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Bringing Discipline to the Civilianization of the Battlefield: A Proposal for a More Legitimate Approach to Resurrecting Military-Criminal Jurisdiction over Civilian Augmentees**

GEOFFREY S. CORN*

I. INTRODUCTION

In October 2006 the National Defense Authorization Act of 2007 became law.¹ Included within the thousands of statutory provisions of this Act was an amendment to the Uniform Code of Military Justice (“UCMJ”).² Unexpected by even the Department of Defense, this amendment radically altered what is best described as the *de facto* immunity from military-criminal jurisdiction that civilians accompanying the armed forces in operational areas enjoy. Pursuant to *United States v. Averette*,³ a 1970 U.S. Court of Military Appeals case, these civilians—a group that includes both civil servants and contractors—were beyond the reach of military jurisdiction in all wars not formally declared by Congress.⁴ This decision produced what can almost be described as an article of faith within the military-legal community that civilians would never again be subject to military-criminal jurisdiction.⁵

** The term “civilian augmentee” is not a doctrinal term within the U.S. Department of Defense. It will, however, be used throughout this article to refer to civilians who work for the armed forces to augment military capabilities in areas of active military operations. These civilians are designated “civilians accompanying the force in the field” in both the Uniform Code of Military Justice and in most doctrinal sources.

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1. John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364, 120 Stat. 2083 (2006).

2. *Id.* § 552, 120 Stat. at 2217 (to be codified at 10 U.S.C. § 802) (“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’.”).

3. 19 C.M.A. 363 (1970).

4. *Id.* at 365.

5. See Joseph R. Perlak, *The Military Extraterritorial Jurisdiction Act of 2000: Implications for Contractor Personnel*, 169 MIL. L. REV. 92, 97–98 (2001); see also U.S. ARMY JUDGE ADVOCATE GENERAL’S LEGAL CENTER AND SCHOOL, OPERATIONAL LAW HANDBOOK 129–48 (John Rawcliffe & Jeannine Smith eds., 2006) [hereinafter OPERATIONAL LAW HANDBOOK]. Although the *Operational Law Handbook* is not a source of official Army or Department of

This immunity, coupled with the exponential increase in the civilianization of the modern "battle space," led military commanders, lawmakers and nongovernmental organizations to become increasingly frustrated with the lack of disciplinary sanctions responsive to civilian misconduct.⁶

This concern was not a post-September 11 phenomenon. In fact, the civilianization trend began in earnest following the end of the Cold War in response to the reduction of the armed forces.⁷ During the 1990s, Congress responded to this trend by passing the War Crimes Act

Defense doctrine, it is regarded throughout the military legal community (and other governmental agencies) as a concise and pragmatically oriented summary of other binding sources of authority concerning military operations.

6. According to one recent article:

It is estimated there are as many as 100,000 civilian support personnel working in Iraq, including highly trained former special forces soldiers, drivers, cooks, mechanics, plumbers, translators, electricians and laundry workers.

A trend toward "privatizing war" has been accelerating steadily since the end of the Cold War. The U.S. armed forces has shrunk from 2.1 million when the Berlin Wall came down in 1989 to 1.4 million today.

"At its present size, the U.S. military could not function without civilian contractors," said Jeffrey Addicott, an expert at St. Mary's University in San Antonio. "The problem is that the civilians operate in a legal gray zone. There has been little effort at regulation, oversight, standardized training and a uniform code of conduct."

Bernd Debusmann, *War Is Also Taking a Toll on Contractors: At Least 647 Support Personnel Killed*, SAN DIEGO UNION-TRIB., Oct. 12, 2006; see also Michael N. Schmitt, *War, International Law, and Sovereignty: Reevaluating the Rules of the Game in a New Century: Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees*, 5 CHI. J. INT'L L. 511 (2005). As Professor Schmitt notes:

What accounts for the explosion of contractor personnel and civilian government employees on or near the battlefield? Cost is one factor. In the aftermath of the Cold War, most governments sought to realize the "peace dividend" by drawing down legacy armies sized and equipped to fight a global conflict. But the dividend never materialized; on the contrary, many states found their security environment complicated by the demise of (stabilizing) bipolarity and the emergence of new threats like transnational terrorism and internal unrest. Yet, for domestic political reasons, downsizing was a process that usually proved irreversible.

In light of this dilemma, the use of civilians in support roles proved especially appealing because it freed up military personnel to perform combat missions. In this way, armed forces avoided a straight-line relationship between reduced numbers and reduced combat effectiveness. In the US, the consequent civilianization was labeled "Transformation."

Id. at 517 (citations omitted). As of October 12, 2006, more than 600 civilian-support personnel have been killed while performing duties associated with the armed conflict in Iraq. See Debusmann, *supra*.

7. See Schmitt, *supra* note 6, at 517.

of 1996⁸ and the Military Extraterritorial Jurisdiction Act of 2000,⁹ both of which subjected civilians accompanying the armed forces to federal-criminal jurisdiction for certain felony offenses. Unfortunately—or perhaps fortunately depending on perspective—the executive branch did not efficiently implement these statutes, and they were rarely used to respond to civilian-augmentee misconduct.¹⁰ Nonetheless, these statutes provided the exclusive criminal and disciplinary remedy available to military commanders to respond to such misconduct.¹¹ Neither the impact on the good order and discipline of the military unit with which the civilian was associated, nor the perception of “discipline inequity” resulting from disparate treatment of civilian and military personnel working in close proximity, justified any alternate remedy.¹²

In what must have been a response to these statutes’ ineffective use and to the increasing concern over civilian misconduct associated with the global War on Terror,¹³ Congress did what many military legal experts thought unthinkable: it amended the UCMJ to resurrect military jurisdiction over civilians during all “contingency” operation.¹⁴ With one paragraph of a massive statute, Congress effectively subjected the tens of thousands of U.S. civilians working for the armed forces—a group referred to throughout this article as “civilian augmentees”—to

8. See Pub. L. No. 104-192, 110 Stat. 2104 (codified as amended in scattered sections of 18 U.S.C.).

9. See Pub. L. No. 106-523, 114 Stat. 2488 (codified as amended in 18 U.S.C. §§ 3001, 3261–3267).

10. See Wm. C. Peters, *On Law, Wars, and Mercenaries: The Case for Courts-Martial Jurisdiction over Civilian Contractor Misconduct in Iraq*, 2006 BYU L. REV. 367, 373, 414 (2006); see also Perlak, *supra* note 5, at 104.

11. See OPERATIONAL LAW HANDBOOK, *supra* note 5, at 136–37. Although civilians accompanying the force were placed under the jurisdiction of the UCMJ by operation of Article 2 of the Code, application of this jurisdiction was restricted to periods of formally declared war as the result of the Court of Military Appeals decision in *United States v. Averette*, 19 C.M.A. 363 (1970). See *infra* notes 97–105 and accompanying text.

12. See generally Thomas G. Becker, *Justice on the Far Side of the World: The Continuing Problem of Misconduct by Civilians Accompanying the Armed Forces in Foreign Countries*, 18 HASTINGS INT’L & COMP. L. REV. 277 (1995).

13. This term will be used throughout this article as a convenient reference for the variety of military operations conducted by the United States after September 11, 2001. Use of this term is not intended as a reflection on this author’s position on the legitimacy of characterizing these operations as a “war.” While the author acknowledges the hyperbolic nature of this term, it is intended to refer to combat military operations against armed and organized opposition groups.

14. See 10 U.S.C.A. § 101(a)(13) (West 2007) (“The term ‘contingency operation’ means a military operation that—(a) is designated by the Secretary of Defense as an operation in which members of the armed forces are or may become involved in military actions, operations, or hostilities against an enemy of the United States or against an opposing military force; or (b) results in the call or order to, or retention on, active duty of members of the uniformed services under section 688, 12301(a), 12302, 12304, 12305, or 12406 of this title, chapter 15 of this title, or any other provision of law during a war or during a national emergency declared by the President or Congress.”); see also OPERATIONAL LAW HANDBOOK, *supra* note 5, at 129–30.

the full corpus of the UCMJ during any operation authorized by the Secretary of Defense.¹⁵ Although ostensibly motivated by a legitimate desire to improve the disciplinary arsenal available for military commanders to address misconduct by civilians associated with their units, the scope of jurisdiction this amendment established raises troubling constitutional and pragmatic concerns.

The most obvious of these concerns is the trial by a military court of a U.S. citizen who is *not* a member of the armed forces. Imagine that inside a former Saddam palace in Iraq sits a military courtroom. There is a prosecutor and defense counsel, both junior JAG officers; a more senior JAG officer presiding as a military judge; an enlisted soldier serving as a court reporter; a chair for witnesses; and a jury box in which approximately seven military personnel of various rank and experience sit. Consistent with the tradition of bringing military justice to the battlefield,¹⁶ such courts are convened routinely in places like Iraq and Afghanistan and there is nothing particularly remarkable about this scene. But now imagine that the individual sitting next to the military defense counsel is not another member of the armed forces, but a U.S. civilian—perhaps someone who signed up at a Kellog-Brown and Root job fair in Houston to drive a truck in Iraq.

What was unremarkable suddenly becomes remarkable. A U.S. citizen who is not a member of the armed forces faces a federal felony conviction in a non Article III court. A judge who does not enjoy life tenure presides. And the U.S. citizen is without the benefit of indictment by grand jury. In addition, this citizen's fate is to be decided by a panel of military personnel—anything but a jury of his peers.

In a seminal decision addressing the reach of the Bill of Rights, the Supreme Court in 1957 struck down a provision of the UCMJ that established military jurisdiction over civilian dependents residing on U.S. military bases overseas.¹⁷ The Court held that it was unconstitutional to subject these civilians to trial by courts-martial because military courts deprived citizens of fundamental constitutional rights.¹⁸ The Court was careful to indicate, however, that it was not necessarily addressing the

15. See John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364, § 552, 120 Stat. 2083, 2217 (2006) (to be codified at 10 U.S.C. § 802(a)(10)) ("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'.").

16. See OPERATIONAL LAW HANDBOOK, *supra* note 5, at 193–204 (describing criminal law in operations).

17. *Reid v. Covert*, 354 U.S. 1, 5 (1957).

18. *Id.* at 9–10 ("[I]n view of our heritage and the history of the adoption of the Constitution and the Bill of Rights, it seems particularly anomalous to say that trial before a civilian judge and by an independent jury picked from the common citizenry is not a fundamental right.").

constitutionality of such a forum in the very different context of a theater of military operations.¹⁹ This qualification was significant because Congress had established two distinct sources of military jurisdiction over civilians through the UCMJ.²⁰ The jurisdiction struck down by the Court in *Reid* extended to any civilian who was associated with the armed forces overseas, so long as there was a treaty or other agreement granting jurisdiction to the armed forces by the host nation.²¹ This source of jurisdiction was not limited to the exigency of active military operations. Thus, it reached any spouse or employee of the armed forces stationed abroad. In a different provision of the UCMJ—the one recently amended—Congress also established military jurisdiction over civilians accompanying the armed forces in the field during “time of declared war.”²² In *Reid*, the Court indicated that it was not ruling on this distinct source of jurisdiction.²³

This other basis of jurisdiction survived the *Reid* decision. Thus, although the prospect of a civilian being tried by a military court may seem remarkable today, it was the norm until 1970. From the inception of the Republic, civilians accompanying the armed forces during war-time have been subject to military-criminal jurisdiction,²⁴ which had been provided for in predecessors to the UCMJ²⁵ and which is currently incorporated in the UCMJ today.²⁶ In 1970, however, the Court of Military Appeals effectively eliminated this source of jurisdiction when it held that the phrase “in time of war” meant “a war formally declared by Congress.”²⁷

For the next thirty-four years, military-legal experts assumed that

19. *Id.* at 33 (“There have been a number of decisions in the lower federal courts which have upheld military trial of civilians performing services for the armed forces ‘in the field’ *during time of war*. To the extent that these cases can be justified, insofar as they involved trial of persons who were not ‘members’ of the armed forces, they must rest on the Government’s ‘war powers.’ In the face of an active hostile enemy, military commanders necessarily have broad power over persons in the battlefield. From a time prior to the adoption of the Constitution the extraordinary circumstances present in an area of actual fighting have been considered sufficient to permit punishment of some civilians in that area by military courts under military rules.”).

20. See 10 U.S.C. § 802(a)(10)–(11) (2000).

21. See *Reid*, 354 U.S. at 3 (discussing what is now 10 U.S.C. § 802(a)(11)).

22. See 10 U.S.C. § 802(a)(10).

23. See *Reid*, 354 U.S. at 33 (“From a time prior to the adoption of the Constitution the extraordinary circumstances present in an area of actual fighting have been considered sufficient to permit punishment of some civilians in that area by military courts under military rules.”).

24. See *id.*

25. When passed by Congress, the UCMJ had the intended purpose of “unifying, consolidating, revising, and codifying the Articles of War, the Articles for the Government of the Navy, and the disciplinary laws of the Coast Guard.” Pub. L. No. 81-506, 64 Stat. 107, 108 (1950) (current version at 10 U.S.C. §§ 801–946 (2000)).

26. See 10 U.S.C. § 802(a)(10)–(11).

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

civilians accompanying the armed forces, even during combat operations, were beyond the scope of military-criminal jurisdiction. Even as the number of such civilians expanded exponentially following the end of the Cold War,²⁸ with an accordant concern over how to hold them accountable for serious misconduct in locations where turning them over to host-nation jurisdiction was an unrealistic option, this assumption remained intact.²⁹ Then, like a bolt out of the blue in October 2006, the UCMJ was amended to resurrect military-criminal jurisdiction over these civilian augmentees.³⁰

This resurrection took the form of a one-paragraph provision in the National Defense Authorization Act of 2007, which reads as follows:

SEC. 552. CLARIFICATION OF APPLICATION OF UNIFORM CODE OF MILITARY JUSTICE DURING A TIME OF WAR.

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”.³¹

Purportedly inserted by Senator Graham of South Carolina,³² the amendment has the effect of subjecting any civilian—civil servant or contractor—“accompanying” the armed forces in a deployed location to the jurisdiction of the entire UCMJ, including the jurisdiction of military courts.³³ Because there is no legislative history for this amendment or any other background information that might have existed had it been enacted at the request of the Department of Defense, it is unclear how far this “accompanying” theory might reach. Experts would likely assert that the term refers to civilians connected to the military through some kind of employment relationship.³⁴ But military jurisprudence from an earlier era suggests that the net may have been thrown much farther, able to reach other civilians only peripherally associated with the military,³⁵ such as journalists and former employees who remain in the

28. See Schmitt, *supra* note 6, at 517.

29. See OPERATIONAL LAW HANDBOOK, *supra* note 5, at 136 (“Contractor employees are not subject to military law under the UCMJ when accompanying U.S. forces, except during a declared war.”).

30. See John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364, § 552, 120 Stat. 2083, 2217 (2006) (to be codified at 10 U.S.C. § 802).

31. *Id.* (bold omitted).

32. John M. Broder & James Risen, *Armed Guards in Iraq Occupy a Legal Limbo*, N.Y. TIMES, Sept. 19, 2007, at A1.

33. The amended version of § 802 establishes who is subject to the Code. Accordingly, any person falling into one of the personam-jurisdiction categories of Article 2 is subject to the entire UCMJ, including all the punitive prohibitions established by the Code and the plenary jurisdiction of all military courts. See 10 U.S.C.A. § 802(a) (West 2007).

