Mind the “Gap”:
Private Military Companies
and the Rule of Law
BY MITCHELL MCNAYLOR

Although private military companies (PMCs) operating in the service of the United States are widely believed to operate outside of any legal framework, such an understanding is based on a perceived, rather than real gap in jurisdiction. Nevertheless, in 2006, the United States Congress expanded the jurisdictional scope of the Uniform Code of Military Justice, in an attempt to subject members of private military companies to military jurisdiction. The jurisdictional statute is overbroad and the statute now potentially subjects United States civilians to military jurisdiction in situations short of declared wars.

The Current Perceived Problem

Throughout the course of the Global War on Terror (GWOT) and the war in Iraq, the Bush administration rarely chose to employ laws that would allow the United States to prosecute members of private military companies for alleged criminal misconduct. Although private military companies (PMCs) operating in the service of the United States are widely believed to operate outside of any legal framework, such an understanding is based on a perceived, rather than real gap in jurisdiction. In fact, an array of

Mitchell McNaylor is an independent scholar. In 2007, he earned a J.D. from the University of Florida Frederic G. Levin College of Law, serving as a research editor on the staff of the Florida Journal of International Law. He also holds an M.A. in history from the Ohio State University, and a B. A. in history from Louisiana State University. From 2000 to 2004, he served as a history instructor at Our Lady of the Lake College in Baton Rouge, Louisiana. He has published eighteen book reviews and numerous encyclopedia articles.
options exists for pursuing legal sanctions against either PMCs or individual contractors accused of misconduct. After changes in 2006 to the United States Code, contractors are now subject to the Uniform Code of Military Justice (UCMJ), which subjects civilians to military jurisdiction in situations short of declared wars. This is a problematic overcorrection, which results in many unintended consequences. PMCs need to be brought under a legal framework to allow them to be used effectively as an instrument of American policy. Such a system would protect the interests and rights of contractors, and would provide a venue for the prosecution of those contractors accused of violating the rights of non-combatants.

Types of Private Military Companies

Brookings Institution Fellow Peter W. Singer, in his book Corporate Warriors, offers a thorough typology of companies that offer military services for money. Those operating closest to the fighting are military provider firms, such as Executive Outcomes or Blackwater USA. Removed from direct action against an opponent, but still providing planning or training support are military consulting firms. Farthest from the fighting are military support firms that provide logistical and other kinds of support, but do not normally engage in combat.

Current Legal Control Over PMCs

Contractors are subject to an array of American laws. The means of control might not always be clear, though, and it would be more precise to say that private military companies and their personnel serving overseas are not subject to the clearly defined American criminal jurisdiction.

First, by their very definition, contractors are bound by law, since they require the law of contract to operate. The United States, as party to contracts, has a say in how those contracts are formed and executed, and, in the fall of 2007, Congress added specific language to be included in contracts with...
contractors providing private security functions. The new contract clause requires contractors to comply with regulations, keep relevant records, keep track of weapons, register vehicles, and report incidents involving discharge of weapons, death, or injury. In addition, contracts now require that persons serving under the contract be made aware of the relevant laws governing their situation. Still, the federal government often does not take as aggressive an approach as it might. For instance, oversight of State Department contracts does not appear to be robust. According to an October 24, 2007 New York Times story, there are only seventeen compliance officers at the State Department’s management bureau overseeing $4 billion worth of private security contracts, up from $1 billion four years earlier. That development follows the larger nationwide trend toward privatization; under the Bush administration, while the number of government workers has remained nearly static, the amount of money spent on contractors has doubled to about $400 billion per year. If the United States were to regulate and monitor the private military industry as closely as it does, say, the securities industry, private military companies might operate with greater transparency and accountability. The State Department could also institute greater supervision under the contract, something taken up in the wake of the September 17, 2007 shooting incident in which actions by Blackwater guards allegedly caused the death of seventeen Iraqis. It could also adjust the rules of engagement employed by State Department contractors. Also, if contractors are only working for profit, the first steps in regulating their behavior might be to penalize them for every week that they have an incident, to reward them for every week that they do their job without any extrajudicial killings, and to offer additional incentives to be delivered once work is completed on the battlefield.

