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## “RUNAWAY TRAIN”<sup>1</sup>: CONTROLLING CRIMES COMMITTED BY PRIVATE CONTRACTORS THROUGH APPLICATION OF THE UNIFORM CODE OF MILITARY JUSTICE

Matthew Dahl\*

### I. INTRODUCTION

Since the Cold War, contract employees have played an increasingly essential role in the deployment of U.S. armed forces. Civilians accompanying armed forces overseas provide a wide range of services to the military in areas ranging from weapons system operations, to communications, to stevedoring.<sup>2</sup> Operations Desert Storm and Desert Shield ushered in the recent trend of using contractors as a major component of the armed forces when they deploy.<sup>3</sup> Since the first Gulf War these civilian contractors<sup>4</sup> have performed services for the United States in military deployments in Somalia, Haiti, Kuwait, Rwanda, and the Balkans.<sup>5</sup>

There are approximately 154,000 contractors operating in Iraq,<sup>6</sup> and the U.S. government spends billions of dollars every year paying them for their services.<sup>7</sup> The unprecedented need for contractors began in Iraq because the plan for the invasion, created by then Secretary of Defense Donald Rumsfeld, wanted to use as lean an invasion force as possible.<sup>8</sup> Conventional wisdom from past and present

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\* Matthew Dahl is a 2009 graduate of the University of Richmond School of Law. He would like to thank Professor John Paul Jones for his ideas and edits with regard to this paper.

1. This is a variation on the title of Elvis Presley’s song “Mystery Train” which plays on a video of security contractors firing on civilian vehicles in Iraq. The video is available at <http://www.youtube.com/watch?v=5z0NMKcVHHM>.

2. OVERSEAS JURISDICTION ADVISORY COMM., § 1151 Pub. L. No. 104-106, REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL LAW JURISDICTION OVER CIVILIANS ACCOMPANYING THE ARMED FORCES IN TIME OF ARMED CONFLICT 16-17 (1997) [hereinafter “OJAC REPORT”].

3. 4,500 Department of Defense civilian employees and 3,000 contractors deployed with the armed forces during Desert Storm and Desert Shield. *Id.* at 15-16.

4. This paper will focus on applying court-martial jurisdiction to private contractors that accompany U.S. forces in the field. The private contractors referred to in this paper are U.S. citizens. There are contractors accompanying U.S. forces that are not U.S. citizens, which raises even more jurisdictional questions, but those contractors are not the focus of this paper. It is also important to note that the recommendations made in this paper can also be applied to civilian employees of the U.S. government who accompany U.S. forces overseas.

5. *Id.* at 16. The combined number of civilians accompanying the military to these conflicts was 2,906. *Id.*

6. Ben Davidson, *Liability on the Battlefield: Adjudicating Torts Suits Brought by Soldiers Against Military Contractors*, 37 PUB. CONT. L.J. 803, 807 (2008).

7. GOV’T ACCOUNTABILITY OFFICE, GAO No. 07-145, REPORT TO CONGRESSIONAL COMMITTEES, HIGH-LEVEL DOD ACTION NEEDED TO ADDRESS LONG-STANDING PROBLEMS WITH MANAGEMENT AND OVERSIGHT OF CONTRACTORS SUPPORTING DEPLOYED FORCES 1 (2006).

8. Donald Rumsfeld imagined a total invasion force much closer to 100,000 troops while some military leaders were insisting that several hundred thousand would be needed. Eric Schmitt, *Threats and Responses: Military Spending; Pentagon Contradicts General on Iraq Occupation Force’s Size*, NY TIMES, Feb. 28, 2003, available at <http://www.nytimes.com> (search “February 28 2003” and follow the “Threats and Responses” hyperlink).

military commanders was that a force, anywhere from 385,000<sup>9</sup> to 500,000<sup>10</sup> troops, was needed to invade and secure Iraq; however, Rumsfeld envisioned a force of no more than 125,000 troops.<sup>11</sup> In the end, the U.S. invaded Iraq with just over 150,000 troops.<sup>12</sup> Because of the significant reduction in troop numbers, the United States created a situation in which it needed more manpower to carry out its mission. The United States filled this vacuum with private contractors.

A significant number of the total contractor force was comprised of private security contractors.<sup>13</sup> Private security contractors provided a wide array of contracting services ranging from logistics support to direct tactical and combat support.<sup>14</sup> As of 2007, there were approximately 30,000 security contractors operating in Iraq, and the U.S. government planned to spend \$1.5 billion in outsourcing its security operations within the next year.<sup>15</sup> These security contractors caused major legal concerns. There are numerous reports by Iraqi citizens, and contractors themselves, saying that security contractors are indiscriminate with how they use force and frequently use it against innocent bystanders.<sup>16</sup> Despite what would usually be considered serious criminal violations, there was no legal action taken against the contractors involved in the abuses of prisoners in Abu Ghraib or against the contractors employed by Blackwater USA, who killed 17 and wounded 24 individuals, when they opened fire on innocent Iraqis at Nisoor Square in Baghdad.<sup>17</sup>

Recent reports say that the number of contractors in Afghanistan will increase dramatically along with the surge in troops.<sup>18</sup> While the contractors' services are considered vital to the mission of U.S. armed forces, a serious jurisdictional gap exists which makes it extremely difficult to hold them accountable for crimes they commit while overseas. In 2006, Congress took an important step towards holding contractors accountable with section 552 of the John Warner National Defense Authorization Act for Fiscal Year 2007. This legislation amended Article 2(a)(10) of the Uniform Code of Military Justice ("UCMJ") granting military jurisdiction over civilians accompanying armed forces during a "contingency operation" – es-

9. This is the number General Tommy Franks first approached Rumsfeld with in 2001 when Rumsfeld first called for an invasion plan with reduced troop numbers. MICHAEL R. GORDON & GENERAL BERNARD E. TRAINOR, *Cobra II 28* (Pantheon Books 2006).

10. This is the number laid out in U.S. Central Command's OPLAN 1003-98 before Rumsfeld asked for the number to be significantly reduced. *Id.* at 4.

11. This is the number of troops Rumsfeld felt should be the maximum needed after he was presented with OPLAN 1003-98. *Id.*

12. *Id.* at Appendix.

13. In 2008 there were 30,000 private security contractors operating in Iraq. Jennifer K. Elsea, et al., *Private Security Contractors in Iraq: Background, Legal Status, and Other Issues*, Aug. 25, 2008, available at <http://www.fas.org/spp/crs/natsec/RL32419.pdf>.

14. E.L. Gaston, *Mercenarism 2.0? The Rise of the Modern Private Security Industry and its Implications for International Humanitarian Law Enforcement*, 49 HARV. INT'L L.J. 221, 225 (2008).

