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# If It Looks Like a Duck: Reining in Private-Military Contractor Conduct Through the Amended UCMJ

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# IF IT LOOKS LIKE A DUCK: REINING IN PRIVATE-MILITARY CONTRACTOR CONDUCT THROUGH THE AMENDED UCMJ

*Michael Anderson\**

*This Note will explore the 2007 Amendment to the Uniform Code of Military Justice, which I contend allows the military to exercise legal jurisdiction over a narrow-field of private-military contractors who act as de facto soldiers. I will first explain the historical roots of the military justice system and how it rose as a means of ensuring discipline within military ranks. From there I will explore the Constitutional framework of the military justice system, including where military justice springs from and how the military and civilian justice systems differ. I will ultimately conclude that those subject to military law are afforded Constitutional rights differently than those in the civilian justice system, and that there are narrow exceptions where extension of military justice over civilians is Constitutionally permitted. Next, I will discuss why alternatives to military jurisdiction of PMCs have failed and why this failure is an important issue. After this, I will examine relevant case law and conclude that PMCs are distinguishable from civilians who have been exempt from military jurisdiction. Namely, I will conclude that PMCs are more “soldier” than “civilian” and should thus fall under the military’s jurisdiction when they engage in criminal conduct. Ultimately, I will conclude that because a lack of PMC discipline can harm military objectives, PMCs act as de facto soldiers, and existing alternatives have failed to offer adequate oversight, the extension of military law over PMCs is Constitutionally permissible and should be not be revoked. Accordingly, the 2007 Amendment should be upheld if applied to a PMC.*

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I. INTRODUCTION

The legal system under which military personnel live and work has long been perceived to be markedly different from the civilian legal system.<sup>1</sup> Since 1950, active service-members in the United States military have fallen under the jurisdiction of the Uniform Code of Military Justice (“UCMJ”).<sup>2</sup> The UCMJ, which is promulgated by Congress pursuant to Constitutional authority, serves as the legal authority for the military and defines criminal conduct.<sup>3</sup> For example,

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1. Major John W. Brooker, *Improving Uniform Code of Military Justice*, 222 MIL. L. REV. 1, 35 (2014).
  2. Brigadier General Jack L. Rives & Colonel Bradley P. Grant, *Explaining the UCMJ*, 27 Rep. 15, 16 (2000).
  3. 10 U.S.C. § 801-946 (2016) [hereinafter *UCMJ*].

one of the most notable differences between civilian courts, or Article III courts,<sup>4</sup> and courts-martials convened pursuant to the UCMJ, is the latter's failure to provide the protections guaranteed by the Fifth and Sixth Amendment of the Constitution.<sup>5</sup>

In 2007, despite the apparent differences between the military and civilian justice system, Congress, as part of the John Warner National Defense Authorization Act for Fiscal Year 2007,<sup>6</sup> made a seemingly innocuous amendment to the provisions of Article 2(a)(10) ("2007 Amendment") of the UCMJ. Article 2(a)(10) previously stated that civilians "serving with or accompanying an armed force in the field . . . in times of war" were subject to the provisions of the UCMJ.<sup>7</sup> The 2007 Amendment altered this provision to read "*in time of declared war or a contingency operation.*"<sup>8</sup> Contemporary courts had interpreted the phrase "in times of war" to mean only a Congressionally declared war.<sup>9</sup> However, there has not been a Congressional declared war in over fifty years,<sup>10</sup> rendering Article

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4. An Article III court is a court created pursuant to Article III of the Constitution. These include federal district courts, state courts, appellate courts, and the United States Supreme Court. In other words, Article III courts are where United States civilians are tried. Throughout this Note, Article III and civilian justice system will be used interchangeably.
  5. Cara-Ann M. Hamaguchi, *Between War and Peace: Exploring the Constitutionality of Subjecting Private Civilian Contractors to the Uniform Code of Military Justice During "Contingency Operations"*, 86 N.C.L. REV. 1047, 1055-56 (2008).
  6. Kara M. Sacilotto, *Jumping the (Un)Constitutional Gun?: Constitutional Questions in the Application of the UCMJ to Contractors*, 37 PUB. CONT. L.J. 179, 180 (2008).
  7. *Court-martial Jurisdiction under Amended Article 2(a)(10), UCMJ*, <http://www.ucmjdefense.com/resources/army-jag-school-criminal-law-deskbook-volume/military-justice-system-overview/court-martial-jurisdiction.html> (last visited Mar. 26, 2018) [<https://perma.cc/6PCN-NMGL>].
  8. UCMJ, *supra* note 3, § 802 ("(a) The following persons are subject to this chapter [10 USCS §§ 801 et seq.] . . . (10) In time of declared war or a contingency operation, persons serving with or accompanying an armed force in the field"). Under the statute, a contingency operation is defined as: "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 opposing military force; or B) results in the call or order to, or retention on, active duty of members of the uniformed services . . . or any other provision of law during a war or during a national emergency declared by the President or Congress." (emphasis added).
  9. See *e.g.* United States v. Averette, 19 C.M.R. 363 (1970).
  10. Sacilotto, *supra* note 6, at 180.

2(a)(10) largely unusable in its previous iteration. As such, the 2007 Amendment may re-institute the application of military justice to civilian contractors accompanying military forces, potentially closing a legal-loophole that has existed for decades.<sup>11</sup>

The changes in the language of Article 2(a)(10) were largely a response to public outcry following a massive shooting during the Iraq War resulting in the deaths of seventeen Iraqi civilians.<sup>12</sup> In the midst of the Iraq War, a car approaching a police checkpoint in busy Nisour Square drew the attention of a small cadre of armed men.<sup>13</sup> When the vehicle failed to yield, the group began to indiscriminately fire their weapons in the packed square.<sup>14</sup> By the time the dust settled and the fracas had abated, the shooting had resulted in nearly fifty casualties, including the seventeen Iraqi civilians.<sup>15</sup> The perpetrators of this attack, however, were not active military personnel.<sup>16</sup> Rather the armed men were employed by Blackwater USA and contracted by the United States government to assist military personnel in Iraq.<sup>17</sup> This massacre, termed by some as Baghdad's "Bloody Sunday",<sup>18</sup> revealed to the greater public a "dirty" secret of the United States military: civilian contractors are frequently utilized as like replacements for actual military personnel in modern contingency operations.

Blowback from the Nisour Square massacre was immediate, with the military investigation conducted post-shooting noting that there was no evidence of "enemy activity" and characterizing the

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11. Ingrid L. Price, *Criminal Liability of Civilian Contractors in Iraq and Afghanistan*, 49 STAN. J INT'L L. 491, 492-493 (2013).
  12. Katherine Chapman, *The Untouchables: Private Military Contractors' Criminal Accountability Under the UCMJ*, 63 VAND. L. REV. 1047, 1048 (2010).
  13. *Blackwater Incident: What happened*, BBC NEWS: AMERICAS, <http://news.bbc.co.uk/2/hi/7033332.stm> (last updated Dec. 8, 2008) [<https://perma.cc/NA6K-XEBR>].
  14. James Glanz and Alissa J. Rubin, *From Errand to Fatal Shot to Hail of Fire to 17 Deaths*, NY TIMES (Oct. 3, 2007), <http://www.nytimes.com/2007/10/03/world/middleeast/03firefight.html> [<https://perma.cc/2M7Z-3S8U>].
  15. Wesley Bruer & Michael Pearson, *Ex-Blackwater contractors sentenced in Nusoor Square shooting in Iraq*, CNN, <http://www.cnn.com/2015/04/13/us/blackwater-contractors-iraq-sentencing> (last updated Apr. 14, 2015) [<https://perma.cc/SR8W-VCCC>].
  16. Ed Pilkington, *Blackwater and its Soldiers of Misfortune*, THE GUARDIAN (Jan. 1, 2010) <https://www.theguardian.com/world/2010/jan/01/blackwater-xe-history> [<https://perma.cc/XYJ6-XACE>].
  17. *Id.*
  18. Jeremy Scahill, BLACKWATER: THE RISE OF THE WORLD'S MOST POWERFUL MERCENARY ARMY 2 (2007).

Blackwater employee's actions as "criminal."<sup>19</sup> Iraqi civilians who witnessed the shooting described the event by saying "it was horror . . . Anything that moved in Nusoor [sic] Square was shot. Women, children, young people, they shot everyone."<sup>20</sup> While the perpetrators of the Nisour Square were eventually indicted for their actions,<sup>21</sup> a lengthy delay preceded legal proceedings, belying the difficulties in holding civilian contractors serving overseas accountable for criminal conduct.<sup>22</sup>

Although events like the Nisour Square shooting and atrocities committed by American contractors at Abu Gharib<sup>23</sup> brought the United States reliance on military contractors to the general public's conscience, such reliance on civilian contractors is hardly a modern development.<sup>24</sup> Historically, the military has frequently used civilian forces to augment its strength.<sup>25</sup> For example, General Washington hired numerous civilians for logistical support and to haul equipment for the Continental Army,<sup>26</sup> while civilians accompanied General Sherman as his forces burned their way across the Confederate States during the Civil War.<sup>27</sup> Recent trends suggest that the use of civilian contractors is poised to continue and perhaps even become more prevalent, as some estimates placed the ratio of soldiers to civilians serving during the Iraq War at 1:1.<sup>28</sup> Other sources proffered that

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19. Chapman, *supra* note 12, at 1048.
  20. Bruer, *supra* note 15.
  21. *Finally, A Verdict on Blackwater's Nisour Square Shooters*, THE NATION (Oct. 29, 2014), <https://www.thenation.com/article/finally-verdict-blackwaters-nisour-square-shooters/> [<https://perma.cc/B97Z-GG99>].
  22. Bruer, *supra* note 15.
  23. Abu Ghraib was an American prison in Iraq used to house detainees captured by American forces. After a series of graphic photos emerged that showed detainees being subjected numerous abuses, the Department of Justice commenced investigations into the prison. *Iraq Prison Abuse Scandal Fast Facts*, CNN, <http://www.cnn.com/2013/10/30/world/meast/iraq-prison-abuse-scandal-fast-facts/> (last updated Mar. 18, 2018) [<https://perma.cc/4AUK-VDM5>].
  24. Marc Lindemann, *Civilian Contractors under Military Law*, 37 U.S. ARMY WAR C. Q. PARAMETERS, 83, 84 (2007).
  25. *Id.*
  26. David Snyder, *Civilian Military Contractors on Trial: The Case for Upholding the Amended Exceptional Jurisdiction Clause of the Uniform Code of Military Justice*, 44 TEX. INT'L. L. J. 65, 69 (2008).
  27. William C. Peters, *On Law, Wars, and Mercenaries: The Case for Courts-Martial Jurisdiction Over Civilian Contractor Misconduct in Iraq*, 2 BYU L. REV. 367, 377 (2006).
  28. CARLOS ORTIZ, PRIVATE ARMED FORCES AND GLOBAL SECURITY: A GUIDE TO THE ISSUES 28 (2010).

civilian contractors actually outnumbered military personnel in Iraq.<sup>29</sup> This ratio has continued to grow in recent years and by some estimates, in 2013, contractors outnumbered American military personnel in Afghanistan by a near 2:1 ratio.<sup>30</sup> In contrast, during World War II, this ratio was greatly skewed towards soldiers, with nearly seven soldiers for every civilian contractor accompanying the military.<sup>31</sup>

While the use of civilians as supplemental forces is not a recent development, the manner in which civilians have been utilized and deployed has drastically changed since the times of Washington and Sherman.<sup>32</sup> The events of Nisour Square, perpetrated by the employees of Blackwater USA, is emblematic of the evolving role of a civilian contractor, and highlights the rise of private-military contractors (“PMCs”)<sup>33</sup> as an increasingly vital component of American military strength.<sup>34</sup> Although the term PMC, as typically used, can cover a host of contractors, from those merely involved in logistical support to those involved in direct combat,<sup>35</sup> of chief concern to this Note is the trend towards employing PMCs who act as *de facto* soldiers by engaging in conduct typically thought as a “soldiers” role. For example, these PMCs often engage in front-line combat operations,<sup>36</sup> dress like soldiers, bear military-weaponry,<sup>37</sup> and provide security on military bases and installations.<sup>38</sup>

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29. Michael Hurst, *After Blackwater: A Mission-Focused Jurisdictional Regime for Private Military Contractors During Contingency Operations*, 76 GEO. WASH. L. REV. 1308, 1310 (2008).

