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**The Courts or Courts-Martial: What Is The Proper Venue For Trying “Accompanying”  
and “In the Field” Civilian Contractors?  
Matt Engel\***

I. Introduction

In December 2007, Ala Mohammed Ali, a dual citizen of Canada and Iraq, signed a contract with L3 Communications to provide language services to the United States Army Intelligence and Security Command in Iraq.<sup>1</sup> In early 2008, Ali was deployed to Hit, Iraq, to serve as a language interpreter with the 1st Squad, 3rd Platoon, 170th Military Police Company.<sup>2</sup> Ali’s job as an interpreter was to accompany the 1st Squad on missions and to be the communicative middleman between the Squad and the Iraqi police.<sup>3</sup> Ali wore the uniform of a soldier, but did not carry a weapon.<sup>4</sup> At one point Ali lived with the Squad itself although, when the Squad was moved, he resided with other interpreters.<sup>5</sup> Ali’s supervisor, in terms of his employment, was the L3 Site Manager, who operated in Al Asad, Iraq.<sup>6</sup> Nonetheless, the record shows that in practice, Ali reported to one Staff Sergeant Butler, the 1st Squad Leader.<sup>7</sup> Ali was unquestionably a civilian, as he was serving neither as an American nor as an Iraqi military member. But as can be seen from the above facts, he was highly integrated in both his dress and supervision, blurring the distinction between serving in a civilian and military capacity.

In February of 2008, not long after his initial deployment, Ali was involved in an altercation with another Iraqi interpreter, Al-Umarryi.<sup>8</sup> Though the confrontation started as

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<sup>1</sup> *United States v. Ali*, 71 M.J. 256, 259 (C.A.A.F. 2012) *reconsideration denied*, 12-0008/AR, 2012 WL 3966727 (C.A.A.F. Aug. 31, 2012).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Ali*, 71 M.J. at 259.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 259–260.

merely verbal, it escalated when Al-Umarryi struck Ali in the head.<sup>9</sup> Ali was instructed to wait in Butler’s room until the Squad Leader returned.<sup>10</sup> From Butler, he stole a knife, which he later used to attack Al-Umarryi, who ended up with four lacerations to his chest.<sup>11</sup> Consequently, Ali was placed on “restricted liberty,” required not to leave the military base, and to check in with L3 twice daily, a condition he violated when he travelled to Al, Asad, shortly thereafter.<sup>12</sup> Ali was placed in pre-trial confinement, charged with assaulting Al-Umarryi, violating his restricted liberty instruction, and was referred to a court-martial—established by the Uniform Code of Military Justice (herein “UCMJ”)—where he was convicted.<sup>13</sup>

Not long after the incidents involving Ali in Iraq took place, a similar series of events occurred at the Kandahar Airfield (herein “KAF”), in Kandahar, Afghanistan. KAF was the place of employment for Sean Brehm, a South African citizen.<sup>14</sup> In July 2010, Brehm signed an employment contract with DynCorp International LLC, an American-based security contractor that operated in Afghanistan.<sup>15</sup> Brehm’s primary responsibility was to make and coordinate travel arrangements for other contractors.<sup>16</sup> On November 25, 2010, a contractor, J.O., with whom Brehm had a previous dispute, was returning to KAF.<sup>17</sup> Brehm engaged him at the airport, and similar to what occurred between Ali and Al-Umarryi, a verbal argument turned physical and ended with Brehm stabbing J.O.<sup>18</sup> Brehm was arrested, charged pursuant to the

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<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Ali*, 71 M.J. at 260.

<sup>13</sup> *Id.*

<sup>14</sup> *United States v. Brehm*, 691 F.3d 547, 549 (4th Cir. 2012).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

Military Extraterritorial Jurisdiction Act (herein “MEJA”), and extradited to the United States for trial in the Eastern District of Virginia.<sup>19</sup>

Though certain factual distinctions between any two cases are unavoidable, and these two are no different, their similarities are also undeniable—from the alleged criminals’ employment as contractors, to the locus of the crimes and the types of crimes committed. Nonetheless, two very different legal mechanisms were used to adjudicate these two cases. Ali was prosecuted using a relatively new conception of the American court-martial system, which until 2006, traditionally had been used to try civilians only “in a time of declared war.”<sup>20</sup> Indeed, in 1970, the U.S. Court of Military Appeals held that a civilian contractor accused of criminal activity in Vietnam could not be court-martialed because the conflict was not a Congressionally declared War, such as World War II.<sup>21</sup> Prosecuting civilians by court-martial, then, became something of an exercise in futility because of the infrequency with which the United States Congress declares wars.<sup>22</sup>

In response to the increase in criminal abuses committed by civilian contractors serving with the military in Iraq and Afghanistan, Senator Lindsey Graham sought to amend the UCMJ to allow for the court-martial to be used more easily against offending civilians.<sup>23</sup> In 2006, he succeeded and the language of UCMJ 2(a)(10) providing for court-martial jurisdiction over civilians was substantially broadened (this legislation will herein be referred to as the “Graham

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<sup>19</sup> *Id.* at 549-550.

<sup>20</sup> Brittany Warren, *If You Have A Zero-Tolerance Policy, Why Aren't You Doing Anything?: Using the Uniform Code of Military Justice to Combat Human Trafficking Abroad*, 80 GEO. WASH. L. REV. 1255, 1272 (2012).

<sup>21</sup> *United States v. Averette*, 41 C.M.R. 363 (1970).

<sup>22</sup> See Barbara Salazar Torreon, CONG. RESEARCH SERV., RS21405, U.S. PERIODS OF WAR AND DATES OF CURRENT CONFLICT (2011).

<sup>23</sup> See Warren, *supra* note 20, at 1272.

Amendment”).<sup>24</sup> The effect of the Graham Amendment was to eliminate the constraint that a Congressionally declared war was the only conflict an accompanying civilian could be court-martialed during; instead, he or she could be court-martialed during any conflict the Secretary of Defense deemed appropriate and so named a “contingency operation.”<sup>25</sup> Accordingly, Ali could be court-martialed as a civilian only because of this amendment, since Operation Iraqi Freedom, the conflict during which Ali served, was not a declared war, but rather a contingency operation.<sup>26</sup>

Brehm on the other hand was not referred to a court-martial to be tried in a military court, presided over by a military judge, but to an Article III District Court, in Virginia, pursuant to MEJA. Though he pled guilty as a condition to appeal the district court’s denial of his motion to dismiss, Brehm was afforded the right of a jury trial, a right Ali did not have under the court-martial.<sup>27</sup> Brehm was afforded the venue of a civilian court and the procedural benefits that come with it because of MEJA. Like the Graham Amendment, MEJA was passed to provide American jurisdiction over civilians working for the United States military abroad.<sup>28</sup> Unlike the Graham Amendment, it sought to close the “jurisdictional gap”<sup>29</sup> while retaining the core due process protections to the accused offered by the American criminal justice system.

The *Ali* and *Brehm* cases show that similar cases can be adjudicated to substantially similar results, but may arrive at those results in very different ways. This Comment will explore

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<sup>24</sup> Paragraph (10) of section 802(a) of title 10, United States Code (article 2(a) of the Uniform Code of Military Justice), is amended by striking “war” and inserting “declared war or a contingency operation.” H.R. REP. NO. 109-702, at 137 (2006).

<sup>25</sup> A “contingency operation” is defined as “a military operation that is (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.” 10 U.S.C. § 101 (2006).

<sup>26</sup> Operation Enduring Freedom in Afghanistan in Afghanistan, and Operations Iraqi Freedom and Operation New Dawn in Iraq are all clearly contingency operations according to this statutory definition.

<sup>27</sup> *Brehm*, 691 F.3d at 550.

<sup>28</sup> H.R. REP. 106-778 at 4 (2000). (The “jurisdictional gap” refers to the problem that occurs when no law or a law’s failure “allows . . . crimes to go unpunished.”)