Of course, even more carefully written contracts will not alter the problem of non-performance by contractors. As Dina Rasor and Robert Bauman note in Betraying Our Troops, “the fundamental danger of outsourcing the critically important supply chain lies in the contractor’s ability to quit the battlefield, to decide not to perform because of dangers involved.” Contract performance in combat conditions offers an extreme example of “efficient breach,” the idea that it is acceptable to breach a contract if it is economically advantageous to do so. In cases where the choice is between contract performance and death, the former is likely the less economically profitable alternative.

Second, U.S. courts can acquire jurisdiction over American companies, where PMCs may be sued in tort for alleged wrongs. Nordan v. Blackwater Sec. Consulting, LLC., 460 F.3d 576 (4th Cir., 2006) was an attempt by survivors of deceased Blackwater employees to pursue legal remedy against the corporation. In another attempt to pursue recourse against PMCs in United
States courts, the Center for Constitutional Rights is bringing suit against Blackwater for alleged wrongs committed in Iraq.\textsuperscript{22}

Third, U.S. law provides other mechanisms for gaining criminal jurisdiction over contractors. The Military Extraterritorial Jurisdiction Act (MEJA) gave U.S. federal courts criminal jurisdiction over some acts committed overseas by contractors employed by the Department of Defense.\textsuperscript{23} The MEJA has not been employed often during the War on Terror or the Iraq War, though. According to a \textit{New York Times} report, “under the law adopted in 2000, only two criminal cases have originated in Iraq, the experts said, one involving a contractor accused of possessing child pornography and another accused of attempted rape. In the attempted rape case, both the reported victim and the accused were Americans.”\textsuperscript{24} So, although there is a means to try most contractors working for the Department of Defense, the U.S. government has not chosen to charge many people under the law, something that is perhaps more a matter of policy, rather than of law.

In addition to the MEJA, a 2008 Congressional Budget Office report identifies three other possible ways to gain jurisdiction over contractors.\textsuperscript{25} The report refers to: “certain federal criminal statutes [that] govern actions in U.S. facilities overseas, including the premises of the U.S. military in foreign states that qualify as part of the special maritime and territorial jurisdiction (SMTJ) of the United States.”\textsuperscript{26} That jurisdiction may be used to try crimes against the property or personnel of the U.S. government.\textsuperscript{27} Also, the War Crimes Act of 1996, amended by the Military Commissions Act of 2006, confers jurisdiction over U.S. citizens and members of the U.S. armed forces who commit war crimes.\textsuperscript{28} In addition, the USA PATRIOT Act increased American jurisdiction by expanding the list of federal crimes that receive extraterritorial jurisdiction and also broadened the SMTJ to cover crimes committed by or against U.S. citizens on U.S. diplomatic, consular, or military facilities in foreign countries.\textsuperscript{29}

Fourth, local laws could be used to charge a contractor accused of a crime. Such an exercise of power would, of course, be subject to any treaties or status of force agreements that a country might have with the United States. These agreements are not always spelled out in great detail. For instance, the United States and Afghanistan only have a two-page agreement establishing the criminal jurisdiction over U.S. actions in Afghanistan.\textsuperscript{30} If a state is sovereign, then it has the authority to try, or not to try, people for offenses committed within its borders, in the absence of a status of force agreement with the United States. In Iraq, this has been problematic since the promulgation of Coalition Provisional Authority Order 17. Issued on the eve of the transfer of power from the Coalition Provisional Authority to
the Iraqi government, CPA Order 17 granted limited immunity from Iraqi legal process to contractors.\(^{31}\)

