficient legal guidance and inconsistent joint and service religious support doctrine. The paper discusses legal and doctrinal considerations for the employment of military chaplains during HLD and CS, and proposes the way ahead to resolve these shortcomings.

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> "In future disaster relief operations, chaplain activities should be confined to ministering to the needs of the force, except to the extent that chaplains can perform FEMA directed, secular counseling or other informational functions."
>
> — Major Strong, Staff Judge Advocate, JTF-Andrew, 1992

> "… [O]ccasions arose where the disaster victims would seek spiritual solace while undergoing crisis counseling. In such situations, many chaplains felt a moral and ethical obligation to minister to the victims. However, to provide spiritual counseling (e-g. prayer) could possibly constitute a violation of the Establishment Clause of the U.S. Constitution. This issue should be reviewed so as to determine the proper role of the chaplains in future deployments involving disaster relief operations."
>
> — Chaplain, Lieutenant Colonel, Kitchens, JTF-Andrew, 1992

During the hellish aftermath of Hurricane Andrew's devastation of South Florida in September 1992, President George H. W. Bush ordered more than 23,000 troops to provide support to local and state authorities. Working in conjunction with the Florida National Guard, these troops conducted presence patrols to enhance security, distributed food, erected temporary shelters, provided medical treatment and helped residents repair their homes. In early September 1992, The Miami Herald showed a photograph of Army Chaplain Jeff Houston of the 82nd Airborne Division praying with an elderly disaster victim. The story seemed innocuous to many, a good public relations story of how the Army responded to help disaster victims. The woman was attempting to protect her home from looters. In the attempt, her feet had been injured. The roof of her home was damaged and the home was filled with water. CH (CPT) Houston was

accompanying his troops through the streets, assisting victims, when they encountered this elderly widow. They bandaged her feet, pumped the water out of her home, made temporary repairs to her roof, and began to depart. When she requested prayer, CH Houston acceded to her request.[1]

That photograph provoked a profound disagreement that continues to complicate the planning efforts of USNORTHCOM. At issue was what role, if any, military chaplains may play with non-Department of Defense (DoD) civilians during disaster relief operations. What are the parameters that delimit constitutionally permissible chaplain activities from clearly unconstitutional ones? As seen in the above quotations from the Hurricane Andrew Joint Task Force after-action report, a strong difference of opinion divided the Staff Judge Advocate and Command Chaplain. To complicate the story, in the years since 1992, chaplains have continued to conduct similar activities with non-DoD civilians in the response following the Oklahoma City Bombing and the terrorist attacks of 11 September 2001.

This historical conflict remains unresolved in planning for homeland defense (HLD) and civil support (CS).[2] The most significant problem concerning effective employment of military chaplains during domestic operations in support of USNORTHCOM is deficient legal guidance that has resulted in inconsistent joint and service religious support doctrine. The command chaplain of USNORTHCOM states, "the issue of chaplain ministry to civilian victims in civil support operations is of paramount importance … because … service chaplains might be called on to respond to consequence management events given the new strategic environment, following 9/11."[3] Since 1992, aside from several SJA memoranda, no comprehensive review has

been completed to “determine the proper role of the chaplains in future deployments involving disaster relief operations.”[4] This paper will review the relevant issues and attempt to provide a practical and constitutionally permissible approach to answer the question, “what role, if any, may military chaplains perform with non-DoD civilians during domestic operations?”

PROBLEM STATED

The primary role for military chaplains is to insure the “free exercise of religion” rights of all Department of Defense (DoD) personnel. DoD personnel include active and reserve component military service members, retired service members, the families of the above, and DoD civilian employees. In recent years, DoD policy has also permitted religious support to contractors deployed in support of DoD.[5]

The difference of opinion arises when military chaplains interact with civilians unaffiliated with DoD (henceforth called “non-DoD civilians”) during domestic operations. During contingency planning and exercises at U.S. Northern Command, the author has heard military lawyers argue that “the chaplains were out of control during Hurricane Andrew, so something needs to be done to keep chaplains in the box and to protect the chaplaincy.”[6]

BACKGROUND

As part of the national response to the terrorist attacks of 11 September 2001, the 2002 Unified Command Plan (UCP) established U.S. Northern Command as a new regional combatant command with the area of responsibility (AOR) of North America with its land, air and maritime approaches. The USNORTHCOM mission is

> to conduct operations to deter, prevent and defeat threats and aggression aimed at the United States, its territories and interests

> within the assigned AOR. As directed by the President of the United States (POTUS) or Secretary of Defense (SECDEF), USNORTHCOM provides military assistance to civil authorities, including consequence management operations.[7]

USNORTHCOM has few assigned forces, but employs forces provided by the military services. The most important USNORTHCOM task is its HLD mission (the "deter, prevent and defeat" mission). Yet, some of the most challenging issues faced by the command are in its CS tasks (the "provide military assistance to civil authorities" mission).

Chaplains perform or provide religious support to DoD personnel. Religious support (RS) is the full spectrum of professional duties performed by chaplains in their dual role as religious leaders and military staff officers, aided by enlisted chaplain assistants.[8] For more than two hundred years, U.S. military chaplains have accompanied U.S. service members during military operations in the United States and abroad. The military chaplaincy predates the U.S. Constitution as chaplains provided religious support to soldiers in the colonial militias and in the Continental Army.[9]

Chaplains are ministers or spiritual leaders endorsed for military service by more than two hundred recognized endorsing agencies.[10] As endorsed spiritual leaders, "[c]haplains serve in the Army as clergy representing the respective faiths or denominations that endorse them. A chaplain's call, ministry, message, ecclesiastical authority, and responsibility come from the religious organization that the chaplain represents."[11] Thus, as ordained clergy, chaplains are obligated to be faithful to their ordination vows or creedal beliefs, as well as to DoD policy and regulations.[12] [13]

The verbs "perform" and "provide" demonstrate the manner in which military chaplains balance their concurrent responsibility as religious leaders from a distinct faith

community, and military officers assisting commanders in the obligation to insure free exercise rights for all DoD personnel. If a chaplain is able to directly perform the religious rites, ceremonies or sacraments requested, a chaplain will do so, consistent with his endorsement, ordination vows or creedal beliefs. If a chaplain is unable to perform, a chaplain must provide the means through which the requested needs can be met.[14]

HISTORICAL EXAMPLES

Following Hurricane Andrew in 1992, the 1995 Oklahoma City bombing, the terrorist attacks on the Pentagon and World Trade Center in 2001, federal and state military chaplains have deployed to provide religious support. While not an exhaustive history, the following section surveys chaplain activities during three significant domestic operations since 1992 and identifies categories of those activities to determine patterns.