<sup>29</sup> *Id.*

both routes in an attempt to determine which is best suited to prosecute offenses, while simultaneously best honoring the United States Constitution, the Constitution's values, and the Supreme and appellate court precedent that has interpreted them. It will argue, and ultimately conclude, that MEJA, though flawed and in need of reform and revision to achieve its prosecutorial potential, is the substantially more constitutionally-sound approach to prosecuting civilians accompanying or employed by the United States Military abroad. While MEJA currently leaves much to be desired in terms of its efficiency and effectiveness, it could be easily amended to encourage Federal prosecutors to use it more frequently. Moreover, the Civilian Extraterritorial Jurisdiction Act (herein "CEJA") should be passed to complement MEJA, which would expand the scope of civilians working with the military who come under Article III court jurisdiction.

The Comment will also argue that the Graham Amendment, in its current form, is unconstitutional. Not only does it break with a long line of Supreme Court precedent that restricts the use of court-martials to try civilians, but it also implicates Congress in passing a law that it may not have had authority to pass in the first place given its restricted rulemaking power. The Comment will acknowledge these deficiencies and offer some practical solutions, including a "totality of the circumstances" test that the courts should adopt to ensure the Graham Amendment is not used in a fashion that contravenes the values of the Constitution, and applied only in the few circumstances where MEJA and CEJA are inapplicable.

The Comment will be structured as follows: Part II provides a historical overview of military justice in the United States, particularly jurisdiction over civilians, in both peacetime and wartime, and both before and after the codification of the UCMJ. Part III explains how the increasing use of civilian contractors and the ensuing "jurisdictional gap" led Congress to create

MEJA and the Graham Amendment, two competing, concurrent schemes to bring these civilians under American jurisdiction, and delve into the substance of these schemes. Part IV of the Comment analyzes how the *Ali* and *Brehm* cases are illustrative of both the problems and benefits associated with each of the two legislative schemes. Part V of the Comment argues for enhancing the Justice Department's ability to use MEJA/CEJA with more frequency and to greater prosecutorial effect, while also suggesting a judicially-formed standard to limit the use of the Graham Amendment exclusively to situations when it is absolutely necessary. Part VI summarizes the issues and concludes.

## II. Civilian Court and Military Jurisdiction Over Civilians Employed By or Accompanying The Military In Times of Peace and War

### A. *The Early Years: The U.C.M.J. and the Early "Peace-Time" Cases*

The American military's jurisdiction over civilians can be traced to 1775 when the Provisional Congress of Massachusetts Bay codified the Massachusetts Articles of War, which allowed for "all persons whatsoever serving with the Massachusetts Army," soldiers or otherwise to be subject to the Articles.<sup>30</sup> After the First Continental Congress, the American Articles of War made the same provision uniform for the fledgling American nation.<sup>31</sup> Shortly thereafter, Congress was authorized to create laws regulating the military pursuant to the power granted by Article I of the Constitution.<sup>32</sup> For 150 years, the manifestation of these regulations was the *Articles of War for the Army and Articles for the Government of the Navy for the Navy and Marine Corps*.<sup>33</sup>

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<sup>30</sup> See Anna Manasco Dionne, "In Time of Whenever the Secretary Says": *The Constitutional Case Against Court-Martial Jurisdiction over Accompanying Civilians During Contingency Operations*, 27 YALE L. & POL'Y REV. 205, 216 (2008), citing William B. Aycock & Seymour W. Wurfel, MILITARY LAW UNDER THE UNIFORM CODE OF MILITARY JUSTICE 9 (1955), and William Winthrop, MILITARY LAW AND PRECEDENTS 97-100 (2d ed. 1920).

<sup>31</sup> See AMERICAN ARTICLES OF WAR OF 1775, art. XXXII, reprinted in WINTHROP, MILITARY LAW AND PRECEDENTS, 953-956.

<sup>32</sup> U.S. CONST. Art. I.

<sup>33</sup> *Id.*

During this time, the Supreme Court frowned upon the use of the court-martial to prosecute civilians. In *Ex parte Milligan*, the Court held that the trying nature of the times (i.e., the Civil War) could not provide a legal rationale for the denial of a civilian's constitutionally protected right to a trial by jury, stating, "[n]o doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government."<sup>34</sup> The Court went on to find that the government could not deny Milligan his trial by jury when a civilian court in his home state of Indiana was functioning and capable of adjudicating the same case.<sup>35</sup>

Later on, and just before the advent of the UCMJ, the Court similarly held that military tribunals could not supplant the civilian courts when the latter were open for business. In *Duncan v. Kahanamoku*, the Court found that Congress could not properly authorize the military to try civilians in military tribunals in Hawaii because of the attack on Pearl Harbor.<sup>36</sup> In finding the military tribunals unconstitutional, quoting *Milligan*, the Court held "civil liberty and this kind of martial law cannot endure together; the antagonism is irreconcilable; and, in the conflict, one or the other must perish."<sup>37</sup>

Following World War II, due to the substantial growth of both the American Armed Forces and the corresponding increase in cases in which military justice was necessary to adjudicate crimes and claims, Congress passed and President Truman signed the UCMJ into law in 1950 to aggregate and systematize the legal scheme going forward.<sup>38</sup> Article 2(a)(10) of the

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<sup>34</sup> *Ex parte Milligan*, 71 U.S. 2, 121(1866).

<sup>35</sup> *Id.* at 122–123.

<sup>36</sup> *Duncan v. Kahanamoku*, 327 U.S. 304 (1946).

<sup>37</sup> *Id.* at 324.

<sup>38</sup> *See Dionne, supra* note 30, at 217.



UCMJ provided the military with jurisdiction over civilians in a time of “declared war” so long as they were “serving with or accompanying an armed force in the field.”<sup>39</sup>

Despite the language explicitly permitting court-martial jurisdiction over civilians in a specific circumstance, the Court continued to be circumspect about such use. In *Toth v. Quarles*, the seminal case on this issue, the Court disallowed the court-martial to try a service member who had been discharged and then accused of murder because at the time of the accusation, he was a civilian and no longer an active military member.<sup>40</sup> In his opinion, Justice Black saw a great danger in using courts-martial to try civilians, stating:

“[t]here are dangers lurking in military trials which were sought to be avoided by the Bill of Rights and Article III of our Constitution. Free countries of the world have tried to restrict military tribunals to the narrowest jurisdiction deemed absolutely essential to maintaining discipline among troops in active service.”<sup>41</sup>

The Court then laid down what has become known as the *Toth* Doctrine, ruling that courts-martial should be “limit[ed] to ‘the least possible power adequate to the end proposed.’”<sup>42</sup> Thus, in writing the *Toth* opinion, the Court maintained the principles of *Milligan* and *Duncan* that sought to check the power of military justice to adjudicate claims over civilians.

In its next term, the Court again prohibited the use of the court-martial to prosecute a civilian. In *Reid v. Covert*, Clarice Covert was accused of murdering her husband, an active Air Force member, while they both resided at an American Air Force base in England.<sup>43</sup> Though she was convicted by court-martial, the Supreme Court overturned the conviction for reasons similar to those in its recent opinion in *Toth*.<sup>44</sup> The Court found incredulous the idea that the Framers would have permitted military jurisdiction over a civilian such as Covert, writing:

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<sup>39</sup> 10 U.S.C. § 802 (2006).

<sup>40</sup> U.S. ex. rel. *Toth v. Quarles*, 350 U.S. 11 (1955).

<sup>41</sup> *Id.* at 22.

<sup>42</sup> *Id.*

<sup>43</sup> *Reid v. Covert*, 354 U.S. 1 (1957).