34. See Peters, *supra* note 10, at 401–03.

35. See David A. Melson, *Military Jurisdiction over Civilian Contractors: A Historical*

deployed area. Nor is the jurisdiction limited to the type of common-law offenses normally applicable to civilians. Instead, it subjects these civilians to every punitive article in the UCMJ, including offenses unique to the military such as disrespect toward superiors,³⁶ disobedience of orders,³⁷ absence without official leave,³⁸ and desertion.³⁹

This amendment raises a troubling and difficult question: Does the decision of a U.S. civilian to accept employment supporting the armed forces in an area of active military operations justify the deprivation of some of the most fundamental constitutional rights of a criminal defendant? The history of military jurisdiction over civilians in active theaters of operations and the qualified holding of *Reid* both suggest an affirmative answer to this question.⁴⁰ But is there sufficient justification today to warrant resurrecting plenary military jurisdiction over these civilians? Assuming that the need to provide some meaningful remedy for serious criminal misconduct provides justification, it is essential to consider how Congress, working with the Department of Defense, changed the jurisdictional landscape during that thirty-four-year period of dormancy for military jurisdiction over civilians. When these changes are considered along with the scope of criminal proscription, and civilians are subjected to this amendment and the long-term stigmatization resulting from a conviction by a military court of general jurisdiction,⁴¹ the justification seems far less compelling than it did in previous eras.

Nonetheless, it would be disingenuous to suggest that there is no

Overview, 52 NAVAL L. REV. 277, 290–92 (2005). The problematic nature of this provision and the associated uncertainty as to the scope of jurisdiction has been recently highlighted by the controversy over alleged misconduct by “Blackwater” contractors in Iraq.

36. 10 U.S.C. § 889 (2000).

37. *Id.* § 891 (assaulting or willfully disobeying superior commissioned officer); *id.* § 892 (failure to obey order or regulation).

38. *Id.* § 886.

39. *Id.* § 885.

40. See Peters, *supra* note 10, at 369; see also Melson, *supra* note 35, at 282 (“[T]he set of laws governing civilians accompanying military forces is shaped by evolving concepts of constitutional rights, foreign policy concerns, and the military’s interest in maintaining order.”).

41. Under the UCMJ, three types of military courts are empowered to try individuals subject to the Code. The general court-martial is a court of plenary jurisdiction, empowered to try any person subject to the Code for any offense established by the Code, and to impose any punishment authorized by the Code. 10 U.S.C. § 816(1) (2000). A special court-martial is a court of more limited jurisdiction, empowered to try individuals other than commissioned officers, but limited in the authorized punishment it may adjudge (a maximum of one year confinement and a Bad Conduct punitive discharge). See *id.* §§ 816(2), 819. Conviction by either of these courts results in a federal felony record. A summary court-martial is the court of most limited jurisdiction. Like the special court-martial, it may not try commissioned officers. Authorized punishments are also limited, and do not include adjudging a punitive discharge (or any discharge from military service). *Id.* § 820. Most importantly for purposes of this article, a conviction by a summary court-martial *does not* result in a federal felony record. See *id.* § 820.

“disciplinary gap” related to civilian-augmentee misconduct, even when considering the change in federal-criminal jurisdiction. The rate of civilianization over the past two decades has resulted in an explosion of civilians who support the armed forces in operational areas.⁴² This has produced a disciplinary anomaly for military commanders. Although they are armed with a powerful arsenal of criminal and disciplinary remedies for misconduct committed by members of the armed forces, there is virtually no remedy for civilians working side by side with these service members. Eliminating this anomaly was a probable motive behind the recent amendment to the UCMJ. But the most important question related to this amendment remains unanswered: Does the nature of the military interest justify the scope of the jurisdictional resurrection?

This article will propose a negative answer to that question. Although acknowledging the conceptual constitutionality of this amendment, it will show how the uncertain authority of *Reid*, when coupled with the changes in federal-criminal law, calls into question the necessity for subjecting civilians to the full corpus of the UCMJ. In recognition of the genuine disciplinary concerns of military commanders in the contemporary operational area, however, the article will propose an alternative to the amendment. This alternative would subject civilian augmentees to the limited jurisdiction of summary courts-martial.⁴³ Such an amendment would empower the military commander to initiate quasi-judicial proceedings against civilians in a forum authorized to impose disciplinary-like sanctions. Unlike special⁴⁴ and general⁴⁵ courts-martial, however, a finding of guilt before a summary court would not result in a federal-criminal conviction. This alternate amendment would also remove from military jurisdiction the disposition of allegations of serious criminal misconduct not considered amenable to disciplinary-type sanctions. Instead, the disposition of these allegations would fall under the federal-criminal jurisdiction established by Congress in the 1990s.

Such a limited resurrection of military jurisdiction will provide commanders with a viable tool to impose disciplinary sanctions on civilians whose conduct jeopardizes the good order and discipline of the unit. And it will also protect the civilian from any criminal conviction absent protection of fundamental constitutional trial rights that the *Reid* Court considered so significant.⁴⁶ This alternative will accordingly strike a

42. See Chris Lombardi, *Law Curbs Contractors in Iraq*, A.B.A. J. EREP., May 14, 2004, <http://scrivovivo.net/chris/my14iraq.html>.

43. See 10 U.S.C. § 820.

44. See *id.* § 819.

45. See *id.* § 818.

46. See *Reid*, 354 U.S. at 8–9 (“This Court and other federal courts have held or asserted that

more equitable balance between the genuine needs of military commanders and the fundamental constitutional rights of civilians associated with their units.

A. *How the Jurisdictional Landscape for Civilian Augmentees Has Changed*

Because the *Averette* decision effectively nullified military jurisdiction over civilian augmentees,⁴⁷ some scholars have suggested the need to amend the “time of war” language of the UCMJ to restore this jurisdiction.⁴⁸ The de facto nullification of such jurisdiction damaged the effectiveness of U.S. military operations during the post-Cold War period.⁴⁹ During this period, the increased frequency of U.S. military operations combined with downsizing of the uniformed force produced an ever-growing population of civilian augmentees in operational areas.⁵⁰ Because of the “time of war” holding of *Averette*, these civilians were effectively immune from U.S. criminal jurisdiction.⁵¹ Exacerbating this de facto immunity was the reality that when these civilians committed serious criminal misconduct, it often occurred in places where turning them over to host-nation authorities for prosecution was never a feasible option—places like Bosnia, Kosovo, Somalia, Haiti, and theaters of actual-combat operations like Afghanistan and Iraq.

Well before the recent amendment to the UCMJ, Congress sought to fill this jurisdictional vacuum with two significant but clearly underused federal statutes—the War Crimes Act of 1996 (“WCA”)⁵² and the Military Extraterritorial Jurisdiction Act of 2000 (“MEJA”).⁵³ These statutes combined to provide a potentially effective source of criminal jurisdiction over civilian augmentees for the type of serious

various constitutional limitations apply to the Government when it acts outside the continental United States. While it has been suggested that only those constitutional rights which are ‘fundamental’ protect Americans abroad, we can find no warrant, in logic or otherwise, for picking and choosing among the remarkable collection of ‘Thou shalt nots’ which were explicitly fastened on all departments and agencies of the Federal Government by the Constitution and its Amendments.”) (citations omitted).

47. See Peters, *supra* note 10, at 395.

48. See, e.g., *id.* at 373–74, 395.

49. See generally Perlak, *supra* note 5, at 93 (“For over forty-three years, civilians accompanying the force overseas have been beyond court-martial jurisdiction and a significant portion of the overall criminal jurisdiction of the United States.”).

50. See Schmitt, *supra* note 6, at 517–18, 546.

51. See Peters, *supra* note 10, at 399–405.

52. Pub. L. No. 104-192, 110 Stat. 2104 (codified as amended in scattered sections of 18 U.S.C.).

53. Pub. L. No. 106-523, 114 Stat. 2488 (codified as amended in 18 U.S.C. §§ 3001, 3261–3267); see also Glenn R. Schmitt, *Closing the Gap in Criminal Jurisdiction over Civilians Accompanying the Armed Forces Abroad—A First Person Account of the Creation of the Military Extraterritorial Jurisdiction Act of 2000*, 51 CATH. U. L. REV. 55 (2001).

common-law offenses that their military counterparts would undoubtedly be prosecuted for committing.⁵⁴ By effectively filling the jurisdictional vacuum, Congress altered the jurisdictional landscape related to the necessity of subjecting civilians to military-criminal jurisdiction. This article contends that within this context, the resurrection of plenary military jurisdiction is an unnecessary return to an outdated jurisdictional concept. Further, the scope of jurisdiction resurrected by the recent amendment to the UCMJ is, independent of the existing federal-criminal jurisdiction established by the MEJA and the WCA, unnecessarily overbroad to provide criminal sanctions for civilian-augmentee misconduct. A more carefully crafted balance between military interests and those of civilian augmentees is both necessary and justified. The amendment to the UCMJ provides a seed for developing a solution for the issue of civilian-augmentee misconduct that strikes such a solution. As will be asserted in this article, however, limiting the extent of the resurrection of military jurisdiction is essential to achieve this objective.

II. THE NOT SO UNPRECEDENTED APPLICATION OF MILITARY JURISDICTION TO CIVILIAN AUGMENTEES.

For as long as the United States has fielded armed forces, civilian-support personnel have been associated with these forces in operational areas, and have been recognized as an essential component to military operations.⁵⁵ Often referred to as "sutlers" or "camp-followers," these civilians historically provided essential logistical support.⁵⁶ These civilians were also subject historically to military jurisdiction while they were associated with the armed forces.⁵⁷ This jurisdiction was based on the perceived necessity of empowering military commanders with authority to impose disciplinary and criminal sanctions on these civilians, an authority considered essential to the maintenance of good order and discipline in the military unit.⁵⁸

54. In fact, MEJA was responsive to a congressional mandate contained in the 1996 National Defense Authorization Act requiring the Department of Defense and the Department of Justice to review and make recommendations to Congress before January 15, 1997 "concerning the appropriate forum for criminal jurisdiction over civilians accompanying the Armed Forces in the field outside the United States in time of armed conflict." National Defense Authorization Act for Fiscal Year 1996, Pub. L. 104-106, § 1151, 110 Stat. 186, 467 (codified as amended in 10 U.S.C. § 802 note).

55. See SAMUEL ELIOT MORISON, *THE OXFORD HISTORY OF THE AMERICAN PEOPLE* 367 (1965) (noting the crucial role played by civilians in aiding Lewis and Clark's expedition in 1804); see also Peters, *supra* note 10, at 376 ("Civilians have accompanied American military forces in the ranks, in the field, and at post, camp, and station since the War of Independence.").

56. See WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 98-99 (2d ed. 1920).

57. *Id.* at 98.

58. See Becker, *supra* note 12, at 280 ("As part of an extensive 1920 revision of the Articles

Jurisdiction over civilian augmentees was established by the Continental Congress as far back as the Revolutionary War, in a predecessor to the UCMJ.⁵⁹ Colonel William Winthrop described this jurisdiction in his seminal treatise on military law:

"All retainers to the camp, and all persons serving with the armies of the United States in the field, though not enlisted soldiers, are to be subject to orders, according to the rules and discipline of war." [Article 63 of the Articles of War], which, with some slight modifications, has come down from our original code of 1775, which derived it from a corresponding British article, has always been interpreted as subjecting the descriptions of persons specified, not only to the orders made for the government and discipline of the command to which they may be attached, but also to trial by court-martial for violations of the military code. Protected as they are by the military arm, they owe to it the correlative obligation of obedience; and a due consideration for the *morale* and discipline of the troops⁶⁰

This jurisdiction was invoked routinely to prosecute a wide variety of both common-law and military offenses committed by civilian augmentees.⁶¹ World War II provided some of the most interesting examples of the range of offenses resulting in the court-martial of civilians.⁶² These included not only common-law offenses that civilians would be prosecuted for in civilian jurisdiction, such as assault and larceny, but also offenses unique to the military, such as desertion.⁶³

In 1950 U.S. military law was radically transformed and unified among all the branches of the armed forces. This transformation took the form of the UCMJ.⁶⁴ Enacted by Congress under its constitutional authority to make rules for the land and naval forces,⁶⁵ the UCMJ unified criminal and disciplinary process for the entire armed forces, established the jurisdiction of military courts, and established offenses falling

of War, Congress recognized a need to control and discipline the many civilians accompanying our expeditionary forces and thus adopted Article 2(d)").

59. The First Continental Congress adopted the Articles of War in June, 1775. Article LXIII allowed military officials to employ punitive measures against both soldiers and "independent company." See 2 LIBRARY OF CONGRESS, JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, at 121 (1905).

60. WINTHROP, *supra* note 56, at 98 (citations omitted). For an excellent discussion of the history of military jurisdiction over civilians, see also Peters, *supra* note 10, at 376-84.

61. See Melson, *supra* note 35, at 294-302.

62. See Michael E. Guillory, *Civilianizing the Force: Is the United States Crossing the Rubicon?*, 51 A.F. L. REV. 111, 118 (2001); see also Melson, *supra* note 35, at 289-93.

63. See Melson, *supra* note 35, at 289-94, 307.

64. Pub. L. No. 81-506, 64 Stat. 107 (1950) (current version at 10 U.S.C. §§ 801-946 (2000)). The UCMJ now contains a total of 146 articles applicable to all of the armed forces, including the U.S. Coast Guard. While some military service has developed certain restrictions on the implementation of the UCMJ, the statute binds all equally. See 10 U.S.C. §§ 801-946 (2000).

65. U.S. CONST. art. I, § 8, cl. 14.

under such jurisdiction.⁶⁶ Congress explicitly established personam jurisdiction of military courts in Article 2 of the Code, limiting such jurisdiction to specifically defined categories of citizens and aliens. Under this article, the Code—in other words the full corpus of the UCMJ—was applicable only to those individuals defined by Article 2 as “subject to the code.”⁶⁷ In keeping with historical practice, however,

66. See 10 U.S.C. §§ 877–943.

67. Article 2 lists twelve categories of individuals subject to the Code. Obvious among these are members of the armed forces, reserves in federal service, cadets and midshipmen. As amended, Article 2 of the UCMJ now reads:

§ 802. Art. 2. Persons subject to this chapter

(a) The following persons are subject to this chapter:

(1) Members of a regular component of the armed forces, including those awaiting discharge after expiration of their terms of enlistment; volunteers from the time of their muster or acceptance into the armed forces; inductees from the time of their actual induction into the armed forces; and other persons lawfully called or ordered into, or to duty in or for training in, the armed forces, from the dates when they are required by the terms of the call or order to obey it.

(2) Cadets, aviation cadets, and midshipman.

(3) Members of a reserve component while on inactive-duty training, but in the case of members of the Army National Guard of the United States or the Air National Guard of the United States only when in Federal service.

(4) Retired members of a regular component of the armed forces who are entitled to pay.

(5) Retired members of a reserve component who are receiving hospitalization from an armed force.

(6) Members of the Fleet Reserve and Fleet Marine Corps Reserve.

(7) Persons in custody of the armed forces serving a sentence imposed by a court-martial.

(8) Members of the National Oceanic and Atmospheric Administration, Public Health Service, and other organizations, when assigned to and serving with the armed forces.

(9) Prisoners of war in custody of the armed forces.

(10) In time of war, persons serving with or accompanying an armed force in the field.

(11) Subject to any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, persons serving with, employed by, or accompanying the armed forces outside the United States and outside the Commonwealth of Puerto Rico, Guam, and the Virgin Islands.