HURRICANE ANDREW, 1992

On 24 August 1992, Hurricane Andrew slammed ashore in South Florida, leaving a thirty-five mile swath of destruction as it crawled across the state, and entered the Gulf of Mexico near Naples. For several days, the actual devastation was unknown, but it was soon clear that the resources of local and state governments were overwhelmed. Ravaged by sustained 160 mile per hour winds, the area was devastated and lost all basic services. Homestead Air Base was destroyed. As the Army Chaplaincy official history reads,

> From the city limits of Miami to the southern border of Dade County, some 85,000 houses, 38,000 apartment dwellings, and 82,000 businesses were damaged or destroyed. One hundred sixty thousand people had lost their homes; 85,000 people had lost

> their jobs. Forty-one people lost their lives. Two hundred and fifty thousand telephone poles were blown down and 8,500 streetlights were out. Looters roamed freely through several shopping centers. The scene was reminiscent of a nuclear blast.[15]

The Florida National Guard was rapidly mobilized for security, law enforcement and disaster relief. Within several days, a federal joint task force, JTF-Andrew, under the command of Lieutenant General Samuel E. Ebbesen, commanding general of 2nd U.S. Army at Fort Gillem, Georgia, deployed to bring relief to the beleaguered residents of South Florida. JTF-Andrew provided assistance to local and state authorities for 54 days in the first exercise of the Federal Response Plan (FRP).[16]

The JTF-Andrew command chaplain was Chaplain Gerald Mangham. CH (COL) Mangham arrived in South Florida to assess the dire situation and organize religious support for DoD personnel. His assessment determined that

> most religious buildings and congregations had themselves been damaged. Likewise, many pastors, rabbis, priests, and lay leaders could not help because they were victims as well. Army unit ministry teams with special training in Family Life and Clinical Pastoral Education were needed to help reconstitute the counseling services available to victims.[17]

The Army and Navy chaplains of JTF-Andrew deployed with their units to provide religious support. They provided pastoral care for their troops and crisis counseling for victims. They led worship services for service members at the Life Support Centers established for temporary housing of victims.[18] Many civilian disaster victims also attended these services. It is DoD policy that "[c]ivilian guests frequently attend military chapel services as well as social and civic functions where chaplains may preside. For example, approximately one million guests annually visit the United States Air Force Academy chapel alone."[19] Chaplains also conducted vital liaison with nongovernmental

organizations (NGOs) and assisted local ministerial alliances in restoring the ministries of numerous religious organizations.[20] Some chaplains, upon invitation from civilian churches, participated in worship leadership in those churches. Such activities are consistent with DoD practice, as chaplains are not prohibited from doing such when off-duty.

While accompanying service members, chaplains often encountered non-DoD disaster victims. CH (CPT) Houston's story is similar to that of many soldiers and chaplains. In an interesting historical footnote, this particular woman was the widow of a military veteran, and as such would have been considered eligible to receive DoD religious support.[21] A Roman Catholic, this same woman requested a priest to hear her confession, which CH (MAJ) Rutherford, a Roman Catholic priest, granted.[22]

In addition, the Army Chief of Chaplains "…offered ten unit ministry teams with training in disaster relief, counseling, death and dying, and trauma ministry to reach out to the community."[23] These "Added Dimension" Teams worked under the supervision of the JTF-Andrew Command Chaplain, and provided religious support to military and civilians alike, in hospitals, "Life Support Centers", and homes. By the end of September, the Added Dimension teams were returning to home station as local clergy and caregivers recovered the ability to provide care. By early October, a little over one month later, JTF-Andrew was redeploying to home stations.

In summary, chaplain activities by JTF-Andrew can be classified into five categories:

1. Sacramental or worship leadership and pastoral care in support of troops
2. Humanitarian activities while accompanying troops
3. Pastoral and crisis counseling

4. Informational services to victims
5. Liaison and coordination with non-governmental organizations (NGO).

Several patterns are apparent regarding chaplain activities and non-DoD civilians. First, military chaplain support to non-DoD civilians during JTF-Andrew was "incidental" to the chaplain's primary purpose of service member ministry.[24] For the purpose of this analysis, incidental requests are secondary, and do not interfere with the primary purpose of troop ministry. Second, chaplain support to non-DoD civilians was temporary. At most, Army chaplains were present in South Florida for less than one month, and in some cases, they redeployed earlier. Third, chaplains provided support at times in the absence of civilian clergy. It cannot be forgotten that the devastation in South Florida was similar to that wrought by the tsunamis that struck South Asia in December 2004. Local and state authorities, the National Guard, and all helping agencies were overwhelmed. Local civilian clergy and caregivers were themselves victims, traumatized by the disaster.[25] Fourth, such support to non-DoD civilians was conducted during emergency conditions and pursuant to a Presidential disaster declaration.[26]

OKLAHOMA CITY BOMBING, 1995

The bombing of the Murrah Federal Building in downtown Oklahoma City on 19 April 1995, was the most devastating terrorist attack to that date in U.S. history. A domestic terrorist exploded a 4,800 pound homemade bomb that "killed 168 people, in addition to injuring hundreds of people and causing tens of millions of dollars in direct blast damage."[27] The combined efforts of local, state, federal and private sector professionals and volunteers labored for months to assist recovery.

Numerous military chaplains assisted in the disaster recovery effort, serving with first responders at the bombing site, and at the Family Assistance Center (FAC). The American Psychological Association final report states "…most clergy had no previous training for or experience in a disaster response. The few exceptions were law enforcement clergy and military chaplains; they also had prior security clearance, allowing them access to the crime scene or bombing site."[28] National Guard chaplains performed direct religious support to non-DoD personnel serving in the police and fire services in Oklahoma City. In addition, U.S. Air Force chaplains from Tinker Air Force Base provided pastoral care both at the disaster site and at the Family Assistance Center (FAC).[29]

A key finding of the final report of the Oklahoma City National Memorial Institute for the Prevention of Terrorism states " As a general rule, police, National Guard and fire and rescue chaplains may be better prepared to serve at the scene while other clergy are better prepared to help at the Family Assistance Center."[30]

In the weeks after the Oklahoma City (OKC) bombing, state and federal military chaplains performed sacramental or worship leadership, humanitarian activities, pastoral counseling, informational services to family members, and liaison with NGOs. Chaplain activities in Oklahoma City in 1995 were similar to those during JTF-Andrew in 1992. To the author's knowledge, within DoD, there was no written criticism or allegations of "establishment clause" concerns regarding chaplain response in 1995.[31]

A significant difference with JTF-Andrew is that the National Guard played the predominant role, and virtually no federal military chaplains were involved.[32] When the OKC Bombing memorial service was held in May 1995, military chaplain activities had

ended as civilian agencies shouldered the load of recovery.[33] As in the case of Hurricane Andrew, similar patterns of chaplain activities are found with regard to non-DoD civilians. Military chaplain activities with non-DoD civilians were incidental, temporary, in the absence of civilian clergy, and pursuant to a Presidential Disaster Declaration. An additional pattern since at OKC was that chaplains provided support to non-DoD civilians within a "disaster control area."