This order is often described as allowing contractors to act with impunity in Iraq, and has, so far, worked out that way in fact. A close reading of the order, though, indicates that contractors are only to receive immunity from prosecution for acts done pursuant to the contract; the order also enjoins contractors to obey local laws, which suggests that contractors were intended to receive only a limited immunity and were still expected to obey Iraqi laws. For instance, Blackwater USA contractors would be immune from Iraqi prosecution for the shooting on September 17, 2007, since it occurred while the contractors were on a protection detail; however, in the case of an infamous internal incident, contractors might not be immune from Iraqi legal process. The alleged gang rape by seven KBR employees of Jamie Leigh Jones, a fellow employee, could arguably be prosecuted under Iraqi law, since the act was likely not done pursuant to the terms of the contract.\(^{32}\) In the autumn of 2007, the Iraqi government began the process of canceling CPA Order 17 and subjecting contractors to Iraqi law.\(^{33}\)

Fifth, international humanitarian law may provide the means to pursue contractors for criminal conduct. In the international arena, the late twentieth century saw two major attempts to define and to regulate mercenaries. In 1977, a protocol to the Geneva Convention addressed mercenaries\(^{34}\) and twelve years later the United Nations approved an anti-mercenary convention.\(^{35}\) Although well intentioned, both have had as much success in banning mercenaries as the Kellogg–Briand Pact had outlawing war.\(^{36}\)

**Nevertheless, Congress Intervenes—2006 Changes to UCMJ Jurisdiction**

On October 17, 2006, the National Defense Authorization Act of 2007 went into effect as Public Law No: 109-364.\(^{37}\) It contained a single section that made what appeared to be a minor change: “Paragraph (10) of section 802(a) of title 10, United States Code (article 2(a) of the Uniform Code of Military Justice), is amended by striking ‘war’ and inserting ‘declared war or a contingency operation’.”\(^{38}\) The change was added to the National Defense Authorization Act for 2007 by Senator Lindsey Graham, a Republican from South Carolina. Graham stated that he sought to make the administration of justice more efficient and to give commanders more control by placing contractors under UCMJ jurisdiction.\(^{39}\) That minor change has major ramifications for the military and for the PMC industry. Unfortunately, this change raises even more problems, as described in *Army Lawyer*: “No legislative history explains this change. Further, as there is no published guidance, it is unclear how this change will be implemented and precisely what the ramifications will be.”\(^{40}\) 10 U.S.C. 802(a)(10) now potentially subjects American civilians to military
justice in the absence of a declared war, while American courts remain open, able to hear such cases. This development is particularly troubling in light of both the way in which the UCMJ criminalizes behavior that might not be illegal in civilian life and in the particularly broad way federal courts have interpreted the language of that statute.

**What Does the UCMJ Do?**

The application of the Uniform Code of Military Justice to private contractors simplifies jurisdiction and gives greater control—in theory at least—to unit commanders over PMCs operating nearby. In addition, it subjects members of PMCs to criminal jurisdiction, ensuring that they may be held accountable for any criminal actions.

The UCMJ criminalizes behavior not illegal in civilian life. Both adultery and sodomy are illegal under the UCMJ. Since the latter is explicitly recognized as a constitutional right after *Lawrence v. Texas*, the attempt to apply the UCMJ to contractors could prove problematic. It also raises the question: would this extend “Don’t Ask Don’t Tell” to persons swept up by 10 USC 802(a)(10)? Further, under military law, one accused of drug possession does not need to have a usable quantity of a drug to be convicted.