(12) Subject to any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, persons within an area leased by or otherwise reserved or acquired for the use of the United States which is under the control of the Secretary concerned and which is outside the United States and outside the Commonwealth of Puerto Rico, Guam, and the Virgin Islands.

(13) Lawful enemy combatants (as that term is defined in section 948a(2) of this title) who violate the law of war.

(b) The voluntary enlistment of any person who has the capacity to understand the significance of enlisting in the armed forces shall be valid for purposes of jurisdiction under subsection (a) and a change of status from civilian to member of the armed forces shall be effective upon the taking of the oath of enlistment.

(c) Notwithstanding any other provision of law, a person serving with an armed force who—

Article 2 also included among those subject to military jurisdiction “[i]n time of war, persons serving with or accompanying an armed force in the field.”⁶⁸

There is no clear explanation why the “time of war” qualifier was placed on this category of jurisdiction. Perhaps it was intended to reflect the tradition of subjecting civilians to military-criminal jurisdiction only in those situations when civilians supported wartime missions. Nonetheless, the “time of war” qualifier did not impede the use of this provision to prosecute U.S. civilians in post-war Germany, a common practice.⁶⁹ Indeed, the meaning of “in time of war” would not become an issue for the application of this grant of jurisdiction until 1970,

(1) submitted voluntarily to military authority;

(2) met the mental competence and minimum age qualifications of sections 504 and 505 of this title at the time of voluntary submissions to military authority;

(3) received military pay or allowances; and

(4) performed military duties;

is subject to this chapter until such person’s active service has been terminated in accordance with law or regulations promulgated by the Secretary concerned.

(d)(1) A member of a reserve component who is not on active duty and who is made the subject of proceedings under section 815 (article 15) or section 830 (article 30) with respect to an offense against this chapter may be ordered to active duty involuntary for the purpose of—

(A) investigation under section 832 of this title (article 32);

(B) trial by court-martial; or

(C) non judicial punishment under section 815 of this title (article 15).

(2) A member of a reserve component may not be ordered to active duty under paragraph [one] except with respect to an offense committed while the member was—

(A) on active duty; or

(B) on inactive-duty training, but in the case of members of the Army National Guard of the United States or the Air National Guard of the United States only when in Federal service.

(3) Authority to order a member to active duty under paragraph (1) shall be exercised under regulations prescribed by the President.

(4) A member may be ordered to active duty under paragraph (1) only by a person empowered to convene general courts-martial in a regular component of the armed forces.

(5) A member ordered to active duty under paragraph (1), unless the order to active duty was approved by the Secretary concerned, may not—

(A) be sentenced to confinement; or

(B) be required to serve a punishment of any restriction on liberty during a period other than a period of inactive-duty training or active duty (other than active duty ordered under paragraph (1)).

(e) The provisions of this section are subject to section 876b(d)(2) of this title (article 76b(d)(2)).

10 U.S.C.A. § 802 (West 2007) (bold omitted).

68. *Id.* § 802(a)(10).

69. *See Reid v. Covert*, 354 U.S. 1, 3 (1957). *Reid* is perhaps the best example of this practice that ultimately ran afoul of constitutional scrutiny. But *Reid*’s court-martial reflects the practice followed before the Supreme Court decision in that case.

twenty years after the passage of the UCMJ, in a case that would alter the application of this jurisdiction for nearly four decades.⁷⁰

But it was the U.S. Supreme Court that first raised questions regarding the legitimacy of subjecting U.S. civilians to the jurisdiction of military courts.⁷¹ In a 1957 decision involving a challenge to the constitutionality of a different provision of Article 2 establishing military jurisdiction over civilians associated with the armed forces,⁷² the Court issued a landmark decision that has, perhaps inappropriately, cast doubt on the constitutional validity of subjecting civilian augmentees to the UCMJ. Until that year, it was routine, and in fact sometimes required by status-of-forces agreements with receiving states,⁷³ to sub-

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

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

72. *Id.* at 1.

73. Status-of-force agreements are international agreements, usually executive agreements, establishing the legal rights and duties of U.S. forces and associated personnel stationed in the territory of another state. These agreements almost always include provisions establishing the jurisdiction over these U.S. personnel. These provisions normally provide for either concurrent jurisdiction for offenses in violation of both U.S. and receiving state law, or exclusive jurisdiction granted to the United States. See OPERATIONAL LAW HANDBOOK, *supra* note 5, at 383, which explains:

a. *Historically.* Scant formal international law governed the stationing of friendly forces on a host nation's territory. Most frequently, the law of the flag was applied, which basically held that since the friendly forces were transiting a host nation's territory with their permission, it was understood that the nation whose forces were visiting retained jurisdiction over its members. After World War II, with the large increase in the number of forces stationed in friendly countries, more formal SOFAs were deemed necessary to address the many and diverse legal issues that would arise, and to clarify the legal relationships between the countries. SOFAs varied in format and length, ranging from complex multi-lateral agreements, such as the NATO SOFA and its accompanying country supplements, to very limited, smaller-scale one-page Diplomatic Notes. Topics addressed in SOFAs may cover a large variety of issues.

b. *Status/FCJ.* One of the most important deployment issues is criminal jurisdiction. The general rule of international law is that a sovereign nation has jurisdiction over all persons found within its borders. There can be no derogation of that sovereign right without the consent of the Receiving State and, in the absence of agreement, U.S. personnel are subject to the criminal jurisdiction of the Receiving State. On the other hand, the idea of subjecting U.S. personnel to the jurisdiction of a country in whose territory they are present due solely to orders to help defend that country raises serious problems. In recognition of this, and as a result of the Senate's advice and consent to ratification of the NATO SOFA, DoD policy, as stated in DoDD 5525.1, is to maximize the exercise of jurisdiction over U.S. personnel by U.S. authorities.

c. *Exception.* An exception to the general rule of Receiving State jurisdiction is deployment for combat, wherein U.S. forces are generally subject to exclusive U.S. jurisdiction. As the exigencies of combat subside, however, the primary right to exercise criminal jurisdiction may revert to the Receiving State or come under another jurisdictional structure established in a negotiated agreement with the Receiving State.

ject civilian dependents of military personnel to U.S. military jurisdiction.⁷⁴ The jurisdiction to do so was provided for in Article 2(11) of the Code, which provides that "subject to any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, persons serving with, employed by, or accompanying the armed forces outside the United States and outside the Commonwealth of Puerto Rico, Guam, and the Virgin Islands."⁷⁵

Under this jurisdictional grant, military commanders court-martialed civilians stationed overseas when the nation hosting U.S. forces granted the military jurisdiction for the misconduct of military and associated U.S. personnel.⁷⁶ Such jurisdictional grants were a common feature of stationing, or "status of forces agreements."⁷⁷ This jurisdictional provision of the Code came under scrutiny by the Supreme Court in 1957, in two consolidated cases.⁷⁸ Both cases involved the trial and conviction by general court-martial of U.S. civilian spouses for murdering their military husbands.⁷⁹ In both cases, the U.S. military commanders exercised jurisdiction pursuant to stationing agreements that granted the military jurisdiction over offenses committed by not only members of the armed forces, but by all accompanying civilians, including family members.⁸⁰ Military authorities followed the practice of relying on Article 2(11) as a source of military-criminal jurisdiction, and both civilian defendants were tried and convicted by military courts.⁸¹

Petitioners challenged the constitutionality of being subjected to criminal sanction by the federal government without the full protections of the Bill of Rights.⁸² Among the rights not afforded by the military courts included indictment by grand jury, trial by a jury of one's peers, unanimous verdict, and trial before an Article III life-tenured judge.⁸³

In response, the Supreme Court struck down the constitutionality of reliance on Article 2(11) as a source of jurisdiction over civilians associated with the armed forces overseas, even if such jurisdiction were

74. See Schmitt, *supra* note 53, at 61–63.

75. 10 U.S.C. § 802(a)(11) (2000).

76. See Melson, *supra* note 35, at 288–302.

77. See OPERATIONAL LAW HANDBOOK, *supra* note 5, at 383.

78. Reid v. Covert, 354 U.S. 1, 5 (1957).

79. *Id.* at 3–4.

80. *Id.*

81. *Id.*

82. *Id.* at 3.

83. *Id.* at 21 ("Under the grand design of the Constitution civilian courts are the normal repositories of power to try persons charged with crimes against the United States. And to protect persons brought before these courts, Article III and the Fifth, Sixth, and Eighth Amendments establish the right to trial by jury, to indictment by a grand jury and a number of other specific safeguards. By way of contrast, jurisdiction of military tribunals is a very limited and extraordinary jurisdiction . . .").

granted to the United States by treaty or by executive agreement.⁸⁴ The Court held that the provision created an unavoidable conflict with the Bill of Rights, and that although the military-justice system permits deviation from some of those rights, such deviation must be limited to individuals appropriately connected to the armed forces.⁸⁵ Only such members of the force triggered, according to the Court, the unique justification of maintaining good order and discipline within the force. It was this justification that was treated by the Court as the critical distinction between the civilian- and military-justice systems, and on which the legitimacy of the latter rested.⁸⁶

Constitutional-law textbooks cite *Reid* for the proposition that there is no territorial limit to the constitutional rights that U.S. citizens enjoy.⁸⁷ But on the more precise issue of military jurisdiction over civilians, the decision raises questions about the constitutionality of such jurisdiction. The uncertainty created by the opinion is not, however, limited to military jurisdiction established by treaty or executive agreement. Instead, the opinion casts doubt on the constitutionality of any assertion of military jurisdiction over U.S. civilians, even under Article 2(10) of the Code. Two aspects of the opinion create this uncertainty.

First, in its holding, the *Reid* Court emphasized that it was reaching only the issue of the constitutionality of Article 2(11).⁸⁸ This provision of the Code was held invalid because it effectively nullified the fundamental constitutional rights of U.S. citizens pursuant to the interaction between statute and international agreement.⁸⁹ The exact provision of the UCMJ at issue in that case was explained by the Court as follows: "At the time of Mrs. Covert's alleged offense, an executive agreement was in effect between the United States and Great Britain which permitted United States' military courts to exercise exclusive jurisdiction over offenses committed in Great Britain by American servicemen or their dependents."⁹⁰

Second, the Court also emphasized the problematic nature of subjecting citizens to military jurisdiction whenever their association to the armed forces seemed somewhat incidental.⁹¹ According to the Court, the key consideration was whether the individual subjected to military

84. *Id.* at 34-35.

85. *Id.* at 33.

86. *Id.* 20-39.

87. *See, e.g.,* JESSE H. CHOPER ET AL., CONSTITUTIONAL LAW 127 (10th ed., Thomson West 2006).

88. *Reid*, 354 U.S. at 16.

89. *Id.* at 15.

90. *Id.*

91. *Id.* at 22-23.

jurisdiction was a civilian or a de facto member of the armed forces.⁹² As a result, the decision did not necessarily invalidate military jurisdiction over civilians in other circumstances—such as when the civilian was working for the armed forces in a theater of war—a point emphasized by the Court.⁹³

Even if it were possible, we need not attempt here to precisely define the boundary between “civilians” and members of the “land and naval Forces.” We recognize that there might be circumstances where a person could be “in” the armed services for purposes of Clause 14 even though he had not formally been inducted into the military or did not wear a uniform.⁹⁴

The *Reid* Court held that civilian dependents were not “in” the armed forces for purposes of constitutional rights.⁹⁵ But because the Court chose not to define precisely the boundary between civilians who were associated with the armed forces but who remained civilians for constitutional purposes, and those who became de facto members of the armed forces, the conditions necessary to remove civilian augmentees from the sweep of the decision remained unclear.

This uncertainty apparently did not influence the military practice of asserting jurisdiction over civilians “accompanying the force.” Although military commanders ceased to assert such jurisdiction over civilian dependants, they continued to do so over civilian augmentees working in support of the armed forces in theaters of combat operations.⁹⁶ It was not until 1970 that the exercise of military jurisdiction over these civilians fell prey to judicial challenge, ironically not by the Supreme Court, but by the highest military-appellate court—the U.S. Court of Military Appeals (“COMA”).⁹⁷ In *United States v. Averette*, a

92. *Id.*

93. *Reid* did not lead to amendment of the UCMJ. Instead, new approaches were developed for dealing with criminal misconduct of civilian dependents and other employees serving in foreign locations not during wartime. The most common approach was to grant both the United States (the sending state) and the host state (the receiving state) concurrent jurisdiction over offenses that violate both U.S. and receiving state law. These status-of-forces provisions thereby ensured that serious misconduct committed by U.S. civilians could be prosecuted in the courts of the receiving state. See OPERATIONAL LAW HANDBOOK, *supra* note 5, at 132–33.

94. *Reid*, 354 U.S. at 22–23.

95. *Id.* at 23.

96. See Melson, *supra* note 35, at 293–307.

97. Today, COMA is called the United States Court of Appeals for the Armed Forces (“CAAF”). See 10 U.S.C. §§ 941–946 (2000). According to the Code, the court must be composed of five judges appointed by the President from “civilian life.” *Id.* § 942. This court serves as the highest military-appellate court and hears appeals from decisions of the Service appellate courts, such as the Army Court of Criminal Appeals (Service courts are composed of military judges). See U.S. COURT OF APPEALS FOR THE ARMED FORCES, COURT BROCHURE 1 (2006), available at <http://www.armfor.uscourts.gov/CAAFBooklet2006.pdf>. According to the Court Brochure:

case that radically altered military-disciplinary authority over civilian augmentees, the COMA struck down the exercise of jurisdiction under Article 2(10) absent a formal declaration of war.⁹⁸

Averette involved a trial by general court-martial sitting in the Republic of Vietnam.⁹⁹ *Averette* was a U.S. civilian contractor working for the armed forces in South Vietnam.¹⁰⁰ He was charged and convicted of larceny and conspiracy to commit larceny in violation of the punitive articles of the UCMJ, and sentenced to a one-year term of confinement and a \$500 fine.¹⁰¹ The case came to the COMA on review from the decision of the Army Court of Criminal Appeals upholding the conviction.¹⁰² The COMA did not hold that Article 2(10) violated the Constitution in all circumstances. Instead, relying on the consternation expressed by the *Reid* Court over subjecting U.S. civilians to military jurisdiction, the court concluded that the gravity of such a deprivation of fundamental constitutional rights required the court to interpret strictly and narrowly the meaning of "time of war" in Article 2(10).¹⁰³ Accordingly, given the absence of a formal declaration of war, it was unconstitutional for the military tribunal to impose its jurisdiction on civilians:

We emphasize our awareness that the fighting in Vietnam qualifies as a war as that word is generally used and understood. By almost any standard of comparison—the number of persons involved, the level of casualties, the ferocity of the combat, the extent of the suffering, and the impact on our nation—the Vietnamese armed conflict is a major military action. But such a recognition should not serve as a

The United States Court of Appeals for the Armed Forces exercises worldwide appellate jurisdiction over members of the armed forces on active duty and other persons subject to the Uniform Code of Military Justice. The Court is composed of five civilian judges appointed for 15-year terms by the President with the advice and consent of the Senate.

Cases on the Court's docket address a broad range of legal issues, including constitutional law, criminal law, evidence, criminal procedure, ethics, administrative law, and national security law. Decisions by the Court are subject to direct review by the Supreme Court of the United States.

The Court, an independent tribunal established under Article I of the Constitution, . . . regularly interprets federal statutes, executive orders, and departmental regulations. The Court also determines the applicability of constitutional provisions to members of the armed forces. Through its decisions, the Court has a significant impact on the state of discipline in the armed forces, military readiness, and the rights of servicemembers. The Court plays an indispensable role in the military justice system.