15. Steve Fainaru, *Iraq Contractors Face Growing Parallel War*, WASHINGTON POST, June 16, 2007, at A1.

16. Human Rights First, *Private Security Contractors at War: Ending the Culture of Impunity* 5-8 (2008), available at <http://www.humanrightsfirst.info/pdf/08115-usls-psec-final.pdf>.

17. *Id.* at 15-21.

18. Walter Pincus, *Up to 56,000 More Contractors Likely for Afghanistan, Congressional Agency Says*, WASHINGTON POST, Dec. 16, 2009, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/12/15/AR2009121504850.html>.

essentially allowing the military to court-martial civilians deployed with U.S. military forces. In the absence of other effective methods, the new amendment to Article 2(a)(10) is vital to controlling contractors accompanying U.S. armed forces because it provides a workable and efficient avenue through which most crimes by contractors can be prosecuted. Despite its utility, the amendment to Article 2(a)(10) raises very serious constitutional questions, and a significant prosecution under this new law will likely result in a challenge that will reach the Supreme Court.

This paper will argue that, in the absence of effective alternatives, the new law granting court-martial jurisdiction over civilians is a necessary step in effectively controlling crimes by private contractors and other civilians accompanying U.S. armed forces overseas if other measures are not effectuated. Part II will look at two important Supreme Court decisions that currently restrict the military's ability to court-martial civilians, and it will also highlight the government's attempts over the past 50 years to come up with a solution to the problem. Part III will examine three alternatives to the amendment to Article 2(a)(10) that could make the amendment unnecessary if they are effectively implemented. Part IV examines the new Article 2(a)(10), highlights the constitutional concerns it raises, and will show that these concerns can be overcome. Part V briefly discusses Supreme Court precedent that could allow court-martialing of civilians to be a constitutional alternative to the civilian criminal process. The paper will conclude that, if other effective measures are not implemented, the amendment to Article 2(a)(10) is necessary to control contractor crime, and that the Supreme Court should uphold the new law if a future challenge arises.

## II. THE COURT'S DECISIONS IN *REID* AND *AVERETTE*, AND THE SUBSEQUENT PUSH FOR LEGISLATION TO CONTROL CRIMES COMMITTED BY CIVILIANS ACCOMPANYING ARMED FORCES OVERSEAS.

### A. *Reid v. Covert* and *United States v. Averette*

Attempts to control crimes committed by civilians accompanying armed forces overseas has been a problem since the Supreme Court's decisions in *Reid v. Covert*<sup>19</sup> and *United States v. Averette*.<sup>20</sup> The *Reid* case involved an appeal by two wives of active duty servicemen that were found guilty, in court-martial proceedings, of killing their husbands.<sup>21</sup> Both appealed the convictions arguing that court-martialing civilians was unconstitutional.<sup>22</sup>

The Court in *Reid* found that the military court-martial system did not effectively protect the right to a trial by jury promised to civilians in Article III section 2 and the Sixth Amendment, and it also abridged the Fifth Amendment right to a

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

20. *United States v. Averette*, 19 C.M.A. 363 (1970).

21. *Reid*, 354 U.S. at 3.

22. *Id.*

grand jury.<sup>23</sup> It also analyzed Article I section 8, clause 14 of the Constitution, which gives Congress the ability to make rules for regulation of the land and naval forces.<sup>24</sup> The Court reasoned that the “land and naval forces” referred only to members of the armed services and not civilians accompanying armed forces.<sup>25</sup> The government relied on the Constitution’s Necessary and Proper Clause to show that Congress could subject civilians to military law, but the Court countered by saying that the Necessary and Proper Clause could not trump the guarantees given to civilians by the Bill of Rights.<sup>26</sup> The opinion recognized that lower federal courts had upheld civilian courts-martial before, but that those courts-martial were conducted under the government’s “war powers” that arise during a time of active hostility.<sup>27</sup> Because the wives’ cases happened during peace-time that congressional authority did not exist; therefore, both of the courts-martial were struck down as unconstitutional.<sup>28</sup>

Thirteen years after *Reid*, the U.S. Court of Military Appeals decided the case of *United States v. Averette*. *Averette* arose during the Vietnam War when a civilian employee of the Army was caught stealing 36,000 batteries from the U.S. government. He was convicted by court-martial and appealed.<sup>29</sup> In a short opinion, the U.S. Court of Military Appeals adopted a strict construction of the phrase “in time of war” finding that the phrase referred only to a congressionally declared war.<sup>30</sup> Since the Vietnamese conflict was not a congressionally declared war, *Averette*’s trial by court-martial was declared unconstitutional.

While the court’s decision struck down the court-martial, the *Averette* opinion did make an interesting comment regarding the courts-martial of civilians, saying that Congress could use its legislative power to allow civilian courts-martial if it amended the Article 2(a)(10).<sup>31</sup> While the opinion left this possibility open, it also offered a caveat by saying that it did not presume the constitutionality of civilian courts-martial should Congress decide to pass the legislation.<sup>32</sup>

Taking *Reid* and *Averette* together, the real questions become: 1) if Congress changes Article 2(a)(10) to allow for civilian courts-martial during a time of something other than a congressionally declared war, will such a court-martial still be constitutional?; and 2) will the Court strike down any law permitting civilian courts-martial because it would automatically violate the rights that concerned the Court in *Reid*? The new Article 2(a)(10) should provide a vehicle through which these questions could be answered.

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23. *Id.* at 5-10.

24. *Id.* at 19-20.

25. *Id.*

26. *Id.* at 21.

27. *Id.* at 33.

28. *Id.* at 34.

29. *Averette*, 19 C.M.A. at 363.

30. *Id.* at 365.

31. *Id.*

32. *Id.*

## B. The 1979 GAO Report on Crimes by U.S. Civilian Personnel Overseas

After the decisions in *Reid* and *Averette*, crimes by civilians accompanying armed forces overseas became such a concern that it prompted the United States General Accounting Office (“GAO”) to issue a report in 1979 detailing the dangers of the restricted jurisdiction over these civilians. The GAO reported that a series of Supreme Court cases from 1957 to 1960 eviscerated the United States’ ability to prosecute crimes committed by civilian employees overseas.<sup>33</sup> It reported further that, from 1960 to 1979, the United States sent 343,000 civilian personnel and dependents overseas, but had no power to prosecute crimes committed by these people.<sup>34</sup>

