

In Times of War, Pentagon Reserves Right to Treat Journalists Like Spies

By [Frank Smyth](#)

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The Pentagon has produced its [first](#) Department of Defense-wide Law of War Manual and the results are not encouraging for journalists who, the documents states, may be treated as “unprivileged belligerents.” But the manual’s justification for categorizing journalists this way is not based on any specific case, law or treaty. Instead, the relevant passages have footnotes referring to either other parts of the document or matters not germane to this legal assertion. And the language used to attempt to justify this categorization is weak at best.

This broad and poorly defined category gives U.S. military commanders across all services the purported right to at least detain journalists without charge, and without any apparent need to show evidence or bring a suspect to trial. The Obama administration’s Defense Department appears to have taken the ill-defined practices begun under the Bush administration during the War on Terror and codified them to formally govern the way U.S. military forces treat journalists covering conflicts.

The manual’s impact overseas, especially in the short run, may be even worse. The language used to justify treating journalists as “unprivileged belligerents” comes at a time when international law for conflict is being flouted by armed groups—including government, militia, and insurgent forces—from Ukraine and Iraq to Nigeria and the Congo—and during a time in which CPJ has documented record numbers of journalists being [imprisoned](#) and [killed](#). At a time when international leadership on human rights and press freedom is most needed, the Pentagon has produced a self-serving document that is unfortunately helping to lower the bar.



A press briefing at the Pentagon in April. Worrying guidelines on how the military can categorize the press during conflict are contained in the Defense Department’s Law of War Manual. (AP/Andrew Harnik)

So far the manual has received little press, but both *The Washington Times* and *Russia Today* covered it. The Moscow-funded global news outlet *Russia Today* quoted Chris Chambers, a [Georgetown University undergraduate communications professor](#), saying that the manual gives U.S. military forces “license to attack” journalists.

At 1,180 pages long and with 6,196 footnotes, the manual includes vague and contradictory language about when and how the category of “unprivileged belligerents” might be applied

to journalists. It ignores the most relevant cases where the U.S. military detained war correspondents and accused them of being—using the term coined by Pentagon officials in the 2000s—“unlawful combatants,” without producing evidence or bringing even one accused journalist to trial. The manual mentions international human rights treaties and declarations, but ignores the most important one, the Universal Declaration of Human Rights, which deals most clearly with the right to free expression and the press.

The *Law of War* manual is the Defense Department’s most ambitious endeavor of its kind to date. Yet its authority already seems in doubt. The last paragraph in the preface written by lead author and top Pentagon lawyer, Stephen W. Preston, is a disclaimer stating that, while the manual represents the views of the Defense Department, it does not necessarily represent the view of the government. Weeks after the document was released, Preston, who previously served as general counsel to the CIA, resigned quietly without any public notification. He could not be located for comment.

The manual devotes attention to “classes of persons” who “do not fit neatly within the dichotomy” between combatants and civilians, and replaces the term “unlawful combatants,” which U.S. officials used to refer to terrorist suspects held under extra-legal circumstances in the wake of September 11, 2001 attacks, with “unprivileged belligerent.”

“Unprivileged” means the suspect is not entitled to the rights afforded to prisoners of war under international law and can instead be held as a criminal suspect in a category that includes suspected spies, saboteurs, and guerrillas.

Prisoners of war are protected internationally with rights that include being treated humanely, having their status as prisoners reported to a neutral body such as the International Committee of the Red Cross, and being held with the expectation of release once hostilities end. “Unprivileged belligerents,” however, like “spies, saboteurs and other persons engaging in similar acts behind enemy lines,” according to the *Law of War Manual*, may be subject to domestic laws. The domestic penalties for such suspects can include, for instance, the death penalty for those found guilty of spying.

“In general, journalists are civilians. However, journalists may be members of the armed forces, persons authorized to accompany the armed forces, or unprivileged belligerents,” reads the manual. While the document notes in other parts that journalists can work independently, in this section it fails to explain under what circumstances, or for what kinds of activities the category “unprivileged belligerents” could be applied to journalists.

A Pentagon spokesman offered a few examples. “The fact that a person is a journalist does not prevent that person from becoming an unprivileged belligerent,” U.S. Army Lieutenant Colonel Joe Sowers, of the Pentagon’s Office of the Assistant Secretary for Public Affairs, told [The Washington Times](#). Sowers pointed to the al-Qaeda publication *Inspire*, saying that propagandists for terrorist groups could be categorized as unprivileged belligerents. So could enemy spies who use journalism as a cover, he added.

But the language in the Pentagon manual seems to at least qualify one of the spokesman’s claims. In footnote 241, which refers to section 2.24.1 on independent journalists, the manual cites a U.N. report to the International Criminal Tribunal for the former Yugoslavia. “Whether the media constitutes a legitimate target group is a debatable issue. If the media is used to incite crimes, as in Rwanda, then it is a legitimate target. If it is merely

disseminating propaganda to generate support for the war effort, it is not a legitimate target,” it states.

The manual does not create new laws, Sowers told CPJ. Instead, it “provides a description” of existing laws-of-war rules for “informational purposes; it is not an authorization for any person to take any particular action related to journalists or anyone else.”

The U.S. military has taken action against journalists before. [Bilal Hussein](#), whose photo of insurgents firing on U.S. soldiers in Fallujah in 2004 helped earn Associated Press photographers, including Hussein, the Pulitzer Prize, was detained by Marines in 2006 and held for two years. The U.S. military never provided evidence or an explanation for the detention of the AP photographer, who was presented with [CPJ’s International Press Freedom Award in 2008](#).