In addition, the UCMJ has several other classes of crimes that might apply to contractors, but which criminalize behavior that would not be illegal in civilian life. These types of “peculiarly military offenses” are categorized as: absence offenses, duties and orders offenses, superior–subordinate relationship offenses, and combat-related offenses. The wording of many of these statutes makes no explicit requirement that the accused be a member of the military, but merely refers to “any person.” Included among the absence offenses, a contractor could be charged with missing movement, for failing to accompany a ship or military formation to which the contractor was assigned. Included among the duties and orders, a contractor could be charged with failure to obey, willful disobedience, drunk on duty, malingering, and misbehavior of sentinel. Among the superior–subordinate relationship offenses, are charges of mutiny or sedition and disrespect toward superior commissioned officer. Under combat related offenses, a contractor could be charged with aiding the enemy, compelling surrender, forcing a safeguard, offenses against captured or abandoned property, and misconduct as prisoner. Of the crimes enumerated supra, several are capital offenses. Also, under the Mutiny or Sedition statute, a contractor could receive the death penalty for behavior which, in another context, could be construed as free speech, or could be sentenced to death for failing to suppress mutiny or sedition. American criminal law does not usually criminalize omissions, let alone make an omission a capital offense.
In addition, the UCMJ also contains a general article, which allows courts to punish individuals for acts that are not specifically enumerated in the UCMJ, but are still detrimental to military order.58

**Explicating 10 USC 802(A)(10) in the Context of History and Case Law**

Some of the phrasing of 10 USC 802(a)(10) is language held over from old articles of war; therefore, one should look to interpretation of that as well. Earlier commentators treated civilians under military jurisdiction in other ways. William Winthrop stated explicitly that civilians under military jurisdictions “are persons whose liability to military government and trial by court martial arises only in time of war, and is the result solely of the exceptional relations and obligations prevailing during a state of war.”59 Article 6360 of the Articles of War granted military jurisdiction over, “All retainers to the camp, and all persons serving with the armies of the United States in the field, though not enlisted soldiers, [who] are to be subject to orders, according to the rules and disciplines of war.”61 Winthrop treated two categories of civilians accompanying the army: “Retainers to the Camp” and “Persons serving with armies in the field.”62 By the former, he meant camp-followers, private entrepreneurs known as sutlers, who accompanied the armies and sold goods to the soldiers, and newspaper correspondents; by the latter, Winthrop referred to “civilians in the employment and service of the government.”63 Winthrop argued that such jurisdiction ought to be construed strictly. Winthrop does appear to be discussing declared wars, although he considered the Indian Wars of the nineteenth century to be wars for the purpose of jurisdiction. He specified two limits on military jurisdiction over civilians, namely that “the application of the Article is confined both to the period and pendency of war and to acts committed on the theatre of war.”64

The United States does not have a long tradition of using mercenaries to supplement combat forces, although American forces have long relied on private contractors to supplement the military logistical infrastructure.65 During the War for American Independence, the Continental Army relied on civilians to drive the wagons in its supply trains.66 During the American Civil War, sutlers traveled with the armies and sold supplies to the troops to supplement the often meager rations offered by the Union and Confederate governments.67 These examples from American military history most clearly resemble the military support firms described by Peter Singer.

Particular phrases in 10 USC 802(a)(10) have specific meanings within the context of U.S. law and other phrases have been interpreted by lower courts. The phrase “declared war” refers to the power of Congress under Article I, section 8 of the Constitution to declare war.68 Recent analyses of American law have tended not to favor trying American citizens in military courts.
absent a declaration of war: in United States v. Averette (C. M. A., 1970) the Court of Military Appeals held that, absent a declaration of war, the military has no authority to try civilians.

Averette is not without controversy, though. In a 2002 article, Colonel Lawrence J. Schwarz, then serving as a Judge Advocate in the United States Army Reserve, listed four objections to Averette. First, Averette was narrowly decided at a time when declared wars were more common than they are now. Second, it conflicts with United States v. Anderson: In Anderson, decided by the same court just two years before Averette, the COMA held that “in time of war” did include the Vietnam War for purposes of tolling of the statute of limitations. Averette rested its holding on the concern that it should strictly limit the exercise of court-martial jurisdiction over non-combatant U.S. citizens. Although the court could simply have reasoned that constitutional concerns limited Article 2(a)(10) jurisdiction in cases such as the one presented, the court instead based its decision on a definition of “in time of war” inconsistent with its own precedent. As a result, the reasoning in Averette seems disingenuous.

