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Between War and Peace: Exploring the Constitutionality of Subjecting Private Civilian Contractors to the Uniform Code of Military Justice During “Contingency Operations”

“I want to kill somebody today,” the voice of Jacob Washbourne rang out in the armored SUV as he and three fellow private security contractors sped along Baghdad’s airport road.¹ Washbourne was the leader of a team employed by Triple Canopy, a company contracted by the U.S. government to provide security escorts along dangerous roads in Iraq.² Although the details of what happened the afternoon of July 8, 2006, remain unclear,³ by the end of the day Washbourne’s team had engaged in at least two separate shooting incidents.⁴ One shooting involved a random local taxicab that they encountered while speeding along the airport road.⁵ According to two of his teammates, Washbourne proclaimed, “‘I’ve never shot anyone with my pistol before,’ ” and then proceeded to “push[] open the armored door, lean[] out with his handgun and fire[] ‘7 or 8 rounds’ into the taxi’s windshield.”⁶ The taxi veered off the road erratically, but the team did not stop to see if anyone was hurt.⁷ Although the shooting seemed to be reckless and unprovoked, no criminal investigation ensued.⁸ Instead, it was another confirmation of the motto often repeated by American security contractors: “What happens here today, stays here today.”⁹

The Triple Canopy incident is evidence of the struggle to integrate private contractors into government operations. In the

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1. Steve Fainaru, *A Chaotic Day on Baghdad’s Airport Road*, WASH. POST, Apr. 15, 2007, at A1. Washbourne made statements such as these on every mission. *Id.* (noting that Washbourne “frequently made similar jokes” and said “[o]kay, let’s go shoot somebody” prior to each mission).

2. *Id.*

3. *Id.* (“The full story of what happened on Baghdad’s airport road that day may never be known.”).

4. *Id.*

5. *Id.* Another incident involved a white pickup truck that the team encountered on their way to the airport. *Id.* While there are conflicting versions of the incident, two members of the team said, “it was Washbourne who shot at the white truck and that he fired intentionally into the windshield.” *Id.*

6. *Id.*

7. *Id.*

8. *See id.*

9. *Id.*

context of the Global War on Terrorism and modern counterinsurgency operations,¹⁰ the Department of Defense and other agencies within the U.S. government utilize an unprecedented number of private contractors to support missions in Iraq and Afghanistan.¹¹ These contractors are vital to counterinsurgency efforts because they augment force limitations by performing services ranging from logistics support to security functions.¹² However, unlike members of the Armed Forces who are “accountable under [the Uniform Code of Military Justice] wherever they are located,”¹³ private security contractors fall into “legal ‘gray areas’” between host-nation laws, domestic criminal laws, and international laws such as the Geneva Convention.¹⁴ As civilians, they would normally be subject to host-nation laws.¹⁵ In Iraq and Afghanistan, however, contractors are expressly protected by agreements providing immunity from prosecution in the local jurisdiction.¹⁶ In addition,

10. Counterinsurgency operations are defined as “military, paramilitary, political, economic, psychological, and civic actions taken by a government to defeat insurgency,” THE U.S. ARMY/MARINE CORPS COUNTERINSURGENCY FIELD MANUAL 383 (2007) [hereinafter COUNTERINSURGENCY FIELD MANUAL], and are descriptive of the mission of the United States in Iraq and Afghanistan.

11. See *id.* at 65 (“Recently, private contractors from firms providing military-related services have become more prominent in theaters of operations.”); P.W. Singer, *Outsourcing War: Understanding the Private Military Industry*, FOREIGN AFF., Mar.–Apr. 2005, at 123 (commenting that private military firms “have been essential to the U.S. effort in Iraq”). See generally John M. Broder & David Rohde, *State Department Use of Contractors Leaps in 4 Years*, N.Y. TIMES, Oct. 24, 2007, at A1 (reporting that the State Department spends nearly \$4 billion annually on private security and law enforcement contractors such as Blackwater USA and DynCorp International).

12. CTR. FOR LAW AND MILITARY OPERATIONS, FORGED IN THE FIRE: LEGAL LESSONS LEARNED DURING MILITARY OPERATIONS 1994–2006, at 26 (2006) [hereinafter FORGED IN THE FIRE] (“The Department of Defense uses contractors to provide U.S. forces that are deployed overseas with a wide variety of services because of force limitations and a lack of needed skills.”); see JENNIFER ELSEA & NINA M. SERAFINO, CONG. RESEARCH SERV., PRIVATE SECURITY CONTRACTORS IN IRAQ: BACKGROUND, LEGAL STATUS, AND OTHER ISSUES 1 (2004), http://assets.opencrs.com/rpts/RL32419_20040528.pdf (“[T]he United States has gradually increased the types of tasks and roles for which it contracts private companies in military operations . . .”).

13. Singer, *supra* note 11, at 127.

14. Lauren Stone, “*Understanding the Privatization of National Security*” Conference Executive Summary, A.B.A. NAT’L SECURITY L. REP., Nov. 2006, at 11, 13; Singer, *supra* note 11, at 127 (“[C]ontractors have a murky legal status.”).

15. See COUNTERINSURGENCY FIELD MANUAL, *supra* note 10, at 357.

16. See, e.g., COALITION PROVISIONAL AUTHORITY ORDER NO. 17 (REVISED), STATUS OF THE COALITION PROVISIONAL AUTHORITY, MNF-IRAQ, CERTAIN MISSIONS AND PERSONNEL IN IRAQ 5 (2004), http://www.cpa-iraq.org/regulations/20040627_CPAORD_17_Status_of_Coalition_Rev_with_Annex_A.pdf. This order was signed by L. Paul Bremer during his tenure as the head of the Coalition Provisional Authority and provides that “[c]ontractors shall be immune from [the] Iraqi legal process.” *Id.*

although Congress passed the Military Extraterritorial Jurisdiction Act ("MEJA")¹⁷ to hold civilians accountable under domestic criminal laws,¹⁸ MEJA has not been widely utilized due to significant resource limitations.¹⁹ Finally, contractors do not "fit the formal definition of mercenaries" and are thus "undefined by international law."²⁰

Recognizing the need to close this legal loophole,²¹ Senator Lindsey Graham proposed the addition of section 552 to the John Warner National Defense Authorization Act for Fiscal Year 2007 ("FY07 NDAA").²² This addition expanded the jurisdiction of the Uniform Code of Military Justice ("UCMJ") to hold civilians "accompanying the force" accountable to military laws during "contingency operation[s]."²³ Prior to section 552, the jurisdiction of the UCMJ could only be extended to these civilians in "time[s] of war,"²⁴ which has been interpreted by the military's highest court to

17. 18 U.S.C. §§ 3261–67 (2000).

18. *Id.* § 3261(a)(1).

19. These limitations are due to factors such as "remoteness of the crime scene; issues arising out of combat operations in finding witnesses, victims, and evidence; and cultural prohibitions on autopsies." Anthony E. Giardino, *Using Extraterritorial Jurisdiction To Prosecute Violations of the Law of War: Looking Beyond the War Crimes Act*, 48 B.C. L. REV. 699, 731 (2007); *see also* Peter W. Singer, Brookings Inst., Frequently Asked Questions on the UCMJ Change and its Applicability to Private Military Contractors, Jan. 12, 2007, http://www.brookings.edu/opinions/2007/0112defenseindustry_singer.aspx (explaining that using MEJA to prosecute civilians for crimes in Iraq would require a U.S. Attorney to travel to Iraq several times and possibly spend "his entire yearly budget on one case" while trying to balance ongoing domestic prosecutions).