The Vietnam War is an excellent example of the inability of the United States to prosecute overseas crimes by U.S. civilian personnel. At the peak of the U.S. buildup in Vietnam, it is estimated that there were over 10,000 civilian government personnel and contractors present in the country.<sup>35</sup> Due to an unclear agreement between the U.S. and Vietnam<sup>36</sup> the question as to jurisdiction over criminal actions by civilian personnel became a major concern.<sup>37</sup> Even though the agreement was unclear, U.S. military forces still had the option of court-martialing civilians that committed crimes in Vietnam. That option ended in 1970 when the *Averette* opinion was handed down. Since Vietnam was not a congressionally declared war, courts-martial of civilian personnel were no longer possible.<sup>38</sup> Instead, the U.S. military was forced to adopt administrative sanctions (debarment), which merely removed an offending civilian’s military privileges,<sup>39</sup> taking away the civilian’s ability to be employed in Vietnam.<sup>40</sup>

The GAO report concluded that all criminal offenses, petty and serious, committed by U.S. civilian personnel overseas should be subjected to prosecution by U.S. authorities. It recommended that Congress pass legislation allowing the prosecution of these civilians, and that the Department of Defense (“DoD”) and Department of Justice (“DoJ”) begin preparing procedures by which they could handle these potential prosecutions.<sup>41</sup>

33. SOME CRIMINAL OFFENSES COMMITTED OVERSEAS BY DoD CIVILIANS ARE NOT BEING PROSECUTED: LEGISLATION IS NEEDED, GAO Report No. FPCD 79-45 at 6 (1979), available at <http://archive.gao.gov/f0302/110369.pdf> [hereinafter “GAO Report”] (citing *Reid*, 354 U.S. 1 (1957); *Kinsella v. Singleton*, 361 U.S. 234 (1960); and *Grisham v. Hagan*, 361 U.S. 278 (1960)).

34. *Id.* at 5.

35. George S. Prugh, *Law at War: Vietnam 1964-1973* 88 (Dep’t of the Army, U.S. Gov’t Printing Office) (1975), available at [http://www.loc.gov/rr/rfd/Military\\_Law/law-at-war/pdf](http://www.loc.gov/rr/rfd/Military_Law/law-at-war/pdf).

36. This agreement was known as the “Pentalateral Agreement”, and it controlled the legal rights of U.S. personnel in Indochina between the U.S., France, Vietnam, Laos, and Cambodia. *Id.* at 87.

37. *Id.* at 92.

38. *Averette*, 19 C.M.A. at 365-66.

39. Prugh, *supra* note 35, at 110. By 1971, just one year after the *Averette* decision, the U.S. military debarred 943 U.S. civilians. *Id.* This means that 943 U.S. civilians committed crimes in Vietnam for which the only consequence was losing their job and getting sent back to the United States. *Id.*

40. By 1971, just one year after the *Averette* decision, the U.S. military debarred 943 U.S. civilians. This means that 943 U.S. civilians committed crimes in Vietnam for which the only consequence was losing their job and getting sent back to the United States. *Id.*

41. GAO Report, *supra* note 33, at 19.

### C. The Report of the Overseas Jurisdiction Advisory Committee

After the 1979 GAO Report, Congress attempted to cure the jurisdictional gap, but the proposed legislation never garnered enough support to become law.<sup>42</sup> However, with the Vietnam War over, the issue of what to do with U.S. civilian personnel deployed overseas faded into the background because there were no conflicts which required their services.<sup>43</sup> The end of the Cold War marked the latest uptick in using civilians as a significant part of deployed armed forces.<sup>44</sup> Because worldwide military activity decreased during the Cold War, an abundance of former military operators chose to enter the contracting business and sell their services to governments that needed them.<sup>45</sup>

For the United States, the First Gulf War saw the reemergence of utilizing civilian personnel to supplement deployed military forces.<sup>46</sup> This group of civilians consisted of government civilian employees and a new contingent composed of private contractors. The U.S. used 4,500 DoD civilian employees along with 3,000 private contractors during Operations Desert Shield and Desert Storm.<sup>47</sup> Following the First Gulf War, the U.S. would use over 3,000 government civilian and private contract employees in the conflicts in Somalia, Haiti, Kuwait, Rwanda, and the Balkans.<sup>48</sup> With the significant use of civilian personnel in those conflicts, the question of the legal status of civilians deployed with U.S. armed forces became a concern again.<sup>49</sup> In 1996, Congress created the Overseas Jurisdiction Advisory Committee (“OJAC”) to take another look at this problem.

The OJAC considered options for applying criminal laws to the actions of civilians accompanying U.S. armed forces outside of the United States as a way to bridge the jurisdictional gap.<sup>50</sup> It compiled a major report for Congress that analyzed the increasing use of civilians in armed conflicts and concluded that legislation was needed to control criminal activity by civilian personnel operating with U.S. armed forces. The conclusions of the OJAC would create the basis for the new amendment to Article 2(a)(10) that granted court-martial jurisdiction over civilians accompanying an armed force in a contingency operation.<sup>51</sup>

42. Susan S. Gibson, *Lack of Extraterritorial Jurisdiction Over Civilians: A New Look at an Old Problem*, 148 MIL. L. REV. 114 n.2 (1995).

43. The 1983 U.S. invasion of Grenada and the 1988 U.S. invasion of Panama were the most significant U.S. military actions between 1979 and 1991, but there is no evidence to show that U.S. civilian personnel played a significant role during these two conflicts.

44. William R. Casto, *Regulating the New Privateers of the Twenty-First Century*, 37 RUTGERS L.J. 671, 671-72 (2006).

45. *Id.* at 672.

46. OJAC REPORT, *supra* note 2, at 15.

47. *Id.* at 16 (citing DEP’T OF DEF., CONDUCT OF THE PERSIAN GULF WAR: FINAL REPORT TO CONGRESS N-2-3 (1992)), available at [http://www.dod.mil/pubs/foi/reading\\_room/404.pdf](http://www.dod.mil/pubs/foi/reading_room/404.pdf).

48. *Id.*

49. *Id.* at 16-21.

50. National Defense Authorization Act for Fiscal Year 1996 § 1151, Pub. L. No. 104-106, 110 Stat. 186 (1996). See Transmittal Letter from Judith A. Miller of the Overseas Jurisdiction Advisory Committee to Albert Gore (June 21, 1997) (on file with author) [hereinafter “Miller Letter”].

51. See Miller Letter, *supra* note 49.

The OJAC recognized two existing gaps in jurisdiction over government civilian employees and contractors that accompanied armed forces overseas. The first gap was the lack of court-martial jurisdiction over crimes committed by civilians accompanying a U.S. armed force. The OJAC report stated it was imperative that the military be able to enforce the UCMJ over civilians because of the increasing integration of civilians into military operations.<sup>52</sup> The second gap involved the jurisdiction of Article III civilian courts here in the U.S. The OJAC recommended that felonies committed by civilians, accompanied by an armed force in a foreign country, be subject to the jurisdiction of U.S. federal courts.<sup>53</sup> The first recommendation created the basis for the new law granting court-martial jurisdiction over civilians, while the second created the basis for Military Extraterritorial Jurisdiction Act (“MEJA”). The OJAC explicitly stated that these recommendations were independent of each other and that each should be implemented to completely fill the jurisdictional gaps.<sup>54</sup>

### **III. ALTERNATIVE METHODS OF CONTROLLING CONTRACTOR CRIME WITHOUT RESORTING TO THE NEW ARTICLE 2(A)(10)**

There are several methods through which contractors could be held accountable for crimes they commit while accompanying an armed force overseas. This section will lay out two alternatives to the new Article 2(a)(10). First, it will explore the possibility of using contracts to clear up the constitutional problems caused by court-martialing contractors on the front end. Second, the section will look at the Military Extraterritorial Jurisdiction Act and whether it is an effective alternative to civilian court-martial.