Third, the court in Averette ignored precedent that viewed the Indian Wars of the nineteenth century as a justification for court-martial jurisdiction over civilians accompanying armed forces, and that had previously interpreted “in time of war” as referring to undeclared conflicts. Fourth, in Averette the court relied on the O’Callahan v. Parker decision that the phrase “in time of war” should be construed literally, a case that was overruled by the Supreme Court in Solorio v. United States.

The term “contingency operation” is specifically defined in the U.S. Code, under 10 USC 101 (a)(13). Contrary to the requirements laid out in Averette, the jurisdictional expansion of 10 USC 802(a)(10) allows American citizens to be subjected to military jurisdiction not after a congressional declaration of war, but at the whim of the Secretary of Defense. By extension, this means that the Secretary of Defense has the power, without further Congressional authorization, to subject American citizens to military jurisdiction in some situations.

In re DiBartolo, 50 F. Supp. 929, 931 (S.D.N.Y. 1943) helps to clarify the meaning of “accompanying” and appears to suggest that physical proximity to an armed force is enough, and that no greater contact is required. The Court stated that: “assuming that by analogy, military jurisdiction would expire when the accompaniment ceased, it by no means follows that jurisdiction
failed when the employment terminated. The primary issue is whether the petitioner accompanied the Armies of the United States.”

Addressing the question of whether or not the petitioner accompanied the Army, the Court conducted a fact-specific inquiry. It noted that the petitioner was on a military base, that he traveled there to work on military aircraft as a mechanic and that, at that time, military operations were underway in Eritrea.

The phrase “in the field” has likewise received much attention from courts. In footnote 61 of Reid v. Covert, Justice Black noted that “‘in the field’ means in an area of actual fighting...Article 2 (10) of the UCMJ, 50 U.S.C. § 552 (10), provides that in time of war persons serving with or accompanying the armed forces in the field 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.’”

A series of lower court cases decided during the two world wars, interpreting that phrase as employed in the Articles of War, show just how broadly that phrase could be construed. In Ex parte Gerlach 247 F. 616, 617 (S. D. N. Y. 1917), the District Court of New Jersey declared that, “the words in the field do not refer to land only, but to any place, whether on land or water, apart from permanent cantonments or fortifications, where military operations are being conducted.” In Ex parte Falls DCNJ 1918 251 F. 415, when the civilian Chief Cook on a U.S. Army Transport attempted to leave his ship while docked in Brooklyn, New York he was tried for desertion. He was held to be “in the field,” even though the ship on which he was to sail was still docked in Brooklyn when he deserted. In Hines v. Mikell (4th Circ. 1919) 259 F. 28, the Court addressed the issue of whether or not Fort Jackson, South Carolina was “in the field.” It decided that, “to hold that a cantonment like this is not within military jurisdiction would handicap the military authorities, and greatly hinder and delay military operations, and would, in some instances, enable one employed in such capacity to successfully defraud the government without incurring any criminal liability whatsoever. We think that all persons serving there are strictly “in the field” and subject to military regulations.”

During the Second World War, courts viewed transport ships as being “in the field.” When describing a merchant ship transporting troops and supplies to the battle zone, the court in McCune v. Kilpatrick 53 F.Supp.80 (Eastern District Virginia 1943) Page 84 declared that “a military voyage for the purpose of transporting army troops and supplies during the present war is, in my opinion, clearly a military expedition in the field.” The court in In re Berue, 54 F.Supp 252 (S.D. Ohio 1944) held that a ship transporting troops through U-Boat infested waters and traveling in convoy was “in the field.”

MITCHELL MCNAYLOR
The expansive scope of “in the field” allows for an especially broad territorial expansion of UCMJ jurisdiction. During the two world wars, federal courts interpreted the scope of that phrase to include even a military base in the United States. What does all of this mean in the twenty-first century? These cases raise the question of whether “in the field” would also hold for those traveling by air, especially in the GWOT, where airlines are a major battleground, and precisely how much contact with the military would be required. Would airplane travel be analogous to traveling by ship during the world wars? Might a civilian contractor in the United States providing computer support to troops overseas be considered to be “in the field,” either under Hines, or Ex Parte Gerlach? What about a contractor, physically present in the United States, supporting the operation of an unmanned aerial vehicle operating against Taliban forces in Afghanistan? That is a clear case of an individual participating in military operations in a theater of war, without physically leaving the United States. What about during the GWOT, where there is no clear front?

