PEPPERDINE UNIVERSITY

Journal of the National Association of Administrative Law Judiciary

Volume 27 | Issue 1 Article 7

3-15-2007

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By Katherine Jackson*

I. INTRODUCTION

Civilian contractors serving alongside the armed services in combat zones in Iraq and Afghanistan have created a jurisdictional nightmare for politicians and prosecuting authorities. While there is at least a century's worth of Supreme Court precedent sorting out when civilians can and cannot be subject to court-martial jurisdiction, the situation the United States now faces seems entirely unprecedented.[1] Contractors today serve in capacities that make them a hybrid as yet untested under the Constitution – the civilian-soldier. They are not soldiers, but they are not quite civilians either. In Iraq today contractors work as interrogators, complex systems operators, even provide armed security for high profile politicians and military commanders.[2] Their work represents greater military and political efficiency and efficacy in many ways.[3] It also

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1. Griff Witte, *New Law Could Subject Civilians to Military Trial: Provision Aimed at Contractors, but Some Fear it Will Sweep Up Other Workers*, WASH. POST, Jan. 15, 2007, at A1.

2. Peter W. Singer, *The Law Catches Up to Private Militaries, Embeds*, DEFENSE TECH, Jan. 3, 2007, http://www.defensetech.org/archives/003123.html.

3. Michael J. Davidson, *Ruck Up: An Introduction to the Legal Issues Associated with Civilian Contractors on the Battlefield*, 29 PUB. CONT. L.J. 233, 263 (Winter 2000).

represents a development that the civilian criminal justice system has not been well equipped to deal with.[4]

This problem is not new, in fact, academics, military leadership, and other critics have long sought a solution to this paradox that would balance the rights of the civilian with the necessity of military authority in order to achieve criminal accountability and justice. Recently, however, the Congress passed the Fiscal Year 2007 Military Authorization Act, a spending bill which contained a little noticed provision altering the Uniform Code of Military Justice (UCMJ), specifically, the section that describes those subject to its jurisdiction.[5] Prior to the revision, civilians were only subject to the Code in a time of declared war;[6] they now fall under the Code during a "contingency operation" as well.[7] The military operations underway in Iraq and Afghanistan qualify as contingency operations, whereas they would not qualify as "declared wars."[8]

This section of the law, which has profound implications on the one hundred thousand civilian contractors the Pentagon estimates are working in Iraq alone, was passed with little debate or discussion.[9]

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4. *See* Jason McLure, *Abuse Case Prosecution Falls Apart: Evidence of Alleged Rape by Iraq Contractor Elusive*, 29 LEGAL TIMES 1, May 29, 2006, at 1.

5. Witte, *supra* note 1. Witte credits Peter Singer for breaking the news that most of the mainstream media did not notice. *Id.* Singer explains this situation accurately by saying:

> The amazing thing is that the change in the legal code is so succinct and easy to miss (one sentence in a 439-page bill, sandwiched between a discussion on timely notice of deployments and a section ordering that the next of kin of medal of honor winners get flags) that it has so far gone completely unnoticed in the few weeks since it became the law of the land. Not only has the media not yet reported on it. Neither have military officers or even the lobbyists paid by the military industry to stay on top of these things.

Singer, *supra* note 2. He goes on to note that he is not even sure that those effected by the change (including contractors, military prosecutors, commanding officers etc.) are being made aware of the situation. *See id.*

6. United States v. Averette, 19 C.M.A. 363, 365 (U.S. C.A.A.F. 1970).

7. FY 2007 Military Authorization Act, Pub. L. No. 109-364, § 552, 120 Stat. 2083, 2217 (2006).

8. *See id.* at § 355.

9. Singer, *supra* note 2.

That fact seems inconsistent with the gravity of the effect of the provision.

Surely, there must be accountability for civilian contractors who commit crimes abroad while contracting with the United States. They are emissaries of our public law values while abroad and their misbehavior cannot be tolerated if the United States is truly committed to winning the hearts and minds of the world.[10] But should the sweeping changes that need to be made to correct this system be instituted through one sentence in a more than four hundred page document, which few lawmakers, and apparently no contractor lobbyists, even noticed?[11]

The prior system was broken in many ways. Incidents like the Abu Ghraib prisoner abuse scandal highlighted the relative failure of the U.S. civilian criminal justice system in Iraq as compared to the military justice system. While both civilian contractors and military service-people were implicated in the abuse, only members of the military have been prosecuted for those crimes.[12] Investigators and potential prosecutors of the civilian contractors cited problems with evidence collection, witness interviewing, and crime scene investigation as impediments to mounting successful prosecutions.[13] These were not obstacles for the military courts.[14] It is easy to see why a lawmaker would think that subjecting contractors abroad to a demonstrably successful prosecutorial system would be an attractive remedy. The new system that this change creates may create greater efficiency and accountability, but at what cost?

When confronted with cases of civilians being charged and tried by courts-martial, the Supreme Court has construed Congress' power to create such tribunals and subject civilians to them narrowly.[15] Dispensing with the citizen's Constitutional right to a jury trial by one's peers (among other rights) is not something the Court has been eager to allow Congress to do despite advocates' claims of greater

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10. *See generally*, Laura A. Dickinson, *Public Law Values in a Privatized World*, 31 YALE J. INT'L L. 383 (Summer 2006) (arguing that contracts should be used as a tool for enforcing standards and public law values).

11. Singer, *supra* note 2.

12. McLure, *supra* note 4.

13. *Id.*

14. *See id.*

15. *See Averette*, 19 C.M.A. at 364.

efficiency and effectiveness.[16] Without the factual scenario of a challenge to this provision, it is difficult to know how the court might rule.

Part II of this article explores the historical interaction between civilian contractors and the armed services, focusing on the rise of privatization in the military, allegations of criminal behavior by contractors and the state of the law prior to the new change in the U.C.M.J. Part III examines the constitutional precedent for trying civilians in military courts. It also explains the revision to the U.C.M.J. made law by the spending bill and the effect that this could have on whom is subject to military law. Part IV provides a constitutional analysis of the revision in anticipation of Supreme Court review on a challenge by a civilian contractor. It will also address whether there are alternative ways of addressing the problem of prosecuting civilian contractors. Part V concludes the article.

II. HISTORICAL BACKGROUND

A. The Rise of Privatization in the Military

> [T]he Iraq War is where the history books will note that the [private military] industry took full flight. Iraq is not just the biggest U.S. military commitment in a generation but also the biggest marketplace in the short history of the privatized military industry. In Iraq, private actors play a pivotal role in great-power warfare to an extent not seen since the advent of the mass nation-state armies in the Napoleonic Age.[17]

The rise of the private military industry is attributable to the global economy of the post-Cold War era.[18] The proliferation of excess arms from massive military buildup made military weapons of all shapes and sizes readily available to private purchasers. [19] As

16. Reid v. Covert, 354 U.S. 1, 10 (1957).

17. Peter W. Singer, *Warriors for Hire in Iraq*, SALON.COM, Apr. 15, 2004, http://www.brook.edu/views/articles/fellows/singer20040415.htm.

18. Mark Calaguas, Comment, *Military Privatization: Efficiency or Anarchy?*, 6 CHI.-KENT J. INT'L & COMP. L. 58, 60 (Spring 2006).

19. *Id.*

militaries made up of large numbers of soldiers became less necessary, many professionally trained personnel sought jobs in the private sector.[20] These two trends, in effect, destabilized the governmental monopoly on the ability to make war and maintain sovereignty and presented an opportunity for companies to offer experienced personnel and military services to the highest bidder.[21] As ethnic animosity flared in the former U.S.S.R. and guerilla movements in Africa raged, private companies found a niche market in which to develop.[22] These are not the only markets, however, where private military companies have flourished.

