Court-Martialing Civilians Who Accompany the Armed Forces

By Michael J. Davidson

For the first time since the Vietnam War, military jurisdiction extends to civilians who accompany American military forces overseas during periods short of a declared war. Under current law, civilians serving with or accompanying the armed forces during a contingency operation are subject to court-martial, and the Army has already conducted its first court-martial under this expanded authority. The military's expanded jurisdiction over civilians has deep historical roots, but for this expanded jurisdiction to survive judicial scrutiny it must first run a gauntlet of unfavorable Supreme Court precedent.

In 2006, Congress passed legislation that subjected civilians to court-martial jurisdiction during periods short of declared war. Shortly thereafter, on June 22, 2008, the Army obtained its first court-martial conviction against a civilian contractor. Although this conviction may cause some consternation within the defense contractor community, the incident is hardly an unprecedented event. Throughout most of American history, civilians accompanying the armed forces into a theater of war have been subject to military jurisdiction. It was only in relatively modern times that military commanders have been denied this legal authority.

Although the U.S. Supreme Court has narrowed military jurisdiction over civilians, particularly over civilians performing nonmilitary functions during peacetime, the Court has not foreclosed the application of military jurisdiction over civilians in an area of actual hostilities. With the recent expansion of military jurisdiction over civilians accompanying the armed forces during contingency operations—along with the military's apparent willingness to exercise that authority—the limits of the military's jurisdiction are likely to be tested.

Historical Background

Civilians have been subject to military jurisdiction since the founding of the nation. Article XXIII of the British Articles of War that were in force in 1775 provided the following: "All Sutters and Retainers to a Camp, and all persons whatsoever serving with Our Armies in the Field, though no inlisted Soldiers, are to be subject to orders, according to the Rules and Discipline of War." During the Revolutionary War, the Continental Army adopted an Article of War applying to civilians that mirrored the British version, and at least one civilian was convicted by court-martial of corresponding with the enemy. Civilians were considered subject to military jurisdiction during the War of 1812, and in 1818 General Andrew Jackson convened a court-martial that convicted a civilian for aiding the enemy.[1]

During the same time period, the French subjected their civilian contractors to military law during the Napoleonic wars. Experience taught the French military that "it was necessary to subject the contractors to martial law to prevent their committing frauds, and to make them expeditious and prompt in the performance of their engagements."[2]

The American Civil War saw civilians subject to both military commissions and courts-martial. During that time, more than 83,000 courts-martial were convened, compared to approximately 4,500 military commissions, which operated primarily in the border states.[3] Several legal vehicles were employed to extend military jurisdiction to civilians. In 1862, Congress passed legislation that subjected to military jurisdiction defense contractors, quartermaster department inspectors, and employees of the Bureau for the Relief of Freedmen and Refugees.[4] The 1862 legislation extended court-martial jurisdiction over contractors who provided supplies, arms, or ammunition to the Army and Navy and provided for im-

prisonment for any contractor convicted of "fraud or willful neglect of duty."[5] In his seminal treatise on military law, Col. William Wintrop reported at least 19 courts-martial of Army contractors for various "frauds, neglects."[6] One such court-martial was that of William H. White, who was subjected to a court-martial for supplying approximately 50,000 defective haversacks. White and his associates had been awarded a contract to produce haversacks, but the goods they delivered were too small and defective (the straps were improperly sewn on). A court-martial convicted White of neglect of duty and fined him $3,000.[7]

In addition, Congress reacted to reports of widespread fraud by defense contractors by enacting the False Claims Act.[8] Defense contractors "sold the Union Army decrepit horses or mules in ill health, faulty rifles and ammunition, and rancid rations and provisions among other unscrupulous actions."[9] Included in the proposed legislation was a provision that would subject civilian contractors who committed fraud to military jurisdiction; however, after some debate, this provision was dropped.[10]

