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On Law, Wars, and Mercenaries:  
The Case for Courts-Martial Jurisdiction over  
Civilian Contractor Misconduct in Iraq  

Wm. C. Peters*  

I. OPENING  

[N]ot one private military contractor has been prosecuted or  
punished for a crime in Iraq (unlike the dozens of U.S. soldiers  
who have), despite the fact that more than 20,000 contractors have  
now spent almost two years there. Either every one of them  
happens to be a model citizen, or there are serious shortcomings in  
the legal system that governs them.¹  

Two weeks before the collapse of Baghdad during the Iraqi  
campaign of the U.S.-led global war against radical Islamists,² the  

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of this Article. Any errors in content, clarity, or organization of the finished product, of course,  
remain my own. The author serves with the rank of major in the Judge Advocate General’s  
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Advocate General’s School of the Army. The views presented in this Article are solely the  
author’s; they do not represent the position of the Department of Defense, the U.S. Army and  
its legal branch, or any particular commanding officer.  

¹. P.W. Singer, Outsourcing War, FOREIGN AFFAIRS, Mar./Apr. 2005, at 127. Since  
Singer’s observation a year ago, a U.S. government contractor employed by DynCorp  
International was charged with defrauding the United States through unauthorized  
distribution of identity badges. The badges at issue would have granted those in possession  
access to Baghdad’s Green Zone, the area of the city that includes the U.S. Embassy and  
numerous offices of the Iraqi government. Jerry Markon & Josh White, Contractor Charged in  
offenses that touch corruption in the formulation and administration of defense contracts in  
Iraq have been more actively pursued by the Department of Justice. See James Glanz, Iraqi  
Translator Is Accused of Bribery in Kickback Case, N.Y. TIMES, Mar. 25, 2006, at A6. These  
cases, however, may be distinguished from the nebulous regime of criminal justice applicable  
to civilian contractors that operate day to day alongside of active duty military forces in Iraq.  

². “And those nations that harbor and support them” completes a statement of the  
doctrine. See George W. Bush, U.S. President, Address to a Joint Session of Congress and the
Army’s 173rd Airborne Brigade moved to seize oil fields in northern Iraq. The operation was a tactical effort to preserve resources crucial to a democratic Iraq’s recovery and to prevent Saddam Hussein from again unleashing ecologic terrorism on a mass scale. The 173rd Airborne’s move also served strategically to dissuade a Kurdish independence movement and to block their potential for expansion toward southern regions with a Shia majority—regions that the

American People (Sept. 20, 2001), http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html (“Our war on terror begins with al Qaeda, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped, and defeated.”); see also BOB WOODWARD, BUSH AT WAR 31 (2002). Discounting this early enunciation of the current administration’s war goals, some argue that waging war in Iraq has no relevant link to the terrorist attacks perpetrated by al Qaeda on September 11, 2001. This sanguine view flies in the face of specific U.S. congressional determinations that members of al Qaeda were openly operating within Iraq as of October 2002, and that Iraq continued, at that time, to “aid and harbor other international terrorist organizations . . . that threaten the lives and safety of United States citizens.” Joint Resolution to Authorize the Use of United States Armed Forces Against Iraq, Pub. L. No. 107-243, 116 Stat. 1498, 1499 (2002). In a 2002 address to West Point graduates, President Bush stated, “We must take the battle to the enemy, disrupt his plans and confront the worst threats before they emerge. In the world we have entered, the only path to safety is the path of action.” George W. Bush, U.S. President, Address at West Point Graduation Ceremony (June 1, 2001), http://www.whitehouse.gov/news/releases/2002/06/20020601-3.html; NATIONAL STRATEGY FOR COMBATING TERRORISM 11 (2003), available at http://www.whitehouse.gov/news/releases/2003/02/counter_terrorism/counter_terrorism_strategy.pdf. See generally THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA (2003), available at http://www.whitehouse.gov/nsc/nss.pdf. Refusal to acknowledge any Iraqi-al Qaeda confederacy based on the perceived divergent secular and radical worldviews of both ignores the findings of the bipartisan 9/11 Commission. The Commission found that although no specific operational link between Iraq and al Qaeda was uncovered as to the 2001 attacks on the United States, a shared commonality of purpose led to repeated meetings between al Qaeda and representatives of Iraqi intelligence in both Afghanistan and Iraq throughout the 1990s. See NAT’L COMM’N ON TERRORIST ATTACKS, THE 9/11 COMMISSION REPORT 66 (2004) [hereinafter 9/11 REPORT]. As early as the mid-1990s, al Qaeda’s aspiring caliph, Usama bin Laden, personally met with a high-level Iraqi intelligence official in Khartoum, Sudan, seeking weapons and training for his fighters. Id. at 61. He likely met with Iraqi officials as recently as 1999 when Hussein’s government offered bin Laden safety in the form of Iraqi residency. Id. at 66. A number of careful investigative authors have documented the strong possibility of an Iraqi link to the first New York World Trade Center bombing in February 1993. See STEPHEN F. HAYES, THE CONNECTION (2004); LAURIE MYLROIE, THE WAR AGAINST AMERICA: SADDAM HUSSEIN AND THE WORLD TRADE CENTER ATTACKS (2001). One author reports that the then Director of Central Intelligence, R. James Woolsey, wanted to pursue the possible Iraq connection to that attack but was dissuaded by National Security Council staffers in the Clinton Administration. GERALD FOSNER, WHY AMERICA SLEPT 63 (2003).

Sunni Muslim minority previously dominated politically. Open civil war among Iraqi religious and ethnic factions was not the desired end state of Operation Iraqi Freedom.

Following the early deployment of stabilizing U.S. military forces into Iraq, privatized contractors representing the Department of Defense, individual armed services, and various U.S. government agencies arrived. These contractors initially filled service support roles, such as logistics, and provided an enhanced transportation capability. Over time, however, they came to provide operational functions in limited circumstances. Many contract employees provided their own security elements and organized armed convoy operations over main supply routes through hostile territory; similarly, heavily armed contractors often accompanied active duty soldiers during combat operations, serving as translators and interrogators.4

The existing U.S. legal regime available to address instances of criminal misconduct by such contractors on the battlefield includes the option of both federal district court prosecution and military courts-martial. This Article argues the case that military courts-martial of civilian contractors, particularly for those accused of war crimes and similarly serious offenses, is not only constitutional but also the preferred course of judicial action.

Of the myriad of problems that arise with the increased use of civilian contractors performing military functions during combat operations, some of the more salient are highlighted by the following fictional account. It is late December 2003 and civilian contractors from a Wisconsin-based company called Red River Group-USA comprise all of the translators and more than half of the interrogators at an Army-administered prison northwest of Kirkuk known as the Dokan Pit.5 After a local man with suspected ties to Sunni insurgents


5. This government contract company, named prison facility, its location, oversight, and staff structure are completely fictional, as is the scenario that immediately follows it above.
was detained by a 173rd Brigade patrol for his role in concealing improvised explosive devices along Route Irish, the heavily traveled supply road between Baghdad’s International Airport and the Green Zone, he was promptly transferred to the Dokan Pit. A zealous contract interrogator from Red River Group assumed responsibility for the suspected insurgent.

The detainee was identified as Ahmed Mire Wali. The Army patrol’s combat lifesaver informed the Red River Group contractor that the detainee had suffered numerous injuries, including the likelihood of broken ribs, when he violently resisted capture by U.S. forces. The medic relayed that Wali had not yet received sufficient medical treatment for those injuries. It was late in the day, a light rain was beginning to fall, and both daylight and the temperature were dropping.

After stripping the man and removing his makeshift blindfold fashioned from a sandbag long enough to intimidate him with leashed but unmuzzled attack dogs, the Red River interrogator hosed him down with cold water and struck him forcefully numerous times in his ribs with a heavy metal flashlight. The interrogator then had the detainee chained naked to the floor of his outside holding cell. The interrogator directed junior enlisted soldiers from the Iowa National Guard military police unit on duty to leave him there until questioning would begin the next day. When morning arrived, Mire Wali was found dead, presumably the result of hypothermia.⁶

It is designed solely to highlight the legal issues of criminal jurisdiction inherent in instances of misconduct involving civilians serving with or accompanying U.S. armed forces in the field in time of war. The timeliness and relevancy of the topic is magnified by the recent publication of interrogation rules for the Department of Defense (DOD). The guidelines expressly apply to civilian contractor employees operating “under DoD cognizance.” U.S. DEP’T OF DEF., DIRECTIVE NO. 3115.09, DOD INTELLIGENCE INTERROGATIONS, DETAINEE DEBRIEFINGS, AND TACTICAL QUESTIONING (Nov. 3, 2005).

Although this imagined scenario serves only as backdrop for the legal issues this Article explores, the possibility of similar incidents is apparent from recent perusal of our nation’s newspapers. What criminal charges, if any, could be brought under the circumstances of this hypothetical setting? Against whom could the United States Army proceed criminally, and in what forum? Should the Army’s junior enlisted soldiers be court-martialed for violation of their special orders or dereliction of duty, cruelty and maltreatment, unlawful detention, involuntary manslaughter, or even conspiracy to commit murder? Under what federal statutes or treaty-based law of war might the civilian contractor be charged, and what jurisdictional scheme would govern? Are there any constitutional limitations that require the civilian contractor to be tried in federal district court?

This Article presents the case for courts-martial jurisdiction over a very narrow class of government contractors that includes our Red River Group interrogator. It examines the legal regimes applicable to civilian contractors who commit criminal misconduct while serving with U.S. uniformed military personnel in the field during times of war. The evidence will show that existing statutes provide that federal district courts and military courts have concurrent

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7. Whether to prosecute a given case once the professional ethical obligation is satisfied is always a matter of discretion based on both evidentiary and policy concerns. This article primarily addresses the “how” of prosecutions in a wartime setting with the admitted assumption that there will be at least some incidents worthy of court action arising from a major military deployment where contractors take part in large number. Despite this Article’s opening observation, I refrain from in-depth analysis of why it might be good policy to bring a criminal action in the first instance.


9. See id. § 893.

10. See id. § 897.

11. See id. § 919(b).

12. See id. § 881.

jurisdiction over civilian misconduct occurring in theaters of combat operations.

Historical practice, existing legislation, and the pragmatic realities of our contractor-heavy Iraqi campaign all weigh in favor of using courts-martial jurisdiction over civilian contractors. Existing military case law, primarily the Court of Military Appeals ruling in *United States v. Averette*,15 precludes military jurisdiction over civilians except when war has been expressly declared by Congress. That view, however, is based on outdated and misunderstood Supreme Court precedent as it relates to roles performed by contract civilians today, is inconsistent with other statutory interpretations of “times of war,” and disregards that concerted executive and legislative action is required for engaging in any military campaign, regardless of a formal declaration. Recognizing military court jurisdiction over civilian contractors accompanying combat troops was contemplated by the drafters of the Uniform Code of Military Justice,16 is squarely within the competency of Congress, and does not run afoul of the Fifth or Sixth Amendments.

Two principal options currently exist to rectify the paucity of criminal enforcement actions taken against contractors who operate alongside our active duty forces in the war against Islamist terrorism. First, the Department of Justice could pursue a vigorous agenda to investigate and charge actionable misconduct by civilian contractors engaged in the Iraqi campaign. Second, if military appellate courts or the Supreme Court were to overrule *Averette* or if Congress were to bypass its holding through amendments to existing statutes, military commanders could charge civilian contractors and bring them before courts-martial convened on site in the theater of combat operations.