30. See Price, *supra* note 11, at 493 (noting that in 2013, nearly 110,000 Department of Defense contractors were present in Afghanistan, while American military personnel numbered only 66,000. Perhaps unsurprisingly, the article further points out that in 2012, contractor deaths had actually eclipsed those of service-members.).

31. Ortiz, *supra* note 28.

32. See Peters, *supra* note 27, at 377-84 (discussing the development of civilian contractors throughout American martial history).

33. Although the acronym PMC encompasses many different types of civilian contractors, most of whom do not engage in military actions, for purposes of simplicity, this Note will use PMC to mean those civilian contractors who fill a “quasi-military” role only. For a more extensive and nuanced discussion of the broad spectrum of PMCs, see generally PETER WARREN SINGER, *CORPORATE WARRIORS: THE RISE OF THE PRIVATIZED MILITARY INDUSTRY* (2003).

34. Sacilotto, *supra* note 6, at 182, quoting *U.S. Dep’t Of Def., Quadrennial Defense Review Report 75, 81 (2006)* (“The Department’s Total Force—its active and reserve military components, its civil servants, and its contractors—constitutes its warfighting capability and capacity.”).

35. See generally Singer, *supra* note 33 (noting that contractors carried out military and non-military functions).

36. Chapman, *supra* note 12, at 1049.

Part and parcel to the increasing integration of PMCs and actual military personnel is the need to regulate PMC's behavior and conduct in the field through a system of legal oversight. As indicated by the 2007 Amendment, one such attempt to ensure legal accountability of PMCs is by placing them under the jurisdiction of the UCMJ.<sup>39</sup> The use of military justice to check the behavior of civilians is not a novel concept and the 2007 Amendment to the UCMJ reflects a long-standing principle that "civilians serving alongside the military may be subject to courts-martial under the military justice system in some limited capacity."<sup>40</sup>

Determining how to best hold PMCs legally accountable when they accompany military forces overseas is no mere triviality. Firstly, holding PMCs criminally accountable is necessary for ensuring that victims of PMC criminal conduct receive personal justice.<sup>41</sup> Secondly, legal accountability is necessary for pragmatic reasons, namely the achievement of military objectives. Particularly in contingency operations such as Iraq, in which military personnel are deeply ingrained with local civilian populations, it is necessary to foster amicable relationships with domestic populations to achieve military objectives.<sup>42</sup> However, local populations often do not recognize or differentiate military personnel from PMCs, which can hamper American military efforts when PMCs engage in criminal conduct and are not held accountable.<sup>43</sup>

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37. *Id.* at 1049.

38. Martha Minow, *Outsourcing Power: Privatizing Military Efforts and the Risks to Accountability, Professionalism, and Democracy*, in GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY 112 (Jody Freeman & Martha Minow eds., 2009).

39. Chapman, *supra* note 12, at 1052-53.

40. United States v. Ali, 71 M.J. 256, 262 (C.A.A.F. 2012).

41. See Steven Paul Cullen, *Out of Reach: Improving the System to Deter and Address Criminal Acts Committed By Contractor Employees Accompanying Armed Forces Overseas*, 38 PUB. CONT. L.J. 509, 511 (noting that the absence of actual legal oversight of PMCs prior to the 2007 left victims of PMC unable to seek redress for their injuries or grievances).

42. Chapman, *supra* note 12, at 1052.

43. Snyder, *supra* note 26, at 97. See also JENNIFER K. ELSEA, MOSHE SCHWARTZ, & KENNON H. NAKAMURA, CONG. RESEARCH SERV., RL 32419, PRIVATE SECURITY CONTRACTORS IN IRAQ: BACKGROUND, LEGAL STATUS, AND OTHER ISSUES, 38 (2008) ("News reports from Iraq indicate that [private security forces] may have led in some cases to a disregard of the sensitivities of and consequences for the Iraqi public. For a U.S. commander in Iraq whose mission may well include winning "hearts and minds," such a disregard is problematic, some analysts argue.").



Although the application of the UCMJ to PMCs is likely the most pragmatic option available for ensuring legal accountability of PMCs, the practice of such application undoubtedly raises Constitutional concerns. Namely, the amendment raises the issue of when it is permissible to subject a civilian to the legal oversight of the military, thus potentially depriving them of Constitutionally guaranteed rights required in Article III courts.<sup>44</sup>

Despite the importance of the Constitutional questions raised by military oversight of civilians, the topic has continued to remain ambiguous in contemporary times. Even George W. Bush, an ardent supporter of increased reliance on PMCs during his administration, had little idea about what legal restrictions were placed on PMCs.<sup>45</sup> This Note, however, argues that subjecting PMCs to the military justice system is not only Constitutional, but is a superior choice to existing alternatives in regulating PMC conduct. Thus, any attempts to repeal or replace the 2007 Amendment to the UCMJ are unadvised.

In Part II, this Note will discuss the rationale giving rise to a system of military justice separate from the civilian legal system and discusses the differences and similarities between the two systems. Part III of this Note will examine the Constitutional framework under which the military justice system was created, and how courts have approached the application of military justice to civilians under this framework. Ultimately, Part III will conclude military jurisdiction over civilians is only permissible when: (1) the application of military justice is a last-resort and; (2) the person to be subjected to military jurisdiction is one whom could reasonably be determined to fall within the purveyor of land and naval forces of the United States.

Next, Part IV will consider the alternatives to subjecting PMCs to military jurisdiction, primarily focusing on extending United States domestic law via the Military Extraterritorial Jurisdiction Act (“MEJA”). Part IV will ultimately conclude that MEJA and other alternatives would prove ineffective in adjudicating PMC conduct. Part V will then discuss the contemporary use of PMCs as quasi-military forces. This section will conclude that contemporary PMCs do not fall within the gambit of civilians that have historically been exempted from courts-martial proceedings, and instead are more similar to the land and naval forces of the United States, thus permitting the military to exercise jurisdiction over them. Lastly, in

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44. Peter W. Singer, *Frequently Asked Questions on the UCMJ Change and Its Applicability to Private Military Contractors*, BROOKINGS, (Friday, Jan. 12, 2007), <https://www.brookings.edu/opinions/frequently-asked-questions-on-the-ucmj-change-and-its-applicability-to-private-military-contractors/> [https://perma.cc/BK9P-UMKN].

45. Minow, *supra* note 38, at 110.

Part VI, this Note will ultimately conclude that the 2007 Amendment is Constitutional and should be upheld, and further, that PMC permissibly fall within military jurisdiction under the 2007 Amendment.

## II. PURPOSES OF THE MILITARY JUSTICE SYSTEM: DO MILITARY JUSTICE AND CIVILIAN JUSTICE COMPORT?

### A. *Underlying Rationale of the Military Justice System*

The military justice system has frequently been described as a system separate and apart from the civilian justice system,<sup>46</sup> with the practice of separating the military and civilian justice systems stretching back to the earliest days of the United States.<sup>47</sup> In fact, the existence of a separate system of military justice predates the founding of the United States, as the Articles of War, which governed military justice for nearly two centuries in the United States, were first promulgated in 1775.<sup>48</sup> The Articles of War, largely derived from both Roman and British legal traditions, served as the statutory basis for military justice for 175 years until the codification of the UCMJ in 1950.<sup>49</sup> In spite of the long history of the use of a separate military justice system in the United States the continued use of such a system raises important questions. More specifically: what are the underlying rationales giving rise to a military justice system separate?

It has long been assumed that the overriding purpose of the military justice system was to enforce discipline and order throughout military ranks.<sup>50</sup> This assumption has its roots in the belief that the civilian legal system is ill-suited for the unique problems faced by the military.<sup>51</sup> First and foremost, the military justice system developed to enforce the “law of obedience”, as “[m]ilitary justice provides a stimulus to cultivate such habits [instantaneous obedience] by posing

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46. David A. Schlueter, *The Military Justice Conundrum: Justice or Discipline?*, 215 MIL. L. REV., 1, 5 (2013).

47. Rives, *supra* note 2, at 16.

48. Kevin J. Barry, *A Face Lift (and Much More) for an Aging Beauty: The Cox Commission Recommendations to Rejuvenate the Uniform Code of Military Justice*, 2002 L. REV. M.S.U.-D.C.L. 57, 60 (2002).

49. *Id.* at 58.

50. Schlueter, *supra* note 46, at 6.

51. Lieutenant Colonel James B. Roan & Captain Cynthia Buxton, *The American Military Justice System in the New Millennium*, 52 A.F. L. REV. 185, 189-90 (2002) (“An army is not a deliberative body. It is the executive arm. Its law is that of obedience. No question can be left open as to the right to command in the officer, or the duty of obedience in the soldier.”) (quoting *Orloff v. Willoughby*, 345 U.S. 83, 94 (1953)).

the threat that disobedience of commands will be penalized.”<sup>52</sup> The concept of discipline is of the utmost importance in the military, for “discipline is the soul of an army. It makes small numbers formidable; procures success to the weak.”<sup>53</sup> In light of this the military system largely developed as means to criminalize actions, such as desertion, which had no analogues in the civilian justice system, and further, would be detrimental to military structure and objectives if left unchecked.<sup>54</sup>

At the center of the military justice system sits a commanding officer imbued with an impressively broad scope of authority.<sup>55</sup> Prior to convening a court-martial, the commanding officer conducts an investigation, with advice from a judge-advocate general, into the alleged events, and can ultimately decide to punish an offending service member in a multitude of ways.<sup>56</sup> If a commanding officer believes that an accused conduct is sufficiently criminal, then he may institute further investigation into whether a general court-martial, the military analogue to a civilian trial for felony offenses, is warranted.<sup>57</sup>

To many observers, from the earliest days of the Articles of War through contemporary times, the fundamental nature of the military justice system developed merely as a tool of commanding officers to discipline their soldiers.<sup>58</sup> For many who subscribe to this view, the incessant demand on promoting discipline and order meant that the principles of law and justice were largely relegated to a secondary concern. As a result, commanders were given near unfettered

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52. See *id.* at 189 (quoting Robinson O. Everett, *Military Justice in the Armed Forces of the United States*, THE TELEGRAPH PRESS (1956)).

53. General George Washington, *Instructions to Company Captains* (29 July 1757), available at <https://founders.archives.gov/documents/Washington/02-04-02-0223> [<https://perma.cc/8GBN-VHRN>].

54. Roan, *supra* note 51, at 190.

55. Schlueter, *supra* note 46, at 8-9.

56. *Id.* at 9 (noting that a commander can issue four different rulings following the initial investigation: 1) a commander could decide that a simple reprimand or individual counseling would suffice; 2) a commander could decide that the offense was serious enough to warrant discharge of the soldier and begin administrative proceedings; 3) a commander, who decides on his own accord that the offender’s conduct was merely “minor” may decide to impose nonjudicial punishment. However, the service member is free to demand a court-martial in such a scenario, and; 4) a commander determines that the offense is sufficiently serious, he may begin to initiate court-martial proceedings against the offending party).