In his treatise, Col. Wintrop notes further that, in addition to contractors, the Army exercised court-martial jurisdiction pursuant to the Articles of War over "retainers to the camp," which included officers' servants and camp followers, such as sutlers (that is, civilian provisioners to the Army) and their employees, newspaper correspondents, and telegraph operators. More frequently court-martialed under the Articles of War were "[p]ersons serving with the armies in the field"—that is, "civilians in the employment and service of the *government*," including "civilian clerks, teamsters, laborers and other employees of the different staff departments, hospital officials and attendants, veterinaries, interpreters, guides, scouts and spies, and men employed on transports and military railroads and as telegraph operators. …" This Article of War was strictly construed. According to Wintrop, it was insufficient that the civilian was employed by the government within a theater of war, the individual had to be "*serving with the army*," as contemplated by the Articles of War.[11]

In the wake of the Civil War, the U.S. Supreme Court decided *Ex parte Milligan,*[12] which narrowed the application of military jurisdiction over civilians. In *Milligan*, the Court overturned the conviction of a citizen of Indiana whom a military commission sitting in Indiana convicted of conspiring against the United States, providing aid and comfort to the enemy, inciting insurrection, undertaking disloyal practices, and violating the laws of war. The Court determined that military commissions had no jurisdiction over civilians outside the "theater of active military operations" when the local courts were open and functioning.

However, civilians remained subject to military jurisdiction, which was exercised during the wars against the Indians. Indeed, in 1871, the attorney general posited that the Articles of War extended to civilians in New Mexico who had been apprehended for providing ammunition to hostile Indians.[13]

The military continued to exercise jurisdiction over civilians during World War I. However, the Army did not limit the exercise of its jurisdiction to civilians in an actual theater of war. Article 2(e) of the Articles of War provided the authority for such courts-martial, subjecting the following cases to military jurisdiction:

> All retainers to the camp and all persons accompanying or serving with the armies of the United States *without* the territorial jurisdiction of the United States, and *in time of war* all such retainers and persons accompanying or serving with the armies of the United States in the field, *both within and without* the territorial jurisdiction of the United States though not otherwise subject to the Articles of War.[14]

In *Hines v. Mikell*,[15] the U.S. Court of Appeals for the Fourth Circuit upheld military jurisdiction over a civilian auditor employed at Camp Jackson in South Carolina—an Army camp that had been established to train soldiers prior to deployment overseas. Focusing on the Army's "activity," rather than its "locality," the court determined that Mikell was serving with the Army "in the field" for Article 2 jurisdiction to attach, even though he was not in the actual theater of operations.

In comparison, the Navy followed the "Articles for the Government of the Navy," which did not possess an article that mirrored the Army's version and, accordingly, limited its jurisdiction to "all civilians attached to the naval forces of the United States in the actual theater of war. …"[16] The Army and Navy continued to follow separate articles until the Uniform Code of Military Justice (UCMJ) was enacted in 1951.

At least two contractors unsuccessfully challenged court-martial jurisdiction on constitutional grounds. In *Ex parte Falls*,[17] the chief cook of a ship that was used to transport supplies for the U.S. Army Transport Service deserted while the ship was docked in Brooklyn, N.Y., and subsequently challenged the authority of an Army court-martial to try him for attempted desertion. The court determined that the civilian cook was "a person 'serving with the armies of the United States in the field'" for purposes of Article 2. Further, the court rejected the defendant's argument that a court-martial violated his Fifth Amendment right to "a trial by jury on a presentment or indictment by a grand jury," reasoning that "[t]his amendment in excepting 'cases arising in the land or naval forces' in effect says that in cases arising in those forces a person may be held to answer to a capital or otherwise infamous crime without a presentment or indictment by a grand jury; in other words, such cases may be dealt with according to military law." The court also noted that Article 1, § 8 of the Constitution provides Congress with the "power 'to make rules for the government and regulations of the land and naval forces,'" and Congress exercised that power when it enacted Article 2, which determines who is subject to military jurisdiction, and Article 58, which made desertion a crime.

In *Ex parte Gerlach*,[18] a seaman returning to the United States after having served on a military transport steamship volunteered to stand watch on the returning Army transport as it crossed the Atlantic Ocean, but he later refused to continue performing watch duties. For refusing the order of the Army officer in command of the ship to continue

standing watch, Gerlach was convicted at court-martial for disobeying the order, and he was sentenced to five years of incarceration. The court determined that Gerlach was voluntarily serving with the Army at the time he disobeyed the order and that he was "in the field" for purposes of Article 2, interpreting that term to mean "any place, whether on land or water, apart from permanent cantonments or fortifications, where military operations are being conducted." The court also noted that the Army transport ship was in peril from submarines at the time.

