

# The Long Arm of the Law: **THE MILITARY EXTRATERRITORIAL JURISDICTION ACT**

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**Author's Note:** *The views expressed in this article are the author's and do not necessarily reflect the policy of the Air Force, the Department of Defense or the U.S. government.*

In October 2003, three months before the investigation on inmate abuse at Abu Ghraib prison in Iraq began, a former Navy intelligence specialist arrived in Iraq as a civilian contract interrogator employed by CACI Inc. The man who directed the investigation into the alleged prison abuse, Maj. Gen. Antonio Taguba, found that the civilian contract interrogator had directed some military prison guards linked to the abuses and "clearly knew that his instructions equated to physical abuse."<sup>1</sup> When this became public, Defense Secretary Donald Rumsfeld believed that disciplining contractors for misconduct in theater was the contractor's responsibility, and Justice Department officials had not determined whether they had jurisdiction to prosecute contractors who worked there.<sup>2</sup>

Fast forward to Sept. 16, 2007, when U.S. civilian contractor private security guards fired on a crowd in Baghdad's Nisour Square, killing 17 Iraqi civilians. The private security guards were employed by Blackwater USA<sup>3</sup> and were protecting a U.S. diplomatic convoy in Baghdad.

In March 2007, a federal grand jury in the District of Arizona returned an indictment against a civilian contractor who worked at Al Asad Airbase, Iraq, for assault with a deadly weapon and assault resulting in serious bodily injury for allegedly stabbing an Indian national in the throat.

In May 2007, a Virginia man who worked as a civilian contractor at the Baghdad Central Confinement Facility was sentenced by a U.S. federal court judge to 41 months in prison for possession of child pornography.

What do all these cases have in common? Civilians have served with or accompanied American forces in the field since the founding of the U.S., but not in significant numbers. During Operation Desert Shield and Operation Desert Storm, however, thousands of Department of Defense (DOD) civilian and contract employees were present in host nations. They performed a wide variety of functions, including communications and equipment maintenance, weapon system modernization and logistics work but, until recently, worked in relative obscurity. The Abu Ghraib and the Blackwater incidents highlight the extent to which the U.S. uses civilian contractors to provide a variety of military services.

Historically, private contractors and other civilians who have accompanied the armed forces have not been subject to the military justice process or criminal prosecution. America's federal criminal jurisdiction generally ends at the nation's borders, and the Uniform Code of Military Justice only applied to civilians in combat areas during periods of war declared by Congress.<sup>4</sup> That means most civilians accompanying the armed forces in such places as Iraq or Afghanistan who committed crimes in that country could not be brought to justice, at least not by the U.S. For example, a spouse of a military member who allegedly kills the military member while the member is stationed overseas could not be prosecuted under the Uniform Code of Military Justice or by a U.S. court. That is because, although host foreign nations have jurisdiction to prosecute violations of their law committed by U.S. citizens, they frequently decline to exercise that jurisdiction when an American is the victim or when the crime involves only property owned by Americans. To address this "gap," on Nov. 22, 2000, the president signed into law the Military Extraterritorial Jurisdiction Act of 2000 (MEJA).<sup>5</sup>

## THE ACT

MEJA created a new federal crime for felonies (crimes punishable by more than one year imprisonment) committed "within the special maritime and territorial jurisdiction of the United States" occurring overseas.<sup>6</sup> This means that criminal charges can be brought in the U.S. against civilians employed by the armed forces, family member dependents accompanying the armed forces overseas, and former members of the armed forces who commit a crime while in the military but are no longer subject to the Uniform Code of Military Justice<sup>7</sup> when they commit crimes overseas that would have been federal felonies had they been committed in the U.S. How does that definition impact the CACI Inc. civilian interrogator at Abu Ghraib? Assuming what he did was a felony if committed in the U.S., he would be subject to prosecution under MEJA, right?