#### **A. Contractual Waiver of Constitutional Rights**

Making contractors waive their normal constitutional trial rights when they sign their employment contracts could be a clean and effective way to avoid the constitutional issues discussed in this paper. A contract provision, acting as a waiver of constitutional rights, would need to explicitly lay out that if the contractor broke a criminal law while accompanying an armed force in the field that person would be subject to a military court-martial rather than a civilian criminal trial. The contract provision would also need language stating specific constitutional rights and how they could be affected. This idea seems like it could be an easy end run around the constitutional issues, but it has its own difficulties and uncertainties.

Waiving constitutional rights by contract is not a new idea. Waivers are common components of contracts in the business world where they usually affect the Seventh Amendment right to a jury trial.<sup>55</sup> The waivers that cause the most con-

52. OJAC REPORT, *supra* note 2, at iv-v.

53. *Id.* at v-vi.

54. *Id.* at vi.

55. Wayne Klomp, *Harmonizing the Law in Waiver of Fundamental Rights: Jury Waiver Provisions in Contracts*, 6 NEV. L.J. 545, 545 (2005-2006).



cern are called “pre-dispute” waivers.<sup>56</sup> “Pre-dispute” waivers in contracts take effect before a dispute arises and come in two forms: explicit and implicit.<sup>57</sup> The language in explicit waivers directly states that the party signing the contract agrees not to exercise a specific constitutional right.<sup>58</sup> In the case of government contractors waiving their civilian trial rights in favor of those granted under military court-martial, the waiver would need to be explicit.<sup>59</sup>

The need for explicit waivers comes from the fact that courts are hesitant to enforce these types of waivers unless they are “voluntary, knowing, and intelligent,” especially in the area of fundamental rights.<sup>60</sup> This standard for a waiver of constitutional rights in the criminal context was recognized in *Brady v. United States*.<sup>61</sup> While *Brady* did not elucidate what makes up a “voluntary, knowing, and intelligent” waiver, scholars have enumerated several factors which courts use in making the determination: 1) negotiability of the waiver; 2) conspicuousness of the waiver; 3) disparity of the bargaining power between the parties; and 4) the experience and sophistication of the party opposing the waiver.<sup>62</sup>

The Supreme Court upheld a “pre-dispute” waiver in the case of *D.H. Overmyer Co. of Ohio v. Frick Co.*<sup>63</sup> In *Overmyer*, the Court reiterated its support for the “voluntary, knowing, and intelligent” standard, but found that the circumstances surrounding the waiver are very important in any waiver analysis.<sup>64</sup> The facts that the Court seemed to find most important were those relating to the bargaining power between the parties.<sup>65</sup> In *Overmyer*, the Court found the waiver to be valid because the party that opposed the waiver was a sophisticated business that should have understood the gravity of the waiver it signed.<sup>66</sup> The Court stuck by its decision in *Overmyer* in the later case of *Fuentes v. Shevin* when it overturned waivers of constitutional rights signed by unsophisticated, laymen purchasers because the contracts containing the waivers amounted to contracts of adhesion and did not clearly state the rights that the purchasers were giving up.<sup>67</sup>

The *Overmyer* and *Fuentes* cases both deal with rights in the civil realm rather than the criminal one, but they are used only to illustrate what the Supreme Court finds to be important in analyzing waivers of constitutional rights and the “volunta-

56. *Id.* at 546-47. There are also “post-dispute” waivers, but their application is governed by Rules 38-39 of the Federal Rules of Civil Procedure. *Id.* The application of post-dispute waivers is almost universally enforced under the “voluntary, knowing, and intelligent” standard. *Id.* at 550.

57. *Id.* at 548.

58. *Id.* at 547. Implicit waivers make no such direct statement and, in the realm of commercial contracts, come in the form of arbitration clauses. *Id.* at 548.

59. *Id.* at 548. Implicit waivers make no such direct statement and, in the realm of commercial contracts, come in the form of arbitration clauses. *Id.*

60. *Id.* at 550.

61. *Brady v. United States*, 397 U.S. 742, 748 (1970).

62. Klomp, *supra* note 55, at 550 (citing Jean R. Sternlight, *Rethinking the Constitutionality of the Supreme Court's Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers, and Due Process Concerns*, 72 TUL. L. Rev. 1, 57-58 (1997)).

63. *D.H. Overmyer Co. of Ohio v. Frick Co.*, 405 U.S. 174, 187 (1972).

64. *Id.* at 187-88.

65. *Id.* at 188.

66. *Id.* at 186.

67. *Fuentes v. Shevin*, 407 U.S. 67, 95-96 (1983).

ry, knowing, and intelligent” standard. The Court did adopt the “voluntary, knowing, and intelligent” standard as to criminal trial rights in *Brady*, but the situations facing courts with regards to waiver in the criminal context have been different than those in *Overmyer* and *Fuentes*. The discussion on a waiver of constitutional rights in the criminal area is based around plea bargains acting as waivers.<sup>68</sup> The Court has found that criminals can use plea bargains to waive certain Fourth, Fifth, and Sixth Amendment rights.<sup>69</sup> The logic behind this is that the criminal is free to give up these rights in order to get beneficial treatment from the government.<sup>70</sup>

While the Supreme Court upheld a person’s right to waive constitutional rights in the criminal sphere in plea bargain situations, it is unclear whether they will allow waiver of these rights by contract before an alleged crime is ever committed. The waivers I propose would be equivalent to the “pre-dispute” waivers mentioned above because they would force a contractor to sign away his civilian trial rights, for those of the court-martial system, before he ever began work as a contractor accompanying an armed force. This differs from plea bargain waivers because when a defendant is plea bargaining he is admitting that he committed a crime, whereas a contractor signing a “pre-dispute” waiver would be waiving his criminal trial rights before he ever committed a crime. While “pre-dispute” waivers, as long as they are “voluntary, knowing, and intelligent,” are allowed in the context of civil trial rights, a court may find that such a waiver is not permissible as to criminal rights because the gravity of criminal trial rights is greater than that of civil trial rights.