Upholding the constitutionality of the Articles of War, the court determined that they were enacted pursuant to Congress' general war powers authority found in Article 1, § 8 of the Constitution. In addition, the court posited that the Articles of War "ought to be given a broad scope in order to afford the fullest protection to the nation," and that such power was reasonably exercised under the particular circumstances of this case.

Court-martial records from World War II reflect numerous instances in which the Army exercised jurisdiction over civilians under the authority of Article 2. Relatively prevalent among such cases were civilians serving on Army transport vessels. For example, in *United States v. Bosnich*,[19] a seaman "serving with the Armies of the United States in the field, along the lines of communication on board the United States Steamship George G. Crawford" was convicted of assault with the intent to commit manslaughter after shooting his roommate aboard ship while the ship was docked in Belfast, Ireland. Similarly, in *United States v. Harris*,[20] a seaman serving on a U.S. steamship was convicted of killing a shipmate while the ship was docked in Brindisi, Italy.

In re Berue,[21] involved a merchant seaman who filed a petition for habeas corpus after a court-martial convicted him of engaging in certain misconduct while serving on a United States ship that was assigned to the Army but operated by a private corporation. The misconduct occurred while the ship was part of a convoy bound for Casablanca. The federal district court held that Berue was "a person 'accompanying or serving with the Armies of the United States in the field'" and upheld the court-martial's jurisdiction.

Seamen were not the only civilians subjected to military jurisdiction, however. In *United States v. Acosta*,[22] a civilian aircraft engine mechanic serving with the Army in England was convicted of petty larceny and interfering with the mail. Further, in *United States v. Lang*,[23] a civilian accountant with the Army Exchange Service working in France was convicted of various offenses involving forged documents.

Contractors accompanying our military forces overseas also fell under the military's jurisdiction. In *United States v. Kendrick*,[24] an employee of the Philco Corporation providing technical assistance on radar used by antiaircraft units in France was convicted of larceny. In *Perlstein v. United States*,[25] the U.S. Court of Appeals for the Third Circuit upheld the court-martial jurisdiction under Article 2 over an Army contractor working in Eritrea who had been convicted of various offenses associated with his theft of jewelry. In addition, the Army's *Bulletin of the Judge Advocate General of the Army* 357 (Dec. 1942) reported that a contractor doing construction on an Army-leased base overseas was court-martialed for advising "his fellow employees to slow down their work."

During the Korean War, two civilian crew members of a ship operated by the U.S. Army were convicted at court-martial of premeditated murder that had been committed while the ship was docked in Kyushu, Japan.[26] Jurisdiction was premised on Article 2 of the Articles of War as "persons serving with the armies of the United States without the territorial limits of the United States." In comparison, a merchant seaman in Japan in 1946 was determined not to be subject to military jurisdiction because his ship was not "owned by, or allocated to, the Army, or under Army control or carrying military personnel or cargo."

Even after the war in Korea ended, civilians accompanying the military remained subject to military jurisdiction. In 1958, the Army charged an employee of the Vinnell Corporation with two specifications of Article 92 of the UCMJ for "wrongfully dealing in and exchanging Military Paper Certificates, United States Currency, for Korean Hwan." The civilian employee was a U.S. citizen who was working on a contract that "included the operation and maintenance of power systems for the distribution of electric power to Army facilities. …" Military jurisdiction was based on Article 2 of the UCMJ, which extended jurisdiction to "persons serving with, employed by, or accompanying the armed forces outside the United States."[27] After rejecting a motion to dismiss the case for lack of jurisdiction, the court convicted the contractor and sentenced him to a fine of $1,200. However, the convening authority (the commanding general) did not approve the conviction and ordered the charges to be dismissed after determining that the general regulation that the employee had violated was not in effect at the time of the misconduct that was charged.[28]

In the 1950s, the U.S. Supreme Court began to narrow the application of military jurisdiction over civilians. In 1956, in *Reid v. Covert*,[29] the Court heard the appeals of two military spouses who had been convicted at courts-martial of killing their husbands who had been on active military duty in England and Japan, respectively. Finding that military jurisdiction did not extend to these military spouses, the Court held that "the Constitution in its entirety" was applicable, and the Court also determined that "their courts-martial did not meet the requirements of Art. III, § 2, or the Fifth and Sixth Amendments."