In the decades since the Cold War ended, the United States has attempted to increase the efficiency, efficacy and elasticity of its military by trimming the accumulated "bulk" from its war machine.[23] The Department of Defense aims to reduce the size of the military's infrastructure without reducing its capacity for mobilization and combat effectiveness.[24] Private military companies (PMCs) have filled the gap between Cold War era forces and the modern military.[25] They provide a variety of services, including meal preparation, housing, building, transportation, and maintenance of vehicles, that are innocuous and necessary in today's US military.[26] By using contractors in these capacities, the military is able to maintain a "favorable teeth-to-tail ratio."[27] The military can save money and develop its "teeth," or its combat strength, by outsourcing its "tail," otherwise known as rear support.[28] The efficiency of employing professionals already skilled and knowledgeable in

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20. *Id.* at 61.

21. *Id.*

22. *Id.* at 62.

23. Frontline interview with Steven Schooner, Professor, George Washington University School of Law, http://www.pbs.org/wgbh/pages/frontline/shows/warriors/interviews/schooner.html (posted June 21, 2005).

24. Lieutenant Junior Grade David A. Melson, JAGC, USN, *Military Jurisdiction Over Civilian Contractors: A Historical Overview*, 52 NAVAL L. REV. 277, 279 (2005).

25. *Id.*

26. Singer, *supra* note 17.

27. Davidson, *supra* note 3, at 263.

28. *Id.*

maintenance of technical systems saves the government time and money.[29]

More controversially, however, these companies also provide security and operation of tactical systems that blur the lines between civilian contractors and professional soldiers.[30] Today, civilian contractors work for various U.S. agencies as intelligence specialists, linguists, translators, security guards and interrogators.[31] Many even carry weapons and have occasion to use them.[32]

While the benefits to the military in terms of greater flexibility and money saved makes the privatization of these services attractive, it poses unique and complex problems.[33] Many observers argue that the U.S. military is overly dependent on the services contractors provide.[34] If that source of services should dry up or their tasks become too dangerous, the United States loses the ability to make war and the flexibility to deploy its armed services around the world.[35] Arguably more important, however, is the effect that these contractors have on the war effort in less definable ways.

Several events taking place during Operation Iraqi Freedom and the subsequent occupation illustrate these intangible effects and recast military contractors in a new light. The four Blackwater U.S.A. personnel that were ambushed, tortured, and hung from a bridge highlighted the danger civilians employed in a war zone face. As tragic and disturbing as this incident was, perhaps more unsettling were the allegations leveled against employees of TitanCorp in the Abu Ghraib prisoner abuse scandal. This incident demonstrated the power individual contractors wield in terms of influencing global perception of American foreign policy and values in times of war. More importantly, it highlighted a lack of accountability, oversight and administrative mechanisms for bringing civilian contractors who accompany the military overseas to justice. To date, one civilian

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29. *Id.* at 265.
30. Singer, *supra* note 17.
31. Melson, *supra* note 24, at 279.
32. Singer, *supra* note 17.
33. *Id.*
34. Interview with Steven Schooner, *supra* note 23.
35. Melson, *supra* note 24.

contractor has been prosecuted for crimes committed abroad and none have been prosecuted for crimes committed in Iraq.[36]

B. The Pros and Cons of Privatization

Contractors are beneficial to the military in several ways: (1) they can save the government money and increase the efficiency of the fighting force in that they provide highly technical knowledge without the government having to pay for training them and equipping them; and (2) they provide political flexibility in offering armed assistance to allies.[37]

Civilian contractors are an efficient substitute for a variety of logistical support positions.[38] Rather than spend time and money training a new member of the armed services to maintain technically complex equipment, the Government can contract for the same service through a defense contractor or PMC for the same service.[39] Usually, these contractors have already been trained by the contracting company, or acquired the knowledge from serving with the military in their younger years.[40] Conversely, however, the use of these civilians detracts from a recruiting tool of most of the armed services – a technical education.[41] The tradeoff has generally been considered worthwhile as it is cost-effective, but only time will tell how this could affect the future of military enlistment and the availability of these practitioners on the global market.[42]

The government can also achieve political flexibility by employing civilian contractors in military capacities.[43] First, politicians can use contractors to achieve traditionally military

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36. McLure, *supra* note 4.

37. Davidson, *supra* note 3, at 263-64.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.* at 265.

42. *Id.* This is representative of the so-called "brain-drain" from the armed services. Davidson hypothesizes that since contracting companies draw a lot of their workforce from ex-soldiers (which is why they have the requisite knowledge without needing training), in the future there will be a workforce shortage as there will be fewer soldiers leaving the military with such knowledge. *Id.*

43. Davidson, *supra* note 3, at 263.

objectives in places and situations where their constituencies do not want to send U.S. troops.[44] Second, the relatively low visibility in the media of contractor deaths and casualties enables the government to use contractors in high risk situations.[45]

Aside from the jurisdictional nightmare that accompanies contractors working overseas with the military, they pose significant problems in that: (1) the risks they face seem to be mounting and might affect their continued use; and (2) they are not subject to command structure.[46]

Sometimes the involvement of civilians on the battlefield can be disastrous and can complicate military missions.[47] The four contractors killed, dismembered, hung from a bridge and set afire shocked the United States public and precipitated the Marines' bloody and costly siege on Fallujah, Iraq.[48] The numerous contractors who have been kidnapped, killed, and beheaded have inflamed and incited both sides of the conflict.[49] While these crimes would be no less horrifying if they were soldiers, they represent a stark and frightening prospect to would-be contractors.[50] Some military scholars worry that the United State's increasing dependence on contractors to fulfill military jobs could be threatened by the growing perception that such jobs are too difficult or too dangerous.[51]

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44. *Id.*

45. *Id.*

46. *Id.* at 265-67.

47. *See* Frontline's Private Warriors FAQ, http://www.pbs.org/wgbh/pages/frontline/shows/warriors/faqs/ (last visited May 1, 2007) [hereinafter Private Warriors FAQ].

48. Davidson, *supra* note 3, at 265-67.

49. *Id.*

50. *See id.* at 265.

51. Davidson, *supra* note 3, at 265. A shortage in the job market would inhibit the military from satisfying commitments overseas and seriously disable it. *Id.* Also, contractors can quit while in the field if they feel that their job has become too dangerous, unlike their military counterparts. *Id.* All that bars them from abandoning their jobs are their company's contractual commitments. *Id.* The fact that these contractors are not subject to military command structure compounds the problem. *Id.* The new revision to the UCMJ might alleviate this potential problem, however. Singer, *supra* note 2.

Civilian contractors are also not subject to military command structure.[52] This means that when an officer gives them an order, they do not face the threat of punishment should they disobey it.[53] This not only makes the battlefield ripe for chaos when contractors are involved, but it also subjects both parties to harm through a lack of coordination and cooperation.[54]

Another way employing contractors can be potentially disadvantageous is when contractors conduct themselves in a manner contrary to American values. The allegations that have been made against contractors serving in Iraq have been numerous and detrimental to global perception of the United States and its citizens. These few individuals are emissaries of American culture and values – when their misdeeds are held up to be representative of all Americans, the United States loses the moral authority it has commanded for so long.

C. Allegations of Contractor Crimes in Iraq

Of all the ugly stories that emerged from the Abu Ghraib prison scandal, the alleged rape of a teenage boy was perhaps the most disturbing.[55] A prisoner in a nearby cell reported witnessing the rape. This witness claimed that the rape was committed by Adel Nakhla, a civilian contract-interpreter working at the prison.[56] The employee of TitanCorp was never prosecuted, although this allegation and other abuse charges against him were investigated.[57] Prosecutors cited problems with locating witnesses as well as problems with the lack of statutory authority to bring charges as impediments to the prosecution of Nakhla, as well as at least twenty other cases of

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52. Davidson, *supra* note 3, at 265.