16. See infra text accompanying note 43.
Despite statutes empowering federal extraterritorial prosecutions and a recent amendment to one of those statutes that makes it expressly applicable to government agency contractors and subcontractors, only one such case has commenced to date, and it derives from conduct in Afghanistan in 2002.\textsuperscript{17}

The first option, federal district court prosecution, has proven ineffective. The government has not charged any misconduct arising from civilian contractor actions taken against detainees of the insurgency in the Iraqi theater despite numerous prosecutions of active duty military service members. Some twenty cases of suspected criminal misconduct by civilian contractors in Iraq were referred to the Department of Justice for prosecution, yet only the one indictment referred to above has actually been filed.\textsuperscript{18} Whether this anomaly is reflective of more pressing domestic concerns at the Department of Justice, the practical expense and difficulty of trying cases arising in very distant locations, or simple evidentiary shortcomings and problems of proof, is beyond the scope of this Article. Recognizing military court jurisdiction over the conduct of civilian contractors in the field could, however, bring to an end this current dearth of federal prosecutions.

This Article makes the case that military commanders can and should charge civilian contractors at courts-martial convened where the crimes are committed under appropriate circumstances. The ability for a commander to regulate the behavior of available forces—active duty or contractor—is critical to maintaining discipline and fostering a unified fighting morale. Admittedly, this step would be highly unusual and would break from recent military practice.\textsuperscript{19} However, the statutory basis, constitutional framework, policy rationale, and practical necessity for just such actions are both available and compelling.

In order for our military to employ the Uniform Code of Military Justice (UCMJ), which already allows for courts-martial

\textsuperscript{17}United States v. Passaro, No. 5:04-CR-211-1 (E.D.N.C. filed June 17, 2004).


\textsuperscript{19}Pursuant to the Staff Judge Advocate’s pretrial advice to a commander prior to convening a general courts-martial, the command’s top legal officer must indicate in writing his or her legal conclusion, inter alia, that a courts-martial would have jurisdiction over the accused and offenses to be tried. \textit{See} 10 U.S.C. § 834(a)(3).
jurisdiction over certain civilians, prosecutors would have to overcome current military case law. This could be accomplished in one of two ways. First, the arraigning military service prosecuting such a case, most likely the Army or Marine Corps, could bring an interlocutory appeal asking the Court of Appeals for the Armed Forces\(^2\) or, if necessary, the Supreme Court to overrule the narrow holding of \textit{United States v. Averette}.\(^1\) This 1970 Court of Military Appeals’ decision is the seminal ruling on the UCMJ’s jurisdictional definition of “time of war.”\(^2\) \textit{Averette}’s holding limits courts-martial jurisdiction over certain civilians to those serving with the force in times of war expressly declared by Congress.

Second, Congress could amend § 802(a)(10) of the UCMJ to provide for courts-martial jurisdiction in instances of misconduct by civilians accompanying or serving with the armed forces in times of armed conflict. The clarification of “armed conflict” in place of “war,” or more specifically, formally declared war, would moot the holding in \textit{Averette} and allow military commanders the power of the courts-martial process to enforce discipline uniformly among all military assets within their respective areas of responsibility.\(^3\)

\(^2\) Military courts-martial results may be appealed first to individual service courts of appeal made up of senior uniformed military judges (Army Court of Criminal Appeals, Navy and Marine Corps Court of Criminal Appeals, and so forth). Appeals are then made to the Court of Appeals for the Armed Forces, composed of civilian judges appointed by the President, which may review appeals from all the armed services. Finally, appeals are made to the United States Supreme Court. Because the holding in \textit{United States v. Averette}, 19 C.M.A. 363 (1970), is binding authority on a military trial court, the defense would undoubtedly move to dismiss any charge against a civilian for lack of jurisdiction. Assuming the trial court granted such a motion, the Government would have seventy-two hours to appeal the constitutional issue. See 10 U.S.C. § 862(a); see also MANUAL, supra note 14, R.C.M. 908.

\(^1\) 19 C.M.A. 363 (1970).

\(^2\) \textit{Id.} The U.S. Court of Military Appeals was subsequently designated the Court of Appeals for the Armed Forces in 1995.

\(^3\) Similar language was proposed as an amendment to the UCMJ through the Fiscal Year 1996 Department of Defense (DOD) Authorization Act. The Department of Justice (DOJ) determined that it was likely an amendment to Article 2(a)(10) of the UCMJ, extending courts-martial jurisdiction over civilians during contingency operations in armed conflict, presented possible constitutional problems and therefore did not support that portion of the proposed amendment. Telephone Interview with John De Pue, former Senior Trial Attorney, Counterterrorism Section, Criminal Div., U.S. Dep’t of Justice (Apr. 7, 2005). Mr. De Pue was the DOJ representative on the panel that considered the amendment. A joint DOJ and DOD Advisory Committee was established with direction to review and make recommendations to Congress before January 15, 1997 “concerning the appropriate forum for criminal jurisdiction over civilians accompanying the Armed Forces in the field outside the United States in time of armed conflict.” National Defense Authorization Act for Fiscal Year
Part II of this Article lays out our case’s evidentiary foundation through the United States’ historical practice regarding civilian misconduct in combat settings and the recent rise of the extensive use of civilian contractors to wage war. In Part III, I articulate my case in chief: the statutory means under which prosecutions of civilian contractors could currently be employed, the judicial decisions that have limited civilian prosecutions in military courts for the last fifty years, and the reason those decisions were wrongly decided or are no longer controlling as to civilian contractors accompanying our forces at war today.

In rebuttal to expected criticism of my theory of the case, and in response to anticipated arguments that courts-martial jurisdiction should not be recognized over our Red River contract interrogator, Part IV argues that creating military court jurisdiction over certain civilians is within Congress’s plenary power. Part IV also deals with likely constitutional objections to recognizing the latent military court jurisdiction over this very narrow class of civilians. It also articulates some pragmatic benefits of using military courts. Finally, in Part V, this Article’s closing concludes that it is simply unacceptable to allow our national system of criminal justice to rightfully punish American soldiers for the very types of crimes for which, to date, alleged civilian perpetrators remain untouched.24

1996, Pub. L. 104-106, §1151, 110 Stat. 186. Regardless of any recommendations generated in that report, it appears that Congress has been satisfied with the Military Extraterritorial Jurisdiction Act and the War Crimes Act, measures that address jurisdiction to try civilians for misconduct occurring overseas but that generally defray a direct courts-martial option. See supra note 13.

24. For example, despite investigations that led to the courts-martial of numerous Army junior enlisted and noncommissioned officers for their crimes at the Abu Ghraib prison complex in Iraq, six civilian contractors implicated as culpable of wrongdoing in the very same investigations remain unindicted in the federal courts as of this writing. For findings of U.S. Army investigations, the Taguba report, and the Jones/Fay report, see MARK DANNER, TORTURE AND TRUTH: AMERICA, ABU GHRAIB, AND THE WAR ON TERROR 302, 424, 426, 447, 509, 518, 520, 522–23, 552 (2004); Singer, supra note 1, at 128; see also Rowan Scarborough, Abu Ghraib Convict Breaks Silence, WASH. TIMES, Apr. 13, 2005, at A5 (soldier convicted at courts-martial implicates civilian contractor in detainee’s abuse). For an overview of the military investigations that have resulted in more than 230 soldiers being punished for detainee abuse, including the Abu Ghraib and other Iraqi-related prosecutions, see A Roll Call of Recent Abuse Cases, WASH. POST, Jan. 16, 2005, at A9; Beating of Iraqi General Alleged in Army Hearing, WASH. POST, Apr. 3, 2005, at A21; Melissa Edy, U.S. Soldier Convicted in Iraqi Shooting Death: Charge Is Reduced to Manslaughter, WASH. POST, Apr. 1, 2005, at A21; Erwin Emery, Army Captain Found Guilty of Assaulting Iraqi Detainees, DENVER POST, Mar. 17, 2005, at A1; Scott Gold, 5 Calif. Guardsmen Face Charges of Abusing Iraqis, L.A. TIMES, Aug. 23, 2005, at A1; Scott Gold & Rone Tempest, Army Probes Guard Unit, L.A. TIMES,
II. FOUNDATION

A. Sutlers in the Ranks

Civilians have accompanied American military forces in the ranks, in the field, and at post, camp, and station since the War of Independence. Not only did family members and servants—identified as “retainers” under the Articles of War during the revolutionary period—travel with the fledgling American forces, specific provisions of law allowed for their discipline by means of military courts-martial. This legal tradition creates the basis for current statutes that allow military court jurisdiction over certain civilians accompanying soldiers in the field during time of war.

Colonel William Winthrop, remembered as the Blackstone of United States military law, observed that under the 63rd Article of War in force during the Revolutionary War, “[a]ll retainers to the camp, and all persons serving with the armies of the United States in the field, though not enlisted soldiers, are to be subject to orders, according to the rules and discipline of war.” Winthrop continued,


25. A sutler is “[a] provisioner to an army post esp. when established in a shop on the post.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 2304 (2002). By definition, sutlers were civilians, serving with but not in the ranks of the uniformed military. They were just one class of numerous civilian members accompanying early American military forces that historically were subject to courts-martial jurisdiction.

26. The term “retainers” included officers’ servants and other categories of camp followers that tended to the army’s needs but otherwise maintained a civilian’s status in their individual capacity. WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 98 (1920).

27. Id.

28. Id.
This provision, which, with some slight modifications, has come down from our original code of 1775, which derived it from a corresponding British article, has always been interpreted as subjecting the descriptions of persons specified, not only to the orders made for the government and discipline of the command to which they may be attached, but also to trial by court-martial for violations of the military code. Protected as they are by the military arm, they owe to it the correlative obligation of obedience; and a due consideration for the morale and discipline of the troops . . . .

In legislation passed during the Ninth Congress’s first session in 1806, Article 63 was renumbered Article 60 and updated by expanding on the language quoted above. Article 60 amended criminal jurisdiction of civilians over sutlers and retainers, adding an additional category for “all persons whatsoever, serving with the armies of the United States.”

Throughout major military expeditions and armed campaigns in U.S. history, civilians accompanying the force have played critical roles. Nearly a quarter of Captain Lewis and Lieutenant Clark’s complement of adventurers were civilian contractors. During the Civil War, civilian family members, correspondents, couriers, teamsters, and quartermasters often swelled the ranks of camps and units on the march. In his memoirs, President Grant recalled that “thousands of employees in the quartermaster’s and other departments,” in addition to garrisoned, uniformed soldiers, were used to strengthen the defense of Nashville and thus allowed Union General Tecumseh Sherman’s march through Georgia to the sea.

The civilian presence with military units continued during the Indian wars on the western plains and in the Dakota Territory. In June 1876, Army cavalry and infantry units assembled to assault the
Lakota Sioux seasonal encampments. The United States’ forces were accompanied by civilian packers with General Crook’s column and a contract surgeon who would die with Custer at the Battle of the Little Bighorn. Shortly before the 7th Cavalry’s historic fight, Custer allegedly threatened to hang a civilian scout for perceived incompetence in reporting the daunting size of the Indian force.

The use of civilian contractors by the military did not end with settlement of the American West. During the Great War in Europe, persons subject to military courts included those civilians accompanying or serving with the forces outside the United States and, given it was a time of war, extended even to those serving with the forces of the United States in the field “within . . . the territorial jurisdiction of the United States.” Under the 1917 Manual for Courts-Martial, contractors serving in such diverse positions as mates on steamships, cooks and watchmen on Army transports crossing the Atlantic, and auditors of quartermaster units at stateside training posts were all subject to military-court jurisdiction.

Throughout World War II, civilian contractors performed certain, limited noncombat duties alongside active duty service members on land and at sea, in combat theaters, and at home stations. Civilian scientists donned military uniforms when conducting operational studies in hostile theaters, while contract civilian engineers and construction personnel were taken prisoners of war.

35. Id. at 276, 283.
36. Id. at 287–88. Civilian guides rode with the Army’s storied 7th Cavalry as late as their last major horseback operation, the March 1916 strike into Mexico in pursuit of Pancho Villa. See Herbert Molloy Mason, Jr., The Great Pursuit 97 (1970).