The Court did not completely close the door on military jurisdiction, however. Declining to "precisely define the boundary between 'civilians' and members of the 'land and naval Forces,'" the Court "recognize[d] that there may be circumstances where a person could be 'in' the armed forces for purposes of [Article I, § 8] Clause 14 even though he had not formally been inducted into the military or did not wear a uniform." (Clause 14 "empowers Congress '[t]o makes Rules for the Government and Regulation of the land and naval forces.'") In addition, the Court addressed the earlier rulings that had upheld military jurisdiction over civilians "'in the field' during *time of war*" as resting on the government's "war powers." The Court recognized the

broad powers of military commanders in "the face of an actively hostile enemy" and noted that such "extraordinary circumstances present in an area of actual fighting have been considered sufficient to permit punishment of some civilians in that area by military courts under military rules."

In 1960, the Supreme Court further restricted military jurisdiction over civilians. In *Kinsella v. United States ex rel. Singleton*,[30] a case involving a noncapital crime, the Court determined that the exercise of military jurisdiction over the dependent spouse of a soldier stationed in peacetime Germany was unconstitutional. The Court rejected any distinction between capital and noncapital offenses for purpose of Clause 14 and looked to the status of the defendant for purposes of determining the application of military jurisdiction. Citing the decision in *Covert*, the Court posited that the "test for jurisdiction … is one of status, namely, whether the accused in the court-martial proceeding is a person who can be regarded as falling within the term 'land and naval Forces.'"

In the companion case of *Grisham v. Hagan*,[31] the Court reversed the court-martial conviction, for unpremeditated murder, of an Army civilian employee who was attached to an Army base in peacetime France at the time of the misconduct. Determining that the issue was "controlled by *Reid v. Covert*," the Court rejected military jurisdiction over Grisham, finding no distinction between a civilian dependent of the military and a civilian employee. As one noted jurist has opined, these two cases "sounded the death knell of court-martial jurisdiction over civilians accompanying the Armed Forces overseas in nonbattle areas in peacetime."[32]

The Vietnam War marked the end of military jurisdiction over civilians. American military forces in Vietnam increasingly relied on contractor support; with the rising presence of contractors came a concomitant rise in related crimes. In *Vietnam Studies: Law at War, Vietnam 1964–1973*,[33] Army Judge Advocate General Maj. Gen. George S. Prugh grouped the misconduct into three general categories: "rowdyism, abuse of military privileges, and black market activities and currency manipulation." However, by 1967, the increased seriousness of crimes committed by U.S. civilians in Vietnam caused the military to press the State Department for a change in policy concerning the exercise of military jurisdiction over civilians. Prugh explained that, prior to that time, contractors' misconduct was dealt with primarily through "administrative measures, such as withdrawing military privileges or loss of employment. …"

By August 1967, three American civilians—including two American contractor employees who were charged with negligent homicide and aggravated assault—were waiting to be tried by Vietnamese authorities. After a seaman, James Latney, was arrested for homicide, the American Embassy in Vietnam contacted Marine Corps authorities, expressing concern that another American civilian would be prosecuted by the Vietnamese government and that such prosecutions would become standard practice.[34] Eventually, the U.S. Military Assistance Advisory Command requested permission from the State Department to exercise court-martial jurisdiction over 16 civilians, only four of whom went forward to trial.

One such case involved James Latney, an American civilian seaman from a Military Sea Transportation contract ship, who had stabbed a shipmate while in Vietnam. Jurisdiction over Latney was predicated on Article 2 as "a person accompanying the Armed Forces in the field in time of war." Charged with premeditated murder, Latney was convicted of unpremeditated murder. In *Latney v. Ignatius*,[35] the U.S. Court of Appeals for the District of Columbia Circuit reversed the ruling. In a brief and fact-specific opinion, the court determined that the "spirit" of existing Supreme Court precedent—including the "service-connected" test from *O'Callahan v. Parker*,[36] reversed by *Solorio v. United States*[37]—"preclude[d] an expansive view of Article 2(10) of the [UCMJ]" and, under the specific facts, before the court, Article 2 did not apply to the civilian seaman.

