

# Civilian Contractors under Military Law

MARC LINDEMANN

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Over the course of its efforts to stabilize Iraq and Afghanistan, the United States has increasingly relied upon the work of civilian contractors. By the US Central Command's count at the end of 2006, there were nearly 100,000 contractors operating in Iraq alone.<sup>1</sup> An estimated 30,000—more than the number of non-US Coalition forces in Iraq—provide armed military services such as personal and site security.<sup>2</sup> The insertion of five words into Congress's fiscal year 2007 defense authorization act may now subject every civilian contractor operating in a combat zone to the discipline of the *Uniform Code of Military Justice* (UCMJ). This legislation ostensibly brings long-overdue regulation to contractor behavior, but it also raises a number of questions regarding interpretation and enforcement. By drawing on the lessons of past efforts to control contractors, the military should be able to craft a workable standard for the exercise of its expanded UCMJ jurisdiction.

## *Expertise for a Price*

Civilian contractors have frequently played an important role in American military operations. George Washington hired civilians to haul the Continental Army's equipment; supply vendors followed the Union and Confederate armies during the Civil War. Indeed, today's military recognizes the use of civilian contractors as a force multiplier in stabilization efforts.<sup>3</sup> Although sometimes expensive, contractors are capable of supplying immediate expertise and manpower much more rapidly than the military can grow subject matter experts.

In the second half of the twentieth century, a combination of technology, budget constraints, and personnel shortages forced the military to rely

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heavily on contractors for support services and even low-intensity combat skills. Technological innovation increasingly required the presence of contractors on the battlefield to maintain and repair their companies' sophisticated equipment, leading *Business Week* to label Vietnam a "war by contract" in March 1965.<sup>4</sup> The contractor facilities that exist on military installations today are legacies of that development. Even greater reliance on contractors came as a direct result of downsizing following the Cold War. This was a period when the military outsourced many of its basic support operations to civilian contractors.

Even as the military turned over its support services to civilians, companies such as Blackwater USA began to offer more combat-related specialties. Brookings Institution fellow P. W. Singer has ably chronicled the rise of private military firms (PMFs), private-sector organizations that provide military services to people, corporations, and governments. Singer notes that although PMFs fiercely fight the label of "mercenaries," they also advertise themselves as being capable of supplying an alternative means of furthering US interests abroad. In recent years, PMFs have grown in size and power. At a conference in Jordan last year, Blackwater USA Vice Chairman J. Cofer Black announced that his firm can "have a small, nimble, brigade-size force ready to move into a troubled region on short notice."<sup>5</sup>

Recent scholarship on the privatization of military force has emphasized the distinction between PMFs, such as Blackwater USA, and more logistics-oriented organizations, such as Kellogg, Brown, & Root (KBR).<sup>6</sup> Yet just as the difference between service support and combat arms can vanish on the asymmetric battlefield, the gap between PMFs and logistical contractors has narrowed. Given the current operational environment, military support personnel and their civilian counterparts are as vulnerable, if not more so, to attacks than combat units on patrol. The Geneva Conventions characterize contractors who accompany forces as noncombatants, but contractor tasks in today's combat zones bring these civilians into situations that force them to act in self defense.

From the onset of the Coalition's presence in Iraq, the United States has depended on PMFs and their logistics-oriented brethren to supplement

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Captain Marc Lindemann served as a platoon leader for personal security missions in central Iraq from 2005 to 2006. He holds a B.A. and M.A. in history from Yale University and a J.D. from Harvard Law School. Prior to entering the military, he worked as an attorney in New York City. He is currently assigned to the 1st Battalion, 258th Field Artillery of the New York Army National Guard.

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the force of uniformed service members. Coalition Provisional Authority (CPA) Administrator L. Paul Bremer III hired Blackwater USA personnel to provide security for his administration. Military and contractor missions often overlapped during the Coalition's stabilization efforts, making uniformed and non-uniformed personnel interchangeable. In personal security missions for the US State Department, soldiers work alongside private-contractor personnel. State Department officials might rely upon Blackwater USA one day and a US Army escort the next. American soldiers even receive missions to recover disabled PMF vehicles in Baghdad.