11 SEPTEMBER 2001

The general facts of the response to the terrorist attacks are commonly known, but the particulars bear repeating. At the Pentagon and in New York City, state and federal military chaplains provided pastoral care to DoD and non-DoD personnel.[34] In New York City, U.S. Coast Guard (USCG) chaplains provided pastoral care to first responders at respite centers, in the "pit" of the World Trade Center buildings, and in various other facilities.[35] Military chaplains worked alongside civilian clergy to provide religious support to first responders within the disaster control area. Military chaplains provided such support to non-DoD civilians for only several weeks, though the declared emergency lasted much longer. In addition, such support was limited to the disaster control area, or the Family Assistance Centers.[36] Many of these first responders were non-DoD civilians serving with the police and fire services of New York City. At the Pentagon Family Assistance Center (PFAC) in Arlington, Virginia, military chaplains provided religious support to the families of victims of the terrorist attacks, including the families of the victims of American Airlines Flight 77.[37]

In summary, chaplain activities in the response to 9/11 followed the same patterns seen after Hurricane Andrew and the OKC bombing. Curiously, there has

been no critique of chaplain activities following 9/11.[38] In all three domestic operations, chaplains deployed to provide religious support to their service members. Yet, chaplains also provided incidental, temporary care to non-DoD civilians who requested such support. Chaplain support to non-DoD civilians was generally within a "disaster control area"[39] during the declared emergency, and following a Presidential disaster declaration.

A LEGAL AND DOCTRINAL VOID

There is no DoD policy[40] regarding constitutionally permissible employment of military chaplains to non-DoD civilians. The extant legal guidance is deficient because it is incomplete and does not address actual practice during domestic operations. For reasons to be discussed below, the 2005 Domestic Operational Law (DOPLAW) Handbook does not mention chaplain activities during in domestic operations. Further, Joint and Service religious support doctrine address this issue in a limited and contradictory manner.

LEGAL

The author provides this overview as an informed, but lay, observer of the legal issues involved. Even among SJAs, these legal issues are contentious, so the overview will consist of broad strokes with observations relevant to the topic at hand.

First, chaplain service within the U.S. military has strong historical, constitutional and legal precedents. The First Amendment states "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof…." In that simple statement are two clauses that address religion, known as the "free exercise" clause and the "establishment" clause.

The impact of the "free exercise" clause on the military chaplaincy is significant. Since the government places service members in places where they cannot exercise their First Amendment rights, the government is obligated to provide for the free exercise of religion. Title 10 U.S. Code states clearly in several sections that there will be chaplains in the military services.[41] During military service, service members and their families retain their rights to the free exercise of their religion.[42]

The establishment clause of the Constitution is a necessary constraint for the military chaplaincy. The Army reminds its chaplains to "avoid even the appearance of any establishment of religion."[43] The difficult issue here is determining what is meant by a violation of the "establishment clause." To aid in that determination, the courts generally apply a three-pronged test called the "Lemon" test from the decision in Lemon v. Kurtzman.[44] The "Lemon" test has three prongs to determine if government activity constitutes a violation of the establishment clause. These prongs are "secular purpose", "primary effect" and "unnecessary entanglement." In short, to avoid an unconstitutional establishment of religion, government actions must be secular in purpose. Next, the primary effect of government action must be secular. Finally, government action must not be unnecessarily entangled with religion.

Several observations are relevant here. First, the "Lemon" test has never been applied to the military chaplaincy, and only one court case has addressed the existence and practices of the military chaplaincy. In 1986, following several years of litigation, the Army won *Katcoff v. Marsh* on narrow grounds.[45] Upon appeal, the circuit court denied the plaintiffs' motions, did not rule on the merits of their argument, and agreed that the Army chaplaincy exists as an exception to the establishment clause, in order to

provide for the free exercise rights of soldiers.[46] Commenting on the circuit court decision, Chaplain (Brigadier General, Retired) Israel Drazin, an expert in constitutional law, said, "The establishment clause must be interpreted to "accommodate other equally valid provisions of the Constitution, to include the free exercise clause, when they are implicated."[47] He states,

> …if the three-pronged test of purpose, primary effect, and entanglement were applied to the Army chaplaincy it would be found to be unconstitutional. However, the chaplaincy must be viewed in the light of its historical background. The judges added that a test "which may be reasonable in one context may be wholly inappropriate in another.[48]

It is significant that in the only court case to consider the military chaplaincy, the judges at both district and circuit level did not apply the "Lemon" test to the chaplaincy.

Another observation is that the courts seem to rely less on the "Lemon" test in recent years. To some observers, the "Lemon" test has declined in utility in establishment clause cases in the past twenty years. One legal researcher has concluded that "the analytical framework used by the Court to determine compliance with these values has evolved over time. Moreover, the Court has applied its various tests in a distinctly contextual manner that is remarkably malleable."[49]

Another point of view that worth considering is that, in spite of its weaknesses, the "Lemon" test could validate limited military chaplain support to non-DoD civilians during domestic operations. The argument states that since the unit mission is secular in purpose, and secular in effect, and there is obviously no unnecessary entanglement with religion, the unit, with its assigned chaplains, may provide support to affected civilian populations without fear of a violation of the "establishment clause", since the overall purpose is to mitigate human suffering.[50]

Yet, in spite of a paltry record of case law, and the recent trend for the courts to not apply the "Lemon" test in "establishment" clause cases, DoD SJAs normally consider the "Lemon" test determinative when answering the question if military chaplains may provide religious support to non-DoD civilians.[51] In fact, concern about the unpredictability of future litigation similar to *Katcoff v. Marsh* has caused most SJAs to provide cautious and conservative advice since 1986.[52]

The common view of most SJAs is that military chaplains may not provide such support in any circumstance without raising the specter of government sponsorship of religion. This view was most widely reflected in a series of memoranda written after Hurricane Andrew by legal counsel at JTF-Andrew, Army Forces Command (FORSCOM), Army Office of the Judge Advocate General (OTJAG) and Office of the Secretary of Defense General Counsel (OSD General Counsel).[53] These memoranda became codified in the late 1990s in the 2001 Domestic Operational Law (DOPLAW) Handbook for JAGs. In the past several years, these memoranda have been widely quoted as the USNORTHCOM Chaplain Directorate has formulated plans and policy.[54]

The 2001 DOPLAW handbook contained very conservative language which states that during domestic operations "chaplains are required to limit their religious services to DoD personnel."[55] Yet, the 2001 DOPLAW language contained several notable errors. The most obvious error is the statement that the Robert T. Stafford Act contains no provision for DoD chaplains to provide support to civilians during disaster operations. The Stafford Act does not address chaplain activity at all, and neither recommends, nor prohibits, military chaplain activities during disaster relief.[56] In addition, DOPLAW 2001 did not accurately address the permissibility of any chaplain

activities at Hurricane Andrew, the Oklahoma City Bombing and on 9/11.[57] Another deficiency with the 2001 DOPLAW language is that it appears to be based upon flawed application of the "Lemon" test.[58] This analysis seems to be derived from the OTJAG and OSD General Counsel memoranda cited above. Therefore, in 2004, the USNORTHCOM Chaplain Directorate, in coordination with the USNORTHCOM SJA, successfully advocated that chaplain language in the 2005 DOPLAW handbook be amended. The 2005 DOPLAW handbook contains no guidance, leaving maximum discretion to local commands.[59]

