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The Constitutionality of Amended 10 U.S.C. Sec. 802(a)(10): Does the Military Need a Formal Invitation to Reign In "Cowboy" Civilian Contractors?

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THE CONSTITUTIONALITY OF AMENDED 10 U.S.C. § 802(A)(10): DOES THE MILITARY NEED A FORMAL INVITATION TO REIGN IN "COWBOY" CIVILIAN CONTRACTORS?

Andres Healy[*]

I. INTRODUCTION

Alaa "Alex" Mohammad Ali never set out to make history. He just needed a job.[1] Nevertheless, on February 23, 2008, Ali took his first step toward making history, and did it with blood on his hands.[2] What began as an argument with a fellow translator on a U.S. military base near Baghdad quickly escalated into a fight.[3] It ended just as quickly, with Ali allegedly stabbing the other man in the chest four times.[4] Of course, while terrible, a simple assault is hardly history making, or even

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1. Emma Schwartz, *First Contractor Charged Under Military Justice System*, U.S. NEWS & WORLD REP., Apr. 5, 2008, *available at* http://www.usnews.com/articles/news/iraq/2008/04/05/first-contractor-charged-under-military-justice-system.html.

2. Michael R. Gordon, *U.S. Charges Contractor at Iraq Post in Stabbing*, N.Y. TIMES, Apr. 5, 2008, at A6; Schwartz, *supra* note 1.

3. Gordon, *supra* note 2; Schwartz, *supra* note 1.

4. Gordon, *supra* note 2; Schwartz, *supra* note 1.

newsworthy, given the daily carnage in Iraq.[5] So what makes Ali's story so special?

On March 27, 2008, Ali became the first civilian contractor working for the United States since 1968 to be criminally charged by the U.S. military.[6] The charges were the first to be levied under Congress' 2006 amendment to 10 U.S.C. § 802(a)(10),[7] which expanded the reach of the military justice system to "persons serving with or accompanying an armed force in the field" during even contingency operations[8]—a profound shift from the pre-amendment need for a war formally declared by Congress.[9] Because U.S. citizens are generally immune from prosecution in U.S. courts for crimes committed abroad[10] and cannot be tried by the military outside of exceptionally limited circumstances,[11] the amendment's proponents hoped that the amendment would finally close the jurisdictional gap that allowed civilian contractors to operate abroad without fear of criminal prosecution for any unlawful action.[12]

Instead, the amendment has ignited a storm of controversy[13] and put Ali's otherwise mundane case into the limelight. Michael Navarre, a former member of the Navy's Judge Advocate General's Corps (JAG) who now works in private practice, explained that "[Ali's case] is a significant test case because the constitutionality of the new amendment will be litigated . . . . There is a question as to whether the Congress extended the power of the military too far."[14]

Navarre was not alone in raising the question of the amendment's constitutionality; besides commentators and academics, even the

5. Gordon, *supra* note 2; Schwartz, *supra* note 1.

6. CONGRESSIONAL BUDGET OFFICE, CONTRACTORS' SUPPORT OF U.S. OPERATIONS IN IRAQ 23 (2008) [hereinafter CONGRESSIONAL BUDGET OFFICE]; Jeremy Scahill, *An Iraqi Contractor Gets Prosecuted While Blackwater's Contract is Renewed*, THE NATION (N.Y.), Apr. 10, 2008, *available at* http://www.alternet.org/module/printversion/81977.

7. Gordon, *supra* note 2; Schwartz, *supra* note 1.

8. John Warner National Defense Act for Fiscal Year 2007, Pub. L. No. 109-364, § 552, 120 Stat. 2083, 2217 (2006); CONGRESSIONAL BUDGET OFFICE, *supra* note 6, at 23.

9. *See* United States v. Averette, 19 C.M.A. 363, 365 (1970) (2-1 decision).

10. Del Quentin Wilber & Karen DeYoung, *Justice Department Moves Toward Charges Against Contractors in Iraq Shooting*, WASH. POST, Aug. 17, 2008, at A1.

11. *See infra* notes 153, 158 and accompanying text.

12. *See* Griff Witte, *New Law Could Subject Civilians to Military Trial*, WASH. POST, Jan. 15, 2007, at A1. Generally speaking, U.S. civilians travelling abroad can only be criminally charged and tried by the authorities of the locality they are in. Such is currently not possible in Iraq due to an immunity agreement obtained by the United States from Iraq's Coalition Provisional Authority. CONGRESSIONAL BUDGET OFFICE, *supra* note 6, at 23; Sudarsan Raghavan, *Progress Cited on U.S.-Iraq Pacts; Foreign Minister Says Nations Are Working to Resolve Differences*, WASH. POST, July 3, 2008, at A13 (describing how immunity could soon evaporate, exposing contractors to local criminal jurisdiction).

13. Gordon, *supra* note 2.

14. *Id.*

government has been wary of the constitutionality of the amendment.[15] The Congressional Budget Office[16] reported that "using the [Uniform Code of Military Justice] to prosecute civilians, even during a war, may generate constitutional challenges based on the standards of due process applicable to military courts."[17] This might explain why the Department of Defense waited nearly seventeen months after passage of the amendment[18] before it issued a memorandum directing the military branches on how to begin employing the military's newly authorized jurisdiction.[19] Notably, Ali was charged only days later, though he had already been in military custody for thirty-three days.[20] Some commentators, as well as Ali's military attorney, have thus postulated that the government is using Ali, who is not an American citizen, as a legal lab rat.[21] "They want to test out a new American law on somebody who is not even an American," said Captain Clay Compton, Ali's attorney.[22]

If a legal laboratory was the military's intent, its experiment was a success. Originally charged with aggravated assault, Ali pled guilty on June 22, 2008, to lesser charges of wrongful appropriation of a knife owned by a U.S. soldier, obstruction of justice for wrongfully disposing of the knife, and making a false official statement to military investigators.[23] As a result of his plea, Ali's assault charge, which carried an independent maximum penalty of eight years confinement,[24] was dismissed,[25] and Ali would spend only five months in

15. *See* CONGRESSIONAL BUDGET OFFICE, *supra* note 6, at 23.

16. "[The Congressional Budget Office] produces policy analyses, cost estimates of legislation, and budget and economic projections that serve as a basis for the Congress's decisions about spending and taxes. Every piece of legislation affecting the use of the nation's resources undergoes [the office's] scrutiny." Congressional Budget Office, Who We Are, http://www.cbo.gov/employment/whoweare.shtml (last visited Jan. 28, 2010).

17. CONGRESSIONAL BUDGET OFFICE, *supra* note 6, at 23; *see also* JENNIFER K. ELSEA & NINA M. SERAFINO, CONGRESSIONAL RESEARCH SERVICE, PRIVATE SECURITY CONTRACTORS IN IRAQ: BACKGROUND, LEGAL STATUS, AND OTHER ISSUES 20–21 (2007).

18. Memorandum from Sec'y of Def. Robert M. Gates to Sec'ys of the Military Dep'ts, Chairman of the Joint Chiefs of Staff, Under Sec'ys of Def., Commanders of the Combatant Commands 1–3 (Mar. 10, 2008), *available at* http://www.fas.org/sgp/othergov/dod/gates-ucmj.pdf [hereinafter Gates Memorandum].

19. *Id.* at 1–2.

20. *See supra* notes 2, 6 and accompanying text.

21. *See* Scahill, *supra* note 6.

22. *Id.*

23. *See* Press Release, Multi-National Force-Iraq, Multi-National Corps–Iraq, Pub. Affairs Office, Camp Victory, Civilian Contractor Convicted at a Court-Martial (June 23, 2008), *available at* http://www.mnf-iraq.com/index.php?option=com content&task=view&id=20671&Itemid=128 [hereinafter Press Release, Multi-National Force-Iraq].

24. Simon Montlake, *U.S. Soldier Convicted of Assault in Iraq Death*, CHRISTIAN SCI. MONITOR, Feb. 21, 2008, *available at* http://www.csmonitor.com/2008/0221/p99s01-duts.html.

25. Press Release, Multi-National Force-Iraq, *supra* note 23.

confinement.[26]

The decision in Ali's case, however, does not render the issue moot. Perhaps as a result of its initial success, the military has not hesitated in utilizing its new authority. In January 2009, it began court-martial proceedings against two more civilian contractors in Iraq.[27] In response, each contractor, in petitions for writs of habeas corpus filed in federal court, challenged the military's ability to exercise constitutionally such jurisdiction, specifically raising the issue of whether such jurisdiction is allowable outside the context of a declared war.[28]

Critically, the viability of the statute depends on this very issue. This Note will therefore resolve whether Congress extended the power of the military too far when it amended 10 U.S.C. § 802(a)(10). Part II illustrates the problems that arise with the absence of civil or military jurisdiction over criminal acts committed by civilian contractors. Part III describes the failure of Congress' attempts to subject civilian contractors to civilian criminal jurisdiction and the resulting need for the amendment to 10 U.S.C. § 802(a)(10). Part IV analyzes judicial precedent concerning previous attempts to expand military jurisdiction to civilians. Finally, Part V concludes by stating definitively that 10 U.S.C. § 802(a)(10) is constitutional.