The pivotal court-martial to come out of the Vietnam experience was that of William Averette, a civilian working for an Army contractor in Vietnam. In *United States v. Averette*,[38] the accused challenged his court-martial convictions of "conspiracy to commit larceny and attempted larceny of 36,000 U.S. government-owned batteries" and his sentences of a $500 fine and "confinement at hard labor for one year." The U.S. Court of Military Appeals reversed Averett's convictions, holding that "the words 'in time of war' mean, for purposes of Article 2(10) … a war formally declared by Congress."

Without military criminal jurisdiction over civilian contractors, American authorities relied on a form of administrative debarment to deal with contractors' misconduct by prohibiting further employment by any U.S. contractor in Vietnam. By war's end, "943 contractor employees had been debarred."[39]

The Rise of Contracted Armed Forces

During the recent conflicts in Iraq and Afghanistan, use of contractor employees on the battlefield has reached unprecedented levels. By September 2007, "over 196,000 contractor personnel [were] working for the Defense Department in Iraq and Afghanistan,"—a force larger than the U.S. military force in those countries.[40] Figures from 2008 place the number of Defense and State Department contractors at 265,000, with approximately half of them Iraqis.[41] In addition, these two departments employed some 11,000 private security contractors to provide services in Iraq, and the government has estimated that replacing these contractors would require the equivalent of nine Army brigades.[42]

In comparison, during the first Gulf War, approximately 9,200 contractors were deployed to support U.S. forces.[43] In 1969, during the high point of the American military presence in Vietnam, the United States had 540,000 military personnel in the country but only 1,100 civilian employees of the Department of Defense and 9,000 U.S. civilian contractor employees.[44] By any standard, the current reliance on contractor support within the actual theater of operations is unprecedented.

Perhaps equally significant to the expanded number of contractors on the battlefield has been the expanded roles

they perform. Not only have contractors worked as interpreters and advisers and assumed a large portion of the military's logistical functions, but they also have been hired to fill more controversial roles, such as security guards, bodyguards, and interrogators.

Despite the general unease expressed about the current reliance on contractors, the armed forces are unlikely to reduce their reliance on contract personnel significantly—either in the near term or during future protracted wars. As one commentator recently noted in the military periodical, *Parameters*, the Army's reorganization of its force structure after the end of the Cold War resulted in the reduction of support forces, which became an acute problem when the Iraq war developed into a long-term insurgency and the Army began to assume logistical support missions to the Air Force and Marine Corps and also to deploy National Guard units, which lacked adequate support forces. The solution was a dramatically increased use of contractors, and the Army's leadership has not disavowed its dependence on them. The author of the article opined that the Army's developing strategy for future conflicts as well as for associated force structure necessitates a continued reliance on contractors for support.[45]

The Amended UCMJ

Prior to the amendment made to the Uniformed Code of Military Justice, only a handful of legal mechanisms existed for prosecuting civilians who accompany the armed forces and, accordingly, legal action was rarely taken. Contractors in Iraq were immune from prosecution under Iraqi law. Although rarely exercised, Article 2(4) still extends military jurisdiction to certain retired members of the armed forces, including those serving in a civilian capacity with the armed forces overseas. Federal prosecutors could use the handful of criminal statutes that specifically provide for extraterritorial jurisdiction, such as 18 U.S.C. § 1119 (foreign murder of U.S. nationals). In a limited number of cases, the courts have inferred extrajurisdictional application of certain laws.[46] In *United States v. Bowman*,[47] for example, the Supreme Court found extraterritorial application of laws prohibiting false claims and fraud against the United States.