<sup>44</sup> *Id.*

“[t]he idea that the relatives of soldiers could be denied a jury trial in a court of law and instead be tried by court-martial under the guise of regulating the armed forces would have seemed incredible to those men, in whose lifetime the right of the military to try soldiers for any offenses in time of peace had only been grudgingly conceded.”<sup>45</sup>

It is useful to understand why the Court was so forceful in restricting courts-martials of civilians to the most exceptional circumstances, and Justice Black’s language again proves instructive:

“Courts-martial are typically ad hoc bodies appointed by a military officer from among his subordinates. They have always been subject to varying degrees of ‘command influence.’ In essence, these tribunals are simply executive tribunals whose personnel are in the executive chain of command. Frequently, the members of the court-martial must look to the appointing officer for promotions, advantageous assignments and efficiency ratings—in short, for their future progress in the service. Conceding to military personnel that high degree of honesty and sense of justice which nearly all of them undoubtedly have, the members of a court-martial, in the nature of things, do not and cannot have the independence of jurors drawn from the general public or of civilian judges.”<sup>46</sup>

Justice Black did, if albeit grudgingly, make a concession that in “extraordinary” war-time circumstances, courts-martial of civilians may be allowed, so long as the accused was “serving in the field” as U.C.M.J. 2(a)(10) specifies.<sup>47</sup> Nonetheless, Black found that the prosecution of Clarice Covert in 1950’s Great Britain did not meet this contextual requirement, writing, “the exigencies which have required military rule on the battlefield are not present in areas where no conflict exists.”<sup>48</sup> So while Justice Black did strongly reaffirm the *Toth* Doctrine, he left the door open to Congress and the courts to utilize 2(a)(10) for the strict use its plain language permitted. Shortly thereafter, the Court, for the first time, was confronted with a case involving the court-martial of civilian contractors working with the military. In *McElroy v. U.S. Ex rel. Guagliardo*, and no differently than in *Toth* and *Covert*, the Court found that in peacetime

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<sup>45</sup> *Id.* at 23.

<sup>46</sup> *Id.* at 36

<sup>47</sup> *Id.* at 34

<sup>48</sup> *Id.* at 34–35.

the military could not use the court-martial to try a civilian, which contractors are despite their employment by the Armed Forces.<sup>49</sup>

*B. The “War-Time” Cases and Clarification of the 2(a)(10) Language*

In short, there is no lack of Supreme Court precedent on how to interpret 2(a)(10) in times of peace. The Court has made clear that using a court-martial to try a civilian is not constitutionally permissible in peacetime. But what about “wartime?” As noted earlier in this article, the lack of declared wars had left 2(a)(10) essentially inoperable since the very War (and last Congressionally declared one) that inspired its passage. Nonetheless, two cases have helped elucidate the meaning of the language as it pertains to wartime.

*U.S. v. Averette* has proven the most instructive on defining the previously required “in a time of war” language of 2(a)(10).<sup>50</sup> In finding that Averette, a civilian, could not be tried by court-martial for conspiracy to commit larceny and attempted larceny, the Court of Military Appeals (herein “C.M.A.”) restricted its holding to deciding the exact meaning of the language at issue.<sup>51</sup> In determining that “in a time of war” referred only to declared wars, the C.M.A. went no further and did not profess an opinion on whether the court-martial of civilians in a time of war was constitutionally permissible.<sup>52</sup> However, it did cite *Reid v. Covert* for the proposition that Congress’s war powers are considerably broader than its powers to regulate the armed forces, implying that in a time of war, the court-martial of civilians might be allowed.<sup>53</sup>

The courts have otherwise been relatively silent in exploring the meaning of the statutory language of 2(a)(10) as it applies to “wartime.” One case, *United States v. Burney*, relied on by

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<sup>49</sup> *McElroy v. U.S. ex rel. Guagliardo*, 361 U.S. 281 (1960).

<sup>50</sup> *United States v. Averette*, 41 C.M.R. 363 (1970).

<sup>51</sup> *Id.* at 366.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 364 (“The Supreme Court pointed out in *Reid v Covert*, *supra*, that the constitutional grants of legislative authority to the Congress, collectively referred to as the war powers, are considerably more extensive than the authority in Article I, section 8, clause 14, of the Constitution to prescribe rules for the government of the armed forces standing alone.”).

the majority opinion in *Ali*, stated that “in the field” refers to the “activity” a civilian is engaged in, not merely the location of where it occurs, and that the activity referred to in this sense is one that “impl[ies] military operations with a view to the enemy.”<sup>54</sup> *Burney* also states that “serving with” or “accompanying” the Armed Forces depends on whether a civilian’s movement is not “incidental, but directly connected with, or dependent upon, the activities of the armed force or its personnel,” implying that when the movement is superfluous to the activities of the army, the movement, would not meet the requirement of 2(a)(10).<sup>55</sup> Interestingly, and at odds with *Averette*, *Burney* states that “in the time of war,” does not necessitate a formal declaration of war by Congress.<sup>56</sup> Instead, it states that the language refers to the “actualities of the situation.”<sup>57</sup>

Given vagaries in the case law such and splits like those between *Averette* and *Burney*, what emerged was a developed, but now dated “peace-time” jurisprudence that has little immediately applicable value to the United States’ current military involvement, and the ever-increasing reliance on civilian contractors for a variety of purposes abroad. More recently, it became necessary to reevaluate the statutory scope of 2(a)(10). This reevaluation created two judicial schemes for dealing with the issue of civilians serving with the military abroad: the MEJA and the Graham Amendment.

### III. MEJA and the Graham Amendment: Two Competing, Concurrent Attempts to Assert Article III Court and Military Court-Martial Jurisdiction Over Civilians Abroad

Of the two schemes, MEJA was enacted first, in 2000. Its purpose, as stated, was to “establish Federal criminal jurisdiction over offenses committed outside the United States by persons employed by or accompanying the United States Armed Forces.”<sup>58</sup> The need for the

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<sup>54</sup> *United States v. Burney*, 21 C.M.R. 98, 109 (1956).

<sup>55</sup> *Id.* at 110.

<sup>56</sup> *Id.* at 109.

<sup>57</sup> *Id.*

<sup>58</sup> H.R. REP. 106-778 at 4.

legislation arose from the aforementioned “jurisdictional gap”: because the conflicts the United States is currently involved in are not congressionally declared wars, the UCMJ 2(a)(10) could not be used.<sup>59</sup> Furthermore, even though host nations presumably have jurisdiction to try these civilians, Congress stated that they often failed to do so when the civilian was an American, or American property was implicated in the crime.<sup>60</sup> The House Judiciary Committee determined that such a jurisdictional gap “undermined deterrence and increased injustice.”<sup>61</sup> Thus, MEJA was established to provide jurisdiction over the more than 58,000 civilian employees working for the Department of Defense (herein “DoD”).<sup>62</sup> Not only does MEJA provide jurisdiction over these civilians, but it also provides the processes for implementation, including those regarding initial proceedings and eventual removal of a suspect.<sup>63</sup> The Judiciary Committee found the Act to be constitutional pursuant to Article 1, Section 8, Clauses 10, 14, 16, and 18 of the Constitution.<sup>64</sup> MEJA went into effect in November 2000, but a review of cases citing to the statute reveals that it has been used infrequently.<sup>65</sup>

MEJA’s under-utilization follows for several reasons. Though it was changed in 2004, MEJA initially covered only civilians and contractors working with the DoD.<sup>66</sup> Many more work for other executive offices such as the State Department, the Central Intelligence Agency (“CIA”), and the Department of the Interior; none of these agencies fall under MEJA’s purview.<sup>67</sup> Additionally, MEJA does not support jurisdiction over civilian host country

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<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> 18 U.S.C. § 3264, 3265 (2006).

<sup>64</sup> *Id.*

<sup>65</sup> 18 U.S.C. § 3261 (2006).

<sup>66</sup> See Dionne, *supra* note 30, at 221–22.

<sup>67</sup> *Id.*

nationals.<sup>68</sup> People like Ali cannot be prosecuted under MEJA because host country nationals (i.e., citizens of the country where the civilian is working, like Ali in Iraq) are excluded from MEJA jurisdiction under 18 U.S.C. 3267(1)(C).<sup>69</sup> Lastly, MEJA has been underutilized because the Justice Department will not take any cases unless they receive referrals from the DoD.<sup>70</sup> This is further complicated by the fact that the DoD has not shown great interest in referring cases involving civilians and civilian contractors to the Justice Department.<sup>71</sup> Essentially, because of problems not only with its statutory language, but also with its implementation, MEJA has failed to plug the jurisdictional gap that was the reason for its creation.