Id. (quoting S. REP. NO. 101-81, at 171 (1989)).

98. 19 C.M.A. 363, 364 (1970).

99. *Id.* at 363.

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.* at 365.

shortcut for a formal declaration of war, at least in the sensitive area of subjecting civilians to military jurisdiction.¹⁰⁴

That the civilian worked for the armed forces in a theater of active-combat operations, enjoyed privileges and immunities granted to members of the armed forces, resided on a military installation, or performed duties essential to the operations of the armed forces did not alter the court's conclusion.

No further review altered the decision of the COMA, and *Averette* thus became the controlling law for the armed forces. Because the prospect of a formally declared war seemed virtually inconceivable at that time of American history, the decision essentially nullified Article 2(10). Accordingly, for the following thirty-six years, military legal experts learned, assumed, and advised that civilian augmentees were beyond the scope of military-criminal jurisdiction, regardless of the nature of their misconduct or the impact on the command or mission.¹⁰⁵

III. THE WALL COMES DOWN, THE MILITARY MOVES OUT, AND CIVILIAN MISCONDUCT BECOMES A FLASHPOINT

Congress took no action in response to the *Averette* decision to amend Article 2(10).¹⁰⁶ This is not surprising considering the context of the decision and the mood of the nation and the Congress. By 1970 the conflict in Vietnam was becoming increasingly unpopular,¹⁰⁷ and the prospect of asserting greater military authority over civilians would have been inconsistent with the broader anti-war and anti-military sentiment. A critical view by certain members of the court toward the military-justice system in general may also have impacted the outcome of this

104. *Id.* at 365–66.

105. See Schmitt, *supra* note 53, at 74–75. According to Schmitt, who worked on the development of MEJA:

[I]n 1979, the General Accounting Office (GAO) issued a report on the problem. The GAO found that in 1977, 343,000 civilians had accompanied the forces abroad in a twelve-month period and that, during that year, host countries exercised their jurisdiction in 200 serious cases. The GAO also found that host countries waived their right to prosecute in fifty-nine serious cases (including rape, manslaughter, rape, arson, robbery, and burglary) and in fifty-four less serious cases (including simple assault, drug abuse, and drunkenness). The GAO concluded that the lack of criminal jurisdiction over civilians and the inadequacy of administrative sanctions caused serious morale and discipline problems in overseas military communities. In the report, the GAO recommended that Congress enact legislation to extend criminal jurisdiction over American citizens accompanying the forces overseas.

Id. at 74.

106. Section 802(a)(10) of the UCMJ was not modified until section 552 of the John Warner National Defense Authorization Act for Fiscal Year 2007.

107. See, e.g., Rick Lyman & Christopher Drew, *33 Years Later, Draft Becomes Topic for Dean*, N.Y. TIMES, Nov. 22, 2003, at A1 (“[In 1970,] medical deferments were a frequently used avenue for those reluctant to take part in the unpopular war in Vietnam.”).

case.¹⁰⁸

Congressional acceptance of this jurisdiction nullification was likely attributable to a variety of factors. Perhaps most significant was that during this period there was not a "theater of combat operations" to implicate the need for such jurisdiction.¹⁰⁹ During the peak of the Cold War, the U.S. military was principally a "forward deployed" force, with large numbers of military and associated civilian personnel stationed in countries with well-developed legal systems.¹¹⁰ Status agreements generally governed the presence of these forces, with designation of jurisdiction a key component.¹¹¹ Under most of these agreements, U.S. personnel—both military and civilian—were subject to the concurrent jurisdiction of the host nation and of the United States.¹¹²

For military personnel, this meant that an act of criminal misconduct that violated both host-nation law and the UCMJ could be prosecuted in local courts or by court-martial.¹¹³ Offenses that violated only the UCMJ fell under the military's exclusive jurisdiction. But for civilian augmentees (and dependants), the grant of concurrent jurisdiction to the United States in such agreements was essentially a nullity, because no U.S. court existed with authority to exercise such jurisdiction.¹¹⁴ Instead, when civilians committed criminal misconduct that violated the UCMJ and host-nation law, they would de facto be subject to the exclusive jurisdiction of the host nation.¹¹⁵ Although this method of dealing

108. See Melson, *supra* note 35, at 311–13 (providing an excellent discussion of the background factors ostensibly influencing the COMA at the time of the *Averette* decision).

109. After the termination of U.S. military involvement in Vietnam, U.S. defense efforts once again returned to preparation to fight the Soviet threat. This period was marked by a "rebuilding" of the armed forces and revisions of U.S. military doctrine to prepare for such a contingency. During this period, most U.S. forces operating outside the United States were forward deployed to mature theaters of operations pursuant to status-of-forces agreements, such as allied countries in Western Europe and the Far East. Actual combat operations between 1973 and 1991 were characterized by short duration with minimal need for a robust civilian-augmentee presence. See 2 U.S. ARMY CTR. FOR MILITARY HISTORY, *AMERICAN MILITARY HISTORY* 251–283 (2005) (addressing the evolution of the U.S. Army during the Cold War period).

110. *Id.*

111. See OPERATIONAL LAW HANDBOOK, *supra* note 5, at 383–84 (explaining the jurisdictional scheme of the North Atlantic Treaty Alliance Status of Forces Agreement).

112. See Agreement Under Article IV of the Mutual Defense Treaty Between the United States of America and the Republic of Korea, Regarding Facilities and Areas and the Status of United States Armed Forces in the Republic of Korea, U.S.-S. Korea, art. XXII, ¶ 2(a), July 9, 1966, 2 U.S.T. 1677 [hereinafter *Mutual Defense Treaty*].

113. See OPERATIONAL LAW HANDBOOK, *supra* note 5, at 383–84; see also *Mutual Defense Treaty*, *supra* note 112, art. XXII, ¶ 2(a).

114. See OPERATIONAL LAW HANDBOOK, *supra* note 5, at 137–38; see also Schmitt, *supra* note 6, at 516.

115. According to the *Operational Law Handbook*:

Contractor employees are not subject to military law under the UCMJ when accompanying U.S. forces, except during a declared war. When a contractor is

with civilian misconduct did not always satisfy the concerns of U.S. commanders, and although in some cases this method produced arbitrary results, it was generally accepted as an effective accommodation of interests.

This all began to change with the end of the Cold War. That event led to two primary developments that sparked concerns over the lack of viable U.S. jurisdiction over civilians augmenting the operations of the armed forces abroad. First, the armed forces underwent a major downsizing.¹¹⁶ As part of this process, the U.S. military became increasingly reliant on the support of civilian contractors to augment military operations and perform functions previously performed by the much larger Cold War force.¹¹⁷ This civilianization process was intended to enhance what military personnel refer to as the “tooth to tail ratio”—maximizing the number of uniformed personnel to conduct combat operations by minimizing the number necessary to provide logistical support.¹¹⁸ The emphasis on accomplishing this goal along with the continued downsizing of the armed forces led to an ever-increasing reliance on these civilians. As noted by one author:

The startling growth in the ratio of contractors compared to active duty service members during overseas deployments demonstrates the policy in practice. During the Gulf War in 1991, slightly more than five thousand contractors helped support half a million troops. In the Balkans, from 1995 to 2000, contractors actually outnumbered active duty forces by three thousand civilian personnel. With approximately 138,000 service members currently serving in the Iraqi Campaign (a number that has remained fairly static over the last three years), an American Bar Association report estimates that

involved in criminal activity, international agreements and the host nation's laws take precedence.

OPERATIONAL LAW HANDBOOK, *supra* note 5, at 136.

116. See P.W. Singer, *Outsourcing War*, FOREIGN AFF., Mar.–Apr. 2005, at 119, 120.

117. See *id.* at 123; see also Schmitt, *supra* note 6, at 517.

118. According to William C. Peters:

During this reduction of active duty strength, military deployments in support of peace-keeping and humanitarian interventions, dramatically increased the services' operational tempo. Forces were deployed to Somalia, Haiti, the Balkans, and even Florida. Notwithstanding these often overlapping operations, the Clinton Administration embarked on its “reinventing government” campaign. In conjunction with the passage of the 1998 Federal Activities Inventory Reform Act, which outsourced positions deemed other than inherently governmental when economically efficient to do so, the administration continued military cutbacks. The Secretary of Defense, William Cohen, announced the policy of military streamlining in 1997: “We can sustain the shooters and reduce the supporters—we can keep the tooth, but cut the tail.” Cohen's announcement “prefaced modern military's unprecedented reliance on civilian contractors.”

Peters, *supra* note 10, at 381–82 (citations omitted).

there are about thirty thousand U.S. contractors operating in Iraq, or "about 10 times the ratio during the 1991 Persian Gulf conflict." When foreign workers actively engaged in the reconstruction and oil work are added to the government contractor mix, the numbers swell as high as 50,000 to 75,000. If we recall from evidence introduced earlier that fewer than ten thousand civilians supported over half a million troops in Vietnam, the phenomenon's picture is complete.¹¹⁹

Perhaps more important than the requirement to use civilians to enhance this "tooth to tail ratio" was the second development: The U.S. military began to conduct an increasing number of expeditionary military operations. These ranged from the full-scale combat operation of the first Iraq war, to a wide array of peacekeeping operations in locations such as Bosnia, Kosovo, Haiti, and Somalia.¹²⁰ These two changes in the nature of the armed forces and the missions they were conducting converged to produce a new military-civilian paradigm, in which civilian augmentees were a constant and increasingly essential part of military operations in locations where reliance on the host nation to address their misconduct was never a viable option.

This soon led to concerns that U.S. civilians were effectively immune from criminal sanctions for their misconduct, regardless of how egregious that misconduct might be.¹²¹ The only real response available to commanders for such misconduct was to terminate the civilian-employment relationship with the military and request that the civilian be removed from the operational area.¹²² How could the command maintain credibility when a civilian associated with the unit (even if not technically subject to the authority of the commander) committed a seri-

119. *Id.* at 382-83 (citations omitted).

120. See Rebecca Rafferty Vernon, *Battlefield Contractors: Facing the Tough Issues*, 33 PUB. CONT. L.J. 369 *passim* (2004).

121. See Becker, *supra* note 12, at 277-78 (describing how the son of a U.S. serviceman stationed in Japan got off easy by being convicted of involuntary manslaughter, even though the son stabbed to death another U.S. serviceman's son); see also Perlak, *supra* note 5, at 98-99. According to Perlak:

With court-martial jurisdiction effectively removed by the courts, it devolved to Congress to come up with a legal scheme that would fill the gap. From the very outset in 1957, up to the present day, no court has ever questioned the ability of Congress to do exactly that. Federal criminal laws with extraterritorial effect have existed for years. Likewise, jurisdiction over land under military control or put to military use within the United States has existed under the special maritime and territorial jurisdiction of the United States. However, because this jurisdiction has no extraterritorial effect, there have been conspicuous gaps. Courts have employed a rule of statutory construction providing a presumption that a law does not have extraterritorial effect unless there is clear congressional intent to make it so.

Id. (citations omitted).

122. See OPERATIONAL LAW HANDBOOK, *supra* note 5, at 135-36; see also Perlak, *supra* note 5, at 120 ("There is an existing scheme of control, however, based on contract terms and parameters of performance.").

ous criminal offense, such as murder or rape of a local national? What impact would it have on the morale of the military force when they realized that a double standard exists as the result of their being subject to court-martial for misconduct while their civilian counterparts were effectively immune? How could a commander ensure compliance with his or her obligations under the laws of war if a civilian augmentee commits a war crime and the commander has no meaningful disciplinary option to respond to such misconduct?

In the mid-1990s, during the height of the “peacekeeping” era, these concerns led Congress, working with the Department of Defense and the Department of State, to address the issue of criminal jurisdiction over civilian augmentees.¹²³ One option available to Congress, and perhaps the easiest option, would have been to reverse the holding of *Averette* by amending either the “time of war” provision of Article 2(10) or some other statute to indicate that “time of war” was not intended to be narrowly restricted to formally declared war, but rather was to be interpreted more broadly so as to apply to any active-military operation. Congress, however, did nothing to alter the post-*Averette* status quo.¹²⁴

Rather, Congress chose to enact legislation establishing federal-criminal jurisdiction over civilian augmentees for serious criminal misconduct committed outside the jurisdiction of the United States. Through the MEJA, Congress made applicable to civilians accompanying the armed forces overseas (irrespective of the nature of the mission or operation) those offenses applicable to any civilian in the Special Maritime or Territorial Jurisdiction of the United States.¹²⁵ Accordingly, civilian augmentees became liable for all offenses contained in Title 18 of the United States Code, including civilian-type offenses such as homicide, sexual assault, larceny, and arson.¹²⁶ Congress did not specify how to implement this statute, delegating that task to the Secretary of Defense.¹²⁷

Since enactment, MEJA has not been particularly effective.¹²⁸ It

123. See Perlak, *supra* note 5, at 99–100.

124. See Peters, *supra* note 10, at 372.

125. 18 U.S.C. § 3261 (2000); see also Perlak, *supra* note 5, at 99–100.

126. See Perlak, *supra* note 5, at 98–99.

127. See 18 U.S.C. § 3266(a) (2000) (“The Secretary of Defense, after consultation with the Secretary of State and the Attorney General, shall prescribe regulations governing the apprehension, detention, delivery, and removal of persons under this chapter and the facilitation of proceedings under section 3265. Such regulations shall be uniform throughout the Department of Defense.”).

128. See Peters, *supra* note 10, at 386 (“[T]he tens of thousands of contractors who have served or are currently serving in the Iraqi campaign have either scrupulously avoided any meaningful misconduct, or government efforts to address those crimes are either lacking or simply ineffective in practice.”); *id.* at 391 (“[F]ederal prosecutors have yet to employ MEJA for any alleged misconduct of civilian contractors arising from their actions during the Iraqi campaign.”).

was not until 2005 that the Department of Defense finally published an implementing instruction.¹²⁹ But perhaps more problematic is that as implemented, the statute relies on U.S. Attorneys to “accept” cases referred to them from an overseas-military command.¹³⁰ This procedure alone makes it unsurprising that there has not been a strong appetite for prosecuting civilians for MEJA violations. Further, the overall complexity of initiating, coordinating, and managing such a case also undoubtedly contributes to this lack of appetite.¹³¹ The several MEJA cases that have been prosecuted, however, indicate that if applied, MEJA can be effective in responding to civilian-criminal misconduct.¹³²

During this period Congress also passed the WCA, which provides federal-criminal jurisdiction over civilian augmentees.¹³³ Unlike MEJA, this statute was not motivated primarily by the concerns related to civil-

129. See DEP'T OF DEF., INSTRUCTION NO. 5525.11, CRIMINAL JURISDICTION OVER CIVILIANS EMPLOYED BY OR ACCOMPANYING THE ARMED FORCES OUTSIDE THE UNITED STATES, CERTAIN SERVICE MEMBERS, AND FORMER SERVICE MEMBERS (2005), <http://www.dtic.mil/whs/directives/corres/pdf/552511p.pdf> [hereinafter INSTRUCTION NO. 5525.11]; see also Peters, *supra* note 10, at 391.