Title 18, U.S. Code, § 7 provides for limited jurisdiction over certain crimes committed within the "special maritime and territorial jurisdiction of the United States." However, for jurisdiction to attach, the crime must generally be committed in the following settings:

- on the "high seas" or "within the admiralty and maritime jurisdiction of the United States";
- on a U.S. vessel;
- on "lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof";
- in a U.S. aircraft flying over the high seas;
- on a spacecraft;
- at a place outside any other nation's jurisdiction involving an offense against a U.S. national; or
- on a foreign vessel departing from or arriving in the United States.

Beginning in 1996, Congress began to expand federal jurisdiction over crimes related to the battlefield. The War Crimes Act of 1996[48] extended federal jurisdiction to United States nationals who committed a war crime as defined by the act, "whether inside or outside of the United States. …" Significantly, no requirement for a declared war exists under this statute. Next, the Military Extraterritorial Jurisdiction Act of 2000[49] expanded the scope of federal jurisdiction to persons "employed by or accompanying the Armed Forces of the United States" for misconduct constituting a felony if it had been committed "within the special maritime and territorial jurisdiction of the United States." Section 3267(1)(A)(ii)(II) of the act broadly defines the term "employed by the Armed Forces outside the United States" to include not only Defense Department contractors but also "a contractor [of] any other Federal agency, or any provisional authority, to the extent such employment relates to supporting the mission of the Department of Defense overseas. …" Finally, the 2001 USA PATRIOT Act[50] further extended the federal jurisdiction of U.S. nationals who committed crimes on U.S. "missions or entities."

Although these legal mechanisms existed to address contractors' misconduct in Iraq and Afghanistan, they were rarely exercised in practice.[51] In January 2008, a nonprofit organization, Human Rights First, released a report criticizing the Department of Justice for failing to complete "a single prosecution of private contractor personnel implicated in the deaths of Iraqi civilians."[52] As of April 2008, the Justice Department reported that it had formally pursued only a total of 12 cases under the Military Extraterritorial Jurisdiction Act, and this number included prosecutions brought against contractor employees and civilian employees of the Defense Department from Japan, Qatar, and Iraq, for such crimes as abusive sexual assault and child pornography.[53] At least one commentator attributes the low number of cases to the difficulties inherent in gathering evidence in a war zone by a civilian prosecutor located in the United States—a challenge that the Justice Department has acknowledged.[54]

The Department of Justice has achieved some success—albeit limited success—in this area. As early as 2006, the department conducted a successful prosecution of a CIA contractor for assaulting a detainee during an interrogation in Afghanistan.[55] Most recently, the Justice Department obtained indictments under the Military Extraterritorial Jurisdiction Act against contract guard employed by Blackwater as a result of the shootings in Nisour Square that killed 17 Iraqis in 2007—the first such use of the act against individuals who were not Defense Department contractors.[56] However, it is unclear whether the Military Extraterritorial Jurisdiction Act applies to the Blackwater guards, because they were employed by the State Department rather than the Department of Defense, although the prosecutors posit that the act is extended "to include contractors 'supporting the mission of the Department of Defense.'"[57]

Finally, the John Warner National Defense Authorization Act for Fiscal Year 2007 contained a provision expanding the jurisdiction of the Uniformed Code of Military Justice over civilians who accompany the armed forces by extend-

ing jurisdiction beyond declared wars to include contingency operations. Pub. L. No. 109-364, 120 Stat. 2083, § 552 (Oct. 17, 2006). Article 2(10) of the UCMJ now provides that "[t]he following persons are subject to [the UCMJ]: … [I]n time of declared war or contingency operations, persons serving with or accompanying an armed force in the field."[58] A contingency operation is defined by 10 U.S.C. § 101 (13) as—

> a military operation that … is designated by the Secretary of Defense as an operation in which members of the armed forces are or may become involved in military actions, operations, or hostilities against an enemy of the United States or against an opposing military force; or … results in the call or order to, or retention on, active duty of members of the uniformed services under [various statutory authorities] or any other provision of law during a war or during a national emergency declared by the President or Congress.