57. *Id.*

58. Barry, *supra* note 48, at 58.

authority in carrying out legal proceedings.<sup>59</sup> However, such a draconian system of adjudication has often led to calls for the military system to reform and fall more in-line with the legal standards of the civilian justice system.<sup>60</sup>

While still affording commanding officers a tool to enforce discipline within their ranks,<sup>61</sup> in many facets, the military justice system has gradually begun to place more emphasis on the legal rights of the individuals under its jurisdiction.<sup>62</sup> In fact, as noted by some scholars, the Manual for Courts-Martial,<sup>63</sup> which articulates the procedural requirements and due process rights in courts-martial proceedings under the UCMJ, states that “justice” is a primary purpose of military law, listing justice before discipline.<sup>64</sup> Apart from this language, developments in the past half-century reflect the growing emphasis on the theme of justice, as individuals under military jurisdiction have begun to receive many of the same rights of law found in Article III courts.<sup>65</sup> For example, defendants in a court-martial proceeding are protected from self-incrimination and cruel and unusual punishment, just as civilians are in Article III proceedings.<sup>66</sup>

Despite recent developments, which have greatly increased the due process rights of those accused of crimes in the military justice system, it cannot be forgotten that the desire to enforce discipline is largely the bedrock of military justice.<sup>67</sup> To that end, some have

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59. *Id.* at 63-64 (quoting General Samuel T. Ansell, *Military Justice*, 5 CORNELL L.Q. 1, 5 (1919)) (“I have gratifying evidence of support not only from the public generally but from the profession - that the existing system of Military Justice is un-American. . . that it is a system arising out of and regulated by the mere power of Military Command rather than Law.”) (emphasis added).
60. David A. Schlueter, *American Military Justice: Responding to the Siren Calls for Reform*, 73 A.F. L. REV. 193, 195 (noting that the military justice system has frequently faced calls for reform after major conflicts such as: World War I, World War II, and the Vietnam War).
61. *See generally* Schlueter, *supra* note 46.
62. Schlueter, *supra* note 60, at 196-197 (noting that the UCMJ was heavily amended in the 1980’s to bring the military justice system in closer accordance with the Federal Rules of Criminal Procedure and Evidence).
63. MANUAL FOR COURTS-MARTIAL UNITED STATES, pt. II, chp. II, r. 101 (2012) [hereinafter *MCM*] (acting as the military equivalent of the Federal Rules of Civil or Criminal Procedures by proscribing the appropriate procedural requirements in a court-martial proceeding).
64. Schlueter, *supra* note 46, at 6 (quoting *MCM*).
65. Peters, *supra* note 27, at 409.
66. Snyder, *supra* note 26, at 91.
67. *See generally* Major Christopher W. Behan, *Don’t Tug on Superman’s Cape: In Defense of Convening Authority Selection and Appointment of*

suggested that the concepts of discipline and justice should not be thought of as dichotomous themes, but rather, the two themes should be considered as complementary concepts to be balanced with each other.<sup>68</sup> That is, the role of the commander is still given ample deference during courts-martial proceedings. However, the extent of a commander's power has been somewhat tempered by the adoption of numerous procedural protections, such as the adoption of procedural practices that closely emulate the Federal Rules of Evidence and Criminal Procedure.<sup>69</sup> Thus, while the military justice system remains first and foremost a tool for ensuring discipline, modern developments have ensured that defendants in the military justice system are afforded much more legal protection during courts-martial proceedings, a reflection of the growing emphasis of justice under the UCMJ.<sup>70</sup>

*B. Similarities and Differences Between the Two Legal Systems*

As befitting the creation of a separate legal systems, there are fairly significant differences in the procedural requirements afforded to defendants in the civilian and military justice systems. This Note will elect to highlight to two major differences between the military justice and civilian justice systems that potentially could create Constitutional concerns: the use of grand-juries and juries in the respective systems.<sup>71</sup>

1. Lack of Grand-Jury Requirement

In the civilian justice system, a criminal defendant's right to a grand-jury is enshrined in the Fifth Amendment.<sup>72</sup> Under the Fifth

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*Court-Martial Panel Members*, 176 MIL. L. REV. 190 (2003) ("By far the greatest influence on the modern court-martial, however, came from two different systems, the Court of Chivalry in England and the military code of Sweden's King Gustavus Adolphus. These courts both struck a balance between the demands of good order and discipline and concepts of due process, thereby laying a foundation for modern systems of military justice that strive to do the same.").

68. Schlueter, *supra* note 46, at 28-29 (quoting Captain John S. Cooke, *The United States Court of Military Appeals, 1975-1977: Judicializing the Military Justice System*, 76 MIL L. REV. 43, 52 (1977) ("The precept [of the relationship of justice and discipline] has generally been reflected in the tendency of the court to distinguish and separate functions exercised by the commander and other line personnel . . . This tendency deserves close scrutiny, for it must be recognized that justice and discipline are properly but two sides of the same coin; to the extent that the court separates them unnecessarily, it risks devaluing the whole system.") (emphasis added)).

69. Schlueter, *supra* note 60, at 195-96.

70. Schlueter, *supra* note 60, at 196-98.

71. Sacilotto, *supra* note 6, at 207.

72. U.S. CONST. amend. V.

Amendment, however, the requirement of a grand-jury is explicitly omitted in cases arising in the military.<sup>73</sup> The explicit decision to exclude the grand-jury requirement from the military justice system indicates that the Founders certainly envisioned that the military justice system could (and should) operate under a different set of procedural rules than its civilian counterpart. This is not to say, however, that the military justice system does not provide a mechanism that functions as the equivalent of a grand-jury. Instead, a court-martial proceeding utilizes a mechanism known as an Article 32 hearing.<sup>74</sup>

Some claim that an Article 32 hearing may provide more protections and rights than a grand-jury does.<sup>75</sup> The Manual for Courts-Martial provides that:

Except as provided in subsection (k) of this rule, *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 made in substantial compliance with this rule.*<sup>76</sup>

Moreover, an Article 32 hearing allows for the accused: to be present, to have counsel accompany him, to cross-examine adverse witnesses and review government evidence, and to present his own evidence and witnesses.<sup>77</sup> These safeguards are noticeably absent in a grand-jury in a federal proceeding in the United States.<sup>78</sup>

## 2. Lack of a Jury of Peers

A second noteworthy difference between the civilian legal system and its military counterpart is the absence of the jury trial in a military trial, or court-martial.<sup>79</sup> The right to a jury trial is explicitly granted by the Constitution; in fact, as the United States Supreme Court has noted, the right to a jury is considered so important a safeguard to individual liberty that it appears in two different parts of

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73. *Id.* (“No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, *except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger.*”) (emphasis added).

74. Adam R. Pearlman, *Applying the UCMJ to Contractors in Contingency Operations*, 6 AM. U. NAT’L SEC. L. BRIEF 1, 8 (2016).

75. *Id.* at 9; *see also* Peters, *supra* note 27, at 409.

76. MCM, *supra* note 63, at pt. II, chp. IV, r. 405(a) (emphasis added).

77. *Id.* at pt. II, chp. IV, r. 405(b).

78. Pearlman, *supra* note 74, at 9; *see also* Sacilotto, *supra* note 6, at 207.

79. Hamaguchi, *supra* note 5, at 1055.

the Constitution.<sup>80</sup> Understandably, given the importance attached to the right to an impartial jury, courts are wary of the lack of a jury in courts-martial proceedings, believing them to be inferior to civilian juries.<sup>81</sup> The Sixth Amendment states that:

shall enjoy the right to a speedy and public trial, *by an impartial jury* of the State and district where in the crime shall have been committed, which district shall have been previously ascertained by law.<sup>82</sup>

However, while courts-martial do not utilize a jury of the accused's peers, the UCMJ does provide a very similar mechanism as a substitute.<sup>83</sup> While this body is known as a "panel" and is made up of "members",<sup>84</sup> it essentially serves the same fact-finding roles as a civilian jury<sup>85</sup> by weighing evidence and adjudging a proper verdict based on the judge's instructions.<sup>86</sup> Further, members of military panels are subject to voir dire proceedings and can be peremptorily removed by a defendant.<sup>87</sup> Although both a military panel and civilian jury serve essentially the same function, many critics contend that a PMC would not receive an impartial trial under military jurisdiction.<sup>88</sup> For example, members of military of military panels are selected solely at discretion of the convening authority of the court-martial.<sup>89</sup>

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80. United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 16 (1955) ("Article III, § 2, commands that the 'Trial of all Crimes . . . shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed . . .' And the *Sixth Amendment* provides that 'In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed . . . .'").
81. *See id.* at 17-18 ([T]here is "a great difference between trial by jury and trial by selected members of the military forces. . . . T[he] premise underlying the constitutional method for determining guilt or innocence in federal court is that layman are better than specialists to perform this task.").
82. U.S. CONST. amend. VI.
83. MCM, *supra* note 63, at pt. II, chp. V, r. 501.
84. Peters, *supra* note 27, at 409-10.
85. Behan, *supra* note 67, at 193.
86. MCM, *supra* note 63, at pt. II, chp. V, r. 502(a)(2).
87. Peters, *supra* note 27, at 410.
88. *See e.g.* Hamaguchi, *supra* note 5, at 1058 (speculating that animosity between the actual military personnel that populate courts-martial panels and PMCs may lead to biases that adversely impact a PMCs defense).
89. Behan, *supra* note 67, at 193.

3. What Constitutional Protections Are Due to Individuals under the UCMJ?

Irrespective of the fact that the military justice system provides mechanisms that effectively mimic the safeguards of the Fifth and Sixth Amendment, it may be arguable that these Constitutional concerns are moot.<sup>90</sup> Simply put, the status of the modern-day PMC is much more akin to that of a soldier than a civilian.<sup>91</sup> As will be further discussed in this Note, it has been well-settled that the Constitutional guarantees required in an Article III court do not apply to the same degree in a court-martial proceeding commenced pursuant to military law.<sup>92</sup> This proposition was largely settled in the United States Supreme Court case *Ex parte Quirin*, in which the Court held that “the Fifth and Sixth Amendments cannot be taken to have extended the right to demand a jury to trials by military commission.”<sup>93</sup> Thus, if a PMC could reasonably be shown to constitute a *de facto* soldier and fall under military jurisdiction, the claims of violation of their Constitutional rights might be largely irrelevant.<sup>94</sup>

### III. CONSTITUTIONAL FRAMEWORK OF MILITARY JUSTICE

In 2011 the United States Court of Appeals for the Armed Forces affirmed the court-martial conviction of a civilian contractor, Alaa Mohammed Ali, employed by the United States’ military to serve as a translator in Iraq.<sup>95</sup> Ali’s conviction, in *United States v. Ali*, represented the first attempt to use the newly expanded reach of the UCMJ to prosecute a PMC for criminal conduct.<sup>96</sup> However, while the decision in *Ali* indicates that the Amendment may survive Constitutional scrutiny, the factual posture of *Ali* could distinguish the case from future challenges. Vitally, the defendant in *Ali* was not

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90. Peters, *supra* note 27, at 410.

91. *Id.* at 410.

92. Hamaguchi, *supra* note 5, at 1053.

93. *Ex parte Quirin*, 317 U.S. 1, 39 (1942); *see also* Rives, *supra* note 2, at 16 (citing *Burns v. Wilson*, 346 U.S. 147 (1953) (arguing that the holding in *Burns* stands for the proposition that members of the military are guaranteed Constitutional protections to the extent that affording these protections does not interfere with military duties and the discipline demanded by the military)).

94. Pearlman, *supra* note 74, at 6.

95. *United States v. Ali*, 71 M.J. 256, 271 (C.A.A.F. 2012).

96. *See* David C. Hammond, *The First Prosecution of a Contractor Under the UCMJ: Lessons for Service Contractors*, SERVICE CONTRACTOR, Fall 2008, at 33.



a United States citizen,<sup>97</sup> rendering any potential Constitutional violations largely irrelevant.<sup>98</sup>

The Constitution, despite granting Congress the authority to promulgate a system of military justice, offers no specific instructions as to when a civilian could be subjected to military law.<sup>99</sup> Thus, the Constitutional permissibility of expanded military jurisdiction under the 2007 Amendment remains unresolved, and a more in-depth examination of previous verdicts involving civilians contesting military oversight would likely be necessary to establish how a court may view the 2007 Amendment when applied to an American citizen. While no prior case law speaks directly to this issue, relevant case law does indicate that a workable solution, permitting military oversight under the 2007 Amendment to pass Constitutional muster, could be reached.