II. THE PROBLEM OF "COWBOY" CONTRACTORS

Omar H. Waso, a senior Kurdish official, could not believe his eyes. On September 16, 2007, from a rooftop overlooking Nisoor Square in Baghdad, Iraq, Waso watched as private security contractors from Blackwater Worldwide (Blackwater)[29] fired machine guns and grenade launchers at anything that moved.[30] "Women and children, all of them

26. *Id.* His subsequent collateral attack on the authority of the military to exercise jurisdiction over him was dismissed by the U.S. Court of Appeals for the Armed Forces (CAAF), the "supreme court" of military justice. Ali v. Austin, Misc. No. 09-8001/AR (C.A.A.F. Nov. 5, 2008) (petition summarily dismissed).

27. *See* Petition for Writ of Habeas Corpus, Adolph v. Gates, No. 1:09-cv-00135 (D.C. Cir. Jan. 23, 2009); *see also* Petition for Writ of Habeas Corpus, Price v. Gates, No. 1:09-cv-00106 (D.C. Cir. Jan. 16, 2009).

28. *See* Petition for Writ of Habeas Corpus, *Adolph*, (No. 1:09-cv-00135); *see also* Petition for Writ of Habeas Corpus, *Price*, (No. 1:09-cv-00106). *But see* Keith Rogers, *No Court-Martial for Man Suspected in Spy Plane Fire*, LAS VEGAS REV. J., Jan. 23, 2009, at B1.

29. Blackwater Worldwide was formerly known as Blackwater USA and is owned by Erik Prince, a former U.S. Navy SEAL. Memorandum from Majority Staff to the H. Comm. on Oversight and Gov't Reform 5 (Oct. 1, 2007), *available at* http://oversight.house.gov/documents/20071001121609.pdf [hereinafter Majority Staff Memorandum]. From 2001 to 2006, Blackwater received over a billion dollars in government contracts. *Id.* at 4. On May 8, 2006, the State Department awarded Blackwater a diplomatic security contract with a maximum value of $1.2 billion per contractor, or $3.6 billion in total. *Id.* at 4–5.

30. James Glanz, *New Evidence that Guards Took No Fire*, N.Y. TIMES, Oct. 13, 2007, at

were shouting and crying," he said. "They killed innocent people for no reason."[31]

According to testimony given by Erik Prince, Blackwater's owner, before the House Oversight and Government Reform Committee, the contractors responded only after coming under fire.[32] "[T]eam members returned fire at threatening targets," he said in prepared testimony. "Among the threats identified were men with AK-47s firing on the convoy, as well as approaching vehicles that appeared to be suicide car bombers."[33]

Eyewitnesses painted a different picture. "It was one-sided shooting from one direction," Waso said. "There wasn't any return fire."[34] Waso and other witnesses allege that contractors fired indiscriminately and continued firing long after it was clear that there was no resistance—even firing at vehicles trying to flee the square. "I call it a massacre," Waso said. "It is illegal. They used the law of the jungle."[35]

Military investigators agreed,[36] finding no evidence that the Blackwater contractors were threatened.[37] "It was obviously excessive, it was obviously wrong," said an anonymous U.S. military official. "The civilians that were fired upon, they didn't have any weapons to fire back at them."[38] An independent investigation by the FBI concluded likewise.[39] In fact, to military officials, this was a clear-cut case. "If our people had done this, they would be court-martialed," said a U.S. military official.[40] Instead, U.S. authorities, both civilian and military, did nothing,[41] which raises the question: Given the 2006 amendment to 10 U.S.C. § 802(a)(10), why didn't the military prosecute those involved?

A1.

31. *Id.*

32. Sudarsan Raghavan et al., *Blackwater Faulted in Military Reports from Shooting Scene*, WASH. POST., Oct. 5, 2007, at A1. Portions of the remarks were left out of Prince's testimony after the Justice Department warned that the incident was under investigation and should not be discussed in public session. *Id.*

33. *Id.*

34. Glanz, *supra* note 30.

35. *Id.*

36. Raghavan et al., *supra* note 32.

37. Military investigators found only cartridges and casings corresponding to contractor weapons. Glanz, *supra* note 30.

38. Raghavan et al., *supra* note 32.

39. Wilber & DeYoung, *supra* note 10.

40. Glanz, *supra* note 30.

41. Scahill, *supra* note 6. *But see* Del Quentin Wilber & Julie Tate, *Contractors' Attorneys Lash Out at Justice Department*, WASH. POST., Dec. 7, 2008, at A2 (detailing how six Blackwater contractors involved in the Nisoor Square incident have been indicted under the Military Extraterritorial Jurisdiction Act).

The simple answer is that the military had not yet decided how to exercise its newfound authority. As previously discussed, even though Congress amended 10 U.S.C. § 802(a)(10) in 2006, the military waited until March of 2008 to determine how, or if, it would exercise its newfound power,"[42]—effectively expanding the duration of the jurisdictional gap enjoyed by civilian contractors by an additional seventeen months.[43] Arguably, this delay might have lingered had the actions taken by the contractors at Nisoor Square[44] represented a rare and isolated occurrence. However, such abuses by civilian contractors had become less the exception, and more the rule.[45]

A memorandum prepared for members of the House of Representatives' Committee on Oversight and Government Reform found, according to reports obtained from Blackwater, that the company was involved in 195 "escalation of force" incidents from 2005 through 2006.[46] These reported incidents included the Nasoor incident,[47] the shooting of Iraqi Vice President Adil Abd-al-Mahdi's bodyguard by a drunken Blackwater contractor on Christmas Eve,[48] and miscellaneous acts of what could best be described as wanton and reckless acts of violence.[49]

Perhaps more disturbing, these incidents represent just those reported by Blackwater itself.[50] The Iraqi government has accused Blackwater security contractors of causing far more incidents and demanded that the company be excluded from the region.[51] Additionally, Iraqis are not alone in their assessment of some private contractors' actions.[52] During an October 2007 hearing on Blackwater,

42. Gates Memorandum, *supra* note 18, at 1–3.

43. *Id.* at 1–2.

44. *See supra* notes 29–40 and accompanying text.

45. *See* Jonathan Finer, *Security Contractors In Iraq under Scrutiny after Shootings*, WASH. POST., Sept. 10, 2005, at A1 (detailing investigation of contractors for indiscriminately shooting at civilians and civilian vehicles while driving through the streets of Iraq); David Washburn & Bruce Bigelow, *Civilian Contractors Suspected in Abuses in Legal Gray Area*, SAN DIEGO UNION-TRIB., May 29, 2004, at A1 (examining legal ramifications for civilian contractors involved in prisoner abuses that took place at the Abu Ghraib military prison in Iraq); Jamie Wilson, *Marines 'Beat U.S. Workers' in Iraq*, GUARDIAN (London), June 9, 2005, at 15 (describing response of U.S. marines to private security contractors allegedly shooting at a Marine convoy, as well as indiscriminately shooting at Iraqi civilians).

46. Majority Staff Memorandum, *supra* note 29, at 1.

47. *See supra* notes 29–40 and accompanying text. The Nasoor incident actually took place in 2007.

48. Majority Staff Memorandum, *supra* note 29, at 9–12.

49. *Id.* at 1–2, 6–9.

50. *Id.* at 1–2.

51. Andrew E. Kramer, *Security Contractors Shoot at Taxi, Wounding 3 Iraqis*, N.Y. TIMES, Oct. 19, 2007, at A12.

52. *See generally Hearing on Blackwater USA Before the H. Comm. on Oversight and Gov't Reform*, 110th Cong. 42–43 (2007) [hereinafter *Hearing*] (questioning Blackwater CEO

Representative Henry Waxman, chairman of the Committee on Oversight and Government Reform, noted that military commanders had stated publicly that Blackwater contractors "often act like cowboys."[53] According to the committee, senior military officials had "asserted that the impact of Blackwater's actions on Iraqi attitudes toward U.S. forces 'is going to hurt us badly' and 'may be worse than Abu Ghraib.'"[54]

Notably, though Blackwater contractors were the focus of the congressional inquiry,[55] they are not the sole culprits of alleged misconduct.[56] Similar charges of criminal conduct have been levied against employees of many private contractor companies operating in Iraq.[57] Still, while such abuses have colored the world's perception of the entire civilian contractor population, they truly cannot be considered systemic.