Other government agencies also rely on PMFs such as Triple Canopy and Aegis to perform combat-related functions that, in another age, service members would have performed. The US government is calling upon contractors to operate weapon systems, interrogate prisoners, and drive convoys through high-risk areas. These combat-zone contracts have proven particularly lucrative. The State Department is giving DynCorp International \$1.8 billion to train the Iraqi police and security forces, a mission shared with the US Army's Special Police Transition Teams.<sup>7</sup> The United States has awarded \$16 billion to Halliburton—which recently spun off its subsidiary, KBR—for services in Iraq ranging from food preparation to laundry.<sup>8</sup>

With the overlapping of military and contractor missions, the line between service members and contractors has blurred. As a result, it has become even more essential for contractors to understand and follow the applicable Rules of Engagement.<sup>9</sup> If a contractor violates the Rules of Engagement while attempting to protect people or property, the indigenous population will not care whether he is a member of the US armed forces or merely a civilian proxy. As Major General William L. Nash, USA Ret., noted, "If you're trying to win hearts and minds and the contractor is driving 90 miles per hour through the streets and running over kids, that's not helping the image of the American army. The Iraqis aren't going to distinguish between a contractor and a soldier."<sup>10</sup>

For the first three years of Operation Iraqi Freedom, the US government did not have an accurate count of its contractors and is only starting to determine the approximate number present in today's Iraq. As recently as December 2006, the Iraq Study Group estimated there were only 5,000 civilian contractors in Iraq.<sup>11</sup> The same month, however, Central Command issued the results of its own internal review: About 100,000 government contractors, not counting subcontractors, were operating in Iraq.<sup>12</sup> Then, in February 2007, the Associated Press reported 120,000 contractors in Iraq.<sup>13</sup> The Department of Defense (DOD) does not track contractor casualties, but at least 917 contractors have died and some 12,000 have been wounded in support of Operation Iraqi Freedom.<sup>14</sup>

The military's dependence upon contractors shows little sign of abating. The US Army predicts that "the future battlefield will require ever-increasing numbers of often critically important contractor employees."<sup>15</sup> In the first Gulf War, there were an estimated 9,200 contractors, less than one-tenth of the current number in Iraq.<sup>16</sup> The sheer size of the ballooning contractor force in stability operations requires a renewed emphasis on accountability.<sup>17</sup>

### ***Controlling Contractors***

The United States has a long history of applying military law to contractor organizations and personnel, albeit in limited circumstances. As current US Army doctrine on the subject notes, the regulation of contractor behavior is particularly important during wartime. "To fully integrate contractor support into the theater operational support structure, proper military oversight of contractors is imperative."<sup>18</sup> The Articles of War, the legal framework that preceded the UCMJ, extended military law to, "in time of war[,] all such retainers and persons accompanying or serving with the armies of the United States in the field."<sup>19</sup> With the UCMJ's institution in 1950, "persons serving with or accompanying an armed force in the field" were subject to the UCMJ "[i]n time of war."<sup>20</sup> Even in peacetime, "[s]ubject to any treaty or agreement" or "any accepted rule of international law," the UCMJ extended court-martial jurisdiction to "persons serving with, employed by, or accompanying the armed forces outside the United States and outside the Commonwealth of Puerto Rico, Guam, and the Virgin Islands."<sup>21</sup>

Over the next two decades, however, US courts eviscerated the portions of the UCMJ that ostensibly applied to contractors working for the armed forces. Beginning in 1957, the US Supreme Court repeatedly rejected as unconstitutional the notion that the military could exert court-martial jurisdiction over civilians in peacetime.<sup>22</sup> Furthermore, military courts interpreted the UCMJ's definition of "war" to mean one that Congress has formally declared. In 1970, the Court of Military Appeals overturned the conviction of a civilian contractor in Saigon because the Vietnam War did not meet this standard.<sup>23</sup> Contractors fell into a legal limbo in which their behavior went largely unregulated. At most, the military could only ask a contracting company to fire, demote, or send home an unsatisfactory employee.<sup>24</sup>