   PERSONS SUBJECT TO MILITARY LAW . . . [t]he following persons are subject to the Articles of War . . . . (e) [a]ll 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.

Id.
38. Id.; see also infra note 41 and accompanying text.
Courts-Martial for Civilian Contractor Misconduct

war during Japan’s sweep through the South Pacific.\(^{40}\) When contractors serving with the military during both world wars committed crimes, even counsel for those who might oppose the practice of court-martialing civilian contractors today should stipulate that federal courts squarely upheld courts-martial jurisdiction.\(^{41}\)

One of today’s federal statutes that defines military court jurisdiction—10 U.S.C. § 802(a)(10) of the UCMJ—originated in earlier versions of the Articles of War. Section 802(a)(10) provides that “(a) The following persons are subject to this chapter: . . . (10) In time of war, persons serving with or accompanying an armed force in the field.”\(^{42}\) This language is clearly applicable to contractors accompanying our uniformed military, fulfilling military functions, and being employed on military missions in the Iraqi campaign. Certainly, our Red River Group defendant meets all five elements of the statute: in a time of war he is serving with and accompanying an armed force in the field.

During House subcommittee hearings on § 802(a)(10), the Assistant General Counsel of the Office of the Secretary of Defense made very clear that during wartime and while in the field, this provision would allow courts-martial jurisdiction over civilian members of the Red Cross, the Salvation Army, members of church organizations, reporters, civilian employees of the services, and indeed, anyone within a commander’s sphere of operation.\(^{43}\)

\(^{40}\) Id. at 118–19.

\(^{41}\) See Hines v. Mikell, 259 F. 28 (4th Cir. 1919); McCune v. Kilpatrick, 53 F. Supp. 80 (E.D. Va. 1943); In re Di Bartolo, 50 F. Supp. 929 (S.D.N.Y. 1943); Ex parte Jochen, 257 F. 200 (S.D. Tex. 1919); Ex parte Falls 251 F. 415 (D.N.J. 1918); Ex parte Gerlach, 247 F. 616 (S.D.N.Y. 1917). But see Hammond v. Squier, 51 F. Supp. 227 (W.D. Wash. 1943) (holding an improperly convened military commission without jurisdiction to try a civilian seaman for disobeying a naval officer while attached to a merchant ship at sea); Ex parte Weitz, 256 F. 58 (D. Mass. 1919) (holding that driver of automobile employed by construction contractor at Camp Devens that struck and killed a soldier was beyond the jurisdiction of military courts). Perhaps owing to the suddenness of the ground attack in the Korean War and the close proximity of ground combat, less has been recorded about civilians accompanying forces there between 1950 and 1953. However, merchant-mariners delivered U.S. fighting forces to the Korean Peninsula and early logistical response efforts required the United States to contract with Japanese transport ships and crews. See CLAY BLAIR, THE FORGOTTEN WAR 96 (1987).


Congress passed § 802(a)(10) into law with no objections from members of the House subcommittee that examined the statute line by line.44 Surely if the drafters considered Red Cross members and news reporters accompanying a force in wartime to be subject to courts-martial, paid contractors performing military missions and engaging enemy combatants would be.

As we will see in greater detail in Part IV, the necessity for an existing state of war and contractors’ active participation in that endeavor comprise the keystones that allow military courts to try misconduct committed by certain, narrow classes of civilian.

B. The Rise of Privatized Military Firms45

Civilian contractor support to U.S. armed forces during combat operations, though a historical reality down through the years, has increased dramatically since the Vietnam War era. At the high-water mark of U.S. efforts in Vietnam, 550,000 U.S. service members were serving in the war. At the same time, roughly 9000 civilian employees served in support roles through contracts awarded from the Army Procurement Agency, Vietnam.46

Following the Vietnam War, a continual reduction in the number of U.S. military personnel throughout the 1980s and 1990s meant that more civilian contractors would undertake roles formerly occupied by the military. By the mid-1980s, “with a shrinking budget and limited logistical capability, Army planners concluded that contractors were necessary to fill the gaps in the Army’s logistical support plan. The LOGCAP program was born.”47 The Logistics Civil Augmentation Program (LOGCAP) was created to facilitate the use of civilian contractors for short-notice deployment operations. The basic concept was to ensure ongoing readiness for

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44. Id. at 873.
45. The term “privatized military firm” (PMF) and its academic study is perhaps most notably attributed to P.W. Singer, currently the director of the Project on U.S. Policy Towards the Islamic World at the Saban Center for Middle East Policy, The Brookings Institution. See generally P.W. SINGER, CORPORATE WARRIORS: THE RISE OF THE PRIVATIZED MILITARY INDUSTRY (2003).
47. Id. at 237.
the delivery of logistical services “on short notice anywhere in the world in any type of contingency operation or military conflict.”

Today’s “private military industry emerged at the start of the 1990s,” writes the Brookings Institution’s P.W. Singer, and was “driven by three dynamics: the end of the Cold War, transformations in the nature of warfare that blurred the lines between soldiers and civilians, and a general trend toward privatization and outsourcing of government functions around the world.”

The present surge in the use of defense contractors is one result of the Clinton Administration’s accelerated military downsizing policies that began during the first Bush administration. Following the fall of the Soviet Union, the Department of Defense undertook a drastic downsizing of personnel and a reduction in defense spending—this despite the fact that the 1991 Persian Gulf War saw the largest deployment of military forces since Vietnam in support of a conflict unrelated to the former Soviet Empire. This so-called “peace dividend” would ultimately result in a thirty percent reduction of the U.S. active duty force during the 1990s.

During this reduction of active duty strength, military deployments in support of peace-keeping and humanitarian interventions, dramatically increased the services’ operational tempo. Forces were deployed to Somalia, Haiti, the Balkans, and even Florida. Notwithstanding these often overlapping operations, the

48. Id. Shortly after the award of the first LOGCAP procurement, Houston, Texas-based Brown and Root Services Corporation arrived in the failed East African state of Somalia in late 1992 to support Operation Restore Hope. Brown and Root provided construction, food service, laundry, and countless other logistic requirements through the spring of 1995. For much of that period, Brown and Root was the largest single employer in the country, employing some 2500 Somalis. Singer, supra note 45, at 143. From the author’s personal experience during two assignments to Somalia in both early 1993 and through March of 1994, Brown and Root personnel participated in nearly every aspect of military staff planning, if not actual execution. Because of their pervasive presence throughout areas where regional support efforts and combat operations were underway, Brown and Root regularly provided a representative at the Army’s 10th Mountain Division, Quick Reaction Force (QRF) brigade staff calls.

49. Singer, supra note 1, at 120.

50. Id.


52. In the aftermath of Hurricane Andrew’s devastation of much of Florida in 1992, the government deployed thousands of active duty military personnel to support relief efforts and work beside overwhelmed National Guard and FEMA personnel.
Clinton Administration embarked on its “reinventing government” campaign. In conjunction with the passage of the 1998 Federal Activities Inventory Reform Act, which outsourced positions deemed other than inherently governmental when economically efficient to do so, the administration continued military cutbacks. The Secretary of Defense, William Cohen, announced the policy of military streamlining in 1997: “We can sustain the shooters and reduce the supporters—we can keep the tooth, but cut the tail.” Cohen’s announcement “prefaced modern military’s unprecedented reliance on civilian contractors.”

The startling growth in the ratio of contractors compared to active duty service members during overseas deployments demonstrates the policy in practice. During the Gulf War in 1991, slightly more than five thousand contractors helped support half a million troops. In the Balkans, from 1995 to 2000, contractors actually outnumbered active duty forces by three thousand civilian personnel. With approximately 138,000 service members currently serving in the Iraqi Campaign (a number that has remained fairly static over the last three years), an American Bar Association report estimates that there are about thirty thousand U.S. contractors operating in Iraq, or “about 10 times the ratio during the 1991 Persian Gulf conflict.” When foreign workers actively engaged in the reconstruction and oil work are added to the government

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55. Vernon, supra note 51, at 371. This thinking has persisted to compose at least one aspect of Secretary of Defense Rumsfeld’s press for “transformation.” Frederick W. Kagan sharply critiques this business efficiency model and approach to military force structure. He argues that the absence of sufficient uniformed military forces in reserve presupposes that future U.S. conflicts will be waged without significant tactical error, that “excess” personnel will not be required to respond to an enemy’s unexpected counter actions, and that reserves will not be needed to capitalize on battlefield successes. Frederick W. Kagan, The War Against Reserves, NAT’L SECURITY OUTLOOK, Aug. 2005, at 1–5.
56. Vernon, supra note 51, at 374.
57. Id.
contractor mix, the numbers swell as high as 50,000 to 75,000.\textsuperscript{60} If we recall from evidence introduced earlier that fewer than ten thousand civilians supported over half a million troops in Vietnam,\textsuperscript{61} the phenomenon’s picture is complete.

Today, privatized military firms (PMFs) provide an unparalleled breadth of support to the U.S. active duty military force. From providing instructors and manning the day-to-day operations of the Army’s Reserve Officer Training Corps’ programs;\textsuperscript{62} to writing Army Field Manuals;\textsuperscript{63} to teaching career senior Army officers graduate-level courses in the military decision-making process and the details of staff planning;\textsuperscript{64} to providing mail delivery, food service, power generation, water distribution, refueling, and vehicle maintenance and repair in combat zones; PMFs have become indispensable to the United States’ ability to wage war.\textsuperscript{65}

This development is not unique to the United States. On the global level, privatization of the soldier’s calling for profit has resulted in some PMFs taking on actual war-fighting roles. Firms such as “Executive Outcomes, Sandline, SCI, and NFD are the classic examples of this type of privatized military implementers, having run active combat operations in Angola, Sierra Leone, Papua New Guinea, Indonesia, and elsewhere.”\textsuperscript{66}

In 1995, at least one U.S. firm, ostensibly implementing administration objectives in the Balkans that U.S. active duty and United Nations sponsored forces would not pursue, stepped into a training role that proved so effective that some later questioned its propriety.

With the war also going badly for the Serb’s opponents and the UN peacekeeping operation languishing, the basic goal of U.S. policy in the region became to bring the situation to an endgame.

\textsuperscript{60} Max Boot, Commentary, \textit{The Iraq War’s Outsourcing Snafu}, L.A. TIMES, Mar. 31, 2005, at B13.

\textsuperscript{61} See supra text accompanying note 46.

\textsuperscript{62} SINGER, supra note 45, at 123.

\textsuperscript{63} Id.

\textsuperscript{64} Id. at 124.

\textsuperscript{65} Id. at 144. The continuing drain of highly qualified and experienced active duty members to the private military sector continues to concern military personnel managers. See James W. Crawley, \textit{Commandos Leaving In Record Numbers}, WINSTON-SALEM J., July 30, 2005, at A1; Richard Lardner, \textit{Senior Soldiers in Special Ops Being Lured Off}, TAMPA TRIB., Mar. 21, 2005, at 1.

\textsuperscript{66} SINGER, supra note 45, at 93; see also supra note 4.
The concept was to turn the Croats into U.S.’s “junkyard dog”; that is, to strengthen them into a regional enforcer and ally them with the Bosnians, in order to balance Serbian power.

It was at this time that the Pentagon referred the Croatian Defense Minister to MPRI.67

The resulting Croat offensive was not only surprisingly effective operationally, but it “violated the UN cease-fire and created 170,000 new refugees. In addition, numerous reports of human rights violations surfaced in the wake of the offensive, including the murders of elderly Serbs who had stayed behind.”68 Although MPRI has denied any improper role that may have contributed to suspected war crimes violations, the International War Crimes Tribunal at the Hague reportedly contacted the U.S. Defense Department seeking information on the firm.69

Writing in the Spring 2005 edition of *Foreign Affairs*, P.W. Singer divided PMFs into three general categories: (1) military provider firms, sometimes called private security firms, which provide tactical operational support; (2) military consulting firms, most frequently manned by experienced former service members, which offer military advice and training; and (3) military support firms that generally fill logistics, maintenance, and intelligence functions.70 The best evidence thus allows that our case’s fictional Red River Group-USA interrogator71 could be employed by any of these three strands of corporate military organizations currently serving in Iraq.