The first court-martial conviction to occur under this expanded authority involved Alaa Mohammad Ali, an Army contractor employee who worked as an interpreter in Iraq and was initially charged with aggravated assault after stabbing another interpreter; the accused ultimately pled guilty "to wrongfully appropriating a knife owned by a U.S. soldier; obstructing justice by wrongfully disposing of the knife after it was used in a fight with another interpreter; and making a false official statement to military investigators." Because the accused held dual Canadian and Iraqi citizenship, this factor reportedly contributed to the decision to subject him to court-martial.[59]

The scope of the UCMJ's jurisdiction and the military's implementation of its newly found jurisdiction has yet to be fully developed. The military has historically been selective in applying military jurisdiction to civilians, and it appears likely that today's military leadership will follow a similar policy.

Conclusion

The recent expansion of military jurisdiction over civilians accompanying American forces on the battlefield is hardly unprecedented. The military necessity for the exercise of such jurisdiction throughout American military history continues to resonate on today's battlefields in Iraq and Afghanistan. The military's expanded jurisdiction represents a sorely needed tool that military commanders on the battleground can use to deter, control, and address contractors' misconduct, particularly when the local country's judicial system is nonexistent or unavailable. As the hostilities in Iraq and Afghanistan demonstrate, the U.S. federal criminal system is not as well equipped as the military justice system to respond to criminal violations by contractors in a theater of war. Because military investigators, attorneys, and legal support personnel are often co-located with combat forces, the military justice system travels with the troops and is better able to investigate crimes, gather evidence, and bring a contractor to trial in a timely manner.

No doubt, the expansion of military jurisdiction will be challenged along a broad spectrum. The media and the American public are likely to cast a jaundiced eye on the application of the military justice system to an American contractor employee.[60]

Moreover, expanded military jurisdiction will eventually be challenged in court in terms of both its constitutionality and its scope. However, when modern courts review these issues, the courts will not be writing on a blank slate. Although military jurisdiction over civilians during peacetime has been largely foreclosed, the same cannot be said of military jurisdiction over civilians on an active battlefield. A small body of case law from the World War I era has upheld the constitutionality of military jurisdiction over civilians—at least during periods of active hostilities—and Supreme Court precedent appears to suggest that such narrow jurisdiction may be constitutional.

Also, as earlier case law suggests, the phrase "serving with or accompanying an armed force in the field" may reach more than Defense Department civilian employees or those employed by the department's contractors. As suggested by *Gerlach* and *Reid*, a reasonable interpretation of the term "in the field" should include an area in which "military operations are being conducted"—that is, where "actual fighting" is taking place, such as in Iraq or Afghanistan. Individuals who are not Defense Department contractors may be deemed to be serving with or accompanying the armed forces when they are physically located with the armed forces in a combat area, such as contractors who are working at forward military bases, are accompanying military forces into actual or anticipated combat, or are traveling in a convoy under the protection and direction of a military escort.

Finally, some civilian contractors function more like soldiers than like civilians, and these contractors may be deemed to be part of the land and naval forces of the United States for constitutional purposes. Many contractors in Iraq and Afghanistan perform traditional military functions, are not readily distinguishable in appearance from U.S. military forces, and even engage in combat with the enemy. These contractors differ markedly from military dependents living on a base overseas or from a contractor or federal employee performing administrative duties for the Department of Defense in a peacetime environment. **TFL**

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Endnotes

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[2]James B. Helmer Jr., False Claims Act: Whistleblower Litigation 2–4, 39 (3rd ed. 2002).

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[4]Wintrop, *supra* note 1, at 98 n.83.

[5]James Nagle, A HISTORY OF GOVERNMENT CONTRACTING 202 (1992).

[6]Wintrop, *supra* note 1, at 98 n. 83.

[7]Lowry, *supra* note 3, at 223. On Jan. 13, 1864, President Lincoln approved the conviction.

[8]False Claims Act Amendments Act of 1986, S. Rep. No. 99-345, at 8, reprinted in 1986 U.S.C.C.A.N. 5266, 5273.

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[12]71 U.S. (4 Wall.) 2, 6 (1866).

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[26]*United States v. Fernandez and Pantorilla*, 12 B.R.-J.C. 183 (1951).

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[28]Roger J. Miner, *The Last Civilian Court-Martial and its Aftermath*, 67 OHIO STATE L.J. 401, 407, 418, 422–423, 424 (2006).

[29]354 U.S. 487 (1956).