20. Singer, *supra* note 11, at 127. *See generally* ELSEA & SERAFINO, *supra* note 12, at 9–11 (examining the definition of mercenary under Article 47 of Protocol I to the Geneva Conventions and concluding that "some of . . . [its] requirements are inherently difficult to prove"). Although "[t]he United States has not ratified Protocol I, . . . some of its provisions may be considered binding as customary international law." *Id.* at 10 n.37.

21. *See* William Matthews, *Some UCMJ Rules Now Cover U.S. Contractors*, MARINE CORPS TIMES, Jan. 10, 2007, available at <http://www.marinecorpstimes.com/news/2007/01/dfn.ucmjcontractors070105/> (reporting that the change was "intended to close a legal loophole that has enabled contract personnel to escape punishment for violating the law").

22. John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364, § 552, 120 Stat. 2083, 2217. Notably, there are no records of debates leading up to the legislative change because section 552 was a "little noticed" provision that was added to "the FY07 NDAA at the last minute." *Civilians Accompanying Forces in the Field Now Subject to U.S. Military Justice*, GOV'T CONT. ADVISORY (McKenna Long & Aldridge L.L.P., D.C.), Jan. 29, 2007, at 1, <http://www.mckennalong.com/attachment/570/GC+Advisory+1-29-07+UCMJ+Jurisdiction.pdf> [hereinafter *Civilians Accompanying Forces*].

23. 10 U.S.C. § 802(a)(10) (2000), amended by Pub. L. No. 109-364, § 552, 120 Stat. 2083, 2217 (2007).

24. *Id.* (emphasis added).

mean a *declared* war.²⁵ Since Congress has not officially declared war since World War II,²⁶ civilians serving in Iraq and Afghanistan were previously immune from prosecution under the UCMJ.²⁷ Section 552 amended 10 U.S.C. § 802(a)(10), expanding the jurisdiction of the UCMJ to cover civilians in “time[s] of declared war *or a contingency operation*.”²⁸ Because the efforts in Iraq and Afghanistan are both contingency operations,²⁹ the addition effectively subjects civilians accompanying the force, including private contractors, to the UCMJ.³⁰ In essence, “100,000 contractors woke up to find themselves potentially under the same set of military laws that govern the armed forces.”³¹

While perhaps well intended, section 552 raises many questions.³² One of the most important questions concerns the constitutionality of section 552. On one hand, numerous federal court decisions have upheld military convictions of civilians accompanying the force during

25. See *United States v. Averette*, 19 C.M.A. 363, 365 (1970) (“We conclude that the words ‘in time of war’ mean . . . a war formally declared by Congress.”).

26. See *FORGED IN THE FIRE*, *supra* note 12, at 31 (“[T]here has not been a declared war since World War II.”).

27. See U.S. DEP’T OF DEF., INSTRUCTION NO. 5525.11: CRIMINAL JURISDICTION OVER CIVILIANS EMPLOYED OUTSIDE THE UNITED STATES, CERTAIN SERVICE MEMBERS, AND FORMER SERVICE MEMBERS § 2.4 (2005), <http://www.dtic.mil/whs/directives/corres/pdf/552511p.pdf> (“[C]ivilians are generally not subject to prosecution under the UCMJ, unless Congress ha[s] declared a ‘time of war’ when the acts were committed.”); U.S. GOV’T ACCOUNTABILITY OFFICE, REBUILDING IRAQ: ACTIONS STILL NEEDED TO IMPROVE THE USE OF PRIVATE SECURITY PROVIDERS 6 (2006), available at <http://www.gao.gov/new.items/d06865t.pdf> (“[P]rivate security providers are generally not subject to prosecution under the Uniform Code of Military Justice in the absence of a formal declaration of war by Congress.”).

28. 10 U.S.C.A. § 802(a)(10) (2007) (emphasis added).

29. A contingency operation is “designated by the Secretary of Defense” and defined 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.” 10 U.S.C. § 101(a)(13)(A) (2000). Alternatively, it can also be an operation in which reserve-component members are called to active status “during a war or during a national emergency declared by the President or Congress.” § 101(a)(13)(B).

30. Civilians “accompanying the force” is a broad term that potentially encompasses civilians employed by the government, private contractors, and even dependents. See Singer, *supra* note 19 (“On the whole, there are all sorts of theories as to whether it will apply to only direct Defense Department contractors or those from other agencies working in the same warzones or to 3rd party nationals.”). While there are certainly constitutional concerns regarding applicability to each of these groups, this Recent Development will focus on private contractors.

31. Singer, *supra* note 19.

32. See, e.g., *id.* (“[K]ey controversies are the scope and depth of its interpretation. That is, who does it apply to and for what issues?”).

times of *declared war*.³³ On the other hand, the Supreme Court has declared that subjecting civilians to the UCMJ in *peacetime* is unconstitutional.³⁴ As such, the question of whether the UCMJ can be constitutionally applied to civilian contractors during *contingency operations*, which fall between war and peace, remains unanswered. This Recent Development will argue that, although there are significant due process barriers to constitutionality, these concerns do not completely rule out the possibility of applying the UCMJ to civilian contractors accompanying the force in contingency operations.

To support this argument, this Recent Development will analyze *Reid v. Covert*,³⁵ which is the seminal case addressing UCMJ jurisdiction over civilians. First, it will argue that the *Reid* decision, which held that subjecting civilian spouses of servicemen to the UCMJ is unconstitutional, can be distinguished from section 552. Next, this Recent Development will use the analytical framework established in *Reid* to evaluate the constitutionality of section 552. In *Reid*, Justice Black based his opinion on two grounds: (1) due process rights under the Fifth and Sixth Amendments, and (2) Congress's authority to regulate the "land and naval Forces" under Article I, Section 8 of the Constitution.³⁶ Likewise, this Recent Development will consider whether the UCMJ will afford civilians adequate due process rights, as well as whether Congress's power over "land and naval Forces" applies to civilian contractors in contingency operations. Finally, this Recent Development will conclude by noting

33. See, e.g., *In re Berue*, 54 F. Supp. 252, 254 (S.D. Ohio 1944) (finding that a civilian merchant seaman accompanying the Army during a declared war was subject to a court-martial); *McCune v. Kilpatrick*, 53 F. Supp. 80, 89 (E.D. Va. 1943) (denying application for writ of habeas corpus to a civilian cook onboard a vessel used to transport troops and supplies); *In re Di Bartolo*, 50 F. Supp. 929, 933 (S.D.N.Y. 1943) (finding as proper court-martial jurisdiction over a civilian employee of an aircraft company in a combat zone during a declared war).

34. See *McElroy v. United States*, 361 U.S. 281, 284 (1960) ("That a civilian . . . cannot legally be made liable to the military law and jurisdiction, in time of peace, is a fundamental principle of our public law." (quoting 1 WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 127 (2d ed. 1896))).