Of the estimated 180,000 civilian contractors working in Iraq,[58] allegations and reports of abuses almost entirely can be attributed to a fractional subset—private security contractors. Tasked with providing personal security details for high ranking officials or with protecting contractors not deployed directly with the combat force,[59] these individuals often have extensive military backgrounds and are generally heavily armed.[60] Many reportedly carry rocket and grenade launchers, in addition to automatic weapons,[61] and some apparently have access to chemical riot control agents that even U.S. soldiers are prohibited from using.[62] It is against this small subset, which accounts for no more than an estimated 30,000 of the contractors in Iraq,[63] that nearly all complaints of contractor abuses have been lodged.

Still, prior to Ali, not a single security contractor had been prosecuted or punished for criminal conduct in Iraq.[64] As described by

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Erik Prince about allegations of misconduct by Blackwater contractors in Iraq).

53. *Id.*

54. Majority Staff Memorandum, *supra* note 29, at 6.

55. *See generally Hearing*, *supra* note 52, at 42–43.

56. ELSEA & SERAFINO, *supra* note 17, at 10–11.

57. *Id.*

58. Jeremy Scahill, *A Very Private War*, GUARDIAN (London), Aug. 1, 2007, at 4.

59. CONGRESSIONAL BUDGET OFFICE, *supra* note 6, at 13.

60. *Id.* at 15.

61. *See* Joshua Partlow & Sudarsan Raghavan, *Iraq Probe of U.S. Security Firm Grows; Blackwater, Accused of Killing 11 on Sunday, Cited in Earlier Deaths*, WASH. POST, Sept. 22, 2007, at A1.

62. James Risen, *'05 Use of Gas by Blackwater Leaves Questions*, N.Y. TIMES, Jan. 10, 2008, at A1.

63. CONGRESSIONAL BUDGET OFFICE, *supra* note 6, at 15.

64. ELSEA & SERAFINO, *supra* note 17, at 20; William C. Peters, *On Laws, Wars, and Mercenaries: The Case for Courts-Martial Jurisdiction over Civilian Contractor Misconduct in Iraq*, 2006 BYU L. REV. 367, 367.

Professor William C. Peters of the United States Military Academy at West Point, this meant one of two things: "Either every [contractor] happens to be a model citizen, or there [were] serious shortcomings in the legal system that governs them."[65] Given the "cowboy" reputation earned by many contractors, the answer was clearly the latter.

III. CONGRESSIONAL ATTEMPTS TO REIGN IN COWBOY CONTRACTORS

Frustrated by the apparent lawlessness of some security contractors and the apparent exasperation of many military officials, Congress invariably sought to halt further abuses, or at least provide an avenue of accountability, by closing the jurisdictional gap.[66] Giving the military jurisdiction was not its first choice.[67] Rather, Congress first attempted a less controversial approach—expanding the jurisdiction of U.S. federal courts to allow criminal contractors to be prosecuted in the United States.[68] In theory, tailoring legislation to allow civil jurisdiction should have been easy. In practice, it was a dismal failure and precipitated the need for more effective action, which eventually came in the form of expanded military jurisdiction.

It is important to note that at the time the contractor abuses in Iraq first came to light, legislation expanding federal court jurisdiction to felonies committed outside the United States was already in effect.[69] During the Clinton Administration, Congress passed the Military Extraterritorial Jurisdiction Act of 2000 (MEJA)[70] to address the longstanding problem of the immunity from prosecution of which civilian contractors and other civilians accompanying the military abroad had taken advantage.[71] Ostensibly, MEJA, as originally enacted, gave federal courts criminal jurisdiction over members of the Armed Forces and individuals "employed by or accompanying the Armed Forces outside the United States."[72] Of course, the devil was in the details, which included language excluding most of the estimated

65. Peters, *supra* note 64, at 367.

66. *See supra* notes 11–12 and accompanying text.

67. *See* Military Extraterritorial Jurisdiction Act of 2000, Pub. L. No. 106-523, §§ 1–2, 114 Stat. 2488, 2488–92 (current version at 18 U.S.C. §§ 3261–67 (2004)).

68. *Id.*; *see also Closing Legal Loopholes: Prosecuting Sexual Assaults and Other Violent Crimes Committed Overseas by American Civilians in a Combat Environment: Hearing Before the S. Comm. on Foreign Relations*, 110th Cong. 2 (2008) (statement of Sigal P. Mandelker, Deputy Assistant Att'y Gen., Dep't of Justice) [hereinafter Mandelker].

69. *See generally* Military Extraterritorial Jurisdiction Act §§ 1–2.

70. *Id.*

71. Glenn R. Schmitt, *Amending the Military Extraterritorial Jurisdiction Act of 2000: Rushing to Close an Unforeseen Loophole*, ARMY LAW., June 2005, *available at* http://findarticles.com/p/articles/mi_m6052/is_2005_June/ai_n14935862.

72. Military Extraterritorial Jurisdiction Act § 2.

30,000 private security contractors in Iraq from U.S. jurisdiction.[73]

The basis for MEJA's original shortcomings can be broadly delineated into two categories: citizenship or status. Concerning citizenship, MEJA excludes nearly all foreign nationals—nearly 25,000 individuals—from its jurisdiction.[74] Based on that limitation alone, the scope of MEJA's applicability shrinks considerably—remaining only applicable to an estimated 5,000 security contractors.[75] Arguably, though, this is not the source of MEJA's failures. In truth, the exempted foreign nationals were never the target of congressional action for one simple reason—foreign nationals were subject to prosecution by their respective governments.[76]

In contrast, the pertinent status limitation had a much more insidious effect. By narrowly defining those "employed by or accompanying the Armed Forces" to include only contractors or employees of the Department of Defense (as well as military dependants residing with their military member),[77] MEJA rendered itself toothless. Of the remaining 5,000 security contractors, the majority—including Blackwater contractors and the rest of the most notorious cowboys—worked for the Department of State,[78] which exempted them from MEJA jurisdiction.[79] Most of the remaining contractors were employed by a variety of government agencies and were likewise exempt.[80] In reality, few security contractors were employed by the Department of Defense.[81] Thus, though intended to bring law to the lawless, MEJA, as originally enacted, effectively made little difference. It could not bring private security contractors to justice.

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73. CONGRESSIONAL BUDGET OFFICE, *supra* note 6, at 15.

74. First, MEJA, as originally enacted, explicitly excluded from U.S. jurisdiction any citizen of the country in which the crime was committed. Mandelker, *supra* note 68, at 2. In Iraq, half of all security contractors are Iraqi nationals. CONGRESSIONAL BUDGET OFFICE, *supra* note 6, at 15. Second, MEJA, as originally enacted, did not extend U.S. jurisdiction to foreign nationals subject to prosecution in their own countries. Mandelker, *supra* note 68, at 2. As tabulated by the Congressional Budget Office, this potentially excludes another 10,000 security contractors from prosecution. CONGRESSIONAL BUDGET OFFICE, *supra* note 6, at 15.

75. CONGRESSIONAL BUDGET OFFICE, *supra* note 6, at 15.

76. Mandelker, *supra* note 68, at 2.

77. Military Extraterritorial Jurisdiction Act §§ 1–2; Mandelker, *supra* note 68, at 2; Schmitt, *supra* note 71.

78. CONGRESSIONAL BUDGET OFFICE, *supra* note 6, at 16; ELSEA & SERAFINO, *supra* note 17, at 6–7.

79. CONGRESSIONAL BUDGET OFFICE, *supra* note 6, at 24.

80. ELSEA & SERAFINO, *supra* note 17, at 7–9. Notably, contractors involved in the Abu Ghraib incident worked for the CIA and the Department of the Interior and were thus immune from prosecution under MEJA. Schmitt, *supra* note 71.

81. CONGRESSIONAL BUDGET OFFICE, *supra* note 6, at 15.

In light of that fact, in 2004, members of Congress acted to free MEJA from some of its limitations.[82] While retaining MEJA's exemptions for foreign nationals,[83] Congress expanded MEJA's definition of non-military individuals to include contractors employed by "any other Federal agency, or any provisional authority, to the extent such employment relates to supporting the mission of the Department of Defense overseas . . . ."[84] Unfortunately, the clarity of MEJA's applicability would have been better served if Congress had taken more time debating and drafting the amendment.[85] While clearly broader in applicability, the new language leaves much to be desired in clearly delineating to whom MEJA now applies.[86] Many authorities have concluded that contractors employed by the State Department remain exempt from U.S. jurisdiction,[87] a conclusion seemingly supported by the paucity of prosecutions brought under MEJA.[88] As explained by Peter Singer, a Brookings Institute scholar, by 2005 "[t]here ha[d] been more than 20,000 [security contractors] on the ground in Iraq for more than two years and not one has been prosecuted for anything . . . . Given the raw number of contractors, let alone the incidents we know about, it boggles the mind."[89]

As a result of MEJA's shortcomings, members of Congress sought yet another method of curbing contractor abuses—the 2006 amendment to 10 U.S.C. § 802(a)(10).[90] The statute subjects arguably all civilians—contractors, military dependants, and even embedded journalists—to military trials for offenses committed near a conflict zone.[91] Supporters stated that its implementation would raise troop morale and aid the military by bringing "uniformity to the commander's ability to control the behavior of people representing [the United States]."[92]

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82. Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, § 1088, 118 Stat. 1811, 2066–67 (2004); Mandelker, *supra* note 68, at 2.