## B. The Military Extraterritorial Jurisdiction Act

Congress passed the MEJA in 2000, which granted jurisdiction over acts committed outside of the United States that would have constituted criminal felonies if committed inside the U.S.<sup>71</sup> The MEJA allowed for crimes committed by contractors accompanying an armed force to be investigated by the Department of Justice and tried in a federal court in the United States.<sup>72</sup> Thus far, the MEJA suffers from glaring deficiencies and has not been effective.

Since its passage, there have only been twelve prosecutions carried out under the MEJA.<sup>73</sup> One problem with the statute is that the government agencies responsible for implementing it have not coordinated an implementation process.<sup>74</sup> After the MEJA’s passage, the DoD, the DoJ, the Department of State, and other federal

68. Jason Mazzone, *The Waiver Paradox*, 97 NW. U. L. REV. 801, 832-42 (2003).

69. *Id.* at 831 (citing *United States v. Ruiz*, 536 U.S. 622 (2002); *Schneekloth v. Bustamonte*, 412 U.S. 218, 248 (1973); *Boykin v. Alabama*, 395 U.S. 238, 243 (1969); *Johnson v. Zerbst*, 304 U.S. 458, 463-64 (1938)).

70. *Id.* at 832-33 (quoting *Corbitt v. New Jersey*, 439 U.S. 212, 218-19 (1978)).

71. *No Safe Haven: Accountability for Human Rights Violators in the United States: Hearing Before the Subcomm. on Human Rights and Law*, 110th Cong. 2 (2007) [hereinafter “Mandelker Testimony”] (statement of Sigal P. Mandelker, Deputy Assistant Att’y Gen. Criminal Division Department of Justice), available at <http://foreign.senate.gov/testimony/2008/MandelkerTestimony080409a.pdf>.

72. *Id.* at 2-3.

73. *Id.* at 3.

74. David A. Melson, *Military Jurisdiction Over Civilian Contractors: A Historical Overview*, 52 NAVAL L. REV. 277, 316-17 (2005).

agencies were supposed to coordinate a plan for implementing the MEJA, but they never did.<sup>75</sup> Given the lack of guidance as to how and when to apply the MEJA, it is practically a dead letter law today.<sup>76</sup>

Another factor adding to the MEJA's ineffectiveness are the practical/logistical difficulties associated with the prosecutions of overseas contractor crime. The OJAC recognized that the major practical problem from a law like the MEJA would be that victims, witnesses, and other evidence will be at the site of the crime, which will most likely be thousands of miles away.<sup>77</sup> Getting all the evidence to a U.S. federal court would prove to be extremely burdensome or impossible in many cases.

In testimony before the Senate Committee on Foreign Relations, Robert E. Reed, a DoD attorney, confirmed the OJAC's fears concerning the practical/logistical problems.<sup>78</sup> Under the MEJA, it is up to the individual U.S. Attorney's office that is assigned the case, to prosecute the case. In the case of a prosecution in Iraq, this would mean traveling thousands of miles to Iraq on multiple occasions, attempting to gather information in a warzone and attempting to get whatever evidence they can find into a court in the U.S.<sup>79</sup> In addition, it is up to the individual office to fund the prosecution out of its own budget.<sup>80</sup> Such a prosecution could conceivably sap the entire annual budget of a single U.S. Attorney's office.

As noted above, the MEJA was contemplated as one of a set of laws that the U.S. could rely on to control crimes by contractors, but it was not meant to stand alone. In theory, the MEJA could stand alone as the way by which contractor crime could be controlled. Given enough resources it is conceivable that federal prosecutors in the U.S. could prosecute these cases, but thus far the federal government seems to lack the will to make the MEJA effective. If the government is unwilling to throw its full support behind the MEJA it must be supplemented by the new Article 2(a)(10) to allow for more practical and efficient prosecution of contractor crimes.

#### IV. THE AMENDMENT TO UCMJ ARTICLE 2(A)(10)

On October 17, 2006, Congress changed the statutory framework of the law surrounding the military's ability to hold contractors accountable via military

75. *Closing Legal Loopholes: Justice for Americans Sexually Assaulted in Iraq and Afghanistan: Hearing Before the Comm. on Foreign Relations*, 110th Cong. 3 (2008) [hereinafter "Reed Testimony"] (statement of Robert E. Reed, Associate Deputy General Counsel for Military Justice and Personnel Policy Department of Defense), available at <http://foreign.senate.gov/testimony/2008/ReedTestimony080409a.pdf>.

76. *Proposals to Reform the Military Justice System: Hearing Before the Subcomm. on Constitution, Civil Rights and Civil Liberties, Comm. on the Judiciary*, 110th Cong. 6 (statement of Eugene R. Fidell, President of the National Institute of Military Justice and Senior Research Scholar in Law and Florence Rogatz Lecturer in Law, Yale Law School), available at <http://judiciary.house.gov/HEARINGS/PDF/FIDELL090730.PDF>.

77. *Id.*

78. Reed Testimony, *supra* note 75, at 2.

79. Peter W. Singer, *The Law Catches up to Private Militaries, Embeds*, BROOKINGS, Jan. 4, 2007, [http://www.brookings.edu/articles/2007/0104defenseindustry\\_singer.aspx](http://www.brookings.edu/articles/2007/0104defenseindustry_singer.aspx).

80. *Id.*

court-martial.<sup>81</sup> Buried deep in the John Warner National Defense Authorization Act for Fiscal Year 2007 was a provision that changed the words “time of war” in UCMJ Article 2(a)(10) to “declared war or *contingency operations*.”<sup>82</sup> The term contingency operation was added in order to cover instances, like the operations in Iraq and Afghanistan, where the U.S. military was engaging in armed conflict outside of an official declaration of war.<sup>83</sup> This seemingly significant change was passed with little fanfare. Senators Lindsey Graham and John Kerry co-sponsored the amendment and added it to the Defense Authorization Act as a floor amendment that was quickly and unanimously passed without any recorded debate.<sup>84</sup> With the passage of this law, the vision of the OJAC ten years earlier was finally realized, and the military now had the authority to effectively control civilian contractors operating with its units.

Since its passage there has been some clarification as to how and under what circumstances the new law will be used. A DoD memo sent out on March 10, 2008 stated that the first step in any prosecution under the new Article 2(a)(10) amendment is to alert the DoJ.<sup>85</sup> Once the military notifies the DoJ of the impending prosecution the DoJ decides whether it will take the case or not, but during this time the military continues its investigation.<sup>86</sup> The DoJ has 14 days to notify the DoD whether it intends to pursue prosecution or whether it needs more time to decide.<sup>87</sup> If the DoJ decides to pursue prosecution then the military must end its investigation and turn it over to the DoJ to commence the prosecutorial process.<sup>88</sup> If the DoJ does not respond within the 14 days or responds and says it will not pursue prosecution, then the military can commence prosecution under the new UCMJ Article 2(a)(10).<sup>89</sup>

81. Kara M. Sacilotto, *Jumping the (Un)Constitutional Gun?: Constitutional Questions in the Application of the UCMJ to Contractors*, 37 PUB. CONT. L.J. 179, 180 (2008).