A. *Congressional Power to Create the Military Justice System*

The concept of military oversight over civilians in general has long served as a controversial idea, with many of the Founding Fathers adopting Blackstone's philosophy that military law was "entirely arbitrary" and "in truth and reality, no law."<sup>100</sup> Despite the Founder's misgivings, the Constitution does not contain any express restrictions on the use of military law over non-military personnel.<sup>101</sup> Historically, since pre-Revolution days, the United States has typically permitted varying degrees of military oversight to govern the conduct of civilian accomplices.<sup>102</sup>

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97. *Ali*, 71 M.J. at 259.

98. *Id.* at 269 ("We are mindful of the Supreme Court's repeated refusals to extend court-martial jurisdiction over civilians . . . However, those cases are factually distinguishable because the defendants in those cases were U.S. citizens who indisputably enjoyed the protections of the Fifth and Sixth Amendments."). Although the majority opinion in *Ali* avoids the Constitutional question, Chief Justice Baker's concurring opinion concludes that irrespective of *Ali*'s nationality, his constitutional rights would not have been violated as "[i]t seems to me that *if a civilian is sufficiently integrated into the United States Armed Forces to qualify for court-martial jurisdiction under Article 2(a)(10), UCMJ, then that same person is sufficiently integrated so as to be entitled to those Fifth and Sixth Amendment rights embedded in the UCMJ.*" *Id.* at 277 (emphasis added).

99. *See* U.S. CONST.

100. Snyder, *supra* note 26, at 90 (quoting *Reid v. Covert*, 354 U.S. 1, 26 (1957)) (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES \*413).

101. *See* U.S. CONST.

102. *See e.g.* Cullen, *supra* note 41, at 519 ("The 1775 Articles of War extended the jurisdiction of military tribunals to 'all sutlers and retainers to a camp, and all persons whatsoever serving with the Continental Army in the field.'"); *see also* Sacilotto, *supra* note 6, at

Although the military justice system does adjudicate legal matters through the use of courts-martial proceedings, a court-martial is a not “court” in the same sense that the term “court” is understood in the civilian justice system.<sup>103</sup> This is because the military justice system is not created pursuant to Article III of the Constitution, but rather, created by Congress, pursuant to its authority in Article I of the Constitution.<sup>104</sup> In this sense, the military justice system acts in direct opposition to Article III courts and “every extension of military jurisdiction is an encroachment on the jurisdiction of the civil courts.”<sup>105</sup>

The above cited distinction has numerous practical effects. For example, unlike Article III courts, in which certain members of the judiciary enjoy life tenure, there is no requirement in the military justice system that military trial judges be given life tenure.<sup>106</sup> Moreover, “common-law” does not exist in the military justice system: there are only crimes which have been statutorily codified by Congress pursuant to its Constitutional authority.<sup>107</sup>

However, the most significant result of the military justice system being an Article I, rather than Article III creation, is what Constitutional rights are guaranteed in the military justice system. In sum, because a military-court martial is not a “court” as defined in Article III of the Constitution, *the Constitutional requirements of Article III courts do not apply to the same degree in the military justice system.*<sup>108</sup> The language of the Fifth Amendment affirms this

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189 (noting that the provisions contained in the 1775 Articles were largely carried over to 1916 Articles of War).

103. Snyder, *supra* note 26, at 75.

104. Geoffrey S. Corn, *Bringing Discipline to the Civilianization of the Battlefield: A Proposal for a More Legitimate Approach to Resurrecting Military-Criminal Jurisdiction over Civilian Augmentees*, 62 U. MIAMI L. REV. 491, 526 (2008).

105. Reid v. Covert, 354 U.S. 1, 21 (1957).

106. Corn, *supra* note 104, at 526.

107. Snyder, *supra* note 26, at 75.

108. Numerous courts, both civilian and military, have adopted this proposition. See *Burns*, 346 U.S. 137, 140 (1953) (“Military law . . . is a jurisprudence which exists separate and apart from the law which governs in our federal judicial establishment . . . *the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty*, and the civil courts are not the agencies which must determine the precise balance to be struck in this adjustment. The Framers expressly entrusted that task to Congress.”) (emphasis added); *Ex parte Quirin*, 317 U.S. 1, 40 (1942) (“[W]e must conclude that § 2 of Article III and the *Fifth* and *Sixth Amendments* cannot be taken to have extended the right to demand a jury to trials by military commission.”); *Kinsella v. United States*, 361 U.S. 234, 272 (“*The provisions of . . . the Fifth and Sixth Amendments*

statement and explicitly differentiates the Constitutional requirements due to military personnel by stating:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, *except in cases arising in the land or naval forces, or in the militia*, when in actual service in time of war or public danger.<sup>109</sup>

Congress's power to regulate the laws of the military is vested in Art. I § 8, Clause 14 of the Constitution, which grants Congress the power to "make Rules for the Government and Regulation of the land and naval Forces."<sup>110</sup> Historically, this phrase had been used in conjunction with Art. I §8 Clause 18, which grants Congress the power to "make all Laws which shall be necessary and proper" to execute the powers vested in the Congress.<sup>111</sup> Together, these clauses had been relied upon as a limited exception for Congress to create legal proceedings not subject to the Constitutional rights required in Article III courts.<sup>112</sup>

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*of the Constitution* requiring the trial of capital or otherwise infamous crimes in an Article III court, upon an indictment of a grand jury, by an impartial petit jury, *are not applicable to 'cases arising in the land or naval forces.'*") (emphasis added); *United States v. Ali*, 71 M.J. 256, 277 (2012) (Baker, C.J. concurring) ("[T]he Constitution delimits the application of *Fifth* and *Sixth Amendment* to members of the United States Armed Forces."). Further, Baker noted that the "exception to the requirement of indictment by grand jury 'has been read over into the Sixth Amendment *so that the requirements of jury trial are inapplicable.*'" *Id.* (quoting *Reid*, 354 U.S. at 37 n.68); *United States v. Marcum*, 60 M.J. 198, 205 (C.A.A.F. 2004) ("Constitutional rights may apply differently" in the military context.).

109. U.S. CONST. amend. V. As noted in the preceding footnote, the military exemption contained in the Fifth Amendment, has, by implication, been read into the Sixth Amendment as well.

110. U.S. CONST. art. I, § 8, cl. 14.

111. *See Ali*, 71 M.J. at 269. Article I, § 8, Clause 18 of the United States Constitution is colloquially known as the "Necessary and Proper Clause" and acts as Congress's authority to pass laws necessary to effectuate its Constitutionally enumerated powers.

112. *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234, 237-38, 246-47 (1960); *see also Reid*, 354 U.S. at 42 (Frankfurter, J., concurring) (noting that persons subject to courts-martial are not protected by the specific provisions of Art. III, nor are they guaranteed the rights granted by the Fifth or Sixth Amendment).

B. *Military and Civilians: When Can Civilians Fall Under Military Jurisdiction?*

As held in *Reid*, however, Congress's ability to create the laws of the military cannot be extended to civilians through the Necessary and Proper Clause alone.<sup>113</sup> Instead, contemporary courts have held that it is Congress's "war-powers" and the implied powers derived from them, which act as the source and authority permitting Congress to extend Article I § 8, Clause 14 to civilians.<sup>114</sup> In *Ali*, the concurring opinion described these powers as being found in Article I, § 8, Clauses 10-13, 16.<sup>115</sup> Among these powers include:

The power to . . . raise and support armies; provide and maintain a navy; and to provide for organizing, arming, and discipline the military.<sup>116</sup>

While Congress's power to promulgate a military justice system separate and apart from the civilian justice is well-settled, courts have historically been loath to allow the extension of military justice to civilians and thus deprive them of the full gambit of Constitutional protections guaranteed in Article III courts.<sup>117</sup> In *Ex parte Milligan*, the Supreme Court established the proposition that if civilian courts are "open," then military jurisdiction of civilians is improper.<sup>118</sup> The Court in *Reid* reaffirmed this proposition, holding that:

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113. *Reid*, 354 U.S. at 22.

114. *Ali*, 71 M.J. at 269-70 (quoting *Reid*, 354 U.S. at 33) ("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.'").

115. *Ali*, 71 M.J. at 273 (Baker, C.J., concurring).

116. *Id.* (emphasis added).

117. *See, e.g., Reid*, 354 U.S. at 19 ("Article I, § 8, cl. 14 empowers Congress 'To make Rules for the Government and Regulation of the land and naval Forces' . . . But if the language of Clause 14 is given its natural meaning, the power granted does not extend to civilians.").

118. *Ex parte Milligan*, 71 U.S. 2, 123 ("Congress has declared the kinds of trial . . . for offences committed while the party is in the military or naval service. Every one [sic] connected with these branches . . . is amenable to the jurisdiction which Congress has created for their government . . . All other persons, *citizens of states where the courts are open*, if charged with crime, are guaranteed the inestimable privilege of trial by jury.") (emphasis added). The court went on to further state that "[i]t follows, from what has been said on this subject, that there are occasions when martial rule can be properly applied . . . [but] if this government is continued after the courts are reinstated, it is a gross usurpation of power. Martial rule can never exist where the courts are open.") *Id.* at 127 (emphasis added).

civilian courts are the normal repositories of power to try persons charged with crimes against the United States . . . *the jurisdiction of military tribunals is a very limited and extraordinary jurisdiction derived from the cryptic language in Art. I, § 8, and, at most, was intended to be only a narrow exception to the normal and preferred method of trial in courts of law.*<sup>119</sup>

Moreover, courts have historically held that military jurisdiction over civilians is only permissible if the civilian could be determined to be within the language of Article I, § 8 Clause 14.<sup>120</sup> Justice Frankfurter's concurring opinion in *Reid* succinctly highlights this proposition when he states:

trial by court-martial is constitutionally permissible only for persons who can, on a fair appraisal, be regarded as falling within the authority given to Congress under Article I, § 8, Clause 14 to regulate the "land and naval Forces."<sup>121</sup>

In sum, while the ability of Congress to promulgate the UCMJ and permit court-martials in the military is well-settled, courts have often cautioned that courts-martial are to be last-resort for trying civilians,<sup>122</sup> and that a civilian must "reach the level of land and naval forces" to fall under military jurisdiction.<sup>123</sup> Thus, to prosecute a PMC under the UCMJ they would have to be sufficiently shown to be a *de facto* member of the military and further, no other methods of adjudication would be available to ensure accountability for criminal action.

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119. *Reid*, 354 U.S. at 21 (emphasis added).

120. *See id.* at 22-23 ("[T]he authority conferred by Clause 14 does not encompass persons who cannot fairly be said to be 'in' the military service . . . 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.").

121. *Id.* at 42 (Frankfurter, J., concurring).

122. *See generally* United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 23 (1955) (Cautioning that the authority to convene a court-martial must be limited to the least amount of power required to achieve the proposed end); *see also* Milligan, 71 U.S. at 119, ([M]ilitary tribunals for civilians . . . whether in war or peace, are inconsistent with the liberty of the citizen, and can have no place in constitutional government.").

123. *See Reid*, 354 U.S. at 22-23 (noting that a civilian could fall within the land and naval forces depending on the circumstances of that civilian's association with the military, but holding that a dependent of a service member did not reach the level of "land and naval" forces as to fall under Article I, § 8 Clause 14).