In the absence of a legal mechanism for controlling contractor activity, the military has attempted to formulate a coherent doctrine governing contractor oversight. This doctrine, however, has been more of a concession of the difficulties inherent in the regulation of contractor conduct than a guide to resolving the problem. "Currently, there is no specifically identified force

structure nor detailed policy on how to establish contractor management oversight within an [Area of Responsibility]. Consolidated contractor management is the goal, but reality is that it has been, and continues to be, accomplished through a rather convoluted system.”<sup>25</sup>

Until the passage of the fiscal year 2007 defense authorization act, the military explicitly exempted contractors from the UCMJ, vesting limited authority over contractors in the contracting officer and the contracting officer’s representative (COR). In this system, the primary responsibility for controlling contractor conduct rested with the contracting company. “Management of contractor activities is accomplished through the responsible contracting organization, not the chain of command. Commanders do not have direct control over contractors or their employees (contractor employees are not the same as government employees); only contractors manage, supervise, and give directions to their employees.”<sup>26</sup> Although federal regulation required contractor employees to comply with the directives of an area’s combatant commander, offenders normally faced removal from the country, rather than prosecution.<sup>27</sup>

In 2000, Congress sought to rein in civilian contractors by passing the Military Extraterritorial Jurisdiction Act (MEJA). Under MEJA, DOD contractors “employed by or accompanying the Armed Forces” could be brought back to the United States and tried in federal court for any crime that would be a felony under US law.<sup>28</sup> MEJA entrusted the US Department of Justice with the prosecution of these crimes. Military and civilian lawyers alike heralded the 2000 law as a means of regulating contractors’ actions in a theater of operations.<sup>29</sup> In practice, however, MEJA has had little visible effect. Given the evidentiary difficulties facing stateside civilian prosecutors with regard to criminal investigations in overseas combat zones, it is no surprise that US Attorneys have been hesitant to prosecute under MEJA.<sup>30</sup> The holes in MEJA became especially apparent during the Abu Ghraib scandal of 2004, when a civilian interrogator from Titan Corporation and a civilian interpreter from CACI International faced no punishment, despite their implication in the official report.<sup>31</sup> These civilians were technically working for the US Department of the Interior, rather than the DOD, thus shielding them from MEJA’s reach. Their military colleagues had no such protection from courts-martial, however.

Since MEJA, the US government and its representatives in Iraq have applied limited and sometimes contradictory methods of keeping contractors in line. In 2001, the USA Patriot Act granted federal jurisdiction over crimes committed by or against American citizens on certain US government property. Not all combat-zone offenses occur within the walls of an embassy compound, however. The stateside enforcement problems that plagued MEJA have

dogged the USA Patriot Act, as well; there has only been one successful prosecution of an Afghanistan- or Iraq-based government contractor under the USA Patriot Act.<sup>32</sup> By contrast, US officials in Iraq have largely left contractor discipline in the hands of the contracting companies and have even worked to ensure that contractors are safe from prosecution in Iraqi courts. In June 2003, CPA Administrator Bremer issued an order that granted civilian contractors sweeping immunity against local prosecution. A year later, he extended the contractors' protection until the election of a transitional Iraqi government, which in turn adopted Bremer's order during the subsequent transfer of authority. Although the current Iraqi administration has challenged this provision, the United States has continued to insist that an absolute bar exists to local criminal prosecution.<sup>33</sup> The Iraqi government could theoretically end this immunity, but the specter of local prosecution is often unconvincing during stabilization efforts in areas with emerging legal systems.