Problems with the 2006 Jurisdictional Expansion of UCMJ

Although Congress passed the expansion UCMJ jurisdiction delineated in 10 USC 802(a)(10), such an expansion raises major problems. First, it is possibly unconstitutional by way of being overly broad; second, it raises public policy problems, and also leads to significant unintended consequences.

Twelve years after the end of World War II, the U.S. Supreme Court ruled on the issue of the scope of “in the field” in a situation short of war. In Reid v. Covert, the Court stated that:

While we recognize that the “war powers” of the Congress and the Executive are broad, we reject the Government’s argument that present threats to peace permit military trial of civilians accompanying the
armed forces overseas in an area where no actual hostilities are under way. The exigencies which have required military rule on the battlefront are not present in areas where no conflict exists. Military trial of civilians “in the field” is an extraordinary jurisdiction and it should not be expanded at the expense of the Bill of Rights. We agree with Colonel Winthrop, an expert on military jurisdiction, who declared: “a statute cannot be framed by which a civilian can lawfully be made amenable to the military jurisdiction in time of peace.”

In Reid, the Court suggests that while military jurisdiction over civilians may be appropriate in limited circumstances, there is a need to restrict that jurisdiction strictly. Reid is enough to suggest that a more moderate and restrained approach to the subject of military jurisdiction over civilians might be warranted.

From the late 1950s through the 1970s, American courts pruned the portions of the UCMJ that might apply to civilians. McElroy v. United States ex rel Guagliardo (S. Ct. 1960) eliminated most military jurisdiction over civilians. Parker v. Levy (S. Ct. 1974) describes how military and civilian legal systems are set apart and how UCMJ criminalizes what is legal in civilian life. Most significantly, in constitutional terms, changes to 10 USC 802(a) (10) run directly counter to Ex Parte Milligan, in that they subject civilians to military jurisdiction when Federal Article III courts are open. The MEJA, much maligned by commentators and, perhaps, underemployed by the Department of Justice, does confer jurisdiction over crimes committed by contractors to civilian courts. As long as courts are open, there is a preference for trying civilians in civilian courts. There is no reason why federal courts should not have jurisdiction, except that many of the actions would not be criminal under federal law.

In addition, the jurisdiction expansion raises a significant public policy problem. This is a kind of unfunded mandate, for it requires military lawyers potentially to handle far more cases than usual, without making a provision to expand the number of attorneys serving with military forces in the field. With the contractor to soldier ratio in Iraq approaching 1:1, this change effectively doubles the potential number of people to investigate and indict, not to mention the problem of dealing with the legal challenges to 10 USC 802(a)(10).

There are also many unintended consequences of extending UCMJ jurisdiction in the way that Congress did in 2006. Because of the lack of
Congressional hearings and reports on the decision to expand 10 USC 802(a)(10), though, Congressional intent is unclear, beyond statements made by Senator Graham. As demonstrated supra, merely expanding the scope of 10 USC 802(a)(10) subjects contractors to several laws criminalizing behaviors not illegal in civilian life, since many penal sections of the UCMJ refer to “persons,” rather than specifically to military personnel. Furthermore, some of those sections of the UCMJ carry the death penalty. While in civilian life, breach of contract does not normally carry a criminal penalty, under the expanded scope of the UCMJ, a contractor could conceivably be charged with desertion for what would be, in civilian life, merely breach of contract. Also, this is potentially a much larger expansion of jurisdiction: if contemporary courts follow earlier interpretations of the language of 10 USC 802(a)(10), then civilian contractors traveling to and from a theater of war, or working in the United States could be swept up. Moreover, the expanded scope of the UCMJ would cover far more people than just “mercenaries.” Embedded reporters, members of NGOs, federal employees, diplomats, and members of the intelligence services could all be prosecuted for violations of the UCMJ.