82. *Id.*

83. OJAC REPORT, *supra* note 2, at 33. A major concern of the OJAC was that Article 2(a)(10), as it existed, only allowed for court martial jurisdiction in a time of war. The “in time of war” language was problematic because the United States has not officially declared a war since World War II, and *Averette* limited the phrase only to congressionally declared wars. In order to remedy this legal deficiency the OJAC recommended that Article 2(a)(10) be revised to include “contingency operations.” The concept of a “contingency operation” is not new, but the OJAC wanted to redefine it in to mean a military operation in which there is combat or the threat of combat. The committee wanted the definition of “contingency operation” to be narrow. The OJAC sought to confine the reach of a contingency operation by requiring that the operation be one designated by the Secretary of Defense so that there would be a bright line rule in which the term only covered those operations in which offenses by civilians would have a substantial impact on operational success. *Id.*

84. <http://thomas.loc.gov/cgi-bin/query/D?c109:6:./temp/~c109rHuFRf>.

85. Memorandum from Robert Gates, Secretary of Defense, to Secretaries of the Military Departments (UCMJ Jurisdiction Over DoD Civilian Employees, DoD, Contractor Personnel, and Other Persons Serving With or Accompanying the Armed Forces Overseas During Declared War and in Contingency Operations 2008), *available at* <http://www.dtic.mil/whs/directives/corres/pdf/sec080310ucmj.pdf>.

86. *Id.*

87. *Id.* at Attachment 3.

88. *Id.* at Attachment 2.

89. *Id.*

## A. Constitutional Hurdles for the Newly Amended UCMJ Article 2(a)(10)

The new Article 2(a)(10) provides an important and necessary tool in holding contractors accountable for their crimes. However, the new law does not come without its problems. It is questionable whether Congress can pass a law that subjects contractors to power of a military court. The sections below will outline the potential constitutional challenges that face the new Article 2(a)(10).

### 1. Article I, § 8, clause 14 and the “Necessary and Proper Clause”

In *Reid*, the government argued that Congress had the power to create laws that subjected civilians to court-martial jurisdiction under the Constitution’s Article I, section 8, clause 14 in conjunction with the “Necessary and Proper Clause.”<sup>90</sup> Article I, section 8, clause 14 of the Constitution allows Congress “[t]o make rules for the government and regulation of the land and naval forces.”<sup>91</sup> Article I, section 8 also contains the “Necessary and Proper Clause” which allows Congress to carry out its authority in any way it chooses as long as that action does not violate the Constitution.<sup>92</sup> The argument was that these two clauses taken together gave Congress power to subject all persons to court-martial jurisdiction if it was necessary to regulate the military.<sup>93</sup>

The Court shot down this argument saying that Congress cannot use the “Necessary and Proper Clause” to extend court-martial jurisdiction to include civilians because such an extension is not allowed by the language of Article I, section 8, clause 14. The Court interpreted “land and naval forces” to include only members of the armed services. Even though the Court rejected this argument when it decided *Reid*, the door is still open for a court to now find this argument persuasive.

The controversies in *Reid* were based around the crimes of family members of active duty servicemen and not contractors.<sup>94</sup> The Court specifically said that “land and naval forces” cannot extend to “civilian wives, children and other dependents”;<sup>95</sup> however, the Court then said there might be circumstances where someone who is not an active duty military member could be considered part of the “land and naval forces.”<sup>96</sup> Now that contractors are such a significant portion of deployed military forces, a much stronger argument can be made that they constitute part of the “land and naval forces.” The only connection between the military and the two wives in *Reid* was that they were married to members of the military. They did not perform any sort of service for the military or participate in the military’s activities in any direct way.

90. *Reid*, 354 U.S. at 17-23.

91. U.S. CONST. art. I, § 8, cl. 14.

92. U.S. CONST. art. I, § 8; See ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 241 (3d ed., Aspen Publishers 2006).

93. *Reid*, 354 U.S. at 19-20.

94. *Id.* at 4.

95. *Id.* at 19-20.

96. *Id.* at 23.

The case is not the same with contractors accompanying the military into the field. Most prominently, and most controversially, private security contractors now serve a variety of functions which allow them to engage human targets with weapons at their discretion. It is the case of the private security contractor where the “land and naval forces” exception in *Reid* most likely applies. The activities that security contractors engage in blur the line between civilian and soldier to the point where distinguishing between the two can be nearly impossible. It could be harder to make the case that the contractor who provides logistical or transportation support falls within the exception in *Reid*. However, although the logistical and transportation based contractors do not engage in actions like security contractors, they still provide a service that would traditionally be performed by military personnel, but for the outsourcing by contract.

## 2. Fifth and Sixth Amendment Concerns

There are two major Bill of Rights concerns with respect to the new Article 2(a)(10). The Fifth Amendment grants a criminal defendant the right to an indictment by a grand jury.<sup>97</sup> If a contractor were prosecuted through the U.S. civilian justice system his case would be sent to a grand jury to determine whether there is enough evidence to move forward with the case. These proceedings are secret, and the accused and his attorney are not allowed to be present.

In contrast, the military justice system does not provide for the right to a civilian grand jury, but does provide for access to an analogous proceeding.<sup>98</sup> As opposed to secretive civilian grand jury proceedings, the military justice system’s grand jury equivalent allows for proceedings in which the accused and his counsel may be present, and the accused may cross-examine witnesses.<sup>99</sup> This means that the military proceeding actually provides an accused person with more rights than a civilian grand jury. Given these expanded rights a court should have little trouble in finding that a court-martial provides sufficient Fifth Amendment protection to civilian contractors.

More contrast is found between civilian and military criminal processes when the Sixth Amendment is examined. Two issues exist with respect to the Sixth Amendment right to an impartial jury. First, the Manual for Courts-Martial only requires that the jury consist of five members.<sup>100</sup> The Constitution does not require that a jury contain a certain amount of jurors, but the Supreme Court’s decision in *Ballew v. Georgia*<sup>101</sup> specifically held that a panel of five jurors was insufficient to meet the requirements of the Sixth Amendment.<sup>102</sup> Furthermore, the military jus-

97. U.S. CONST. amend. V.

98. Cara-Ann M. Hamaguchi, *Between War and Peace: Exploring the Constitutionality of Subjecting Private Civilian Contractors to the Uniform Code of Military Justice During “Contingency Operations”*, 86 N.C. L. REV. 1047, 1055 (2008).