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67. Singer, supra note 45, at 125 (citation omitted). MPRI refers to Military Professional Resources Incorporated, a Delaware corporation headquartered in Alexandria, Virginia. It is the same privatized military firm the U.S. Army contracted with to provide staff support for courses in military instruction at R.O.T.C. programs at U.S. colleges and universities from 1996 until the Army awarded the contract to COMTek, a different PMF, beginning in fiscal year 2002. The author served as legal counsel to U.S. Army Cadet Command (ROTC) from 2000 to 2002. Government contracts, once awarded, are matters of public record.
68. Id. at 126.
69. Id. at 122–23.
70. Singer, supra note 1, at 120–21.
71. See supra text accompanying note 5.
Three separate statutes—the special maritime and territorial jurisdiction provision, the Military Extraterritorial Jurisdiction Act (MEJA) and its subsequent amendments, and the War Crimes Act (WCA)—currently allow for prosecution in federal district court of U.S. civilian contractors for criminal acts committed in a wartime environment beyond the borders of the United States. Prosecutors can use 18 U.S.C. § 7 to bring misconduct within the purview of the federal courts by way of special maritime and territorial jurisdiction when other substantive provisions of federal law have been violated at any of the statute’s enumerated locations.

The MEJA and the WCA also allow for federal court jurisdiction over misconduct committed by civilian contractors overseas. As noted, however, the tens of thousands of contractors who have served or are currently serving in the Iraqi campaign have either scrupulously avoided any meaningful misconduct, or government efforts to address those crimes are either lacking or simply ineffective in practice. The facts at least suggest the latter of these two possibilities.

A. Constitutional Grounds for Criminal Jurisdiction over Contractors Accompanying the Force in Time of War

When examining a statutory based legal regime, it is usually best to start at the beginning. In legislating the conduct of military land forces, providing for courts-martial, and punishing war crimes, the Constitution explicitly vests authority in Congress “[t]o make Rules for the Government and Regulation of the land and naval Forces,” “[t]o constitute Tribunals inferior to the supreme Court,” and finally, “[t]o . . . make Rules concerning Captures on...
Land and Water,” and to “define and punish . . . Offences against the Law of Nations.” Of course, the Necessary and Proper Clause allows for any needed legislation otherwise grounded in Congress’s enumerated powers. Strands of all of these broad parameters of constitutional authority can be seen throughout the federal district court jurisdiction provisions that follow.

When considering the concurrent jurisdiction of military courts and the leading cases discussed in Part C of this section, the reader may wish to keep in mind the Supreme Court opinions in Youngstown Sheet and Tube Co. v. Sawyer (Steel Seizure). Justice Frankfurter expressed the “historical gloss” interpretation of constitutional powers in that case. Broadly speaking, he suggested that congressional and executive powers are best considered in the light of our Republic’s practice over time. In addition, Justice Jackson’s concurrence articulated that the Constitution supports presidential power most clearly when the executive acts in concert with Congress. Particularly during wartime, the commander-in-chief’s authority to make rules concerning the conduct of courts-martial and to convene courts pursuant to the UCMJ should not be lightly disregarded.

B. Statutory Provisions

Part II introduced the historical practice of courts-martial jurisdiction covering civilians accompanying a force in wartime. I now move that the following statutes be examined more thoroughly to better understand the law federal prosecutors could employ to address civilian contractor misconduct in Iraq. The statutes are the special maritime and territorial jurisdiction provision, the Military Extraterritorial Jurisdiction Act, and the War Crimes Act of 1997.

80. U.S. CONST. art. I, § 8, cl. 11.
81. Id. art. I, § 8, cl. 10.
82. Id. art. I, § 8, cl. 18.
83. Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure), 343 U.S. 579 (1952).
84. Id. at 610 (Frankfurter, J., concurring).
85. Id. at 635–37 (Jackson, J., concurring).
86. See U.S. CONST. art. II, § 2, cl. 1.
Courts-Martial for Civilian Contractor Misconduct

1. Special maritime and territorial jurisdiction

Certain provisions of the federal criminal code allow for in personam jurisdiction in the district courts for offenses occurring within the special maritime and territorial jurisdiction of the United States. Eight subsections of 18 U.S.C. § 7 define this jurisdictional scheme of U.S. practice. These provisions extend jurisdiction to areas of the “high seas, [and] any other waters within the admiralty and maritime jurisdiction of the United States,”87 “[a]ny vessel registered, licensed, or enrolled under the laws of the United States,”88 and “aircraft belonging in whole or in part to the United States, or any citizen thereof, or to any corporation created by or under the laws of the United States.”89

Two broader subsections apply to military locations and settings, one of them principally foreign and the other domestic. 18 U.S.C. § 7(3) allows for federal court jurisdiction of offenses occurring on “[a]ny lands reserved or acquired for the use of the United States, and under exclusive or concurrent jurisdiction thereof” and also as to “any place purchased or otherwise acquired by the United States by consent of the legislature of [a] State . . . for the erection of a fort, magazine, arsenal, dockyard, or other needful building.”90 As a potential catch-all, subsection seven of the statute additionally confers U.S. jurisdiction to all places beyond any state’s jurisdiction when an offense is committed either by or against a U.S. national.91 These provisions offer some jurisdictional authority over contractor misconduct overseas but do not readily create the judicial ability to prosecute contractor misconduct in a foreign occupied state during combat operations.

2. The Military Extraterritorial Jurisdiction Act

For decades, military commanders and their subordinate legal staff officers suffered from a systemic shortcoming in enforcing
criminal sanctions against civilian employees and family member dependants of active duty service members abroad. A soldier who committed serious misconduct in Germany, Japan, or South Korea, for example, was answerable to both the UCMJ and was potentially liable to foreign prosecutors as well. This often depended on the category of the committed offense under existing status of forces agreements concluded with the host state.

By contrast, if an active duty civilian family member or civilian contractor or employee committed a felony against a U.S. national under U.S. law on a military installation overseas, the foreign state would have little interest in the outcome and might even lack the legal capacity to prosecute. This was not a small problem. At the close of the twentieth century, nearly 50,000 civilian employees of the Department of Defense were serving overseas, along with approximately 200,000 family member dependants of active duty service members and civilian employees.

Military courts were barred from trying civilian family members for capital offenses under 10 U.S.C. § 802(a)(11) of the UCMJ after the Supreme Court ruling in Reid v. Covert. As a consequence, the


95. 354 U.S. 1 (1957). The provision of the UCMJ struck down on Article III and Sixth Amendment grounds in Reid provides for courts-martial jurisdiction over those “subject to the provisions of any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, all persons serving with, employed by, or accompanying the armed forces without the continental limits of the United States.” Id. at 3–4 (quoting 50 U.S.C. § 552(11)). Virtually identical language remains in today’s UCMJ at 10 U.S.C. § 802(a)(11) (2000). The Court in Reid actually reached a contrary constitutional conclusion during its previous term. See Reid v. Covert, 351 U.S. 487 (1956), rev’d granted, 352 U.S. 901 (1956), rev’d, 354 U.S. 1 (1957). Upon rehearing, the Court reversed its holding in a plurality opinion with Justice Harlan concurring on the very narrow ground that the issue presented involved only the UCMJ’s article 2(11) acting upon service member dependants during peacetime in a capital case. Reid, 354 U.S. at 65 (Harlan, J., concurring).
only recourse following that decision was for a service commander’s staff judge advocate to convince federal prosecutors—thousands of miles away and with busy dockets of their own—to pursue a case under the special maritime and territorial provisions discussed above.96

A similar shortfall in legal process arose for permanently discharged ex-service members when misconduct they had committed while still in military service was discovered. Because UCMJ jurisdiction over soldiers, sailors, marines, and airmen terminates with a validly obtained and completed certificate of discharge,97 the services are powerless to prosecute ex-service members unless the member maintains military status by assignment to a reserve unit98 or is retired and drawing a pension.99

In United States ex rel Toth v. Quarles,100 the Supreme Court invalidated the Air Force court-martial of a former service member five months after his honorable discharge for his newly discovered role in a murder and conspiring to commit murder while formerly serving in Korea. The statutory provision at play in Quarles, since repealed, allowed the military retroactive jurisdiction in such instances.101 The Court’s rationale relied primarily on the consideration that the accused had severed all relationship with the service and its institutions at the time charges were brought.102

Justice Black’s opinion cited the congressional testimony of Major General Thomas H. Green, the Judge Advocate General of the Army, during hearings considering passage of the UCMJ. General Green opined that such a retroactive scheme was virtually unworkable and recommended “that ‘[i]f you expressly confer jurisdiction on the Federal courts to try such cases, you preserve the constitutional separation of military and civil courts, you save the military from a lot of unmerited grief, and you provide for a clean,
constitutional method for disposing of such cases.’”103 It took fifty years for Congress to fulfill that advice.

Effective November 22, 2000, MEJA104 now allows for criminal prosecution of anyone “(1) employed by or accompanying the Armed Forces outside the United States; or (2) while a member of the Armed Forces”105 for commission of any offense that would be punishable by imprisonment for more than one year if such offense had been committed within the special maritime and territorial jurisdiction of the United States.106

The Act, § 3261(c), implicitly acknowledges the UCMJ’s authority over civilians accompanying a force in the field during wartime while at the same time expressly recognizing military court jurisdiction to try law of war offenses. That section provides, in pertinent part, “Nothing in this chapter may be construed to deprive a court-martial, military commission, provost court, or other military tribunal of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by a court-martial, [or] military commission . . . .”107

An amendment to MEJA included in the 2005 National Defense Authorization Act108 specifies that the phrase “employed by the armed forces outside the United States” in § 3261 of MEJA includes contractors and subcontractors of the Department of Defense or any

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103. Id. at 21 (quoting Hearings before Subcomm. of S. Comm. on Armed Servs. on S. 857 and H.R. 4680, 81st Cong. 256–57 (1950) (statement of Major General Thomas H. Green, J. Advocate General, United States Army)).


106. 18 U.S.C. § 3261(a).

107. Id. § 3261(c) (emphasis added). The Senate version of the bill that became MEJA would have expressly incorporated military court jurisdiction over civilians abroad. See 145 CONG. REC. S8194–95 (daily ed. July 1, 1999) (statements by Sen. Gorton and Sen. Leahy). For a pre-war on terrorism discussion of the perceived gap in the law regarding defense contractor misconduct overseas, see Michael J. Davidson & Robert E. Korroch, Extending Military Jurisdiction to American Contractors Overseas, PROCUREMENT L., Summer 2000, at 1.

other federal agency providing their employment to support the defense mission overseas.\(^{109}\)

In March 2005, the Department of Defense General Counsel published an instruction implementing the department’s policies and procedures under MEJA.\(^{110}\) Despite availability of this statutory framework, its recognition of existing concurrent jurisdiction of courts-martial to try law of war violations, and the Department of Defense’s specific implementing regulation, federal prosecutors have yet to employ MEJA for any alleged misconduct of civilian contractors arising from their actions during the Iraqi campaign.

