

USAWC STRATEGY RESEARCH PROJECT

**RESTORING UCMJ JURISDICTION OVER CIVILIAN EMPLOYEES
DURING ARMED HOSTILITIES**

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ABSTRACT

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Modern United States military operations have become increasingly reliant upon services provided by civilian employees of the Department of Defense, other federal employees, and contractors. The range of such services is remarkably diverse. Large numbers of civilians now accompany Armed Forces on virtually all deployments, including combat operations. In short, civilian personnel are key members of the modern military team. Their actions, like those of uniformed military members, may have profound effects upon national interests. While commanders are now heavily reliant upon civilian services, commanders have relatively little disciplinary authority over the conduct of deployed civilian personnel.

This paper proposes extending Uniform Code of Military Justice jurisdiction to United States citizen civilian personnel accompanying United States Armed Forces outside the United States in theaters of armed hostilities. It reviews and analyzes existing statutory bases of jurisdiction over civilians and the case law which has interpreted it. It also analyzes relevant evolutions of military jurisdiction and criminal practice in recent decades which call into question older case law which restricts UCMJ jurisdiction over civilians accompanying the Armed Forces. Finally, it recommends how the law may be shaped to effectively re-establish UCMJ jurisdiction over deployed civilian personnel in combat environments.

RESTORING UCMJ JURISDICTION OVER CIVILIAN EMPLOYEES DURING ARMED HOSTILITIES

From the founding of the United States, American military forces have been subject to a code of discipline distinct from civil society. The ensuing centuries have witnessed significant evolutions in both the substance and procedure of military criminal law. Since 1950, the Uniform Code of Military Justice (UCMJ) has governed the conduct of service members. Regularly updated since its inception, the Code now applies wherever our Armed Forces operate; both at home and abroad.¹ Today, courts-martial and other UCMJ procedures are conducted routinely in our combat theaters, just as they continue to be in garrison. At peace and at war, the UCMJ continues to provide a world-wide system whereby the Armed Forces can meet the needs of justice and discipline with regard to uniformed personnel.

Modern military operations are not, however, conducted exclusively by uniformed members of the Armed Forces. Civilian employees of a host of federal agencies as well as vast numbers of contractor employees serve side by side with service members around the world. In every setting, including within combat theaters, these civilian personnel provide services which are indispensable to the success of military missions. In short, the Department of Defense has built civilians inextricably into the teams through which the United States exercises military power.

While the nation realizes tremendous synergy and achieves important savings through such military-civilian team efforts, the intimate linkage does not come without cost. Specifically, civilian criminal conduct can have detrimental impacts upon the morale, good order, and discipline of the military forces civilian personnel accompany. Those impacts can equal in every way the effects of crime committed by service members. As a practical matter, however, and in consequence of a long series of court decisions, civilians accompanying the force may not be subjected to UCMJ jurisdiction.²

This paper argues that United States civilian citizens who accompany military forces outside the United States in theaters of active armed hostilities should be subject to the UCMJ. While this notion may seem controversial, it is not novel. The history of American military justice, as well as current provisions of the UCMJ, both provide a clear foundation for the exercise of jurisdiction over civilians. Accordingly, this paper recommends how Congress could amend the UCMJ to effectively re-establish appropriate military criminal jurisdiction over civilians.

Constitutional Foundation

Under Article III of the United States Constitution, “[t]he judicial power of the United States [is]...vested in one Supreme Court and in such inferior courts as the Congress may...establish.”³ Further, “[t]he [t]rial of all crimes...shall be by [j]ury...”⁴ Finally, the Founders specified that “[n]o person shall be held to answer for a capital or otherwise infamous crime unless upon presentment or indictment of a [g]rand [j]ury.”⁵ Taken together, these provisions constitute the key bases of federal civilian trial and appellate courts. The Founders, however, also provided a Constitutional basis for a military justice system in addition to other federal courts. In Article I, Section 8, Clause 14, they authorized Congress “[t]o make Rules for the Government and Regulation of the land and naval Forces.”⁶ The Founders reinforced the distinction between the two systems of justice by exempting “...cases arising in the land and naval forces...” from the grand jury indictment requirement of the Fifth Amendment.⁷ In short, the Constitution grants Congress explicit authority to enact and maintain a distinct military code of discipline.

Statutory Basis

From the Revolutionary era forward, Congress has consistently included provisions in our various military codes which have granted courts-martial jurisdiction to try certain categories of civilians. The Continental Congress enacted the first American Articles of War in 1775. These included Article XXXII which extended jurisdiction to “[a]ll sutlers and retainers to a camp, and all persons whatsoever serving with the continental army in the field...”⁸ While the 1775 articles obviously predate the Constitution, it can be safely assumed that the Founders were aware of their existence. Indeed, subsequent versions of the Articles of War included similar jurisdictional measures. Article 60 of the 1806 Articles granted jurisdiction concerning “[a]ll sutlers and retainers to the camp, and all persons whatsoever serving with the armies of the United States in the field...”⁹ In 1874 Congress again provided jurisdiction over “[a]ll retainers to the camp, and all persons serving with the armies of the United States in the field...”¹⁰ Congress expanded the scope of civilian jurisdiction in 1916 when it enacted Article 2(d) which covered:

All retainers to the camp and all persons accompanying or serving with the armies of the United States without the territorial jurisdiction of the United States, and in time of war, all such retainers and persons accompanying or serving with the armies of the United States in the field, both within and without the territorial jurisdiction of the United States, though not otherwise subject to these articles[.]¹¹

This same article was included in the post World War I Articles of War of 1920.¹² During World War II, the same text appeared as 10 United States Code Section 1473(d)¹³.

The post World War II era saw a major revision of military law, including the passage of the UCMJ in May 1950.¹⁴ Building on the text stemming from the earlier Articles of War, Congress enacted UCMJ Articles 2(a)(10) and 2(a)(11). While each has undergone minor amendments in subsequent years,¹⁵ the current language reflects the substance of the law throughout the existence of the UCMJ. According to Article 2(a)(10), "In time of war, persons serving with or accompanying an armed force in the field,"¹⁶ are subject to the code. Under Article 2(a)(11),

[s]ubject to any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, 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[,]¹⁷

are likewise bound by the UCMJ.

Historical Application

The legislative record makes clear that both before and after the adoption of the Constitution, Congress has deemed it proper, under certain conditions, to subject to courts-martial jurisdiction civilian personnel who were closely associated with the Armed Forces. The regular exercise of that jurisdiction is also amply illustrated through history.

George Washington, the Revolutionary era Commander in Chief, recorded several instances where civilians were apparently tried by military courts. For example, his writings addressing the period of 1778 to 1780 make reference to the trials of a wagon master,¹⁸ wagoners,¹⁹ an express rider,²⁰ commissaries,²¹ and a barrack master.²²

Six Twentieth Century federal court opinions from the periods of both World Wars offer more modern and instructive civilian cases. Each involved unsuccessful challenges to the jurisdiction of military courts by individuals who were either facing trial by courts-martial, or who had already been tried.²³ Each case came before civilian federal courts via petitions for writs of habeas corpus filed by or on behalf of the civilian accused.

Samuel Gerlach was a World War I merchant seaman. Late in 1917, he apparently completed a cruise to Europe and embarked on a return trip to the United States aboard an Army transport ship. Sometime during the cruise, the captain of the vessel (an Army officer) ordered Gerlach to stand watch. Gerlach declined to do so. "For this disobedience...he was tried by court-martial and sentenced to five year's imprisonment."²⁴ Gerlach thereafter questioned military jurisdiction in United States District Court. The court made fairly short work

of the challenge. It found that Gerlach was a "...person accompanying the army of the United States..." and that he was "...serving without the territorial jurisdiction of the United States ...;" both circumstances being "...within the meaning "...of Article 2(d) of the 1916 Articles of War."²⁵ The court was satisfied that since Gerlach was aboard an Army vessel while it was on the high seas, and thus in ...peril from submarines....," that Gerlach was "...in the field."²⁶ Finally, the court held that Article 2(d) was a constitutionally legitimate exercise of Congress's authority under Article 1, Section 8, Clause 14.²⁷