Given the Department of Justice's inaction under MEJA, Congress awarded the role of enforcing contractor discipline to the military. Under the 2007 defense authorization act, Congress added five words to the UCMJ, expanding the Code's jurisdiction to civilian contractors "[i]n time of *declared war or a contingency operation* (emphasis added)."<sup>34</sup> By statutory definition, a "contingency operation" is an "operation in which members of the armed forces are or may become involved in military actions, operations, or hostilities against an enemy of the United States or against an opposing military force" or an operation that involves the federal callup of the reserves or National Guard.<sup>35</sup> Operation Iraqi Freedom and Operation Enduring Freedom are contingency operations, according to this definition.<sup>36</sup> Senator Lindsey Graham, one of the change's architects, has stated that this modification of the UCMJ would "give military commanders a more fair and efficient means of discipline on the battlefield" by placing "civilian contractors accompanying the armed forces in the field under court-martial jurisdiction during contingency operations as well as in times of declared war."<sup>37</sup>

The expansion of the UCMJ's jurisdiction now provides a means of regulating contractor behavior, whatever the contracting company's mission is in the combat zone. In doing so, the 2007 legislation has fundamentally changed the military-civilian relationship in stability operations. To ensure contractor accountability in present and future stability operations, the military needs to define the limits of the UCMJ's jurisdiction, in terms of personnel, substance, and enforcement authority.

### ***Casting a Wider Net***

Although the UCMJ's jurisdiction now clearly extends to military contractors in Iraq and Afghanistan, the 2007 defense authorization act has

the potential for a far greater reach. MEJA restricted prosecution under US law to contractors working for the DOD, but the 2007 act does not make any such distinction. A mass of federal officials and agencies—and their own contractors—deploys with the military force during stability operations. These personnel often work alongside service members in their day-to-day missions. As such, the military must assess what constitutes a person “accompanying” US troops during contingency operations such as Operation Iraqi Freedom and Operation Enduring Freedom.

In applying the UCMJ to civilians, there are three degrees of inclusiveness that may govern jurisdiction. First, the military might, as a matter of policy, limit its prosecutions to DOD contractors. While in keeping with Congress’s earlier MEJA legislation, such a limitation would run counter to the legislative intent behind the 2007 act. MEJA was not applicable to the civilian contractors in the Abu Ghraib scandal because the DOD had not technically hired them, even though they performed military functions. According to Senator Graham, the recent change in UCMJ jurisdiction was intended to curb contractor abuses such as Abu Ghraib.<sup>38</sup> Thus, at the very least, non-DOD contractors actively involved in military operations should now be subject to UCMJ authority.

Second, the military might choose to apply the UCMJ to all civilian contractors in a combat zone, regardless of the government agency that hired them. Such an approach would solve the problem posed by the civilian offenders at Abu Ghraib; a contractor’s mere presence in the combat zone would be sufficient to trigger UCMJ jurisdiction. Although there would be inevitable turf wars between the military and other federal agencies, the alternative has already failed; these other agencies have demonstrated that they cannot adequately police the activities of their own contractors.

Third, the military may take a newly expansive view of those persons “accompanying an armed force in the field.”<sup>39</sup> This choice would extend the UCMJ to all US representatives, not just contractors, in a combat zone. Under this interpretation, the phalanx of federal officials, journalists, and nongovernmental organization representatives that accompany the armed forces during stability operations would have to adhere to the UCMJ. Although these different groups are often working toward the same goal, the prospect of UCMJ prosecution would give the military leverage in its dealings with the other players on the battlefield. Previously, military leaders could only exert soft control over their civilian colleagues in a combat zone, relying on persuasion and horse trading to convince civilian officials to support the military’s objectives. The extension of UCMJ jurisdiction could buttress the military’s authority in a theater of operations, making the military the sole clearinghouse for combat-zone justice. If a Department of the Inte-



rior contractor was subject to the UCMJ by virtue of his presence in the combat zone, the government administrator who hired him and supervises him might be, as well. In order to foster a good working relationship between different federal organizations, the military, and the media within a combat zone, however, this third option may not be feasible.

The amendment has turned the concept of civilian control of the military on its head, as Congress has, in effect, placed more than 100,000 civilians under the jurisdiction of military courts. The military needs to be judicious in determining how to apply the UCMJ to these civilians, many of whom have never even looked at the UCMJ, much less lived under its discipline. Of the three options above, the second option—that of regulating all contractors in Iraq, regardless of employer—appears to be the most effective. Military leaders should ensure that contracting firms educate their employees about the UCMJ prior to their employment in a combat zone. Unfortunately, this added level of accountability and potential legal liability may dissuade some civilians from serving in a combat zone, and the price of contractor services may consequently increase. Nevertheless, the cost of unregulated contractor behavior could be significantly greater in terms of undermining US stabilization efforts.