35. 354 U.S. 1 (1957). *Reid* combines the cases of two civilian wives of service members who were each convicted of murder under the UCMJ. See *id.* at 3-4. First, "Mrs. Clarice Covert killed her husband, a sergeant in the United States Air Force, at an airbase in England." *Id.* at 3. In an unrelated incident, "Mrs. Dorothy Smith killed her husband, an Army officer, at a post in Japan where she was living with him." *Id.* at 4. These cases were "particularly significant because [they were] the first time since the adoption of the Constitution [that] wives of soldiers [had] been denied trial by jury in a court of law and forced to trial before courts-martial." *Id.* at 3.

36. *Id.* at 22 (internal quotation marks omitted).

that despite due process shortcomings, dicta in *Reid* suggest that Congress's authority under Article I, Section 8 may uphold the constitutionality of section 552.

The most fundamental distinction between *Reid* and section 552 is that each implicates a different source of jurisdictional authority. The jurisdictional authority of the UCMJ is codified at 10 U.S.C. § 802(a), which explicitly specifies categories of persons subject to the UCMJ.³⁷ These categories range from “[m]embers of a regular component of the armed forces” in § 802(a)(1) to “[l]awful enemy combatants” under § 802(a)(13).³⁸ Whereas section 552 amends § 802(a)(10) to confer authority over “persons serving with or accompanying an armed force in the field” in either a “declared war or a contingency operation,”³⁹ *Reid* was based on an entirely separate provision: § 802(a)(11).⁴⁰ As such, while the *Reid* decision narrowly rendered § 802(a)(11) unconstitutional,⁴¹ it is not necessarily binding on the constitutionality of subjecting a civilian to the UCMJ under § 802(a)(10). In fact, Justice Black carefully distinguished the two provisions in *Reid* and emphasized that § 802(a)(10) was not at issue.⁴² This intentional separation leaves open the possibility that prosecuting civilians under § 802(a)(10) may be constitutional. Furthermore, *Reid* was only a plurality decision. Of the eight Justices participating,⁴³ four were in the plurality, two concurred separately in

37. 10 U.S.C. § 802 (2000) (“Art. 2. Persons subject to this chapter”). Article 2 of the UCMJ corresponds with parallel provisions in 10 U.S.C. § 802. For example, Article 2(a)(5) is identical to 10 U.S.C. § 802(a)(5).

38. 10 U.S.C.A. §§ 802(a)(1)–(13) (2007). Examples of other persons subject to the UCMJ include cadets at service academies, “[r]etired members of a regular component of the armed forces who are entitled to pay,” and “prisoners of war in custody of the armed forces.” *Id.*

39. 10 U.S.C. § 802(a)(10), amended by Pub. L. No. 109-364, § 552, 120 Stat. 2083, 2217 (2007).

40. *Reid*, 354 U.S. at 3 (“The court-martial asserted jurisdiction over [the defendant] under Article 2(11) of the UCMJ . . .”). This provision broadly covers “persons serving with, employed by, or accompanying the armed forces outside the United States . . . [and its territories].” § 802(a)(11).

41. See MANUAL FOR COURTS-MARTIAL UNITED STATES R.C.M. 202(a)(4) (2005) (“The exercise of jurisdiction under Article 2(a)(11) in peacetime has been held unconstitutional by the Supreme Court of the United States.” (emphasis added)).

42. *Reid*, 354 U.S. at 34 n.61 (“We believe that Art. 2(10) sets forth the maximum historically recognized extent of military jurisdiction over civilians The Government does not attempt—and quite appropriately so—to support military jurisdiction over [the defendants] under Art. 2(10).”).

43. *Id.* at 41 (“Mr. Justice Whittaker took no part in the consideration or decision of these cases.”).

result only, and two dissented.⁴⁴ Therefore, the plurality opinion in *Reid* is far from the final word on UCMJ jurisdiction over civilians. Nevertheless, it provides an analytical framework for considering the constitutionality of section 552.⁴⁵ The due process concerns and the scope of Congress's Article I, Section 8 authority are just as relevant for private contractors as they were for the civilian spouses in *Reid*.

Turning first to a due process analysis, the U.S. Constitution mandates specific procedural requirements for criminal prosecutions, which serve the core function of safeguarding defendants' rights.⁴⁶ These provisions, elaborated in the Fifth, Sixth, and Eighth Amendments, set the constitutional floor for our criminal justice system and are reflected in the federal judicial system through the Federal Rules of Criminal Procedure and the Federal Rules of Evidence.⁴⁷ However, military courts—known as courts-martial—are not bound by federal court rules because the military system is distinct from the federal system. Whereas federal courts fall under Article III of the Constitution, the authority for courts-martial comes from Article I.⁴⁸ Under Article I, Section 8, Congress has the power “[t]o raise and support Armies,” “provide and maintain a Navy,” and “provide for organizing . . . and disciplining them.”⁴⁹ Because “Congress[s] power [t]o Make Rules for the Government and

44. Justice Black, Chief Justice Warren, Justice Douglas, and Justice Brennan were in the plurality, Justices Frankfurter and Harlan concurred in result only with separate opinions, and Justices Clark and Burton dissented. *Id.* As a side note, “the Court first ruled against [the defendant], but, upon petition for reconsideration, Mr. Justice Harlan changed his position, thus paving the way for a reversal of the conviction.” Walter T. Cox III, *The Army, the Courts, and the Constitution: The Evolution of Military Justice*, 118 MIL. L. REV. 1, 20–21 (1987).

45. See *Marks v. United States*, 430 U.S. 188, 193 (1976) (“When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, ‘the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds’” (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976))).

46. See *Reid*, 354 U.S. at 10 (“These elemental procedural safeguards were embedded in our Constitution to secure their inviolateness and sanctity against the passing demands of expediency or convenience.”).

47. JENNIFER K. ELSEA, CONG. RESEARCH SERV., SELECTED PROCEDURAL SAFEGUARDS IN FEDERAL, MILITARY, AND INTERNATIONAL COURTS 3 (2006), <http://www.fas.org/sgp/crs/natsec/RL31262.pdf>.

48. JENNIFER K. ELSEA, CONG. RESEARCH SERV., MILITARY COURTS-MARTIAL: AN OVERVIEW 1 (2005), <http://www.house.gov/delahunt/hutchinscrs.pdf>. Under the UCMJ, there are also nonjudicial administrative forms of punishment for lesser crimes, as well as lesser degrees of courts-martial. See 10 U.S.C. § 815 (2000) (nonjudicial punishment); *id.* § 819 (special courts-martial); *id.* § 820 (summary courts-martial). However, this Recent Development will only address general courts-martial.

49. U.S. CONST. art. I, § 8 (emphasis added).

Regulation of the land and naval Forces' is entirely separate from Article III,"⁵⁰ the UCMJ has unique rules that govern criminal procedure.