53. *See* Private Warrior FAQs, *supra* note 47.

54. The commingling of contractors and soldiers in prison facilities is especially troubling. In Abu Ghraib, and more recently, at Guantanamo Bay, soldiers have reported being given orders by civilians to subject detainees to treatment that might be inconsistent with the Geneva Conventions. A soldier is not supposed to follow an order they know is unlawful, however, in interrogations especially, that which is unlawful is not clearly defined.

55. McLure, *supra* note 4.

56. *Id.*

57. *Id.*

alleged prisoner abuse by civilian contractors or personnel that have been referred to the Justice Department.[58]

While the military personnel involved in the abuses at Abu Ghraib have all been prosecuted, none of the civilian contractors implicated in the scandal have been held accountable in criminal prosecutions.[59] In order to achieve some semblance of justice the victims of these alleged crimes have had to resort to the civil legal system of the United States to be made whole by monetary means.[60] Dollars seem inadequate to address the egregious abuse these Iraqis claim to have suffered, and yet flaws in the legal system virtually prevent any other means of achieving justice through criminal prosecution. Recently, the Federal Bureau of Investigation made public allegations of abuse at Guantanamo Bay, Cuba, providing yet another reason to clarify when criminal statutes apply to contractors.[61]

D. Prior State of the Law Pertaining to Contractors

The Iraq War is not the first forum in which the services of civilian contractors have been used in conjunction with military operations.[62] It is, however, the most illustrative example of the inadequacy of the criminal justice system that was created to address crimes committed by civilians in the theatre of operations. Since the Iraq War began, not a single civilian contractor has been prosecuted for a crime committed while working in Iraq.[63] There are two possible explanations: either the 100,000 contractors that the Pentagon estimates are working abroad are unique from the rest of the population in their aversion to criminal behavior, or there is an

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58. *Id.*

59. *Id.*

60. *Id.*

61. Griff Witte & Renae Merle, *Contractors Are Cited in Abuses at Guantanamo: Reports Indicate Interrogation Role*, WASH. POST, Jan. 4, 2007, at D1.

62. Melson, *supra* note 24, at 279.

63. John Sifton, *United States Military and Central Intelligence Agency Personnel Abroad: Plugging the Prosecutorial Gaps*, 43 HARV. J. ON LEGIS. 487, 490 (Summer 2006).

inadequate system in place to investigate and prosecute crimes committed overseas.[64] The latter explanation seems more likely.[65]

Prior to the spending bill revision, there were many hurdles to the criminal prosecution of civilian contractors, both jurisdictional and substantive.[66] The Military Extraterritorial Jurisdiction Act of 2000 represents the last time that Congress attempted to address the contractor jurisdiction problem. The fact that only several prosecutions have occurred under it, and none of those of contractors in Iraq, highlights its ineffectiveness in plugging the jurisdictional gap that contractors have long fallen through. The prosecutorial system with which it was designed to cooperate was terribly flawed as well.

1. The Military Extraterritorial Jurisdiction Act of 2000

The Military Extraterritorial Jurisdiction Act (MEJA) was passed in 2000 in an attempt to subject civilians to the civilian jurisdiction of the U.S. criminal justice system.[67] It provides that people who accompany or are employed by the armed services and who commit crimes abroad are punished as if they had committed the crime in the United States.[68] If the crime was punishable by more than a year in prison in the United States, and was committed by the person while he or she was employed by or accompanying the Armed Forces

64. Singer, *supra* note 17.

65. *Id.*

66. Sifton, *supra* note 63, at 491.

67. Witte, *supra* note 1. In *United States v. Gatlin*, the Second Circuit held that the conviction of a U.S. citizen married to a service-member for sexually abusing a minor while living on base unconstitutional on the grounds that he was not subject to military jurisdiction. Melson, *supra* note 24, at 314 (interpreting United States v. Gatlin, 216 F. 3d 207 (2d Cir. 2000). In response, many proposals designed to address the jurisdiction problem were debated in Congress. Melson, *supra* note 24, at 314. Interestingly, Senator Sessions of Alabama introduced a bill to "legislate around" precedent that said that civilians could only be subject to military jurisdiction in a time of war. *Id.* He attempted to amend the UCMJ to apply to civilian contractors working in "contingency operations." *Id.* at 315. Both the Department of Defense and the Department of Justice objected to these amendments: "Neither department supported extending court-martial jurisdiction, believing that any attempt to extend it to civilians would be unconstitutional." *Id.*

68. Sifton, *supra* note 63, at 507.

outside the United States, the person was subject to the criminal justice system of the courts of the United States.[69]

The term "employed by the Armed Forces outside the United States" was defined by the statute as three different classes of employees.[70] The first encompasses those who are employed as civilian employees of the Department of Defense (DOD) or any other federal agency to the extent that their employment relates to the mission of the DOD operation overseas.[71] The second are those contractors (or subcontractors) who are employed by the DOD or any other federal agency.[72] The third, and final group, are those people who are employees of a contractor (or subcontractor etc.) of the DOD or any other federal agency.[73] Aside from being a member of one of these classes of employees, the person must be present or residing outside the United States in connection with this employment.[74] And, the person must not be a national or usual resident of the nation in which they are being employed, to be subject to the jurisdiction of the United States under MEJA.[75]

The term "accompanying the Armed Forces outside the United States" is defined as a dependent of either a member of the Armed Forces or a civilian employee of the DOD or a DOD contractor.[76] Also, the dependent must be residing with the member, employee or contractor outside the United States and the dependent must not be a national or resident of the country in which they are residing outside the United States.[78]

This construction of the statute was problematic and, therefore, so was the resulting prosecutorial scheme. Under the statute, there is

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69. Military Extraterritorial Jurisdiction Act, 18 U.S.C. § 3261 (2000).

70. § 3267.

71. *Id.*

72. *Id.* The contractors of the federal agencies or provisional authority are limited to the extent that the employment relates to supporting the mission of the DOD overseas. *Id.*

73. *Id.* The employees of contractors are limited to the same extent as the others and extend to provisional authorities also. *Id.*

74. *Id.*

75. § 3267.

76. *Id.*

78. *Id.*

some ambiguity about which employees are subject to its jurisdiction.[79] Contractors for the CIA, the State Department, or the Department of Justice might not fall under MEJA's provisions.[80] Although it appears to cover employees, a contractor etc. of other United States agencies and provisional authorities, the scope of their vulnerability to prosecution is correlated to their relationship to the mission of the Department of Defense overseas.[81]

2. Investigative and Prosecutorial Authority

More challenging to bringing contractors who commit crimes to justice was the delegation of prosecutorial authority.[82] There were no specific regulations mandating which agency would initiate prosecutions.[83] One of the main problems that prosecutors faced in developing cases against contractors was with prompt investigation – interviewing witnesses and recovering physical evidence from crime scenes.[84] Federal regulations indicate that the Department of Defense is responsible for initiating investigations, but the Department of Justice is responsible for the prosecution.[85] The lack of delegation of

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79. *See id.; see also* Melson, *supra* note 24, at 317 (Arguing that "if only through trial and error, MEJA will continue to apply to a limited number of the contractors accompanying armed forces abroad.").

80. Melson, *supra* note 24, at 317.

81. *See id.*

82. *Id.* at 316.

83. *See id.* at 317.