### *Setting Classes of Offenses*

On its face, the 2007 defense authorization act applies the whole of the UCMJ to contractors. The five-word change in Article 2 of the UCMJ does not distinguish between different classes of offenses. Yet the UCMJ articulates a code of behavior as much as it does a system of justice. The military ethics enshrined in the UCMJ do not necessarily or neatly translate into what contractors may expect from the civilian legal system. In the day-to-day affairs of the civilian world, disrespect toward a senior fellow employee does not result in judicial punishment. Civilians may go to a bar for a few beers after work, whereas a soldier's consumption of alcohol in a combat zone may violate General Order Number One and result in a court-martial.

As noted earlier, when Congress first enacted the UCMJ in 1950, legislators had anticipated the application of military law to civilians. While the courts exempted civilians from court-martial jurisdiction during peacetime and undeclared wars, the introduction to each punitive article of the UCMJ does state whether that article applies to “any person” or “any member of the armed services,” for example. The offense of absence without leave expressly applies to “[a]ny member of the armed forces,” whereas the offense of murder applies to “[a]ny person.”<sup>40</sup> Upon closer reading of the UCMJ, however, there are a number of “any-person” offenses that might be problematic

when applied to civilian contractors, including misbehavior before the enemy, misconduct as a prisoner, and provoking speech or gestures.<sup>41</sup>

MEJA is a potential source of guidance in creating a feasible system for UCMJ enforcement. In 2000, MEJA extended civilian prosecution of wartime offenses to felonies, criminal behavior “punishable by imprisonment for more than one year if the conduct had been engaged in within the special maritime and territorial jurisdiction of the United States.”<sup>42</sup> A similar principle could govern the enforcement of the UCMJ with regard to civilians. As a matter of policy, the military might limit enforcement of the UCMJ to civilians in cases where the offense was punishable as an equivalent felony in a civilian court. Military prosecution of civilians seems appropriate for combat-zone crimes such as rape, murder, and robbery, but not for contempt toward officials, misconduct as a prisoner, or malingering.

Thus, the military has the option of classifying the offenses under the UCMJ into felony and non-felony categories. Ultimately, the military should undertake a revision of its contractor-related doctrine, distinguishing between different types of offenses and clearly stating the ones for which civilians “accompanying an armed force” may face prosecution. It will also be important to include a description of these offenses in military contracts to ensure that the civilians involved understand the extent of their exposure to the UCMJ.

The question of whether contractors would have to obey orders from military personnel still remains. Although there may not be an obvious civilian equivalent, a combat environment raises particular concerns about deference to on-the-ground military authority. The discussion of placing contractors within a chain of command is tied up in the question of who will have the authority to enforce contractor discipline during wartime and contingency operations.

### ***Enforcing the UCMJ***

The military already has a system in place for the limited supervision of contractor activities. The chain of command’s influence, however, has previously stopped at the four corners of a civilian’s contract. “Only the contractor can directly supervise its employees. The military chain of command exercises management control through the contract.”<sup>43</sup>

Currently, the two military representatives who provide oversight for a contract’s performance are the contracting officer and COR. Contracting officers have the legal authority to enter and end contracts with PMFs and logistics-oriented companies; they may be military members or DOD civilian employees. The designated COR monitors day-to-day operations of the contractors, acting, in accordance with doctrine, “as the eyes and ears of

the contracting officer.”<sup>44</sup> The COR usually comes from the unit that requires the contractor’s services, serving as a liaison between the contractor, supported unit, and contracting officer. The COR does not, however, have the power to change the terms of the contract and cannot direct the contractor’s activities.