#### IV. REINING IN PMC BEHAVIOR: WHY ALTERNATIVES TO MILITARY JUSTICE FAIL

##### A. *Why Do We Need to Hold PMCs Accountable?*

Although numerous Blackwater operatives involved in the Nisour Square shooting would eventually be convicted for their roles in the tragedy, the first attempt to prosecute the instigators resulted in dismissal of charges.<sup>124</sup> Following the dismissal, Iraqi citizens, many of whom were victims of the attack, expressed their dismay with the decision, believing it represented a concerted effort by the American judicial system to shelter the perpetrators of the attack.<sup>125</sup> As one victim asked

What are we — not human? Why do they have the right to kill people? Is our blood so cheap? For America, the land of justice and law, what does it mean to let criminals go?<sup>126</sup>

This response illustrates the perception created by America's heavy reliance on PMCs. Although the term "mercenary" may be somewhat of a misnomer,<sup>127</sup> many view PMC as nothing more than "guns for hire" with little regard for the well-being of innocent civilians.<sup>128</sup> Unsurprisingly, this negative association of PMC has a profound impact on the perception of the American military, which often works in close conjunction with PMCs.<sup>129</sup>

Shortly after the massacre at Nisour Square, one witness to the attack stated that

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124. Timothy Williams, *Iraqis Angered as Blackwater Charges Are Dropped*, N.Y. TIMES (Jan. 1, 2010), <http://www.nytimes.com/2010/01/02/us/02blackwater.html> [<https://perma.cc/FFT4-9X9D>].

125. *Id.*

126. *Id.* (quoting Abdul Wahab Adul Khader, a 34-year-old bank employee and one of at least 20 people wounded in the melee).

127. Singer, *supra* note 33, at 42-44.

128. *Id.* at 44 (quoting Abdel-Fatau Musah, who claims that there is no distinction between the historical mercenary and contemporary PMCs, and that "private military companies are nothing but the old poison of vagabond mercenaries in new designer bottles.").

129. See Cullen, *supra* note 41, at 515-16 (noting that not only are PMCs often heavily armed, they frequently serve in close proximity to local populations. Moreover, because these PMCs are frequently in close contact with United States military and government personnel, when they do commit crimes, local populous have a difficult time distinguishing the conduct and simply associate PMC conduct with official United States policy).

when someone . . . gets killed by an American and that American is protected-untouchable, this will definitely create new enemies for the United States.<sup>130</sup>

Such a mindset reflects perhaps the most compelling argument for the extension of military jurisdiction over PMC: when PMCs engage in criminal conduct and go unpunished, American military efforts can be greatly harmed.<sup>131</sup>

The Nisour Square massacre, however, is far from the only contemporary example of PMC misconduct resulting in harm to foreign civilians.<sup>132</sup> On a hot day in July 2006, a PMC employed by an American contracting firm called Triple Canopy bluntly told his colleagues that he was “going to kill someone today.”<sup>133</sup> As the group’s vehicle approached the Baghdad Airport, the PMC jumped out of the vehicle and fired several rounds from his M4 rifle into a truck parked nearby.<sup>134</sup> The perpetrator’s colleagues stated that the truck did not pose a threat, nor was the team in danger at the time of the attack.<sup>135</sup>

Unsatisfied with this amount of bloodshed, the PMC proclaimed “I’ve [sic] never shot anyone with my pistol before,” un-holstered his sidearm, and proceeded to fire seven or eight rounds into the windshield of a nearby taxi.<sup>136</sup> The perpetrator of these attacks, Jacob Washburn, was never prosecuted for his actions despite his colleagues reporting the incidents to their employer.<sup>137</sup> Instead, Triple Canopy terminated Washburn’s colleagues, a jury cleared Triple Canopy of any wrongdoing, and there was no determination of whether any Iraqi civilians were killed or injured that July day.<sup>138</sup>

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130. Snyder, *supra* note 26, at 97.

131. Cullen, *supra* note 41, at 514 (describing the negative consequences of PMC misconduct on military morale, as well as the adverse impact PMCs can have on the implementation of certain policies and strategic choices).

132. C.J. Chivers, *Contractor’s Boss in Iraq Shot at Civilians, Worker’s Suit Says*, N.Y. TIMES (Nov. 17, 2006), <http://www.nytimes.com/2006/11/17/world/middleeast/17contractors.html> [https://perma.cc/SG4H-UUE7].

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. Tom Jackman, *Security Contractor Cleared in Two Firings*, WASH. POST (Aug. 2, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/08/01/AR2007080102350.html> [https://perma.cc/44TW-XZ52].

138. *Id.*

The failure to prosecute Blackwater and Triple Canopy employees are indicative of the largely under-regulated behavior of PMCs, but the failure to prosecute PMCs goes far beyond just these two notable examples.<sup>139</sup> For example, in 2007, at the height of the Iraq War, there were approximately 180,000 contractors, of all types, serving with the United States military.<sup>140</sup> About 30,000 of these contractors were the type of PMCs of chief concern to this Note.<sup>141</sup> Yet, despite the fact that PMCs served in such great numbers, prosecutions for criminal activity were few and far between.<sup>142</sup> As one commentator pointed out, it would be a very charitable, if not naïve assumption, to believe that not one PMC had committed *any* sort of criminal action during the first few years of the Iraq War.<sup>143</sup>

*B. Alternatives to Subjecting PMCs to Military Jurisdiction*

In light of the foregoing, it is apparent that the existing legal landscape has failed to regulate the conduct of PMCs, thus necessitating the extension of military jurisdiction over PMCs. Critics, however, may argue that existing mechanisms, namely the Military Extraterritorial Jurisdiction Act (“MEJA”), are sufficient to hold PMCs accountable.<sup>144</sup> Bearing in mind the well-settled presumption that civilians should be subjected to Article III courts unless there are not ready alternatives,<sup>145</sup> this Note will consider MEJA as the most persuasive argument against extended military jurisdiction. However,

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139. Hurst, *supra* note 29, at 1316-18.

140. *Id.* at 1310.

141. Snyder, *supra* note 26, at 68.

142. *See* Peters, *supra* note 27, at 367 (claiming that, as of 2006, there had been *zero* prosecutions of a PMC for criminal conduct despite the fact PMCs had been serving in large numbers for over two years. In contrast, dozens of United States military personnel were convicted of criminal conduct in the same time period); *see also* Snyder, *supra* note 26, at 68 (noting how, by 2008, there had been only one prosecution of a PMC for criminal action despite the large number of PMCs present in the country).

143. *Id.* at 367.

144. Dan Stigall, *An Unnecessary Convenience: The Assertion of the Uniform Code of Military Justice (UCMJ) over Civilians and the Implications of International Human Rights Law*, 17 CARDOZO J. OF INT’L. & COMP. L. 59, 61(2009).

145. *See generally Ex parte Milligan*, 71 U.S. 2 (discusses writs of habeas corpus and the jurisdiction of military commissions); *see also* Reid v. Covert, 354 U.S. 1, 21 (1956) (noting that civilian courts are the “normal repositories of power to try persons charged with crimes against the United States.”).



for a variety of reasons, MEJA does not effectively mitigate jurisdictional gaps created by PMCs' unique role.<sup>146</sup>

1. Military Extraterritorial Jurisdiction Act

The ideal alternative to subjecting a civilian contractor to military jurisdiction is to simply subject civilians to existing criminal law in the continental United States, regardless of where the alleged criminal activity occurs. While such a solution is undoubtedly enticing in theory, such extraterritorial extension of domestic criminal law is plagued by a host of pragmatic concerns, effectively rendering such extension insufficient for purposes of ensuring criminal accountability of PMCs serving abroad.

The most significant attempt to rein in civilian contractors conduct through extension of domestic criminal law occurred with the passage of MEJA in 2000.<sup>147</sup> MEJA was largely a response to roughly thirty years of nearly unregulated PMC conduct in the wake of various court decisions.<sup>148</sup> By passing MEJA, Congress gave the Department of Justice jurisdiction to pursue criminal actions against overseas contractors if the crime would constitute a felony when committed on United States' soil.<sup>149</sup> Initially, MEJA's provisions only applied to Department of Defense contractors,<sup>150</sup> meaning that the perpetrators of the notorious Abu Ghraib prison scandal, largely contractors retained by the Department of State, fell outside the act's

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146. Stigall, *supra* note 144, at 68-69.

147. *Id.* at 70.

148. David Ehrhart, *Closing the Gap: The Continuing Search for Accountability of Civilian Contractors Accompanying the Force*, 34 THE REP. 10, 13 (2008); see also Glenn R. Schmidt, *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 CATHOLIC UNI. L. REV. 7, 74 (describing the finding of 1979 General Accounting Office report on contractor misconduct preceding MEJA's enactment. The report detailed numerous instances of civilian crime while accompanying military forces, including fifty-nine "serious" offenses, such as rape, arson, and murder, over a year-long span. The report further noted that a lack of ability to prosecute such crimes had a detrimental effect on military operations and "caused serious morale and discipline problems in overseas military communities.").

149. 18 U.S.C. § 3261 (2000) (MEJA has four prerequisites for Department of Justice jurisdiction: 1) the offense is punishable by more than a year's imprisonment; 2) the conduct occurred outside the United States; 3) the offense was committed by a member of the U.S. Armed Forces or a person accompanying and/or employed by the Armed Forces; and 4) the conduct occurred within the scope of the maritime and territorial jurisdiction of the United States).

150. Ehrhart, *supra* note 148, at 15.

reach.<sup>151</sup> While Congress would eventually rectify this oversight in 2004,<sup>152</sup> this mistake foreshadowed problems to come, as MEJA continued to be plagued by pragmatic concerns which largely sapped it of any genuine effectiveness in prosecuting PMC misconduct.<sup>153</sup>

The pragmatic shortcomings of MEJA are readily apparent upon examination of the Act. Chief amongst these is MEJA's reliance on stateside, Department of Justice attorneys, whom are tasked with pursuing prosecutions of criminal acts alleged to have occurred thousands of miles away.<sup>154</sup> This expansive distance places an incredibly burdensome weight on Department of Justice prosecutors to carry out even the most basic of legal task associated with preparation for litigation.<sup>155</sup> For example, the vast distances makes taking a simple deposition an incredibly difficult task.<sup>156</sup> Additionally, MEJA fails to consider the inherent difficulties that manifest when attempting to procure witnesses and compel them to testify; it is highly unlikely that many foreign nationals, witness to a crime perpetrated by an American PMC, would be excited at the prospect of traveling to American soil to testify *against* an American citizen, lest they face reprisals for their testimony.<sup>157</sup>

MEJA's reliance on stateside prosecutors also creates massive evidentiary concerns, such as spoliation of vital evidence. Such fears are certainly not unwarranted; for example, in the wake of the Nisour Square shootings, it took stateside investigators from the FBI nearly *two weeks* to reach Baghdad and commence their investigation into the shooting.<sup>158</sup> By that point, Blackwater employees had taken steps to repair and repaint vehicles that had been involved in the altercation, severely compromising important evidence in the process.<sup>159</sup>

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151. CONTRACTORS AND WAR: LEGAL ASPECTS OF FUTURE U.S. OPERATIONS 213 (Malcolm Patterson & Christopher Kinsey eds., 2012).

152. Ehrhart, *supra* note 148, at 15.

153. *See generally* MILITARY CONTRACTORS LEGAL STATUS, OVERSIGHT, AND SECURITY (Richard Quigly ed., 2009) (noting that from MEJA's enactment in 2000 through 2008, only 58 cases of contractor misconduct were referred to the Department of Justice, of which, only 13 made it to trial).

154. Singer, *supra* note 44.

155. *Id.*

156. *Id.*

157. *Id.*

158. Chapman, *supra* note 12, at 1066.

159. *See id.* at 1066-1067 (noting that while stateside investigators took nearly two weeks to reach the site of the shooting, American military personnel were able to reach the scene in roughly twenty-five minutes).