Wrong. Abu Ghraib highlighted another hole in America's ability to prosecute civilians overseas. Although Attorney General John Ashcroft announced that the DOJ was considering using MEJA to prosecute the civilians involved in the prison abuses because the civilian contractors were working for other federal agencies, like the CIA, MEJA did not apply. The act only applied to Defense Department employees and contractors, even if the employee or contractor was working directly to support military operations, as was the case at Abu Ghraib. To close that jurisdictional gap, Congress, in the fiscal year 2005 Department of Defense Authorization Act, amended MEJA to extend its jurisdictional coverage to employees and contractors of other federal agencies and "any provisional authority."<sup>8</sup> However, MEJA's reach extends only to those employees and contractors "to the extent such employment relates to supporting the mission of the Department of Defense."<sup>9</sup> Unfortunately, Congress neglected to define the phrase "supporting the mission of the Department of Defense."

Turning again to the shooting involving the Blackwater employees, since they were working under a contract with the Department of State, the original MEJA would not have allowed a criminal prosecution in a U.S. federal court. However, it is possible that with the 2005 amendment, Blackwater employees would be subject to prosecution if they were found to be "supporting the mission of the Department of Defense." In November 2007, 16 of the Blackwater employees were subpoenaed by a federal grand jury investigating the September shooting. The grand jury was convened under MEJA and is still ongoing. Another interesting facet of the Blackwater case is that, unlike the civilian contractors at Abu Ghraib, the private security contractors working for Blackwater are not subject to criminal prosecution in Iraq as a result of an order issued by L. Paul Bremer, the chief American envoy in Iraq. On June 27, 2004, the day before the Coalition Provisional Authority in Iraq ceased to exist, Bremer issued Coalition Provisional Authority Order 17, which granted American private security contractors immunity from Iraqi laws and regulations.<sup>10</sup>

## THE UNIFORM CODE OF MILITARY JUSTICE

Congress added another arrow to the quiver when it amended the Uniform Code of Military Justice in the National Defense Authorization Act of 2007 to extend military jurisdiction over those serving with or accompanying an armed force in the field "in a time of declared war or a contingency operation."<sup>11</sup> Contingency operation is defined as a military operation "designated by the Secretary of Defense as an operation in which members of the armed forces are or may become involved in military actions, operations or hostilities against an enemy of the U.S. or against an opposing military force; or results in the call or order to, or retention on, active duty of members of the uniformed services."<sup>12</sup>

An attorney at the Defense Department Office of the General Counsel analyzed the criminal articles of the Uniform Code of Military Justice to determine which would apply to civilians. His conclusion was that, of the 163 offenses in the Uniform Code of Military Justice, 14 are not applicable to civilians, including absent without leave, desertion, leave, fraternization and gambling with a subordinate.<sup>13</sup> This means that civilian contractors in locations such as Iraq or Afghanistan can now be court-martialed or punished under the provisions of Article 15, a disciplinary tool less serious than trial by court-martial, if they violate applicable punitive articles of the Uniform Code of Military Justice. For example, if a civilian serving with or accompanying the force in a time of declared war or contingency operation sold military property on eBay, he or she could be tried by court-martial for a violation of Article 108 of the code, which prohibits the sale, loss, damage, destruction or wrongful disposition of military property.

No civilian or contractor accompanying the armed forces has yet been tried in a military court under the Uniform Code of Military Justice, and it is unclear how

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Supreme Court decisions that bar the courts-martial of civilians would affect any such prosecution in the long run. However, on March 10, Defense Secretary Robert Gates published additional guidance to commanders on the exercise of their Uniform Code of Military Justice authority over civilians during contingency operations, including those supporting the global war on terror. Military commanders have the authority to investigate any crime allegedly committed by someone subject to the Uniform Code of Military Justice as well as those subject to MEJA jurisdiction. Because of the unique nature of Uniform Code of Military Justice jurisdiction over civilians, Gates directed that the exercise of that jurisdiction should be based on military necessity to support an effective fighting force and be called for by circumstances that meet the interests of justice.<sup>14</sup> When offenses alleged to have been committed by civilians violate U.S. federal criminal law, the DOD will notify DOJ authorities and afford the Justice Department the opportunity to pursue prosecution in federal district court under MEJA. If the Justice Department declines to prosecute, proceedings under the Uniform Code of Military Justice may be initiated.

