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Applying the UCMJ to Contractors in Contingency Operations

Adam R. Pearlman*

I. INTRODUCTION

Civilian contractors play a pivotal role in contingency operations, particularly in the field of the formerly-monikered War on Terror, as they provide “vital support to our military forces engaged in combat operations,” including a cost-effective means of facilitating swift force multiplication and necessary technological expertise while working alongside military forces.¹ Due to the expanding role contractors play in combat missions, and because of certain contractors’ activities in Iraq between 2003 and 2005, Congress sought to increase contractor accountability in field operations by amending the Uniform Code of Military Justice (UCMJ) in 2006 to extend military commanders’ authority to prosecute by court-martial certain defense contractors serving with the armed forces. As part of the John Warner National Defense Authorization Act for Fiscal Year 2007,² the “Warner Amendment” to section 802(a)(10) of the UCMJ provides that: “[i]n time of declared war or a contingency operation, persons serving with or accompanying an armed force in the field” can be tried and punished for violations of the UCMJ.³ The first contractor to be tried under the amended provision was charged with stabbing a co-worker and pleaded guilty on June 24, 2008.⁴

Historically, between the Revolutionary War and the Supreme Court’s decision in *Reid v. Covert*,⁵ civilians had been subject to prosecution by court-martial in certain instances. The Articles of War, as the precursor to the UCMJ, “authorized court-martial jurisdiction over civilians

* Associate Deputy General Counsel, United States Department of Defense; Special Advisor, International and National Security Law Practice Group, The Federalist Society for Law and Public Policy Studies; Co-Editor, The U.S. Intelligence Community Law Sourcebook. B.A., UCLA; J.D., The George Washington University Law School; M.S.S.I., National Intelligence University. The author is grateful for the insights of W. Hartmann Young. The views expressed in this Article are those of the author alone and do not necessarily reflect the official policy or position of the Department of Defense or the U.S. Government.

¹ See Memorandum from the Deputy Sec’y of Def. on Management of DoD Contractors and Contractor Personnel Accompanying U.S. Armed Forces in Contingency Operations Outside the United States (Sept. 25, 2007), <http://www.usdoj.gov/criminal/dss/docs/09-25-07dodmanagecontract-ucmj.pdf> [hereinafter *Sept. 2007 Memo*]; see also Ctr. for Law and Military Operations, FORGED IN THE FIRE: LEGAL LESSONS LEARNED DURING MILITARY OPERATIONS 204 (2d ed. 2008).

² John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364, 120 Stat. 2083 (2006) (codified as 10 U.S.C. § 802(a)(10)).

³ 10 U.S.C. § 802(a)(10) (2008).

⁴ See David C. Hammond, *The First Prosecution of a Contractor Under the UCMJ: Lessons for Service Contractors*, SERVICE CONTRACTOR, Fall 2008, at 33, <https://www.crowell.com/documents/The-First-Prosecution-of-a-Contractor-Under-the-UCMJ.pdf>.

⁵ 354 U.S. 1 (1957).

accompanying or serving with the Army overseas, and during World Wars I and II, civilians accompanying the Armed Forces in the field were tried by court-martial.”⁶ When the UCMJ was first adopted in 1950, it, too, contained provisions to try civilians before court-martial. Article 2(10) read, “[i]n times of war, all persons serving with or accompanying an armed force in the field” were subject to military law. Alternatively, Article 2(11) provided that, “[s]ubject to the provisions of any treaty or agreement to which the United States is or may be a party . . . all persons serving with, employed by or accompanying the armed forces” outside the United States could also be court-martialed.

That began to change in 1957 with the Supreme Court’s decision in *Reid v. Covert*. In *Reid*, Mrs. Covert had been tried and convicted by court-martial for the murder of her serviceman husband while stationed in England. Court-martial jurisdiction had been asserted under Article 2(11), pursuant to an executive agreement between the President and the government of Great Britain.⁷ The Supreme Court declared it unconstitutional for a court-martial to exercise jurisdiction in peacetime over civilian dependents of service-members accused of murdering service-members in peacetime, in part because the executive agreement did not rise to the level of a treaty, and also because of constitutional deficiencies in the proceedings against the accused. Three years later in *United States v. Averette*, the United States Court of Military Appeals (now the United States Court of Appeals for the Armed Forces) found that Article 2(10)’s language only applied in times of *declared* war.⁸ These two jurisprudential developments greatly reduced any ability the military had to try civilians and/or contractors.⁹