84. McLure, *supra* note 4.

85. Melson, *supra* note 24, at 317. Peter Singer, a leading authority on civilian contractors and the Armed Forces and a forceful advocate for the new revision to the UCMJ, argues:

> The roles and numbers of military contractors are far greater than in the past, but the legal system hasn't caught up. Even in situations when US civilian law could potentially have been applied to contractor crimes (through the Military Extraterritorial Jurisdiction Act), it wasn't. Underlying the previous laws like MEJA was the assumption that civilian prosecutors back in the US would be able to make determinations of what is proper and improper behavior in conflicts, go gather evidence, carry out depositions in the middle of war zones, and then be willing and able to prosecute them to juries back home. The reality is that no U.S. Attorney likes to waste limited budgets on such messy,

this duty severely impaired prosecutors' ability to bring charges against contractors accused of prisoner abuse in Abu Ghraib, and likely more individuals.[86] It would seem that the lack of coordination between these agencies at least contributed to the failure to prosecute any civilian for crimes committed in Iraq.[87]

Another factor in this failure was that the statute only addresses crimes that would be felonies.[88] It does not criminalize "military offenses" and it does not address crimes like simple assault, which is not a felony but could be associated with a charge of prisoner mistreatment.[89] The MEJA cannot be considered a comprehensive remedy to the problem of contractor prosecutions because there is still unacceptable criminal behavior that goes unpunished.[90]

E. Differences between UCMJ and Civilian Criminal Prosecutions

The differences between the Uniform Code of Military Justice and civilian criminal prosecutions are reflective of the different cultures they are designed to govern.[91] "Military offenses," such as failure to follow orders, are made punishable to achieve military goals and promote military values – completing the mission and

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> complex cases 9,000 miles outside their district, even if they were fortunate enough to have the evidence at hand. The only time MEJA has been successfully applied was against the wife of a soldier, who stabbed him during a domestic dispute at a US base in Turkey. Not one contractor of the entire military industry in Iraq has been charged with any crime over the last 3 and a half years, let alone prosecuted or punished. Given the raw numbers of contractors, let alone the incidents we know about, it boggles the mind.

Singer, *supra* note 2.

86. *See* Melson, *supra* note 24, at 317.

87. Melson, *supra* note 24, at 317.

88. *Id.*

89. *Id.* Disobeying an order is an example of a charge under the UCMJ that is not contemplated by MEJA, but should be considered as a possibility considering the work that contractors do alongside the military. *Id.*

90. *See id.*

91. *See* Reid v. Covert, 354 U.S. 1, 39 (1957).

preserving the unit.[92] Civilian law is oriented around the societal value of personal freedom.[93]

Objections to the expansion of military jurisdiction arise out of Fifth and Sixth Amendment concerns.[94] The Constitution grants Congress the power to regulate the governance of the Armed Forces and the UCMJ is the prosecutorial arm Congress has provided for that governance.[95] The courts have held that this grant of power creates an exception to the protections afforded citizens facing prosecution – defendants under the UCMJ do not have a right to a jury trial or grand jury proceedings.[96] Congress is limited in applying this jurisdiction to members of the Armed Services and the Supreme Court has most often found Congress' extension of this jurisdiction to civilians unconstitutional.[97]

III. STATE OF THE LAW

> Military authorities have the greatest interest in governing the actions of contractors accompanying military forces abroad. However, allowing military authorities to try U.S. civilians conflicts with the traditional jurisdictional separation of U.S. military and civilian authorities. Thus, civilian contractors exist in a jurisdictional "no man's land" between the military and civilian justice systems that has only recently been addressed by legislation.[98]

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92. Melson, *supra* note 24, at 317.

93. *Reid*, 354 U.S. at 39 (Arguing that "[i]n part this is attributable to the inherent differences in values and attitudes that separate the military establishment from civilian society. In the military, by necessity, emphasis must be placed on the security and order of the group rather than on the value and integrity of the individual.") *Id.*

94. *Id.* at 6.

95. *See id.* at 19.

96. *See id.*

97. United States v. Averette, 19 C.M.A. 363, 364-65 (U.S. C.A.A.F. 1970).

98. Melson, *supra* note 24, at 277.

A. Constitutional Precedent[99]

The Constitution grants Congress the power to determine the jurisdictional scope of courts-martial through its power to regulate the governance of the "land and naval forces."[100] Therefore, the jurisdiction of the UCMJ must be limited to apply only to people who are considered so closely associated with the armed services that they fall under the term "land and naval forces" as described in the Constitution.[101] This classification is referred to as the "status

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99. Several portions of the Constitution are referred to continually in this discussion. They include:

> The Congress shall have Power To...make Rules for the Government and Regulation of the land and naval Forces;...To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

U.S. CONST. art. I, § 8, cl. 14, 18.

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish....

U.S. CONST. art. III, § I.

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger;...nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law...

U.S. CONST. amend. V.

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him...

U.S. CONST. amend. VI.

100. 57 C.J.S. Military Justice § 14 (2007).

101. *Id.*

test."[102] The power of Congress, thus, is circumscribed by the Bill of Rights, allowing civilians to be prosecuted under military law only when they fit within the definition of a member of the armed forces.

Article 2 of the UCMJ defines those people subject to its jurisdiction and provisions.[103] It is clear that Congress has the right to amend the UCMJ as it pertains to the "land and naval Forces;" but attempts to extend that jurisdiction to include civilians, as the new provision does, have often failed as unconstitutional.[104]

1. Limitations of Court-Martial Jurisdiction

Ex parte Milligan took place just after the commencement of the Civil War.[105] The petitioner was arrested, tried by military commission and found guilty for various charges including conspiracy against the government and disloyal practices.[106] Milligan, an American citizen and resident of Indiana, challenged his conviction and imprisonment on the grounds that the military commission did not have the jurisdiction to try him as he was a citizen of the United States, was not a resident of a state in rebellion and had never served in the armed services; thus, he argued, he was entitled to a trial by jury under the Constitution.[107]

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102. Kinsella v. United States *ex rel.* Singleton, 361 U.S. 234, 241 (1960).

103. *Id.* These parties include regular members of the armed services, military students, reserves, retirees entitled to pay, prisoners in the custody of the armed forces (after a sentence imposed by a court-martial), and finally persons accompanying or employed by the military overseas in certain situations, subject to any treaty in place between the U.S. and the country in which the armed forces are located. Uniform Code of Military Justice, 10 U.S.C.A. art. 2, § 802 (2006).

104. *See infra* part III, sect. A, sub. 1.

105. *Ex parte* Milligan, 71 U.S. 2, 107 (1866).

106. *Id.*

107. *Id.* at 108. The court considered these facts to be especially relevant: Milligan was not a resident of a rebellious state; he was not a prisoner of war; he was a citizen of Indiana for over twenty years; he had never served in the military or naval service; and he was arrested by the military in his home and imprisoned. *Id.* at 118. The Supreme Court stated:

> No graver question was ever considered by this court, nor one which more nearly concerns the rights of the whole people; for it is the birthright of every American citizen when charged with crime, to be tried and punished according to law.

Id. at 118-19.

The Supreme Court held that Milligan's constitutional rights were infringed upon when he was denied a trial by jury.[108] Using strong language, the court states that despite debate on the correct interpretation of numerous provisions of the Constitution, one thing was certain: "[if] language has any meaning, *this right* – one of the most valuable in a free country – is preserved to every one accused of crime who is not attached to the army, navy, or militia in actual service."[109] The Court acknowledges that according to the Constitution, Congress has the power to determine the manner in which members of the military will be tried.[110] Interestingly, the Court states that "[e]very [sic]one connected with these branches of the public service is amenable to the jurisdiction which Congress has created for their government, and while thus serving, surrenders his right to be tried by the civil courts."[111] But, those citizens who are not members of those services would not be subject to military jurisdiction where the courts were open and their state was not in rebellion.[112]

The scope of Congress's power to extend military jurisdiction was further refined in *Reid v. Covert*.[113] In that case, two wives of servicemen were arrested, charged, and tried by courts-martial for killing their husbands while residing on overseas military bases.[114] Each woman challenged her conviction and imprisonment on the grounds that the military did not have the jurisdiction to try her, even though she was a civilian dependent married to a serviceman and living on a military base.[115] On rehearing, the Supreme Court held

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108. *Id.* at 122.