3. The War Crimes Act

Three years before MEJA was enacted, Congress acted to legislate provisions of the Geneva Conventions of 1949 through the War Crimes Act (WCA).\(^{111}\) The legislation arose out of concern that the Geneva Conventions were not domestically justiciable in the absence of executing legislation.\(^{112}\) All four of the pertinent Geneva Conventions specifically allow that “[t]he High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention.”\(^{113}\)

At the time the United States ratified the Geneva Conventions, implementing domestic legislation was deemed unnecessary as the

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110. *See U.S. DEP’T OF DEF., INSTRUCTION NO. 5525.11, CRIMINAL JURISDICTION OVER CIVILIANS EMPLOYED BY OR ACCOMPANYING THE ARMED FORCES OUTSIDE THE UNITED STATES, CERTAIN SERVICE MEMBERS, AND FORMER SERVICE MEMBERS (2005).*


112. A self-executing treaty requires no implementing legislation from a signatory to be considered part of the nation’s domestic law. A non-self-executing treaty, on the other hand, requires executing legislation to be justiciable. For a discussion of the distinction between self-executing and non-self-executing treaties, see *BRADLEY & GOLDSMITH, supra note 13*, at 339–48.

grave breach provisions were thought to be adequately covered by existing federal law. However, when considering passage of the WCA, Congressman Lamar Smith of Texas submitted that “[a] review of current federal and state law indicates that while there are many instances in which individuals committing grave breaches of the Geneva conventions may already be prosecuted, prosecution would be impossible in many situations.” He particularly noted that killing a prisoner of war was not specifically penalized in federal criminal law.

The WCA allows for a fine, imprisonment for life or any set term of years, or death for anyone committing a war crime that results in the death of the victim, whether within or without the territory of the United States. A war crime is any offense “defined as a grave breach” by the Geneva Conventions of 12 August 1949, or in any of the “protocol[s] to such conventions” that the U.S. has joined as a party. The definition of war crimes further includes enumerated

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114. Grave breaches include “willful killing, torture, or inhuman treatment, including biological experiments, willfully causing great suffering or serious injury to body or health.” Geneva III, supra note 113, art. 130.
116. 18 U.S.C. § 2441(c)(3). A final definitional provision of the WCA, not germane under the scenario presented in this paper, prohibits conduct of a person who, in relation to an armed conflict and contrary to the provisions of the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended at Geneva on 3 May 1996 (Protocol II as amended on 3 May 1996), when the United States is a party to such Protocol, willfully kills or causes serious injury to civilians.
118. Id. at 5.
120. Id. § 2441(c)(1). Four such conventions were signed on that date: Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field (Geneva I), 6 U.S.T. 3314, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Conditions of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea (Geneva II), 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva III, supra note 113; and Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Geneva IV), 6 U.S.T. 3516, 75 U.N.T.S. 287.
conduct prohibited in the annex to the Hague Convention Respecting the Laws and Customs of War on Land. Finally, war crimes also encompass any violations of common Article 3 of the four August 1949 Geneva Conventions.

The grave breach threshold thus criminalizes “willful killing, torture or inhuman treatment, including biological experiments, willfully causing great suffering or serious injury . . . compelling a prisoner of war to serve in the forces of the hostile Power, or willfully depriving a prisoner of war of the rights of fair and regular trial.” Under the Annex to the Hague Convention of 1907, the grave breach criteria of the WCA also binds a signatory not “[t]o employ poison or poisoned weapons; . . . [t]o kill or wound an enemy who, having laid down his arms, or having no longer means of defense, has surrendered . . . [t]o declare that no quarter will be given . . . [and] [t]o employ arms, projectiles, or material calculated to cause unnecessary Suffering.”

Article 3 of all four Geneva Conventions of August 1949 includes identical language applicable during armed conflict occurring within the territory of one of the member states but not between member states. Known therefore as common Article 3, it is designed to provide a minimum standard of care during hostilities, even in instances of internal state conflict. As a result, grave breaches of the law of war under the WCA include, “murder of all kinds, mutilation, cruel treatment and torture; [the] taking of hostages; . . .

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123. 18 U.S.C. § 2441(c)(3).


125. Hague Convention, supra note 122, annex art. 23. The WCA also includes as grave breaches from the Hague Convention annex such conduct as killing or wounding “treacherously,” using a flag of truce, a national flag, or uniform improperly, destroying or seizing personal property absent military necessity, and abolishing the rights of nationals of a belligerent or requiring them to “take part in the operations of war directed against their own country.” Id. The grave breaches prohibited by Article 25 of the annex include the attack or bombardment of undefended populated areas, id. art. 25, while Article 27 prohibits not taking “all necessary steps . . . as far as possible” to spare buildings dedicated to religion, the arts and sciences, and hospitals during an attack. Id. art. 27. Article 28 concludes, “The pillage of a town or place, even when taken by assault, is prohibited.” Id. art. 28.
outrages upon personal dignity, in particular, humiliating and degrading treatment; [and] the passing of sentences and the carrying out of executions without previous judgment.”

Under the facts of our case, the Red River Group contract interrogator has arguably committed numerous grave breaches of the law of war.

While considering enactment of the WCA, the House Committee on the Judiciary presciently acknowledged that “courts-martial would seem to be a powerful mechanism for the punishment of war crimes . . . however . . . they apply to very circumscribed groups of people: generally, members of the United States armed forces, persons serving with or accompanying armed forces in the field, and enemy prisoners of war.”

126. Geneva III, supra note 113 art. 3 (demonstrative of all Article 3 treaty provisions in Geneva I–IV).


128. 19 C.M.A. 363 (1970). I am not the first to criticize the ruling of Averette. For a brief but spirited critique of the Averette majority opinion, which also questions its holding and notes the lack of historical foundation for the court’s decision, see Lawrence J. Schwarz, The Case for Court-Martial Jurisdiction over Civilians Under Article 2(a)(10) of the Uniform Code of Military Justice, ARMY LAW., Oct. 2002, at 31, 34.

129. Averette, 19 C.M.A. at 364.

C. The Case Law

The paucity of district court prosecutions of contractors accompanying our armed forces at war, despite three statutes available to the Department of Justice, demonstrates the need for appellate courts to reconsider the courts-martial of civilian contractors. Currently, the controlling case is United States v. Averette, decided by the United States Court of Military Appeals in April of 1970.

1. United States v. Averette

In 1969, Raymond Averette was a U.S. Army civilian contractor working at Camp Davies in the Republic of South Vietnam. He was implicated in a plot to steal 36,000 government-owned batteries and was ultimately tried under 10 U.S.C. § 802(a)(10) of the UCMJ as a civilian accompanying an armed force in the field in time of war.

126. Geneva III, supra note 113 art. 3 (demonstrative of all Article 3 treaty provisions in Geneva I–IV).


128. 19 C.M.A. 363 (1970). I am not the first to criticize the ruling of Averette. For a brief but spirited critique of the Averette majority opinion, which also questions its holding and notes the lack of historical foundation for the court’s decision, see Lawrence J. Schwarz, The Case for Court-Martial Jurisdiction over Civilians Under Article 2(a)(10) of the Uniform Code of Military Justice, ARMY LAW., Oct. 2002, at 31, 34.

129. Averette, 19 C.M.A. at 364.
He was convicted of conspiracy to commit larceny and attempted larceny of government property at a general court-martial convened at Long Binh, Vietnam. After modification of some of the courts-martial findings, he was sentenced to one year of confinement and fined $500.

Upon appeal, the Court of Military Appeals held that “the words ‘in time of war’ mean, for the purposes of Article 2(10), . . . a war formally declared by Congress.” The three-page opinion cited no binding precedent as authority and offered only a cursory review of the extensive U.S. historical practice that actually supports a contrary conclusion.

After briefly touching on several Supreme Court holdings in the wake of United States ex rel. Toth v. Quarles, the two-judge Averette majority reasoned that, “[a]s a result of the most recent guidance in this area from the Supreme Court we believe that a strict and literal construction of the phrase ‘in time of war’ should be applied.” Of course, the war in Vietnam was conducted without a formal congressional declaration. The Averette court refused to acknowledge the jurisdiction of the military trial court and consequently dismissed the charges against the defendant.

An obvious problem with the court’s stated rationale is that the Supreme Court has never ruled on the UCMJ provision at issue in Averette. In Reid v. Covert, introduced earlier in our case-in-chief, the Supreme Court invalidated a different provision of the UCMJ that purported to allow military court jurisdiction over civilian spouses accompanying their service-member husbands overseas in peacetime pursuant to a treaty. However, in dicta that squarely touches the issue of wartime jurisdiction, the Reid Court wrote:

> Article 2(10) of the UCMJ . . . provides that in time of war persons serving with or accompanying the armed forces in the field

130. Id. at 363.
131. Id.
132. Id.
133. Id. at 365.
134. 350 U.S. 11 (1955). For a discussion of Quarles, see supra text accompanying notes 100–03.
136. Id. at 366.
137. 354 U.S. 1 (1957).
138. Id. at 22.
are subject to court-martial and military law. We believe that Art. 2(10) sets forth the maximum historically recognized extent of military jurisdiction over civilians under the concept of “in the field.” The Government does not attempt—and quite appropriately so—to support military jurisdiction over Mrs. Smith or Mrs. Covert under Art. 2(10).139

It is just this provision of the UCMJ that should be employed to prosecute our hypothetical contract interrogator. Indeed, in distinguishing a commander’s authority in time of war over the facts presented in Reid, the Court’s opinion noted that “commanders necessarily have broad power over persons on the battlefront. From a time prior to the adoption of the Constitution the extraordinary circumstances present in the area of actual fighting have been considered sufficient to permit punishment of some civilians in that area by military courts under military rules.”140

The “recent guidance” relied upon by the court in Averette was most likely the ruling in O’Callahan v. Parker, a Supreme Court case decided one year earlier.141 O’Callahan held unconstitutional the courts-martial of an active duty soldier for crimes committed in the civilian community that lacked any nexus to his military service.142 That decision, coupled with a series of Supreme Court opinions143 addressing other civilian jurisdictional provisions of the UCMJ, undoubtedly played a central role in the Court of Military Appeals’ thinking.

However, the Chief Judge of the court dissented in Averette. “In my opinion,” wrote Chief Judge Quinn, “there is no compelling or cogent reason to construe the phrase ‘time of war’ as used in Article 2(10) of the Uniform Code differently from the construction we have accorded the same phrase in other Articles of the Code.”144

139. Id. at 34 n.61 (first emphasis in original, second emphasis added).
140. Id. at 33 (emphasis added).
142. Id.
143. See Grisham v. Hagen, 361 U.S. 278 (1960); Kinsella v. Singleton, 361 U.S. 268 (1960); McElroy v. United States ex rel. Guagliardo, 361 U.S. 281 (1960). Although all of these cases addressed courts-martial of civilians overseas, none dealt with Article 2(a)(10) of the UCMJ; that is, all were decided concerning crimes committed in peacetime.
144. Averette, 19 C.M.A. at 366 (Quinn, C.J., dissenting). The dissent refers to the court’s earlier holding interpreting offenses as committed “in time of war” in the absence of a congressional declaration for purposes of the running of the statute of limitations in a conviction for absent from duty without leave. Id. See United States v. Anderson, 17 C.M.A
Notwithstanding the lack of a congressional declaration of war, the dissent observed that, “[i]n any event, if congressional participation is required to energize the phrase in regard to court-martial jurisdiction, sufficient congressional participation is present in connection with the Vietnam conflict to fulfill the requirement.”

2. Other decisions that affect courts-martial jurisdiction of civilians

At least two other court rulings have held Article 2(a)(10) of the UCMJ invalid. The D.C. Court of Appeals ordered the release of a merchant seaman court-martialed for murdering a fellow shipmate at a DaNang, South Vietnam bar while on shore leave from their service aboard the S.S. Amtank. That opinion, however, relied heavily on the service connection analysis required by the holding of O’Callahan v. Parker and did not deem appellant’s brief port visit sufficient to satisfy the service/nexus requirement.

Furthermore, the court suggested that hostilities in a time of undeclared war were sufficient for purposes of conferring jurisdiction upon courts-martial. “[A]ssuming as we do that this is a time of undeclared war which permits some invocation of the war power under which Article 2(10) was enacted . . . Article 2(10) may not be read so expansively as to reach this civilian seaman . . . in port for a short period . . . .”