Given the absence of policy, the author considered the two most important official documents to address this issue, the memoranda of the OTJAG, and OSD General Counsel, following Hurricane Andrew in 1992.[60] The OSD General Counsel stated that "there is no authority under which military chaplains may provide the requested services to personnel not affiliated with the armed forces."[61] Later, the memorandum admits the possibility that in some rare disaster relief situations, civilian clergy may be unavailable:

> …[T]his limitation does not preclude the provision of necessary pastoral care in emergency situations where there is an acute need for assistance that cannot be rendered by members of the clergy unaffiliated with the armed forces. A victim of a natural emergency in need of receiving last rites, for example, would be within the realm of this exception. The emergency exception practice is well established in the area of medical care (on a reimbursable basis) and can be extended to clerical functions in rare cases without raising the specter of state sponsored religion.[62]

In a "desk opinion," the Army OTJAG employed the "Lemon" test and called chaplain activity with non-DoD civilians "[c]onstitutionally invalid."[63] The OTJAG went on to state "[e]ven in the unlikely event that there was a shortage of civilian clergy in the

aftermath of a disaster, the disaster could not be construed as a government inhibition of religion, as could military service without a chaplaincy."[64]

The above statement is obsolete in light of the "unlikely" and catastrophic events of 9-11. In the aftermath of CBRNE terrorist attacks, civilian clergy will likely be unable to respond. Biological attacks are expected to result in quarantines or even martial law during which military chaplains are the only clergy available to respond. [65]

In summary, the only authoritative documents addressing what role military chaplains may have with non-DoD civilians during domestic operations are twelve year old memoranda written before 9/11, based upon a view of the "Lemon" test that does not appear dominant. Though these documents generally prohibit military chaplain support to non-DoD civilians, they offer interesting caveats that fit the post 9/11 environment, such as the "unavailability of civilian clergy" in disaster situations.

DOCTRINAL

Joint and service doctrine is virtually silent on chaplain activities during HLD and CS. Joint Doctrine for Religious Support, Joint Publication 1-05, contains only one paragraph on the subject. Joint Doctrine for Homeland Security, JP 3-26, also has only one paragraph. The USAF has no doctrine on the subject. The Army has only a couple of paragraphs in FM 1-05. The Navy and Marine Corps contain the most current doctrine, written after 9/11.[66]

The final draft of Joint Doctrine for Homeland Security, Joint Publication 3-26 contains the following language, approved in all Comment Resolution Conferences, and is expected to become joint doctrine in Summer 2005:

> Military chaplains may deploy in response to CM events. Requests will be from the LFA through the Federal Coordinating Officer

> (FCO), the DCO, and / or the on-scene JTF commander. Accordingly, military chaplains may provide religious support to civilian disaster victims during emergency operations. This ministry will be limited to the designated disaster control area and will cease with the termination of emergency operations. Moreover, the primary focus of military chaplain ministry will remain DoD personnel. See JP 1-05, *Religious Support for Joint Operations* for more information.[67]

The above language has very clear implications for the relationship military chaplains may have with non-DoD civilians during domestic operations. When directed by commanders, and/or requested by the Primary Agency during CS operations, military chaplains may provide religious support to non-DoD civilians. The question remains as to how to apply this new doctrine in the future.

PROPOSALS TO ADDRESS THE VOID

This paper advocates a DoD-wide effort to provide guiding principles and planning considerations for how military chaplains may be employed in domestic operations.[68] From the historical examples, noticed several patterns. In particular, we see that military chaplain activities with non-DoD civilians were:

- Incidental to the primary purpose of troop religious support
- Temporary in duration
- In the absence of civilian clergy
- When directed by commanders, or requested by the Primary Agency following a Presidential Disaster Declaration.
- Within a disaster control area

When these historical patterns above are compared with the language in the OTJAG and OSD General Counsel memoranda, an approach emerges which respects the “establishment” and “free exercise” clauses, while enhancing mission accomplishment during domestic operations:

RECOMMENDED POSITION

The following language is proposed as a joint doctrinal remedy to answer what role military chaplains may have with non-DoD civilians during domestic operations. Given that JP 3-26 states that "military chaplains may provide religious support to civilian disaster victims", the question is how this support can be provided in a constitutionally permissible manner. Thus, this language is suggested for inclusion in the next version of the DOPLAW handbook, and in *Joint Doctrine for Homeland Defense*, JP 3-26.1 and *Joint Doctrine for Civil Support,* JP 3-26.2. to fill the void discussed above.[69]

During emergency conditions, military chaplains may also provide religious support to non-DoD civilians. Military chaplains may provide such support only when directed by commanders, or requested by the Primary Agency. Military chaplain ministry to non-DoD civilians must conform to the following parameters that strike a careful balance between the Establishment and Free Exercise Clauses of the First Amendment of the U.S. Constitution.

Commanders and Defense Coordinating Officers (DCOs) will exercise caution in examining each request and situation using the following parameters. Military chaplain ministry to non-DoD civilians is generally permissible when conducted in accordance with the following planning considerations:

1) <u>Is the requested or directed support incidental to the primary purpose of troop ministry</u>? Ministry to non-DoD civilians may not interfere with the primary

mission of religious support to troops. In certain disaster relief settings, military chaplains will encounter non-DoD civilians while accompanying troops. Chaplains may respond to the voluntary requests of non-DoD civilians for religious support when such requests are incidental. Incidental requests are secondary, and may not interfere with the primary purpose of troop ministry.

2) Is support to non-DoD civilians requested because of the absence, or inability of civilian clergy to provide religious support? If civilian clergy are available, military chaplain ministry to non-DoD civilians is generally prohibited. In certain rare situations, civilian authorities may request support from military chaplains because civilian clergy are unable to provide. For example, inside quarantine areas, or disaster control areas, military chaplains may be able to provide essential religious support to non-DoD civilian disaster victims that civilian clergy neither have the training or equipment to provide.

3) Is the requested support short-term in duration? The longer the duration of such support, the greater the likelihood that civilian clergy will be available to meet needs. In most domestic operations, normalcy is resumed rapidly and federal military support of all kinds is no longer needed.

4) Is the requested support offered under emergency circumstances and within the disaster control area? Military chaplains can provide emergency care during the aftermath of terrorist attacks and natural disasters in the homeland. Chaplains provided constitutionally permissible pastoral care to non-DoD civilians in the immediate aftermath of Hurricane Andrew, the Oklahoma City

Bombing and at the Pentagon and World Trade Center on 9/11 which ended when the emergency circumstances ended.