It is in this context of MEJA under-utilization, the increasing use of civilians abroad for military operations, and of the number of incidents involving these civilian contractors in Iraq and Afghanistan,<sup>72</sup> that the Graham Amendment was passed. As noted earlier in this article, the Graham Amendment changes the language of UCMJ Article 2(a)(10) minimally. Nevertheless, that minimal change has spawned a potentially great effect; no longer is the court-martial for civilians restricted to use during formally declared wars. Court-martials can now be used to adjudicate crimes of civilians during all contingency operations. This means the military can assert court-martial jurisdiction over civilians as long as the Secretary Defense says it can.<sup>73</sup> This expansive use of the court-martial in a time that is *not* a congressionally declared war is an explicitly stark departure from the string of cases that follow the *Toth* Doctrine. Implicitly, the Graham Amendment questions the civilian courts' ability to lead the way in civilian and civilian contractor jurisdiction.

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<sup>68</sup> 18 U.S.C. 3267(1)(C) (2006).

<sup>69</sup> *Id.*

<sup>70</sup> See Dionne, *supra* note 30, at 222.

<sup>71</sup> *Id.* at F.N. 93.

<sup>72</sup> See Moshe Schwartz, CONG. RESEARCH SERV., R40835, THE DEPARTMENT OF DEFENSE'S USE OF PRIVATE SECURITY CONTRACTORS IN IRAQ AND AFGHANISTAN: BACKGROUND, ANALYSIS, AND OPTIONS FOR CONGRESS (2009) for a summary of major incidents and other background information.

<sup>73</sup> See Dionne, *supra* note 30, at 237.

This Comment will argue that such questioning is misplaced. It will acknowledge the failures of MEJA, but also its recent success. The Comment will offer a way to revise it, both by amending the current legislation and by endorsing CEJA a scheme that can benefit MEJA by supplementing the existing statute. Finally, it will analyze the constitutionality of the Graham Amendment and conclude that in its current form, as applied, it is violative of the *Toth* Doctrine, a doctrine that is still good law and must be adhered to pursuant to respect for Supreme Court precedent and *stare decisis*. It will lastly propose a judicial doctrine that can interpret the Graham Amendment in a way that validates it under *Toth* and allows it to complement, rather than compete with MEJA, keeping the jurisdiction over civilians abroad, whenever possible, in the civilian courts, where it belongs.

#### IV. The Practical and Constitutional Implications of *Brehm* and *Ali* With Regards to MEJA and the Graham Amendment

The *Brehm* and *Ali* cases are illustrative of the practical potential for these respective statutory schemes: they show that it is possible to successfully adjudicate crimes committed by civilians serving with the armed forces abroad. Nonetheless, both cases also show how difficult these prosecutions can be in more murky factual situations. These cases were prosecuted successfully, the record shows, likely because their relevant facts were so straightforward. In less cut and dried circumstances, it is unclear if both schemes would work as effectively, and indeed, scholarly literature on the subject shows ways in which both schemes might fail practically to adjudicate more complicated cases.

Besides their practical and prosecutorial implications, the cases also reveal how each scheme might or might not fit within the *Toth* Doctrine. In short, as *Brehm* shows, MEJA provides a statutory scheme that will flourish in some cases (such as the instant one) but may struggle mightily to succeed in others. However, because of MEJA's locus of adjudication in the

civilian court system, it is consistent with *Toth*, and seems to be constitutional both facially and in cases like *Brehm* as applied. Conversely, as *Ali* shows, the Graham Amendment immediately affronts *Toth* and is constitutionally questionable in a way MEJA is not.

#### A. *The Case of Sean Brehm*

The facts surrounding *Brehm* made it ripe for adjudication under MEJA. First, Brehm's contract was with DynCorp,<sup>74</sup> who in turn had contracted with the DoD.<sup>75</sup> As a civilian employee of the DoD, Brehm fell firmly within MEJA's definition of *who* falls under its jurisdiction.<sup>76</sup> As we will see below in *Ali*, it is not always that civilians do. Additionally, Brehm's alleged crime occurred at the KAF Airport in full view of an Army Criminal Investigation Division ("CID") agent.<sup>77</sup> The agent and two other contractors were able to intervene and stop the assault from continuing, before remanding Brehm into custody.<sup>78</sup> Given the CID agent's fortuitous intervention,<sup>79</sup> it is possible he was able to expediently and accurately create a record of the incident that could be used in any investigation and the court case to follow. This is important, because one of the criticisms of MEJA has been that it is too difficult for the Justice Department—the agency tasked with prosecuting MEJA cases—to frequently prosecute MEJA cases due to the lack of referrals from the DoD.<sup>80</sup>

These lack of referrals can be attributed to the DoD's lack of interest, or lack of time, and contribute directly to the dearth of prosecutions under the law.<sup>81</sup> Due to the CID's intervention,

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<sup>74</sup> *United States v. Brehm*, 1:11-CR-11, 2011 WL 1226088 (E.D. Va. Mar. 30, 2011) *aff'd*, 691 F.3d 547 (4th Cir. 2012).

<sup>75</sup> *Id.*

<sup>76</sup> 18 U.S.C. 3267 (2006).

<sup>77</sup> *Brehm*, 2011 WL 1226088 at \*3.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* (He was only at the KAF Airport to pick up a witness to another case, independent of anything involving Sean Brehm).

<sup>80</sup> See Dionne, *supra* note 30, at 222.

<sup>81</sup> *Id.* (citing Glenn Schmitt, HOLD CONTRACTORS ACCOUNTABLE, NavyTimes.com, [http://www.navytimes.com/community/opinion/army\\_backtalk\\_contractors\\_071126/](http://www.navytimes.com/community/opinion/army_backtalk_contractors_071126/) (Mar. 9, 2008) (explaining that



it is likely that the DoD had no option but to investigate and refer the case to the Justice Department for prosecution. Once that was done, the procedures of MEJA seemed to have gone smoothly with a Magistrate Judge issuing an arrest warrant, then holding a telephonic conference, ordering extradition, and referring the case a to grand jury for indictment within a one month period.<sup>82</sup> In short, given Brehm's status as an employee of DynCorp (and thus, the DoD), as well as the particular and somewhat serendipitous circumstances of the CID's presence during the crime, the case was workable within the context of MEJA's practical underpinnings.

Just as, if not more importantly, the case provides a convincing argument that MEJA is constitutionally permissible. And though, as noted above, the *Toth* Doctrine is not implicated by MEJA, such a novel statute requires at least some degree of constitutional review. Though not exhaustive, both the Eastern District of Virginia and the Fourth Circuit have done a convincing job of refuting arguments that the scheme is unconstitutional as applied in certain factual contexts. The two constitutional challenges *Brehm* presented the court were that MEJA's provision violated his due process rights under the Fifth Amendment, and that it exceeded Congress's enumerated powers.<sup>83</sup>

With regards to Brehm's due process challenge, generally the United States can enforce its laws beyond its territory.<sup>84</sup> The dispositive test to determine whether jurisdiction is proper under a specific law, and thus not offensive to Brehm's due process rights, is whether there is a "sufficient nexus" between him, his activities, and the United States.<sup>85</sup> Factors that determine

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"[t]he Defense Department's position is that it is too busy fighting the war to investigate the acts of contractors, even those who work directly for the military. And the Justice Department takes the position that it will prosecute only cases that the Defense Department refers to it.")

<sup>82</sup> *Brehm*, 2011 WL 1226088 at \*4.

<sup>83</sup> *Id.*

<sup>84</sup> *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991).