Finally, ruling in Zamora v. Woodson just over a month after Averette was decided, the Court of Military Appeals declined to revisit its earlier pronouncement and dismissed fifty-six criminal counts against a civilian serving with U.S. forces in Vietnam. The military system of justice has been content to honor the Averette analysis and its limited progeny of cases ever since.

Although Article 2(a)(10) remains in the UCMJ, the Manual for Courts-Martial now cautiously defines in “time of war” as requiring a declaration of war by Congress or a similar factual determination when the term is included as an aggravating factor for punishing certain offenses and for capital charges.

588 (1968); see also United States v. Bancroft, 3 C.M.A. 3 (1955) (deciding the issue in the context of the Korean War).

147. Id. at 823.
149. MANUAL, supra note 14, R.C.M. 103(19).
IV. REBUTTAL

This Article accepts that acknowledging courts-martial jurisdiction over civilians in any context would be vehemently opposed by some. Arguments against my thesis will be based on court decisions like Averette, Reid, and Quarles. Legitimate concern that courts-martial of civilians might disrupt the separation of powers between the legislative and judicial branch will likely surface, as will thoughtful objections grounded in the Fifth and Sixth Amendments. In a dark time, when the jurisdiction of military tribunals is decried even over unlawful foreign combatants captured in a theater of battle—whose stated aim remains the massacre of as many American citizens as possible—any courts-martial option for civilians, however limited the category, is likely unthinkable for some.

When opposing counsels’ objections to courts-martial jurisdiction are more carefully examined, however, they clearly open the door to well-grounded counterarguments in rebuttal. First, Averette was wrongly decided at the time it was rendered. Second, the Constitution allows limited courts-martial jurisdiction of civilians when they serve with and alongside of military forces in the field in wartime. Finally, the policy argument that supports a military court’s authority over the ever swelling ranks of for-profit contractors operating on the battlefield is compelling.

150. It would do well, perhaps, for some to review al Qaeda’s fatwa of February 1998, which was published in a London Arabic newspaper and reportedly originated from a group named the World Islamic Front. Usama bin Laden and Dr. Ayman al Zawahiri “called for the murder of any American, anywhere on earth, as the ‘individual duty for every Muslim who can do it in any country in which it is possible to do it.’” 9/11 REPORT, supra note 2, at 47; see also Scenes of Rejoicing and Words of Strategy from bin Laden and His Allies, N.Y. TIMES, Dec. 14, 2001, at B4 (recounting a conversation on intercepted tape how Usama bin Laden was the “most optimistic” as to the number of “enemy” killed upon learning of the successful air attacks on the World Trade Center towers). Recent revelations by the Bush Administration confirm that al Qaeda’s lack of successful attacks on the United States subsequent to the September 11th atrocities are not for want of trying. See Peter Baker & Susan B. Glasser, Bush Says 10 Plots by Al Qaeda Were Foiled, WASH. POST, Oct. 7, 2005, at A01. It is now well documented that a substantial number of terrorist detainees, once held and subsequently released by the United States, have continued active combat operations against coalition forces. Thomas Harding, Ex-Guantanamo Prisoners Fight On, LONDON DAILY TEL., Sep. 22, 2005; John Mintz, Released Detainees Rejoining the Fight, WASH. POST, Oct. 22, 2004, at A01.
A. United States v. Averette’s Holding Has Little Basis in Historical Practice or Supreme Court and Congressional Treatment of War Powers

The conclusion of Averette that civilians are subject to courts-martial jurisdiction only during periods of congressionally declared war has little logical support and virtually no support in national historic practice. As already shown in laying the foundation for evidence introduced in our case-in-chief, the Articles of War authorized courts-martial of sutlers and retainers who accompanied American forces during the revolutionary period before there was even a Congress from whence a formal declaration of war could issue.\(^{151}\)

Moreover, for over half a century now, established constitutional analysis accepts that the executive branch acts most securely when doing so in conjunction with an Article II function and in furtherance of existing congressional legislation.\(^ {152}\) The conduct of war is an executive prerogative and legislation that regulates the conduct of forces at war in the form of the UCMJ puts the courts-martial of our hypothetical civilian contractor squarely within Justice Jackson’s first tier of analysis.

Congress has never issued a declaration of war absent a request from the President and has similarly never declined a presidential request in any of the five declared wars the United States has fought.\(^ {153}\) However, Professors Bradley and Goldsmith have recently

\(^{151}\) See supra note 28 and accompanying text.

\(^{152}\) See Youngstown Sheet & Tube v. Sawyer (Steel Seizure), 343 U.S. 579, 587–88 (1952).

\(^{153}\) Congress declared war on Britain on June 18, 1812. See Act of June 18, 1812, ch. 102, 2 Stat. 755. President Polk requested that Congress formally declare war on Mexico on May 11, 1846. See Letter from President James Polk to the Senate and House of Representatives (May 11, 1846), available at http://www.yale.edu/lawweb/avalon/presiden/messages/polk01.htm (“In further vindication of our rights and defense of our territory, I involve the prompt action of Congress to recognize the existence of the war, and to place at the disposition of the Executive the means of prosecuting the war with vigor, and thus hastening the restoration of peace.”). Congress responded with a declaration of war on May 13, 1846. Act of May 13, 1846, 9 Stat. 9 (Mexican-American War). President McKinley asked Congress to intervene in the war between Spain and Cuban insurgents on April 11, 1898. See José A. Cabranes, Citizenship and the American Empire, 127 U. PA. L. REV. 391, 392 n.4 (1978). Congress officially declared war on Spain later that month. See Act of Apr. 25, 1898, 30 Stat. 364 (Spanish-American War). Congress declared war on Germany and Austria-Hungary after a request from President Wilson on April 2, 1917. See Joint Resolution of Apr. 6, 1917, 40 Stat. 1 (Germany); Joint Resolution of Dec. 7, 1917, 40 Stat. 429 (Austria-
observed that, if anything, it is the specific congressional authorization for the executive to use force—not the formal declaration of war itself—which has foremost served as the legal basis upon which the United States has constitutionally acted in past wars. 154

Although the United States has seldom declared war in our nation’s history,155 armed forces have been deployed abroad nearly 240 times since 1798.156 During the American Civil War—the bloodiest and most costly period of combat in our nation’s history and one that also went undeclared by Congress—military commissions conducted countless trials of “camp-followers and other civilians employed by the government in connection with the army in war.”157

Indeed, and more recently, ink on the new UCMJ was still wet—enacted into law with the full understanding that certain civilians serving in the field during war time would be subject to its terms158—at the very moment President Truman was committing U.S. ground forces to the Korean War. That war was waged pursuant only to United Nations Security Council Resolutions159 and Truman’s Article II authority as commander in chief. Such

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155. These include the War of 1812, the Mexican-American War, the Spanish-American War, and World Wars I and II. BRADLEY & GOLDSMITH, supra note 13, at 168.

156. Id. (citing ELLEN C. COLLIER, INSTANCES OF USE OF UNITED STATES FORCES ABROAD, 1798–1993 (1993)).

157. WINTHROP, supra note 26, at 838.

158. See supra note 43 and accompanying text.

practice does not logically support the thinking of the two-judge majority in *Averette* that a declared war is required for military court jurisdiction over civilians.

Counsel opposing my argument in the case at bar will likely object and cite the celebrated decision of *Ex parte Milligan*\(^{160}\) for the proposition that military courts have no authority to try civilian contractors where U.S. territory is not under military control and when the federal courts are otherwise open for business.

But the *Milligan* decision in no way affects military jurisdiction when exercised pursuant to specific congressional legislation. That case’s holding is irrelevant to jurisdiction over civilians serving actively beside and with armed forces in the field during wartime abroad. The majority in *Milligan* decided only that “in Indiana the Federal authority was always unopposed, and its courts always open to hear criminal accusations and redress grievances; and no usage of war could sanction a military trial there for any offense whatever of a citizen in civil life, in no wise connected with military service.”\(^{161}\)

The real issues in *Milligan* were twofold: first, whether the military commission that tried Lamdin Milligan should have honored his petition for release by writ of habeas corpus presented to the military jailers after the Circuit Court of Indiana considered the matter and failed to issue a bill of indictment against him; and second, whether the act of Congress of March 1863 that ratified Lincoln’s earlier suspension of the Great Writ in any way authorized Milligan’s extended detention and military trial.\(^{162}\)

The majority opinion by Justice Davis observed that the power to suspend habeas did not “authorize the arrest of any one, but simply denies to one arrested the privilege of this writ in order to obtain his liberty.”\(^{163}\) As to the authority to try a civilian, and before embarking on the expansive and often-cited portion of that opinion, the majority conceded that no one had “pretended”\(^{164}\) that the military court that tried Milligan was ordained and established by an

\(^{160}\) 71 U.S. (4 Wall.) 2 (1866).

\(^{161}\) *Id.* at 121–22, reprinted in WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME 130 (1998) (emphasis added). At the same time, the Supreme Court has upheld the military trial of a U.S. citizen for suspected violations of the law of war. *Ex parte Quirin*, 317 U.S. 1, 46 (1942); see also *Colepaugh v. Looney*, 235 F.2d 429 (1956).


\(^{163}\) *Id.* at 115.

\(^{164}\) *Id.* at 121.
act of Congress.\textsuperscript{165} Chief Justice Chase, agreeing that the Army had no jurisdiction to try Milligan under the facts before the Court, nonetheless noted that Davis’s opinion swept too broadly in suggesting that Congress lacked the power to authorize a military trial in any circumstance.\textsuperscript{166}

Although unique so as to constrain broad application to this Article’s analysis, it is well to remember that civilian conspirators in President Lincoln’s assassination were tried and sentenced by a military court.\textsuperscript{167} One of the convicted conspirators, Dr. Samuel Mudd, applied to a Florida district court for habeas relief in July 1868; the writ was denied.\textsuperscript{168}

The larger point is that it is difficult to understand how application of the UCMJ to a very narrow class of civilians, expressly allowed by federal legislation during times of war, applied consistently in military practice, and recognized by U.S. courts over nearly two-hundred years of our national story, suddenly required a congressionally “declared” war beginning only with the tumult of 1970 Vietnam. After all, Article I, Section 8 authorizes Congress to regulate the “\textit{land} and naval forces,”\textsuperscript{169} not the \textit{uniformed, active duty U.S. Army} land and naval military forces.\textsuperscript{170}

Numerous past advisory opinions of the U.S. Attorney General further refute the \textit{Averette} conclusion as a matter of law. In 1872, during the undeclared Indian Wars on the Western Plains, the U.S. Attorney General opined to the Secretary of War that “[c]ivilian employés [sic] serving with the Army, in the Indian country, during offensive or defensive operations against the Indians, are subject to military jurisdiction and trial by court-martial under the provisions of

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\textsuperscript{165} Id.

\textsuperscript{166} Id. at 136 (Chase, C.J., dissenting); see also \textit{Rehnquist, supra} note 161, at 131, 132 (explaining that, under Chase’s view, “[t]here was no occasion for the Justices . . . to deal with the question of what might have been the result . . . if Congress had by law provided for the trial of these particular defendants before a military commission”).

\textsuperscript{167} \textit{See generally} \textit{The Assassination of President Lincoln and the Trial of the Conspirators} (Comp. by Benn Pittman, Recorder to the Commission 1865).

\textsuperscript{168} \textit{Rehnquist, supra} note 161, at 167. Concededly, the judge’s reasoning focused primarily on the victims of the conspiracy and their relation to the Union’s military leadership rather than the prisoner’s lack of contacts with the rebellion’s military forces.

\textsuperscript{169} U.S. \textit{Const.} art. I, § 8, cl. 14 (emphasis added).