Department of Defense Guidelines on the Use of 10 USC 802(a)(10) 2008 Developments

On March 10, 2008, Secretary of Defense Robert Gates issued a memorandum offering some guidance for the implementation of 10 USC 802(a)(10). In the memo, Gates recognized that the statute covers Department of Defense civilian employees and Department of Defense contractors. Also, Gates established a procedure that allows the Department of Justice to decide whether or not it wishes to prosecute civilians who might be prosecuted under the UCMJ, before the Department of Defense proceeds with charges under the UCMJ. Still, he also directed military commanders to continue investigating alleged wrongdoing and preparing for a prosecution, in case the Department of Justice should chose not to act. There are several attachments to the memo and attachment 2, “Article 2(a)(10), UCMJ, Authority Over Persons Serving With or Accompanying the Armed Forces,” explicitly recognizes that during contingency operations, the UCMJ has jurisdiction over some civilians in the United States, and lays out procedures for handling such offenses. The attachment reserves exclusively to the Secretary of Defense the right to bring charges under the UCMJ against civilians in the United States. Overseas, combatant commanders and commanders who possess the ability to convene a general court martial may convene a court martial and exercise non-judicial punishment over persons subject to 10 USC 802(a)(10). In order to initiate charges against someone under the statute, commanders must first follow the notice requirements in attachment 3 of Gate’s March 10 memo and, if the Department of Justice
should elect to prosecute the case, military commanders may not initiate charges.\(^97\)

In an April 9, 2008 statement to the Senate Foreign Relations Committee, Robert Reed, Associate Deputy General Counsel for Military Justice and Personnel Policy in the Department of Defense described progress being made implementing the MEJA and the jurisdiction of the UCMJ over civilians.\(^98\) He stated that, “with increased familiarity regarding the applicability of these various extraterritorial laws and the intra- and inter-departmental implementing procedures, along with the practical experience of handling these cases, the process continues to improve and accountability is enhanced.”\(^99\)

As of the summer of 2008, the Department of Defense had only used the expanded jurisdictional reach of the UCMJ once, to charge an Iraqi–Canadian translator with aggravated assault.\(^100\) He later pled guilty to lesser charges.\(^101\) Whether the grant of jurisdiction over civilians under 10 USC 802 (a)(10) will fall to challenges on appeal remains to be seen, and will require a test case in which the defendant does not plead guilty.

**Conclusion**

In 1776, in the Declaration of Independence, the Second Continental Congress listed a bill of complaints against King George III, including that, “He has affected to render the Military independent of and superior to the Civil power.”\(^102\) The 2006 expansion of UCMJ jurisdiction comes dangerously close to doing just that by subjecting civilians to military jurisdiction in situations short of a declared war. Marc Lindemann, writing in the service journal *Parameters*, notes that, “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.”\(^103\) This jurisdictional change is overly broad and should either be declared unconstitutional or superseded by a new law such as the one outlined *supra*. Under the new version of 10 USC 802(a)(10), any time any contingency operation is underway anywhere in the world, most any civilian working near or for the military may be swept up by the UCMJ. This clearly defies *Ex Parte Milligan* and the long American tradition of trying American citizens under Article III courts, when Article III jurisdiction is available. It makes little sense for the United States to attempt to resolve a perceived jurisdictional gap in a way that tramples on the rights of American citizens, many of whom may not even be members of the private military companies. These PMCs need closer regulation, as they serve as the public face of America abroad. \(^\text{\#}\)

—Hannah Elka Meyers served as the lead editor of this article.
NOTES

1 The author would like to thank Pamela McNaylor, Malcom McNaylor, Maggie McNaylor, Professor Winston Nagan, Justin Klatsky, and Lt. Col. James Fischer, for all of their assistance during the writing of this article.