Sami al-Haj, an [Al-Jazeera cameraman](#), was detained in December 2001 by Pakistani forces along the Afghan-Pakistani border while covering a U.S.-led offensive against the Taliban in Afghanistan. U.S. military forces accused the Sudanese cameraman of being a financial courier for armed groups and assisting al-Qaeda and extremist figures, but never provided evidence to support the claims, [CPJ found](#) in its 2006 report “Sami al-Haj: The Enemy?” Al-Haj, who is now head of the human rights and public liberties department at Al-Jazeera, was held for six years at the U.S. military base in Guantanamo, Cuba. Prior to releasing him, U.S. military officials tried to compel al-Haj to agree to spy on Al-Jazeera as a condition of his release, his lawyer, Clive Stafford Smith, told CPJ and media outlets.

One section of the *Law of War Manual* deals with “Mixed Cases” made up of “(1) certain personnel engaged in humanitarian duties; (2) certain authorized supporters of armed forces; and (3) unprivileged belligerents.” But journalists are not among the examples listed in this category, Sowers told CPJ, and the section that does deal with journalists treats them as “a factual category rather than a legal case.”

Factually speaking, the manual acknowledges “independent journalists” are “regarded as civilians.” But it also rightfully notes limits and cases that could lead a journalist to lose their legal status as a member of the press. For instance, “journalism does not constitute taking a direct part in hostilities such that such a person would be deprived of protection from being made the object of attack.” The manual adds: “In some cases, the relaying of information (such as providing information of immediate use in combat operations) could constitute taking direct part in hostilities.”

U.S. military authorities made similar, unsubstantiated claims about AP’s Hussein and Al-Jazeera’s al-Haj, whose cases the manual ignores. Instead the manual offers its own perspective on how journalists covering conflict should operate.

“Reporting on military operations can be very similar to collecting intelligence or even spying. A journalist who acts as a spy may be subject to security measures and punished if captured,” it states. “To avoid being mistaken for spies, journalists should act openly and with the permission of relevant authorities. Presenting identification documents, such as the identification card issued to authorized war correspondents or other appropriate identification, may help journalists avoid being mistaken as spies.”

As any conflict reporter knows, the idea of finding relevant authorities and seeking permission to report on a battlefield would be as unlikely as it would be unwise. Who

constitutes relevant authorities is often impossible to determine in shifting battle lines. Moreover, the manual's language seems to weaken the point of other passages that affirm the right of independent reporters to be on the battlefield.

Finally, the language in paragraph 4.24.5 "Security Precautions and Journalists" simply contradicts the post-World War II norm of a free press. "States may need to censor journalists' work or take other security measures so that journalists do not reveal sensitive information to the enemy. Under the law of war, there is no special right for journalists to enter a State's territory without its consent or to access areas of military operations without the consent of the State conducting those operations," it says.

To delay journalists who are embedded with the military from filing information that could be of use to an enemy for a reasonable period of time is one thing. But to flatly ban journalists from conflict areas, or to restrict or censor them from filing allegedly sensitive information, which the manual fails to specify or explain, would be a violation of international documents such as the Universal Declaration of Human Rights. Under Article 19, the declaration affirms not only the right to free expression, but the right to "receive and impart information through any media and regardless of frontiers." The manual ignores it, even though the declaration was conceived and sponsored by the U.S.

The manual addresses other human rights treaties and documents, including [the International Covenant on Civil and Political Rights](#), noting that tension can indeed arise between them and the laws of war. But the manual continues to state that the rules of war trump human rights treaties on the battlefield. "These apparent conflicts may be resolved by the principle that the law of war is the *lex specialis* during situations of armed conflict, and, as such, is the controlling body of law with regard to the conduct of hostilities and the protection of war victims."

Authors involved in some of the manual's earlier drafts argued in *The Weekly Standard* that prior drafts were [too deferential](#) to human rights concerns due to the influence of Obama administration State Department political appointees and human rights activists on the National Security Council. The manual goes on to note that "human rights treaties would clearly be controlling with respect to matters that are within their scope of application and that are not addressed by the laws of war," using language suggesting that a compromise may have been reached to try to find balance.

The manual states in its preface that it has built on [antecedent manuals](#) by U.S. military services, the most important of which was a U.S. Army manual on [The Law of Land Warfare](#) published in 1956. Military legal experts from the United Kingdom, Canada, New Zealand, and Australia also had input, as did unspecified "distinguished scholars."

The manual ignores many other scholars. While it includes 21 citations, for instance, to a 1923 Commission of Jurists to Consider and Report Upon the Revision of the Rules of Warfare, the manual arguably ignores more relevant documents, including a 2009 [International Commission of Jurists report on the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights](#) (to which [I testified](#) on behalf of CPJ about the U.S. treatment of journalists).

By giving approval for the military to detain journalists on vague national security grounds, the manual is sending a disturbing message to dictatorships and democracies alike. The same accusations of threats to national security are routinely used to put journalists behind

bars in nations including China, Ethiopia, and Russia to name [just a few](#).

The message the manual sends to U.S. forces may have serious repercussions for press freedom and conflict journalists for years to come. By simply declaring a journalist an “unprivileged belligerent,” military commanders may now well claim the right to be able hold journalists for long periods outside the normal laws of war.

Frank Smyth is CPJ’s senior adviser for journalist security. He has reported on armed conflicts, organized crime, and human rights from nations including El Salvador, Guatemala, Colombia, Cuba, Rwanda, Uganda, Eritrea, Ethiopia, Sudan, Jordan, and Iraq. Follow him on Twitter [@JournoSecurity](#).

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