109. *Id.* at 123.

110. *Id.* at 123.

111. *Ex parte* Milligan, 71 U.S. at 123 (1866).

112. *Id.* at 121-22 (Arguing that:

> [n]o usage of war could sanction a military trial there for any offense whatever of a citizen in civil life, in nowise connected with the military service. Congress could grant no such power; and to the honor of our national legislature be it said, it has never been provoked...to attempt its exercise.)

113. *See* Reid v. Covert, 354 U.S. 1 (1955).

114. *Id.* at 3.

115. *Id.* at 4. In its first hearing and decision on this matter, the Supreme Court decided that the convictions of Mrs. Smith and Mrs. Covert were constitutional. *Id.* at 5. The majority held that the protections of the Fifth and

that a citizen retains the rights enumerated in the Bill of Rights, even while abroad, and thus a civilian could not be subject to military jurisdiction when charged with a capital crime in a time of peace.[116]

The Court first undertook the task of determining whether anything in the Constitution authorizes the military trials of dependents accompanying the armed forces overseas.[117] Article I, § 8, cl. 14 enables Congress "[t]o make Rules for the Government and Regulation of the land and naval Forces" but does not say anything about dependants.[118] The majority states that prior holdings dictate that this clause creates an exception to the normal rules pertaining to trials: Congress can authorize trials of service-people that do not fully comport with the Bill of Rights or Article III.[119] But in examining the natural meaning of the language of Clause 14, the Court holds that Congress does not have the power to expand military jurisdiction to civilians just because they accompany the military overseas.[120]

The Court decided that dependents living abroad with members of the armed services did not fall under the definition of "land and naval Forces" and therefore could not be subject to courts-martial jurisdiction because Congress does not have the power to curtail the rights guaranteed them by the Constitution.[121] Its power in limiting

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Sixth Amendments (right to a jury trial and a hearing by a grand jury) did not apply to an American citizen when tried by the United States abroad. *Id.* Congress could determine the procedure in any way it saw fit as long as the trial would be consistent with due process. *Id.* On rehearing the Court reversed its previous decision and decided that the military trials were unconstitutional. *Id.*

116. *Id.* at 6.

117. *Id.* at 19.

118. U.S. CONST. art. I, § 8, cl. 14; *Reid*, 354 U.S. at 19.

119. Reid v. Covert, 354 U.S. 1, 19 (1955).

120. *Id.*

121. *Id.* at 20. Specifically, the Court said: "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." *Id.* at 19-20. The Court also includes a quote from Colonel Winthrop, the "Blackstone of Military Law," that is a very important for the purposes of civilian contractors:

> Can [the power of Congress to raise, support, and govern the military forces] be held to include the raising or constituting, and the governing *nolens volens*, in a time of peace, as a part of the army, of a class of persons who are under no contract for military service, ...who render no military service, perform no military duty, receive no military pay, but are and remain civilians in

those rights (by subjecting individuals to military law) reaches only so far as members of the armed forces.[122] Individuals must be more connected than simply being dependants of members of the Armed Services to be subject to the rules Congress proscribes.[123] The majority rejects the Government's contention that the Necessary and Proper Clause and Clause 14 allow Congress to subject civilians like the defendants to military law.[124] It argues that this interpretation is much too broad – that if they adopted the Government's position, Congress would be without limitation in subjecting all persons to military trial if "necessary and proper" in governing the land and naval forces.[125]

The Court states that military jurisdiction is supposed to be a narrow exception to the protections and procedure proscribed and

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> every sense and for every capacity...In the opinion of the author, such a range of control is certainly beyond the power of Congress under [the Constitution. The Fifth Amendment] clearly distinguishes the military from the civil class as separate communities. It recognizes no third class which is part civil and part military...and it cannot be perceived how Congress can create such a class, without a disregard of the letter and spirit of the organic law.

Id. at 19 (quoting Winthrop, Military Law and Precedents (2d ed., Reprint 1920), 106). It seems that the passage of time may have created the "third class" Winthrop refers to as fiction, a hybrid of military and civilian, that might warrant different treatment that simply military or purely civilian.

122. Reid v. Covert, 354 U.S. 1, 21 (1955).

123. *See id.*

124. *Id.* at 20-21 (arguing:

> [T]he jurisdiction of military tribunals is a very limited and extraordinary jurisdiction derived from the cryptic language in Art. I, § 8, and at most, was intended to be only a narrow exception to the normal and preferred method of trial in courts of law. Every extension of military jurisdiction is an encroachment on the jurisdiction of the civil courts, and more important, acts as a deprivation of the right to jury trial and of other treasured constitutional protections. Having run up against the steadfast bulwark of the Bill of Rights, the Necessary and Proper Clause cannot extend the scope of Clause 14.)

125. *Id.* The Court continues that in one instance, Congress legislated that people who contracted with the military were subject to courts-martial if they committed fraud related to those contracts. *Id.* In *Ex parte Henderson*, a circuit court held that the law was unconstitutional. 11 Fed. Cas. 1067, No. 6,349; *Reid*, 354 U.S. at 20.

mandated by the Fifth, Sixth and Eighth Amendments and Article III.[126] While the Court acknowledges that, in fact, Congress does have the power to "make all rules necessary and proper to govern and regulate those persons who are serving in the 'land and naval Forces,'" the Court holds Congress is not empowered by that clause to expand military jurisdiction to groups of citizens not fitting within the definition of "members of the armed services.[127] "

Further, in interpreting the historical development of the Constitution, the Court holds that Congress does not have the power to subject those who have a relationship to the maintenance of the land and naval forces to military jurisdiction.[128] Importantly, the majority recognizes 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 did not wear a uniform."[129] They do not define precisely who is a civilian and who is a member of the armed services.[130]

Four Justices took part in the decision of the Court and two Justices concurred, but limited the Court's holding to civilian dependents accused of and tried for capital crimes by a military tribunal.[131] In *Kinsella v. United States ex rel. Singleton*, the Court extended its holding to prohibit military jurisdiction over civilian dependents in a time of peace whether the charged offense was capital or not.[132]

United States ex rel Toth v. Quarles addressed the issue of whether Congress has the power to subject ex-servicemen to trial by military tribunal.[133] At the time of his arrest, Toth was an honorably discharged civilian and had no relationship of any kind with the

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126. *Reid*, 354 U.S. at 21.

127. *Id.*. at 20.

128. *Id.* at 30.

129. *Id.* at 23.

130. *Id.* at 22. Because the Court had determined that wives, children and other dependents of servicemen were not "members of the armed services," they did not deem it necessary to clearly define instances where someone who hadn't enlisted or did not wear a uniform would be subject to military jurisdiction despite being a civilian. *Id.* at 23.

131. *Id.*

132. United States v. Averette, 19 C.M.A. 363, 365 (U.S. C.A.A.F. 1970).

133. United States *ex rel* Toth v. Quarles, 350 U.S. 11, 13 (1955).

military.[134] He was charged with conspiracy to commit murder and murder, offenses committed while he was a serviceman in Korea, and taken back to Korea to be tried by court-martial.[135] The Supreme Court held that members of the armed forces were civilians once they had severed their relationship with the military, and thus were not subject to military jurisdiction, even for crimes committed while they were still in the service.[136] This decision is significant in that it further refines who is considered a member of the Armed Services and who is not.