130. INSTRUCTION NO. 5525.11, *supra* note 129, ¶ 6.2.2.1. This paragraph provides:

When a Military Criminal Investigative Organization is the lead investigative organization, the criminal investigator, in order to assist the DSS/DOJ and the designated U.S. Attorney representative (once the DSS/DOJ has made the designation), in making a preliminary determination of whether the case warrants prosecution under the Act, shall provide a copy of the Investigative Report, or a summary thereof, to the Office of the Staff Judge Advocate of the Designated Commanding Officer (DCO) (as defined in enclosure 2) at the location where the offense was committed for review and transmittal, through the Commander of the Combatant Command, to the DSS/DOJ and the designated U.S. Attorney representative. The Office of the Staff Judge Advocate shall also furnish the DSS/DOJ and the designated U.S. Attorney representative an affidavit or declaration from the criminal investigator or other appropriate law enforcement official that sets forth the probable cause basis for believing that a violation of the Act has occurred and that the person identified in the affidavit or declaration has committed the violation.

131. For example, the implementing instruction requires coordination between the responsible military command and the host nation; the responsible military command and the Department of Defense General Counsel; the Department of Defense General Counsel and the Department of Justice; the Defense Criminal Investigation Service and the Department of Justice; the Department of Justice and the U.S. Attorney in whose venue the case lies. *Id.*

132. See Press Release, Dep't of Justice, Former Ft. Campbell Soldier Indicted in Iraqi Civilian Deaths (Nov. 2, 2006), available at <http://louisville.fbi.gov/dojpressrel/pressrel06/iraquideaths110206.htm> (discussing the indictment of a former soldier under MEJA for the rape and murder of an Iraqi girl); *Abu Ghraib Contractor Sentenced for Child Porn*, MSN.BC.COM, May 25, 2007, <http://www.msnbc.msn.com/id/18866442/> (discussing the MEJA-based prosecution of a civilian-network administrator working for the armed forces at the Baghdad Central Confinement Facility in Abu Ghraib).

133. 18 U.S.C. § 2441(a) (2000) (“Whoever, whether inside or outside the United States, commits a war crime . . . shall be fined under this title or imprisoned for life or any term of years, or both, and if death results to the victim, shall also be subject to the penalty of death.”).

ian misconduct.¹³⁴ Nonetheless, the statute subjects *any* U.S. national to federal-criminal jurisdiction for the commission of certain war crimes.¹³⁵ Thus, if it were established that a U.S.-national civilian augmentee engaged in criminal misconduct that qualified as an enumerated war crime under the statute and international law, the WCA would provide another source of federal-criminal jurisdiction over the individual and the offense.

As a result of these developments, the jurisdictional paradigm related to civilian augmentees came to be understood by military practitioners as follows: Although the UCMJ applied extraterritorially, prosecuting civilians for violation of the Code was not a viable option to respond to civilian misconduct. Instead, when deemed appropriate, and in response to an offense in violation of Title 18 of the United States Code, the commander could initiate a process by which the case would be referred to the Department of Justice for prosecution in the United States.¹³⁶

134. The primary motivation for the War Crimes Act was to fulfill U.S. obligations to implement the four Geneva Conventions of 1949. These treaties include articles obligating state parties to provide domestic legislation for the prosecutions of treaty violations. *See* H.R. REP. 104-69, at 3-4 (1996). This report indicates that:

Despite ratifying the Geneva conventions, the United States has never enacted legislation specifically implementing their penal provisions. This was felt to be unnecessary, that existing United States law provided adequate means of prosecution. The Senate Committee on Foreign Relations stated that:

The committee is satisfied that the obligations imposed upon the United States by the "grave breaches" provisions are such as can be met by existing legislation enacted by the Federal Government within its constitutional powers. A review of that legislation reveals that no further measures are needed to provide effective penal sanctions or procedures

A review of current federal and state law indicates that while there are many instances in which individuals committing grave breaches of the Geneva conventions may already be prosecuted, prosecution would be impossible in many other situations.

Id. (footnote omitted) (quoting *Geneva Conventions for the Protection of War Victims: Hearing Before the S. Comm. on Foreign Relations*, 84th Cong., 1st Sess. 27 (1955)). Although ratified in 1954, it was not until 1996 that the United States met this obligation to enact such legislation. The War Crimes Act, as amended, establishes federal criminal jurisdiction over any U.S. national who violates certain provisions of the law of war. This jurisdiction provides an effective gap filler to reach members of the armed forces who commit war crimes but who separate from the armed forces before discovery of the offense (military jurisdiction ceases to apply on discharge from the armed forces). But the jurisdictional language is broad enough to reach any U.S. resident who violates the applicable law-of-war obligations to include civilian augmentees. *See* Military Commissions Act of 2006, Pub. L. No. 109-366, § 6(b), 120 Stat. 2600, 2633 (to be codified at 18 U.S.C. § 2441).

135. *See* 18 U.S.C.A. § 2441(b) (West 2007).

136. *See* INSTRUCTION NO. 5525.11, *supra* note 129, ¶ 5.1. The Department of Defense also declared that:

Although some Federal criminal statutes are expressly or implicitly extraterritorial, many acts described therein are criminal only if they are committed within "the

With as many as 70,000 civilian contractors associated with military operations in Iraq, this paradigm came under increasing scrutiny.¹³⁷ This scrutiny was most significant in relation to civilian contractors involved in the interrogation of detainees. Reports of detainee abuse and even killings by such civilians led human-rights advocates to demand a more robust civilian-accountability structure.¹³⁸ Nonetheless, as is reflected in the 2005 Instruction implementing MEJA,¹³⁹ the Department of Defense continued to work within this new jurisdictional paradigm, and did not call for the resurrection of military criminal jurisdiction over civilians.¹⁴⁰

special maritime and territorial jurisdiction of the United States,” or if they affect interstate or foreign commerce. Therefore, in most instances, Federal criminal jurisdiction ends at the nation’s borders. . . . Similarly, civilians are generally not subject to prosecution under the UCMJ, unless Congress had declared a “time of war” when the acts were committed. As a result, these acts are crimes, and therefore criminally punishable, only under the law of the foreign country in which they occurred. However, there have been occasions where the foreign country has elected not to exercise its criminal jurisdiction and the person goes unpunished for the crimes committed. . . .

The Act and this Instruction are intended to address the jurisdictional gap in U.S. law regarding criminal sanctions, as applied to civilians employed by or accompanying the Armed Forces outside the United States, members of the Armed Forces, and former members of the Armed Forces, including their dependents. It does not enforce a foreign nation’s criminal laws and, as such, does not require that the person’s actions violate the foreign nation’s laws and applies even if the conduct may be legal under the foreign nation’s laws. The jurisdictional requirement is that the conduct be in violation of U.S. Federal laws. When, however, the same conduct violates the Act and the laws of the foreign nation, the Act provides for consideration of existing international agreements between the United States and the foreign nation.

Id. ¶¶ 2.4–2.5.

137. See Daniel Bergner, *The Other Army*, N.Y. TIMES, Aug. 14, 2005, § 6 (Magazine), at 29; Jonathan Finer, *Security Contractors in Iraq Under Scrutiny After Shootings*, WASH. POST, Sept. 10, 2005, at A01; Nathan Hodge, *Army Chief Notes ‘Problematic’ Potential of Armed Contractors on the Battlefield*, DEF. DAILY, Aug. 26, 2005; David Washburn & Bruce V. Bigelow, *In Harm’s Way: Titan in Iraq*, SAN DIEGO UNION-TRIB., July 24, 2005, at A1.

138. See, e.g., Paul Tait, *Shooting Shines Light on Murky World of Iraq Security*, REUTERS, Sept. 18, 2007, <http://www.reuters.com/article/worldNews/idUSL1882490620070918> (“Iraq has vowed to review all local and foreign security contractors, described by critics as mercenaries who act with impunity, after a shooting incident involving U.S. firm Blackwater on Sunday in which 11 people were killed.”); see also Amnesty International U.S.A., *Corporate Accountability in the “War on Terror,”* http://www.amnestyusa.org/War_on_Terror/Private_Military_and_Security_Contractors/page.do?id=1101665&n1=3&n2=26&n3=157 (last visited Jan. 19, 2008).

139. See INSTRUCTION NO. 5525.11, *supra* note 129.

140. This perceived lack of effective mechanisms to hold civilian contractors accountable for criminal misconduct has recently become a hot-button issue as the result of the Blackwater scandal. These contractors worked under a State Department contract, which ostensibly removed them from the jurisdiction of MEJA (a loophole Congress intends to close). Contrary to popular misconception, however, this incident is as much an indication of the lack of effective implementation of existing law as it is an indication of a gap in the law. Regardless, it undoubtedly reinforces the need to ensure that contractors performing quasi-military functions in

IV. DOES THAT SAY WHAT I THINK IT SAYS?

This jurisdictional paradigm was suddenly and radically changed in October of 2006, when Congress passed the John Warner National Defense Authorization Act for Fiscal Year 2007.¹⁴¹ The amended law included hundreds of provisions related to the armed forces. Although not requested by the Department of Defense, inserted among these provisions was the following amendment to the UCMJ:

SEC. 552. CLARIFICATION OF APPLICATION OF UNIFORM CODE OF MILITARY JUSTICE DURING A TIME OF WAR.

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".¹⁴²

With this amendment, Congress resurrected military-criminal jurisdiction for the tens of thousands of U.S. civilians working for, with, or perhaps even in proximity to the armed forces in Iraq, Afghanistan, and other locations designated as "contingency operations" by the Secretary of Defense. By amending Article 2(10) to read "declared war or a contingency operation,"¹⁴³ Congress nullified the *Averette* interpretation of Article 2(10) that required a formally declared war to trigger the jurisdiction of the Code. Because virtually every conflict or nonconflict-military operation falls under the expansive definition of "contingency operation,"¹⁴⁴ this amendment effectively made the extraterritorial jurisdiction of the UCMJ coextensive for military and civilian personnel.

Based on the author's discussions with a number of individuals within the military-legal community, this amendment came as a complete surprise to the Department of Defense.¹⁴⁵ To date, instead of enthusiastically welcoming this resurrection of jurisdiction, the military services have responded cautiously.¹⁴⁶ No charges have been initiated

operational areas are subject to some meaningful disciplinary and criminal-accountability mechanisms.

141. John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364, 120 Stat. 2083 (2006).

142. *Id.* § 552 (bold omitted).

143. *Id.*

144. See 10 U.S.C. § 101(a)(13) (2000); see also *supra* Part I, note 14.

145. There is no legislative record indicating this amendment responded to a request by the Department of Defense.

146. For example, an Air Force Judge Advocate General's Talking Paper on the amendment includes the following:

- Amended Article 2(a)(10) broad enough to include embedded journalists and foreign employees of contractors
- Manual for Courts-Martial does not separately address prosecution of civilians in detail, except Analysis of R.C.M. 202 in Appendix 21, A21-11
- DoD GC representative first addressed with Joint Service Committee on 1 Feb 07

under this resurrection of jurisdiction, nor have any implementing instructions been issued by the Service Judge Advocates.¹⁴⁷ This is not surprising, for this resurrection has produced tremendous uncertainty, stemming from two principal concerns: First, which civilians fall within the definition of “accompanying the force”? And second, will the exercise of military-criminal jurisdiction over a U.S. civilian under this amendment withstand constitutional scrutiny?¹⁴⁸

These concerns are exacerbated by the simple reality that virtually all of the jurisprudence related to these questions is decades old. Nonetheless, if this jurisprudence provides a baseline from which to interpret the scope of this provision, the answer to the question regarding the scope of application is potentially very broad.¹⁴⁹ During both the First and the Second World Wars, a number of cases addressed the predecessor provision of Article 2(10) in the Articles of War.¹⁵⁰ These held that civilians “accompanying the force” included not only civilian employees of the armed forces and contractors working for the armed forces, but also U.S. civilians whose employment with the armed forces had been terminated but who remained in the theater of operations.¹⁵¹ This expansive understanding of military jurisdiction over civilians “accompanying the force” was confirmed during congressional hearings on enactment of the UCMJ, when the Assistant General Counsel for the

– *One possibility, non-binding criteria/guidance to exercise such jurisdiction sparingly*

Air Force Judge Advocate General’s Office, Talking Paper on Article 2(a)(10), UCMJ (on file with author) (emphasis added).

147. See 10 U.S.C. § 806(b) (imposing a statutory obligation on courts-martial convening authorities to communicate with their Judge Advocate on matters related to military justice).

148. According to Peters, this concern was actually expressed by the Department of Justice in relation to the development of MEJA:

Similar language was proposed as an amendment to the UCMJ through the Fiscal Year 1996 Department of Defense (DOD) Authorization Act. The Department of Justice (DOJ) determined that it was likely an amendment to Article 2(a)(10) of the UCMJ, extending courts-martial jurisdiction over civilians during contingency operations in armed conflict, presented possible constitutional problems and therefore did not support that portion of the proposed amendment. Telephone Interview with John De Pue, former Senior Trial Attorney, Counterterrorism Section, Criminal Div., U.S. Dep’t of Justice (Apr. 7, 2005). Mr. De Pue was the DOJ representative on the panel that considered the amendment.

Peters, *supra* note 10, at 374 n.23.

149. See, e.g., Melson, *supra* note 35, at 289 (“[M]ilitary jurisdiction over civilians reached an unprecedented and expansive limit [during Word War II].”); see also Talking Paper on Article 2(a)(10), UCMJ, *supra* note 146.

150. See Hines v. Mikell, 259 F. 28, 29–30 (4th Cir. 1919); McCune v. Kilpatrick, 53 F. Supp. 80, 84 (E.D. Va. 1943); *In re Di Bartolo*, 50 F. Supp. 929, 930 (S.D.N.Y. 1943); *Ex parte Jochen*, 257 F. 200, 203 (S.D. Tex. 1919); *Ex parte Falls*, 251 F. 415, 415–16 (D.N.J. 1918); *Ex parte Gerlach*, 247 F. 616, 617 (S.D.N.Y. 1917).

151. See Melson, *supra* note 35, at 291–94.

Department of Defense asserted that even Red Cross workers and journalists could fall under Article 2(10) of the Code.¹⁵²

It is difficult to conceive of a CNN journalist being charged and tried by a court-martial in Iraq simply because that journalist happened to be in the operational area of U.S. forces. It is equally difficult to conceive of a U.S. military commander pursuing such a course of action. But this extreme example highlights the uncertainty that perhaps lies behind the caution in invoking this jurisdiction by the military services. This example is also useful to reveal that the object of this amendment to the UCMJ was not to achieve such an extreme result. Instead, a more logical object was likely responsible: the desire to enhance the ability of military commanders to control and discipline civilian contractors integrally related to their units and missions.

It has long been recognized that the military-justice system is intended to serve two distinct yet hopefully complimentary functions: achieving justice while contributing to the good order and discipline of the military unit.¹⁵³ It is this latter purpose that has been so significant in justifying the continuing central role of military commanders in the military-justice process. Unlike civilians, or even most other nations' military systems, U.S. commanders are vested with enormous authority over the disposition of allegations of misconduct.¹⁵⁴ This authority includes charging decisions, nonjudicial diversions, the level of court to

152. See *A Bill To Unify, Consolidate, Revise, and Codify the Articles of War, the Articles for the Government of the Navy, and Disciplinary Laws of the Coast Guard, and To Enact and Establish a Uniform Code of Military Justice: Hearings on H.R. 2498 Before the Subcomm. of the H. Comm. on Armed Services*, 81st Cong. 565, 622–23 (1949) (statement of Felix Larkin, Assistant General Counsel, Secretary of Defense).