\textsuperscript{170} \textit{See Ex parte} Jochen, 257 F. 200 (S.D. Tex. 1919). “That it is not necessary that a person be in uniform in order to be a part of the land forces, I think clear, not only upon considerations of common sense and common judgment, but upon well-considered and adjudicated authority.” Id. at 204.
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the 60th Article of War.\textsuperscript{171} Our current case’s evidentiary foundation traced the lineage of today’s UCMJ provision back to that very provision.

The rationale supporting \textit{Averette’s} holding strongly hinted at the service connection doctrine articulated in \textit{O’Callahan v. Parker}.\textsuperscript{172} Importantly, the Supreme Court expressly overruled the holding of \textit{O’Callahan} in its 1987 decision \textit{Solorio v. United States}.\textsuperscript{173} Arguably, \textit{Averette’s} ruling reflected a twenty-year erosion of military court authority that ended with the holding of \textit{Solorio}.

The Court of Military Appeal’s decision in \textit{Averette} fails to muster on at least three additional legal bases. First, the Supreme Court has never defined war based solely on the existence of a formal declaration. At least since the holding of \textit{Bas v. Tingy},\textsuperscript{174} Congress has been on notice that the Supreme Court defines public war and the constitutional recognition of its actual existence for legal purposes in terms expressly other than a formal congressional declaration. In \textit{The Brig Amy Warwick (The Prize Cases)},\textsuperscript{175} the Supreme Court recognized that “the technical existence of war” may begin with congressional sanction by way of enactments, not formal declarations of a state of war.\textsuperscript{176} Given such clear notice one could rationally conclude that if Congress intended only a declared war to meet the jurisdictional requirements for prosecuting civilian contractors like our interrogator at the Dokan Pit prison, it would have so provided. It did not.

Second, although the Constitution grants Congress the power to declare war, the formal act has been anachronistic in international law since the founding of the United Nations over sixty years ago.

\textsuperscript{171. 14 Op. Att’y Gen. 22 (1872); see also 16 Op. Att’y Gen. 13 (1878) (advising that Quartermaster clerks by position are not subject to courts-martial jurisdiction, but expressly differentiating the opinion from the setting of clerks serving with the armies in the field and amenable to jurisdiction under the Articles of War); 15 Op. Att’y Gen. 597 (1876) (civil engineers laboring in navy yards subject to naval court-martial).}

\textsuperscript{172. 395 U.S. 258 (1969); see supra notes 141–42 and accompanying text.}

\textsuperscript{173. 483 U.S. 435 (1987).}

\textsuperscript{174. 4 U.S. (4 Dall.) 37, 40 (1800) (“[F]orce between two nations . . . under authority of their respective governments, is not only war, but public war. If it be declared in form, it is called solemn, and is of the perfect kind. . . . [H]ostilities may subsist between two nations more confined in its nature and extent. . . . [T]his is more properly termed imperfect war . . . .”

\textsuperscript{175. 67 U.S. (2 Black) 635, 670 (1863); see also Montoya v. United States, 180 U.S. 261 (1901); Talbot v. Seeman, 5 U.S. (1 Cranch) 1 (1801).}

\textsuperscript{176. \textit{The Prize Cases}, 67 U.S. (2 Black) at 670.}
Historically, a declaration of war was necessary to put foreign states and their nationals on notice of the intent to pursue hostilities. A declaration “served the legal function of triggering international law governing neutral and belligerent states on issues such as rights to seize, contraband, and blockades, as well as domestic laws related to war.”

Since the establishment of the United Nations, however, “war has been abolished as a category of international law. A declaration of war serves no purpose under international law; it can have no bearing on the underlying legal situation.” Thus, in modern practice, the practical effect of Averette precludes article 2(a)(10) of the UCMJ from ever being called into play. Such was not the likely intent of Congress; legislatures are not prone to pass superfluous statutes in matters so grave.

Third, even if one accepts Averette’s premise that Congress must formally declare war for legitimate courts-martial jurisdiction over civilians accompanying the force in time of war, Congress’s joint resolution authorizing force in the present Iraqi campaign meets the requirement of a declaration of war for purposes of jurisdiction. This conclusion is manifest when the use of force resolution and the 1973 War Powers Act are examined side by side.

Section 3(c)(1) of the use-of-force authorization for Iraq reads in relevant part, “Consistent with . . . the War Powers Resolution, the Congress declares that this section is intended to constitute specific statutory authorization within the meaning of section 5(b) of the

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177. Bradley & Goldsmith, supra note 13, at 177, 178.

178. Paul W. Kahn, War Powers and the Millennium, 34 Loy. L.A. L. Rev. 11, 16 (2000), quoted in Bradley & Goldsmith, supra note 13, at 178. Consider too that Alexander Hamilton observed that practice of formal declarations of war among states was falling into disuse even prior to adoption of the United States Constitution. See The Federalist No. 25 (Alexander Hamilton). Professor Turner presents a compelling argument that declarations of war were only required in early international law when a state conducted offensive wars. If that is the better view, and defensive wars are fought without need or expectation of formal declarations of war by the defending state, then Averette’s logical conclusion as to Article 2(a)(10) of the UCMJ’s true meaning is troubling itself. See Turner, supra note 159, at 906–10 (1994) (reviewing John Hart Ely, War and Responsibility: Constitutional Lessons of Vietnam and Its Aftermath (1993)).


War Powers Resolution.” Section 5(b) of the Act provides for the only exceptions to the executive’s required termination of the deployment of U.S. military units within sixty calendar days to those instances where “Congress (1) has declared war or has enacted a specific authorization for such use of United States Armed Forces, (2) has extended by law such sixty-day period, or (3) is physically unable to meet as a result of an armed attack.” It is therefore clear that Congress placed specific congressional authorization for the use of force on the same constitutional plateau as a formal declaration of war. This equivalency not only supports courts-martial jurisdiction itself but also indicates that, contrary to the holding in *Averette*, a congressional authorization of force results in “a time of war” as readily as a formally declared war.

**B. Constitutional Arguments**

To be sure, Article III of the Constitution and the Fifth and Sixth Amendments provide powerful support for the view that Article III judges should ordinarily conduct civilian criminal trials after indictment by a grand jury. Notwithstanding that our nation faces anything but ordinary times while uniformed and contract forces battle radical Islamists around the globe, the argument claims far too much. A plain reading of these provisions indicates that limited military courts-martial jurisdiction would pass constitutional muster, and that Article I grants to Congress all the power it needs to both establish military courts and set the limits of those courts’ jurisdiction.

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181. Joint Resolution to Authorize the Use of United States Armed Forces Against Iraq, 116 Stat. at 1501.
183. U.S. Const. art. III, § 2, cl. 3. “The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.”
184. Id. amend. V. “No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger . . . .”
185. Id. amend. VI. “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . .”
1. Article III

Article III expressly provides that trials shall be held in the state in which the crimes were committed, “but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by law have directed.”\textsuperscript{186} Congress has directed, through appropriate legislation in the form of the UCMJ, that when civilians accompanying an armed force in the field during time of war commit crimes “not within any state,” they may be tried by courts-martial wherever they are found.

Tensions between what the Article III text calls for and specific constitutional powers left undefined, though just assuredly reserved to Congress, have surfaced before. In \textit{Ex parte McCardle},\textsuperscript{187} Congress exercised its authority to make exceptions to and regulate the appellate jurisdiction of Article III courts, preserved its broader efforts in a Reconstruction-era South, and withdrew an entire class of habeas corpus reviews from Supreme Court jurisdiction. Congress revoked habeas jurisdiction after the case that sparked the separation of powers confrontation had been argued to the Court and was pending review in conference and an announcement of a decision.\textsuperscript{188} Chief Justice Chase conceded that, “this court cannot proceed to pronounce judgment in this case, for it has no longer jurisdiction of the appeal; and judicial duty is not less fitly performed by declining ungranted jurisdiction than in exercising firmly that which the Constitution and the laws confer.”\textsuperscript{189}

Conversely, Article III establishes the judicial power of the United States in both a Supreme Court and such “inferior Courts as the Congress may from time to time ordain and establish.”\textsuperscript{190} At the same time, Article I, Section 8, Clause 9 expressly grants to Congress the power to establish tribunals “inferior to the Supreme Court.”\textsuperscript{191} It cannot be convincingly argued that Congress has the power to establish courts under the powers vested by Article I but lacks the authority to define the necessary parameters of jurisdiction those courts will exercise through appropriate legislation like the UCMJ.

\begin{itemize}
\item \textsuperscript{186} \textit{Id.} art. III, § 2, cl. 3.
\item \textsuperscript{187} 74 U.S. (1 Wall.) 506 (1869).
\item \textsuperscript{188} \textit{Id.} at 508.
\item \textsuperscript{189} \textit{Id.} at 515.
\item \textsuperscript{190} U.S. CONST. art. III, § 1.
\item \textsuperscript{191} \textit{Id.} art. 1, § 8, cl. 9.
\end{itemize}
As we have seen, the ruling in *Solorio v. United States*\(^{192}\) reversed whatever trend was developing to hamstring courts-martial powers under the UCMJ. The Court observed that Congress’s plenary power under Article I, Section 8, Clause 14 to “make Rules for the ‘Government and Regulation of the land and naval Forces’”\(^{193}\) is found in the same section as the power to regulate commerce, coin money, and declare war.\(^{194}\) “On its face,” the Court wrote, “there is no indication that the grant of power in Clause 14 was any less plenary than the grants of other authority to Congress in the same section.”\(^{195}\)

The writings of Alexander Hamilton in the Federalist Papers further this conclusion and express the Founders’ intent to give Congress unlimited power over matters of defense, the raising of armies, and providing for the means of their support. His argument remains meaningful and relevant today:

> The authorities essential to the common defense are these: to raise armies; to build and equip fleets; to prescribe rules for the government of both; to direct their operations; to provide for their support. These powers ought to exist without limitation, because it is impossible to foresee or to define the extent and variety of national exigencies, and the correspondent extent and variety of the means which may be necessary to satisfy them. The circumstances that endanger the safety of nations are infinite, and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed.\(^{196}\)

Of course, the Necessary and Proper Clause\(^{197}\) also serves to augment Congress’s enumerated powers when required. In his

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193. *Id.* at 441.
194. *Id.*
195. *Id.*
196. THE FEDERALIST NO. 23 (Alexander Hamilton). Hamilton’s views provided much of the historical support and constitutional analysis for the majority’s reasoning in *Solorio*. Some commentators have made the subtle observation that, absent thousands of private defense contractors filling multiple roles in the Iraqi theater, some requirement of a military draft might be necessary to meet the manpower needs of the U.S. force. See Singer, *supra* note 1; see also Boot, *supra* note 60. If that is so, then Hamilton’s prescient warning that “circumstances that endanger the safety of nations are infinite” has unique applicability to this Article’s core topic.
197. U.S. CONST. art. 1, § 8, cl. 18.
recent book, *America’s Constitution: A Biography*, Yale University law professor Akhil Reed Amar carefully discusses Article I powers vis-à-vis the other branches of our government. Introducing his examination of congressional powers and the courts, he argues that the “real sweep of section 8’s final clause extended not downward over states but sideways against other branches of the federal government.” Thus, he writes, “[T]he Constitution’s text made explicit what otherwise might have been a disputed reading of the document’s organizing schema: Congress stood first among equals . . . .”

2. The Fifth Amendment

Similarly, an exception to the right to a grand jury indictment may be found within the four corners of the Fifth Amendment itself: “except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger.” Professor Amar has also observed that the Fifth Amendment’s indictment and grand jury provisions bespeak a broader recognition of the reality of the needs of the military system of justice. While the amendment explicitly exempts the military from the requirements of civilian indictment, he writes, “the amendment also implicitly recognized that military justice more generally could be governed by a distinct set of procedures across the board; thus, military trials themselves have traditionally operated outside the ordinary Article III rules governing judges and juries.”