Mr. William Mikell served as a civilian employee of the Army at Camp Jackson, South Carolina, in 1918. Mikell faced military charges of defrauding the government. His pretrial jurisdictional habeas action ended up before the 4th United States Circuit Court of Appeal after he initially prevailed at the District Court level. The central question on appeal became whether Mikell, while working at Camp Jackson (which was obviously within the United States) was "in the field" for purposes of the 1916 Article 2(d). The court observed that "...an individual [who] during peace had enlisted at an army post...could not, so long as he remained there...be deemed to be...in the field."²⁸ The court added, however, that "...those who entered the cantonment took the first step which was to lead them to the firing line and...were then...'in the field'...."²⁹ The court went on to find that "Camp Jackson [was] a temporary cantonment where troops ...are assembled...for the purpose of training preparatory for service in the actual theater of war."³⁰ The court thus held that Mikell was "in the field" and subject to court-martial jurisdiction.³¹

The 1943 case of Anthony Di Bartolo presents a fact pattern that appears strikingly modern. Di Bartolo was an airplane mechanic employed by Douglas Aircraft Company. In August of 1942 he was working in Eritrea, where Douglas had a federal contract to operate a maintenance depot servicing United States and allied aircraft. Eritrea, a former Italian colony, was then under allied occupation. The depot was "...under the supervision and control of officers of the United States Army."³² On 13 August, while visiting the city of Asmara which was about 30 miles from the depot, Di Bartolo allegedly stole a diamond ring. He was soon tried by court-martial and convicted of larceny.³³ Di Bartolo thereafter sought habeas relief in federal court. The court determined that "[t]he primary issue is whether [Di Bartolo] accompanied the Armies of the United States."³⁴ The court found rather easily that he did. It recognized that the "...existence, maintenance, and operation [of the depot] were in the hands of the military...." and that "[i]ts activities were purely military...."³⁵ The court likewise found that Di Bartolo was at the depot for the express purpose of working as a "...mechanic on military aircraft." The court

therefore concluded that Di Bartolo was subject to Article 2 jurisdiction, as then described in 10 U.S.C. Section 1473(d).³⁶

The background in *Perlstein v. United States et al*,³⁷ is remarkably similar to that of the Di Bartolo case. Perlstein was also an employee of a wartime Army contractor. Coincidentally, he also worked in Eritrea in August and September 1942. Perlstein's employer provided marine salvage services, but his own duties were to maintain the air conditioning systems of the billets of his fellow employees. Perlstein apparently soon wore out his welcome and on 19 September the Army major general in command of the area "...ordered that [Perlstein] be discharged and returned to the United States at the earliest opportunity."³⁸ Six days later, after his employment was terminated, and "...on the day he was to board a ship...to the United States..." he, like Di Bartolo, stole some jewelry.³⁹ He was tried by general court-martial for larceny and related offenses.⁴⁰ Convicted and sentenced to prison, he too brought his jurisdictional challenge to federal court. Perlstein unsuccessfully argued that he was no longer subject to military jurisdiction due to his discharge from employment. The court found that "Perlstein was "being sent home but until this could be accomplished...he remained under Army control."⁴¹ The court also found relevant the facts that "...no entry of [Eritrea by] outside civilians was permitted..." that "...American civilians were required...to leave the country when their [contract] employment...was terminated;" that "...the work was directed by [Army] authorities..." and that "[a]bsolute security, lack of confusion, complete coordination and concentration on...tremendous Army objectives were essential."⁴² In light of these pervasive military controls and interests, the court held that Perlstein was still "...'accompanying' the Army after the contractor had discharged him."⁴³

Jacob Berue was another merchant sailor who ran afoul of the master of his vessel and the Articles of War. On 13 December 1942, he "...sailed with a convoy bound for Casablanca, Morocco"⁴⁴ aboard the Anthony Wayne, a cargo ship. The Wayne was under direct control of the Army; Army officers had issued its sailing orders; and the ship carried only Army cargo which was accompanied by an Army lieutenant acting as a "Cargo Security Officer."⁴⁵ On or about 15 December, while the Wayne was under way on the high seas, Berue allegedly assaulted the ship's master. After arriving in Casablanca, Berue was convicted of the assault by a general court-martial. His sentence included confinement. Once in prison in Ohio, Berue sought federal relief via habeas corpus.⁴⁶ Once again, the issue for the court was "...whether or not the petitioner was a person 'accompanying or serving with the Armies of the United States in the field.'⁴⁷ In answering this question adversely to Berue, the court found that the Anthony Wayne was effectively Army property and while it was on the high seas "...it was in waters

infested by [Axis] submarines...” and “...not only ‘in the field’ but in actual combat zones.”⁴⁸ The court held that Berue was subject to Article 2(d) and that there was “...no constitutional objection to a trial by court-martial...” of Berue as a civilian.⁴⁹

A final World War II period case involved Lawrence McCune, yet another merchant seaman. In September of 1943, McCune was serving on the S.S. Thomas B. Robertson, a “liberty ship” owned by the United States then at Norfolk bound for undisclosed points. Though built as a cargo vessel, the ship had been “...converted into quarters for the purpose of transporting human beings, specifically prisoners of war.”⁵⁰ McCune was employed as chief cook. He expected to prepare “...three meals each day for the crew of the vessel, seventy-eight in number, including a gun crew of twenty-nine.”⁵¹ McCune was unhappily surprised when 500 soldiers embarked for the voyage. Having made all preparations necessary to serve a hot supper to the 500 men, McCune was offended when an Army major (of questionable judgment) told him “There isn’t anybody going to eat until the colonel eats.”⁵² McCune became further perturbed and decided to quit the ship. He did so by “...jumping over the rail of the vessel as it was pulling away from the dock.”⁵³ Immediately apprehended by military policemen, McCune was charged with desertion. He filed a habeas corpus action seeking release from military custody while awaiting trial by court-martial. Though the Robertson was still in port when McCune left her, the court found that McCune was at that time “in the field.” The crew of the vessel was “...engaged on a voyage to transport some five hundred troops organized under the command of their officers, together with their equipment, and other war materials to battle zones.”⁵⁴ “[D]ocked and loaded at an Army base and under strict military control...” the vessel was part of “...an organized military enterprise of the army of the highest importance...” which in the court’s “...opinion [came] clearly within the term ‘army in the field’ under the provisions of Article of War 2(d).”⁵⁵ For the same reasons, the court found that McCune was accompanying the Army and accordingly held that he was subject to military jurisdiction.⁵⁶

Erosion of Jurisdiction over Civilians

While many federal courts sustained civilian jurisdiction through both World Wars, the ensuing Cold War era brought an effective end to such jurisdiction. Though Congress enacted ample jurisdictional bases in the UCMJ, a number of cases decided by both the Supreme Court and military appellate courts during a 15-year period beginning in 1955, restricted jurisdiction to a vanishing point.

The seminal case became *Toth v. Quarles*,⁵⁷ decided in 1955. Robert Toth was a former airman. He had served in Korea until he was honorably discharged from the Air Force on 8

December 1952.⁵⁸ Five months after his discharge, and after he had returned to the United States and taken civilian employment, Toth was charged under the UCMJ with the murder of a Korean national and conspiracy to commit murder.⁵⁹ Toth was alleged to have committed the offenses in Korea while he was still in the Air Force. The jurisdictional basis for the charges was UCMJ Article 3(a).⁶⁰ That statute extended jurisdiction to former service members who had committed UCMJ violations punishable by more than five years confinement while still in the Armed Forces, but which fell beyond the geographical jurisdiction of United States federal courts. Toth and his alleged crimes met these conditions in that no federal court had jurisdiction over acts which had been committed in Korea. Toth's pretrial federal habeas corpus petition alleging lack of jurisdiction eventually reached the Supreme Court.

The Court ruled in favor of Toth, holding "...that Congress cannot subject civilians like Toth to trial by court-martial. They, like other civilians, are entitled to have the benefit of safeguards afforded in the regular courts authorized by Article III of the Constitution."⁶¹ The Court emphasized the Constitutional safeguards in question included indictment by grand jury in accordance with the Fifth Amendment; trial before Article III courts where judges had life tenure and secure salaries; and trial by civilian juries consistent with both Article III and the Sixth Amendment.⁶² Declining to equate courts-martial with Article III courts, the Court stated that "...given its natural meaning, the power granted Congress 'To make Rules' to regulate 'the land and naval Forces' would seem to restrict court-martial jurisdiction to persons who are actually members or parts of the armed forces."⁶³

Toth had severed all ties with the Armed Forces before he was charged. But in 1955 there were many thousands of other civilians around the world who were more closely associated with the military, and who, according to UCMJ Article 2(a)(11), remained subject to courts-martial. These included vast numbers of dependent family members who by then had been allowed to accompany their sponsors to the far flung overseas United States military installations which helped characterize the Cold War.