Contractors serving with military forces have therefore spent much of the past fifty years operating in a legal limbo, hovering between domestic laws, host nation laws, and international treaties.¹⁰ In an effort to close the loophole, Congress in 1996 directed the Secretary of Defense and the Attorney General jointly to appoint an Overseas Jurisdiction Advisory Committee to “review and make recommendations concerning the appropriate forum for criminal jurisdiction over civilians accompanying the Armed Forces in the field outside the United States in time of armed conflict.”¹¹ When the committee reported back to Congress four years later, several constitutional and administrative concerns, coupled by a perceived lack of necessity, led to its recommendation that federal civilian criminal code (Title 18) authorities be expanded to cover civilians and contractors, but that no similar alterations be made to the Title 10 provisions that govern the military.¹² Congress

⁶ *Hearing on the Mil. Extraterritorial Jurisdiction Act before the Subcomm. On Crime of the H. Comm. on the Judiciary*, 106th Cong. (2000) (statement by Mr. Robert E. Reed, et al.) [hereinafter *Reed*].

⁷ *Reid*, 354 U.S. at 15.

⁸ 41 C.M.R. 363, 365 (C.A.A.F. 1970).

⁹ See *Kinsella v. Singleton*, 361 U.S. 234, 237 (1960) (applying the *Reid* holding to court-martials of civilians in peacetime for non-capital offenses).

¹⁰ See, e.g., U.S. DEPT OF THE ARMY, FIELD MANUAL 3-100.21, CONTRACTORS ON THE BATTLEFIELD para. 2-25 (Jan. 2003); Karen L. Manos, Presentation, ABA National Security Annual Meeting, *Contractors on the Battlefield, What Laws Apply?* (Aug. 9, 2008).

¹¹ See *Reed*, *supra* note 6 (citing the National Defense Authorization Act for Fiscal Year 1996 § 1151, Pub. L. No. 104-106, 110 Stat. 186 (1996)).

¹² See *Reed*, *supra* note 6 (“The expansion of UCMJ jurisdiction presents unique constitutional questions that may likely engender protracted litigation. Within the Department’s civilian workforce, this provision would give rise to several significant anomalies in the existing structure governing civilian disciplinary matters, to include the fact that

accepted the committee's recommendations, and the resulting Military Extraterritorial Jurisdiction Act (MEJA)¹³ subjected Department of Defense ("DoD") contractors to United States criminal laws for felonies committed abroad.¹⁴ However, the narrow reach of the provision and the difficulties surrounding evidence-gathering efforts of overseas combat-zone crimes for use in a domestic prosecution resulted in federal prosecutors hesitating to enforce MEJA.¹⁵ Likewise, contractors were often shielded from prosecution under host-country laws because of provisions in Status of Forces Agreements.

Together, all of the above factors combined to effectively preclude the prosecution of defense contractors in post-September 11, 2001 operations in Iraq and Afghanistan. Congress sought to rectify the situation in 2006, by amending the jurisdictional provision of the UCMJ to expand the application of military laws to include civilian contractors.¹⁶ The section 802(a)(10) amendment added five words that both codified the *Averette* holding, and expanded the jurisdictional reach of military law to encompass "persons serving with or accompanying an armed force in the field . . . in time of *declared war or a contingency operation*."¹⁷

The remainder of this article discusses the two chief constitutional concerns surrounding this expansion of court-martial jurisdiction. Section II discusses whether passing the amendment was within Congress' Article I authority to "make Rules for the Government and Regulation of the land and naval forces," as augmented by the Necessary and Proper clause. Section III assesses contractors' constitutional rights, particularly those afforded by the Fifth and Sixth Amendments, and whether subjecting contractors to court-martials violates those rights. Section IV briefly concludes, noting that although the expanded section 802(a)(10) is likely to withstand constitutional scrutiny, sound discretion in its application is necessary for the United States government to avoid as-applied constitutional challenges.

such employees would be subject to prosecution by court-martial based on their location, rather than the misconduct involved. This potential for inconsistency within the Departmental civilian workforce would serve to detract from, rather than enhance, morale and the interests of justice. Furthermore, the necessity for UCMJ jurisdiction has not been adequately substantiated by events occurring during previous contingency operations.").