Much of the "status test" is analogy; the decision in *Grisham v. Hagan* is significant to determining whether contractors will be considered outside the reach of military jurisdiction. In *Grisham v. Hagan*, the Court held that civilian employees of the Armed Services were analogous to dependents accompanying the Armed Forces overseas and, therefore, were not subject to court-martial jurisdiction.[137] In this case, Grisham was a civilian employee of the U.S. Army stationed in France and was tried by court-martial there for premeditated murder under the UCMJ, a capital offense.[138] The Government contended that under Article 2(11) of the UCMJ, persons employed by and accompanying the armed forces overseas were subject to court martial jurisdiction.[139]

The court held that in capital cases, the accused civilian has a right to a jury trial as the consequences are so dire he should be afforded that constitutional protection, following the decision in *Reid*.[140] The court did acknowledge, however, that there might be valid distinctions between civilian dependents and civilian

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134. *Id.*

135. *Id.*

136. *Id.* at 14. The Court provides an interesting description of the difference between courts-martial and the right to a jury trial. Military personnel have unique training and experience and that training is fit for determining crimes occurring on the battlefield. *Id.* at 18. But, the basic premise underlying the jury trial is that laymen are better than experts to adjudicate the guilt or innocence of their peers. *Id.*

137. Grisham v. Hagan, 361 U.S. 278, 280 (1960).

138. *Id.* at 279.

139. *Id.*

140. *Id.* at 280.

employees.[141] The gravity of the potential punishment overrode any distinction that might have made civilian employees more amenable to prosecution under military jurisdiction.[142]

2. When Civilians Are Subject to Military Law

In *Reid v. Covert*, the Supreme Court also acknowledged that there are a number of decisions in the lower courts upholding the military trials of civilians performing services for the armed forces in the field during a time of war.[143] The Court interpreted the holdings in these cases to be based on the Government's "war powers" – that in times of war and in places where war is raging, military commanders need broad power over those on the battlefield.[144] The extraordinary circumstances present on the battlefield have justified subjecting civilians to military law in those instances.[145]

The Court goes on to add that although the war powers of the Congress and the Executive are broad, they do not extend so far as to infringe on the Constitutional rights of civilians accompanying the armed forces overseas in areas where no hostilities are taking place.[146] The majority holds that the military trial of civilians accompanying the armed forces should not take place in a time or place of peace.[147]

The question then becomes "what constitutes a time of war in which Congress has the power to subject civilians to military jurisdiction?" *United States v. Averette* held that civilians accompanying the armed forces in the field in a time of war can be

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141. *See id.*

142. *See id.*

143. Reid v. Covert, 354 U.S. 1, 33 (1955).

144. *Id.*

145. *Id.*

146. *Id.* at 34.

147. *Id.* at 35. The Court adds, in a latter portion of its decision, that the military's business is in training soldiers and fighting wars, not in prosecuting civilians for criminal offenses. *Id.* (referencing United States ex rel. Toth v. Quarles, 350 U.S. 11 (1955)). Accordingly, military justice has been oriented toward expediency and strict penalties in order to command obedience and maintain discipline. *Id.* at 36. Consequently, the military has placed less emphasis on the rights of the individual than civilian courts and society do. *Id.*

tried by court martial; however, the Court of Military Appeals interpreted Article 2(10) of the UCMJ to mean a declared war.[148] Although the *Averette* crime and decision took place during the Vietnam Conflict, the court did not construe "time of war" to include undeclared wars such as Vietnam.[149] In light of recent precedent on the topic of civilians and court marital jurisdiction, the appeals court construed the provision narrowly, warning that a broader interpretation would make possible the military prosecution of civilians whenever military action occurs, no matter what the intensity.[150]

The court did, however, stop short of expressing an opinion on whether the Constitution granted Congress the power to provide for military jurisdiction over civilians in a time of a declared war when these civilians accompany the armed forces in the field.[151] They limit their holding to defining Article 2(10) of the UCMJ as applying to civilians only in a time of a war formally declared by Congress.[152] In *Reid*, the Supreme Court did acknowledge that there was some precedent to suggest that civilians could be subject to military jurisdiction when accompanying the Armed Forces into a war zone.[153] Even after *Averette*, it is still unclear what the current Supreme Court will consider sufficient hostilities to subject civilians to military jurisdiction.

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148. United States v. Averette, 19 C.M.A. 363, 365 (U.S. C.A.A.F. 1970). Although the decisions of the Court of Military Appeals do not bind the Supreme Court, the military justice system's highest court's interpretation of when Congress has the power to submit civilians to military jurisdiction is significant. *Id.* The soundness of their reasoning and decision seems to be confirmed by the Spending Bill provision clarifying "in a time of war." *Id.* The change legislates the *Averette* interpretation of the UCMJ language of Section 2(a)(10) – "in times of declared war" – but also adds the more vague term "contingency operation." FY 2007 Military Authorization Act, Pub. L. No. 109-364, § 552, 120 Stat. 2083, 2217 (2006). The *Averette* holding was an interpretation of the meaning of the UCMJ language (which Congress created) but could also represent a Constitutional limitation on Congress's power. *Id.*

149. United States v. Averette, 19 C.M.A. 363, 365 (U.S. C.A.A.F. 1970).

150. *Id.*

151. *Id.*

152. *Id.*

153. Reid, 354 U.S. at 33.

B. The Change to the UCMJ

Until recently, civilian contractors accompanying the Armed Services overseas could only be subject to military jurisdiction under the Uniform Code of Military Justice (UCMJ) when Congress declared war.[154] Last congressional term, Senator Lindsey Graham of South Carolina inserted a sentence into a massive spending bill in an attempt to address legal loopholes that enabled contractors to avoid prosecution for criminal behavior abroad.[155] This revision to Article 2(a)(10) of the UCMJ redefined when civilians can be subject to court martial jurisdiction.[156] This change, adopted with virtually no debate or discussion, will have a profound effect on the constitutional rights of the civilian contractors currently serving abroad.[157] Furthermore, it might fly in the face of half a century of Supreme Court precedent.[158]

Article 2(a) of the UCMJ enumerates persons who are subject to the code or court martial system.[159] Prior to the passage of the spending bill, paragraph 10 read: "[i]n time of war, persons serving with or accompanying an armed force in the field."[160] The new provision revised Article 2(a)(10) of the UCMJ to read: "in a time of a declared war or a contingency operation" persons serving with or accompanying an armed force in the field are subject to the UCMJ.[161]

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154. *Id.*

155. Witte, *supra* note 1.

156. FY 2007 Military Authorization Act, Pub. L. No. 109-364, § 552, 120 Stat. 2083, 2217 (2006).

157. Singer, *supra* note 2.

158. Witte, *supra* note 1.

159. 10 U.S.C § 802(a) (2007).

160. *Id.*

161. FY 2007 Military Authorization Act, Pub. L. No. 109-364, at 2217. The term "contingency operation" is defined in this law by referencing 10 U.S.C.A. §101(a)(13). FY 2007 Military Authorization Act, Pub. L. No. 109-364, § 355, 120 Stat. 2083, 2163 (2006). That statute defines "contingency operation" as 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

Although small, this is a change worthy of note as it expands the jurisdiction of military law and contracts the rights of civilians serving overseas by doing away with their Fifth and Sixth Amendment rights to a trial by a jury of their peers and a grand jury hearing.[162]

This "clarification," as it is labeled in the bill, does not just have constitutional implications.[163] Under the UCMJ, commanding officers have wide latitude in determining who will be prosecuted.[164] Perhaps more importantly, military law defines behavior such as disobeying an order, fraternization, and adultery as crimes, whereas civilian courts do not.[165] Charges such as murder and rape do parallel civilian courts, but in subjecting civilian contractors to charges reserved for military personnel the Congress is making civilians behave like soldiers which, while desirable in combat zones, could be detrimental to the fulfillment of contractual obligations and the personal autonomy associated with being an American citizen.

Some critics of the law believe that if interpreted too broadly or aggressively, this law may affect embedded reporters and their First

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> (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.