5) Is the support to non-DoD civilians part of commander directed immediate response authority? Commanders have broad authority, called "immediate response," to employ DoD forces and resources in emergency situations in which there is no Presidential disaster declaration.[70] Commanders may employ DoD forces to "assist in the rescue, evacuation, and emergency medical treatment of casualties, the maintenance or restoration of emergency medical capabilities, and the safeguarding of public health."[71] Chaplains may also be part of "immediate response" as directed by commanders. For example, chaplains may minister "last rites" to victims of auto crashes near military bases.

6) Has such support been requested by the Primary Agency? During domestic operations operations, the federal Primary Agency will respond to requests from local and state authorities for federal disaster assistance under the provisions of the Robert T. Stafford Act. Military chaplains may provide religious support to non-DoD civilians if such support is requested by the Primary Agency.[72]

CONCLUSION

This paper has revisited the history of past domestic operations in order to provide an approach that balances constitutional requirements with the practical needs of service members, disaster victims and their families, and first responders. The goal is to enhance mission accomplishment and allay concerns regarding potential violations

of the Establishment Clause of the First Amendment of the U.S. Constitution. This issue must be resolved as military chaplains. In the latest round of hurricanes to ravage Florida during 2004, National Guard chaplains deployed to support troops, but also responded to the requests of non-DoD civilian disaster victims during domestic operations.[73]

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ENDNOTES

[1] Donald L. Rutherford, *Personal Monograph, Pastoral Care in Hurricane Andrew Relief*, Personal Experience Monograph (Carlisle Barracks: U.S. Army War College, 2000), 8.

[2] Domestic operations is an old doctrinal term used in the obsolete U.S. Army Field Manual 100-19, and called "domestic support operations" in U.S. Marine Corps Warfare Publication 3-33.4. The new DoD term will be "Defense Support to Civil Authorities," as proposed in *Joint Doctrine for Homeland Security*, Joint Publication 3-26 (Draft). Within USNORTHCOM, the term Civil Support (CS) is the preferred term. The thorniest legal issues for chaplain activities occur in the CS realm. Yet, following HLD in the homeland, there will always be CS implications during the recovery phases. Thus, for the purposes of this analysis, we will employ the term "domestic operations" to cover legal and doctrinal aspects of chaplain activities common to both HLD and CS.

[3] David M. Park, "Position Paper: The Role of Chaplains in Civil Support Operations", memorandum, U.S. Northern Command, Peterson Air Force Base, Colorado, 6 July 2004.

[4] Center for Army Lessons Learned. "The Legality of Religious Support to Civilians Needs to Be Reviewed." Joint Uniform Lessons Learned #00864-96098, Joint Task Force-Andrew Chaplain, 10 October 1992.

[5] U.S. Department of the Army, *Contractors on the Battlefield*, Field Manual 3-100.21 (Washington, D.C.: U.S. Army, 3 January 2003), 5-1, 5-6 and 5-10. During such deployments, contractor families are also eligible to receive a variety of services at DoD installations, to include religious support.

[6] In addition, the author heard similar arguments made by military lawyers while assigned to First U.S. Army, Fort Gillem, Georgia during 2002-2004. The author contends that the statement "the chaplains were out of control during Hurricane Andrew" is bad history that has led to an overstatement of "establishment clause" concerns. It is a partial goal of this paper to deconstruct this myth and build practical legal guidance and doctrine that balance both sides of the First Amendment. These stated views are consistent with numerous SJA memoranda dating from 1992 and 1993, written by the SJA at JTF-Andrew, Army Forces Command, the Office of the Judge Advocate General, and the Office of the Secretary of Defense General Counsel. These memoranda will be discussed later. In addition, during senior chaplains meetings, the author has heard some senior chaplains make similar statements. However, few supervisory chaplains working HLD and CS planning share this view. The SJA memoranda cited above became the basis for very restrictive and conservative chaplain guidance in the 2001 Domestic Operational Law (DOPLAW) Handbook.

[7] U.S. Northern Command, *Concept of Operations* (Peterson Air Force Base, Colorado: U.S. Northern Command, 4 March 2005), 3-3.

[8] U.S. Department of Defense, *Religious Support in Joint Operations*, Joint Publication 1-05 (Washington, D.C.: U. S. Department of Defense, June 2004), II-4. In general, chaplains provide or perform direct personal religious support, to include Rites, Sacraments, and Ordinances; Religious Services; Religious Education; Pastoral Care and Counseling; Management and Administration; Ethical and Moral Living; Managing Lay Leader Programs; and Promoting Spiritual Fitness. In addition, chaplains advise the command regarding Religious Organizations and Doctrine; Religious Practices and Customs; Importance of Worship and Holy

Places and Shrines, and Other Religious Sites; Indigenous Religious History, Culture, and Ethics; Humanitarian Aid; and Ethical and Moral Issues.

[9] Israel Drazin and Cecil B. Currey, *For God and Country: The History of a Constitutional Challenge to the Army Chaplaincy* (Hoboken, New Jersey: KTAV Publishing House, 1995), 9-14.

[10] U.S. Department of Defense Instruction 1304.28, "Guidance for the Appointment of Chaplains for the Military Departments" (Washington, D.C.: 11 June 2004), paragraph E.2.1.5 "Written documentation from a Religious Organization that complies with the administrative requirements of this Instruction that an applicant for the military chaplaincy is fully and professionally qualified and endorsed to perform all offices, functions, sacraments, ordinances, and ceremonies required of a RMP for that Religious Organization, and is capable and authorized to minister as required within a pluralistic environment…" Endorsement means that a qualified religious organization has issued an ecclesiastical endorsement that states that the endorsed spiritual leader "is fully and professionally qualified and endorsed to perform all offices, functions, sacraments, ordinances, and ceremonies required of a [religious ministry professional] for that Religious Organization."

[11] U.S. Department of the Army, *Religious Support,* Field Manual 1-05 (Washington, D.C.: U.S. Department of the Army, April 2003), 1-4.

[12] The significance of this point cannot be overstated. During domestic operations, the previous legal opinions about permissible chaplain activities are so restrictive as to force military chaplains to violate their ecclesiastical endorsement and ordination vows. For example, some chaplains are bound by vow and duty to pray with whomever seeks prayer, and to offer absolution to penitents who seek their care. Legal guidance on this issue needs to be written that takes into consideration the requirements of the ecclesiastical obligations of chaplains endorsed for military service.

[13] Chaplains receive direct commissions, are subject to the Uniform Code of Military Justice, and have the same duties and benefits as other officers. Chaplains have rank without command (See Title 10, United States Code. Sections 3581, 3073, 3547, 774, 6031 and 8547.). Unlike other commissioned officers, chaplains are noncombatants. Enlisted chaplain assistants, in addition to other religious support duties, are combatants who provide force protection to chaplains.

[14] For example, a chaplain who is a Baptist can perform direct religious support for most Protestants. Thus, the Baptist chaplain mentioned above would be unable to perform religious support for a Muslim soldier, but is obligated by DoD policy to provide someone else who can meet those needs.