Under the latest expansion of UCMJ jurisdiction, a military officer may no longer merely be the customer of contractors; he or she now may be their commander. In one interpretation of the legislative change, the chain of command might extend from the COR to the senior contractor to the junior contractors. As the contracting officer’s agent on the ground, the COR has the responsibility of ensuring that contractors are obeying the applicable portions of the UCMJ during their operations. Instead of merely observing contractor activity, the COR may play an active role in enforcing the UCMJ, preventing contractors from engaging in criminal behavior. Without the power to issue enforceable orders, a COR would only be able to stand by and observe such activity, eventually reporting what he or she saw to the contracting officer. By empowering a COR to issue such orders, the military would add another layer of accountability to contractor operations. A COR would also have the duty of reporting any criminal activity to Judge Advocate General officers, thus initiating any necessary prosecution.<sup>45</sup> Yet if the COR receives the ability to issue certain orders to contractors on the battlefield, he or she should operate under the oversight of other, more senior military officers.

According to past doctrine, the contracting officer is not necessarily a military officer. Optimally, however, the COR belongs to the unit that needs the contractor’s services, thus providing an immediate supervisor in the COR and a readymade chain of command—the COR’s unit leadership—to review the COR’s decisions. Thus, in addition to being the contracting officer’s representative, a COR is, by virtue of coming from the supported unit, a representative of an area’s combatant commander. The military should take pains to ensure that senior military officers who outrank the COR, but who are outside the chain of command, cannot interfere with contractor assets they do not “own.” Furthermore, the issuance of enforceable military orders should not extend beyond preventing criminal activity and upholding the Rules of Engagement. The contracting officer must ensure that contractors understand the chain of command involved in the prevention and prosecution of applicable UCMJ offenses.

### ***Conclusion***

Since the Vietnam era, the military has struggled to develop a means of regulating contractor behavior in combat zones. With careful

interpretation, the new limits of UCMJ jurisdiction have the potential to prevent contractors from engaging in criminal activities. In keeping with congressional intent, the military can control DOD and non-DOD contractors alike by preventing and punishing combat-zone violations of the Rules of Engagement and offenses that would be felonies in civilian courts. Furthermore, by giving the COR the ability to issue enforceable orders relating to the Rules of Engagement and certain UCMJ offenses, the military can increase the accountability of contractors and ensure their prosecution in appropriate cases. Contractors constitute a significant portion of today's force in military operations; as representatives of the United States' efforts, they now are subject to the most basic standards of military behavior.

#### NOTES

1. See Renae Merle, "Census Counts 100,000 Contractors in Iraq," *The Washington Post*, 5 December 2006, D1. As the contractor presence in Afghanistan is even less documented than in Iraq, this article will focus on contractor support during Operation Iraqi Freedom. For a discussion of the relative numbers of contractors in each country, see Jennifer Elsea and Nina M. Serafino, "Private Security Contractors in Iraq: Background, Legal Status, and Other Issues," Congressional Research Service, 28 May 2004, [http://openers.cdt.org/rpts/RL32419\\_20040528.pdf](http://openers.cdt.org/rpts/RL32419_20040528.pdf).

2. See, e.g., T. Christian Miller, "Private Contractors Outnumber U.S. Troops in Iraq," *Los Angeles Times*, 4 July 2007, A1 (maintaining that 180,000 civilians are now working in Iraq under US contracts).

3. See, e.g., Michael R. Rampy, "Paradox or Paradigm? Operational Contractor Support," *Military Review*, 85 (May-June 2005), 72-75; see also US Department of the Army, Field Manual 3-07, *Stability Operations and Support Operations*, February 2003, sec. 2-44 ("[c]ommanders can expect that contractors will be involved in stability operations and support operations").

4. "Vietnam: How Business Fights the 'War by Contract,'" *Business Week*, 5 March 1965, 58-62, cited in Stephen J. Zamparelli, "Contractors on the Battlefield: What Have We Signed Up For?" *Air Force Journal of Logistics*, 23 (Fall 1999), 10.

5. Bill Sizemore, "Blackwater USA Says It Can Supply Forces for Conflicts," *The Virginian-Pilot*, 30 March 2006, <http://content.hamptonroads.com/story.cfm?story=102251&ran=202519&trf=po>.