83. *See* Ronald W. Reagan National Defense Authorization Act § 1088.

84. *Id.*

85. *Id.*

86. *Id.*

87. *See* CONGRESSIONAL BUDGET OFFICE, *supra* note 6, at 23. Through March 2008, only thirteen cases had been charged—all of which were referred by the Department of Defense. *Id.* None dealt with the kind of abuses discussed in this Note. *See* Mandelker, *supra* note 68, at 3 (describing how most successful prosecutions have dealt with allegations of sexual abuse); ELSEA & SERAFINO, *supra* note 17, at 19 (discussing prosecution for child pornography); Tony Perry, *Marine Is Acquitted in Killings of 4 Iraqis*, L.A. TIMES, Aug. 29, 2008, at A1 (discussing prosecution of Marine reservist for killing Iraqi prisoners).

88. CONGRESSIONAL BUDGET OFFICE, *supra* note 6, at 24.

89. Witte, *supra* note 12.

90. John Warner National Defense Act for Fiscal Year 2007, Pub. L. No. 109-364, § 552, 120 Stat. 2083, 2217 (2006).

91. Witte, *supra* note 12.

92. *Id.*

Still, given its scope and potential impact, it is somewhat surprising that the amendment was not opposed while being considered by Congress and received little original fanfare after being signed into law.[93] This may be because this massive change in policy was effectuated by adding just five words to the massive John Warner National Defense Authorization Act for Fiscal Year 2007.[94] Regardless, once people became aware of the change, it set the legal community and the contractor community ablaze.[95] Expressing doubt as to the constitutionality of such jurisdiction,[96] critics alleged that the amendment was effectively snuck into law[97] and charge that it gives military commanders too much power.[98] Some feel the military itself was apprehensive about the change,[99] which precipitated the seventeen months delay in its effectuation.[100] Of course, while the government is currently content in its employment of amended 10 U.S.C. § 802(a)(10),[101] it remains to be seen whether the amendment itself will ultimately be successful. If it survives constitutional challenge, it may serve as the perfect tool to curb future contractor abuses. If it does not, Congress might be forced to further revise MEJA, an undertaking some members have already attempted.[102]

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93. *Id.*

94. *Id.*

95. *Id.*

96. *See supra* notes 13–14, 21–22 and accompanying text.

97. Witte, *supra* note 12. "This is a provision that has dramatic impact and deserved far more discussion than it got," said Stan Soloway, president of the Professional Services Council, a trade group that represents civilian contractors. *Id.*

98. *Id.* "This looks good on the surface, but it creates far more problems than it solves," said Stan Soloway. *Id.* "One could imagine a situation in which a commander is unhappy with what a reporter is writing and could use the [Uniform Code of Military Justice] to pressure the reporter," said Phillip E. Carter, a contracting lawyer with McKenna Long & Aldridge. *Id.*

99. Robert E. Reed, Assoc. Deputy Gen. Counsel, Nat'l Def. Indus. Ass'n (Procurement Div.), UCMJ Civilian Jurisdiction, Powerpoint presentation on UCMJ Civilian Jurisdiction (Nov. 15, 2007), *available at* meetings.abanet.org/webupload/commupload/PC704400/sitesofinterest_files/UCMJ_Developments_in_UCMJ_Jurisdiction_Art_2(a)(10)_for_NDIA_Procurement_Division_Nov_15_2007.ppt.

100. Gates Memorandum, *supra* note 18, at 1–3.

101. *See* Press Release, Multi-National Force-Iraq, *supra* note 23 (referencing the successful prosecution of Ali).

102. A proposed amendment would have expand jurisdiction under MEJA to any contractor working for any department or agency of the United States in any area where the U.S. military is conducting a contingency operation. H.R. 2740, 110th Cong. § 2 (2007). Speaking on the floor of the House of Representatives, Representative John Hall stressed the importance of the bill to "bringing previously unaccountable private security contractors under the rule of U.S. law." 153 CONG. REC. H11262 (2007), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getpage.cgi?position=all&page=H11262&dbname=2007_record (statement of Rep. Hall). He then described how without it, contractors like those working for Blackwater, one of many private security companies employed by the State Department, could otherwise operate with impunity. *Id.* On October 4, 2007, the bill was passed by House of Representatives but was

IV. JUDICIAL PRECEDENT: THE LIMITS ON MILITARY JURISDICTION

Quite simply, this is not the first time the government has sought to subject civilians to the jurisdiction of the military.[103] It would also not be the first time such an expansion was held unconstitutional.[104]

The problem of expanded military jurisdiction can best be characterized as a problem of in personam jurisdiction.[105] As a foundational matter, military jurisdiction is derived from Article I, § 8, Clause 14,[106] which allows Congress "[t]o make Rules for the Government and Regulation of the land and naval Forces."[107] Based on this language, the Supreme Court has found that no subject-matter limitation exists as to the category of offenses that can properly be subject to military jurisdiction.[108] In contrast, however, the Court has determined that Congress' ability to subject individuals to military jurisdiction is strictly limited.[109] Generally, the determination as to whether a military court has in personam jurisdiction over an individual depends exclusively on the "military status of the accused."[110]

Importantly, however, the rule is not absolute. Under extremely limited circumstances attendant to war, the Court has held that the in personam jurisdiction of military courts can constitutionally expand to include civilians.[111] Critically, 10 U.S.C. § 802(a)(10) must fall within the strict limits of this exception in order to be constitutional. As such,

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never voted upon by the Senate. GovTrack.us, H.R. 2740: MEJA Expansion and Enforcement Act of 2007, http://www.govtrack.us/congress/bill.xpd?bill=h110-2740 (last visited Jan. 28, 2010).

103. *See* Hamdan v. Rumsfeld, 548 U.S. 557, 595 (2006), *superseded by statute*, Military Commissions Act of 2006, Pub. L. No 109-366, § 7, 120 Stat. 2600, 2635–36. However, the relevant provisions of the Military Commissions Act have since been found unconstitutional by Boumediene v. Bush, 128 S. Ct. 2229, 2274 (2008). For additional cases regarding the subjection of civilians to military jurisdiction, see Reid v. Covert, 354 U.S. 1 (1957) (plurality opinion) (rejecting exercise of military jurisdiction over civilian); *Ex parte* Milligan, 71 U.S. (4 Wall.) 2 (1866) (rejecting exercise of military jurisdiction over civilian).

104. *See Hamdan*, 548 U.S. at 595; *Reid*, 354 U.S. at 41; *Ex parte Milligan*, 71 U.S. at 121.

105. *See* United States v. Hart, 66 M.J. 273, 275 (C.A.A.F. 2008) (determining Air Force had in personam jurisdiction over a serviceman).

106. *See generally* Solorio v. United States, 483 U.S. 435, 439 (1987) (holding that Constitution conditions the jurisdiction of military courts on the "military status of the accused").

107. U.S. CONST. art. I, § 8, cl. 14.

108. Stephen I. Vladeck, *On Jurisdictional Elephants and Kangaroo Courts*, 103 NW. U. L. REV. (COLLOQUY) 172, 174 (2008) (citing O'Callahan v. Parker, 395 U.S. 258, 272–73 (1965)); *Solorio*, 483 U.S. at 440).

109. *Id.*

110. *Solorio*, 483 U.S. at 439 (citations omitted).

111. *See* Reid v. Covert, 354 U.S. 1, 30–31 (1957) (plurality opinion); *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 131 (1866) (holding that the extension of military jurisdiction to Lambdin P. Milligan, charged with planning to steal Union weapons and invade Union prisoner-of-war camps during the Civil War, was unconstitutional given the presence of open civilian courts).

one must analyze precedent to determine the boundaries of the exception and to ascertain whether a formally declared war is requisite to extending military jurisdiction to civilians. This Part will therefore group and analyze precedent in three broad categories: the historical limitations on the application of military jurisdiction to civilians, *Reid v. Covert*[112] and its progeny's effect on the limits on military jurisdiction, and the impact of recent decisions on the permissible reach of military jurisdiction.