Two of these were Mrs. Clarice Covert and Mrs. Dorothy Smith. Both were married to servicemen and both lived with their husbands in overseas on-post quarters. Both also murdered their husbands, Mrs. Covert in England and Mrs. Smith in Japan. Both of them were tried by courts-martial authorized to adjudge capital punishment. While both were convicted, neither was sentenced to die, each receiving instead lengthy prison terms. Their post-trial challenges to military jurisdiction via federal habeas corpus were eventually consolidated into one case before the Supreme Court which was decided in June 1957.⁶⁴

As to the power of Congress to regulate the Armed Forces, four justices of the Court agreed that

if the language of Clause 14 is given its natural meaning, the power granted does not extend to civilians -- even though they may be dependents living with servicemen on a military base. The term 'land and naval Forces' refers to persons who are members of the armed services and not to their civilian wives, children, and other dependents.⁶⁵

The same justices held forth at length concerning the same Constitutional safeguards discussed in *Toth*, again emphasizing that civilians are entitled to their full protection.⁶⁶ Having found no Constitutional basis for military jurisdiction, the four justices ordered both Covert and Smith released from federal custody.⁶⁷ Mr. Justice Frankfurter concurred in this result, as well as with much of the reasoning of the four justices who reached it, but limited his conclusions to capital cases only.⁶⁸

As a plurality, rather than majority opinion, *Reid v. Covert* had limited precedential value. It was restricted to capital cases. In January 1960, however, the Court resolved most questions regarding the extent of the opinion's impact in a group of cases decided with *Kinsella v. Singleton*.⁶⁹ *Kinsella* involved Mrs. Joanna Dial. Dial, along with her soldier husband, was convicted by court-martial in Baumholder, Germany, of the involuntary manslaughter of one of their children. Originally charged with unpremeditated murder, Mrs. Dial did not face the prospect of capital punishment. Based on the analysis set forth in both *Toth* and *Reid v. Covert*, the Court - this time in a clear majority opinion - held that Article I, Section 8, Clause 14 did not confer authority to authorize courts-martial jurisdiction "...of civilian dependents...for noncapital offenses."⁷⁰

On the same day it decided *Kinsella*, the Court reached the same jurisdictional conclusion in three other cases. *Grisham v. Hagan*,⁷¹ declared Article 2(a)(11) unconstitutional with regard to capital cases against civilian employees of the Armed Forces. *McElroy v. Guagliardo*⁷² and *Wilson v. Bohlender*⁷³ did the same as to civilian employees accused of noncapital crimes.

Toth and its progeny all addressed the trial of civilians pursuant to Article 2(a)(11) either employed by or accompanying the Armed Forces overseas in peacetime. They did not directly affect the wartime jurisdiction Congress accorded under Article 2(a)(10).

Article 2(a)(10) was, however, addressed by the United States Court of Military Appeals⁷⁴ in 1970. In *United States v. Averette*,⁷⁵ the court considered the appeal of the employee of a government contractor. Raymond Averette, the employee in question, had been tried and convicted in Vietnam by a general court-martial on charges of conspiracy to commit larceny and attempted larceny. The court described the issue to be decided as "...whether the words 'in

time of war' as used in Article 2(10)...mean a *declared war*.⁷⁶ After reviewing the *Toth* line of cases, the court stated "...that a strict and literal construction of the phrase 'in time of war' should be applied."⁷⁷ So construed, the court concluded "...that the words 'in time of war' mean, for purposes of Article 2(a)(10)...a war formally declared by Congress."⁷⁸

Parallel Erosion of Jurisdiction over Service Members

With *Averette*, the courts sounded a virtual death knell to the concept of court-martial jurisdiction over civilians, at least with regard to how the UCMJ was then - and is now - written. Perhaps not coincidentally, a line of Supreme Court cases decided in the Vietnam War era also significantly eroded court-martial jurisdiction over service members. Giving birth to the so called "service connection doctrine," these case were founded upon some of the same considerations as were *Toth* and its progeny. The service connection cases were, however, ultimately reversed. As will be explained, that reversal may help call into question the vitality of cases restricting civilian jurisdiction.

The Supreme Court decided *O'Callahan v. Parker*⁷⁹ in June 1969. Yet another habeas corpus scenario, O'Callahan challenged the jurisdiction of the court-martial which had convicted him of attempted rape and associated crimes. Tried in 1956, O'Callahan's sentence included a dishonorable discharge and confinement for 10 years. His victim was a young female civilian. O'Callahan committed the crimes in Honolulu, Hawaii. He was on pass from Fort Shafter at the time, and hence off duty and dressed in civilian clothes. Announcing a new jurisdictional touchstone, the Court held "...that the crime to be under military jurisdiction must be service connected, lest...every member of the armed forces [be deprived] of the benefits of an indictment by a grand jury and a trial by a jury of his peers."⁸⁰ As to O'Callahan, the Court wrote that "[t]here was no connection -- not even the remotest one -- between his military duties and the crime in question."⁸¹ The thrust of *O'Callahan* was that a service member's status as a member of the Armed Forces, standing alone, was no longer sufficient to render the member subject to trial by courts-martial. As a prerequisite to jurisdiction, the government would have to demonstrate an affirmative link between the service member's crimes and his or her status as a member of the Armed Forces. In the absence of such, only civilian courts could to exercise jurisdiction.

In part due to a storm of litigation the *O'Callahan* opinion provoked, the Supreme Court revisited the issue two years later in *Relford v. Commandant*.⁸² While serving as an Army corporal, Isaiah Relford was convicted and sentenced by court-martial in 1961 for the on-post kidnapping and rape of two women at Fort Dix, New Jersey. Based on the outcome of

O'Callahan, Relford sought similar relief in his own case. The Court, however, found that Relford's crimes met the *O'Callahan* service connection test. It noted that Relford attacked his victims on post, one of women having been the sister of a soldier and the other an employee of the Post Exchange. The Court also took pains to elaborate upon its language in *O'Callahan* and drew from it a list of 12 factors which could help determine whether a crime was service connected.⁸³

Military practitioners adapted to the Supreme Court mandates in due course. The so-called "service connection doctrine" became formalized. The Court of Military Appeals eventually held that the government was required to allege the facts that established service connection in the specification describing the offense.⁸⁴

A Jurisdictional Turning Point - The End of the Service Connection Doctrine

The service connection doctrine prevailed for 18 years until the issue once again came before the Supreme Court in *Solorio v. United States*.⁸⁵ Richard Solorio was a Coastguardsman who was charged with sexually molesting children of fellow Coastguardsmen in both Alaska and New York. While the New York based offenses took place in government quarters, Solorio asserted that his off-installation Alaska crimes were not service connected. The military judge at Solorio's court-martial granted his motion to dismiss the Alaska based offenses for lack of a connection to his service. Due to successful government appeals of this ruling, Solorio eventually sought review in the Supreme Court.

The Court not only denied Solorio relief but also explicitly reversed *O'Callahan* and its progeny. In a remarkably direct and candid opinion, the Court criticized the validity of the interpretation of the history of court-martial jurisdiction upon which the *O'Callahan* Court relied. Giving force to the text of Article I of the Constitution, the Court wrote that:

Whatever doubts there might be about the extent of Congress's power under [Article I, Section 8] Clause 14 to make rules for the 'Government and Regulation of the land and naval Forces,' that power surely embraces the authority to regulate the conduct of persons who are actually members of the Armed Services.⁸⁶

In emphasizing the historical jurisdictional standard, the Court cited language from its opinion in *Kinsella* that "[t]he test for jurisdiction...is one of status, namely, whether the accused in the court-martial proceeding is a person who can be regarded as falling within the term 'land and naval Forces....'"⁸⁷ Rejecting *O'Callahan's* "novel"⁸⁸ notion of service connection, the Court reached the conclusion "...that we should read Clause 14 in accord with the plain meaning of its language as we did in the many years before *O'Callahan*...."⁸⁹ The Court then made its holding

emphatically clear: “We therefore hold that the requirements of the Constitution are not violated where, as here, a court-martial is convened to try a serviceman who was a member of the Armed Services at the time the offense was charged.”⁹⁰