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[31]361 U.S. 278 (1960).

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[33]Maj. Gen. George S. Prugh, VIETNAM STUDIES: LAW AT WAR, VIETNAM 1964–1973, at 108–109 (1975).

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[37]483 U.S. 435 (1986) (adopting a status test).

[38]19 U.S.C.M.A. 363, 41 C.M.R. 363 (1970).

[39]Solis, *supra* note 34, at 168.

[40]Walter Pincus, *U.S. Cannot Manage Contractors in Wars, Officials Testify on Hill*, WASH. POST, at A5 (Jan. 25, 2008).

[41]Mark Cancian, *Contractors: The New Element of Military Force Structure*, PARAMETERS 62 (2008).

[42]U.S. Government Accountability Office, "Rebuilding Iraq," Report No. GAO-08-966, at 1 (July 2008) ("9,952 with DOD, 1,400 with the State Department").

[43]Renae Merle, *Census Counts 100,000 Contractors in Iraq*, WASH. POST, at D1 (Dec. 5, 2006).

[44]Prugh, *supra* note 33, at 88.

[45]Cancian, *supra* note 41, at 67–69, 70.

[46]*See* John De Pue, *Fundamental Principles Governing Extraterritorial Prosecutions: Jurisdiction and Venue*, 55 U.S. ATTORNEY'S BULLETIN 1, 4–5 (March 2007).

[47]260 U.S. 94, 98 (1922).

[48]18 U.S.C. § 2441.

[49]18 U.S.C. §§ 3261 et seq.

[50]Pub. L. No. 107-56, 115 Stat. 272 (codified at 18 U.S.C. § 7(9)).

[51]Cancian, *supra* note 41, at 71 ("personal misconduct by contractors was not punished in practice"); *see* Glenn Schmitt, *Hold Contractors Accountable*, ARMY TIMES 54 (Nov. 26, 2007) ("MEJA has been used successfully, but only sporadically since 2000 … "very few contractors have been brought to trial for any crime, however serious").

[52]Geoffrey Emeigh, *Group Faults Justice for Not Prosecuting Security Contractors for Criminal Misconduct*, FEDERAL CONTRACTS REPORT 57 (Jan. 22, 2008).

[53]*Closing Legal Loopholes: Prosecuting Sexual Assaults and Other Violent Crimes Committed Overseas by American Civilians in a Combat Environment, Before the Senate Committee on Foreign Affairs* 3 (April 9, 2008).

[54]Marc Lindemann, *Civilian Contractors Under Military Law*, PARAMETERS 83, 87 (Autumn 2007) ("evidentiary difficulties facing stateside civilian prosecutors with regard to criminal investigations in overseas combat zones"); *Closing Legal Loopholes: supra* note 53, at 4 ("investigating and prosecuting serious crimes in Iraq and Afghanistan are very challenging").

[55]Josh White and Dafna Linzer, *Ex-Contractor Guilty of Assaulting Detainee*, WASH. POST, at A8 (Aug. 18, 2006).

[56]Ginger Thompson, *Plea by Blackwater Guard Helps U.S. Indict 5 Others*, N.Y. TIMES at A10 (Dec. 9, 2008). The guards were operating under a contract with the State Department; *see* Del Quentin Wilber, *Judge Refuses to Dismiss Charges Against Blackwater Guards*, WASH. POST, at A5 (Feb. 18, 2009) (jurisdictional issue to be resolved after prosecutors present their case).

[57]Del Quentin Wilber, *Blackwater Guards Indicted in Deadly Baghdad Shooting*, WASH. POST, at A3 (Dec. 6, 2008).

[58]U.S. MANUAL FOR COURTS-MARTIAL, Appendix. 2 (2008) (citing 10 U.S.C. 802(a)(10)).

[59]*Civilian Pleads Guilty at Court-Martial: First Prosecution Under Amended UCMJ*, 77 U.S. LAW WEEK (BNA) no. 1, at 2003 (July 1, 2008).

[60]*See* William Matthews, *Convincing Juries is One Thing: General Public is a Harder Sell*, AIR FORCE TIMES 13 (May 31, 1999) (media generally portrays the military justice system unfavorably).