A. *Historical Limitations on Application of Military Jurisdiction to Civilians*

As early as 1866, in *Ex parte Milligan*, the Supreme Court articulated the general understanding that military jurisdiction was only appropriate in two limited circumstances: the trial of members of the military and the trial of civilians in times of war.[113] Regarding the first, the Court did not question the military's exercise of jurisdiction over its own members.[114] Instead, the Court explained that the Constitution "empower[ed] Congress 'to make rules for the government and regulation of the land and naval forces,'"[115] and approved Congress' designation of authority to the military to subject military members to military trial.[116] In contrast, the Court was quite hostile to the application of military jurisdiction to civilians[117] and allowed such only in extremely narrow circumstances attendant to times of war.[118] The Court was emphatic that even under the "'laws and usages of war'"[119] military jurisdiction could "never be applied to citizens in states which have upheld the authority of the government, and where the courts are open and their process unobstructed."[120] The fact that the country at large was engaged in active domestic combat did not on its own suffice;[121] the fighting had to be particular to the area of the offense and to the extent that civil authority had been rendered incapable of exercising criminal jurisdiction.[122]

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112. 354 U.S. 1 (1957).
113. 71 U.S. at 119–26.
114. *Id.* at 121–26.
115. *Id*. at 35.
116. *Id*. at 123–24.
117. *Id.* at 118–19 ("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.").
118. *Id*. at 121–22.
119. *Id.* at 121.
120. *Id*.
121. *See id*. at 121–22.
122. *Id*. at 122.

As a result, the Court rejected the exercise of military jurisdiction over Milligan, who had been arrested by military authorities and accused of plotting to free Confederate prisoners held in Indiana during the Civil War.[123] In making its determination, the Court stated a maxim that bears careful consideration in resolving the matter at hand.

> The power of punishment is, alone through the means which the laws have provided for that purpose, and if they are ineffectual, there is an immunity from punishment, no matter how great an offender the individual may be, or how much his crimes may have shocked the sense of justice of the country, or endangered its safety. By the protection of the law human rights are secured; withdraw that protection, and they are at the mercy of wicked rulers[,] or the clamor of an excited people.[124]

In short, regardless of the policy implications or perceived needs of the military,[125] the Court cautioned that the country would be better served by allowing transgressors immunity from prosecution, rather than trouncing the fundamental safeguards of the Constitution.[126] The Court thereafter articulated that the determinate issue in such cases is whether the military had "in it *jurisdiction*, legally, to try and sentence" the civilian at issue.[127]

Notably, during the Court's entire analysis of the factors necessary before military jurisdiction could be applied to civilians, the Court never

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123. *Id.* at 121–22; *see also* Peters, *supra* note 64, at 401–02.

124. *Ex parte Milligan*, 71 U.S. at 119.

125. Such language discounts any importance the "military deference doctrine" plays in the resolution of jurisdictional issues, and recent decisions reaffirm the Supreme Court's hostility to the doctrine in such matters. *See* Boumediene v. Bush, 128 S. Ct. 2229 (2008); Hamdan v. Rumsfeld, 548 U.S. 557 (2006), *superseded by statute*, Military Commissions Act of 2006, Pub. L. No 109-366, § 7, 120 Stat. 2600, 2635–36. However, the relevant provisions of the Military Commissions Act have since been found unconstitutional by the Court in Boumediene v. Bush, 128 S. Ct. 2229 (2008). The military deference doctrine is the term given to describe the Court's clear inclination to defer to the assertions and opinions of the military when resolving constitutional challenges to military action. *See generally* Steven B. Lichtman, *The Justices and the Generals: A Critical Examination of the U.S. Supreme Court's Tradition of Deference to the Military, 1918-2004*, 65 MD. L. REV. 907, 915 (2006) (discussing the Court's tradition of deference to the military).

126. The Court found that the military trial of an American citizen implicated the constitutional guarantee to trial of all crimes by jury; his Fourth Amendment right to be secure against seizure without proof of probable cause; his Fifth Amendment right not to be held to answer for a capital crime without presentment by a grand jury; and his Sixth Amendment right to "trial by jury, in such manner and with such regulations that with upright judges, impartial juries, and an able bar, the innocent will be saved and the guilty punished." *Ex parte Milligan*, 71 U.S. at 119–20.

127. *Id.* at 118.

detailed or even hinted at a requirement that a formal declaration of war be in effect.[128] Certainly, the government made no formal declaration of war during the Civil War, though it is arguable that the Court may have concluded that a declaration was immaterial given the presence of open and available courts. However, it seems more likely that the Court did not contemplate an actual declaration of war to be necessary. This proposition is supported by the Court's discussion contrasting the appropriateness of military jurisdiction in the states of Indiana and Virginia during the Civil War.[129] Though rejecting the application of military law to citizens in Indiana, the Court pointed out that military justice would be appropriate in Virginia, as it was "the locality of actual war" where "the national authority was overturned and the courts driven out."[130] Certainly this could not be the case if the Court assumed that a formal declaration of war was necessary. *Milligan* therefore seemingly endorses the principle that the dispositive factor for military jurisdiction over civilians is not a formal declaration of war, but rather the existence of actual hostilities that precludes the exercise of civil jurisdiction (a situation this Note will refer to as "military necessity").

The Court affirmed and strengthened this principle of military necessity eighty years later in the case of *Duncan v. Kahanamoku*.[131] Though Congress had formally declared war against Japan in 1941 and Hawaii had been placed under martial law and had its courts suspended, the Court found the military trial of civilians in Hawaii to be unconstitutional.[132] Citing *Milligan*, the concurring Justice found the mere threat of invasion insufficient to allow the military to supplant civilian jurisdiction.[133] Consequently, even though the military had closed the courts, the military trial of civilians was inappropriate because the closure was not precipitated by true military necessity.[134] The concurrence concluded that civilian courts must be "utterly incapable of trying criminals or of dispensing justice . . . before the Bill of Rights may be temporarily suspended."[135] Importantly, the Court differentiated the circumstances in *Duncan* from cases in which civilians were tried by military courts established in an occupied

128. *See id*. at 121.

129. *Id*. at 127.

130. *Id*.

131. 327 U.S. 304, 330 (1946).

132. *Id.* at 324; *see also id.* at 324–25 (Murphy, J., concurring).

133. *Id*. at 330 (Murphy, J., concurring) ("'Martial law (in relation to closing the courts) cannot arise from a *threatened* invasion. The necessity must be actual and present; the invasion real, such as effectually closes the courts and deposes the civil administration.'" (quoting *Ex parte Milligan*, 71 U.S. at 127)).

134. *Id*. at 311–12 (majority opinion).

135. *Id*. at 330 (Murphy, J., concurring).

territory by a temporary military government.[136] In those cases, the Court had previously concluded, and now reaffirmed, that the military acted within its recognized power.[137]

Thus, in the case of *Madsen v. Kinsella*,[138] the petitioner Yvette Madsen did not even attempt to dispute her amenability to military jurisdiction in general.[139] Madsen, an American citizen accused of murdering her husband while accompanying him in occupied Germany following World War II,[140] instead contended that because she was within the class of individuals statutorily subject to trial by military court-martial, she was not subject to the jurisdiction of the military commission established in that area by military authority.[141] Rejecting her argument, the Court found the jurisdiction of the court-martial and the military commission to be concurrent[142] and stated that the need for military commissions only arises because of statutory limitations on the jurisdiction of court-martial courts.[143] If Congress so desired, it would be constitutionally permissible to broaden court-martial jurisdiction to the limits set by the Court for commission jurisdiction.[144] Therefore, either form of military jurisdiction could appropriately be extended to civilians in any area in which the civil authority has been displaced by warfare.[145] Furthermore, once applied under such circumstances, the duration of military jurisdiction did not necessarily expire upon the cessation of hostilities or even upon the formal signing of a peace treaty.[146] Rather, the Court indicated that such jurisdiction can appropriately be exercised until such time as the military is able to fully discharge its responsibilities.[147] Notably, at the time of Madsen's military trial, German civil courts had been reopened;[148] however, Madsen was immune from trial in such courts by mandate of the U.S. government.[149]

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136. *Id*. at 314 (majority opinion).

137. *Id*.

138. 343 U.S. 341 (1952).

139. *Id*. at 345.

140. *Id*. at 343–44.

141. *Id*. at 360–61. The commission was created under military authority and given jurisdiction over all criminal cases in that area not involving members of the U.S. military. *Id.*

142. *Id*. at 354.

143. *Id*. at 347–48. "The *occasion* for military commission arises principally from the fact that the jurisdiction of the court-martial proper, in our law, is restricted by statute almost exclusively to members of the military force and to certain specific offenses defined in the written code." *Id.* at 346 n.8.

144. *Id.* at 348–49.

145. *See id*. at 354; *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 121–22 (1866).

146. *Madsen*, 343 U.S. at 360.

147. *Id*.

148. *Id*. at 361–62.

149. *Id*. at 362.