Congressional Action to Address Civilian Jurisdiction - The Military Extraterritorial Jurisdiction Act of 2000

Congress has not been ignorant of the judicially driven diminution of jurisdiction of courts-martial over civilians. In 1996, as part of the Department of Defense Appropriation Act for that fiscal year, Congress directed the establishment of a joint Department of Defense and Department of Justice committee to examine civilian jurisdictional issues and issue a report within a year.⁹¹ The committee’s charter was “...to review and make recommendations 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.”⁹² While not limiting the committee’s consideration of additional approaches, Congress mandated that it consider at least the following three: “[e]stablishing court-martial jurisdiction over such persons,” “[e]xtending the jurisdiction of the Article III courts to cover such persons,” and “[e]stablishing an Article I court to exercise criminal jurisdiction over such persons.”⁹³

The committee ultimately submitted two recommendations: to “...expand the jurisdiction of federal courts to allow them to try offenses committed by civilians accompanying the armed forces overseas,” and to “...expand court-martial jurisdiction to cover civilians accompanying the armed forces during certain contingency operations.”⁹⁴ The committee further suggested that the “[t]he President or the Secretary of Defense [could] specifically designate” which contingency operations would qualify and “...the geographic area covered...” by any such contingencies.⁹⁵

With the benefit of the committee’s report, as well as additional time, Congress passed the Military Extraterritorial Jurisdiction Act of 2000 (MEJA).⁹⁶ In essence the MEJA extends the jurisdiction of federal district courts to felony offenses committed by specified civilians while “...employed by or accompanying the Armed Forces outside the United States.”⁹⁷ In pertinent part, such civilians include civilian employees of the Department of Defense (including non-appropriated fund instrumentality employees); Department of Defense civilian contractors, subcontractors, and their employees; and the civilian employees of other federal agencies or provisional authorities when serving in support of overseas Department of Defense missions.⁹⁸ The MEJA included detailed implementation procedures.⁹⁹ It also required the Secretary of Defense to publish administrative regulations which further implement the act.¹⁰⁰ The Secretary of Defense did so by promulgating Department of Defense Instruction 5525.11 on 3 March

2005.¹⁰¹ As implemented, the MEJA allows civilian federal prosecutors to pursue felony cases against covered civilians in a federal district court located in the United States.

The MEJA is a step in the right direction but it does not go far enough. As a threshold matter, while the MEJA extends the reach of federal jurisdiction in limited instances, it does little to overcome the many practical difficulties associated with exercising that jurisdiction. For instance, where cases depend upon the testimony of local national witnesses (i.e. non-United States citizens) prosecutors may be hamstrung by an inability to produce the witnesses at trial. Assuming that the witnesses can be located, foreign nationals may not be compelled to travel to the United States for the purpose of testifying. Even if a witness were willing to travel, entry, visitation, or immigration policies might separately inhibit or even bar participation at trial. In determining whether to prosecute a given crime, it is both routine and proper for a United States Attorney to consider the practical challenges and likely expenditure of resources associated with the case. It is not difficult to suppose that federal prosecutors will usually choose to dedicate their limited resources to resolving those cases which have the most direct impact upon the domestic district for which they are responsible. MEJA cases - arising half-way around the world and founded on a tangle of foreign evidence and witnesses - seem destined to frequently fail such common sense tests.¹⁰²

Perhaps of greater significance is the fact that the MEJA is generally operative only in instances where host nations elect not to exercise their own jurisdiction.¹⁰³ In reality, this is a simple recognition of one of the primary legacies of the Toth line of cases. Once case law effectively forbade courts-martial prosecutions against civilians, the United States has generally deferred to host nation exertion of jurisdiction regarding civilians.¹⁰⁴ Thus, when civilian conduct violates host nation law, even when the action might also violate United States law, host nations typically have jurisdiction.

Subjecting civilians to the jurisdiction of host nation courts can be problematic, however. As a matter of national policy, it may be acceptable to expose civilians accompanying military forces to the jurisdiction of a well-developed host nation judicial system which comports with American notions of basic due process. The now decades-long practice of deference to the jurisdiction of German courts is a good example of such an arrangement. It is quite another matter to subject civilians to host nation processes which may deny accused persons rights which the United States deems fundamental. Contemporary military operations amply illustrate the chaotic character of the environment of failing or failed states into which the United States may deploy for combat. In such settings, the fact that the United States faces the necessity of resorting to armed force strongly suggests that governance, including judicial institutions, has

collapsed. Few would argue the acceptability of subjecting civilian members of the force to whatever “host nation” jurisdiction might exist on such battlefields.

The MEJA now provides a basis for federal prosecutions in circumstances where host nations either choose not to exert jurisdiction, or in appropriate cases, where the Attorney General elects to authorize a federal prosecution in the face of host nation action.¹⁰⁵ But as one of the members of the committee whose report helped lead to the enactment of the MEJA observed: “Expense and logistical hurdles will ensure that this vehicle would be used only infrequently.”¹⁰⁶ Whatever may be said of the MEJA, it cannot match the proven flexibility, responsiveness, or portability of the military justice system.

A Basis for the Re-establishment of Jurisdiction over Civilians Serving with or Accompanying Armed Forces during Periods of Armed Hostilities

While the issue in *Solorio* was the extent of jurisdiction over a uniformed member of the Armed Forces, specifically a member of the Coast Guard, the case nevertheless stands for the key principle of personal jurisdiction in military jurisprudence. As the Court succinctly described that principle: “The test for jurisdiction...is one of status, namely, whether the accused in the court-martial proceeding is a person who can be regarded as falling within the term ‘land and naval Forces’...”¹⁰⁷ In discrediting the “...new constitutional principle... [of] service connection...,”¹⁰⁸ the Court returned personal jurisdiction to both its historical and true Constitutional foundation.

The basic foundation, the *Solorio* Court reminded all, is that “...Congress, and not the Executive, was given the authority to make rules for the regulation of the Armed Forces.”¹⁰⁹ As to judicial constraints on jurisdiction, the Court pointed out

...that Congress has the primary responsibility...of balancing the rights of servicemen against the needs of the military. As we recently reiterated, ‘judicial deference is at its apogee when legislative action under congressional authority to raise and support armies and make rules for their governance is challenged.’¹¹⁰

The essence of *Solorio* is that Congress meant what it said in the simple language of Article 2(a)(1) of the UCMJ: “The following persons are subject to this chapter: Members of a regular component of the armed forces....”¹¹¹ In the Court’s view, Congress had said, that as a Coastguardsman, Richard Solorio was subject to the code at all times and places and that Congress had the Constitutional authority to so declare.

It is tempting to read the long line of civilian cases beginning with *Toth* as permanently casting civilians beyond the jurisdictional grasp of courts-martial as prescribed by Congress. The civilian Supreme Court cases, however, are of limited reach and applicability. They did *not*

forever close the jurisdictional door. The key to opening it has two “teeth.” First, the setting in which a civilian operates with military forces. The second is the status of the individual civilian as a person over whom Congress may prescribe jurisdiction.

With regard to setting, it is vital to recognize that with the exception of *Toth*, the line of relevant Supreme Court cases all involved crimes occurring in peacetime. Though the dependent and employee cases all arose overseas in the general setting of the Cold War, none actually addressed combat theaters or areas undergoing active armed hostilities. For example, the *Reid* Court explicitly recognized that it was not addressing a case involving a “time of war”¹¹² or Congressional “war powers.”¹¹³

Reid, *Kinsella*, *Grisham*, *McElroy*, and *Wilson* all were challenges to jurisdiction under Article 2(a)(11). They did not address Article 2(a)(10) and its extension of jurisdiction “[i]n time of war, [over] persons serving with or accompanying an armed force in the field.”¹¹⁴ These opinions left intact the federal trial and appellate level decisions of the World War eras which repeatedly sustained courts-martial jurisdiction under statutes equivalent to Article 2(a)(10). In other words, the Supreme Court has yet to squarely address the Constitutionality of military jurisdiction under this provision.