6 Ibid. at 93–95. In 2009, Blackwater USA renamed itself ”Xe.” Dana Hedgpeth, Blackwater Sheds Name, Shifts Focus, WASHINGTON POST, February 14, 2009, available online at: http://www.washingtonpost.com/wp-dyn/content/article/2009/02/13/AR2009021303149.html Since it was known as Blackwater at the time of the events discussed in this paper, the company shall be referred to as Blackwater in this paper.

7 Ibid. at 95–97.

8 Ibid. at 97–100.


11 Ibid.

12 Ibid.

13 For more on using contract as a method of applying public international law norms through a private agreement, see Laura A. Dickinson, Public Law Values in a Privatized World, 31 Yale J. Int’l L. 383, 402 (Summer 2006).

14 John M. Broder and David Rohde, State Dept. Use of Contractors Leaps in 4 Years. NEW YORK TIMES, Section A. Pg. 1. October 24, 2007.

15 Ibid.

16 For two approaches that apply ideas of securities regulation to the PMC industry are Deven R. Desai, Have Your Cake and Eat It Too: A Proposal for a Layered Approach to Regulating Private Military Companies 39 U.S.F.L. Rev. 825, 861–864.

17 Karen De Young, Security Firms in Iraq Face New Rules; Rice Convened Group After Blackwater’s Sept. 16 Gun Battle, Section A, Pg. 1, WASHINGTON POST, October 24, 2007.


19 Dina Rasor and Robert Bauman, Betraying Our Troops: The Destructive Results of Privatizing War (Palgrave MacMillan, 2007), at 232.


22 Rights Group Sues Blackwater, Associated Press (December 19, 2007), available online at: http://ap.google.com/article/ALeqM5hNHPWlAKhppP6a09eYb4SPnhwS2QD8TKNLEG0


26 Ibid.

27 Ibid.

28 Ibid.

29 Ibid.


38 Id.
44 Id.
45 10 USCS § 887 (LEXIS 2007).
46 10 USCS § 892 (LEXIS 2007).
47 10 USCS § 890 (LEXIS 2007).
48 10 USCS § 912 (LEXIS 2007).
49 10 USCS § 915 (LEXIS 2007).
50 10 USCS § 913 (LEXIS 2007).
51 10 USCS § 894 (LEXIS 2007).
52 10 USCS § 889 (LEXIS 2007).
53 10 USCS § 904 (LEXIS 2007).
54 10 USCS § 900 (LEXIS 2007).
55 10 USCS § 902 (LEXIS 2007).
56 10 USCS § 903 (LEXIS 2007).
57 10 USCS § 905 (LEXIS 2007).
58 10 USCS § 934 (LEXIS 2007).
60 Ibid 991.
61 Ibid 98.
63 Ibid 99.
64 Ibid 101.
65 For U.S. military history generally, see Millet and Murray, *For the Common Defense*.
68 Art l. s. 8.
71 Ibid 34.
72 38 C.M.R. 386 (C.M.A. 1968).
73 Schwarz, supra note 108, at 34.
74 Ibid.
The term ‘contingency operation’ means a military operation that—(A) is designated by the Secretary of Defense as an operation in which members of the armed forces are or may become involved in military actions, operations, or hostilities against an enemy of the United States or against an opposing military force; or (B) results in the call or order to, or retention on, active duty of members of the uniformed services under section 688, 12301(a), 12302, 12304, 12305, or 12406 of this title, chapter 15 of this title, or any other provision of law during a war or during a national emergency declared by the President or Congress.


247 F. 616, 617 (S. D. N. Y. 1917).

Ex parte Falls DCNJ 1918 251 F. 415 District Court D., New Jersey.

Ibid 416.


Ex parte Milligan, 71 U.S. 2, 127 (U.S. 1866).


Ibid.

Ibid.

Ibid.

Ibid.

Ibid.

Ibid.

Ibid.

Ibid.

Ibid.


Ibid.


Ibid.

The Declaration of Independence is available online at: http://www.archives.gov/national-archives-experience/charters/declaration_transcript.html