The Rules for Courts-Martial ("R.C.M.") and the Military Rules of Evidence guide proceedings in the military justice system and generally "mirror those in the federal criminal justice system."⁵¹ For example, the Federal Rules of Criminal Procedure and the R.C.M. both demand a presumption of a defendant's innocence,⁵² held by the Supreme Court to "lie[] at the foundation of the administration of our criminal law."⁵³ In addition, both federal courts and courts-martial protect a defendant's Fifth Amendment privilege against self-incrimination.⁵⁴ Other commonalities between the federal and military systems include the attorney-client privilege, the protection against double jeopardy, and the burden of proving a defendant's guilt beyond a reasonable doubt.⁵⁵ Despite these similarities, however, there are two major procedural differences between federal and military courts: pretrial investigations and the jury system.⁵⁶ These differences are the specific areas on which the *Reid* plurality focused.⁵⁷ In the five decades since *Reid* was decided, however, the military justice system has evolved significantly and now affords defendants many more rights.⁵⁸ In light of these changes, the UCMJ's pretrial investigations and jury system warrant further consideration.

50. ELSEA, *supra* note 47, at 3 (alteration in original) (quoting U.S. CONST. art. I, § 8, cl. 14).

51. *Civilians Accompanying Forces*, *supra* note 22, at 4.

52. See FED. R. CRIM. P. 11(a); MANUAL FOR COURTS-MARTIAL UNITED STATES R.C.M. 910(b) (2005). These provisions contain identical wording.

53. ELSEA, *supra* note 47, at 11 (quoting *Coffin v. United States*, 156 U.S. 432, 453 (1895)).

54. See *id.* at 26; U.S. CONST. amend. V ("No person . . . shall be compelled in any criminal case to be a witness against himself . . .").

55. See ELSEA, *supra* note 47, at 15, 21, 25.

56. There are also several less significant differences, such as the exact wording of the *Miranda* warnings and pretrial release procedures. See generally *Davis v. United States*, 512 U.S. 452 (1994) (equating UCMJ warnings with *Miranda* warnings); Robert Amrine, *Justice Military, Civilian Systems Differ by Comparison*, HILLTOP TIMES, Apr. 25, 2002, <http://hilltop.standard.net/story.asp?edition=50&storyid=1229> (noting that the military has no system of bail and that, unless pretrial confinement is ordered, those accused are "free on their own recognizance").

57. *Reid v. Covert*, 354 U.S. 1, 22 (1957) ("[T]he Fifth and Sixth Amendments require that certain express safeguards, which were designed to protect persons from oppressive governmental practices, shall be given in criminal prosecutions—safeguards which cannot be given in a military trial.").

58. See James B. Roan & Cynthia Buxton, *The Military Justice System in the New Millennium*, 52 A.F. L. REV. 105, 185–86 (2002) ("[T]he American military justice system

Looking first at pretrial investigations, the Fifth Amendment demands that “[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces.”⁵⁹ The federal criminal system requires grand jury investigations, while the military system is explicitly exempt from this requirement.⁶⁰ Nevertheless, the military system utilizes pretrial investigations in the form of Article 32 investigations.⁶¹ Although Article 32 investigations and grand jury proceedings share the similar goal of “ensur[ing] that there is a basis for prosecution,”⁶² there are stark differences between the two in practice. Grand jury investigations are secret proceedings in which neither the accused nor his counsel are entitled to be present.⁶³ In contrast, Article 32 investigations are generally public and permit the accused to examine evidence presented against him, cross-examine all government witnesses, and offer evidence on his own behalf.⁶⁴ Thus, given that the objective of procedural protections is to safeguard individual rights, subjecting private contractors to Article 32 investigations in lieu of grand jury proceedings is likely constitutional. Civilian contractors prosecuted under the UCMJ would actually enjoy more rights in an Article 32 investigation than in a grand jury proceeding under the federal criminal system. Notably, the fact that Article 32 investigations are similar to the pretrial investigations utilized by many states is further evidence that Article 32 investigations meet procedural due process standards.⁶⁵

The second significant difference between federal and military criminal procedure concerns the right to an impartial jury. Specifically, the Sixth Amendment provides that an accused has a right to “an impartial jury of the State and district wherein the crime

is not static or outdated; it is dynamic and evolving. It incorporates the fundamental protections offered to all United States citizens and, in many ways, exceeds them.”).

59. U.S. CONST. amend. V.

60. Notably, the text also provides an exception for “[m]ilitia, when in actual service in time of War or public danger.” *Id.* However, this exception does not apply to the issue at hand. Assuming *arguendo* that civilian contractors are classified as militia, this textual exception is limited to times of war, not contingency operations. *See id.*

61. 10 U.S.C. § 832 (2000).

62. ELSEA, *supra* note 48, at 5.

63. *See* FED. R. CRIM. P. 6.

64. § 832.

65. The right to a grand jury is not so fundamental that it is incorporated against the states in the 14th Amendment Due Process Clause. *See Hurtado v. California*, 110 U.S. 516, 537–38 (1884). In addition, the pretrial investigations utilized by many states are also not constitutionally required. *See Lem Woon v. Oregon*, 229 U.S. 586, 589 (1913).

shall have been committed.”⁶⁶ This requirement is also well established by precedent as a fundamental right.⁶⁷ In *Reid*, Justice Black noted that “[t]rial by jury in a court of law and in accordance with traditional modes of procedure . . . has served and remains one of our most vital barriers to governmental arbitrariness.”⁶⁸ Addressing courts-martial directly, Justice Black also warned that “[e]very extension of military jurisdiction is an encroachment on the jurisdiction of the civil courts . . . [that] acts as a deprivation of the right to jury trial and of other treasured constitutional protections.”⁶⁹ Determining whether or not courts-martial satisfy the requirement for an impartial jury as applied to civilian contractors requires an inquiry into the procedural rules governing jury composition under the UCMJ, as well as consideration of the fair “impartial jury” standard.

First, although the text of the Sixth Amendment does not offer explicit guidance for specific jury composition practices, a long line of Supreme Court precedent dictates minimum procedural requirements. With regard to the number of jurors required for a trial jury, the R.C.M. fails to meet established standards. The R.C.M. requires that general courts-martial are comprised of “not less than five members.”⁷⁰ However, the Supreme Court specifically held that five jurors were too few in *Ballew v. Georgia*.⁷¹ Although the R.C.M. increases the number of members to twelve for capital cases in most circumstances,⁷² the constitutional minimum established in case law applies to all trials, capital and noncapital as well.⁷³ This problem is exacerbated by the fact that unlike the federal system, the military system does not require a unanimous verdict to convict a defendant

66. U.S. CONST. amend. VI.

67. See, e.g., *United States v. Gaudin*, 515 U.S. 506, 522–23 (1995) (“The Constitution gives a criminal defendant the right to have a jury determine, beyond a reasonable doubt, his guilt of every element of the crime with which he is charged.”).

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

69. *Id.* at 21. The “other treasured constitutional protection[]” that Justice Black primarily refers to is the right to a grand jury hearing, see *id.* at 10, which is discussed above, see *supra* notes 59–65 and accompanying text.

70. MANUAL FOR COURTS-MARTIAL UNITED STATES R.C.M. 501(a)(1)(A) (2005). In the military, individuals who sit on jury panels are called “members.” See ELSEA, *supra* note 48, at 4 n.29 (“Members in the military justice system are the equivalent of jurors . . .”).

71. 435 U.S. 223, 228 (1978).