## ON THE HORIZON

On Jan. 28, 2008, President Bush signed the National Defense Authorization Act for fiscal year 2008. The act contains a section specifically addressing private security contractors, like those employed by Blackwater. Although it does not add criminal provisions other than those already found in MEJA and the Uniform Code of Military Justice, it requires the secretary of defense, in coordination with the secretary of state, to prescribe regulations on the “selection, training, equipping and conduct of personnel performing private security functions under a covered contract.”<sup>15</sup> The regulations are to include provisions for “a process for the independent review and, if practicable, investigation of ... incidents of alleged misconduct by personnel performing private security functions in an area of combat operations.”

Also being debated is another amendment to MEJA. On Oct. 4, 2007, Rep. David Price, D-N.C., sponsored a bill, the MEJA Expansion and Enforcement Act of 2007, which passed the House. If enacted, H.R. 2740 would amend MEJA to specifically cover contractors “while employed under a contract ... awarded by any department or agency of the United States, where the work under such contract is carried out in an area, or in close proximity to an area ... where the Armed Forces is conducting a contingency operation.”<sup>16</sup> It would cover individuals who, while employed under a contract with any federal agency in, or in close proximity to, an area where the armed forces are conducting a contingency operation, engage in conduct that would constitute an offense punishable by imprisonment for more than one year if that conduct occurs within U.S. jurisdiction.

## WHAT IT ALL MEANS

Civilians have always had a role on the battlefield. As early as the Revolutionary War, contract teamsters provided support to George Washington’s army. In the Gulf War, approximately 5,200 contractors supported 500,000 troops. The number of civilian contractors alone in Iraq is estimated by the Defense Department to be approximately 129,000.<sup>17</sup> Unlike Revolutionary War times, civilians today are filling roles that have been filled traditionally by military personnel. And, with increased “action” comes increased scrutiny and accountability.

So, what does all this mean for civilian contractors and employees? If Defense Department civilian employees or contractors working overseas commit a felony under U.S. federal law, they are subject to prosecution in U.S. federal court under MEJA. Civilian employees or contractors of any federal agency accompanying the armed forces in a time of declared war or contingency operation are subject to trial by court-martial. Civilian employees or contractors of an agency other than the DOD are subject to prosecution in U.S. federal court under MEJA if they are supporting the mission of the DOD.

If the new legislation amending MEJA is passed, all contractors, regardless of which federal agency they were contracted to, would be subject to prosecution in U.S. federal court if they committed a criminal offense, punishable by more than one year confinement if committed in the U.S., while working in or “in close proximity to” an area of contingency operations. Finally, the fiscal year

2008 National Defense Authorization Act, while not containing any criminal sanctions, directs the review or investigation of private security contractors in an area of combat operations, regardless of the agency with which they are working.

The bottom line is that the long arm of the law is reaching out in some form to capture most, if not all, civilians who are associated with the military overseas or who are working in an area of combat or contingency operations and who commit crimes.

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## ENDNOTES

<sup>1</sup> Hersh, S. 2004. Torture at Abu Ghraib. *The New Yorker*, May 10. Available at [www.newyorker.com/archive/2004/05/10/040510fa\\_fact](http://www.newyorker.com/archive/2004/05/10/040510fa_fact).

<sup>2</sup> Ultimately, CACI was sued in federal court by 200 Iraqis who were at one time detained at Abu Ghraib. Brinkley, J. 2004. The struggle for Iraq: The civilians; 9/11 set army contractor on path to Abu Ghraib. *New York Times*, May 19. Available at <http://query.nytimes.com/gst/fullpage.html?res=9C06E4D8123FF93AA25756C0A9629C8B63>.

<sup>3</sup> Now Blackwater Worldwide, it was founded in 1997 by former Navy Seals.

<sup>4</sup> Civilians in a time of peace are not triable by court martial. *U.S. v. Averette*, 19 CMA 363, 41 CMR 363 (1970); and *Reid v. Covert*, 354 US 1 (1956).