
JURISDICTION OVER CRIMINAL OFFENSES
BY AMERICAN CIVILIANS IN IRAQ
AND AFGHANISTAN

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Testimony of

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Mr. Chairman and Members of the Subcommittee:

It is an honor to appear before you as you consider the legal regime for prosecuting offenses by United States civilians in Iraq and Afghanistan. My initial remarks will be quite brief, but I will of course be pleased to respond to your questions as you examine the issues.

This hearing could not be timelier. Only last week, news broke of a case in which, for the first time in decades, a civilian was charged with an offense under the Uniform Code of Military Justice.¹ Although the case involves a charge of stabbing rather than sexual assault,² the putative victim in that case was not a U.S. citizen, and indeed, the accused himself is a dual Iraqi-Canadian citizen, it nonetheless demonstrates the need to ensure a workable

¹ Michael R. Gordon, *U.S. Charges Contractor at Iraq Post in Stabbing*, N.Y. TIMES, Apr. 5, 2008, at A3, col. 6.

² See Charge Sheet, *United States v. Alaa Mohammad Ali* (Mar. 27, 2008).

system of criminal justice wherever our forces are called upon to serve.

Our current arrangements for prosecuting crime in Iraq and Afghanistan by individuals other than uniformed military personnel are complex, incomplete, and uncertain. Although our work force in those countries is, I am sure, overwhelmingly law-abiding, we cannot afford to allow anyone to have the sense that “anything goes.” That means we have to have a meaningful, pervasive criminal law regime, especially because the Iraqi legal system continues not to inspire confidence. This includes not only having laws on the books that will sweep in those kinds of criminality that we can reasonably anticipate, but also having an Executive Branch that is committed to the proposition that those laws will be enforced. This does not mean every offense that comes to light will inexorably lead to a trial, but it does mean that every offense that comes to light will be given

Careful consideration just as we expect our United States Attorneys to do for federal offenses committed within the country.

Congress has long attempted to subject a variety of categories of persons to military justice. Some of its efforts have run into constitutional obstacles. For example, in the 1950s, the Supreme Court held unconstitutional provisions of the then-new Uniform Code of Military Justice (“UCMJ”) that were used to prosecute former GIs³ as well as military dependents⁴ and other categories of civilians. The basic theory was that courts-martial denied these civilians a variety of constitutional rights that all of us enjoy in federal criminal cases, such as indictment by grand jury, trial by a jury of peers, jury size and unanimity, and trial before an Article III judge with life tenure.

³ *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955).

⁴ *Reid v. Covert*, 354 U.S. 1 (1957).

One provision in the UCMJ purported to extend court-martial jurisdiction to persons “serving with or accompanying an armed force in the field in time of war.”⁵ This seemed suitable for the prosecution of civilian contractors in Vietnam, but the Court of Military Appeals, as it was then called, held in *United States v. Averette*,⁶ that that provision could apply only in time of a declared war, and of course our Nation’s last declaration of war occurred in World War II. *Averette* was never reviewed by the Supreme Court because, at the time, there was no right to seek a writ of certiorari from the Supreme Court. Congress finally rectified that particular omission 25 years ago. Whether *Averette* was correctly decided is water over the dam, since Congress of course has subsequently made other pertinent

⁵ Art. 2(a)(10), UCMJ, 10 U.S.C. § 802(a)(10).

⁶ 19 U.S.C.M.A. 363, 41 C.M.R. 363 (1970).

changes in the statute. I would say, however, that it is not at all clear to me that the present Court of Appeals for the Armed Forces would come out the same way as their predecessors did in *Averette* if the same question were ever presented. To my knowledge, no military commander or prosecutor ever sought to test whether the case was still good law.