¹³ Military Extraterritorial Act of 2000, Pub. L. No. 106-523, 114 Stat. 2488 § 3261 (2000) (conveying jurisdiction to United States District Courts to prosecute civilians "...employed by or accompanying the Armed Forces outside the United States" for felony-level federal offenses).

¹⁴ Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, 118 Stat. 1811 § 1088 (2004) (amending MEJA to extend its jurisdiction to civilian employees of federal agencies "...to the extent such employment relates to supporting the mission of the Department of Defense overseas").

¹⁵ See Peter W. Singer, *Frequently Asked Questions on the UCMJ Change and its Applicability to Private Military Contractors*, BROOKINGS INST. (Jan. 12, 2007), http://www.brookings.edu/opinions/2007/0112defenseindustry_singer.aspx; see also *Closing Legal Loopholes: Prosecuting Sexual Assaults and Other Violent Crimes Committed Overseas by American Civilians in a Combat Environment: Hearing Before the S. Comm. on Foreign Relations*, 110th Cong. (2008) (statement of Sigal P. Mandelker) (testifying that, in the eight years between MEJA's passage and that hearing, only twelve individuals had been charged under MEJA).

¹⁶ See 10 U.S.C. § 802(a)(10) (2000), amended by John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364, § 552, 120 Stat. 2083, 2217.

¹⁷ *Id.* (emphasis added); see 10 U.S.C. § 101(a)(13) (2008) for the definition of "contingency operations" which includes all military operations "designated by the Secretary of Defense as operations in which members of the armed forces are or may become involved in military actions, operations, or hostilities against an enemy of the United States or against an opposing military force."

II. CONGRESS' ARTICLE I POWERS

The Constitution grants Congress broad powers “to raise and support armies,” “to provide and maintain a Navy,” and “to make rules for the government and regulation of the land and naval forces.”¹⁸ The Supreme Court has construed these powers broadly to include authority to decide “how the armies shall be raised . . . the age at which the soldier shall be received, and the period for which he shall be taken, . . . [and] the rules for the government and regulation of the forces after they are raised, . . . what shall constitute military offences, and prescribe their punishment.”¹⁹ The key question for defense contractors, then, is under what conditions can they be considered “in” the armed forces for the purposes of these powers, as asserting court-martial jurisdiction over any person not covered by Congress’ powers would “encroach[] on the jurisdiction of the federal courts set up under Article III of the Constitution.”²⁰

As explained above, before *Reid*, the military had long asserted jurisdiction over civilians. Indeed, the Supreme Court had long recognized the necessity of broad military jurisdiction to try civilians during a war.²¹ Importantly, the *Reid* Court did *not* hold that courts-martial may never try civilians:

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 [Article I, § 8] Clause 14 even though he had not formally been inducted into the military or did not wear a uniform.²²

Indeed, Justice Black’s plurality opinion in *Reid* asserted that “[i]n the face of an actively hostile enemy, military commanders necessarily have broad power over persons on the battlefield.”²³ The “extraordinary circumstances in an area of actual fighting” justify subjecting civilians to military jurisdiction.²⁴ The concurring opinions also posited that, although court-martial jurisdiction was unconstitutional as applied to Mrs. Covert, it was nevertheless possible that there would be cases where assertion of court-martial jurisdiction over civilians is allowable.²⁵ And, of course, the

¹⁸ U.S. CONST. art. I, § 8, cl. 12–14.

¹⁹ *In re Tarble*, 80 U.S. 397, 408 (1871).

²⁰ *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 15 (1955) (holding that an ex-serviceman cannot be court-martialed for an offense committed during his service).

²¹ *See, e.g., Ex Parte Quirin*, 317 U.S. 1 (1942) (holding trial before military commission of German spies captured in U.S. during WWII to be constitutional); *see also Reid*, 354 U.S. at 33; *Averette*, 41 C.M.A. at 365. *But see Toth*, 350 U.S. at 15 (stating that Congress’ Article I powers “would seem to restrict court-martial jurisdiction to persons who are actually members or part of the armed forces.”).

²² *Reid*, 354 U.S. at 22–23.

²³ *Id.* at 33.