6. See, e.g., Deborah D. Avant, *The Market for Force* (New York: Cambridge Univ. Press, 2005); P. W. Singer, *Corporate Warriors: The Rise of the Privatized Military Industry* (Ithaca, N.Y.: Cornell Univ. Press, 2003).

7. See Griff Witte and Renae Merle, "Reports Fault Oversight of Iraq Police Program," *The Washington Post*, 31 January 2007, D01.

8. See Clifford Krauss, "Halliburton Moving C.E.O. from Houston to Dubai," *The New York Times*, 12 March 2007, A16.

9. See, e.g., Steve Fainaru and Saad al-Izzi, "U.S. Security Contractors Open Fire in Baghdad," *The Washington Post*, 27 May 2007, A1.

10. Merle, "Census Counts 100,000 Contractors in Iraq," D1.

11. James A. Baker III and Lee H. Hamilton, *The Iraq Study Group Report*, 12, [http://www.usip.org/isg/iraq\\_study\\_group\\_report/report/1206/iraq\\_study\\_group\\_report.pdf](http://www.usip.org/isg/iraq_study_group_report/report/1206/iraq_study_group_report.pdf).

12. Merle, "Census Counts 100,000 Contractors in Iraq," D1.

13. Michelle Roberts, "Nearly 800 Contractors Killed in Iraq," *Associated Press*, 23 February 2007.

14. John M. Broder and James Risen, "Death Toll for Contractors Reaches New High in Iraq," *The New York Times*, 19 May 2007, A1. As several commentators have noted, these casualties may be more politically palatable than those of service members. See, e.g., P. W. Singer, "Outsourcing War," *Foreign Affairs*, 84 (March-April 2005), 119-32.

15. US Department of the Army, Field Manual 3-100.21, *Contractors on the Battlefield*, January 2003, Preface.

16. Merle, "Census Counts 100,000 Contractors in Iraq," D1.

17. According to FM 3-100.21, sec. 4-22, "Currently, there are no standard joint or Armywide deployed contractor visibility nor contractor-employee accountability procedures outside of this manual. However, con-

tractor visibility and contractor-employee accountability is needed to ensure that the overall contractor presence in a theater is synchronized with the combat forces being supported.”

18. *Ibid.*, sec. 1-23.

19. *The Articles of War* (Washington: US Government Printing Office, 1920), Article 2(d), [http://www.loc.gov/rr/frd/Military\\_Law/pdf/RAW-vol2.pdf#page=39](http://www.loc.gov/rr/frd/Military_Law/pdf/RAW-vol2.pdf#page=39).

20. *Uniform Code of Military Justice*, Article 2(a)(10), <http://www.au.af.mil/au/awc/awcgate/ucmj.htm>.

21. *Ibid.*, Article 2(a)(11).

22. See, e.g., *Reid v. Covert*, 354 U.S. 1, 40-41 (1957), <http://supreme.justia.com/us/354/1/case.html>; *McElroy v. United States ex rel. Guagliardo*, decided and reported with *Wilson v. Bohlender*, 361 U.S. 281 (1960) (no court-martial jurisdiction over civilian employee committing a non-capital offense during peacetime), <http://supreme.justia.com/us/361/281/case.html>; *Grisham v. Hagan*, 361 U.S. 278 (1960) (civilian employee committing capital offense not subject to military jurisdiction during peacetime), <http://supreme.justia.com/us/361/278/case.html>.

23. See *United States v. Averette*, 41 C.M.R. 363 (1970).

24. See Zamparelli; see also Kenneth A. Romaine, “Developing Lieutenants in a Transforming Army,” *Military Review*, 84 (July-August 2004), 75 (“The Army must teach lieutenants how to influence these people even though they do not have any real authority over them. Influencing people outside of the military organization requires seeing others’ perspectives, tolerating ambiguity, having a variety of leadership techniques, and being persuasive.”).

25. FM 3-100.21, sec. 1-24; see also sec. 2-25 (“Contractor accountability has been, and continues to be, a significant challenge to commanders at all levels.”)