10 U.S.C.A. § 101(a)(13)(A-B) (2006). The Spending Bill clarifies that Operation Iraqi Freedom and Operation Enduring Freedom both fall under the definition of "contingency operations" where they did not fall under the definitions of time of "declared war." FY 2007 Military Authorization Act, Pub. L. No. 109-364, at 2163.

162. Witte, *supra* note 1.

163. FY 2007 Military Authorization Act, Pub. L. No. 109-364, § 552, 120 Stat. 2083, 2217 (2006).

164. Witte, *supra* note 1.

165. *Id.*

Amendment rights as well.[166] Claims that the courts or Congress would interpret this group to be included seem unfounded.[167]

Clearly, the state of the law prior to this revision was a legal morass and critics have long been advocating that Congress address the problem of prosecuting civilian contractors for criminal behavior while serving alongside the military.[168] After the allegations arising from Abu Ghraib and now from Guantanamo Bay, Congress would be shirking its duty if it did not act decisively and deliberately; however, the Constitutional problems that arise from making a sweeping change in this way are not easily surmounted, nor does the change bring clarity to a difficult problem.

IV. ANALYSIS

A. The Constitutional Authority Granted Congress to Create a System to Govern the Armed Forces Should Not Extend to Contractors in Iraq

Article I of the Constitution grants Congress the power to make rules to govern and regulate the armed forces.[169] Through this power, Congress created the Uniform Code of Military Justice (UCMJ).[170] It is within Congress' enumerated power under this clause to create a system for the Armed Forces that does not incorporate all the Constitutional safeguards afforded defendants in civilian trials, which is what it did in codifying the UCMJ.[171] Congress's power only extends so far, however – it cannot extend

166 Singer, *supra* note 2. Singer asserts, however, that the journalists in Iraq are "not armed, not contracted (so not paid directly or indirectly from public monies) and most important, not there to serve the mission objectives" and that therefore, any interpretation that would affect them would be too extensive an interpretation under Constitutional precedent. *Id.* Furthermore, he argues, "embeds already make a rights tradeoff when they agree to the military's reporting rules." *Id.*

167. *Id.*

168. Witte, *supra* note 1.

169. U.S. CONST. art. I, § 8, cl. 14.

170. 57 C.J.S. Military Justice § 14 (1992).

171. *Reid*, 354 U.S. at 19.

such a system to incorporate civilians who cannot fairly be considered members of the "land and naval Forces."[172]

It is clear that Congress has the power to amend the U.C.M.J. By amending the definition of who falls under its jurisdiction, however, Congress may have overstepped its bounds, reaching too far into the civilian realm.

Despite the fact that the U.C.M.J. has become more robust since the 1950s, it still does not afford criminal defendants a right to a jury trial by their peers and a grand jury hearing.[173] It does not seem likely that the Supreme Court will see the imposition of military jurisdiction as less of a threat to individual rights enumerated in the Constitution than it did almost half a century ago.

The determination of whether the provision is constitutional depends on whether the Supreme Court determines either: 1) that civilian contractors are members of the "land or naval Forces" under the Constitution, or, 2) that contingency operations are so akin to war that the infringement on individual rights is justified by the circumstances.[174] In light of precedent, neither of these outcomes seem likely.

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172. *Id.* The *Reid* court argued:

> The Constitution does not say that Congress can regulate "the land and naval Forces and all other persons whose regulation might have some relationship to maintenance of the land and naval Forces." There is no indication that the Founders contemplated setting up a rival system of military courts to compete with civilian courts for jurisdiction over civilians who might have some contact or relationship with the armed forces. Courts-martial were not to have concurrent jurisdiction with courts of law over non-military America.

Id. at 30. Similiary, in *Toth* the Court held "[w]e find nothing in the history or constitutional treatment of military tribunals which entitles them to rank along with Article III courts as adjudicators of the guilt or innocence of people charged with offenses for which they can be deprived of their life, liberty or property." United States *ex rel* Toth v. Quarles, 350 U.S. 11, 17 (1955).

173. Witte, *supra* note 1.

174. *See Reid*, 354 U.S. at 19.

1. The Status Test

Reid v. Covert made clear that Congress authority to circumscribe certain civil rights is limited to members of the Armed Forces.[175] This principle created a "status test;" it made deciding whether a person was fairly considered to be a member of the Armed Forces a threshold decision.[176] If they are not considered a member, the legislative mechanism trying to incorporate them in military jurisdiction is unconstitutional.

The roles civilians play in providing services to the military have changed dramatically since the Civil War. Increasingly, it seems, these roles are becoming more soldier-like.[177] They often involve weapons and equipment maintenance, intelligence gathering, and sometimes involve use of force, including combat.[178] The development of these new roles raises the possibility that contractors could now be considered members of the Armed Forces and, thus, subject to the jurisdiction of the UCMJ.

In order to determine whether or not the evolution of contractor roles has affected their civilian status, the Court will have to determine if contractors are now more like members of the Armed Forces, or more like civilian dependants. Where either a civilian is so connected with an armed force that a statute subjects him to military jurisdiction, his trial by that court is not unconstitutional because it deprives him of some of his constitutional liberties.[179]

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175. *Id.*

176. *Id.*

177. Singer, *supra* note 17. Singer argues that the civilian contractor is becoming increasingly like the soldier in fulfilling "mission critical" roles:

> Private military firms carry out three crucial functions in Iraq: military support, military training and advice, and certain tactical military roles. It is important to note that official U.S. military doctrine has long held that "mission critical" roles must be kept inside the force. It has also held that civilians accompanying the force should not be put into roles where they must carry or use weapons, allowing the carry of sidearms (that is, pistols) only in the most extraordinary circumstances. But what used to be the exception is now the rule.

Id.

178. *Id.*

179. 57 C.J.S. Military Justice § 14 (2007).

Traditionally, in order to be considered a member of the Armed Forces, an individual has to have either a valid enlistment contract or have enlisted constructively.[180] The Supreme Court has never "delineated a bright line rule" in this determination.[181] Rather, the determination must be made by analogy and is not dependant on the civilian's agreement to such jurisdiction, his knowledge that he is subject to such jurisdiction, or on his status as an employee of either the armed forces or the government.[182]

The court first looks to the relationship between the person and the armed services in its determination of status. While there is not a case at hand to analyze, it is easy to imagine several scenarios. In the first scenario, a contractor is employed to provide security for a military commander, which necessitates the use of force often. This person would seem to be the civilian most vulnerable to being categorized as a member of the armed services, falling under Congress's power to regulate. His function is one traditionally associated with soldiers and thus might *need* to be regulated by military authority. His prosecution by military authority for capital offenses might be barred, however, by decisions such as *Grisham*, which held that civilian employees charged with capital crimes should be afforded the protections of all the applicable constitutional amendments and therefore cannot be tried by military courts.[183]

In the second scenario, the civilian contractor works as a civil engineer building schools for Iraqi children. He carries no weapon and performs more of a nation building function than a combat related role. This person would seem to be the least vulnerable to prosecution under the UCMJ as they do not appear to be so closely analogous to the traditional conception of members of the armed services. They seem more like civilian dependents than soldiers.

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180. 57 C.J.S. Military Justice § 16 (2007). A constructive enlistment is deemed to have occurred when a person serving with an armed force, who is of the mental competency and minimum age prescribed by the Code, voluntarily submits to military authority, voluntarily performs military duties, and accepts military benefits. *Id.* This provision of the Code was intended to counteract lack of jurisdiction claims from those who might have been subject to recruiter misconduct. *Id.*

181. 57 C.J.S. Military Justice § 23 (2007).

182. *See id.*

183. *Grisham v. Hagan,* 361 U.S. 278 (1960).