In addition to defining the scope of military jurisdiction, the Court also shed light on whether a formal declaration of war was necessary to support military jurisdiction. Delineating the historical jurisdiction of the various forms of military trials, the Court described the role of military commissions during the United States' second intervention in Cuba,[150] in which the United States used a military commission to try two men accused of murder during the intervention though "the condition was not war" (in reference to the fact that no formal declaration of war was made).[151] The Court concluded that such jurisdiction was nevertheless authorized by the law of war, and that trial by courts-martial was inappropriate only because of statutory restrictions.[152]

In summation, historical military jurisdiction may be considered constitutionally appropriate in only two circumstances: when applied to members of the military and when applied to civilians during times in which civilian courts were rendered incapable of exercising jurisdiction due to actual regional conflict.[153] The Court has restricted the circumstances of that necessity to times of actual invasion[154] or warfare that rendered the civilian courts incapable of exercising criminal jurisdiction.[155] Importantly, it was these actual conditions, and not the formal declaration of war, which gave rise to the constitutional exercise of military jurisdiction over civilians.[156] Additionally, once that necessity arose, the duration of the military's jurisdiction was quite broad, allowing the use of military commissions, at least in foreign territory,[157] until such time as the military was able to complete its mission in that area.[158]

B. *The Limits of* Reid v. Covert *and its Progeny*

Largely regarded as the basis for limiting military jurisdiction over civilians, *Reid v. Covert*[159] is one of the seminal cases dealing with military jurisdiction. While *Reid* is extraordinary in that the Court decided to rehear and reverse two consolidated cases decided in just the previous term,[160] it is far from extraordinary in terms of defining the

150. *Id*. at 354 n.20.

151. *Id*.

152. *Id*. at 354–55.

153. *See* Duncan v. Kahanamoku, 327 U.S. 304, 311–12 (1946); *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 127 (1866).

154. *Duncan*, 327 U.S. at 330.

155. *Ex parte Milligan*, 71 U.S. at 121.

156. *Id*. at 127; *Madsen*, 343 U.S. at 353 n.20.

157. *Madsen*, 343 U.S. at 361–62.

158. *Id*. at 360.

159. 354 U.S. 1 (1957) (plurality opinion).

160. Kinsella v. Krueger, 351 U.S. 470 (1956), *overruled by* Reid v. Covert, 354 U.S. 1, 5

limits of military jurisdiction as applied to civilians. In effect, the Court merely rebuffed efforts to extend military jurisdiction (though this time under the context of the Uniform Code of Military Justice (UCMJ)) beyond its traditional bounds and held that military jurisdiction was only appropriate over those actually in the military or over civilians during limited times of war and military necessity.[161]

From its inception, it is clear that the UCMJ was intended by Congress to subject civilians to the jurisdiction of military justice. Section 2(10) of 50 U.S.C. § 552 provided that "[i]n time of war, all persons serving with or accompanying an armed force in the field" were subject to the UCMJ.[162] Even broader, Section 2(11) of 50 U.S.C. § 552 stated that "[s]ubject to the provisions of any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, all persons serving with, employed by, or accompanying the armed forces without the continental limits of the United States" are subject to the jurisdiction of the Code.[163] For its part, the military was not shy in effectuating that intent.[164] In the five years following passage of the statute, the Army alone tried 2,280 civilians by courts-martial.[165] Of course, though intended and perhaps even useful, the question remained: Was the expanded jurisdiction constitutional?

The question did not linger unanswered for long. In *Reid*, the Court considered the constitutionality of trying, pursuant to Section 2(11) of 50 U.S.C. § 552, two military dependants for crimes committed overseas while accompanying their respective military husbands.[166] Distinguishing the case from *Madsen*,[167] the Court cited the restrictions articulated nearly a century before in *Milligan* and held that military jurisdiction was only appropriate in times of peace if exercised over members of the military itself.[168] Regarding civilians, military jurisdiction passed constitutional muster only if applied to civilians located in an area of actual hostilities during times of military necessity.[169] Determining that the dependants at issue fit neither category, the Court concluded that the military's exercise of jurisdiction over these civilians was inappropriate.[170]

(1957).

161. *See Reid*, 354 U.S. at 20–23, 30–31.
162. 50 U.S.C. § 552(10) (1952) (current version at 10 U.S.C. § 802(a)(10) (2006)).
163. 50 U.S.C. § 552(11) (1952) (current version at 10 U.S.C. § 802(a)(11) (2006)).
164. *See Krueger*, 351 U.S. at 477.
165. *Id.* at 477 n.7.
166. *Reid*, 354 U.S. at 3–4.
167. *Id.* at 35.
168. *Id.* at 19–20, 30–31.
169. *Id.* at 30–31.
170. *Id.* at 41.

Notably, *Reid* was determined by plurality opinion.[171] Three Justices joined in the opinion of Justice Black and rejected any application of military jurisdiction to civilians in a time of peace.[172] Justices Frankfurter and Harlan concurred only in the result, concluding that military jurisdiction might be appropriate in non-capital cases in times of peace[173] (an idea resoundingly rejected shortly thereafter).[174] Certainly, though, the Court's holding in *Reid* should not be discounted because it was decided by plurality.[175] Justice Black's opinion primarily relied on established historical precedent. In truth, *Reid* made no novel assertions regarding the appropriate boundaries of military jurisdiction, other than stating that "there might be circumstances where a person could be 'in' the armed services for purposes of [Congress' power to make rules and regulations of the land and naval forces] even though he had not formally been inducted into the military or did not wear a uniform."[176] Declining to define who might thus be included, the Court merely stated that military dependants were not.[177]

Additionally, any doubt as to *Reid*'s holding can effectively be dismissed in light of *Reid*'s progeny, which collectively affirmed and extended the principles espoused by Justice Black.[178] First, the Court held conclusively in *Kinsella v. United States ex rel. Singleton* that military dependants were not "in" the military, and thus could only be subjected to military jurisdiction in times of war, regardless of the offense charged.[179] Next, the Court in *McElroy v. United States ex rel. Guagliardo* extended that principle to civilian employees of the military.[180] Rejecting the reasoning of the United States Court of Military Appeals (USCMA)[181] in *United States v. Wilson*,[182] the Court

171. *See generally id.*

172. *Id.* at 1, 40–41.

173. *See id*. at 41–64 (Frankfurter, J., concurring); *id.* at 65–78 (Harlan, J., concurring).

174. *See* McElroy v. United States *ex rel.* Guagliardo, 361 U.S. 281, 283–84 (1960); Grisham v. Hagan, 361 U.S. 278, 278–80 (1960); Kinsella v. United States *ex rel.* Singleton, 361 U.S. 234, 249 (1960).

175. The dissent is not to be based on the idea that military jurisdiction over civilians was appropriate in peacetime, but rather that the women at issue satisfied the tests espoused by the plurality opinion, i.e., that they either committed their crimes in a conflict zone or fit into the majority's expanded category of those considered "in" the military. *See Reid*, 354 U.S. at 78–90 (Clark, J., dissenting).

176. *Id.* at 22–23 (plurality opinion).

177. *Id.* at 22–23.

178. *See Guagliardo*, 361 U.S. at 286–87; *Grisham*, 361 U.S. at 278–80; *Singleton*, 361 U.S. at 249.

179. 361 U.S. 234, 249 (1960) (affirming that military dependants cannot be considered to be "in" the military and therefore cannot be subject to military jurisdiction in times of peace regardless of whether the crime is of a capital nature or not).

180. *See* 361 U.S. 281, 286–87 (1960); *Grisham*, 361 U.S. at 278–80.

181. The United States Court of Military Appeals was re-designated the United States

held that one's status, either civilian or service member, was determinate.[183] An individual's contact or relationship with the military—no matter how extensive—was insufficient to subject that person to military jurisdiction in times of peace.[184] Thus, a civilian employee would have to voluntarily enlist into the military before that individual could constitutionally be subject to military jurisdiction in times of peace.[185]

It should also be noted that *Reid* and its progeny all dealt with challenges to jurisdiction brought pursuant to Article 2(11), which purported to extend military jurisdiction to civilians accompanying the armed forces outside the context of war.[186] In accord with precedent, the Court struck down attempts to use such jurisdiction on the basis that civilians were only amenable to military jurisdiction in circumstances of military necessity attendant to war. In contrast, the Court expressed its favor for Article 2(10), stating in dicta "that Art[icle] 2(10) sets forth the maximum historically recognized extent of military jurisdiction over civilians under the concept of 'in the field.'"[187] As Article 2(10) was eventually re-codified as 10 U.S.C. § 802(a)(10), the statute presently at issue, the Court's understanding of the word "war" is of crucial importance in determining whether the amended statute remains constitutionally valid.

As is often the case, the Court does not help matters by providing a precise definition.[188] Still, the Court's discussion clearly demonstrates that actual conflict, and not a formal declaration of war, is the proper keystone. As in *Milligan*, the Court makes no mention of the need for a formal declaration of war.[189] Rather, the Court states that "[f]rom a time prior to the adoption of the 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."[190] Certainly, such a statement is in accord with the

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Court of Appeals for the Armed Forces by Congress in 1994. CLERK OF THE COURT, U.S. COURT OF APPEALS FOR THE ARMED FORCES, THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES, 1,3 (2006), *available at* http://www.armfor.uscourts.gov/CAAFBooklet2006.pdf.