99. Sacilotto, *supra* note 80; see Article 32 UCMJ; Hamaguchi, *supra* note 98, at 1055.

100. Manual for Courts-Martial, United States R.C.M. 501(a)(1)(a).

101. *Ballew v. Georgia*, 435 U.S. 223 (1978).

102. Hamaguchi, *supra* note 98, at 1056.

tice system does not require a unanimous verdict for a conviction.<sup>103</sup> Again, unanimity is not a requirement for due process to be met<sup>104</sup>, but when coupled with the military's lower numerical requirement for jurors, non-unanimous verdicts could potentially violate constitutional rights of civilian defendants.<sup>105</sup>

The other Sixth Amendment concern is the composition of military juries. While civilian juries are chosen from diverse civilian populations in the district where the trial is to be held, military juries are chosen from active duty members of the military.<sup>106</sup> Courts-martial do allow for a similar *voir dire* procedure<sup>107</sup>, but this procedure may not be as effective when jurors are chosen from a more homogenized group than would be found in the civilian world. Another concern is that soldiers may harbor ill will towards civilian contractors leading to military juries being more likely to convict a defendant who is a contractor.<sup>108</sup>

### **B. Arguments Against Fifth and Sixth Amendment Challenges to the New Article 2(a)(10)**

Of these two constitutional hurdles, the Sixth Amendment concerns present a greater obstacle than those of the Fifth Amendment. The Sixth Amendment confers what are considered “fundamental rights.” Fundamental rights receive a great deal of protection from the courts and are rarely susceptible to government infringement. For this reason, the Sixth Amendment issue as to courts-martial, create the biggest threat to the new Article 2(a)(10).<sup>109</sup> Furthermore, the Court's decision in *Reid v. Covert* seemed to be more concerned with Sixth Amendment violations than Fifth Amendment violations because courts-martial are less protective of Sixth Amendment rights.<sup>110</sup>

If the new law granting court-martial jurisdiction over contractors is challenged under this fundamental rights theory the government will have to show a “compelling interest” for infringing on the Sixth Amendment.<sup>111</sup> The government will have to convince a court that allowing for courts-martial of contractors is a vital interest achieved by the new law.<sup>112</sup> In addition to a compelling interest the government will have to show that the new law is necessary to achieve its objective, which means it must show that it could not obtain its goal through less restrictive means.<sup>113</sup>

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103. *Id.* at 1057.

104. *Johnson v. Louisiana*, 406 U.S. 356, 359 (1972).

105. *Hamaguchi*, *supra* note 98, at 1057.

106. R.C.M. 503(a)(2).

107. R.C.M. 912.

108. *Hamaguchi*, *supra* note 98, at 1058. Military members may dislike civilian contractors because they steal quality soldiers and/or because civilian contractors are slowly encroaching on the missions and responsibilities that have historically belonged to the military.

109. *CHEMERINSKY*, *supra* note 92, at 792.

110. *Reid*, 354 U.S. at 8-9.

111. *CHEMERINSKY*, *supra* note 92, at 797.

112. *Id.* Interestingly enough the Court did recognize the winning of a war as satisfying the compelling interest standard for strict scrutiny. *See Korematsu v. United States*, 323 U.S. 214 (1944).

113. *Id.*

The fundamental rights argument will be an onerous burden to overcome. Showing a compelling interest should be the less difficult of the two prongs. The government could try to make the argument that such action is necessary in order to win a war. As has been noted above, crimes by civilian contractors hurt the military's mission and make it substantially more difficult to accomplish, but a court may find this too tangential to allow intrusion on a fundamental right. A better argument could be that the compelling interest is in seeing criminals brought to justice and many criminal acts committed by contractors have thus far gone unpunished. Punishment of these criminals is more likely to be achieved through courts-martial because of the substantial obstacles facing civilian prosecutions of criminals in conflict zones.

Showing that there is no other reasonable, less intrusive path will be more difficult because another path already exists in the form of the MEJA statute. The MEJA allows for prosecutions of these same contractors, but allows them to proceed through civilian prosecuting authorities in civilian courts with all of the normal constitutional protections. A counter-argument is that the MEJA has thus far been a virtual failure. Since its passage very few civilian criminals have actually been prosecuted, and the U.S. Attorney's offices responsible for carrying out the prosecutions seem reluctant to do so. Again, this is because of the financial and practical difficulties that are posed by prosecutions of crimes that happen in a war zone thousands of miles away. The government could make the argument that the only way justice can truly be achieved is by allowing military courts to conduct them, and the military is much more able to investigate the crimes and conduct the trials than the civilian justice system.

#### **V. SUPREME COURT PRECEDENT WILL ALLOW LEGISLATION THAT SUBSTITUTES TRADITIONAL PROCEDURES WITH ALTERNATIVES TO BE CONSTITUTIONAL**

Alternatives to the traditional civilian criminal procedure protections are not a new idea. Certain situations sometimes require civilians to have their usual protections modified. In *Ex Parte Milligan*, the Court recognized that the Writ of Habeas Corpus may be suspended.<sup>114</sup> In the recent but related case of *Boumediene v. Bush*, the Court considered whether the Combatant Status Review Tribunals ("CSRTs") provided sufficient procedural protections for prisoners being held as enemy combatants.<sup>115</sup>

In *Boumediene*, the Supreme Court found that the CSRTs of prisoners deemed "enemy combatants" did not provide procedural protections that comported with the constitution.<sup>116</sup> These CSRTs are analogous to the courts-martial allowed by the new Article 2(a)(10) because they are military justice procedures used against individuals who are not formally connected to the military. The alleged procedural

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

115. *Boumediene v. Bush*, 128 S. Ct. 2229 (2008).

116. *Id.* at 2260.



deficiencies of the CSRTs included: 1) the fact that the detainee was not allowed to have a lawyer assigned to his case; 2) the government's evidence at the CSRT was presumed to be valid; 3) the ability of the detainee to rebut the evidence was extremely limited; and 4) the appeals process was insufficient to cure these deficiencies.<sup>117</sup> All of these factors led the Court to determine that the process afforded to these detainees failed to meet constitutional minimums. Although the Court found the CSRTs were not a sufficient alternative, it did not find that procedural alternatives would never suffice.

The Court could consider a court-martial to be a sufficient procedural alternative because court-martials provide an accused more rights than the CSRTs. To begin, the accused is entitled to counsel.<sup>118</sup> Furthermore, court-martial proceedings protect the accused against unlawful searches and seizure, compelled self-incrimination, and allows for discovery of evidence.<sup>119</sup> As stated above, the military grand jury equivalent lends itself to more protection for an accused than its civilian counterpart. Also, the military appellate process affords greater protection on appeal than civilian trials because every case is reviewed *de novo*, allowing for more scrutiny into the actions of the trial court.<sup>120</sup> These significant differences between a military judicial process the Court found to be unconstitutional (the CSRTs) and courts-show that courts-can, and should, be deemed to be a sufficient alternative to civilian trials for those civilians that accompany armed forces overseas.