The nature of the locales MEJA would conceivably force stateside prosecutors to travel dangerous and remote conflict zones, which further impairs its effectiveness. For example, some commentators have pointed out that a PMC employed by a contracting firm could conceivably be reassigned to a different state in the intervening time between criminal act and the Department of Justice commencing a criminal investigation.<sup>160</sup> Moreover, as PMCs frequently accompany military forces in active war zones, there could be a very real threat that a contractor may be injured or even killed before a stateside prosecutor could reach the PMC.<sup>161</sup> A last complication created by MEJA inserting stateside prosecutors into hostile territory is the inherent danger posed to the attorneys from security risks inherent with war zones. These dangers have led to ironic, if not compromising situations, in which investigating agents and attorneys' security details were provided by the *very contracting firms* whose employees were accused of criminal activity.<sup>162</sup>

Despite MEJA's apparent ineffectiveness in holding PMCs criminally accountable for their overseas conduct, the Act still remains operative and theoretically available to prosecute criminal action of PMCs accompanying military forces.<sup>163</sup> In 2008, after the 2007 Amendment was entered into law, Secretary of Defense Robert Gates issued a statement clarifying the concurrent relationship between MEJA and the UCMJ.<sup>164</sup>

In this memorandum, Gates noted the potential for expanded military jurisdiction to create legal issues and cautioned against excessive utilization of military jurisdiction over civilians.<sup>165</sup> To wit, Gates stated that upon the Department of Defense notifying the Department of Justice of potential criminal conduct, the Department of Justice would be afforded "the opportunity to pursue its

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160. See Singer, *supra* note 44 (noting that a contractor originally employed in Iraq could very be easily reassigned to an equally far-flung locale such as Sudan or the Philippines).

161. See Chapman, *supra* note 12, at 1066 (noting the lack of motivation to prosecute PMCs due to issues of traveling and building a case within war zones).

162. See *id.* at 1066 (noting that Blackwater, through its contract with the Department of State, was responsible for providing security details for the investigating agents from the Department of State in the wake of the Nisour Square Shootings).

163. Stigall, *supra* note 144, at 70-72.

164. *Id.* at 72.

165. Memorandum from Secretary of Defense Robert Gates to Secretaries of the Military Departments, (Mar. 10, 2008) (cautioning that "[t]he unique nature of this extended UCMJ jurisdiction over civilians requires sound management over when, where, and by whom such jurisdiction is exercised.") (emphasis added) [hereinafter *Gates Memorandum*].

prosecution . . . *in federal district court.*<sup>166</sup> This likely indicates a preference that the Department of Justice prosecute the case, but if unable or unwilling to, the military would be permitted to step in to fill the jurisdictional void and pursue criminal prosecution pursuant to Article 2(a)(10) of the UCMJ.

Under this framework, the Department of Justice would still be notified first and “given the opportunity to pursue its prosecution of its case in federal district court.”<sup>167</sup> In the interim, however, military commanders were instructed to conduct customary pre-trial investigations, in preparation for potential court-martial proceedings.<sup>168</sup> In sum, Department of Justice prosecutors would generally be assumed to have “first-choice” in pursuing a criminal investigation of alleged PMC misconduct, while military personnel are simultaneously allowed to conduct their own investigation in the event the Department of Justice declines to indict a PMC.

As some have cautioned, however, mere pragmatic difficulties associated with trying PMCs in Article III courts may not render these courts unavailable.<sup>169</sup> To be more specific, there is a concern that even if prosecution under MEJA is *de facto* unavailable for reasons previously discussed, prosecution is still technically available in an Article III court.<sup>170</sup> As such, prosecution of a civilian pursuant to the UCMJ is not truly a last-resort.

While such concerns are compelling, dicta in *Ali* does indicate courts are cognizant of the pragmatic challenges that largely render

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166. *Id.* (emphasis added).

167. Stigall, *supra* note 144, at 72 (quoting Gates Memorandum, *supra* note 165).

168. *See id.* at 72 (noting that Secretary Gates memorandum stated that “While the DOJ notification and decision process is pending, commanders and military criminal investigators should continue to address the alleged crime. Commanders should ensure that any preliminary military justice procedures that would be required in support of the exercise of UCMJ jurisdiction over civilians continue to be accomplished during the concurrent DOJ notification process. Commanders should be prepared to act, as appropriate, should possible U.S. federal criminal jurisdiction prove to be unavailable to address the alleged criminal behavior.”).

169. *See Price*, *supra* note 11, at 502 (noting that a court may be compelled to find that the mere existence of an Article III court could mean that an Article III court is available, irrespective of the pragmatic difficulties that exist).

170. *See id.* at 502 (“At the same time, the mere existence of MEJA could nullify such an argument because even if DOJ chooses not to pursue a case, the possibility of prosecution in an Article III court remains available and may make it unconstitutional to pursue prosecution in a limited-rights venue like a court-martial.”).

MEJA unavailable as a tool for prosecuting PMCs on foreign soil,<sup>171</sup> which may help dispel the notion that MEJA is a viable alternative. Moreover, the Gates's memorandum may provide a solution to this conundrum in its implied suggestion of a "tiered-system" of jurisdiction.<sup>172</sup> For example, the Department of Justice could be given an opportunity to prosecute a PMC under MEJA. But if, for example, the Department of Justice elected to not pursue the matter for pragmatic reasons, it could *expressly* deny jurisdiction and pass the case to the military. In doing so, the Department of Justice would, in effect, be closing the doors of Article III courts to PMCs, leaving the military justice system as a true last-resort.

## 2. Other Alternatives to Military Jurisdiction

While MEJA will be considered to be the "best" alternative to the extension of military jurisdiction, it should be noted that some have argued that other alternatives exist.<sup>173</sup> Thus, these alternatives will be briefly noted. First, some contend that PMCs could merely be subjected to the laws of the "host" nation where they are currently serving.<sup>174</sup> Secondly, some have advocated for PMCs to be subjected to international law, namely the provisions of the Geneva Convention.<sup>175</sup> It is likely, however, that many of the same Constitutional concerns raised by subjecting PMCs to military jurisdiction would be present under these alternatives. For example, as one commentator notes, subjecting PMCs to either of these alternatives could lead to unpredictable or inconsistent results.<sup>176</sup> To wit, under both of these alternatives, a PMC could face liability for criminal action in one country, while a PMC in a different nation would not be held culpable for the same conduct.<sup>177</sup> Moreover, under international law, PMCs could face different liability merely based on their own nationality.<sup>178</sup> Under both of these examples, PMCs would

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171. *United States v. Ali*, 71 M.J. 256, 259 (2012) (noting that the dicta in the lower court's opinion pointed to the resource challenges - it was easier to hold a court-martial than to send the defendant to the United States to be prosecuted in federal court).

172. Gates Memorandum.

173. Hurst, *supra* note 29, at 1311.

174. *See e.g. id.* at 1311 (arguing for the creation of a "tiered" system of jurisdiction in which host-nation law is given preference over United States military jurisdiction).

175. *See generally* Stigall, *supra* note 144 (contending that UCMJ jurisdiction is largely unnecessary, as international law would be sufficient to hold PMCs accountable).

176. Chapman, *supra* note 12, at 1059-1063.

177. *Id.* at 1063.

178. *Id.*

be left guessing as to what is or is not criminal conduct, leading to equitable concerns that are not as prevalent under military law.

The pragmatic and equitable concerns of these above cited alternatives notwithstanding, these alternatives should not be considered “true” alternatives, as they are not Article III courts. Thus, for purposes of this Note, MEJA will be the most “important” alternative considered.

V. CIVILIANS IN THE “LAND AND NAVAL FORCES”:  
DISTINGUISHING CONTEMPORARY PMCs FROM OTHER  
CIVILIANS

A. *Role of the Civilian Contractor: Then and Now*

As some have put it, the modern-day PMC is tasked with duties that are far more demanding than simply cooking or doing laundry for the military.<sup>179</sup> The massive increase in the use of civilian contractors can in part be explained by increasing reliance on technically sophisticated weapons platforms, which frequently demand examination, maintenance, or calibration.<sup>180</sup> More importantly, the end of the Cold War drastically increased the demand for PMCs acting as fill-ins for actual soldiers.<sup>181</sup> Some have even noted that the increase may have partially been spurred by the fact it is more politically palatable to stomach the deaths and casualties of PMCs, rather than actual soldiers.<sup>182</sup>

PMCs in contemporary times are frequently tasked with combat-related roles including armed security, target specialists, and reconnaissance operations.<sup>183</sup> Additionally, PMCs have served vital roles in the procurement and analysis of military intelligence.<sup>184</sup> Some PMCs have also been used similar to military personnel, in that they are deployed to the battlefield in large numbers and supported by a

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179. Jon D. Michaels, *Beyond Accountability: The Constitutional, Democratic, and Strategic Problems with Privatizing War*, 82 WASH. U. L. Q. 1001, 1019.

180. Lindemann, *supra* note 24, at 84.

181. See Singer, *supra* note 33, at 49 (noting that the end of the Cold War drastically increased the use of PMC as quasi-soldiers for numerous reasons.); see also Michaels, *supra* note 124, at 1020 (noting that along with technological transformations, considerable cutbacks in military spending in the early 1990's has helped lead to increased utilization of private contractors as combat-forces).

182. Peter Singer, *Outsourcing War*, BROOKINGS, <https://www.brookings.edu/articles/outsourcing-war/> (Mar. 1, 2005) [<https://perma.cc/M4XF-VVE8>].

183. Snyder, *supra* note 26, at 71.

184. Singer, *supra* note 33, at 248.

wide array of military air and artillery support units.<sup>185</sup> These tasks often blur the conventional civilian-soldier divide and were once the exclusive domain of enlisted soldiers.<sup>186</sup> Moreover, private military firms, such as Blackwater, often “recruit” employees direct from the various military branches of the United States, giving many PMCs the same valuable military training active soldiers receive.<sup>187</sup>

Combat operations are not the only area in which PMCs have encroached on the traditional domain of soldiers. For example, contemporary PMCs have been tasked with overseeing and instructing cadets in Reserve Officer Training Programs, as well as assisting senior military officers in making military decisions and staff planning.<sup>188</sup> To wit, prior to the invasion of Iraq, PMCs assisted military planners with “war-gaming” and conducting field exercises in the lead up to invasion.<sup>189</sup> Further, in numerous instances after the fall of Saddam Hussein, PMCs provided training for Iraqi military and police forces.<sup>190</sup> PMCs are also a vital component of security details, providing security *on military bases* and security details for American military convoys.<sup>191</sup> Some PMCs even built and guarded the United States main forward operating base, Camp Doha, in Kuwait.<sup>192</sup>

Moreover, PMCs are frequently tasked with manning and maintaining military weaponry and equipment. As Peter Singer notes, PMCs in Iraq were often tasked with maintaining and arming highly sophisticated weapons platforms such as the F-15 fighter, F-117 stealth fighter, and U-2 reconnaissance aircraft.<sup>193</sup> In some cases, PMCs did more than just maintain these systems; for example, PMCs have operated combat systems such as the Global Hawk UAV and air

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185. Snyder, *supra* note 26, at 71.

186. Michaels, *supra* note 179, at 1019; *see also* Sacilotto, *supra* note 6, at 181 quoting *U.S. Gov. Accountability Office* (“The U.S. military has long used contractors to provide supplies and services to deployed U.S. forces. . . . Today, contractors provide deployed U.S. forces with communication services; interpreters who accompany military patrols; base operations support (e.g., food and housing); weapons systems maintenance; intelligence analysis; and a variety of other support. Many of these contractors *live and work side by side with their military counterparts and share many of the same risks and hardships*”) (emphasis added).

187. Hamaguchi, *supra* note 5, at 1058 (2008); *see also* Singer, *supra* note 33, at 76.

188. Peters, *supra* note 27, at 383.

189. Singer, *supra* note 33, at 247.

190. *Id.* at 248.