[15] John W. Brinsfield, "Joint Task Force Andrew: Religious Support in Devastated Areas", *Encouraging Faith, Supporting Soldiers: The United States Army Chaplaincy 1975-1995, Part One* (Washington, D.C.: Office of the Chief of Chaplains, Department of the Army, 1997) 223.

[16] Dale A. Carroll, *The Role of the U.S. Army Medical Department in Domestic Disaster Assistance Operations – Lessons Learned from Hurricane Andrew*, Strategy Research Project (Carlisle Barracks: U.S. Army War College, 3 June 1996), 1. The Federal Response Plan (FRP) has been replaced by the National Response Plan (NRP), issued in late 2004. The NRP,

like its predecessor, is intended to coordinate the activities of every federal agency and department during manmade and natural disasters. The FRP was untested in 1992. From the many mistakes made in the federal response, numerous changes were made. The military services wrote doctrine for domestic operations in the years after Hurricanes Andrew and Iniki, seeking to do better by the American people.

[17] Brinsfield, 226.

[18] Henry A. Haynes, Assistant Division Chaplain, 82nd Airborne Division in September 1992, Telephone interview by author, 30 March 2005. The author is acquainted with CH (COL) Haynes, who now serves as the Command Chaplain, 5th U.S. Army. CH Haynes expressed surprise when told that the SJAs at USNORTHCOM, OSD and First U.S. Army were saying that chaplain activities during Hurricane Andrew had been "out of control." CH Haynes served during Hurricane Andrew relief from several days after landfall through the end of September. He describes the South Florida area as "like a war zone." He says that Army chaplains did what was necessary to mitigate human suffering, since local clergy were themselves traumatized. He remarked that chaplain support to non-DoD civilians were very short-lived. He stated that after approximately two weeks, the community started to come together, power came back on, churches were reopening and normalcy was restored.

[19] Park, 5.

[20] Brinsfield, 232. In one fascinating side note that illustrates wonderful interfaith cooperation, and the strength of a pluralistic military chaplaincy, a chaplain endorsed by the Southern Baptist Convention organized a group of Mormon volunteers to repair the roof of a Jewish synagogue in the disaster area.

[21] Herbert Kitchens, Deputy Command Chaplain, 2nd U.S. Army in September 1992, telephone interview by author, 8 April 2005. CH (COL) Kitchens, USA, Retired, is a personal friend of the author who in his final assignment served as Command Chaplain, 1st U.S. Army. CH (COL) Kitchens confirmed the woman's status as a veteran's widows based upon his personal experience in JTF-Andrew operations, and his conversations with CH (CPT) Jeff Houston. CH Kitchens spent more than one month as deputy command chaplain of JTF-Andrew. CH Kitchens invested considerable time discussing the legal implications of JTF-Andrew actions with the JTF SJA, Colonel Moushegian. He was convinced that COL Moushegian meant well by his actions, as he hoped to be able to defend the chaplaincy from unpredictable future legal challenges similar to Katcoff v. Marsh. See also Rutherford, 15.

[22] Rutherford, 10 and 15.

[23] Brinsfield, 226.

[24] Joginder S. Dhillon, "Chaplain Support during HLD and CS Analysis," memorandum for Command Chaplain, U.S. Northern Command, Colorado Springs, Colorado, 22 April 2005, 17. "Incidental support to the local population would likely not be construed as violating the Establishment Clause if the purpose and scope of the support was tailored to further a legitimate governmental interest in responding to the human suffering created by the crisis or disaster. More precisely, the support would likely be permissible if it was limited in time and geography to the disaster; was provided in a manner which was neutral to the religious beliefs of the beneficiaries; was not coercive; was only provided if alternative sources of religious

support were not available; and, was incidental to and not in conflict with religious support provided to military personnel."

[25] Brinsfield, 230.

[26] A Presidential Disaster Declaration is the act of the President upon the request of the government of a state that a natural or manmade disaster has occurred which necessitates federal assistance to mitigate the consequences of the disaster. Such declarations are made in application of the National Response Plan (NRP). See also Robert T. Stafford Disaster Relief and Emergency Assistance Act, as amended by Public Law 106-390, October 30, 2000. (Pub. L. 106-390, § 301, October 30, 2000).

[27] Oklahoma City National Memorial Institute for the Prevention of Terrorism. *Oklahoma City– Seven Years Later. Lessons for Other Communities* (Oklahoma City, Oklahoma: Oklahoma City National Memorial Institute for the Prevention of Terrorism, 2002), i.

[28] Oklahoma City Task Force of the American Psychological Association, *Final Report on the Mental Health Response to the Oklahoma City Bombing*, 9.

[29] Ibid., 30.

[30] *Oklahoma City-Seven Years Later*, 26.

[31] The author is aware of the weakness of the "argument from silence." Yet, after extensive research, I have been unable to locate any documentation of expressions of concern by SJAs or anyone regarding military chaplain activities in Oklahoma City.

[32] The event does differ in several important respects from Hurricane Andrew. In OKC, the response was overwhelmingly local, state and civilian, with an extensive National Guard chaplain response. Only a handful of federal military personnel, to include chaplains, were involved. The federal chaplains were assigned to Tinker AFB. Their role was not prominent, nor is widely known to this day. Another important difference is that OKC was an act of catastrophic terrorism. It is the author's opinion that the national attitude changed in yet to be understood ways when the homeland was first struck by catastrophic terrorism in 1995.

[33] David Hockensmith, Army National Guard Chaplain, Oklahoma City Bombing Response Task Force, telephone interview by the author, July 2004. See also Jack Poe, Police Department Chaplain, Oklahoma City Police Department, telephone interview by the author, July 2004. See also Ted Wilson, Fire Department Chaplain, Oklahoma City, Oklahoma. Telephone interview by the author, July 2004. The author has met and personally interviewed this men. All of them are also military chaplains, serving either in the Oklahoma Army National Guard, or in the Army Reserves. Chaplain Ted Wilson currently is serving in Iraq with an Army Guard unit. Since 1993, CH Wilson has worked diligently to assist his firefighters and Army National Guard soldiers recover from the effects of the Oklahoma City Bombing.

[34] Jacob Goldstein, STARC Chaplain, New York National Guard, interview by author, various dates in 2003-2004. The author is a personal friend with CH (COL) Jacob Goldstein of the United States Army Reserve. On 9/11, CH Goldstein was the STARC Chaplain for the New York National Guard. CH Goldstein served for many weeks at Ground Zero in New York City. Second, New York National Guard chaplains served in and around "Ground Zero" for a number

of months. These chaplains performed religious support to all first responders in the disaster control area, both those eligible and those not.

[35] Wilbur C. Douglass, Command Chaplain, United States Coast Guard, "World Trade Center Disaster Ministry USCG Chaplain Emergency Response Team, 11 September 2001-20 October 2001," Unpublished paper (Washington, D.C.: United States Coast Guard, 2001). The U.S. Navy assigns active duty Navy chaplains to serve with the U.S. Coast Guard, normally on three year tours of duty.