72. MANUAL FOR COURTS-MARTIAL UNITED STATES R.C.M. 501(a)(1)(B). This increase for capital cases is not a set requirement. In exigent circumstances, “[i]f 12 members are not reasonably available, the convening authority [can set the number of members] under 12, but . . . [no] fewer than five.” *Id.*

73. In *Ballew*, the petitioner had been convicted of a misdemeanor. 435 U.S. at 225.

of a noncapital crime.⁷⁴ While unanimity alone is not a constitutional requirement,⁷⁵ when coupled with the fact that the military system only requires a minimum of five members, the threshold for conviction with a jury verdict is much lower than is constitutionally permissible according to case law. In essence, the concurrence of just four individuals on a five-member panel would be sufficient to convict a defendant and impose a life sentence under the UCMJ. This aspect of jury composition in the military system represents the biggest procedural hurdle in assessing the constitutionality of section 552.

Turning to the second inquiry, the impartiality requirement implicates individual jurors as well as the jury venire.⁷⁶ In both federal and military courts, impartiality of individual jurors is achieved through the voir dire process.⁷⁷ Potentially unfair or biased jurors—as determined through examination—can be dismissed for cause or through peremptory challenges.⁷⁸ In this regard, the military system parallels its federal counterpart. However, it differs vastly with respect to jury venire requirements. Unlike the federal system, the military justice system requires that all courts-martial members be “on active duty with the armed forces.”⁷⁹ Because precedent demands that juries represent a fair cross section of the community,⁸⁰ the constitutionality of the issue at hand turns on whether a jury comprised of all active duty members is diverse enough to ensure an impartial jury to civilian contractors.

74. 10 U.S.C. § 852(a)(2) (2000) (requiring the “concurrence of two-thirds of the members present at the time the vote is taken” for conviction). Sentencing verdicts, with the exception of capital sentences, also do not require unanimity. *Id.* § 852(b) (requiring “concurrence of three-fourths of the members” for sentences exceeding ten years of confinement and “concurrence of two-thirds of the members” for all other noncapital sentences).

75. See *Apodaca v. Oregon*, 406 U.S. 404, 412–13 (1972) (holding that, although history and precedent require verdicts to be unanimous in federal court, a unanimous verdict is not a fundamental right incorporated to the states through the Due Process Clause of the Fourteenth Amendment); *Johnson v. Louisiana*, 406 U.S. 356, 359 (1972) (“[The] Court has never held jury unanimity to be a requisite of due process of law.”).

76. See generally MYRON MOSKOVITZ, *CASES AND PROBLEMS IN CRIMINAL PROCEDURE: THE COURT ROOM 406* (4th ed. 2004) (explaining that the jury selection process will ensure an “impartial” jury).

77. See FED. R. CRIM. P. 24; MANUAL FOR COURTS-MARTIAL UNITED STATES R.C.M. 912 (2005).

78. See MANUAL FOR COURTS-MARTIAL UNITED STATES R.C.M. 912(f), (g).

79. *Id.* R.C.M. 502(a)(1). An enlisted defendant may request a panel of at least one-third enlisted members. *Id.* R.C.M. 503(a)(2).

80. *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975) (“We accept the fair-cross-section requirement as fundamental to the jury trial guaranteed by the Sixth Amendment and are convinced that the requirement has solid foundation.”).

Arguably, one scholar's hypothesis that "[m]ost soldiers . . . have a deeply ambivalent attitude toward [private military firms]" is a strong indication that civilian contractors would not get a fair verdict in a court-martial.⁸¹ This attitude toward contractors is attributed to several factors. First, many private firms recruit from within the military itself, thereby robbing the military of quality soldiers with valuable training.⁸² Second, "the military's professional identity and monopoly on certain activities is being encroached on by the regular civilian marketplace."⁸³ The very fact that civilians have been in a legal criminal loophole for so long could also be a source of ambivalence, as soldiers are accustomed to adhering to both international laws of warfare and the UCMJ. If these biases do indeed exist, subjecting a private military contractor to a court-martial comprised of all active duty members could be seen as partial and, therefore, unfair and unconstitutional.

On the other hand, there are also arguments to support the notion that active duty members would satisfy the constitutional requirement for an impartial jury. The Sixth Amendment demands a jury "of the State and district wherein the crime shall have been committed."⁸⁴ In *United States v. Cores*,⁸⁵ the Supreme Court noted that this provision serves as a "safeguard against the unfairness and hardship involved when an accused is prosecuted in a remote place."⁸⁶ Arguably, while the specific mission of private contractors and members of the armed forces may differ, their overall purposes and experiences have much in common. The unique environment in which they operate can be a unifying factor in favor of fairness. For example, the justification for many of the alleged shootings involving private contractors in Iraq has been self-defense.⁸⁷ Who better to

81. Singer, *supra* note 11, at 128.

82. *Id.*

83. *Id.* (acknowledging the trend of hiring civilian contractors to perform jobs that were once exclusive to the military). For example, whereas infantry units or military police would traditionally guard convoys, this job is often outsourced to contractors. See Steve Fainaru, *Iraq Contractors Face Growing Parallel War*, WASH. POST, June 16, 2007, at A1 (reporting that "[t]he security industry's enormous growth has been facilitated by the U.S. military, which uses . . . 20,000 to 30,000 contractors to offset chronic troop shortages . . . [and perform jobs such as] protect[ing] all convoys transporting reconstruction materiel").

84. U.S. CONST. amend. VI.

85. 356 U.S. 405 (1958).

86. *Id.* at 407.

87. See, e.g., Fainaru, *supra* note 1 (reporting that a Triple Canopy employee's reason for shooting "more than a dozen rounds into . . . [an] oncoming truck with his M-4 [and] wounding the driver" was because "he felt threatened"); Jim Michaels, *Blackwater Firefight Leads Iraq To Look Closer at Contractors*, USA TODAY, Sept. 19, 2007, at 8A

understand the circumstances behind their actions in a combat environment than a panel of military personnel who have potentially been under hostile fire themselves? The counterinsurgency operation in Iraq is not solely a military effort, and it “requires synchronizing the efforts of many non-military . . . agencies in a comprehensive approach.”⁸⁸ The common experiences and unified focus of contractors and military personnel could serve to neutralize any bias against contractors. Additionally, the wide diversity within the military further serves to ensure an impartial verdict for contractors. Men and women in the armed forces represent every state and territory in the United States, and have varied ethnicities, age groups, and upbringings.⁸⁹

As a final note on procedural rights, the military justice system has evolved significantly since 1957, when *Reid* was decided.⁹⁰ For example, President Lyndon B. Johnson’s administration passed the Military Justice Act of 1968,⁹¹ which implemented major changes such as the “designation of a ‘military judge’ to preside over . . . court-martial proceedings,”⁹² and also allowed for “trial by a ‘military judge alone’ upon request of the accused.”⁹³ The most significant change, however, is the modern “existence of the Court of Appeals for the Armed Forces.”⁹⁴ This court was created to be “completely removed

(reporting that Blackwater’s involvement in the September 2007 shooting were actions in self-defense and that Blackwater merely returned defensive fire).