153. In an article first written in 1954 by a major in the Judge Advocate General's Corps who would later serve as the Judge Advocate General of the Army and reach the rank of Major General, then Major George Prugh, Jr. noted this dual purpose:

Now, it seems apparent that any American code of military justice must serve a dual purpose: (1) it must establish a framework whereby offenders are appropriately and promptly punished by means of an enlightened procedure fully in accord with the basic principles of American justice; (2) while at the same time, not only not impeding, but on the contrary, aiding the military commander in accomplishing his assigned mission.

George S. Prugh, Jr., *Observations on the Uniform Code of Military Justice: 1954 and 2000*, 165 MIL. L. REV. 21, 23 (2000).

154. See 10 U.S.C. §§ 801–946 (2000); see also DEP'T OF ARMY, CONTRACTOR DEPLOYMENT GUIDE (1998), available at http://www.army.mil/usapa/epubs/pdf/p715_16.pdf. The MEJA Implementing Instruction published by the Department of Defense emphasizes the relationship between military discipline and civilian misconduct: "It is DoD policy that the requirement for order and discipline of the Armed Forces outside the United States extends to civilians employed by or accompanying the Armed Forces, and that such persons who engage in conduct constituting criminal offenses shall be held accountable for their actions, as appropriate." INSTRUCTION NO. 5525.11, *supra* note 129, ¶ 3.

select, the decision to send a case to trial, and the authority to approve, mitigate, or set aside a court's findings or sentence or both.

Commanders are entrusted with these authorities because, to maintain good order and discipline within a unit, misconduct must be addressed promptly in a manner that responds to the interests of the military command. It is therefore not surprising that as the numbers of civilians associated with military units in theaters of active operations have increased, the desire to subject them to command disciplinary authority has also increased. It is also completely plausible that the recent resurrection of military jurisdiction might indeed contribute to good order and discipline both by providing a more efficient criminal response to civilian misconduct and by enhancing the sense of equity among members of the uniformed force already subject to such jurisdiction. The key question, however, is not whether this provision is efficient or effective, but whether such increased efficiency in responding to civilian misconduct justifies a deprivation of fundamental constitutional rights in a criminal proceeding.

V. THE WEIGHING OF INTERESTS

Conceding the importance to the military commander of providing a viable means to hold civilian augmentees accountable for misconduct may provide justification for enhancing the military disciplinary arsenal applicable to such civilians. But this does not necessarily require the conclusion that the scope and nature of the jurisdiction resurrected by the recent amendment to the UCMJ is equally justified. The legitimacy of such jurisdiction should not be judged simply by considering the theoretical benefit that will accrue to a commander, but instead by the balance between that benefit and the costs to the individual citizen.¹⁵⁵ Perhaps more importantly, to ensure that the deprivation of constitutional rights is limited carefully to that which is genuinely necessary, it is critical to assess the true extent of the post-MEJA-WCA necessity. This assessment reveals that the justification provided by military interests does not extend to the scope of jurisdiction established by this amendment. In short, the scope of the resurrection of UCMJ jurisdiction over civilians is both overbroad and unnecessary.

Although *Reid* did not specifically address the constitutionality of the jurisdiction resurrected by this amendment,¹⁵⁶ the case provides the most applicable framework for assessing the significance of the constitutional interests at stake. This is due to the emphasis the *Reid* Court placed on preserving the rights afforded to U.S. citizens under the Con-

155. Striking such a balance seems to have been the core principle of the *Reid* decision.

156. See *supra* Part II.

stitution, even in relation to claims of military necessity. Indeed, the government argued in *Reid* that the authority vested in Congress to make rules for the land and naval forces, when coupled with the Necessary and Proper Clause of the Constitution, justified the exercise of the challenged military jurisdiction. The Court summarized this argument as follows:

The Government argues that the Necessary and Proper Clause when taken in conjunction with Clause 14 allows Congress to authorize the trial of Mrs. Smith and Mrs. Covert by military tribunals and under military law. The Government claims that the two clauses together constitute a broad grant of power "without limitation" authorizing Congress to subject all persons, civilians and soldiers alike, to military trial if "necessary and proper" to govern and regulate the land and naval forces.¹⁵⁷

This necessity theory proved unpersuasive for the Court. In rejecting the argument, the Court demonstrated that it was unwilling to endorse a deprivation of fundamental constitutional rights of citizens simply because doing so would serve military interests:

It is true that the Constitution expressly grants Congress power to make all rules necessary and proper to govern and regulate those persons who are serving in the "land and naval Forces." But the Necessary and Proper Clause cannot operate to extend military jurisdiction to any group of persons beyond that class described in Clause 14—"the land and naval Forces." . . . Every extension of military jurisdiction is an encroachment on the jurisdiction of the civil courts, and, more important, acts as a deprivation of the right to jury trial and of other treasured constitutional protections. Having run up against the steadfast bulwark of the Bill of Rights, the Necessary and Proper Clause cannot extend the scope of Clause 14.¹⁵⁸

This approach to assessing the constitutionality of depriving citizens of fundamental rights in response to a claim of military necessity should logically extend to an analysis of the recent resurrection of jurisdiction by the amendment to Article 2 (10). It is undoubtedly true that in relation to such analysis, it is more plausible to assert that civilian augmentees are, unlike civilian dependents, "members of the armed forces" for constitutional purposes. It is equally true, however, that the high value placed on preserving fundamental constitutional rights for U.S. citizens facing criminal prosecution reflected in the *Reid* opinion suggests that the government bears a heavy burden to justify such a deprivation.

It is unfortunate from an analytical standpoint that, since the *Reid*

157. *Reid v. Covert*, 354 U.S. 1, 20 (1954).

158. *Id.* at 20–21 (citations omitted).

decision, the status of civilian augmentees in relation to the armed forces has remained so uncertain. But there is no question that the presence of such civilians in areas of active military operations and their importance to mission accomplishment has expanded greatly in the last two decades.¹⁵⁹ This undoubtedly influenced the effort to resurrect military jurisdiction over these citizens. Nonetheless, certain decisions by the armed forces undermine the proposition that civilian augmentees are “members of the armed forces” for constitutional purposes, the apparent *sine qua non* enunciated by the *Reid* Court for a legitimate application of military jurisdiction.¹⁶⁰

Perhaps most significant among these decisions has been the continuing refusal to grant civilian augmentees some type of quasi-combatant status.¹⁶¹ Affirmation of civilian status of these augmentees is reflected in the principal Department of Defense policy governing the use of contractors.¹⁶² One interesting example of this aversion appeared

159. See *supra* Part I, note 6 and accompanying text.

160. See *Reid*, 354 U.S. at 20–21.

161. See Lourdes A. Castillo, *Waging War with Civilians: Asking the Unanswered Questions*, AEROSPACE POWER J., Fall 2000, at 26, 26–28 (discussing numerous short and long-term issues regarding increased contractor support to military operations).

162. See DEP'T OF DEF., INSTRUCTION NO. 3020.41, CONTRACTOR PERSONNEL AUTHORIZED TO ACCOMPANY THE U.S. ARMED FORCES (2005), <http://www.dtic.mil/whs/directives/corres/pdf/302041p.pdf>. This Instruction defines the status of civilian augmentees as follows:

6.1.1. *International Law and Contractor Legal Status*. Under applicable law, contractors may support military operations as civilians accompanying the force, so long as such personnel have been designated as such by the force they accompany and are provided with an appropriate identification card under the provisions of the 1949 Geneva Convention Relative to the Treatment of Prisoners of War (GPW) (reference (j)). If captured during armed conflict, contingency contractor personnel accompanying the force are entitled to prisoner of war status. Contingency contractor personnel may be at risk of injury or death incidental to enemy actions while supporting other military options. *Contingency contractor personnel may support contingency operations through the indirect participation in military operations*, such as by providing communications support, transporting munitions and other supplies, performing maintenance functions for military equipment, providing security services according to subparagraph 6.3.5, and providing logistic services such as billeting, messing, etc. Contingency contractor personnel retain the inherent right of individual self-defense as addressed in subparagraph 6.3.4. Each service to be performed by contingency contractor personnel in contingency operations shall be reviewed on a case-by-case basis in consultation with the servicing legal office to ensure compliance with relevant laws and international agreements.

Id. ¶ 6.1.1. (emphasis added). The emphasis placed on limiting the conduct of civilian augmentees to “indirect” participation in hostilities is a clear indication that they are not regarded as members of the armed forces by the United States. See OFFICE OF THE JOINT CHIEFS OF STAFF, JOINT PUBLICATION 4-0, DOCTRINE FOR LOGISTIC SUPPORT OF JOINT OPERATIONS V-1 (2000), available at www.dtic.mil/doctrine/jel/new_pubs/jp4_0.pdf (“In all instances, contractor employees cannot lawfully perform military functions and should not be working in scenarios that involve military combat operations where they might be conceived as combatants.”); DEP'T OF

in a U.S. Navy decision paper related to the proposal to grant civilian members of merchant vessels "temporary status" as members of the armed forces to avoid conflict with legal obligations related to the use of such vessels.¹⁶³ In spite of the plausible proposal put forward by proponents of this course of action, it was ultimately rejected.¹⁶⁴ This aversion is also reflected in the most recent Department of Defense directives related to civilian-support personnel. These directives state explicitly that civilian augmentees are not members of the armed forces for purposes of rights and obligations under the laws of war.¹⁶⁵ Accordingly, they are restricted from performing any function qualifying as "inherently governmental"—which is defined in other directives as functions reserved for members of the armed forces.¹⁶⁶ Such restrictions undermine any assertion that these civilians are "members of the force" for constitutional purposes, because it is the lack of this status that results in limiting the activities that they may be called on to perform during military operations.¹⁶⁷

Even conceding, for the sake of argument, that civilian augmentees might be considered members of the armed forces for purposes of Article 2(10), the change in the legal landscape since the COMA's rejection of such jurisdiction must be considered in balancing competing interests. These changes have provided a viable legal framework for bringing criminal actions against civilian augmentees for acts of serious misconduct.¹⁶⁸ In assessing the impact of these federal statutes, two considerations are particularly important: (1) whether subjecting civilian

THE ARMY, USE AND MANAGEMENT OF CIVILIAN PERSONNEL IN SUPPORT OF MILITARY CONTINGENCY OPERATIONS (2004), available at http://www.army.mil/usapa/epubs/pdf/r690_11.pdf; DEP'T OF THE ARMY, CONTRACTORS ACCOMPANYING THE FORCE (1999), available at http://www.army.mil/usapa/epubs/pdf/r715_9.pdf; DEP'T OF THE ARMY, CONTRACTORS ON THE BATTLEFIELD (2003), available at http://www.afsc.army.mil/gc/files/fm3_100x21.pdf.

Two authors have summarized the traditionally understood mandate in the following simple yet unambiguous terms: "Non-uniformed employees of an armed force and contractor personnel of an armed force are non-combatant civilians and must never take part in hostilities." Lisa L. Turner & Lynn G. Norton, *Civilians at the Tip of the Spear*, 51 A.F. L. REV. 1, 25 (2001).

163. See Dep't of the Navy, Office of the Judge Advocate Gen., *Civilians on Warships: Transformation of Navy Manning for the 21st Century* (2006) (unpublished paper, on file with author).

164. *Id.*

165. See DEP'T OF THE ARMY, USE AND MANAGEMENT OF CIVILIAN PERSONNEL IN SUPPORT OF MILITARY CONTINGENCY OPERATIONS (2004), available at http://www.army.mil/usapa/epubs/pdf/r690_11.pdf; DEP'T OF THE ARMY, CONTRACTORS ACCOMPANYING THE FORCE (1999), available at http://www.army.mil/usapa/epubs/pdf/r715_9.pdf; DEP'T OF THE ARMY, CONTRACTORS ON THE BATTLEFIELD (2003), available at http://www.afsc.army.mil/gc/files/fm3_100x21.pdf.

166. See DEP'T OF DEFENSE, INSTRUCTION NO. 1100.22, GUIDANCE FOR DETERMINING WORKFORCE MIX 8, ¶ 6.1.2. (2007), available at <http://www.dtic.mil/whs/directives/corres/pdf/110022p.pdf>.

167. *Id.* at 7–8.

168. See *supra* notes 116–39 and accompanying text.

augmentees to the full corpus of the UCMJ is genuinely necessary after the enactment of MEJA and the WCA; and (2) whether the government's ineffective implementation of these federal statutes justifies the potentially more efficient, yet more intrusive, use of military jurisdiction.

In regard to the first consideration, it is critical to consider the full scope of criminal jurisdiction created by the UCMJ amendment. Unlike the MEJA, this jurisdiction is not restricted to criminal offenses normally applicable to civilians in the special territorial and maritime jurisdiction of the United States. Instead, in addition to the UCMJ prohibitions against what could reasonably be considered civilian offenses, every other offense established by the UCMJ is applicable to civilian augmentees. These offenses include offenses unique to the military, such as disobedience to orders,¹⁶⁹ disrespect toward superiors,¹⁷⁰ absence without authority,¹⁷¹ desertion,¹⁷² missing movement,¹⁷³ and misbehavior before an enemy.¹⁷⁴ Although difficult to imagine, the plain language of the 2006 amendment does not preclude a military commander from charging a civilian for violating one of these prohibitions. In addition, historical precedent supports charging civilian augmentees with offenses unique to the military under Article 2(10).¹⁷⁵

This list of offenses made applicable to civilians also includes what is referred to as the "General Article." This article provides:

Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court.¹⁷⁶

Thus, the term "general" is indeed telling, as this article enables military prosecutors to craft a criminal charge for virtually any act or omission the commander believes is contrary to "good order and discipline" or is "service discrediting" (the other prong of Article 134 is an assimilated-crimes provision allowing prosecutors to charge violations of federal or state law). This provision of the UCMJ has always been somewhat con-

169. 10 U.S.C. § 891 (2000).

170. *Id.* § 889.

171. *Id.* § 886.

172. *Id.* § 885.

173. *Id.* § 887.

174. *Id.* § 899.

175. Melson, *supra* note 35, at 290–98.

176. 10 U.S.C. § 934.

troversial as applied to members of the armed forces because of concerns regarding vagueness.¹⁷⁷ Nonetheless, it remains an important source of criminal proscription and is routinely used by commanders and their prosecutors, and it is considered constitutional when applied to members of the armed forces.¹⁷⁸

Extending application of this provision to civilians would, however, trigger substantial due process concerns. These concerns are more significant in relation to civilian augmentees for a simple reason: They are presumptively not committed to the same disciplinary ethos as their military counterparts. Vagueness concerns regarding members of the armed forces are mitigated because membership in the forces provides individuals sufficient notice of the importance of good order and discipline and the reputation of the armed forces. But the far more tangential relationship between civilian augmentees and the armed forces does not lead to the same degree of de facto notice of the significance of these general interests and the potential consequence for their compromise.

Fundamental due process concerns are not, however, confined to substantive offenses. Many procedural provisions of the UCMJ now applicable to civilians also seem fundamentally inconsistent with basic notions of civilian criminal law. Three prominent examples include the plenary authority of lay commanders to effectively "indict" defendants, subjecting civilians to what is referred to in military practice as "non-judicial punishment," and the military-appellate process.