The Court of Appeals for the Armed Forces did address the statute in *United States v. Averette*. *Averette*, however, is as ill-founded as was *O’Callahan*. Decided at the height of the war in Vietnam, *Averette* stands for the proposition that the jurisdictional authority of Article 2(a)(10) is limited to periods of “declared war.”¹¹⁵ In reaching this conclusion, the court noted “As 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.”¹¹⁶ The opinion does not, however, cite or otherwise reliably identify the actual Supreme Court “guidance” upon which it relied. The opinion does make separate reference to *Toth* and the subsequent civilian cases, but it fails to take into account the fact that none of them involved Article 2(a)(10). The court did say that the cases all “...covered offenses occurring in periods other than declared war...,”¹¹⁷ but otherwise did not address the fact that none but *Toth* was remotely related to a force engaged in active armed hostilities against an enemy. The court was careful to distinguish away state, federal, and military cases (including its own) which shed some light on the meaning of the term “in time of war.”¹¹⁸ As the court pointed out, none were relevant because none dealt with courts-martial jurisdiction over civilians. Yet when the court announced its conclusion, the two cases it *did* specifically cite as authority likewise had nothing to do with jurisdiction over civilians.¹¹⁹ The court went on to

...emphasize [its] awareness that the fighting in Vietnam qualifies as a war as that word is generally understood. By almost every standard -- the number of persons involved, the level of casualties, the ferocity of the combat, the extent of suffering, and the impact on our nation -- the Vietnamese armed conflict is a major military action.¹²⁰

The court was unwilling, though, to hold that such an actual state of war satisfied Article 2 (a)(10) in lieu of "...a formal declaration of war...in the sensitive area of subjecting civilians to military jurisdiction."¹²¹

While the Supreme Court has not addressed the question, the lead opinion in *Reid* at very least leaves open the possibility that if the Court did so, it could take a broader view than was adopted in *Averette*. As Justice Black wrote:

In the face of an actively hostile enemy, military commanders necessarily have broad power over persons on the battlefield. From a time prior to the adoption of our Constitution the extraordinary circumstances present in an area of actual fighting have been considered sufficient to permit punishment of some civilians in that area by military courts under military rules.¹²²

As a practical matter *Averette* ignored the reality of war in Vietnam, and for that matter, war as it had been fought by the United States from the end of World War II. To adhere today to the narrow view of "time of war" expressed in *Averette* is to likewise ignore reality. Korea, Vietnam, and the Persian Gulf War, all had virtually every historic hallmark of "war." All demanded enormous national resources, including obvious Congressional support by way of appropriations if not outright resolutions authorizing the use of military force.¹²³ All likewise required immeasurable sacrifice, a fact witnessed by over 90,000 United States dead.¹²⁴ Ongoing wars in both Iraq and Afghanistan share all these characteristics, including the grim fact of thousands of service members dying in combat.

At any rate, the United States, and the world in general, may well have seen its last formally declared war. If for no other reason, the nations of the world have effectively forsworn war in Article 2(4) of the United Nations Charter: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."¹²⁵ For nearly 60 years, the international order has contemplated peaceful resolution of disputes or resort to force only when appropriately sanctioned by extra-national authority.

Notwithstanding these well established international norms, the *fact* of war will remain, as fully evidenced by the current United States led Global War on Terror. To the extent that the conditions of war have ever justified the exercise of military jurisdiction over civilians serving

with the Armed Forces in the field in time of war, it virtually defies logic to assert that those conditions do not exist today in Iraq.

United States military jurisprudence should acknowledge and accept the character and fact of modern war. As to the setting of Article 2(a)(10), the judicial bar to that acknowledgment currently consists of a poorly supported 35 year-old opinion by two judges of the Court of Appeals for the Armed Forces. The foundation for that opinion is weak, as was that of *O'Callahan* before it was reversed by *Solorio*. Unlike *O'Callahan*, however, *Averette* leaves virtually no room to initiate a case which might challenge its validity through the appellate process.

The means to overcome *Averette* lie, therefore, in an amendment to Article 2(a)(10). Congressional substitution of "in time of war or during periods of armed hostilities" for "in time of war" in that statute would provide a legislative basis to once again assert court-martial jurisdiction over persons accompanying or serving with United States Armed Forces in the setting of modern war.¹²⁶

A constitutional challenge to the first such assertion would be inevitable. It would turn on the other "tooth" of the jurisdictional key, namely the status of the individual subjected to trial.

As is the case with the aspect of setting, *Toth* and the cases which stemmed from it have left important latitude regarding status. In *Toth* itself, the Court tellingly observed: "For given its natural meaning, the power granted Congress to regulate 'the land and naval Forces' would seem to restrict court-martial jurisdiction to persons who are actually members *or part of the armed forces*."¹²⁷ This same language was cited with favor by the Court in *Kinsella*.¹²⁸ In *Reid*, the Court acknowledged "...that there might be circumstances where a person could be 'in' the armed services for purposes of Clause 14 *even though he had not formally been inducted into the military or wear a uniform*."¹²⁹ Although, found in a dissenting opinion, the following language from Justice Harlan in *Kinsella* regarding whom Congress could reach under Clause 14 is also highly instructive:

I believe the true issue...concerns that closeness or remoteness of the relationship between the person affected and the military establishment. Is that relationship close enough so that Congress may, in light of all the factors involved, appropriately deem it 'necessary' that the military be given jurisdiction to deal with the offenses committed by such persons?¹³⁰

As the Court noted in *Solorio*, Congressional powers under Article 1, Section 8, Clause 14 warrant "...judicial deference."¹³¹ Observing that Clause 14 "...appears in the same section as do the provisions granting Congress authority, *inter alia*, to regulate commerce among the several States, to coin money, and to declare war...",¹³² the Court went on to say that "...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.¹³³ Further emphasizing the potential breadth of Clause 14 authority, the Court quoted Alexander Hamilton's view of the matter at the time the Constitution was being drafted:

These powers ought to exist without limitation, because it is impossible to foresee or define the extent and variety of national exigencies, or the correspondent extent and variety of the means which may be necessary to satisfy them.... Are fleets and armies and revenues necessary for this purpose [common safety]? The government of the Union must be empowered to pass all laws, and to make all regulations which have relation to them.¹³⁴

Though written in 1956, the following passage from an opinion by Judge George Latimer, then of the Court of Military Appeals, seems remarkably prescient in the manner in which it captures the role of civilian employees or contractors on the modern battlefield, and why they could be fairly deemed to be part of the Armed Forces for jurisdictional purposes:

[T]here is a sound core of logic underlying the principle that, in time of conflict, persons serving with or accompanying the armed forces...must be subject to control by the services and to trial by court-martial. Those persons move with and often support combat troops. They may perform laborious tasks, technical maintenance work, administrative duties, or logistical functions, and failure on their part to perform their duty may be disastrous. In addition, they acquire much valuable information and they may be a fertile source of valuable intelligence data for the enemy. They receive benefits and protection from the military arm while performing their tasks, and their efforts are essential to the accomplishment of the military mission. The security of the nation may depend on their activities, and they should answer to their immediate protector for any transgressions. They need not volunteer for the service, but once they do, they willingly place themselves in an assignment where the success or failure of the mission of the particular armed force may be governed by their conduct, behavior, and strict compliance with orders. It is just as necessary that they be governed by the demands of the military situation as the very troops they serve. Even a premature disclosure of their presence in an area may awaken an enemy to the presence of American combat troops. It is not too much, then, to demand obedience to military law from them, and to conclude that they must be subject to the provisions of the Code....¹³⁵

The nature of modern military operations, including the manifold roles and critical missions of civilian employees and contractors on today's battlefields, seem to provide an ample basis upon which Congress could assert jurisdiction over civilians. These same conditions likewise would appear to allow courts to sustain that jurisdiction on the basis that such civilians are so intimately associated with mission accomplishment that they have become part of the Armed Forces.

Finally, the landscape of the military justice system has undergone major changes in the years since most of the cases discussed in this paper were decided. This evolution could have a telling effect upon how appellate courts would resolve questions of civilian jurisdiction should they again address the issue.¹³⁶ The office, role, and functions of the military trial judiciary are now firmly established.¹³⁷ The Military Rules of Evidence now largely mirror the Federal Rules of Evidence, i.e. those that apply in the federal court system.¹³⁸ In fact, absent contrary action by the President, any amendments to the Federal Rules of Evidence apply to the Military Rules of Evidence "...18 months after the effective date of..." amendments to the Federal Rules.¹³⁹ Perhaps as weighty as any other change to the UCMJ is the fact that it now authorizes direct appeal of cases from the Court of Appeals of the Armed Forces to the United States Supreme Court.¹⁴⁰ In short, today's military justice system is well equipped and structured to guarantee due process of law to any accused, whether a uniformed member of the service or a civilian who supports that service member in a combat theater.