<sup>85</sup> *See Brehm*, 2011 WL 1226088 at \*4 (citing *Mohammad-Omar*, 323 F. App'x. at 261) (*citing United States v. Yousef*, 327 F.3d 56, 111 (2d Cir. 2003)).

whether an actor outside of the territorial United States does have a sufficient nexus with the country are:

“(1) the defendant's actual contacts with the United States, including his citizenship or residency; (2) the location of the acts allegedly giving rise to the alleged offense; (3) the intended effect a defendant's conduct has on or within the United States; and (4) the impact on significant United States interests.”<sup>86</sup>

If an actor's relationship with the United States is so contrived or tenuous as to make a legal proceeding “arbitrary or unfair,” jurisdiction would not be proper.<sup>87</sup>

Between his employment by DynCorp and his access to KAF by virtue of his and DynCorp's relationship with the DoD—both of which led to the assault of his victim—Brehm established a “relationship” with the United States.<sup>88</sup> Furthermore, the court found that by harming another contractor, on an American Air Force base, and requiring the resources of both the CID and the American court system to adjudicate the alleged crime, Brehm's activities clearly established a sufficient nexus between him and the United States.<sup>89</sup> The importance of this determination cannot be understated. Whether the United States could establish facts to create a sufficient nexus between the country and the accused is a concern that's been raised by both the Department of Justice during the law's passage<sup>90</sup> as well as attorneys working for the military directly.<sup>91</sup> Here, the court articulately and cogently describes how Brehm, even though not a citizen of the United States, has more than sufficient contacts given his employment with DynCorp, and by proxy the DoD, and how his actions directly affect the interests and resources of the United States.

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<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Brehm*, 2011 WL 1226088 at \*5.

<sup>89</sup> *Id.*

<sup>90</sup> H.R. REP. 106-778, pt. 1, n. 26 (prepared remarks of DOJ attorney Roger Pauley).

<sup>91</sup> Andrew D. Fallon & Capt. Theresa A. Keene, *Closing the Legal Loophole? Practical Implications of the Military Extraterritorial Jurisdiction Act of 2000*, 51 A.F. L. REV. 271, 271 (2001).

Additionally, the Eastern District of Virginia persuasively argued that Congress’s enactment of MEJA does not violate its enumerated powers as granted by the Constitution. Citing the seminal case, *United States v. Curtis Wright* and numerous cases that have followed it, the court ruled that Congress, pursuant to its powers granted by Article 1, Section 1 of the Constitution had the power to enact MEJA.<sup>92</sup> As the court points out, powers reserved to the states by the Constitution, do not include the right to enforce the Federal penal code extraterritorially.<sup>93</sup> Because this was a power never granted to the states, it falls firmly within those “necessary and proper” for the Federal government to exercise.<sup>94</sup> Though the Fourth Circuit agreed ultimately with the District Court’s ruling, specifically with regards to the “sufficient nexus” of Brehm’s actions and the United States, the court did not MEJA’s constitutionality in Section 1 of Article 1 of the Constitution.<sup>95</sup> Instead, it found MEJA as valid under Article 1, Section 8 Clauses 12 and 18.<sup>96</sup> These clauses provide Congress not only the directive to “raise and support Armies,” but also the mandate to make any laws necessary and proper to their maintenance.<sup>97</sup> Thus, the Fourth Circuit found MEJA fell within Congress’s right and was constitutional as applied to Brehm, who did not challenge the law facially on appeal.<sup>98</sup>

Both the District Court and the Circuit Court decisions make clear that MEJA can serve an effective purpose to prosecuting crime-committing civilian contractors serving with the military abroad, given the right circumstances. Here, because of the simplicity of Brehm’s crime, he was expeditiously stopped, investigated, and brought to the United States to face trial. More importantly, both the District Court and the Fourth Circuit dealt convincingly with the

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<sup>92</sup> *Brehm*, 2011 WL 1226088 at \*6 (citing *United States v. Curtiss–Wright Export Corp.*, 299 U.S. 304, 315–16 (1936); *United States v. Plummer*, 221 F.3d 1298, 1304 (11th Cir .2000)).

<sup>93</sup> *Id.* at \*6.

<sup>94</sup> *Id.*

<sup>95</sup> *Brehm*, 691 F.3d at 551 (4th Cir. 2012).

<sup>96</sup> *Id.*

<sup>97</sup> U.S. CONST. art. I, § 8, cl. 12; cl. 18.

<sup>98</sup> *Brehm*, 691 F.3d at 551.

constitutional problems and found MEJA well within Congress's legal abilities. In short, *Brehm* provides a practical and procedural template for how to use MEJA legally and to its intended effect. Nonetheless, as analysis of *Ali* below will show that problems with the law exist and make the utilization of courts-martial appealing in ways that MEJA is not.

### *B. The Case of Ala Mohammed Ali*

Unlike Sean Brehm, Ala Ali had no chance at all to be adjudicated under MEJA. Because Ali was an Iraqi national, MEJA has no jurisdiction over him.<sup>99</sup> Without the Graham Amendment to UCMJ Article 2(a)(10), there would be no way for the United States to adjudicate the crime Ali was accused of.<sup>100</sup> So from a practical perspective, the Graham Amendment was necessary to trying Ali. Unfortunately, because of the relatively ad hoc nature of the court-martial process, the appellate cases, and not the actual court-martial, has been reported.<sup>101</sup> All that can be told from the record is that the crime was committed in February 2008, and that in June of 2008, sometime after Ali's motion to dismiss for lack of jurisdiction was dismissed, Ali was charged with additional crimes.<sup>102</sup> Sometime between June of 2008 and July 18, 2011, when Ali's appeal to the motion to dismiss was heard, he was court-martialed and ordered to serve five months confinement.<sup>103</sup> Though the majority opinion of the C.A.A.F. references the opinion of this proceeding and the opinion of the military judge, no citation is provided.<sup>104</sup>

In short, while there is ample record of the appellate process on Ali's motion to dismiss, and the reasons for its denial, there is no record available to the public of the actual court-martial.

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<sup>99</sup> *United States v. Ali*, 71 M.J. at 270; 18 U.S.C. 3267 (1996).

<sup>100</sup> See Steve Vladeck, ANALYSIS OF U.S. v. ALI: A FLAWED MAJORITY, CONFLICTING CONCURRENCES, AND THE FUTURE OF MILITARY JURISDICTION, <http://www.lawfareblog.com/2012/07/analysis-of-caaf-decision-in-ali/> (July 19, 2012) (explaining that Ali's case could not have been adjudicated under MEJA due to the textual exception of §3267's prohibition on trying host country nationals, like Ali, under the law).

<sup>101</sup> See *United States v. Ali*, 70 M.J. 514 (A. Ct. Crim. App. 2011) which is the first recorded case in the record of Ali's prosecution.

<sup>102</sup> *Id.* at 517.

<sup>103</sup> *Id.* at 514.

<sup>104</sup> *Ali*, 71 M.J. at 260.

This is problematic for a number of reasons. From a practical perspective, with no record of the court-martial, it is impossible to see if the process was expeditious or slow, efficient to adjudicate the crime, or bogged down by procedural difficulties. In theory, the court-martial, a more ad-hoc body and process, should be able to move expeditiously, but without any record, it is impossible to tell. Furthermore, though the due process protections of a court-martial are limited, there is no way to know if they were adhered to or not. They may well have been, but without a record, it is again, impossible to tell. Finally, given the novelty of the proceeding (the first court martial of a civilian under the Graham Amendment and likely the first at all since *Averette*), the lack of a record creates a knowledge deficit for both outsiders studying the case, and those military judges and attorneys that could learn from it. Nonetheless, from a prosecutorial perspective, it succeeded, as Ali was found guilty and confined for his crime.

Additionally, there are concerns that the Appellate Court misapplied the facts in *Ali* concerning some of the longstanding language in 2(a)(10). Most questionable is the Appellate Court and the C.A.A.F.'s determination that Ali was "in the field" during the incident with Al-Umarryi.<sup>105</sup> The Judge (Erdman) writing the opinion for the C.A.A.F. correctly cited to *Burney* for the proposition that "in the field" means an area of actual fighting.<sup>106</sup> However, he wholly failed to substantiate that this was the area where the incident occurred. He cited to the (unreported) military judge's determination to that effect because the missions Ali was involved in required "mission preparations, safety brief, accountability, convoy to the mission site in up-armored HMMWVs, training of Iraqi Police . . . [and] conduct[ing] patrols with the Iraqi police."<sup>107</sup> What the military and then Judge Erdman describes seems to be fairly standard precautionary procedures for operating in Iraq. Though he states, again without citation, that

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<sup>105</sup> *Id.* at 264.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

Ali's unit was stationed at a combat outpost subject to regular attacks, Judge Erdman fails to describe that the place where the assault on Al-Umarryi took place was an area of actual fighting, at the time of the assault. It may very well have been, but the posture Judge Erdman takes is unapologetically expansive. Under his determination, a history of combat could imply court-martial jurisdiction over a civilian, even if the area was one of relative peace at the time.