One unique aspect of the military-justice system is the immense power of commanders in the criminal-justice process. The UCMJ empowers these officers to make all critical decisions regarding criminal prosecutions.¹⁷⁹ Although many of these decisions must be preceded by advice from a legal officer,¹⁸⁰ or judge advocate, unlike civilian practice it is the layperson, and not the legal officer, who makes the ultimate decision to send a charge to trial. The plenary nature of this power allows commanders to refer (the military analogue to indict) a case to trial even when the pretrial investigation (the military analogue to a grand jury) recommends dismissal of charges.¹⁸¹ Lay commanders are

177. See DAVID A. SCHLUETER, *MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE* § 2-6, at 105 (6th ed. 2004) ("One of the most controversial 'crimes' in military practice is the deeply rooted general article—Article 134. The article, which like Article 133 [Conduct Unbecoming an Officer and a Gentleman], has been ruled constitutional. . . . [Article 134] makes punishable all of those acts that are not specifically proscribed in the other punitive articles of the U.C.M.J.").

178. See *Parker v. Levy*, 417 U.S. 733, 756–58 (1974); see also SCHLUETER, *supra* note 177, § 2-6, at 105.

179. See SCHLUETER, *supra* note 177, § 1-8, at 46–49.

180. See 10 U.S.C. § 834.

181. 10 U.S.C. § 832(a) ("No charge or specification may be referred to a general court-martial for trial until a thorough and impartial investigation of all the matters set forth therein has been

also empowered to approve or deny pretrial agreements (plea bargains). Perhaps most importantly, lay commanders are empowered to approve or modify the results of military trials.¹⁸² While this power does not extend to making a trial result more severe, no result of trial is "final" until it is approved or modified by the commander who convened the court, vesting the commander with the power to totally set aside a court's finding of guilt, a court's sentence, or both. The extent of this command authority is emphasized explicitly in the Code: "The authority under this section to modify the findings and sentence of a court-martial is a matter of command prerogative involving the sole discretion of the convening authority."¹⁸³ Subjecting a civilian to criminal conviction under a process that empowers a lay military commander with such plenary authority is inconsistent with traditional notions of civilian criminal process, and is therefore a serious deprivation of individual rights.

This deprivation is arguably exacerbated by the fact that military courts, unlike their civilian counterparts, are not established under Article III of the Constitution. Instead, UCMJ created these courts under Congress's Article I authority to "make Rules for the Government and Regulation of the land and naval Forces."¹⁸⁴ As a result of this Article I foundation, there has never been a requirement that the military trial or appellate judiciary enjoy life tenure like their Article III counterparts. Instead, these positions are filled by commissioned officers serving as qualified Judge Advocates and assigned to military judiciary duties by their Service Judge Advocate General.¹⁸⁵ This use of Article I courts

made. This investigation shall include inquiry as to the truth of the matter set forth in the charges, consideration of the form of charges, and a recommendation as to the disposition which should be made of the case in the interest of justice and discipline.").

182. See *id.* § 860(c)(1).

183. *Id.*

184. U.S. CONST. art. I, § 8, cl. 14.

185. See 10 U.S.C. § 826, which provides:

(a) A military judge shall be detailed to each general court-martial. Subject to regulations of the Secretary concerned, a military judge may be detailed to any special court-martial. The Secretary concerned shall prescribe regulations providing for the manner in which military judges are detailed for such courts-martial and for the persons who are authorized to detail military judges for such courts-martial. The military judge shall preside over each open session of the court-martial to which he has been detailed.

(b) A military judge shall be a commissioned officer of the armed forces who is a member of the bar of a Federal court or a member of the bar of the highest court of a State and who is certified to be qualified for duty as a military judge by the Judge Advocate General of the armed force of which such military judge is a member.

(c) The military judge of a general court-martial shall be designated by the Judge Advocate General, or his designee, of the armed force of which the military judge is a member for detail in accordance with regulations prescribed under subsection (a). Unless the court-martial was convened by the President or the Secretary concerned, neither the convening authority nor any member of his staff

presided over by non-life-tenured judges has withstood constitutional scrutiny. In *Weiss v. United States*, the U.S. Supreme Court held that the lack of a fixed term of office for military judges did not violate the Due Process Clause of the Fifth Amendment.¹⁸⁶ But the holding of the Court was influenced substantially both by the express authority vested in Congress by the Constitution to establish such Article I courts for the armed forces and by the history of exercising this authority to establish a military-justice system.¹⁸⁷ This authority to provide for a distinct criminal-justice system for the military led the Court to conclude that it was appropriate to apply a reduced standard of due process.¹⁸⁸ It is questionable, however, whether application of this reduced standard would extend to the use of such tribunals to try civilian augmentees. Accordingly, the Article I-derived military-justice construct that was deemed constitutionally sufficient for members of the armed forces might not pass muster when used to subject civilian augmentees to criminal sanction.

The military-appellate process also involves aspects that differ with traditional criminal practice.¹⁸⁹ Like their military trial-judiciary counterparts, military-appellate judges are Judge Advocates appointed for a term of years, with no tenure.¹⁹⁰ If the appeal to the Court of Appeals for the Armed Forces is granted or required, civilian judges will decide

shall prepare or review any report concerning the effectiveness, fitness, or efficiency of the military judge so detailed, which relates to his performance of duty as a military judge. A commissioned officer who is certified to be qualified for duty as a military judge of a general court-martial may perform such duties only when he is assigned and directly responsible to the Judge Advocate General, or his designee, of the armed force of which the military judge is a member and may perform duties of a judicial or nonjudicial nature other than those relating to his primary duty as a military judge of a general court-martial when such duties are assigned to him by or with the approval of that Judge Advocate General or his designee.

(d) No person is eligible to act as military judge in a case if he is the accuser or a witness for the prosecution or has acted as investigating officer or a counsel in the same case.

(e) The military judge of a court-martial may not consult with the members of the court except in the presence of the accused, trial counsel, and defense counsel, nor may he vote with the members of the court.

See id. § 866 (providing for the establishment of Military Courts of Review). These courts are also comprised of commissioned officers assigned by their Service Judge Advocate General. According to the Code: "Each Judge Advocate General shall establish a Court of Criminal Appeals which shall be composed of one or more panels, and each such panel shall be composed of not less than three appellate military judges." *Id.* § 866(a).

186. 510 U.S. 163, 165 (1994).

187. *Id.* at 170–75.

188. *Id.* at 177–78.

189. *See* 10 U.S.C. §§ 807(c), 815 (concerning apprehension and commanding officer's nonjudicial punishment).

190. *See* 10 U.S.C. § 866(a); *see also* MANUAL FOR COURTS-MARTIAL, UNITED STATES, R. 1201(b)(1), at II-165 (2005 ed.).

the case. Unlike their Article III counterparts, however, these judges are appointed for a term of years and are not granted life tenure.¹⁹¹

Military defendants have periodically challenged this statutory construct which vests lay commanders with immense legal powers. These challenges ultimately culminated in the Supreme Court decision of *Loving v. United States*, which upheld the unique procedures of the military-justice system.¹⁹² *Loving* relied heavily on the special obligation imposed on commanders to maintain good order and discipline in military units.¹⁹³ This interest is arguably more attenuated with regard to civilian augmentees. But although the increasing reliance on such civilians by military commanders does implicate this critical justification, the key question is whether it requires a wholesale application of the entire military-justice system to serve this interest.

If no viable alternative existed for addressing serious misconduct by civilian augmentees, this proverbial "baby with the bath water" approach might be justifiable. But the collective impact of subjecting civilian augmentees to the UCMJ when considered within the context of the expansion of federal-criminal jurisdiction resulting from the enactment of MEJA and the WCA suggests a negative answer to this question. Instead, wholesale application of the UCMJ to civilian augmentees greatly exceeds the limited purported necessity of providing meaningful disciplinary authority over these civilians. Review of these provisions also suggests that it was unlikely that the full consequence of the amendment was contemplated before its enactment. Although it may be true that the disciplinary necessity regarding civilian augmentees justified full application of the Code in earlier eras, this simply is no longer the case.

As explained earlier in this article,¹⁹⁴ the scope of MEJA and the WCA provide viable criminal alternatives for prosecuting civilians who commit the kinds of offenses that would subject them to federal prosecution in the United States. But these statutes have rarely been used since enactment.¹⁹⁵ This fact has often been asserted as a justification for the

191. See 10 U.S.C. § 942.

192. 571 U.S. 748, 773–74 (1996) (upholding the President's authority to prescribe aggravating factors permitting a court-martial to impose the death penalty on an army private who was convicted of murder).

193. See *id.* at 761 ("From the English experience the Framers understood the necessity of balancing efficient military discipline, popular control of a standing army, and the rights of soldiers The Framers' choice in Clause 14 [of the U.S. Constitution] was to give Congress the same flexibility to exercise or share power as times might demand.").

194. See *supra* notes 116–39 and accompanying text.

195. As of the date of this article, only two indictments have been handed down alleging violation of the MEJA, and none alleging violation of the WCA. See sources cited *supra* note 132.

resurrection of military jurisdiction over civilians.¹⁹⁶ In short, military commanders purportedly lament the ineffective implementation of federal criminal statutes and therefore prefer the ability to address misconduct through their own system of justice. Although this preference may be an understandable response to the ineffective implementation of these statutes, it does not justify their disregard when analyzing the necessity to resurrect plenary military jurisdiction over civilians.

Such analysis must presume instead that the chief executive will “faithfully execute” these laws.¹⁹⁷ Two considerations bolster this presumption. First, MEJA has been amended to clarify that it applies to all contractors and subcontractors employed not only by the Department of Defense, but also by any other federal agency providing support to defense missions outside the United States.¹⁹⁸ Thus, there is no room for doubt that this statute provides meaningful criminal proscription for a wide range of criminal offenses committed by virtually any civilian employed by or accompanying the armed forces overseas. Second, although it took nearly five years, in 2005 the Department of Defense published an instruction to implement MEJA.¹⁹⁹ This instruction provides clear and comprehensive guidance to U.S. military commanders on how to process a request for prosecution of a civilian augmentee in federal district court.

Exposing the overly broad scope of jurisdiction resurrected by the amendment to the UCMJ, however, does not mandate the conclusion that civilian augmentees must be immune from all military disciplinary sanction. Such a conclusion would accommodate the interests of civilian augmentees without balancing the interests of military commanders—an interest that as noted above ostensibly motivated the recent UCMJ amendment. What this article proposes therefore is a more carefully tailored balance of these competing interests. This balance takes into consideration the already existing federal-criminal jurisdiction over civilian augmentees, as well as the questionable necessity of exposing these civilians to federal-criminal conviction for offenses unique to

196. See, e.g., Peters, *supra* note 10, at 385.

197. See U.S. CONST. art. II, § 1, cl. 7 (“Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:—‘I do solemnly swear (or affirm) that I will *faithfully execute* the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States.’”) (emphasis added).

198. See 18 U.S.C.A. § 3267(1)(A) (West 2007).

199. See INSTRUCTION No. 5525.11, *supra* note 129, ¶ 1.1. (“Implements policies and procedures, and assigns responsibilities, under the ‘Military Extraterritorial Jurisdiction Act of 2000,’ as amended by Section 1088 of the ‘Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005’ . . . for exercising extraterritorial criminal jurisdiction over certain current and former members of the U.S. Armed Forces, and over civilians employed by or accompanying the U.S. Armed Forces outside the United States.”).

the military. But the proposed accommodation will also empower military commanders with what is perhaps the most sorely lacking disciplinary authority over civilian augmentees: the authority to impose disciplinary sanctions for nonfelonious yet highly disruptive misconduct.

VI. A PROPOSAL TO RECONCILE INDIVIDUAL CIVILIAN RIGHTS
WITH GENUINE DISCIPLINARY INTERESTS
OF MILITARY COMMANDERS

Drawing a distinction between criminal and disciplinary sanctions is a concept that military practitioners and commanders understand intuitively. In fact, the vast majority of violations of the UCMJ amount to incidents of minor misconduct, and the vast majority of these incidents are resolved through disciplinary procedures, not through the judicial process of special or general courts-martial.²⁰⁰ The primary provision of the UCMJ providing for nonjudicial disposition of disciplinary infractions is Article 15.²⁰¹ The process provided for by Article 15, and the regulations of the various services implementing this article, are loosely analogous to what civilian practitioners would characterize as pretrial diversion.²⁰² Article 15 authorizes military commanders to impose "nonjudicial punishment" on members of their units, subject to limitations established both by the Code and by the military regulations, to achieve disciplinary objectives without resorting to judicial process.²⁰³ According to the Army Regulation establishing procedures for nonjudicial punishment:

Use of nonjudicial punishment is proper in all cases involving minor offenses in which nonpunitive measures are considered inadequate or inappropriate. If it is clear that nonjudicial punishment will not be sufficient to meet the ends of justice, more stringent measures must be taken. Prompt action is essential for nonjudicial punishment to have the proper corrective effect. Nonjudicial punishment may be imposed to—

- a. Correct, educate, and reform offenders who the imposing commander determines cannot benefit from less stringent measures.

200. James B. Roan & Cynthia Buxton, *The American Military Justice System in the New Millennium*, 52 A.F. L. REV. 185, 193 (2002).

201. 10 U.S.C. § 815 (2000).

202. See SCHLUETER, *supra* note 177, § 1-8(C), at 47. According to Schlueter: "Nonjudicial punishment, widely used in all of the services, is specifically addressed in Article 15 of the U.C.M.J. and is designed to allow a commander to quickly impose minor punishments for minor offenses committed by members of his command." *Id.*

203. See *id.* § 3-1, at 146; see also U.S. DEP'T OF THE ARMY, MILITARY JUSTICE: ARMY REGULATION 27-10, ¶ 3-2, at 3 (2005), available at http://www.army.mil/usapa/epubs/pdf/r27_10.pdf [hereinafter ARMY REGULATION 27-10].

- b. Preserve a Soldier's record of service from unnecessary stigma by record of court-martial conviction.
- c. Further military efficiency by disposing of minor offenses in a manner requiring less time and personnel than trial by court-martial.²⁰⁴

As a general rule, a commander initiates this disciplinary proceeding, and subsequently hears evidence, makes findings of guilt, and decides on an appropriate sentence. Under military regulations appeal is authorized to the next level of command.²⁰⁵ Although some military regulations impose legal-review requirements for certain aspects of the process, the process is quasi-adversarial in nature and the accused is not entitled to legal representation during the proceedings.²⁰⁶ Nonetheless, the accused is entitled to one very important right: the right to object to nonjudicial resolution of an allegation by demanding trial by court-martial. With rare exception, such a demand terminates the nonjudicial disciplinary proceeding.²⁰⁷

If an accused service member has an almost absolute right to demand trial by court-martial, why would so many allegations of misconduct be resolved through this nonjudicial process? The answer lies in the benefit that accrues to the accused by accepting this process. Unlike a court-martial, a finding of guilt in a nonjudicial proceeding under Article 15 does not result in a federal-criminal conviction.²⁰⁸ Accordingly, the service member is protected from the permanent

204. ARMY REGULATION 27-10, *supra* note 203, ¶ 3-2, at 3.

205. *Id.* ¶ 3-30, at 15.

206. *See id.* ¶ 3-2, at 3; *see also id.* ¶ 3-7, at 5, regarding who may impose nonjudicial punishment:

a. *Commanders.* Unless otherwise specified in this regulation or if authority to impose nonjudicial punishment has been limited or withheld by a superior commander . . . any commander is authorized to exercise the disciplinary powers conferred by Article 15.

(1) The term commander, as used in this chapter, means a commissioned or warrant officer who, by virtue of that officer's grade and assignment, exercises primary command authority over a military organization or prescribed territorial area, that under pertinent official directives is recognized as a command.

In regard to the right to counsel, the Regulation provides:

The Soldier will be informed of the right to *consult* with counsel and the location of counsel. For the purpose of this chapter, counsel means the following: A judge advocate (JA), a Department of Army (DA) civilian attorney, or an officer who is a member of the bar of a Federal court or of the highest court of a State, provided that counsel within the last two categories are acting under the supervision of either USATDS or a staff or command judge advocate.