Conclusion

Modern war presents an ever increasingly complex battlefield. The United States continues to adapt to complexity by appropriately modifying strategy, tactics, doctrine, and force structure. Changes to force structure continue to place ever greater numbers of civilian government employees and contractor employees in direct support of Armed Forces on the battlefield. This civilian support structure has become virtually indispensable to the success of all missions, including combat. Civilians are now - and are likely to remain - so closely associated with both the force and its mission that civilian criminal misbehavior can easily pose as great a threat to the good order and discipline of the Armed Forces as that of crime committed by uniformed personnel. Commanders remain responsible for the discipline of the forces they command, yet they currently lack meaningful disciplinary authority over civilians accompanying the Armed Forces in combat theaters. This deficiency can be corrected by subjecting accompanying civilians to the UCMJ.

Civil and military jurisprudence includes a long history of subjecting selected civilians to the jurisdiction of courts-martial. The clearest expression of that jurisdiction has occurred during periods of armed conflict when civilians were accompanying or serving with the Armed Forces in the field. In the face of repeated challenges to such jurisdiction, civilian courts repeatedly sustained its exercise during the two greatest wars of the last century.

The 25 years following the end of World War II witnessed significant Supreme Court litigation regarding the extent of courts-martial jurisdiction and a definite erosion of the authority

of military courts to try civilians. When analyzed, however, the decisions of the Supreme Court reveal that the Constitutional foundation for the exercise of military jurisdiction over civilians accompanying the Armed Forces on the battlefield remains intact. Congressional action to amend Article 2(a)(10) of the UCMJ to state that jurisdiction exists “during periods of armed hostilities” is necessary to re-establish the legislative basis for jurisdiction. Should Congress act, case law suggests a significant body of authority upon which the courts could sustain Congressional action.

Endnotes

¹ See, generally, *Solorio v. United States*, 483 U.S. 435 (1987). 10 U.S.C. § 805 (2000) provides that the UCMJ “...applies in all places.”

² 10 U.S.C. § 802 (2000) (Article 2 of the UCMJ) specifies 12 categories of “[p]ersons subject to...” the UCMJ.

The first six categories are comprised of uniformed members of the Armed Forces. These include active duty personnel, cadets of the various service academies, reserve component personnel (including National Guard members when in a federal status) and certain retired service members. The remaining categories appear to either explicitly or implicitly include civilian personnel.

Article 2(7) applies to persons serving courts-martial sentences in military prisons. While many such persons are still uniformed service members, others cease being such by virtue of the execution of punitive discharges imposed as part of their sentences. Such former service members remain subject to the UCMJ while they continue to serve any adjudged sentence to confinement.

Article 2(8) includes “[m]embers of the National Oceanic and Atmospheric Administration [NOAA], Public Health Service [PHS], and other organizations, when assigned to and serving with the armed forces.” While on its face this provision appears to address civilian personnel, when read in conjunction with other statutes it more accurately contemplates a distinct category of service personnel. Under certain emergency situations, 33 U.S.C. § 3061(a)(1) (2000) authorizes the President to “...transfer to the service and jurisdiction of a military department...officers of the [National Oceanic and Atmospheric] Administration.” 42 U.S.C. § 217 (2000) gives the President similar authority regarding the PHS. Specifically, the President may declare the commissioned corps of the PHS “...a branch of the land and naval forces of the United States...” and when he does the PHS “...shall, to the extent prescribed by regulations of the President, be subject to the Uniform Code of Military Justice.” Once the President acts, members of both the NOAA and PHS gain formal status as service members and are, insofar as the UCMJ is concerned, indistinguishable from other uniformed members of the force. The term “other organizations,” as used in Article 2(8), would seem intended to address similar formal Presidential augmentation of the Armed Forces.

Article 2(9) extends UCMJ jurisdiction to “[p]risoners of war in custody of the armed forces.” While these are normally comprised of uniformed members of an enemy force, such prisoners

may also include civilians. For instance, Article 4A4 of the Geneva Convention Relative to the Treatment of Prisoners of War grants prisoner of war status to “[p]ersons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces....” See the Geneva Convention Relative to the Treatment of Prisoners of War, U.S. Department of the Army, *Treaties Governing Land Warfare*, Army Pamphlet 27-1 (Washington D.C.: U.S. Department of the Army, 7 December 1956), 67-68.

Article 2(10) states that “[i]n time of war, persons serving with or accompanying an armed force in the field” are subject to the UCMJ.

Article 2(11) provides UCMJ jurisdiction “[s]ubject to any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law [over] 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.”

Finally, Article 2(12) establishes UCMJ jurisdiction “[s]ubject to any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, [over] persons within an area leased by or otherwise reserved or acquired for the use of the United States which is under the control of the Secretary concerned and which is outside the United States and outside the Commonwealth of Puerto Rico, Guam, and the Virgin Islands.”

This paper is limited to an examination of the bases of jurisdiction over civilian personnel articulated in Articles 2(10) and 2(11). As the paper illustrates, the jurisdiction these articles describe has a long history of interpretation and application in United States military practice.

³ U.S. Constitution, art. 3.

⁴ U.S. Constitution, art. 3, sec. 2.

⁵ U.S. Constitution, amend. 5.

⁶ U.S. Constitution, art. 1, sec 8, clause 14.

⁷ U.S. Constitution, amend. 5.

⁸ Article XXXII of the American Articles of War of 1775, 2. J. Cont. Cong. 11, cited in *Kinsella, Warden v. United States ex. rel. Singleton*, 361 U.S. 234 (1960), 275, footnote 24.

⁹ Article 60, American Articles of War, 2 Stat. 359, 366, cited in *Kinsella, Warden v. United States ex. rel. Singleton*, 361 U.S. 234 (1960), 275, footnote 24.

¹⁰ Article 63, American Articles of War, Revised Statutes, Section 1342, cited in *Kinsella, Warden v. United States ex. rel. Singleton*, 361 U.S. 234 (1960), 275, footnote 24.

¹¹ Article 2(d), Articles of War, Revised Statutes Section 1342, as amended by Act of August 29, 1916, chapter 418, 39 Stat. 651, cited in *Ex parte Gerlach*, 247 F. 616, 617 (S.D.N.Y. 1917).

¹² Article 2(d), *The Articles of War*, (Washington D.C.: Government Printing Office, September 1920), 3, available from http://www.loc.gov/rr/frd/Military_Law/pdf/RAW-vol2.pdf#page=39; Internet; accessed 24 February 2006.

¹³ See, *Perlstein v. United States et al*, 151 F. 2d. 167, 168 (3d Cir. 1945).

¹⁴ The UCMJ was passed as Public Law 81-506 (1950) and signed into law by President Harry Truman on 5 May 1950.

¹⁵ See 70 Statutes at Large 911 (1956), Public Law 86-70 (1959), Public Law 86-624 (1960), Public Law 87-651 (1962), Public Law 98-209 (1983), Public Law 100-456 (1988), all as cited in notes following 10 U.S.C. § 802(10) (2000). The amendments made minor grammatical changes and geographical adjustments based on changes in the state and territorial status of various United States holdings.

¹⁶ 10 U.S.C. § 802(10) (2000).

¹⁷ 10 U.S.C. § 802(11) (2000).

¹⁸ *Writings of Washington*, Vol. 10, 359, quoted in *Kinsella, Warden v. United States ex. rel. Singleton*, 361 U.S. 234 (1960), 267, footnote 15.

¹⁹ *Ibid*, Vol. 11, p. 487; Vol. 20, 96.

²⁰ *Ibid*. Vol. 20, 24.

²¹ *Ibid*. Vol. 16, 385-386; Vol. 21, 10.

²² *Ibid*. Vol. 21, 22-23.

²³ All of these cases involved prosecutions conducted in normally constituted courts-martial, i.e. none involved the jurisdiction of other, more specialized forms of military tribunals. The law has long provided for adjudicative military bodies in addition to courts-martial. For instance, various military courts may be established as part of a military government to administer territory subject to belligerent occupation. A domestic example of the use of a military tribunal distinct from a court-martial was the trial of a group of German saboteurs by a tribunal specially constituted for that purpose. See generally, *Ex Parte Quirin*, 317 US 1 (1942). Perhaps a more renowned example was the International Military Tribunal which convened in Nuremberg, Germany, to try major figures of the Nazi Reich in the wake of World War II. A contemporary example can be found in the tribunals created for the trial of unlawful enemy combatants the United States has detained at the Guantanamo Bay Naval Base.