88. COUNTERINSURGENCY FIELD MANUAL, *supra* note 10, at 51–52.

89. *See, e.g.*, BETTY D. MAXFIELD, OFFICE OF ARMY DEMOGRAPHICS, ARMY PROFILE 3–6 (2005) (reporting demographic data for the U.S. Army); *see also* TIM KANE, THE HERITAGE CTR. FOR DATA ANALYSIS, WHO BEARS THE BURDEN? DEMOGRAPHIC CHARACTERISTICS OF U.S. MILITARY RECRUITS BEFORE AND AFTER 9/11, at 13–14 (2007), http://www.heritage.org/Research/NationalSecurity/upload/95512_1.pdf (reporting state and territory data for military recruits). For demographic data for the Air Force, Navy, Marine Corps, and Coast Guard, *see* Army G-1 Demographics, <http://www.armyg1.army.mil/hr/demographics.asp> (last visited Mar. 30, 2008).

90. *Civilians Accompanying Forces*, *supra* note 22, at 2 (noting that there are “more procedural protections in place today under the UCMJ than there were 40 years ago”); *see also* Cox, *supra* note 44, at 18 (“The system has continued to change and evolve into a modern, generally efficient, system which tries to serve the delicate balance between the needs of the commander to have an expedient method of administering punishment for serious breaches of the law and the rights of an accused to a fair and impartial trial.”).

91. Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1335 (codified as amended at 10 U.S.C. §§ 822–29, 859–76 (2000)).

92. Cox, *supra* note 44, at 19 (citing the Military Justice Act of 1968).

93. *Id.* (citing the Military Justice Act of 1968).

94. *Civilians Accompanying Forces*, *supra* note 22, at 2. Although the court was actually commenced in 1951, it has undergone several changes since its inception, and today it is an important safeguard in the military system. *See generally* JONATHAN LURIE, MILITARY JUSTICE IN AMERICA: THE U.S. COURT OF APPEALS FOR THE ARMED

from all military influence of persuasion”⁹⁵ and “is composed of five *civilian* judges.”⁹⁶ In addition, all cases decided by the U.S. Court of Appeals for the Armed Forces are eligible for direct appeal to the Supreme Court,⁹⁷ and appellants are permitted representation by civilian counsel.⁹⁸ The safeguards built into the modern Court of Appeals for the Armed Forces, combined with the changes made to the UCMJ in the fifty years since *Reid* was decided, could be enough for the Supreme Court to find adequate procedural protections under the UCMJ, notwithstanding differences with the federal criminal system.⁹⁹

In addition to procedural due process, a significant factor in assessing the constitutionality of section 552 is substantive due process. The Court in *Reid* did not address substantive due process because the defendant was charged with murder, which is criminalized in both the federal and military justice systems. However, in addition to the crimes found concurrently in both systems, such as murder, rape, and assault,¹⁰⁰ the UCMJ also addresses offenses that are “exclusive to the military.”¹⁰¹ As such, the issue of section 552’s constitutionality depends on whether military-

FORCES, 1775–1980 (2001) (providing a detailed account of the evolution of the U.S. Court of Appeals for the Armed Forces).

95. BROCHURE FOR THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES 3 (2006) (internal quotation marks omitted).

96. *Id.* at 1 (emphasis added). In addition, “[t]o underscore the civilian nature of the Court, . . . a person who has retired from the armed forces after 20 or more years of active service” is not eligible to be appointed as a judge. *Id.* at 8.

97. *Id.* at 5.

98. *Id.* This is also true of courts-martial. A defendant is provided with military defense counsel free of charge and may also elect to be represented by defense counsel at his or her own expense. See MANUAL FOR COURTS-MARTIAL UNITED STATES R.C.M. 506(a) (2005).

99. There are also safeguards in the military appellate process prior to reaching the Court of Appeals for the Armed Forces. Under the UCMJ, all courts-martial convictions carrying a sentence of one year or more are *automatically* appealed to the Court of Criminal Appeals of the appropriate service branch. See MANUAL FOR COURTS-MARTIAL UNITED STATES R.C.M. 1201(a) (2005). In reviewing these cases, Courts of Criminal Appeals “may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of *fact*, recognizing that the court-martial saw and heard the evidence.” *Id.* R.C.M. 1203 discussion of section (b) (emphasis added). Whereas other appellate courts can only review questions of law, Courts of Criminal Appeals can review questions of both *law and fact*. This unique feature of the UCMJ is another safeguard against potential due process violations in military jury composition.

100. See 10 U.S.C. § 918 (2000) (murder); *id.* § 920 (rape); *id.* § 928 (assault). Both systems impose similar punishments for these offenses. See ELSEA, *supra* note 48, at 3 (finding that potential punishment imposed by the UCMJ generally matches that available for “the corresponding civilian offense”).

101. ELSEA, *supra* note 48, at 2.

specific laws can be applied to contractors without violating their substantive due process rights.

Examples of offenses unique to the military justice system include articles prohibiting sodomy¹⁰² and failure to obey orders.¹⁰³ The military also imposes exclusive restrictions on service members deployed in Iraq and Afghanistan, which include prohibitions against alcohol and pornography.¹⁰⁴ In addition, the UCMJ contains a general article that covers “all disorders and neglects to the prejudice of good order and discipline in the armed forces, [and] all conduct of a nature to bring discredit upon the armed forces.”¹⁰⁵ While some UCMJ-specific offenses only apply to “member[s] of the armed forces,”¹⁰⁶ most of them apply generally to “person[s] subject to [the UCMJ]”¹⁰⁷ and must therefore be addressed.

Concededly, some military-specific laws in the UCMJ appear to be unconstitutional as applied to civilian contractors. The UCMJ’s prohibition against sodomy,¹⁰⁸ for example, directly conflicts with the Supreme Court’s decision in *Lawrence v. Texas*.¹⁰⁹ Limiting the scope of the UCMJ as applied to civilian contractors, however, is a remedy that would preserve the constitutionality of section 552. This could be achieved by enforcing only certain UCMJ-specific offenses. In fact, section 552 was never intended to prosecute minor infractions.¹¹⁰ A spokesman for Senator Graham commented that the legislative purpose behind section 552 was to “‘give [military commanders] a

102. 10 U.S.C. § 925 (2000).

103. *Id.* § 892.

104. HEADQUARTERS MULTI-NATIONAL CORPS–IRAQ, GENERAL ORDER NUMBER 1 (GO-1), at 1–2 (2006) [hereinafter GENERAL ORDER 1]. Incidentally, some private military firms have their own bars in Iraq, which would clearly be a violation of General Order 1 if it were enforced against contractors. See Fainaru, *supra* note 1 (“Unlike the U.S. military, which prohibits drinking, Triple Canopy employees ran their own bar, called the Gem, inside the Green Zone.”).

105. 10 U.S.C. § 934 (2000). This general article criminalizes conduct such as fraternization and adultery, and has “survived constitutional attacks premised on vagueness or lack of notice that the particular conduct was unlawful.” *United States v. Orellana*, 62 M.J. 595, 599 (2005).

106. 10 U.S.C. § 885 (2000) (covering “[d]esertion” and applying to “[a]ny member of the armed forces” (emphasis added)).

107. *Id.* § 892 (covering “[f]ailure to obey order or regulation” and applying to “[a]ny person subject to this chapter”).