Justice Harlan's concurring opinion in *Reid* stated that courts martial for civilians could be a sufficient procedural alternative if the circumstances call for it. Harlan only concurred in the result in *Reid* because it was a capital offense, and he felt that the gravity of a capital case did not allow for a civilian's trial rights to be replaced with those of the military.<sup>121</sup> Justice Harlan argued that, in other cases, military courts-martial could be a sufficient alternative to a civilian trial. He felt that, under changing circumstances, an expansion of military jurisdiction over civilians did not violate the Framers' intentions of protecting against unchecked military power.<sup>122</sup> Much of his opinion focused on his belief that civilians serving with the U.S. armed forces overseas are not necessarily guaranteed traditional constitutional trial rights.

In other words . . . there is no rigid and abstract rule that Congress, as a condition precedent to exercising power over Americans overseas, must exercise it subject to all the guarantees of the Constitution, no matter what the conditions and considerations are that would make adherence to a specific guarantee altogether impracticable and anomalous.<sup>123</sup>

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117. *Id.* at 2281.

118. R.C.M. 401(b).

119. James B. Roan & Cynthia Buxton, *The American Military Justice System in the New Millennium*, 52 A.F. L. REV. 185, 204-05 (2002).

120. *Id.* at 210.

121. *Reid*, 354 U.S. at 77 (Harlan, J., concurring).

122. *Id.* at 67-68.

123. *Id.* at 74.

Justice Harlan came to the conclusion that grand jury indictment and jury trial were not required for the trial of a civilian, and that the conditions of the particular circumstance should be weighed in determining whether or not to use court-martial jurisdiction over a civilian.<sup>124</sup>

Another important point that the Court made in *Boumediene* was that it was not absolutely necessary to use an alternative process like the CSRTs because the military's mission would not be compromised by the extra time it would take for the detainees at Guantanamo to go through normal habeas corpus proceedings.<sup>125</sup> The Court contrasted this with the situation in the case of *Johnson v. Eisentrager*,<sup>126</sup> where several German soldiers contested their detention by American forces after World War II.<sup>127</sup> The Germans in *Eisentrager* claimed they were actually civilians and not soldiers so they brought a suit requesting that a federal district court review the conditions of their confinement and discharge them from custody because their trial violated the Constitution.<sup>128</sup> The Germans lost their suit and the Court said that it did not make a difference whether they were soldiers or civilians.<sup>129</sup>

The *Boumediene* decision argues that one of the reasons the procedures used in *Eisentrager* were sufficient was that the circumstances surrounding the aftermath of WWII created security concerns because the U.S. was responsible for securing an area of 57,000 square miles and a population of 18 million.<sup>130</sup> Because of this monumental task, the Court felt that judicial interference in the *Eisentrager* situation would be inappropriate given the efforts of American military commanders to effectuate control over the area.<sup>131</sup>

The reasoning that the Court uses in *Boumediene* is directly applicable to the situation facing U.S. forces in Iraq and Afghanistan. U.S. forces in Iraq actually face a greater task than the U.S. forces in *Eisentrager* because they are responsible for the security of a country that covers an area of 169,285 square miles (Iraq) and 251,825 square miles (Afghanistan) with populations of over 28 million people in both countries.<sup>132</sup> American military commanders face a daily battle in trying to protect U.S. forces from insurgent attacks. Keeping order amongst both soldiers and civilians aiding in this fight is essential. Allowing crimes by civilians to go unpunished undermines the military's mission and can affect morale among everyone attempting to restore order in these countries.

It is true that an important distinction can be drawn between *Boumediene* and *Eisentrager* and the contractors covered under the new Article 2(a)(10), being that those two cases involved non-U.S. citizens. It can be argued that because of this

124. *Id.* at 76-78.

125. *Boumediene*, 128 S. Ct. at 2260.

126. *Johnson v. Eisentrager*, 339 U.S. 763 (1950).

127. *Boumediene*, 128 S. Ct. at 2260.

128. *Eisentrager*, 339 U.S. at 767.

129. *Id.* at 765.

130. *Boumediene*, 128 S. Ct. at 2261.

131. *Id.*

132. *The World Factbook 2009*, Washington, DC: Central Intelligence Agency, 2009, available at <https://www.cia.gov/library/publications/the-world-factbook/geos/iz.html#People>. This site lists Iraq's land area at 437,367 square kilometers, but that number was converted to miles for consistency's sake.

distinction, *Boumediene* and *Eisentrager* are irrelevant to the argument concerning court-martial of American civilians under Article 2(a)(10).<sup>133</sup> While this argument cannot be fully fleshed out in this paper, a suggestion is that *Boumediene* and *Eisentrager* are useful because they draw attention to the fact that alternative criminal procedures are sometimes necessary. Even though *Boumediene* struck down the argued procedure because it was unconstitutional, it did not say that alternative procedures are always unconstitutional. The CSRTs were unconstitutional because they deprived detainees of the most basic rights. The same is not true of courts-martial. We subject those that serve in the military to the court-martial system everyday, and do not question its sufficiency as to them even though they are also American citizens. While it is true that the court-martial system is not something we want to impose upon American civilians as a matter of course, it is important to consider that there may be no other way to serve the ends of justice in certain situations, like the one now facing us in Iraq.

## VI. CONCLUSION

The ultimate goal is to serve the ends of justice. Unless the alternatives mentioned in this paper, or similar measures, are effectively implemented allowing for the courts-martial of contractors, the ends of justice will not be achieved. There has thus far been no indication from the contracting community that they wish to include contract provisions that will subject their employees to court-martial jurisdiction. Without cooperation from the contracting community, that alternative will not be realized. The MEJA is a promising alternative to court-martial jurisdiction in theory, but effectively putting it into practice has proven to be a problem. Relying on civilian prosecuting authorities to carry out prosecutions of crimes committed thousands of miles away has resulted in consequences for only a few criminal acts. The fact is that the burden on civilian prosecutors and courts here in the U.S. may be too overwhelming to allow for justice to be served via the MEJA statute. If this is true, then requiring the courts-martial of civilians is a necessary step in controlling contractor crime.

Without a viable alternative, courts-martial of contractors working with U.S. armed forces must be permitted because it allows for rapid response to crimes and more rapid judicial procedures. This increased reaction speed also allows for military commanders to more effectively control their operational area which helps maintain morale amongst those under their command. Due to the increased effectiveness and efficiency in carrying out justice allowed by the new Article 2(a)(10), it should be held to be a constitutionally sufficient procedural alternative to trials in civilian court.

133. See *Eisentrager*, 339 U.S. at 768-781.