182. United States v. Wilson, 9 C.M.A. 60 (1958), *overruled by Guagliardo*, 361 U.S. at 287.

183. *See Guagliardo*, 361 U.S. at 286–87.

184. *Id.*

185. *Id.* (describing how military could follow a procedure along the lines of that provided for paymaster's clerks and approved by the Court in *Ex parte Reed*, 100 U.S. 13 (1879)).

186. *See id.*; Grisham v. Hagan, 361 U.S. 278, 278–80 (1960); Kinsella v. United States *ex rel.* Singleton, 361 U.S. 234, 249 (1960); Reid v. Covert, 354 U.S. 1, 3–4 (1957).

187. *Reid*, 354 U.S. at 34 n.61.

188. *See id.* at 33–34.

189. *Id.* at 34–35.

190. *Id.* at 33.

argument that military jurisdiction authority arises solely out of military necessity and is not dependent on mere formalities.[191] Seemingly then, by affirming the jurisdictional grant in Article 2(10), the Court endorsed the traditional principle that actual hostilities and the disruption of the civil government act as the keystone for exercising military jurisdiction over civilians.[192]

In effect, *Reid* and its contemporaries did little more than maintain the traditional two-prong approach to military jurisdiction. The Court upheld the application of military jurisdiction to military members,[193] but it strictly limited such jurisdiction over civilians—requiring the military necessity as a result of actual conflict in the area.[194] Furthermore, after hinting that it might consider expanding the scope of who might be considered in the military,[195] the Court actually held otherwise, articulating that military dependants and employees could never be considered in the military for the sake of jurisdiction, regardless of the proximity of their relationship.[196] As a result, civilians could only be subject to military jurisdiction in times of war—a concept explicitly endorsed by the Court's admonishment that Article 2(10) described the maximum allowable reach of military jurisdiction.[197] In that regard, the Court clearly upheld precedent that the existence of war was to be determined not by formalities, but rather by the reality of actual conflict.[198] Therefore, only in times of military necessity is military jurisdiction over civilians constitutionally appropriate.[199]

C. *Impact of Recent Decisions on the Permissible Reach of Military Jurisdiction*

Given the Court's preoccupation with Article 2(11), it might have seemed that Article 2(10), which codified the military's authority to subject civilians serving with or accompanying it in the field in time of war, was settled law. However, in 1969, the USMCA, the "supreme court" of military law at the time,[200] decided otherwise and effectively created the jurisdictional gap at issue when it determined in *United States v. Averette* that a formal declaration of war was necessary to permit the application of military jurisdiction to civilians pursuant to the

191. *Id.* at 30–33.

192. *Id.* at 34–35.

193. *Id*. at 19–20.

194. *Id.* at 30–31, 35.

195. *Id.* at 22–23.

196. *See* McElroy v. United States *ex rel.* Guagliardo, 361 U.S. 281, 286–7 (1960); Kinsella v. United States *ex rel.* Singleton, 361 U.S. 234, 249 (1960).

197. *Reid*, 354 U.S. at 34 n.61.

198. *Id.* at 33–34.

199. *Id.* at 30–33.

200. *See supra* note 181 and accompanying text.

statute.[201] Since *Averette*, no civilian had been prosecuted under military jurisdiction[202] until Congress' decision to amend 10 U.S.C. § 802(a)(10) and the subsequent charging of Ali in 2008.[203] Of course, given prior precedent, such a ruling would mark a monumental shift in reasoning if based on constitutional principles. It would also be an exceedingly strong argument for questioning amended 10 U.S.C. § 802(a)(10)'s validity. Unfortunately for cowboy contractors, the situation is not so bleak.

While the *Averette* decision could simply be classified as an aberration, it certainly resulted from a confusing time in the Court's treatment of military jurisdiction. While the Court in *Reid* had effectively rebuffed attempts to expand military jurisdiction beyond its traditional bounds,[204] it took no steps to limit that jurisdiction. As stated previously, it effectively maintained the traditional two-prong approach—in which an individual's status as a member of the military was the determinate factor in deciding when military jurisdiction might be employed outside the context of war.[205] However, during the height of the Vietnam War, the Court made an abrupt about face.[206] In *O'Callahan v. Parker*,[207] the Court declared that an individual's status as a military member was merely a threshold issue.[208] A crime must additionally have been service-related to justify military jurisdiction.[209] Practically speaking, even a soldier could not be tried by the military for crimes committed for "peacetime offenses" in an area where "[c]ivil courts were open."[210] Without a doubt, this was a radical restriction on the exercise of military jurisdiction. Seemingly, the Court determined that characteristics of military necessity were required before the military had jurisdiction over even its own members' crimes.

Given the Court's apparent desire to restrict the exercise of military jurisdiction, it should not come as a surprise that *Averette* was decided in a likewise restrictive manner just one year later.[211] In fact, the USMCA specifically stated that its basis for restricting the statutory employment of military jurisdiction to civilians was "the most recent

201. 19 C.M.A. 363 (1970) (2-1 decision).

202. Peters, *supra* note 64, at 367.

203. Scahill, *supra* note 6.

204. *See generally* Reid v. Covert, 354 U.S. 1 (1957) (declining to allow the military to exert jurisdiction over a civilian during peace time).

205. Kinsella v. United States *ex rel.* Singleton, 361 U.S. 234, 240–41 (1960).

206. *See* O'Callahan v. Parker, 395 U.S. 258, 267, 272–73 (1969), *overruled by* Solorio v. United States, 483 U.S. 435 (1987).

207. *Id.* at 258.

208. *Id.* at 267.

209. *Id.* at 272–73.

210. *Id.* at 273–74.

211. Peters, *supra* note 64, at 394–97.

guidance in this area from the Supreme Court."[212] Many critics of the *Averette* court's decision point out that the USMCA could not have relied on precedent other than *O'Callahan* because none existed.[213] This sentiment was expressed even at the time of the decision.[214] In his dissent to *Averette*, Chief Judge Quinn stated that "there is no compelling or cogent reason" for the manner in which the court was construing the phrase "time of war."[215] Importantly, though, even the *Averette* court did not hold that a formal declaration of war was constitutionally necessary.[216] In fact, the court explicitly declined to make any such determination.[217] Rather, the court merely interpreted the statutory language to require a formal declaration of war[218]—a point bitterly opposed by the dissent.[219]

Thus, even under *Averette*, Congress could have acted to broaden the circumstances under which the statute authorized the exercise of military jurisdiction over civilians. Of course, it is arguable that the *Averette* court correctly interpreted *O'Callahan* as representative of the Court's desire to limit all applications of military jurisdiction, and that given the opportunity the Court would have limited military jurisdiction over civilians as well. Certainly, if the trend started by *O'Callahan* was still in effect, this might bear consideration. Importantly, however, such is not the case; *O'Callahan* is no longer good law.

In 1987, the Rehnquist Court[220] overruled *O'Callahan* in *Solorio v. United States* and re-established the offender's status as the sole factor in determining whether military jurisdiction could appropriately be exercised over service members.[221] In returning to what might be considered the norm, the Court specifically cited *Kinsella*, *Reid*, and *Milligan* as demonstrative of the proper application of military jurisdiction.[222] Notably, though *Solorio*'s holding was limited to the ability of the military to exercise jurisdiction over service members,[223] its reasoning clearly demonstrates the Court's acknowledgement that the traditional norms concerning the exercise of military jurisdiction

212. United States v. Averette, 19 C.M.A. 363, 365 (1970).

213. Peters, *supra* note 64, at 394–97.

214. *Averette*, 19 C.M.A. at 366 (Quinn, C.J., dissenting).

215. *Id.*

216. *Id.* at 365 (majority opinion).

217. *Id.*

218. *Id.*

219. *Id.* at 366 (Quinn, C.J., dissenting).

220. *See generally* Michael Richard Dimino, *Counter-Majoritarian Power and Judges' Political Speech*, 58 FLA. L. REV. 53, 84–85 (2006) (discussing composition of the Court under Chief Justice William Rehnquist).

221. 483 U.S. 435, 439 (1987).

222. *Id.*

223. *Id.* at 450–51.

over civilians were likewise not to be discarded.

Furthermore, that acknowledgement has not waned. In 2005, the Roberts Court[224] determined in *Hamdan v. Rumsfeld*[225] that military jurisdiction could constitutionally be applied to any civilians in areas in which martial law had been appropriately declared, as well as in "'occupied enemy territory or territory regained from an enemy where civilian government cannot and does not function.'"[226] The Court identified *Madsen*, *Duncan*, and *Milligan* as demonstrative of such circumstances.[227] Additionally, affirming the conclusions noted previously concerning the irrelevance of a formal declaration of war, the Court references the military's activities in Afghanistan following the attacks on September 11, 2001,[228] as representative of the theater and duration of war.[229] Certainly, this could not be true unless the Court understood the precedential meaning of "war" to require only the presence of actual conflict, and not a formal declaration.