10 U.S.C. § 821 (2000) (Article 21 of the UCMJ), currently recognizes the vitality of such adjudicative organs. It states: "The provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals."

While both history and current law clearly demonstrate that assorted specialized military tribunals may try civilians, this paper is not concerned with the jurisdiction such bodies. The author's thesis, rather, focuses upon the jurisdiction of regularly constituted courts-martial.

²⁴ Ex parte Gerlach, 247 F. 616, 617 (S.D.N.Y. 1917).

²⁵ Ibid., 617.

²⁶ Ibid., 617.

²⁷ Ibid., 618.

²⁸ Hines v. Mikell, 259 F. 28 (4th Cir. 1919), page 33.

²⁹ Ibid.

³⁰ Ibid., 35.

³¹ Ibid., 35.

³² In re Di Bartolo, 50 F. Supp 929 (S.D.N.Y. 1943), 931.

³³ Ibid., 930.

³⁴ Ibid., 931.

³⁵ Ibid., 933.

³⁶ Ibid., 933.

³⁷ Perlstein v. United States et al, 151 F. 2d. 167 (3d Cir. 1945).

³⁸ Ibid., 168.

³⁹ Ibid.

⁴⁰ Ibid.

⁴¹ Ibid., 170.

⁴² *Perlstein*, 169, 170.

⁴³ Ibid, 170.

⁴⁴ In re Berue, 54 F. Supp 252 (S.D. Ohio 1944).

⁴⁵ Ibid., 254.

⁴⁶ Ibid.

⁴⁷ Ibid., 255.

- ⁴⁸ *Ibid.*, 255.
- ⁴⁹ *Ibid.*, 256.
- ⁵⁰ *McCune v. Kilpatrick*, 53 F. Supp 80, 83 (E.D. Virginia 1943).
- ⁵¹ *Ibid.*, 82.
- ⁵² *Ibid.*, 83.
- ⁵³ *Ibid.*, 83.
- ⁵⁴ *Ibid.*, 84, 85.
- ⁵⁵ *McCune*, 85.
- ⁵⁶ *Ibid.*, 85, 89.
- ⁵⁷ *United States ex. rel. Toth v. Quarles, Secretary of the Air Force*, 350 U.S. 11 (1955).
- ⁵⁸ *Ibid.*, 24.
- ⁵⁹ *Ibid.*, 13, 24.
- ⁶⁰ Then 50 U.S.C. § 553(a). See *Toth*, 13, footnote 2.
- ⁶¹ *Toth*, 23.
- ⁶² *Ibid.*, 15-18.
- ⁶³ *Ibid.*, 15.
- ⁶⁴ *Reid, Superintendent, District of Columbia Jail v. Covert*, 354 U.S. 1 (1957).
- ⁶⁵ *Ibid.*, 19. Citations to footnotes omitted.
- ⁶⁶ *Ibid.*, 30.
- ⁶⁷ *Ibid.*, 41.
- ⁶⁸ *Ibid.*, 49.
- ⁶⁹ *Kinsella, Warden v. United States ex. rel. Singleton*, 361 U.S. 234 (1960).
- ⁷⁰ *Ibid.*, 248.
- ⁷¹ *Grisham v. Hagan, Warden*, 361 U.S. 278 (1960).
- ⁷² *McElroy, Secretary of Defense, et al. v. United States ex re. Guagliardo*, 361 U.S. 281 (1960).

⁷³ Decided and reported with *Guagliardo* at 361 U.S. 281.

⁷⁴ The court, originally known as the Court of Military Appeals, was first established by Article 67 of the 1950 UCMJ. Now named the United States Court of Appeals for the Armed Forces, the court is comprised of five civilian judges. It is the highest appellate court within the military justice system. Clerk of Court, *The United States Court of Military Appeals* (Washington D.C., United States Court of Military Appeals, October 2003), 1-3; available from <http://www.armfor.uscourts.gov/Establis.htm>; Internet; accessed 24 February 2006.

⁷⁵ *United States v. Averette*, 41 C.M.R. 363 (C.M.A. 1970).

⁷⁶ *Ibid.*, 363, emphasis in the original.

⁷⁷ *Ibid.*, 365.

⁷⁸ *Ibid.*, 365.

⁷⁹ *O'Callahan v. Parker, Warden*, 395 U.S. 258 (1969).

⁸⁰ *Ibid.*, 272.

⁸¹ *Ibid.*, 273.

⁸² *Relford v. Commandant, U.S. Disciplinary Barracks, Ft Leavenworth*, 401 U.S. 355 (1971).

⁸³ *Ibid.*, 365.

⁸⁴ See *United States v. Alef*, 3 M.J. 414 (C.M.A. 1977).

⁸⁵ *Solorio v. United States*, 483 U.S. 435 (1987).

⁸⁶ *Ibid.*, 441.

⁸⁷ *Ibid.*, 439.

⁸⁸ *Ibid.*, 450.

⁸⁹ *Ibid.*, 450.

⁹⁰ *Ibid.*, 450 - 451.

⁹¹ Public Law 104-106, Section 1151 (1996), "*Advisory Committee on Criminal Law Jurisdiction over Civilians Accompanying Armed Forces in Time of Armed Conflict.*"

⁹² *Ibid.*, Section 1151(a).

⁹³ Public Law 104-106 (1996), Section 1151(c)(2).

⁹⁴ John S. Cooke, "The Twenty-Sixth Annual Kenneth J. Hodson Lecture: Manual For Courts-Martial 20X," *Military Law Review* 156, no. 1 (June 1998): 22. This article is an edited

version of an address delivered by Brigadier General John S. Cooke on 10 March 1998 at the United States Army Judge Advocate General's School. BG Cooke, while an Army Assistant Judge Advocate General, served as a member of the Advisory Committee on Criminal Law Jurisdiction. His remarks addressed various aspects of the military justice system including matters involving jurisdiction over civilians.

⁹⁵ Ibid.

⁹⁶ Public Law 106-523 (2000), now encoded as 18 U.S.C. §§ 3261 through 3267 (2000).

⁹⁷ 18 U.S.C. § 3261(1) (2000) .

⁹⁸ 18 U.S.C. § 3267(1) (2000). As originally enacted, this provision did not include civilian employees of federal agencies or departments outside the Department of Defense. Public Law 108-375 (2005) (the *Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005*) amended 18 U.S.C. § 3267(1) to extend MEJA jurisdiction to civilian employees of federal agencies and provisional authorities "...to the extent such employment relates to supporting the mission of the Department of Defense overseas." As of this writing, this change is not reflected in the published text of the United States Code. The amendment is nevertheless operative.

⁹⁹ See generally 18 U.S.C. §§ 3262 through 3265 (2000).

¹⁰⁰ 18 U.S.C. § 3266 (2000).

¹⁰¹ U.S. Department of Defense, *Criminal Jurisdiction Over Civilians Employed by or Accompanying the Armed Forces Outside the United States, Certain Service Members, and Former Service Members*, Department of Defense Instruction 5525.11 (Washington, D.C.: U.S. Department of Defense, 3 March 2005). On 22 December 2005, the Secretary of Defense proposed regulations to address the 2005 amendments to the MEJA. See footnote 98, *supra*. The proposed rules appear in Federal Register, Volume 70, Number 245, page 75998 (22 December 2005).

¹⁰² The practical difficulties inherent in implementing the MEJA are at least partially reflected by the fact the Department of Defense required nearly five years to develop regulations which Congress required in 2000.

¹⁰³ 18 U.S.C. § 3261(b) (2000) provides: "No prosecution may be commenced against a person under this section if a foreign government, in accordance with jurisdiction recognized by the United States, has prosecuted or is prosecuting such person for the conduct constituting such offense, except upon the approval of the Attorney General or the Deputy Attorney General (or a person acting in either such capacity), which function of approval may not be delegated."