But even more disconcerting than the informational deficit from a lack of record or Judge Erdman's expansionist view of 2(a)(10), is that this prosecutorial victory was at the expense of constitutional principles reflected in the *Toth* Doctrine and at the expense of Ali's due process rights. With almost remarkable casualness Judge Erdman breezed through the questions of whether the Graham Amendment, as applied to Ali, violates the Constitution.<sup>108</sup>

Judge Erdman stated that there is a history of Supreme Court jurisprudence that denies aliens, as Ali is, the same constitutional protections that American citizens enjoy.<sup>109</sup> Judge Erdman cited these cases for the proposition that, unless aliens enter the United States, spend a significant amount of time in the country, and develop substantial connections with the country, they cannot enjoy the due process rights that citizens enjoy.<sup>110</sup> While mindful of the *Toth* Doctrine, he stated that the cases in that line of jurisprudence are distinguishable from *Ali* because they all involved American citizens, and not aliens.<sup>111</sup> This argument is deficient for three reasons.

First, Judge Erdman too quickly determined that Ali does *not* have sufficient connections to the United States. Judge Erdman's statement that, "[n]either Ali's brief predeployment training at Fort Benning, Georgia, nor his employment with a United States corporation outside

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<sup>108</sup> *Id.* at 269–270.

<sup>109</sup> *United States v. Ali*, 71 M.J. at 267 (citing *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990); *Johnson v. Eisentrager*, 339 U.S. 763, 783 (1950)).

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 269.

the United States constitutes a ‘substantial connection’ with the United States as envisioned in *Verdugo-Urquidez*,” is itself problematic for multiple reasons.<sup>112</sup> Though the tests are somewhat different (“sufficient nexus” vs. “substantial connection”), Ali’s connections to the United States are at least as strong, if not stronger, than Brehm’s. For the same reasons Brehm was deemed to have a sufficient nexus to the United States (mainly his employment by an American contractor doing business with the DoD during an American military operation) to justify jurisdiction over him pursuant to MEJA, Ali has those connections as well. The statement is also problematic, because the constitutional rights at issue in *Ali* were the defendant’s Fifth Amendment Due Process rights. In *Verdugo-Urquidez*, the rights in issue were the defendant’s Fourth Amendment rights against unreasonable search and seizure, which that Court distinguished from the rights protected by the Fifth Amendment.<sup>113</sup> Finally, to the extent that *Verdugo-Urquidez* is instructive, that court also made clear that a main reason the defendant in that case had no substantial connection to the United States was that his sole entrance into this country was involuntary, made only after he was arrested in Mexico and brought to the United States.<sup>114</sup> Ali on the other hand, as previously stated, had voluntarily entered the United States for predeployment training.

The second constitutional problem with Judge Erdman’s opinion is its misunderstanding of the *Toth* Doctrine and, accordingly, its unwarranted dismissal of the Supreme Court’s opinion in *Boumediene v. Bush*. Judge Erdman stated, that although he is aware of *Toth* and the cases that follow it, they were inapplicable because they involved American citizens who “indisputably

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<sup>112</sup> *Id.*

<sup>113</sup> *United States v. Verdugo-Urquidez*, 494 U.S. 259, 264 (1990). “Before analyzing the scope of the Fourth Amendment, we think it significant to note that it operates in a different manner than the Fifth Amendment, which is not at issue in this case. The privilege against self-incrimination guaranteed by the Fifth Amendment is a fundamental trial right of criminal defendants.” *Id.* at 264.

<sup>114</sup> *Id.* at 272–273.

enjoyed the protections of the Fifth and Sixth Amendment.”<sup>115</sup> Though the citizens at issue in the *Toth* line of cases were American, not much was made of any distinction between their rights as Americans, and what those rights would have been if they were aliens.

Nonetheless, even if Judge Erdman is accurate that the *Toth* Doctrine and its due process guarantees for civilians categorically did not used to apply to aliens, he fails to adequately confront how the 2006 ruling in *Boumediene v. Bush* changes this calculus.<sup>116</sup> *Boumediene* examined whether the government had the power to suspend the rights of inmates at the prison in Guantanamo Bay to have expedient Habeas Corpus proceedings.<sup>117</sup> In finding that the right to habeas could not be suspended in this situation, Justice Kennedy, writing for the Court, stated that “questions of extraterritoriality [in the application of constitutional rights] turn on objective factors and practical concerns, not formalism.”<sup>118</sup> Practical concerns may have been an impediment to recognizing due process rights in *Ali*—though that is unlikely if the Supreme Court was willing to grant them to the “dangerous”<sup>119</sup> Guantanamo inmates—but Judge Erdman fails to take them into consideration at all, relegating his analysis of *Boumediene* to an unhelpful footnote that fails to grapple with the core holding stated above.<sup>120</sup> Judge Erdman fails to correctly understand *Toth*, especially in light of *Boumediene*.

Finally, Judge Erdman’s majority opinion paid almost no attention to whether Congress, through the Graham Amendment, had the authority to grant the military court-martial jurisdiction over civilians for contingency operations, and not just formally declared wars as it previously had done. Judge Erdman stated that, “[t]he Supreme Court has cited Congress’s ‘war

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<sup>115</sup> *Ali*, 71 M.J. at 269.

<sup>116</sup> See Vladeck, *supra* note 100 (explaining that *Boumediene* changes the analysis on how Constitutional rights apply to aliens abroad).

<sup>117</sup> *Boumediene v. Bush*, 553 U.S. 723 (2008).

<sup>118</sup> *Id.* at 764.

<sup>119</sup> *Id.* at 769.

<sup>120</sup> *Ali*, 71 M.J. at 269, n. 25.



powers’ as the constitutional source of authority and justification for federal court decisions which ‘upheld military trial of civilians performing services for the armed forces ‘in the field’ during time of war,’ citing to *Reid v. Covert*.<sup>121</sup> This argument is sweeping, and Judge Erdman acknowledged as much in a footnote.<sup>122</sup> He provided no meaningful explanation about why he is looking solely to a “War Powers” explanation for a case arising during a contingency operation and not a declared war. Contingency operations are categorically different from wars in both their designation and their character.<sup>123</sup> It cannot follow that Congress has the power to assert war powers over civilians during conflicts that are not by definition or the character, wars.

It is also questionable whether Congress had the rulemaking authority pursuant to Article III of the Constitution, to pass the Graham Amendment in the first place, an issue that Judge Erdman totally failed to consider. Congress’s rulemaking power allows it “to make rules for the government and regulation of the land and naval forces . . . .”<sup>124</sup> As Dionne notes, this rulemaking authority sets up a dichotomy: Congress has the power to regulate both civilians and the military, but to regulate them separately. There is no “hybrid” category that is part civilian, part military.<sup>125</sup> You are either one or the other. Depending on which category you belong to, the Fifth Amendment either guarantees you a jury trial or it does not. Civilians are guaranteed such jury trials and military members are not.<sup>126</sup> Ali, a civilian, is entitled to a jury trial pursuant to this credited understanding of the Rulemaking Authority and the Fifth Amendment. The

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<sup>121</sup> *Id.*

<sup>122</sup> *Id.*, no. 27.

<sup>123</sup> See Dionne, *supra* note 30, at 224–229 (explaining that contingency operations are designated so solely by the Secretary of Defense, and can range from combat operation like Operation Enduring Freedom, to humanitarian relief operations like those in the former Yugoslavia, and civilian evacuation missions in Libya).

<sup>124</sup> U.S. CONST. Art. I, § 8, cl. 14.

<sup>125</sup> See Dionne, *supra* note 30, at 224; *But see* *Murphy v. Garrett*, 729 F. Supp. 461, 472-473 (W.D. Pa. 1990), for the proposition that military jurisdiction is less intrusive if a civilian is a reservist in the military. Judge Diamond did however qualify that this holding is limited to the “peculiar facts of the instant suit.” *Id.* at 473.