Thus, in effect, the scope of the constitutionally appropriate application of military jurisdiction to civilians during the post-*Reid* era concluded just as it began—though it undertook a wild metamorphosis before returning to its traditional moorings. As evidenced by *Hamdan*, military jurisdiction remains constitutionally appropriate in the two circumstances established historically in *Milligan* and later in the *Reid* era—over military members in all cases and over civilians only in times of military necessity.[230] Of course, military jurisdiction did not escape entirely unscathed. Even after *Solorio*, the *Averette* court's restrictive statutory interpretation of what was to become 10 U.S.C. § 802(a)(10)

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224. *See generally* Jason Marques, Note, *To Bear a Cross: The Establishment Clause, Historic Preservation, and Eminent Domain Intersect at the Mt. Soledad Veterans Memorial*, 59 FLA. L. REV. 829, 853 (2007) (discussing composition of the Court under Chief Justice John Roberts).

225. Hamdan v. Rumsfeld, 548 U.S. 557 (2006), *superseded by* Military Commissions Act of 2006, Pub. L. No 109-366, § 7, 120 Stat. 2600, 2635–36. However, the relevant provisions of the Military Commissions Act have since been found unconstitutional by Boumediene v. Bush, 128 S. Ct. 2229 (2008).

226. *See id*. at 595–96 (quoting Duncan v. Kahanamoku, 327 U.S. 304, 314 (1946)). Additionally, the Court identified a third appropriate circumstance—the trial of enemy individuals for violations of the laws of war—in which the military could exert jurisdiction over non-service members. *Id.* at 596. It was upon this basis that the military sought to subject Salim Ahmed Hamdan to its jurisdiction. *Id.* at 597. Importantly, this basis is beyond the scope of this Note.

227. *See id*. at 596.

228. *See generally* Maxwell O. Chibundu, *For God, For Country, For Universalism: Sovereignty as Solidarity in Our Age of Terror*, 56 FLA. L. REV. 883, 883–84 (2004) (describing the terrorist attacks of September 11, 2001).

229. *See Hamdan*, 548 U.S. at 598–600.

230. Solorio v. United States, 483 U.S. 435, 439 (1987).

remained.[231] As such, formal congressional action was now required to extend military jurisdiction to civilians.[232]

V. CONCLUSION: NO FORMALITIES REQUIRED

In many respects, the "problem" facing civilian contractors[233]—their newfound amenability to the jurisdiction of the military justice system—is of their own design. For nearly forty years,[234] such individuals had enjoyed the benefit of a jurisdictional gap that rendered them free from criminal prosecution.[235] "Cowboy" contractors returned the favor by embarrassing the United States[236] with an impressive litany of abuses[237] that compelled Congress to act.[238] But did Congress act appropriately? As stated so eloquently by the Supreme Court 140 years prior to the amendment of 10 U.S.C. § 802(a)(10), no matter how wicked an offender might be or to what extent his offenses endanger the safety of the country, if the law does not authorize his punishment, then it is better to allow that individual to remain unpunished than to violate the protections of the law and submit to the "clamor of an excited people."[239] Thus, regardless of the perceived need for military jurisdiction to combat allegations of contractor abuses in Iraq, the determinate question remains: Does the Constitution tolerate the statutory expansion of military jurisdiction to civilians serving with or accompanying an armed force in the field outside the context of a declared war?

Without a doubt, it does. While the Court has traditionally considered the exercise of military jurisdiction over civilians to be extraordinary[240] and expressed its reluctance to subject civilians to such,[241] it has never incorporated the need for a formal declaration of war in order to justify that extraordinary grant of jurisdiction.[242] Rather, the Court has focused on the realities faced by military commanders in the face of an actively hostile enemy[243] and determined that jurisdiction

231. United States v. Averette, 19 C.M.A. 363, 365 (1970).

232. *Id.*

233. Witte, *supra* note 12 ("'This looks good on the surface, but it creates far more problems than it solves,' said Stan Soloway, president of the Professional Services Council, a trade group that represents [civilian] contractors.").

234. *See supra* note 6 and accompanying text.

235. *See supra* notes 11–12 and accompanying text.

236. *See supra* note 54 and accompanying text.

237. *See supra* notes 45–49 and accompanying text.

238. *See supra* note 90 and accompanying text.

239. *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 119 (1866).

240. Reid v. Covert, 354 U.S. 1, 35 (1957) (plurality opinion).

241. *Ex parte Milligan*, 71 U.S. at 121.

242. United States v. Averette, 19 C.M.A. 363, 366 (1970) (Quinn, C.J., dissenting).

243. *Reid*, 354 U.S. at 33.

is appropriate in areas in which local invasion or actual military conflict has rendered the civil authority incapable of exercising jurisdiction.[244] Furthermore, per *Hamdan*, military jurisdiction remained particularly appropriate in "'occupied enemy territory or territory regained from an enemy where civilian government cannot and does not function.'"[245]

Arguably, the situation in Iraq meets all such requirements. Direct, local military conflict stripped the local civil authority of the power to exercise criminal jurisdiction,[246] and, even though that civil authority has been restored to some degree, it lacks the authority to subject personnel accompanying the U.S. military to local jurisdiction.[247] Such circumstances are remarkably similar to those present in *Madsen*,[248] in which the Court affirmed the exercise of military jurisdiction over a U.S. military dependant,[249] a decision the Court has never expressed any reservations about.[250] Indeed, in *Reid*, the Court explicitly affirmed *Madsen*, distinguishing it from the circumstance in *Reid* based on the fact that Germany had been conquered by force and continued to be governed by military authority.[251] Certainly, in light of the added insight shared in *Hamdan*, the current conflict in Iraq falls within the category of occupied territory in which the civilian courts are incapable of subjecting civilians to jurisdiction as a result of ongoing direct military conflict.[252]

Simply put, that is all that is required. The need for a formal declaration of war had never been discussed, much less been at issue, until the court in *Averette* determined such to be necessary to comply with the relevant statutory language.[253] Still, even this lone contrary decision was determined not on the basis of constitutional constraints, but rather on the basis of that court's narrow interpretation of statutory language[254] following an unprecedented decision by the Court to radically restrict the exercise of military jurisdiction over even its own

244. *Ex parte Milligan*, 71 U.S. at 127.

245. *See* Hamdan v. Rumsfeld, 548 U.S. 557, 595–96 (2006) (quoting Duncan v. Kahanamoku, 327 U.S. 304, 314 (1946)). Additionally, the Court identified a third appropriate circumstance in which the military could exert jurisdiction over non-service members: the trial of enemy individuals for violations of the laws of war. *Id.* at 596. It was upon this basis that the military sought to subject Salim Ahmed Hamdan to its jurisdiction. *Id.* at 597. Importantly, this basis is beyond the scope of this Note.

246. *See, e.g.*, *Ex parte Milligan*, 71 U.S. at 121.

247. *See, e.g.*, Madsen v. Kinsella, 343 U.S. 341, 361–62 (1952).

248. *Id.*

249. *Id.*

250. Reid v. Covert, 354 U.S. 1, 35 n.63 (1957) (plurality opinion).

251. *Id.*

252. *See generally* Deanese Williams-Harris & Russell Working, *War Cuts Young Soldiers' Lives Short*, CHI. TRIB., Sept. 19, 2008, at 1 (describing the chaos and carnage in Iraq).

253. United States v. Averette, 19 C.M.A. 363, 365 (1970).

254. *Id.*

members;[255] a decision since overruled by *Solorio*.[256] It would take an equally wild departure from established precedent before the Court could determine that a formal declaration of war is necessary to constitutionally permit expanding military jurisdiction to civilians. Notably, the Court's most modern forays into the realm of military jurisdiction demonstrate the unlikelihood of such, as the Court has cited the precedential value not of *Averette*, but rather of those cases it ran counter to—namely *Milligan*, *Duncan*, *Madsen*, *Kinsella*, and *Reid*.[257] Thus, there seems to be no indication that the amendment to 10 U.S.C. § 802(a)(10) rendered the statute unconstitutional. Congress appears to have finally succeeded in enacting an effective method of closing the jurisdictional gap previously enjoyed by civilian contractors and thereby providing the United States with an effective rope with which to reign in cowboy contractors.

255. O'Callahan v. Parker, 395 U.S. 258, 272–73 (1969), *overruled by* Solorio v. United States, 483 U.S. 435 (1987).

256. 483 U.S. at 440–41.

257. *See supra* notes 222, 227 and accompanying text.