Id. ¶ 3-18, at 9 (emphasis added).

207. *See* 10 U.S.C. § 815(a) (2000). The one exception to this right to demand trial by court-martial and terminate nonjudicial-punishment proceedings is "except in the case of a member attached to or embarked in a vessel." *Id.*

208. *Id.* § 815.

stigma of a federal record. Perhaps more importantly for many service members facing the choice of whether to accept nonjudicial proceedings, the punishment permissible under Article 15 is limited to what is best characterized as disciplinary sanctions. These typically include forfeiture of pay for a limited period, loss of rank, restriction, and extra duty. Permissible punishments vary depending on the level of the commander imposing the nonjudicial punishment and the rank of the service member.²⁰⁹ But under no circumstances may the punishment include a punitive discharge from the military (or any discharge for that matter) or incarceration at a military correctional facility—punishments that are almost always authorized after conviction by a military criminal court. Accordingly, a service member is able to shield the extent of punitive exposure by bargaining away his or her absolute right to trial by court-martial; and a commander is able to ensure swift disciplinary process by bargaining away his or her right to initiate criminal proceedings in response to misconduct.²¹⁰

Because the recent amendment to the UCMJ subjects civilian augmentees to the entire Code, these civilians are now subject to Article 15. Subjecting a civilian to this nonjudicial process might be perceived by some to only further exacerbate the deprivation of fundamental rights accorded to criminal defendants. But the process established by Article 15 might actually offer insight into an ideal accommodation of competing interests relating to civilian misconduct.

As discussed previously in this article, exposing civilians to court-martial jurisdiction raises two troubling concerns. The first of these is whether the deprivation of fundamental trial rights inherent in such exposure is constitutionally permissible. The second is whether, even assuming such a deprivation is justifiable in the abstract, the enactment of federal-criminal statutes that address a wide array of civilian misconduct tilts the constitutionality balance against court-martial jurisdiction. Neither *Reid* nor the legislative history of MEJA or the WCA provides dispositive authority to resolve these concerns. But the trepidation with which the military services have received the recent amendment suggests that these authorities might not be considered to provide dispositive support for the amendment.

But if the enactment of MEJA and the WCA are considered to alter the balance of constitutional analysis—as is proposed in this article—this alteration must be limited to criminal sanction. Nothing in these federal statutes empowers military commanders to impose the type of

209. *Id.* § 815(b).

210. Nonjudicial punishment is used primarily to respond to minor offenses unique to the military. See *id.* §§ 877–934; see also ARMY REGULATION 27–10, *supra* note 203, ¶ 3-9, at 6.

disciplinary sanctions normally accomplished through nonjudicial punishment and so critically important in maintaining good order and discipline. What is needed, therefore, is not necessarily an amendment to the Code subjecting civilian augmentees to the full corpus of the UCMJ. Rather, military commanders must be empowered to respond to acts of misconduct by civilian augmentees that endanger the maintenance of good order and discipline in the unit and are not otherwise subject to the jurisdiction established by federal-criminal statutes. Civilians should also be protected, however, from the permanent stigma of a federal-criminal conviction absent the safeguards afforded by the Bill of Rights. In addition, civilian augmentees should be afforded sufficient process to provide safeguards against abuse of power by the military commanders they support. The mechanism with which to accomplish these objectives lies within the Code itself—in the form of what is known as the summary court-martial.

Summary courts-martial are perhaps best understood as a hybrid between nonjudicial punishment and formal criminal proceedings.²¹¹ Like nonjudicial punishment, individuals may be charged with any non-capital offense codified in the punitive articles of the Code. And like Article 15, conviction by a summary court does not result in a federal-criminal record. Unlike nonjudicial punishment, however, the summary court is composed of a commissioned officer who is not the unit commander, providing for division between the officer normally making the allegation and the officer adjudicating the case.²¹² In addition, the summary court is governed by the military rules of evidence, and although there is no right to representation before such a court, it is more adversarial in nature than nonjudicial-punishment proceedings.²¹³

There are two additional important similarities between the summary court and nonjudicial punishment: First, individuals brought before a summary court have an absolute right to object to the jurisdiction of the court.²¹⁴ Like nonjudicial punishment, such objection exposes the

211. See *MANUAL FOR COURTS-MARTIAL*, *supra* note 190, R. 1301(a), at II-175; SCHLUETER, *supra* note 177, § 1-8(D)(1), at 47. According to Schlueter:

A summary court-martial, designed to dispose of minor offenses in a simplified proceeding, consists of one commissioned officer who may, but need not be, a lawyer. The accused, whose consent is a prerequisite to the proceeding, is normally not entitled to a detailed lawyer, but upon request may be represented by a civilian counsel, at no expense to the government, or by an individually requested military counsel.

Id. (citations omitted).

212. See SCHLUETER, *supra* note 177, § 15-26(A), at 894.

213. See *id.* § 15-26(C), at 895.

214. See 10 U.S.C. § 820 (2000) ("No person with respect to whom summary courts-martial have jurisdiction may be brought to trial before a summary court-martial if he objects thereto.").

individual to trial by a true criminal court—a special or general court-martial—both of which are empowered to impose more severe penalties, in addition to a federal-criminal conviction. The second similarity is that the summary court may impose only limited punishment. Like non-judicial punishment, the permissible punishments available for a summary court vary depending on the rank of the accused. As a general rule, however, these are similar to the disciplinary-type punishments authorized under Article 15.

This limited-punishment jurisdiction, requiring trial by an officer who is not the accuser and eliminating the risk of federal criminal record, is the type of disciplinary tool that could be used to reconcile the competing interests related to civilian misconduct. Subjecting civilians to summary-court jurisdiction would of course deprive them of a number of fundamental constitutional trial rights. But the consequence of that deprivation would be far less profound than subjecting them to trial by special or general courts-martial with the power to impose more severe punishments and stigmatize the civilian with a permanent criminal record. From the military commander's perspective, such jurisdiction would allow for the efficient imposition of disciplinary-type sanctions for acts of misconduct that threaten the good order and discipline of the military unit. Perhaps more importantly, civilians suspected of committing acts of serious criminal misconduct not appropriately subject to disciplinary sanctions would, instead of being subjected to trial by court-martial, be referred to a U.S. Attorney for trial in federal court pursuant to MEJA or the WCA.

Such a proposal might appear radical. Subjecting civilians to a disciplinary system with limited individual-trial rights might seem antithetical to the protection from arbitrary governmental condemnation that the Bill of Rights provides for every citizen. But it is essential to assess any proposed extension of military jurisdiction over civilian augmentees from the realistic perspective that the individual's interest be balanced against the military interest. This balancing has always been the *sine qua non* of allowing the application of military jurisdiction over civilians, a justification that survived even the *Averette* decision (provided the requisite declaration of war is enacted by Congress). This proposal acknowledges this historical interest, provides a meaningful military disciplinary tool over civilian augmentees within the broader context of existing federal-criminal jurisdiction, and protects these civilians from any long-term stigmatization resulting from this such sanction.

Implementing such a proposal would require a more complex amendment to the Code than that recently enacted. This amendment

would retain the currently enacted language of Article 2(10), but add the following qualification:

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”. *However, the jurisdiction established by this Article may be exercised only by a summary court-martial following the procedures established in section 820 of this Code.*

Section 820 establishes the jurisdiction of summary courts-martial. This Article currently provides:

Subject to section 817 of this title (article 17), summary courts-martial have jurisdiction to try persons subject to this chapter, except officers, cadets, aviation cadets, and midshipmen, for any noncapital offense made punishable by this chapter. No person with respect to whom summary courts-martial have jurisdiction may be brought to trial before a summary court-martial if he objects thereto. If objection to trial by summary court-martial is made by an accused, trial may be ordered by special or general court-martial as may be appropriate. Summary courts-martial may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by this chapter except death, dismissal, dishonorable or bad-conduct discharge, confinement for more than one month, hard-labor without confinement for more than 45 days, restrictions to specified limits for more than two months, or forfeiture of more than two-thirds of one month's pay.²¹⁵

To provide for the jurisdiction over civilian augmentees proposed in this article, the following subparagraph could be adopted to supplement Article 20:

Civilians subject to the jurisdiction of summary courts-martial by operation of Article 2(10) of this Code may object to trial by summary court-martial only when the charged offense may be charged as a violation of other federal criminal statutes. In all other cases summary court-martial jurisdiction is binding, but only field grade judge advocate may serve as the summary court. Upon conviction by summary court-martial, the court may impose punishment in the form of an order of termination from employment; or restrictions to specified limits for up to one month and/or a fine of two-thirds of one month's pay.

This is, of course, just one proposal for extending the limited jurisdiction of summary courts-martial to civilian augmentees. Other options might include requiring the court to be composed of one field-grade officer and one civilian from the supervisory chain of the accused; mak-

215. *Id.*

ing summary courts-martial jurisdiction binding in all cases; allowing the accused to object to trial by summary court-martial in all cases but only if the accused consents to trial by general court-martial for offenses not falling within the jurisdiction of a federal district court; and the authorization of other types or combinations of punishments, such as a fine and restriction to be followed by termination of employment. Any of these alternates shares a common benefit for the civilian accused of misconduct by a military commander: preservation of the absolute right to minimize the consequence of such an allegation to adjudication not considered "criminal" in the civilian context.

It is this mitigation of the detrimental consequence flowing from court-martial conviction—namely a permanent criminal record and deprivation of liberty—that is so significant for purposes of walking the proverbial tightrope between the concerns reflected in *Reid* and the genuine interests of military commanders. Neither of these considerations should be permitted to consume the other. Instead, a balanced approach to addressing the current disciplinary gap is a more palatable solution than the all-or-nothing options reflected in the pre- and post-amendment jurisdictional paradigm. Limiting the jurisdiction over civilians to summary courts-martial offers the unique benefit of empowering commanders to respond to a wide range of potential misconduct while protecting the fundamental rights of these civilians. It also ensures an appropriate division of authority between the commander, who will almost always serve as the individual initiating the disciplinary process, and the officer responsible for adjudicating an allegation—a benefit not likely if civilians are subject to Article 15 of the Code.

Many of these advantages could also be achieved by subjecting civilian augmentees to Article 15. However, the summary-court proposal is also preferable to subjecting civilian augmentees to Article 15 for other reasons. It ensures that a civilian accused of misconduct will have the benefit of legal advice from a qualified Judge Advocate; the most basic due-process rights of notice and an opportunity to be heard; and the ability to rely on the Rules for Courts-Martial to obtain evidence, question witnesses, and object to inadmissible evidence.²¹⁶ In addition, any finding of guilt by a summary court will be subject to subsequent review by a qualified Judge Advocate.²¹⁷ Finally, the proposed amendments to the UCMJ will strike an effective accommodation between military and civilian jurisdiction by ensuring that a civilian accused of an offense that is also a violation of existing federal criminal law is able to

216. See ARMY REGULATION 27-10, *supra* note 203, ¶ 5-23-28, at 34-35.

217. 10 U.S.C. § 864.

object to military-noncriminal jurisdiction and demand trial in federal court.

VII. CONCLUSION

The recent amendment to the UCMJ resurrecting military-criminal jurisdiction over civilians accompanying the force was unquestionably unexpected. But it was also unquestionably responsive to the perception that the lack of meaningful military disciplinary authority over these evermore-omnipresent civilians is having a detrimental impact on the good order and discipline of deployed armed forces. This perception is certainly not without merit, as cases of civilian-augmentee misconduct become increasingly more common with the accordant increase in the number of such civilians in areas of current military operations.

Unfortunately, simply amending Article 2(10) of the UCMJ is insufficient to conclusively resolve this jurisdictional gap. There remains a substantial question whether subjecting civilians to military jurisdiction—even those civilians accompanying the force in the field—will withstand constitutional scrutiny. Resurrecting such jurisdiction after almost three decades of dormancy during which time nothing in the nature of military procedure changed to rectify the flaws identified by the *Reid* Court only exacerbates this uncertainty.

Nor is the analysis of this amendment to the Code limited to considering the factors analyzed in *Reid*. The enactment of federal-criminal statutes specifically intended to address misconduct committed by civilians accompanying the force has altered the analytical landscape. Although the legislative history of these statutes indicates that they were not intended to displace existing military jurisdiction, it is simply disingenuous to suggest that they were not intended to fill this jurisdictional gap. Accordingly, unlike the jurisdictional landscape that existed at the time of the *Reid* decision, today military commanders have the ability to refer acts of criminal misconduct committed by civilian augmentees to U.S. Attorneys for prosecution. That the executive branch has not effectively implemented these statutes in no way justifies dismissing them as factors of analysis. Instead, these statutes should be considered as, at least, partially filling the jurisdictional gap created in 1970 by the *Averette* decision.

These statutes have not, however, provided a sufficiently comprehensive framework to address civilian-augmentee misconduct. Even if effectively implemented, they failed to provide military commanders with the means to impose disciplinary type sanctions on civilian augmentees—the type of sanctions so critical to the maintenance of good order and discipline within a military unit. Such sanctions are routinely

imposed on military members of deployed units through the nonjudicial procedures of Article 15 of the Code. However, subjecting civilian augmentees to Article 15 would only exacerbate the amendment's questionable constitutionality.²¹⁸ Nonetheless, the basic premise of Article 15—the ability to impose nonjudicial-disciplinary sanctions for minor misconduct without the stigmatization of a criminal conviction—is a more legitimate military interest than application of the entire UCMJ to civilians. A method of implementing Article 15's underlying premise while at the same time ensuring procedures provide more meaningful protection for civilian augmentees is therefore needed.

The UCMJ provides the means to accomplish the balance between military interest and civilian rights in the form of the summary court-martial. On examination of summary-court procedure, it becomes clear that these courts are in fact better understood as another nonjudicial disciplinary forum with important additional procedural safeguards.²¹⁹ Most significant among these is the requirement that the court be composed of an officer independent from the commander initiating disciplinary proceedings. There is, of course, no question that prosecution before such a court fails to afford a number of criminal-trial rights held to be fundamental by the Supreme Court. But the consequence of this deprivation of rights is substantially mitigated by the fact that findings of guilt by such a court do not result in a federal-criminal conviction. Accordingly, summary courts are best understood as disciplinary and not criminal tribunals, a critical consideration when assessing the constitutionality of subjecting civilians to military jurisdiction.

Limiting military jurisdiction over civilians to summary courts-martial will require several additional amendments to the UCMJ. These would include qualifying the resurrection of jurisdiction resulting from the amendment to Article 2(10); providing for the circumstances that permit a civilian to object to the jurisdiction of these courts and demand trial by federal court; and providing for available punishments uniquely tailored to civilian augmentees. But there is no reason why such amendments could not be enacted, particularly considering the fact that the recent amendment reflects a clear desire to enhance the power of military commanders to deal with civilian misconduct. This more limited exposure to military jurisdiction would go far toward accomplishing this goal while reducing the risk of judicial invalidation. This in turn might produce a more enthusiastic response by the armed forces to implement

218. Becker, *supra* note 12, at 590–91 (quoting Neil K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259, 1277 (2002)).

219. See Michael H. Gilbert, *Summary Courts-martial: Rediscovering the Spumoni of Military Justice*, 39 A.F. L. REV. 119, 120 (1996).

such amendments, which will ultimately be essential for the effective implementation of any effort to establish more effective discipline over civilians accompanying the force.