<sup>126</sup> See U.S. CONST. Amend. V (“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....”).

Graham Amendment is an unconstitutional exception to these longstanding rules. Judge Erdman failed, as he does in explaining the Amendment's language, and its relation to *Toth* and *Boumediene*, to reconcile the Amendment's provisions that empower the government to deny this right with its lack of conformity to generally understood Congressional rulemaking authority.

To their credit, though they concurred with the result, two other C.A.A.F. judges wrestled with the Constitutional implications of the Graham Amendment in a significantly more strenuous fashion than Judge Erdman does. Chief Judge Baker, writing an opinion that concurred with the result, but for slightly different reasons, found that Congress did have authority to pass the Graham Amendment, but with more consideration of authority than Judge Erdman's belief that it did solely on the basis of their War Powers.<sup>127</sup> C.J. Baker, while circumspect about extending court-martial over civilians pursuant to the due process protections of the Fifth Amendment and the Supreme Court's caution as expressed through the *Toth* line, saw a combination of legal authorities providing the Constitutional basis for the Graham Amendment as it applied to Ali in the instant case.<sup>128</sup> Relying on a smattering of Congress's War Powers, *Boumediene*'s call for a functional approach to the extension of Constitutional rights, and a tradition of a very limited use of court-martial over civilians during combat operations, C.J. Baker wrote that there was proper authority for the use of the Graham Amendment, "in this case, in this context."<sup>129</sup> The authority comes from a combination of, "Rules and Regulations Clause, the War Powers, and the Necessary and Proper Clause."<sup>130</sup> Thus, C.J. Baker held that the authority necessary to court-

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<sup>127</sup>United States v. Ali, 71 M.J. 256 at 272 (C.J. Baker concurring).

<sup>128</sup> *Id.* at 274–276.

<sup>129</sup> *Id.* at 276.

<sup>130</sup> *Id.*

martial Ali through a far more robust amalgamation of authority and in far narrower circumstances than Judge Erdman's opinion did.

While C.J. Baker's concurrence is far more convincing than the majority's, it runs into similar constitutional problems. It fails to explicitly spell out that the circumstances involved warrant such an extreme departure (one the Supreme Court has been unwilling to give) from the typical understanding of Congress's Rulemaking power. Nowhere in the concurrence does it confront head-on the argument that the Graham Amendment was a congressional exercise of power that denies due process rights guaranteed civilians under the Fifth Amendment. C.J. Baker attempts to reconcile this by stating that Ali's due process rights under the court-martial were no different than those American servicemen and women would receive in their own potential court-martial.<sup>131</sup> But he fails to explicate why that matters, since Ali is clearly not an enlisted serviceman.

The other concurrence, by Senior Judge Effron, comes even closer to hitting the right mark than either of the previous two opinions. For Judge Effron, the U.C.M.J.'s court-martial of Ali is constitutional only to the extent that Ali was not under MEJA's jurisdiction because of his designation of a host-country national, as a citizen of Iraq, working in Iraq.<sup>132</sup> Because there was no other jurisdiction to try Ali, his court-martial complied with the *Toth* Doctrine in that the Graham Amendment was being used to the "least possible power" because there was *no* other venue to do so.<sup>133</sup> Thus, essentially because there was no other option, court-martial jurisdiction was proper over Ali.

While S.J. Effron's opinion comes closest to correctly interpreting Supreme Court law precedent in this area of jurisprudence, it does fail to take into account the full breadth of the

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<sup>131</sup> *Id.*

<sup>132</sup> *United States v. Ali*, 71 M.J. 256 at 280-283 (S.J. Effron concurring).

<sup>133</sup> *Id.* at 280.

*Toth* Doctrine. As one scholar has pointed out, it particularly fails to reconcile the holding in *Ex. Rel Guagliardo*.<sup>134</sup> In that case, the Supreme Court disallowed court-martial jurisdiction over civilians abroad even though there was *no* other available forum to try them.<sup>135</sup> If the Court declined to exercise court-martial jurisdiction over civilians in *Ex. Rel Guagliardo*, it is unclear why the situation in Ali should be treated any differently.

#### V. The Way Forward: Revisions To MEJA And The Graham Amendment That Would Increase Efficiency And Guarantee Constitutionality

An analysis of the foregoing opinions has revealed attempts by Congress to resolve the problem of impunity for civilians serving with the military abroad, but also that Congress has created legislative schemes that raise serious legal concerns in doing so. With regards to MEJA, the problems are solely practical, and while practical issues exist with the Graham Amendment, the greater concerns are constitutional. Both must be resolved. Civilian impunity, especially as it relates to contractors, continues to be a problem in the Middle East whether the crimes committed are more banal<sup>136</sup> or more serious.<sup>137</sup> Fortunately, there are ways to reform both legislative schemes to increase their efficiency and constitutionality in an effort to ameliorate this problem consistent with this country's traditional legal values.

With regards to MEJA, the statute itself must be revised to eliminate the provision excluding host-country nationals from its jurisdiction. In his concurrence, Judge Effron accurately states that this provision, "reflects congressional sensitivity to the interests of a host country in prosecuting its own citizens, an appropriate consideration under the military and

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<sup>134</sup> See Vladeck, *supra* note 100.

<sup>135</sup> *McElroy v. U.S. ex rel. Guagliardo*, 361 U.S. 281 (1960).

<sup>136</sup> Cindy Galli, Rhonda Schwartz & Brian Ross, *Exclusive: Video Shows Drunk, Stoned US Defense Contractors*, ABC NEWS (Oct. 16, 2012), <http://news.yahoo.com/exclusive-video-shows-drunk-stoned-us-security-contractors-221702848--abc-news-topstories.html>.

<sup>137</sup> *Feds.: Defense Firm Put Untrained Guards in Iraq*, ASSOCIATED PRESS (Oct. 31, 2012), [http://seattletimes.com/html/nationworld/2019567982\\_\\_apusdefensecontractorlawsuit.html](http://seattletimes.com/html/nationworld/2019567982__apusdefensecontractorlawsuit.html).

foreign affairs powers of Congress.”<sup>138</sup> However, this purpose is independently satisfied by a different provision of MEJA, which precludes the United States from prosecuting a civilian if the foreign government, with jurisdiction recognized by the United States (as Iraq would have had over Ali), has first started doing so.<sup>139</sup> So long as the Justice Department was careful to make sure that the host country had the first opportunity to prosecute civilian wrongdoers, it would likely be able to assuage Judge Effron’s concern without generally precluding their ability to ever prosecute host country nationals.

In addition to revising this statutory language, Congress should also pass the Civilian Extraterritorial Jurisdiction Act (CEJA). CEJA was introduced by the House in the 110th Congress, and was passed there, but the Senate failed to do so as well and since then little has been done to reignite its potential passage.<sup>140</sup> Its purpose is to bring more non-DoD employed contractors under the jurisdiction of the American Federal Courts.<sup>141</sup> For example, because MEJA requires that the civilian’s employment, “relates to supporting the mission of the Department of Defense overseas” if a contractor is implied by another Federal agency with no connections to the DoD, MEJA will not provide jurisdiction.<sup>142</sup> Thus, if a contractor’s employment supports another agency’s mission overseas, such as the State Department’s or CIA’s, the civilian will fall into the “jurisdiction gap.”<sup>143</sup> The effect of this restriction is to create cases that focus on the minutiae of a contractor employee’s designation, in effect making, “[c]ases that would otherwise be straightforward can turn into complex investigations focusing not just on the underlying criminal conduct, but also on the scope of the defendant’s

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<sup>138</sup> *United States v. Ali*, 71 M.J. 256, 280 (S.J. Effron concurring) (citing H.R. REP. 106-778).

<sup>139</sup> 18 U.S.C. 3261(b) (2006).

<sup>140</sup> Charles Doyle, CONG. RESEARCH SERV., R42358, CIVILIAN EXTRATERRITORIAL JURISDICTION ACT: FEDERAL CONTRACTOR CRIMINAL LIABILITY OVERSEAS (2012).

<sup>141</sup> *Id.*

<sup>142</sup> 18 U.S.C. 3267 (2006).