¹⁰⁴ The respective criminal jurisdiction of nations where one stations forces in another is commonly addressed in Status of Forces Agreements (SOFAs). The SOFA for the North Atlantic Treaty Organization (NATO) often serves as a model for such agreements. Under Article VII 1(b) of the NATO SOFA "...the authorities of the receiving State shall have jurisdiction over the members of a force or civilian component and their dependents with respect to offences committed within the territory of the receiving State and punishable by the law of that State." In contrast, sending states generally retain jurisdiction over those members of their forces who are subject to military jurisdiction. As stated in NATO SOFA Article VII 1(a): "[T]he

military authorities of the sending State shall have the right to exercise...all criminal and disciplinary jurisdiction conferred on them by the law of the sending State over all persons subject to the military law of that State.” Given the state of United States case law, Article VII 1(a) is currently limited to United States uniformed military personnel. See, generally, Agreement between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces, 4 April 1949, available from <http://www.nato.int/docu/basicxt/b510619a.htm> ; Internet; accessed 24 February 2006.

¹⁰⁵ 18 U.S.C. § 3261(b) (2000), note 103, *supra*.

¹⁰⁶ Cooke, 22.

¹⁰⁷ *Solorio v. United States*, 483 U.S. 435, 439 (1987); quoting *Kinsella, Warden v. United States ex. rel. Singleton*, 361 U.S. 234, 240-241 (1960).

¹⁰⁸ *Ibid.*, 440.

¹⁰⁹ *Ibid.*, 446.

¹¹⁰ *Ibid.*, 447, quoting *Goldman v. Weinberger*, 475 U.S. 503, 508 (1986), quoting in turn *Rostker v. Goldberg*, 453, U.S. 57, 70 (1981).

¹¹¹ 10 U.S.C. § 802(a)(1) (2000).

¹¹² *Reid, Superintendent, District of Columbia Jail v. Covert*, 354 U.S. 1, 33 (1957).

¹¹³ *Ibid.*

¹¹⁴ 10 U.S.C. § 802(a)(10) (2000).

¹¹⁵ *United States v. Averette*, 41 C.M.R. 363, 365 (C.M.A. 1970).

¹¹⁶ *Ibid.*

¹¹⁷ *Ibid.*, 364.

¹¹⁸ *Ibid.*, 365. The court specifically distinguished *United States v. Anderson*, 38 C.M.R. 386 (C.M.A. 1968) in which it held that the Vietnam War was a “time of war” for purposes of tolling the two-year statute of limitation for the offense of absence without leave committed by a soldier.

¹¹⁹ *Averette*, page 365. The court cited *Pyramid Life Insurance Company v. Masch*, 134 Colo 56, 299 P.2d 117 (1956); and *Ex parte Givins*, 262 F. 702 (N.D. Ga.) (1920). In *Pyramid*, the Colorado Supreme Court held that the beneficiaries of a soldier killed in action in Korea in 1951 were entitled to payment under an insurance policy which excluded coverage for deaths “...while in military service...in time of war.” The Colorado court noted that Congress had not declared war with respect to Korea and resolved any ambiguity in the insurance contract in favor of the beneficiaries. *Givins* sustained court-martial jurisdiction over an Army officer who had been tried for murdering an Army private at a state-side Army post in the waning days of World War I. At the time, the Articles of War did not authorize a military trial if the murder had

been "...committed within the geographical limits of the states of the Union ... in time of peace." The District court upheld jurisdiction based upon the then prevailing state of declared war with Imperial Germany.

¹²⁰ Ibid., 365.

¹²¹ Ibid., 365, 366.

¹²² Reid, Superintendent, District of Columbia Jail v. Covert, 354 U.S. 1, 33 (1957).

¹²³ Chief Judge Quinn, author of the dissent in *Averette*, wrote: "If congressional participation is required to energize [Article 2(a)(10)] in regard to court-martial jurisdiction, sufficient congressional participation is present in connection with the Vietnam conflict to fulfill the requirement." *United States v. Averette*, 41 C.M.R. 363, 366 (C.M.A. 1970).

¹²⁴ Department of Defense, Washington Headquarters Service, Directorate for Information Operations and Reports, "Principal Wars In Which The United States Participated, U.S. Military Personnel Serving, And Casualties," available from <http://web1.whs.osd.mil/mmid/casualty/WCPRINCIPAL.pdf>; Internet, accessed 11 February 2006. This table from the Department of Defense lists United States military personnel deaths from the Korean War as 36,574, from the Vietnam war as 58,209, and from the Persian Gulf War as 382. These figures yield a total of 95,165, of which 81,312 are identified as battle deaths. Surely, the incalculable cost associated with these figures suggests that the United States was in fact at war during the hostilities in which so many Americans died.

¹²⁵ Charter of the United Nations, Article 2(4); available from <http://www.un.org/aboutun/charter/>; Internet; accessed 24 February 2006.

¹²⁶ The *Averette* decision demonstrates the precision which courts, or for that matter legislators or litigants, employ when determining the meaning of terms of legal art. "War" to the *Averette* court meant a state of war declared by Congress. Had the court been content with a more common - and perhaps more realistic - meaning it might have reached a different result. For example, "war" as defined by a modern dictionary is "A state of open, armed, often prolonged conflict carried on between nations, states, or parties." See, *The American Heritage Dictionary*, 2d ed., (Boston: Houghton Mifflin Company, 1982), 1362.

Were Congress to add "during periods of armed hostilities" to Article 2(10), litigants and courts would doubtless subject its meaning to close scrutiny. Congress could resolve much prospective doubt by adopting a simple definition such as that mentioned in this note. Another means by which to resolve ambiguity would be to adopt a measure similar to one recommended by the Advisory Committee on Criminal Law Jurisdiction. As mentioned elsewhere in the body of this paper, the Committee suggested that Congress could empower "[t]he President or the Secretary of Defense [to] specifically designate ...[the military] operations..." and the geographical limits of an operational area in which courts-martial jurisdiction would extend to civilians. See Cooke, 22.

¹²⁷ *United States ex. rel. Toth v. Quarles, Secretary of the Air Force*, 350 U.S. 11, 15 (1955), emphasis added.

¹²⁸ *Kinsella, Warden v. United States ex. rel. Singleton*, 361 U.S. 234, 240 (1960).

¹²⁹ Reid, Superintendent, District of Columbia Jail v. Covert, 354 U.S. 1, 23 (1957), emphasis added.

¹³⁰ Kinsella, Warden v. United States ex. rel. Singleton, 361 U.S. 234, 257 (1960).

¹³¹ Solorio v. United States, 483 U.S. 435, 447 (1987).

¹³² Ibid., 441.

¹³³ Ibid.

¹³⁴ Ibid., quoting The Federalist No. 23, pp. 152-154 (E. Bourne ed. 1947).

¹³⁵ United States v. Burney, 21 C.M.R. 98, 110 and 111 (C.M.A. 1956). This military case, decided after *Toth* but before *Reid*, sustained non-capital military jurisdiction over the civilian employee of a defense contractor. Burney was convicted in Japan of aggravated assault. He had engaged in a game of "Russian Roulette." In reciting the facts, Judge Latimer wrote at page 104: "[T]he accused picked up one of his loaded revolvers, removed all of the cartridges except one, and from a distance of five feet, pointed the weapon at Mr. Clark, despite that person's vigorous protests. Apparently acting on the premise that he knew the position of the loaded chamber in the gun, the accused pulled the trigger. As may be expected, he erred, and Mr. Clark was seriously wounded."

¹³⁶ A measure of the low esteem in which some justices of the Supreme Court once held the military justice system is manifested in language from *Reid* and *O'Callahan*. In *Reid*, Justice Black wrote: "Traditionally, military justice has been a rough form of justice emphasizing summary procedures, speedy convictions and stern penalties...." Reid, Superintendent, District of Columbia Jail v. Covert, 354 U.S. 1, 35 and 36 (1957). Justice William O. Douglas reflected even greater hostility when he famously observed in *O'Callahan* that "[C]ourts-martial are singularly inept in dealing with the nice subtleties of constitutional law." *O'Callahan v. Parker, Warden*, 395 U.S. 258, 265 (1969).

¹³⁷ 10 U.S.C. § 826 (2000). The office of military judge was established by the Military Justice Act of 1968, Public Law 90-632 (1968).

¹³⁸ 10 U.S.C. § 836 (2000) gives the President authority to prescribe procedural rules for courts-martial, including "...modes of proof." He does do by promulgating the Manual for Courts-Martial. Part III of the Manual consists of the Military Rules of Evidence.

¹³⁹ Manual for Courts-Martial, United States, Mil. R. Evid. 1102 (2005).

¹⁴⁰ 10 U.S.C. § 867a (2000). This provision stems from the Military Justice Act of 1983, Public Law 98-209 (1983), which became effective on 1 August 1984.