26. *Ibid.*, sec. 1-22.

27. See Code of Federal Regulations, Title 48, sec. 5152.225-74-9000(b), 1 October 2005.

28. US Code, Title 18, sec. 3261(a)(1).

29. See, e.g., Joseph R. Perlak, “The Military Extraterritorial Jurisdiction Act of 2000: Implications for Contractor Personnel,” *Military Law Review*, 169 (September 2001), 93-141, [http://www.loc.gov/rr/frd/Military\\_Law/Military\\_Law\\_Review/pdf-files/277085~1.pdf](http://www.loc.gov/rr/frd/Military_Law/Military_Law_Review/pdf-files/277085~1.pdf); Chris Lombardi, “Law Curbs Contractors in Iraq,” *ABA Journal eReport*, 14 May 2004, <http://www.scrivovivo.net/chris/my14iraq.html>.

30. One of the only successful MEJA prosecutions involved a civilian network administrator working for the armed forces at the Baghdad Central Confinement Facility in Abu Ghraib. See “Abu Ghraib Contractor Sentenced for Child Porn,” *Associated Press*, 25 May 2007, <http://www.msnbc.msn.com/id/18866442/>.

31. See Farah Stockman, “Contractors in War Zones Lose Immunity,” *Boston Globe*, 7 January 2007, [http://www.boston.com/news/world/articles/2007/01/07/contractors\\_in\\_war\\_zones\\_lose\\_immunity](http://www.boston.com/news/world/articles/2007/01/07/contractors_in_war_zones_lose_immunity). Of the 44 incidents that the US Army investigated, 14 involved improper behavior by civilian contractors. See “AR 15-6 Investigation of the Abu Ghraib Detention Facility and 205th Military Intelligence Brigade,” 23 August 2004, [http://www.washingtonpost.com/wp-srv/nation/documents/fay\\_report\\_8-25-04.pdf](http://www.washingtonpost.com/wp-srv/nation/documents/fay_report_8-25-04.pdf).

32. Andrea Weigl, “Passaro Will Serve 8 Years for Beating,” *News & Observer*, 14 February 2007, <http://www.newsobserver.com/497/story/543038.html>; see also Scott Horton, “Providing Accountability for Private Military Contractors: Testimony Before the House Judiciary Committee,” 19 June 2007, <http://www.harpers.org/archive/2007/06/hbc-90000309>.

33. See Patrick Radden Keefe, “Iraq: America’s Private Armies,” *New York Review of Books*, 12 August 2004, [http://www.patrickraddenkeefe.com/articles/media/NYRB\\_20040812.pdf](http://www.patrickraddenkeefe.com/articles/media/NYRB_20040812.pdf); and Horton.

34. Public Law 109-364, 17 October 2006, sec. 552, codified in US Code, Title 10, sec. 802(a)(10).

35. US Code, Title 10, sec. 101(a)(13).

36. Moreover, another section of the 2007 defense authorization act explicitly locates these two conflicts within the “contingency operation” classification. Public Law 109-364, sec. 355(b)(2).

37. William Matthews, “Contractor Crackdown,” *Armed Forces Journal*, February 2007, <http://www.armedforcesjournal.com/2007/02/2471808>; see also Griff Witte, “New Law Could Subject Civilians to Military Trial,” *The Washington Post*, 15 January 2007, A1.

38. Matthews.

39. UCMJ, Article 2(a)(10).

40. Compare UCMJ, Article 86(a) with UCMJ, Article 118(a).

41. UCMJ, Articles 99, 105, and 117.

42. US Code, Title 18, sec. 3261(a).

43. FM 3-100.21, sec. 1-25.

44. *Ibid.*, sec. 1-16.

45. In a combat zone, the relative accessibility of Judge Advocate General defense counsel, prosecutors, and judges, as opposed to representatives of the civilian legal system, may also result in more timely and effective justice. Recent discussions about strengthening MEJA must take into account the difficulties in acquiring the necessary witnesses and evidence from overseas. See, e.g., Horton.