[36] "Sea Service Chaplains Respond to the Attack on America," *The Navy Chaplain* Special Edition, December 2001, pages 1-30. See also Douglass. See also Office of the Chief of Chaplains, U.S Army, *The Gunhus Years, 1999-2003* (Washington, D.C.: U.S. Department of the Army, 2003).

[37] U.S. Department of Defense Office of the Secretary of Defense (Personnel and Readiness), *Response to the Terrorist Attack on the Pentagon: Pentagon Family Assistance Center (PFAC) After Action Report* (Washington, D.C.: U.S. Department of Defense, March 2003), 4. The author works full-time in the Chaplain's Directorate of NORAD-USNORTHCOM. In this capacity, the author has on numerous occasions spoken with chaplains and others who served at the PFAC. The author has also reviewed the PFAC After Action Report, which states that "Several days after the attack, the Army, Navy, American Airlines and Department of Justice Office for Victims of Crime closed their individual family and casualty assistance centers and consolidated their efforts within the PFAC." It is indisputable that among the 4800 contacts made by chaplains serving at the PFAC during the month of the PFAC operations, military chaplains provided pastoral care to non-DoD civilians being served by the PFAC.

[38] Again, the author is aware of the weakness of the argument from silence. It could be stated that such critiques can be found if more research could be conducted. Having researched this topic extensively for over one year, the author welcomes discovery of such critique, if any exist within DoD. Yet, it is the author's suspicion that none are extant, because the strategic environment has shifted. Now that the homeland is considered a battlefield and target for terrorist activity, most rational individuals realize that some broadening of the permissible role for military chaplains during domestic operations is permissible.

[39] The term "disaster control area" is subject to some debate within USNORTHCOM. It could mean the area within the "police tape" that prevents gawkers and passersby from entering a crime scene. Or it could mean that area of the disaster site within which urban search and rescue is occurring. It could also mean the disaster site, plus other areas supporting first responders, victims and their families. This broader definition would include the disaster site, respite centers for first responders, family assistance centers for victims families and hospitals treating victims. The USNORTHCOM Chaplain's directorate is advocating for the broader definition, since it comports more closely to what chaplains actually do during these types of situations.

[40] U.S. Department of Defense, "Accommodation of Religious Practices Within the Military Services," Department of Defense Directive 1300.17 (Washington, D.C.: U.S. Department of Defense, 21 November 2003). See also U.S. Department of Defense, "Appointment of Chaplains for the Military Departments," Department of Defense Directive 1304.19 (Washington, D.C.: U.S. Department of Defense, 11 June 2004). The issue of what, if any,

role military chaplains may have with non-DoD civilians during domestic operations is not addressed in policy directives of the Department.

[41] Title 10, United States Code, Sections 3581, 3073, 3547, 774, 6031 and 8547.

[42] Department of Defense Directive 1300.17.

[43] U.S. Department of the Army, *Chaplain Activities in the United States Army*, Army Regulation 165-1 (Washington, D.C.: U.S. Department of the Army, 25 March 2004), paragraph 1-4.d, page 1.

[44] Lemon v. Kurtzman, 403 U.S. 601, 91 S. Ct. 2105, 29 L. Ed. 2d 745 (1971).

[45] Two Harvard Law School students, seeking to fulfill a course requirement, sued to challenge the existence of the Army chaplaincy. The plaintiffs, Joel Katcoff, and Allen Wieder, alleged that the Army chaplaincy violated the "establishment clause" of the First Amendment of the U.S. Constitution.

[46] Dhillon, 8.

[47] Drazin and Currey, 199. CH Drazin was recalled to active duty for three years to assist in the legal defense of the Army Chaplaincy. He provided expert advice to the Army Judge Advocate General team who were in turn advising the Department of Justice attorneys representing the government.

[48] Drazin and Currey, 199.

[49] Dhillon, 2.

[50] Park, 3. See also Alvin M. Moore, III. *Military Ministry to Civilians in Humanitarian Relief Operations,* Student Research Project (Carlisle Barracks: U.S. Army War College, 5 June 2001), 10. Chaplain (COL) Alvin "Sonny" Moore was attached to JTF-Andrew in 1992 as a brigade chaplain in the 82nd Airborne Division.

[51] Though beyond the scope of this paper, a detailed review of constitutional jurisprudence, and the applicability of the "Lemon" Test conducted by an SJA with an open mind on these issues would be of great assistance. In the author's opinion, the current generation of senior SJAs have a closed mind on this issue and are unwilling to consider that perhaps the "Lemon" test is no longer determinative, and that the strategic environment has changed in the past twenty years.

[52] Ronald Buchholz, Chief, General Law Branch, Office of the Judge Advocate General, Department of the Army, "Utilization of Chaplains in Disaster Relief Operations", memorandum for Chief of Chaplains, Washington, D.C., 23 November 1992, 2. LTC Buchholz's memorandum warns of "litigation and court-mandated restrictions on the chaplaincy of an unpredictable scope." The memorandum also prominently features the "Lemon" test in its analysis that prohibits any role during domestic operations for military chaplains with non-DoD civilians.

[53] Buchholtz, 1. See also Carroll Tichenor, Staff Judge Advocate, U.S. Army Forces Command. "Permissible Activities of Chaplains in Disaster Relief," memorandum for Office of the Judge Advocate General, Fort MacPherson, Georgia, 29 October 1992. Robert Gilliat, Deputy General Counsel, Department of Defense, "Utilization of Chaplains in Disaster Relief Operations," memorandum for LTC (P) Clifton A. Ripperger. Washington, D.C., 10 August 1993.

[54] Stephen Parke, Legal Advisor, Joint Task Force-Civil Support, "Use of Military Chaplains For Other Than Military Support," memorandum for Chaplain, Joint Task Force-Civil Support. Fort Monroe, Virginia, 22 March 2002. This memorandum was prepared in the months shortly after 9/11, and used the above memoranda for authority. JTF-Civil Support was COCOM to JFCOM in 2002, but is now a JTF COCOM to USNORTHCOM. For another example, the author is in receipt of a memorandum from the Army Chief of Chaplains office citing a similar conservative opinion based upon guidance dating back to Hurricane Andrew. See James A. Buckner, Director, Plans, Policy Development and Training, Office of the Chief of Chaplains, Department of the Army, "Utilization of Chaplains in Disaster Relief Operations," memorandum for Command Chaplain, Forces Command. Washington, D.C., 19 February 2004.

[55] Center for Law and Military Operations, *Domestic Operational Law (DOPLAW) Handbook for Judge Advocates* (Charlottesville, Virginia: U.S. Department of the Army, 2001), 108-109.