They live and work abroad and receive their livelihood perhaps from working with the armed services, but they could not be fairly categorized as members of the armed forces and therefore can't be subject to military jurisdiction in a time of undeclared war, based on precedent.

The third scenario is much more challenging. The contractor works as a convoy driver, delivering ammunition to soldiers. He wears a weapon to defend himself against ambushes, but his primary function is transportation. Is he more closely analogous to a soldier or to a civilian? This scenario is representative of the new contractor hybrid – not quite a civilian, not quite a soldier. In one sense, this contractor is most like a soldier, specifically, like a serviceman assigned to the "tail" or logistical support services. While it might not be the role typically associated with a soldier, especially in today's military, it is a role that nevertheless has previously been filled by servicemen.

There could be a compromise here – the contractor who carries a weapon and performs a military function could be subject to the UCMJ while others, who perform strictly civilian function, are not. Unfortunately, things aren't always so clear in a war-zone and the situations in Iraq and Afghanistan do not lend themselves to such clear cut scenarios.

If the court decided that contractors are members of the armed forces such that they can be governed by the UCMJ, that jurisdiction can only apply to them for as long as they are serving, presumably the length of their contract.[184] If the court should hold that civilians cannot become members of the armed services without enlisting or being drafted, then Congress will have a lot of work to do to achieve the same level of accountability by creating comprehensive substantive and jurisdictional statutes.

2. Time of War Exception

The Supreme Court has acknowledged that some court decisions provide a basis for an assertion that civilians can be subject to military jurisdiction during a time of war. This provision is included in the UCMJ § 802 art. 2 and is amended in the spending bill

184. *See* Singer, *supra* note 2.

revision: "[i]n a time of declared war or a contingency operation, persons serving with or accompanying an armed force in the field" are subject to military jurisdiction.[185]

Advocates of broadening the application to the UCMJ have interpreted Congress' constitutional authority as powerful enough to extend military jurisdiction to civilians under such circumstances.[186] They cite Article I, Section 8, Clause 14, the Necessary and Proper Clause, and the War Powers as broad enough to support this extension.[187] The Court has decided that in times of peace, the intrusion on civilians' constitutional rights is neither justified nor permissible. This decision begs the question: "what about in times of war?"

Times of war are logically the only circumstances where military authority, and therefore jurisdiction, seems appropriate. In light of all of the military's grave concerns about coordination and security, compelled obedience to military command and adherence to the mission might be justified. But in order to know when it is correct to apply this logic, war must be defined, and not so broadly that any armed conflict constitutes war; if the definition was so easily satisfied, constitutional rights of civilians would be too easily deprived unnecessarily.

In *Reid*, the Supreme Court proclaimed that "[m]ilitary trial of civilians 'in the field' is an extraordinary jurisdiction and it should not be expanded at the expense of the Bill of Rights."[188] Correlatively, the exigencies which require civilians to submit to military authority should be narrowly limited in scope.[189] In conflicts, such as those in Iraq and Afghanistan, the battlefield is not clearly demarcated, nor do these missions qualify as wars under a strict interpretation.

The Court of Military Appeals construed the previous construction of the UCMJ provision ("in time of war" persons serving with or accompanying the armed forces in the field) to be restricted to times of a war formally declared by Congress, based on

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185. 10 U.S.C. § 802, art. 2(a)910).

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

187 *Id.*

188. Reid v. Covert, 354 U.S. 1, 35 (1957).

189. *Id.*

their interpretation of Supreme Court precedent.[190] The Court expressed an awareness that the conflict in Vietnam was considered a war as the word is generally used and understood, and that all the characteristics of the fighting – the number of casualties and troops, the ferocity of the conflict, the extent of the suffering, and the impact on the nation – indicated that it was a major military action.[191] They did not, however, think that such a categorization should "serve as a shortcut for a formal declaration of war, at least in the sensitive area of subjecting civilians to military jurisdiction."[192]

Critics of the Bush Administration have likened the War in Iraq to Vietnam, sometimes too carelessly. But in this respect, the conflicts are similar – both the Iraq and Vietnam wars were military actions authorized by Congress, but they fall short of formal declarations of war. The decision in *Averette* is not binding on the Supreme Court; however, if the Court of Military Appeals' interpretation of precedent and its logic are sound, it foreshadows how the court might rule if presented with a challenge by a contractor prosecuted by the military.

The Court in *Averette* was interpreting the UCMJ as it was previously written. Congress's power to change it to incorporate civilians under military jurisdiction must be based on either its governance of the armed forces or on its war powers. The *Averette* decision suggests that the war powers of Congress are considerably more broad than its power to under Article I to regulate the governance of the armed forces, but those powers do not seem to be so broad as to place civilians under military jurisdiction when the nation is not at war. If such a construction was adopted, any military operation could be considered sufficient to warrant the placing of civilians under military jurisdiction.[193] That result is not consistent with traditional theories of the applicability of constitutional rights.

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190. United States v. Averette, 19 C.M.A. 363, 365 (U.S. C.A.A.F. 1970).

191. *Id.*

192. *Id.*

193. *Id.*

B. There Are Other Ways to Interpret the Provision

Some supporters of this development believe that the change to the UCMJ is the "21st century business version of the rights contract."[194] Peter Singer argues that if

> a private individual wants to travel to a warzone and do military jobs for profit, on behalf of the US government, then that individual agrees to fall under the same codes of law and consequence that American soldiers, in the same zones, doing the same sorts of jobs, have to live and work by.[195]

The contractor always has the option of opting out if he or she does not want to subject themselves to these regulations.[196] Contractors are paid nearly five- to ten-times what a soldier makes doing the same job, and thus is given more than adequate compensation for subjecting himself to such jurisdiction.[197] These proponents might have some merit to their argument.

The lack of clarity on how the provision will be applied creates confusion about whether the contract could operate as a waiver of those constitutional rights not guaranteed under the military justice system.[198] If the provision only applied to contractors who contract in the future and acknowledgement of this provision is incorporated in the contract, this could constitute as a voluntary waiver similar to signing an enlistment contract. Such a contract would ensure a knowing waiver of rights prior to criminal charges and might negate the need for a constitutional analysis of whether contractors are members of the armed forces or are accompanying the armed forces overseas during a time of declared war or contingency operation; it would also make enforcement of public law values in war enforceable.

Implementing a uniform contracting procedure such as this would also make all contractors in the area of operations, including those not contracted specifically to the military, subject to military

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194. Singer, *supra* note 2.

195. *Id.*

196. *Id.* This idea ignores the possibility that contractors already fulfilling contracts abroad might not have the same flexibility in opting out. *See id.*

197. *Id.*

198. *See id.*

authority and command.[199] This type of solution would relieve many if not all of the prosecutorial problems long associated with contractors serving abroad.[200]

V. CONCLUSION

The Supreme Court presiding over *Reid v. Covert* cautioned:

> "It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any encroachments thereon." Moreover we cannot consider [the encroachment on civilian's constitutional rights under military jurisdiction] a slight one. Throughout history many transgressions by the military have been called "slight" and have been justified as "reasonable" in light of the "uniqueness" of the times...We should not break faith with this Nation's tradition of keeping military power subservient to civilian authority, a tradition which we believe is firmly embodied in the Constitution.[201]

While it is apparent that the revision of the UCMJ brings some clarity to a jurisdictional mess, it is not so clear that it seriously and cautiously addresses the problem. The remedy it proposes casually dispenses with individual rights of a class of people that did not subject themselves to such authority by enlisting in the military. The way in which the provision was made into law and the lack of debate about when civilian rights should be constricted is troubling to say the least. It seems to be a solution more concerned with expediency and the "uniqueness" of these times, than the product of more careful reflection on constitutional principles.

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199. Singer, *supra* note 2.

200. *See id.*

201. Reid v. Covert, 354 U.S. 1, 40 (1957).