The various gaps created by the Supreme Court's decisions and *Averette* persisted for decades. Finally, in 2000, the Second Circuit, in the course of setting aside a conviction in a particularly egregious case for lack of special territorial and maritime jurisdiction, directed its Clerk to send a copy of its ruling to committees of the House and Senate.⁷ This spurred Congress to action, resulting in passage of the Military Extraterritorial Jurisdiction Act of

⁷ *United States v. Gatlin*, 216 F.3d 207 (2d Cir. 2000).

2000,⁸ which created federal district court jurisdiction over a variety of offenses that would otherwise elude federal criminal prosecution.

Inexplicably, MEJA has been virtually a dead letter. It took a very long time for the Department of Defense to generate the implementing regulations, and even then, as far as I have been able to determine, the Justice Department has seemed to take little interest in bringing to trial cases that fall within MEJA.

In 2006, Congress finally got around to fixing the part of the UCMJ that was at issue in *Averette*. The specific “fix” was to amend article 2(a)(10) to cover not only those who serve with or accompany an armed force in the field in time of declared war, but also those who do so during a

⁸ 18 U.S.C. § 3261 *et seq.*

statutorily-define “contingency operation,” a defined term⁹ that covers the operations in Iraq and Afghanistan. Here too, however, the Defense Department was slow in issuing implementing instructions. Secretary Gates finally issued a memorandum setting forth the general framework last month, but a good deal of the necessary fine-print guidance remains to be issued. For example, which kinds of UCMJ offenses will be prosecuted when committed by a civilian?¹⁰ What does “in the field” mean, or “serving with or accompanying”?¹¹ Are embedded journalists covered? CIA personnel? Non-U.S. citizens? Iraqi nationals? Is the 2006

⁹ 10 U.S.C. § 101(a)(13).

¹⁰ See Jonathan Finer, *Holstering the Hired Guns: New Accountability Measures for Private Security Contractors*, 33 YALE J. INT’L L. 259, 262 (2008) (urging stricter definition of who is covered and “a clause indicating that only crimes that have a parallel in civilian law should be prosecuted”).

¹¹ See Kara M. Sacilotto, *Jumping the (Un)Constitutional Gun?: Constitutional Questions in the Application of the UCMJ to Contractors*, 37 J. PUB. CONTRACT L. 179, 192-94 (2008).

amendment to article 2(a)(10) constitutional? Early news reports suggest that the defense in the *Ali* case will raise a constitutional objection.

Your letter of invitation indicated that the Subcommittee is immediately concerned with sexual assault allegations against U.S. citizens serving as government contractors in Iraq and Afghanistan. I understand from your letter, Mr. Chairman, that some of these allegations relate to incidents that reportedly occurred as much as three to five years ago, and that not one such case has been prosecuted thus far.

Obviously, I take no position as to the merit or lack of merit of any particular allegation.

That said, and passing over the fact that some of these matters may well, by now, be barred by the statute of limitations, it seems to me that Congress can take the following steps—on top of energetically exercising its

oversight and appropriations powers¹²—to ensure that sexual assaults committed by U.S. government contractors are prosecuted:

1. The definitional section of MEJA, 18 U.S.C. § 3267, could be amended to sweep in any U.S. citizen (or green card holder) who is working overseas as an employee or contractor of any federal agency.

2. Congress could give extraterritorial effect to more of title 18, so that sexual or other offenses committed outside the country by U.S. citizens or green card holders could be prosecuted in federal district court.

3. Congress could expand even further the reach of the Special Maritime and Territorial Jurisdiction, even beyond the 2001 expansion.¹³

¹² See Kathleen A. Duignan, *Civilians and Military Law: An Unconstitutional Mix, Problems with Applying UCMJ to Contractors and its Effects Internationally*, 6 J. INT'L PEACE OPERATIONS 21 (2007).

4. Congress could create a Director of Overseas Prosecutions in the Department of Justice with authority to determine whether offenses by U.S. citizens overseas should be prosecuted, and if so, whether that prosecution should occur in a federal district court or, where applicable, a court-martial.

I would be delighted to respond to your questions.

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¹³ *See* 18 U.S.C. § 7(9).

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