108. *Id.* § 925 (“Any person subject to this chapter who engages in unnatural carnal copulation with another person of the same or opposite sex . . . is guilty of sodomy.”).

109. 539 U.S. 558, 578 (2003) (holding that the “[petitioners’] right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government” and that it is unconstitutional to “mak[e] . . . private sexual conduct a crime”).

110. See Matthews, *supra* note 21.

tool to take action' against violations that are *serious enough to damage U.S. national interests*."¹¹¹ However, because the stated purpose of *all* military law is "to strengthen the national security of the United States,"¹¹² the task of determining which laws should be enforced is particularly difficult absent a bright-line rule. The value achieved by enforcing each law must necessarily be balanced against individual rights.

Some offenses that seem to hinder individual liberties may be justifiably enforced to avoid jeopardizing the military's mission and the needless loss of lives. For example, the general order prohibiting alcohol consumption can have a major impact on a mission. The purpose of this order is to "safeguard[] the image of U.S. forces, and to promot[e] the legitimacy of the host government."¹¹³ In a counterinsurgency operation, "[r]egaining the populace's active and continued support for the [host-nation] government is essential to deprive an insurgency of its power and appeal."¹¹⁴ Therefore, the prohibition against alcohol serves an important role in the government's efforts in Iraq and Afghanistan. An incident that occurred in 2006 involving a Blackwater employee is illustrative of this point. According to reports, "[t]he Blackwater guard had been drinking heavily in the Green Zone, . . . tried to enter an area where Iraqi officials live" and subsequently shot and killed an Iraqi bodyguard.¹¹⁵ Incidents like this ignite "Iraqi public opinion"¹¹⁶ and are counterproductive to counterinsurgency efforts. Preventing behavior that is counterproductive to the mission is a strong argument in favor of enforcing military-specific laws.

Summing up the due process analysis of section 552, differences between the federal and military criminal systems pose major hurdles to the constitutionality of prosecuting civilians under the UCMJ. In particular, jury composition for courts-martial and the existence of military-specific offenses pose the greatest constitutional concerns.

111. William Matthews, *Contractor Crackdown*, ARMED FORCES J., Feb. 2007, at 10, 11 (emphasis added) (quoting Kevin Bishop, a spokesman for Senator Graham).

112. MANUAL FOR COURTS-MARTIAL UNITED STATES pmbl. para. 3 (2002).

113. COUNTERINSURGENCY FIELD MANUAL, *supra* note 10, at 357; *see also* GENERAL ORDER 1, *supra* note 104, at 1 ("Restrictions . . . are essential to fostering US/host nation relations . . .").

114. COUNTERINSURGENCY FIELD MANUAL, *supra* note 10, at 54.

115. Sabrina Tavernise, *U.S. Contractor Banned by Iraq Over Shootings*, N.Y. TIMES, Sept. 18, 2007, at A1. While the actual crime here was murder, this incident reveals why the military may have an interest in regulating alcohol consumption.

116. Ned Parker, *U.S. Restricts Movement of Its Diplomats in Iraq*, L.A. TIMES, Sept. 19, 2007, at A1 (reporting that "Iraqi public opinion [was] inflamed by the deaths" resulting from the Blackwater shooting).

However, in the framework established by *Reid*, due process is only half the inquiry. After evaluating due process, the *Reid* Court next considered the scope of Congress's authority to regulate the "land and naval Forces" under Article I, Section 8 of the Constitution.¹¹⁷ In doing so, the Court indicated that there may be authority within the Constitution allowing for UCMJ prosecution in certain circumstances.¹¹⁸ While the plurality, concurrences, and dissent analyzed and applied Article I, Section 8 differently to the facts in *Reid*, dicta in each of the opinions appear to leave the door open for constitutional prosecution of civilians under the UCMJ.

Looking first at the plurality opinion, Justice Black initially takes a strong stand against any application of Congress's power of "land and naval Forces" to civilians by declaring "if the language of Clause 14 is given its natural meaning, the power granted does not extend to civilians."¹¹⁹ However, he subsequently qualifies this statement by suggesting 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."¹²⁰ According to Justice Black, the justification for such circumstances "rest[s] on the government's 'war powers.'"¹²¹ He acknowledges the fact that combat produces circumstances where military commanders need broad control, and notes that such circumstances have historically warranted military jurisdiction over civilians.¹²² These observations seem to directly apply to civilian contractors participating in contingency operations and indicate that the expanded jurisdiction of the UCMJ under section 552 could indeed pass constitutional muster.

In their respective concurring opinions, Justices Frankfurter and Harlan also raise points that seemingly leave the door open for prosecution of civilian contractors under the UCMJ. Although

117. *Reid v. Covert*, 354 U.S. 1, 19 (1957) ("Article I, § 8, cl. 14 empowers Congress 'To make Rules for the Government and Regulation of the land and naval Forces.' ").

118. *See id.* at 19 ("Since [the] court-martial did not meet the requirements of Art. III, § 2 or the Fifth and Sixth Amendments we are compelled to determine if there is anything *within* the Constitution which authorizes the military trial of dependents accompanying the armed forces overseas.").

119. *Id.* (footnotes omitted).

120. *Id.* at 23.

121. *Id.* at 33.

122. *See id.* (noting that "[i]n the face of an actively hostile enemy, military commanders necessarily have broad power over persons on the battlefield" and that, historically, "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" (footnote omitted)).

Justice Frankfurter finds that applying the UCMJ to civilian *spouses* is unconstitutional, he is emphatic in noting that his decision is narrowly tailored to the specific facts of the case.¹²³ This limitation leaves open the possibility that there may be other circumstances in which civilians can constitutionally be subjected to the UCMJ. In contrast, Justice Harlan's concurrence provides a straightforward analysis of Congress's Article I, Section 8 authority. In his opinion, the authority is broad.¹²⁴ In explaining why Congress's war powers are necessarily wide sweeping, Justice Harlan quotes Alexander Hamilton:

These powers ought to exist without limitation, because it is impossible to foresee or define the extent and variety of national exigencies, or the correspondent extent and variety of the means which may be necessary to satisfy them. The circumstances that endanger the safety of nations are infinite, and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed.¹²⁵

The ongoing operations in Iraq and Afghanistan fit the type of situation that Justice Harlan had in mind when quoting Hamilton. Modern operations are quite different from the "large main force engagements that characterized conflict in World War II, Korea, and Operations Desert Storm and Iraqi Freedom . . . [which] have become the exceptions in American warfare."¹²⁶ In concert with this change, the government's use of civilian contractors has increased dramatically in scope and magnitude.¹²⁷ Justice Harlan's concurrence suggests that he would have no reservations about accepting the constitutionality of section 552 if it were needed to give commanders control over civilian contractors in contingency operations. His position is extremely deferential to a commander's "power to prevent activities which would jeopardize the security and effectiveness of his command."¹²⁸

123. See *id.* at 45 (Frankfurter, J., concurring) ("In making this adjudication, I must emphasize that it is only the trial of civilian dependents . . . in time of peace that is in question. . . . I need not intimate any opinion on . . . situations involving civilians, in the sense of persons not having a military status, other than dependents.").