<sup>143</sup> *See Dionne, supra* note 30, at 222.

employment, his or her specific work duties, and other jurisdiction-related facts.”<sup>144</sup> That this employment information can be classified and difficult for the Justice Department to obtain makes the specter of civilian impunity even more daunting.<sup>145</sup>

CEJA would close this jurisdictional gap and provide for jurisdiction regardless of which agency’s mission the civilian is supporting.<sup>146</sup> It would also provide greater oversight of such prosecutions.<sup>147</sup> CEJA has the support of the Justice Department, State Department, at least one non-governmental organization, and contractors themselves.<sup>148</sup> At a time when the military is drawing down its numbers in Iraq and Afghanistan, and increasing the numbers of contractors it uses,<sup>149</sup> it is imperative to have a Constitutional and efficient statutory scheme in place to adjudicate potential crimes they commit. The above-mentioned revision to MEJA, as well as the enactment and implementation of CEJA would provide that scheme.

The constitutional infirmities that face the Graham Amendment are not so easily resolved by congressional action. As judges, scholars, and legal bloggers have noted, fundamental issues of Congress’s ability to pass this law, as well as the military’s ability to deny due process rights are implicated.<sup>150</sup> Nonetheless, looking to the *Toth* line provides some indication of how the Graham Amendment, may be salvaged and used in a limited fashion. In particular, *McElroy* provides an insight into how the military may use the Graham Amendment in a Constitutional fashion going forward.

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<sup>144</sup> See Statement of Lanny Breuer, *supra* note 64, at 4.

<sup>145</sup> *Id.* at 4–5.

<sup>146</sup> *Id.*

<sup>147</sup> *The Case for the Civilian Extraterritorial Jurisdiction Act (CEJA): Why U.S. Needs to Clarify U.S. Criminal Jurisdiction Over U.S. Contractors Fielded Abroad*, HUMAN RIGHTS FIRST (last visited Jan. 16, 2013) <http://www.humanrightsfirst.org/wp-content/uploads/pdf/CEJA-Fact-Sheet.pdf>.

<sup>148</sup> *Id.* at 2.

<sup>149</sup> *Id.*

<sup>150</sup> See opinions of C.J. Baker, S.J. Effron, the Dionne article, and Vladeck’s blog-post *supra* at 128, 133, 30 and 101 respectively

As stated above, *McElroy* stands for the *Toth* proposition that the use of court-martial be “limited to the least possible power.”<sup>151</sup> It did, however, see a Constitutional way to submit military employees, who would traditionally be thought of as civilians, to the jurisdiction of the court-martial. To do so it offers the example of paymasters in the Navy.<sup>152</sup> Essentially, during the Revolutionary War, because the job of the paymasters were thought to be of such vital importance to the war effort, and any criminal disputes involving them were in need of expedient resolution, people in that position essentially signed a waiver that granted the Navy jurisdiction over them for the duration of the conflict.<sup>153</sup> For that period, they would be enlisted into the American military and be held to court-martial jurisdiction.<sup>154</sup>

A similar scheme to this could be utilized by the American military. For those contractors over whom it would want to potentially have court-martial jurisdiction, the military could require a waiver of a jury trial, which would include a notice that they have received, read, and understand that if they commit a crime, could be court-martialed pursuant to 2(a)(10). The Supreme Court has never ruled directly on whether a jury trial waiver so far in advance of litigation in a criminal trial would be valid and legally enforceable. Generally, Courts are circumspect about waivers. To protect the person waiving Constitutional Rights, Courts have held that “in the civil no less than the criminal area, ‘courts indulge every reasonable presumption against waiver.’”<sup>155</sup> Furthermore, “[w]aivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences.”<sup>156</sup> These holdings could present some difficulty in the

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<sup>151</sup> *McElroy*, 361 U.S. at 286.

<sup>152</sup> *Id.* at 284-285.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *Fuentes v. Shevin*, 407 U.S. 67 (1972) quoting, *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393 (1937).

<sup>156</sup> *Brady v. United States*, 397 U.S. 742, 748 (1970)

contractor context. If these waivers were to be ruled valid and enforceable, they could not be merely included in the contracts signed by contractors; they would have to be adequately explained to the contractor by a member of the company's human resources or legal department. Another obstacle is that many of these contractors speak little or no English. Thus, the waiver, and the explanation would have to be in the contractor's native language to be understood, and thus, valid and enforceable. However, if those requirements could be accommodated, the contractor may be able to validly waive his or her right to a trial by jury as a term of employment.

Additionally, this scheme could only be used, pursuant to the *Toth* line "to the least possible power," and thus only in situations where prosecution under MEJA and CEJA would be impractical (thus also satisfying *Boumediene*). In order to determine whether the use of court-martial satisfies both *Toth* and *Boumediene*, the courts should employ a "totality of the circumstances" test.

Totality of the circumstances tests are ubiquitous in American legal jurisprudence. They are used in everything from Fourth Amendment cases<sup>157</sup> to cases involving the discharge of student loans.<sup>158</sup> They seek to create a proper legal determination on a given case after reviewing a number of deliberative balancing factors. To create a totality of the circumstances test for the current problem, courts should consider factors that reveal whether the use of court-martial violates *Toth* and is being used more than for the "least possible power" necessary, as well as if the court-martial is being used in violation of *Boumediene* for reasons other than to avoid severe impracticability. Such factors to evaluate these circumstances could be, but are not limited to: (1) the context in which the contractor signed the notice and waiver described above,

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<sup>157</sup> Christo Lassiter, *Consent to Search by Ignorant People*, 39 TEX. TECH L. REV. 1171, 1172 (2007).

<sup>158</sup> Julie Swedback & Kelly Prettnner, *Discharge or No Discharge? An Overview of Eighth Circuit Jurisprudence in Student Loan Discharge Cases*, 36 WM. MITCHELL L. REV. 1679, 1680 (2010).



and whether it was willingly with adequate knowledge, rather than coercive; (2) the complexity of the investigation and whether, because of sensitive timing issues with regards to evidence, whether the Justice Department may not be able to expediently provide the necessary resources (3) whether the military can substitute for the Justice Department and adequately provide such a timely and robust investigation; and (4) whether necessity calls for an expedient resolution of the case to restore morale to the local population or the military unit affected.

The combination of a knowledgeable and informed waiver and an incisive totality of the circumstances test would ensure that the Graham Amendment is used in a way that is consistent with longstanding (*Toth*) and recent (*Boumediene*) precedent seeking to ensure that the due process rights of civilians are not violated. Unfortunately, it would not obviate the concern expressed above that Congress did not have the authority in the first place to pass the Graham Amendment.<sup>159</sup> Nonetheless, it would go very far in ensuring that the courts do not over-utilize a procedure that is supposed to be exceedingly limited in these circumstances, especially when there is a concurrent legislative scheme that provides for similar adjudication.

## VI. Conclusion

The problem dealt with by this Comment is relatively new in its pervasiveness, but the legal issues surrounding it are as old as our republic. The problem of jurisdiction over civilians working with the military abroad went on for far too long without resolution. The lack of regulation of these people led to crimes under this country's flag that, because of legal failures, could not be adequately resolved by the United States. Doubtlessly, this affected our reputation as a country that upholds justice, both on these missions abroad and at home.

Those that threw in their lot and passed MEJA and the Graham Amendment should be commended for their willingness to tackle a problem, that if allowed to go on, would further

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<sup>159</sup> See Dionne, *supra* note 30, at 223–237.

sully our reputation, and more importantly, stand in the way of delivering justice. Nonetheless, in their haste to resolve this issue, they failed to carefully consider the effects of the laws that they were passing. The cases of Sean Brehm and Ala Mohammed Ali display how both MEJA and the Graham Amendment were capable of achieving successful prosecutions, but they also revealed serious flaws in these dual schemes. Legal innovation is often important, and here it is necessary, but it can never come at the expense of our Constitutional principles. The proposals outlined above would go a significant way to eliminating the practical and legal problems they present, while hopefully, allowing for increased utilization and prosecutions of civilians who commit crimes while working for our military.