191. Cullen, *supra* note 41, at 513.

192. Singer, *supra* note 33, at 247.

193. *Id.*

defense systems such as Patriot Missile batteries, as well as defense systems on board United States Navy vessels.<sup>194</sup>

*B. The Civilian and Military Justice: Who Falls Under Military Jurisdiction and What Crimes Are Applicable to PMCs?*

The second prong to be considered when analyzing the permissibility of subjecting an individual to military jurisdiction is whether said individual could reasonably be determined to be in the land or naval forces.<sup>195</sup> Based on an examination of relevant case law, a PMC could conceivably be considered to be in the land or naval forces, if: (1) they serve active *and* significant or vital roles in regards to military operations, and; (2) undertake these roles while accompanying military forces “in the field”, during times of active hostilities. For the reasons discussed in the preceding section, this Note contends that the soldier-like roles filled by PMCs in contemporary times renders PMCs *de-facto military*. Thus, this Note argues that PMCs constitute a unique class of civilians, separate from the types of civilians that have been historically exempted from military jurisdiction. As a result, the extension of military jurisdiction to PMCs is permissible.

1. Vital Cogs: Comparing the Role of Contemporary PMCs to Other Civilians

For a PMC to fall under military jurisdiction, it would have to be shown that they were sufficiently “soldier-like” as to be considered a *de facto* member of the United States land and naval forces.<sup>196</sup> That is, a PMC would likely have to have a significant and on-going connection with the military. Additionally, there would likely need to be articulable facts that indicate a PMC was integral to the military due to their role.

One of the earliest Supreme Court cases addressing the permissibility of military jurisdiction over civilians was *Ex parte Milligan*, which was decided soon after the United States Civil War.<sup>197</sup> In *Milligan*, the defendant, a citizen of Indiana was sentenced to death by a military commission.<sup>198</sup> The Supreme Court, however, granted defendant’s writ of habeas corpus, holding that the defendant’s Fifth and Sixth Amendment rights were violated by being subjected to a military trial.<sup>199</sup>

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194. *Id.*

195. Price, *supra* note 11, at 501.

196. Chapman, *supra* note 12, at 1071.

197. *Id.* at 1068.

198. *Ex parte Milligan*, 71 U.S. 2, 123(1866).

199. *Id.* at 123.



Although *Milligan* largely stands for the proposition that an open and functioning Article III court is the proper venue for a civilian accused of criminal conduct,<sup>200</sup> the *Milligan* opinion also speaks to a civilian's role within the military. Numerous times throughout its opinion, the majority stresses the fact that the defendant was neither in active military service, nor did he have *any* connection, substantial or otherwise, with military forces of the United States.<sup>201</sup> As some commentators have pointed out, however, it is likely the modern-day PMC is distinguishable from the defendant in *Milligan*.<sup>202</sup> Unlike the *Milligan* defendant, who had absolutely no connection with any military force, PMCs are deeply ingrained with the military and often serve in roles that are vital to the success of military operations.

In the decades following *Milligan*, the Supreme Court would decide a series of cases which are likely relevant to determining the status of the modern-day PMC. In both *Ex parte Reed* and *Johnson v. Sayre*, the Court held that civilian employees of the Navy had been sufficiently integrated into the military to fall under the military justice system's jurisdiction.<sup>203</sup>

Both *Reed* and *Sayre* were civilian employees, serving as "paymasters" for the Navy.<sup>204</sup> In *Reed*, the Court described the significant role that a paymaster held within the Navy, stating that:

The place of paymaster's clerk is an important one in the machinery of the navy . . . *The good order and efficiency of the service depend largely upon the faithful performance of their duties.*<sup>205</sup>

The Court in *Sayre* would reaffirm the belief that a paymaster was sufficiently integrated with the Navy, holding that:

[Sayre] was therefore, as has been directly adjudged by this court, a person in the naval service . . . and subject to be tried . . . by a general court martial.<sup>206</sup>

In a similar fashion, PMCs could be considered sufficiently integrated into the armed forces. For instance, some PMCs dress in

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200. *Id.* at 127.

201. *See generally id.*

202. Chapman, *supra* note 12, at 1068.

203. *Ex parte Reed*, 100 U.S. 13, 21 (denying applicants writ for habeas corpus); *Johnson v. Sayre*, 158 U.S. 109, 118 (reversing appellate court's decision, and remanding applicant to military custody).

204. *See Reed*, 100 U.S.; *Sayre* 158 U.S.

205. *Reed*, 100 U.S. at 21-22 (emphasis added) (internal citations omitted).

206. *Sayre*, 158 U.S. 15 (citing *Reed*, 100 U.S.).

military-style uniforms,<sup>207</sup> and as has been previously mentioned in this Note, PMCs and American troops are frequently considered by local populations to be one in the same.<sup>208</sup> More importantly, PMCs serve a vital role in the modern-day American military; not only do PMCs serve in numbers that have surpassed actual military personnel, but they serve in increasingly vital roles which are essential to the military's objectives.<sup>209</sup> Perhaps the most revealing insight into how PMCs are utilized is the fact that PMCs *die* in fairly significant numbers serving with the military.<sup>210</sup>

It is also interesting to note that both *Reed* and *Sayre* involved civilians who had signed agreements in which they agreed to subject themselves to the laws of the military.<sup>211</sup> A later Supreme Court case, *McElroy v. United States*, cited *Sayre* and noted that the lack of a contractual stipulation was a factor that suggested the defendant did not fall under the jurisdiction of the military.<sup>212</sup> A similar clause was briefly considered in *Ali*, where the Court noted that Ali's contract *did not* contain a clause informing Ali of his potential liability under the UCMJ.<sup>213</sup> Yet, the Court held this did not preclude the court from holding Ali fell under the jurisdiction of the court-martial.<sup>214</sup> Thus, in light of *Ali*, *Sayre*, *Reed*, and *McElroy*, a court ruling on the status of a PMC may view such a contract as evidence that a PMC should fall under the jurisdiction of the military justice system. While such a provision would likely not be dispositive as to a PMCs status, the existence of a provision may be indicative of a significant relationship between a PMC and the military.

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207. Chapman, *supra* note 12, at 1049.

208. Lindemann, *supra* note 24, at 85 ((citing Rene Merle, *Census Counts 100,000 Contractors in Iraq*, WASHINGTON POST, <http://www.washingtonpost.com/wpdyn/content/article/2006/12/04/A-R2006120401311.html>) (quoting Major General William L. Nash) ("If you're trying to win hearts and minds and the contractor is driving 90 miles per hour through the streets and running over kids, that's not helping the image of the American army. The Iraqis aren't going to distinguish between a contractor and a soldier.")) [<https://perma.cc/CL6W-2V3Y>].

209. See Singer, *supra* note 33, at 248 (stating that "[t]he Iraq operation could not have been carried out without private military support.").

210. See Lindemann, *supra* note 24 (noting that by 2007, over 900 PMCs had been killed in Iraq. Additionally, over 12,000 contractors were wounded in the same time frame.)

211. *Ex parte Reed*, 100 U.S. 13, 19; *Johnson v. Sayre*, 158 U.S. 109, 118.

212. *McElroy v. United States*, 361 U.S. 281, 285 (1959).

213. *United States v. Ali*, 71 M.J. 256, 259 (2012).

214. *Id.* at 259 (stating that "the contract stated that the work may take place in a combat zone or other dangerous environment but did not contain a provision notifying Ali that he was subject to the UCMJ.").

In *United States ex rel. Toth v. Quarles*, 350 U.S. 11, (1955), the Court held that the UCMJ does not apply to ex-service members who have “severed all relationships with the military.”<sup>215</sup> Quarles, who had served in Korea, was honorably-discharged.<sup>216</sup> Five months after his discharge, however, Quarles was arrested by military authorities on charges of a murder committed while he was in service and taken to Korea to stand trial by court-martial.<sup>217</sup>

While the Court did acknowledge that Congress, as authorized by Article I of the Constitution, has the power to subject persons in the armed service to trial by court-martial, the Court held that:

It has never been intimated by this Court, however, that Article I military jurisdiction could be extended to civilian ex-soldiers who had *severed all relationship with the military* and its institutions.<sup>218</sup>

In declining to extend military jurisdiction to former service members, the Court explicitly noted that permitting such jurisdiction would “necessarily encroach on the jurisdiction of federal courts set up under Article III of the Constitution.”<sup>219</sup>

*Quarles* thus reflects the belief that military jurisdiction may only be extended to those individuals that have an *active* or *on-going* connection or relationship with the military.<sup>220</sup> As with the Court in *Reid*, however, the Court in *Quarles* failed to explicitly enumerate the type of connection or relationship a civilian must have with the military, and the Court merely held that a connection of some kind is a condition precedent.<sup>221</sup> In sum, *Quarles* does not appear to definitively bar military jurisdiction over *all* civilians, just those that lack an existing or active connection with the military.

Decided shortly after *Quarles*, and the enactment of the UCMJ, *Reid v. Covert* stands as the landmark case involving military jurisdiction over civilians.<sup>222</sup> In *Reid*, the Supreme Court granted writs of habeas corpus to the wives of American service members after the

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215. *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 14 (1955).

216. *Id.* at 13.

217. *Id.*

218. *Id.* at 14 (emphasis added).

219. *Id.* at 15.

220. *Id.*

221. *See generally id.* at 23 (“We hold that Congress cannot subject civilians like Toth to trial by court-martial.”).

222. Corn, *supra* note at 104, at 494.

wives had been convicted of murder by courts-martial.<sup>223</sup> The Court held that the wives' conviction violated their Constitutional rights to a jury and grand-jury indictment, as the wives were merely dependents of military forces, and thus did not lose their civilian status.<sup>224</sup>

While it is well-settled that *Reid* stands for the fact that a citizen's Constitutional rights "follow" them outside of the territorial limits of the United States,<sup>225</sup> it is just as important to highlight what the Court *did not* say in *Reid*. First, the plurality opinion based its holding largely on the fact that defendants were merely *dependents* of military force and that the dependents were convicted of *capital offenses* during a *time of peace*.<sup>226</sup> Secondly, the Court addressed an entirely different provision of the UCMJ, as the defendants were convicted pursuant to *Article 2(11)* of the UCMJ.<sup>227</sup> Lastly, the Court failed to draw a bright-line rule between civilians and military, stating that:

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.*<sup>228</sup>

In light of these omissions, some have proffered that *Reid* does not foreclose on *all* military jurisdiction of civilians and that the

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223. *See generally Reid v. Covert*, 354 U.S. 1, 18-19 ("[W]e conclude that the Constitution in its entirety applied to the trials of Mrs. Smith and Mrs. Covert. Since their courtmartial did not meet the requirements of Art. III, s 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.").

224. *See id.* at 20 ("The wives of servicemen are no more members of the 'land and naval Forces' when living at a military post in England or Japan than when living at a base in this country or in Hawaii or Alaska.").

225. *See id.* at 5-6 (holding that "we reject the idea that when the United States acts against citizens abroad it can do so free of the Bill of Rights.").

226. *Id.* at 5; *see also id.* at 49 (Frankfurter, J. concurring) ("I therefore conclude that, in *capital cases*, the exercise of court martial jurisdiction over civilian dependents in *time of peace* cannot be justified by Article I.") (emphasis added).

227. *Id.* at 3 (noting that the "court-martial asserted jurisdiction over Mrs. Covert under Article 2 (11) of the UCMJ.").

228. *Id.* at 22-23. (emphasis added).

absence of a bright-line definition of *de facto* soldier leaves open the possibility that a civilian could fall under military jurisdiction.<sup>229</sup> Thus, the court's explicit failure to articulate when a civilian becomes a *de facto* member of the military, combined with the meaningful roles that contemporary PMCs fill, makes it possible a PMC could be distinguished from the civilian dependents in *Reid*.