124. *Id.* at 68 (Harlan, J., concurring) ("[T]here is no indication that any special limitation on the power of Congress . . . was subsumed in the grant of power to govern the land and naval forces.").

125. *Id.* at 68–69 (emphasis omitted).

126. HEADQUARTERS, DEPARTMENT OF THE ARMY, COUNTERINSURGENCY OPERATIONS, at vi (2004).

127. See *supra* notes 10–12 and accompanying text.

128. *Reid*, 354 U.S. at 72 (Harlan, J., concurring).

Finally, the dissenters in *Reid* also believed that Congress has wide authority under Article I, Section 8. Justices Clark and Burton willingly accepted UCMJ jurisdiction over civilians by concluding that the statute authorizing jurisdiction was “reasonably related to the power of Congress ‘[t]o make Rules for the Government and Regulation of the land and naval Forces.’”¹²⁹ Since the dissenters were able to accept jurisdiction over civilian spouses of service members,¹³⁰ it follows that they would also accept section 552 as constitutional.

Realistically, the only true indication of the constitutionality of section 552 will involve a test case challenging the jurisdiction of the UCMJ following a conviction of a civilian by a court-martial.¹³¹ However, the recent *Hamdan v. Rumsfeld*¹³² decision provides some insight into the current Court’s views of the military justice system.

In *Hamdan*, the majority noted that “federal courts should respect the balance that Congress struck between military preparedness and fairness to individual service members when it created ‘an integrated system of military courts and review procedures.’”¹³³ Although it refers to service members, this comment shows deference to Congress’s ability to balance individual rights against military interests. As such, the current Court would likely approach a constitutional challenge to section 552 understanding the requirement for a disciplinary system and appreciating the protections imbedded into the modern UCMJ.

In conclusion, the section 552 amendment to 10 U.S.C. § 802(a)(10) faces major constitutional barriers but may nonetheless pass muster when applying the framework established in *Reid*. Undoubtedly, despite major improvements to the UCMJ and the greater rights it often affords, the remaining due process concerns regarding jury composition and military-specific offenses are extremely significant. Nevertheless, as dicta in *Reid* suggest, Congress’s power under Article I, Section 8 may warrant application of the UCMJ in contingency operations. At the very least, it keeps the door open. Unlike 10 U.S.C. § 802(a)(11), which was found to be

129. *Id.* at 80 (Clark, J., dissenting) (quoting U.S. CONST. art. I, § 8, cl. 14).

130. *Id.* at 85 (“[T]he military commander who bears full responsibility for the care and safety of those civilians attached to his command should also have authority to regulate their conduct.”).

131. See Singer, *supra* note 19 (“[P]redicting what the Supreme Court may or may not rule seems a lot like predicting the lottery. We won’t know until there is a test case.”).

132. 548 U.S. ___, 126 S. Ct. 2749 (2006).

133. *Id.* at ___, 126 S. Ct. at 2770 (quoting *Schlesinger v. Councilman*, 420 U.S. 738, 758 (1975)).

unconstitutional in *Reid*, the amendment to § 802(a)(10) is narrowly focused on declared wars and contingency operations, which fall under Congress's Article I, Section 8 authority. If the power to subject civilians accompanying the force to the UCMJ was inherent in Congress's authority to declare war prior to section 552, then it follows that Congress should be able to subject civilians to the UCMJ in war-like contingency operations without having to actually declare war. Section 552 aims to do just that.

Finally, it is important to note that just because section 552 may be found constitutional, that does not necessarily make it the best or only solution to contractor accountability. There are many practical obstacles to implementing section 552. As one Judge Advocate explains:

[S]ubjecting contractor personnel to the UCMJ during all contingency operations appears to constitute a significant change rather than a clarification. No legislative history explains this change. Further, as there is no published guidance, it is unclear how this change will be implemented and precisely what the ramifications will be.¹³⁴

Notably, Senator Graham's amendment was not solicited by the Department of Defense. In fact, the very concept of subjecting civilians to UCMJ authority in contingency operations was proposed by Congress more than ten years ago and rejected by the Department of Defense.¹³⁵ However, notwithstanding the practical concerns

134. Mark A. Ries, *Contractors Accompanying the Force*, ARMY LAW., Jan. 2007, at 161, 161. As of the time of publication, the Secretary of Defense had just issued a memorandum providing general guidance on the implementation of section 552. See SEC'Y OF DEF., MEMORANDUM ON UCMJ JURISDICTION OVER DOD CIVILIAN EMPLOYEES, DOD CONTRACTOR PERSONNEL, AND OTHER PERSONS SERVING WITH OR ACCOMPANYING THE ARMED FORCES OVERSEAS DURING DECLARED WAR AND IN CONTINGENCY OPERATIONS 1-3 (2008). However, this guidance is limited to general principles regarding section 552's application and does not provide specific instructions for prosecuting civilians under the UCMJ. See *id.*

135. In 1996, Congress established an advisory committee comprised of experts in "military law, international law, and Federal civilian criminal law" to make "recommendations concerning the advisability and feasibility of establishing United States criminal law jurisdiction [in situations other than declared wars]." National Defense Authorization Act for 1996, Pub. L. No. 104-106, § 1151, 110 Stat. 186, 467-68. One of the proposals made by the advisory committee was to expand UCMJ jurisdiction to cover civilians in contingency operations. See *Military Extraterritorial Jurisdiction Act of 1999: Hearing on H.R. 3380 Before the Subcomm. on Crime of the H. Comm. on the Judiciary*, 106th Cong. 30 (2000) (statement of Robert E. Reed, Associate Deputy General Counsel, United States Department of Defense). This recommendation was rejected by the Department of Defense. See *id.* at 31. Interestingly, Senator Graham was present at the hearings at which the proposal was rejected. See *id.* at 2. However, these events predated

raised by section 552, Senator Graham's concern over the lack of legal accountability for contractors in contingency operations is justified. Events such as the Triple Canopy taxi shooting illustrate the need for contractor accountability.¹³⁶ Senator Graham acted quickly to fill a major deficiency in the justice system when he added section 552 to the FY07 NDAA. Subsequent legislation, including an amendment to MEJA in the Transparency and Accountability in Security Contracting Act of 2007, has been proposed but not yet enacted despite a pressing need.¹³⁷ Regardless of whether section 552 is used or a new law is implemented to hold contractors accountable, one thing is clear: whereas contingency operations may fall in a gray area between war and peace, the legal status of contractors serving in them should not.

CARA-ANN M. HAMAGUCHI

the Global War on Terrorism, and the extent of the present utilization of civilian contractors in contingency operations was not fully appreciated at the time.

136. *See supra* notes 1–9 and accompanying text.

137. *See* Transparency and Accountability in Security Contracting Act of 2007, H.R. 369, 110th Cong. (2007). This Act clarifies MEJA's jurisdiction over individuals, "while employed under a contract . . . awarded by any department or agency of the United States Government, where the work under such contract is carried out in a region outside the United States in which the Armed Forces are conducting a contingency operation." *Id.* § 4(a). It also establishes an FBI Theater Investigative Unit which would be "responsible for investigating allegations of criminal misconduct." *Id.* § 5(a). Finally, it leaves section 552 intact, but requires the Secretary of Defense to issue guidance on how it will be implemented. *Id.* § 4(b).