Thus, the status of our contract offender returns as the central issue, and long historic practice allows for military trials of that narrow class of civilians serving with the force in wartime. That both land forces and the militia of the period were included within the Fifth Amendment evinces the founders’ contemplation of the variety of personnel that might participate in military operations in times of war and public danger. As we have seen, the common practice from our nation’s earliest period allowed for military trials of sutlers and

199. *Id. at* 106–13.
200. *Id. at* 110.
201. *Id. at* 110–11.
202. *U.S. Const. amend. V.*
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retainers\textsuperscript{204} to maintain camp discipline. The practical requirements and policy that supported these earlier courts-martial were regularly accepted by U.S. district courts up through the end of World War II.

If the assumption of those who object to civilian trial by military courts is that there will be inadequate due process protections for the accused, the opposite exists in practice. For example, the Article 32 pretrial investigation, required before a General Courts-Martial may try any accused, arguably provides more due process protections than the equivalent civilian federal grand jury process.\textsuperscript{205} Courts-martial accused are entitled to representation by counsel present with them at pretrial hearings.\textsuperscript{206} They have the full pretrial right to cross-examine witnesses, to examine and receive copies of evidence relied on by the government, and to invoke their constitutional right to remain silent at any time.\textsuperscript{207} An accused haled to a military pretrial investigation may make an unsworn statement to the investigating officer on their behalf.\textsuperscript{208} After trial, if conviction results in any charge, a court-martialed defendant has two layers of appellate review beyond the existing civilian court system, beginning with action by the general officer that convened the court\textsuperscript{209} and the service court of appeals.\textsuperscript{210}

3. The Sixth Amendment

The Sixth Amendment right to jury trial has long been held inapplicable to military criminal trials.\textsuperscript{211} Though courts-martial practice allows some procedural irregularities from civilian trials, too much may be made in argument of the right to a “jury.” Military trial practice uses panels, not juries, but they serve the same function.

\textsuperscript{204} See supra notes 25–27 and accompanying text.

\textsuperscript{205} See generally 18 U.S.C. §§ 3321, 3322, 3331–34 (2000). Targets of grand jury proceedings have no right to examine the evidence presented against them, to confront and cross-examine witnesses testifying against them, or to have counsel present with them during their appearance.


\textsuperscript{207} Id.

\textsuperscript{208} Id.

\textsuperscript{209} See id. § 860(c)(3)(A).

\textsuperscript{210} As previously mentioned, military service courts of appeals hear appeals from courts-martial at the trial level below, and, if the issue continues, then to the Court of Appeals for the Armed Forces, and potentially the Supreme Court. See supra note 20.

\textsuperscript{211} Kahn v. Anderson, 255 U.S. 1, 8 (1921).
as the trier of fact;212 are subject to voir dire,213 peremptory removal,214 and unlimited challenge for cause;215 and are instructed by a military judge prior to deliberations.216 Although unanimous verdicts are not required for a finding of guilt except as to capital cases, the Supreme Court has long upheld state court practice that allows procedures not requiring a unanimous finding by a twelve member jury.217

Once it is established that civilian contractors accompanying the force in time of war are amenable to courts-martial jurisdiction, as the statute plainly provides, any Sixth Amendment argument falls out. Similarly, though much was made of the import of the jury right in Reid v. Covert,218 that case controls only capital offenses committed by military family members during peacetime and under an entirely separate article of the UCMJ.219

Resolution of the real Sixth Amendment issue requires a simple understanding that the status in every sense of a contractor actively serving with Privatized Military Firms in combat zones overseas today is far more characteristic of a “soldier” than of a “civilian.” Moreover, our case’s fictional Red River Group contractor is currently serving in Iraq. Addressing his crimes in court are an immediate concern; he is not a former or ex-participant in the machinery of national defense, like the defendant that presented constitutional objection in Quarles.

One additional point underscores the lack of importance of Reid’s ruling to civilian contractor misconduct and the courts-martial option. Some were undoubtedly concerned under the facts in Reid that a civilian spouse on trial by a military jury for murdering her active duty husband would not be afforded fair process. The conflicts of interest for the sitting military jury members should be

212. See MANUAL, supra note 14, R.C.M. 502(a)(2).
213. Id. R.C.M. 912.
214. Id. R.C.M. 912(g).
215. Id. R.C.M. 912(f).
216. Id. R.C.M. 920.
219. See supra text accompanying notes 137–40. The peacetime element that limits powers of military court jurisdiction over civilians may be dispositive. In occupied Germany immediately following World War II, the criminal trial and conviction of a service member’s spouse by a military commission appointed by the executive branch was upheld by the Supreme Court. See Madsen v. Kinsella, 343 U.S. 341 (1952).
apparent. This thinking in no way calls into question the trial of a
civilian contractor for alleged misconduct committed while serving
day-to-day and alongside of the very active duty military colleagues
that bring him to trial.

Indeed, undergraduate cadets at U.S. military service academies,
although college students, warriors, and leaders in training who are
not yet commissioned officers or serving on active duty, are
nonetheless subject to courts-martial convened when necessary.\textsuperscript{220}
Similarly, civilian members of the National Oceanic and Atmospheric
Administration, the Public Health Service, “and other organizations,
when assigned to and serving with the armed forces” are subject to
the jurisdiction of courts-martial.\textsuperscript{221} Members of these last “civilian”
organizations that augment military units when necessary are eligible
to serve on courts-martial panels in judgment of their own when
assigned to and serving with the armed forces.\textsuperscript{222}

Any defense contractor accused of misconduct in the Iraqi
campaign should carefully consider one final and pragmatic aspect of
the concept of a jury of one’s peers. For anyone who has served in a
zone of active combat operations, the surreal quality of life in even
the most mundane daily tasks can seem overpowering. The question
inevitably arises as to what a jury of one’s peers means within that
unique context.

Though military exigencies may never serve as a defense to war
crimes, it would undoubtedly prove helpful for any jury hearing a
case to fully appreciate any mitigating or extenuating circumstances.
To put the issue differently, were a contractor accused of abusing a
battlefield detainee in the rough and tumble of a wartime
environment, who might the contractor truly prefer on his jury:
courts-martial service members on site who have shared a common
purpose and mission or twelve civilians thousands of miles away from
the battle zone, drawn from the safety and comfort of suburban
America, who cannot possibly understand “ground truth” and may
not even support the goals of the underlying military campaign?

\textsuperscript{221} \textit{Id. § 802(a)(8)}. Similarly, these civilian augmentees, along with contractors, may be
afforded prisoner of war status if they fall into the power of an enemy. \textit{See} Geneva III, \textit{supra}
ote 113, art. 4A(4).
\textsuperscript{222} \textit{See} \textit{MANUAL, supra} note 14, R.C.M. 502 and subsequent discussion.
V. CLOSING

It is conceivable that not a single civilian contractor accompanying our military forces in Iraq has committed a serious crime in theater during the operation’s three-year history. That would explain the absence of prosecutions currently underway in our federal courts. However, common sense regarding the vast number of contractors employed there, adumbrates of past practices, and increasing evidence in the form of completed investigations and standing public allegations strongly suggest otherwise.

To return to our case’s events that evening at the Dokan Pit, it should be clear that criminal misconduct occurred. Physical assaults and willful mistreatment committed upon a subdued captive hors de combat, failure to provide urgent medical care when the need was readily apparent, and the intentional failure to provide sufficient shelter from the elements for a suspected enemy combatant are all actionable law of war violations and punishable under the several provisions of federal law this Article reviews. Both MEJA and the WCA provide the statutory means for federal prosecution. However, to the extent those laws are not being used, or effectively cannot be used, they are lesser-included jurisdictional options of the foremost and most sensible approach: a military courts-martial.

It is perhaps the first axiom of law that like cases be treated alike. Soldiers and civilians accused of like misconduct in a like wartime setting should not answer to different courts, different procedures, and different law. The early American Articles of War under General George Washington understood this concept in the unique context

223. See supra text accompanying note 59.
224. See supra text accompanying note 67.
225. See supra notes 18, 24.
226. Hors de combat means “out of combat” due to sickness, wounds, detention, etc. WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1092 (1976). Such persons hold a protected status under the law of war and may not be harmed, provided they no longer resist or pose a threat. Geneva III, supra note 113, art. 3.
227. Of course, the War Crimes Act and the potential for U.S. prosecutions arising out of actions occurring in the Afghanistan campaign, along with the torture statute, 18 U.S.C. §§ 2340, 2340A (2000), filled a major portion of the analysis provided in a series of controversial White House Counsel, Department of Justice, Department of State, and Department of Defense memoranda commonly referred to in the press as the “torture memos.” The various memoranda are reprinted in DANNER, supra note 24, at 83–204. Released copies of relevant portions of those documents are also available at http://www.unponteper.it/leratelpace/dossier/inchiesta/NYT25set04COMPLETECOVERAGE.htm.
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and practice of armed conflict. Civilians accompanying a military force were subject to military means of discipline, including trial and punishment when necessary. The practice continued for nearly two hundred years until 1970, supported in law through declared and undeclared U.S. wars alike. Until halted by the ruling in *Averette v. United States*, an erroneous and poorly reasoned judicial decision of the Court of Military Appeals, such practice not only maintained a consistent standard of behavior among those in and out of uniform, but also assisted a commander’s ability to shape and focus the force’s mission and helped preserve unit morale and high esprit de corps.

With the exponentially expanding participation of civilian contractors accompanying U.S. armed forces in combat over the past decade, in both numbers and designated missions, some things need to change. Legal practice needs to catch up with policy if the civilian contractors’ role in waging war is to effectively continue with any real credibility. And the sooner, the better. There is no good reason why modern American mercenaries should remain effectively beyond the law in our national practice.

228. Colonel Janis Karpinski (U.S. Army retired), the most senior member of the United States Army to be held accountable for the infamous abuses perpetrated at the Abu Ghraib prison complex in Iraq, has opined that "when you take those same [interrogation] techniques and put them in the hands of irresponsible and non-accountable people, like these civilian contractors were, you are combining lethal ingredients. And what happens? You get civilian contractors who have a playground, and they get out of control." Marjorie Cohn, Janis Karpinski: Exclusive Interview, truthout, Aug. 3, 2005, http://www.truthout.org/docs_2005/082405Z.shtml.

229. The common understanding of the word is used here: “[o]ne that serves merely for wages . . . a person paid for his work; esp: a soldier hired into foreign service.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1412 (1976). Under Protocol I to the Geneva Conventions of 12 August 1949, a required element in the definition of a mercenary is that the participant in an armed conflict “is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict.” Protocol Additional to the Geneva Convention of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 47, June 8, 1977, 16 I.L.M. 1391 (1977). This view precludes a U.S. national contractor involved in the Iraqi campaign from one legal definition of a mercenary. It is a distinction lost on at least one professional soldier. For policy arguments opposing the perils of PMFs participating in war as business for profit, see P.W. Singer, *Peacekeepers, Inc.*, POLICY REVIEW, No. 119-June/July 2003, 5–8; see also Joe Galloway, *Broken Army Is In Need of Repair*, SALT LAKE TRIB., Oct. 13, 2005. Galloway, a veteran war correspondent that accompanied 1st Cavalry Division soldiers on operations into the Ia Drang valley in Vietnam in 1965 that served as the backdrop for the 2001 Hollywood film *We Were Soldiers*, makes the trenchant suggestion that the Defense Department might just as well conclude its civilian contractor policies by taking bids from the private sector to fight our nation’s wars altogether “for cost plus 20 percent.” “They could hire all the military people put out of work when we
Although federal law, including courts-martial statutes, provide the criminal jurisdiction necessary to address contractor misconduct committed while accompanying U.S. forces in time of war, to date that law has not been meaningfully employed. There is little policy justification for continuing these separate legal regimes for active duty and civilian participants that wage public war on behalf of we the people and civilization itself. There is even less historical or legal support for doing so.

close down the Army and Marine Corps and Navy and Air Force. We could put in a penalty clause if they lose the war.” *Id.*