2. Active Hostilities: When is a Civilian "in the Field?"

Additionally, it appears well-settled that a PMC could *only* be deemed to be in the land and naval forces if their conduct took place in "the field" of "active hostilities", during a time of "war."<sup>230</sup>

*Reid*, at length, discussed the fact that the defendant's conviction took place during a time of peace.<sup>231</sup> While the Court declined to extend jurisdiction to the defendant, it did note that courts have "upheld military trial of civilians performing services for the armed forces "in the field" during *time of war*."<sup>232</sup> In contrast to the defendant in *Reid*, who was living on a military base in the United Kingdom during a time of peace, PMCs who served in Iraq and other contingency operations are serving during a time of "war" under the amended language of the UCMJ.<sup>233</sup> Moreover, as many of these PMCs serve alongside soldiers, including conducting combat operations and security details, it is arguable a PMC is precisely the type of civilian referenced in *Reid* who could permissibly fall under military jurisdiction.<sup>234</sup>

In *Ali*, the Court also discussed the requirement that a civilian be "in the field" for the military to exercise jurisdiction over the individual. Describing what is meant by the phrase "in the field", the Court explained that:

We see no reason not to adopt [the] interpretation of "in the field," which requires an area of *actual fighting*, for our analysis of Article 2(a)(10).<sup>235</sup>

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229. See *Corn*, *supra* note 104, at 506-507.

230. See *Reid*, 354 U.S. at 33-34.

231. See *id.* at 23-27.

232. *Id.* at 33; see also *McElroy v. United States*, 361 U.S. 281, 286 (1959) (discussing how past convictions of civilians under military law occurred in times of "hostilities", while "in the field.").

233. See *generally* UCMJ.

234. See *Reid*, 354 U.S. at 22-23 (discussing "that there might be circumstances where a person could be 'in' the armed services...even though he had not formally been inducted into the military or did not wear a uniform.").

235. *United States v. Ali*, 71 M.J. 256, 264 (2012).

The Court further went on to explain the defendant's connection with the military, noting that Ali lived at a forward combat outpost, faced daily attacks from insurgents and took part in missions that required him to travel by military convoy in armored vehicles.<sup>236</sup> Under this definition of "in the field", it is certainly arguable many PMCs could fall under military jurisdiction, as there is ample evidence to suggest the modern-day PMC is often in close proximity to actual fighting while they accompany military forces.<sup>237</sup> For example, PMCs are frequently tasked with driving convoys through "high-risk" areas of war zones, and in there have been numerous cases where the United State military was forced to conduct rescue missions to recover disabled PMC vehicles.<sup>238</sup>

For decades, prior to the amended wording in Article 2(a)(10), the Court of Military Appeals decision in *United States v. Averette* constituted a *de facto* elimination of extending military jurisdiction over civilians.<sup>239</sup> While the holding in *Averette* was permissibly abrogated by the 2007 Amendment, given that Congress was within its Constitutional-limits to promulgate the laws of the military, it is still worth briefly examining *Averette*.<sup>240</sup>

In *Averette*, a civilian contractor serving in Vietnam was convicted of larceny by a court-martial.<sup>241</sup> On appeal to the Court of Military Appeals, however, the defendant's conviction was overturned, with the majority holding that Article 2(10), which then read "in time of war", only meant a *Congressionally declared war*.<sup>242</sup> Applying this strict and literal interpretation of the phrase "in time of war", the court believed that it was preventing the "possibility of civilian prosecutions by military courts whenever military action on a varying scale of intensity."<sup>243</sup>

By enacting the 2007 Amendment, Congress legislatively nullified the *Averette* holding.<sup>244</sup> Assuming arguendo that the 2007 Amendment did not abrogate the *Averette* decision, it is arguable that *Averette*

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236. *Id.*

237. See Lindemann, *supra* note 24, at 84-85 (discussing the interchangeability of uniformed and non-uniformed personnel of Blackwater USA personnel).

238. *Id.* at 85 (explaining tasks of contractors).

239. Corn, *supra* note 104, at 499.

240. *United States v. Averette*, 42 C.M.R. 363, 363 (1970).

241. *Id.*

242. *Id.* at 365.

243. *Id.*

244. See *United States v. Ali*, 71 M.J. 256, 262 (2012) (stating that "Congress amended the language of Article 2 in . . . 2007 . . . effectively nullifying *Averette*.").

itself was incorrectly decided and should not be (or have) been binding legal authority.

First, the holding in *Averette* directly contradicted prior Supreme Court precedent.<sup>245</sup> Secondly, *Averette* ignored well-settled historical practices, for, as many commentators point out, the absence of a declaration of war during the Indian Wars during the 19<sup>th</sup> Century did not preclude military courts from exercising jurisdiction over civilian employees.<sup>246</sup> Third, as the dissent in *Averette* noted, the majority construed the phrase “in time of war” in a manner inconsistent with how the phrase was applied in other portions of the UCMJ.<sup>247</sup> As one of the major canons of statutory interpretation is to presume a consistent meaning of usage throughout the entirety of a statute,<sup>248</sup> it is arguable that the Court applied the incorrect meaning of the phrase “in time of war” given its usage throughout the rest of the UCMJ. As Congress was acting well within its Constitutional authority when it amended Article 2(10), however, it is likely that the *Averette* holding is moot regardless.

3. What is a Crime? Military Crimes, Capital Offenses and the PMC

A major criticism of the application of military law to non-military personnel, including PMCs, is the concern that actions that are criminal under the UCMJ may not have an analogous civilian crime.<sup>249</sup> Because of this, many in support of the extension of military justice to PMCs have argued that criminal culpability should be limited to those crimes with a direct civilian analog.<sup>250</sup>

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245. See *Peters*, *supra* note 27, at 403 (noting that the holding in *Averette* ignored governing precedent, such as *Bas v. Tingy*, 4 U.S. (4 Dall.) 37, 40 (1800), which indicated a formal declaration of war was not required for the United States to be at “war”. In *Tingy*, the Supreme Court of the United States held that “*every contention by force between two nations, in external matters, under the authority of their respective governments, is not only war, but public war.*”) (emphasis added).

246. *Id.* at 402; see also *Snyder*, *supra* note 26, at 92.

247. See *Averette*, 42 C.M.R. at 366 (Baker, C.J. dissenting) (noting that in a previous Court of Military Appeals case, the court had rejected a petitioner’s contention that court-martial jurisdiction pursuant to Article 2(10) depended on a Congressional declaration of war, in part because the phrase “in time of war”, as used in Articles 43 and 85(c) of the UCMJ, did not comport with that interpretation of the phrase).

248. See *Ratzlaf v. United States*, 510 U.S. 135, 143 (1994) (stating the precedent that “[a] term appearing in several places in a statutory text is generally read the same way each time it appears.”).

249. *Singer*, *supra* note 44.

250. See e.g. *Chapman*, *supra* note 12, at 1078-1079 (arguing that prosecution of PMCs for criminal conduct should be limited to crimes with civilian equivalents); see also *Singer*, *supra* note 44 (contending

In the estimation of this Note, however, such limitation would be the incorrect approach. As discussed previously, the overriding purpose of the creation of a military justice system is to ensure discipline amongst military forces. Vis-a-vis their conduct PMCs are essentially soldiers in all but name; it would stand to reason that they should be held to the same rigid disciplinary standards as actual military personnel. If PMCs were to be absolved of such responsibility, commanders, who fill the central role in court-martial proceedings, would be severely limited in their ability to hold PMCs accountable for criminal conduct. In turn, this would defeat the purposes of subjecting PMCs to military jurisdiction, namely: ensuring personal justice for injured parties and preventing harm to military objectives caused by the lack of discipline and misconduct of PMCs.

Moreover, in at least one case, the Supreme Court has held that charging civilians with a military crime was permissible.<sup>251</sup> In *Reed*, the defendant was charged and convicted by court-martial for the military crime of “malfeasance in the discharge of his official duties.”<sup>252</sup> Vitally, the Court held that Reed was sufficiently integrated with the military to constitute a *de facto* soldier, making military crimes applicable to Reed.<sup>253</sup> Accordingly, military crimes with no civilian analogs may be appropriate for PMCs, as PMCs could be reasonably be determined to be “in” the “land and naval forces”, and thus beholden to *all* laws of the military.

The more controversial consideration is charging PMCs with capital crimes. In both *Reid* and *Grisham v. Hagan*, the Supreme Court appears to have expressly forbidden charging civilians with capital offense.<sup>254</sup> It is important to note, however, that both of these cases involved civilians who were not deemed in be “in” the military, and were merely dependents or civilian employees.<sup>255</sup> Moreover, both of these cases involved crimes that were committed during times of

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that PMCs should only be held liable under the UCMJ for crimes that would be felonies had they occurred in the United States).

251. *Ex parte Reed*, 100 U.S. 13, 19-23 (1879).

252. *Id.* at 20

253. *See generally id.* at 22 (holding that Reed is a member of the naval service as a paymaster’s clerk and as such, is under the jurisdiction of a naval court).

254. *See generally id.* at 21 (explaining jurisdictional questions with respect to capital offenses); *see also* *Grisham v. Hagan*, 361 U.S. 278, 280 (“the death penalty is so irreversible that a dependent . . . must have the benefit of a jury.”).

255. *See generally id.* at 21-22 (explaining Reed’s position and its importance in the military); *See also Grisham*, 361 U.S. at 279 (explaining the petitioner’s civilian status).



peace, far away from the “field” or any active hostilities.<sup>256</sup> Although it is unclear how a court would rule on the matter involving a civilian, imposition of the death penalty is permissible under military law.<sup>257</sup> Consequently, provided a PMC was deemed “in” the “land and naval forces” and the crime occurred during a time of war, it is arguable a PMC could be charged with a capital offense.

Thus, in light of the above mentioned reasoning, this Note urges the application of the following crimes to PMCs under military jurisdiction: First, PMCs could potentially be charged with capital offenses under the 2007 Amendment, as it is arguable that the *Reid* and *Grisham’s* holdings, forbidding convictions for capital offenses, are limited to times of peace and cases involving civilians with an unsubstantial connection to the military. Secondly, PMCs could be charged with any non-capital offense, whether it has a civilian equivalent. While this may lead to unsavory circumstances where a PMC is charged with a crime that does not exist in the civilian world, given the discipline rationales giving rise to military justice, failing to charge PMCs with these offenses could potentially lead to sharp declines in military effectiveness.

## VI. CONCLUSION

As the use of PMCs as soldier-like replacements for actual military personnel appears likely to continue, it stands to reason that events such as Nisour Square and the Triple Canopy shooting will reoccur. When such events occur they will invariably cause backlash against the United States military, hampering its efforts and objective. As such, it is imperative that PMC conduct be reined in and PMC held accountable when they commit crimes.

The 2007 Amendment, extending military jurisdiction over PMCs, represents the best mechanism for ensuring PMC accountability. The military justice system exists to punish the very misconduct engaged in by PMCs; moreover, there is nothing in the Constitution that forbids the extension of military justice to civilians, provided certain circumstances exist. Although critics may claim that such extension would violate PMCs constitutional rights, it is well-settled that the Constitution applies differently in the military justice context. Accordingly, when an individual finds themselves under the

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256. *See id.* at 19-20 (case in which petitioner was charged with malfeasance while stationed in South America, but not during wartime); *see also Grisham*, 361 U.S. at 310 (case in which petitioner was charged with premeditated murder while working as a civilian employee of the Army, but not during active hostilities).

257. Clark Smith, *Fair and Impartial? Military Jurisdiction and the Decision to Seek the Death Penalty*, 5 U. MIAMI NAT’L SECURITY & ARMED CONFLICT L. REV. 1, 6-8 (2015).

jurisdiction of the military justice system, their Constitutional rights are not the same as they would receive in the civilian realm.

As this Note has argued, PMCs undoubtedly fail within the narrow exception of civilians to whom the UCMJ could Constitutionally apply too. PMCs engage in activity that few would hesitate to consider soldier-like; to wit, most “civilians” do not operate missile batteries on a daily basis as some PMCs do. Moreover, PMCs are frequently in the thick of active hostilities and often serve next to actual soldiers fighting “the field.” Consequently, PMCs are sufficiently integrated into the military so as to fall under its laws, and thus, the 2007 Amendment, as it applies to PMCs should (and can) survive Constitutional scrutiny.