> "The Establishment Clause of the First Amendment to the U.S. Constitution limits the use of military chaplains. There is no provision in the Stafford Act allowing DoD chaplains to provide services to the civilian population of an affected area. DoD chaplains may inadvertently exceed their authority to provide religious support in one of two scenarios.
>
> First, in large-scale disasters, military chaplains may deploy to provide religious services to DoD personnel. Deployed chaplains may be asked or desire to provide religious support to affected members of the civilian community. Chaplains are required to limit their religious services to DoD personnel.
>
> Second, if the disaster occurs at or near an installation the chaplains may have a similar desire to provide religious support to civilian members of the surrounding community. The same restrictions that apply to deployed chaplains also apply in this scenario. Similarly, judge advocates should be aware that these restrictions extend beyond providing religious support to people and also apply to requests for other types of assistance from local churches or religious facilities as well.[55]
>
> One exception is when FEMA requests DoD chaplains to provide non-secular counseling services. A judge advocate should closely scrutinize such requests to ensure that the request does not extend beyond counseling to providing religious services.

[56] Stafford Act, as amended.

[57] In addition, 2001 DOPLAW language did not reflect actual activities conducted by chaplains during the major domestic disaster relief operations in the last two decades. Finally,

the 2001 DOPLAW language does not consider the impact of incidents of catastrophic terrorism on U.S. soil. In some situations, such as CBRNE or WMD attacks, military chaplains may be the only clergy able to provide support to victims and first responders.

[58] The argument that DOPLAW 2001, and the OTJAG and OSG memoranda apply is inconsistent. In essence, both of them argue that "chaplains may not support non-DoD civilians during domestic operations because that is a violation of the "establishment" clause. Yet, when examined, both memoranda seem to rely on the "Lemon" test, without acknowledging the trend to minimize this test. Further, it is the author's experience that SJAs normally will say chaplain support to non-DoD civilians "offends" the "establishment" clause, but they will be unable to say "why" or "how."

[59] This was done partly because *Joint Doctrine for Homeland Security*, JP 3-26, remained unsigned as of Fall 2004. Absent doctrinal guidance, the writers of 2005 DOPLAW were unwilling to include broader language suggested from USNORTHCOM. The issue was deferred because the matters are contentious. In addition, the USNORTHCOM Concepts of Operations (CONOPS), Concepts of Employment (CONEMPS) and the Homeland Security Joint Operating Concept (HLS JOC) remain in draft. Once these documents are finalized with appropriate chaplain input, this effort will be more supportable. The author has worked on the issue with the DOPLAW handbook since January 2004. In coordination with the SJA of USNORTHCOM, we crafted more acceptable DOPLAW language that was consistent with joint doctrine and chaplain practice during past domestic operations. Getting all chaplain language omitted from the 2005 DOPLAW is a partial victory that will be readdressed at the next time DOPLAW is revised. In the meantime, the author has incorporated findings from this paper into the USNORTHCOM Civil Support CONEMP.

[60] The four memoranda are in general agreement that military chaplain ministry is to be limited to DoD personnel. However, the FORSCOM memorandum by COL Tichenor critiques the JTF-Andrew SJA memorandum by COL Moushegian as being overly broad. In fact, COL Moushegian's memorandum is written so restrictively that, as COL Tichenor points out, a military chaplain traveling in uniform on a commercial airplane would be prohibited from praying with a non-DoD civilian seatmate who requests prayer.

[61] Robert L. Gilliat, Deputy General Counsel, Department of Defense. "Utilization of Chaplains in Disaster Relief Operations." Memorandum for LTC (P) Clifton A. Ripperger. Washington, D.C., 10 August 1993.

[62] Ibid.

[63] Buchholz, 1.

[64] Ibid., 1.

[65] The OTJAG argument also seems poorly reasoned in light of the war on terrorism. In the present threat environment, all US citizens are viewed as legitimate targets for terrorist attacks because all US citizens are perceived to support the actions of the US government. Thus, US citizens who are victims of a terrorist attack and are in a disaster control or quarantine area may be indirectly deprived of their free exercise rights because of their indirect support of the US government because they are US citizens. In such situations, military chaplains may be the only clergy who can provide emergency religious support. Though this argument is not

supported by current case law, it is a line of reasoning which bears exploration. In legal research for the USNORTHCOM chaplain directorate, Joe Dhillon could find no support in current case law for this line of argument.

[66] The Navy issued *Religious Ministry in the U.S. Navy*, Naval Warfare Publication 1-05 after 9/11, and the language in it reflects the expeditionary experience of U.S. Navy chaplains, and the new threat posed by catastrophic terrorism. The Marine Corps still uses *Domestic Support Operations*, Marine Corps Warfare Publication 3-33.4, which was a doctrine publication issued jointly by the Army and Marine Corps. The Army version was FM 100-19, Domestic Support Operations, which is now superceded.

[67] JP 3-26, chapter IV, paragraph 6.h.

[68] In the past, for unknown reasons, Service chaplain leadership have tended to resist resolving this dispute, perhaps preferring "helpful ambiguity." This "helpful ambiguity" approach advocates no DoD-wide policy or guidance but would permit maximum latitude to local commanders to employ, or not employ, chaplains, guided by the military decision-making process and advice from staff, SJA and chaplain. Since the situation surrounding each domestic operation is different, broad guidance will not be helpful, having the unintended consequence of being so broad as not to be useful. The author does not concur with this approach because of the complexity of the issues involved, and the conflicting legal guidance across the land as chaplains and SJAs advise commanders. However, any doctrine written must be broad and inclusive of the variety of situations faced by DoD units during CS.

[69] The author will lead the USNORTHCOM effort to include this language in joint doctrine in the future. USNORTHCOM is the lead agent to write two joint publications in the JP 3-26 series: *Joint Doctrine for Homeland Defense*, JP 3-26.1, and *Joint Doctrine for Civil Support*, JP 3-26.2.

[70]U.S. Department of Defense Instruction 3025.1, *Military Support to Civil Authorities* (Washington, D.C.: U.S. Department of Defense, 15 January 1993), paragraph 4.5. Imminently serious conditions resulting from any civil emergency or attack may require immediate action by military commanders, or by responsible officials of other DoD Agencies, to save lives, prevent human suffering, or mitigate great property damage. When such conditions exist and time does not permit prior approval from higher headquarters, local military commanders and responsible officials of other DoD Components are authorized by this Directive, subject to any supplemental direction that may be provided by their DoD Component, to take necessary action to respond to requests of civil authorities. All such necessary action is referred to in this Directive as "Immediate Response."

[71]Ibid.

[72] Normally, FEMA is the Primary Agency that coordinates federal support to local and state governments during manmade and natural disasters.

[73] Kenneth E. Lawson, Kenneth E. *The Ministries of Florida Army National Guard Chaplains during Hurricanes Charlie, Frances, Ivan and Jeanne: August/September 2004*. Unpublished paper. Fort Jackson, South Carolina, 2004. See also Kenneth E. Lawson,

Kenneth E., *The Army National Guard during the Los Angeles Riots of 1992*. Unpublished paper. North Andover, Massachusetts, 1998.