²⁴ *Id.*

²⁵ *See id.* at 45 (Frankfurter, J., concurring) (“In making this adjudication, I must emphasize that it is only the trial of civilian dependents in a capital case in time of peace that is [unconstitutional].”); *id.* at 68–69, 71 (Harlan, J., concurring) Recall that *Reid*’s holding was extended to non-capital cases by *Kinsella* three years afterwards. *See Kinsella*,

dissenters viewed the exercise of military jurisdiction over civilian dependents as acceptable in either peacetime or wartime.²⁶

The *Reid* Court's acceptance of the rationale underlying broad military jurisdiction in wartime likewise can be said to apply to contingency operations, where commanders require disciplinary authority over persons under their control—military personnel and civilians alike. Contingency operations “increasingly require United States military forces to operate alongside civilian . . . contractor personnel who serve with or accompany our armed forces as integral” members.²⁷ The operations require commanders to “retain authority to respond to an incident, restore safety and order, investigate, apprehend suspected offenders, and otherwise address the immediate needs of the situation.”²⁸ Where alternative enforcement regimes such as MEJA, host-nation laws, and international treaties have proved insufficient for holding accountable civilian defense contractors who provide distinctly military services or perform tasks which are indistinguishable from those performed by military personnel, military jurisdiction can be said to be necessary to maintain discipline among both uniformed forces and the defense contractors who serve with them.²⁹ Thus Congress' enacting the Warner amendment, which merely reinstated jurisdiction

supra note 9. The peacetime factor, however, remained key to the Court's reasoning.

²⁶ See *id.* at 78–90 (Clark, J., dissenting). *Reid*'s denial of court-martial jurisdiction over civilians is also distinguishable from Congress' passing the Warner amendment in several respects. First, the offense in *Reid* occurred in peacetime, whereas the activities the amended § 802(a)(10) are meant to cover are limited to those occurring in designated combat zones, specifically during declared war or in contingency operations. (Note, however, that the statutory definition of “contingency operations” is quite broad, to include operations where combat is merely anticipated. See *supra* note 17. Should court-martial jurisdiction be exercised pursuant to offenses occurring outside of combat areas, this may open the provision to as-applied challenges. See *infra* sec. IV). Further, the *Reid* Court declared unconstitutional a separate provision that premised military authorities on treaties, and did not allow for the exercise of court-martial jurisdiction pursuant to executive agreements, as was done in that case. See 354 U.S. at 68-71 (Harlan, J., concurring). Finally, as discussed further in Section III below, subsequent changes to court-martial rules have altered the analysis of how court-martials impact the substantive rights of the accused.

²⁷ DTM 08-009, Memorandum from the Sec'y of Defense on UCMJ Jurisdiction Over DoD Civilian Employees, DoD Contractor Personnel, and Other Persons Serving With or Accompanying the Armed Forces Overseas During Declared War and in Contingency Operations (Mar. 10, 2008), <http://www.dtic.mil/whs/directives/corres/pdf/sec080310ucmj.pdf>. [hereinafter *March 2008 Memo*].

²⁸ *Id.*; see also *Reid*, 354 U.S. at 38–39 (stressing that military law emphasizes discipline and the collective security of the group).

²⁹ See Singer, *supra* note 15. Events since the onset of the War on Terror also appear to have superseded DoD's concerns expressed in 2000 about extending court-martial jurisdiction to civilians and contractors. Compare, *supra* note 12 and accompanying text with DTM 09-015, Memorandum on Policy and Procedures Applicable to DoD and United States Coast Guard (USCG) Civilian Personnel Subject to Uniform Code of Military Justice (UCMJ) Jurisdiction in Time of Declared War or a Contingency Operation (Feb. 16, 2010), defining “serving with or accompanying an Armed Force” as:

Terms judicially construed . . . to mean a connection with or dependence upon the activities of the Armed Forces or its personnel. A person's presence must be more than merely incidental. A person may be “accompanying” an Armed Force although not directly employed by it or the Government. A person “accompanying” an Armed Force may be “serving with” it as well, but the distinction is important because even though a civilian's contract with the Government ended before the commission of an offense, and hence the person is no longer “serving with” an Armed Force, jurisdiction may remain on the basis that the person is “accompanying” an Armed Force because

over defense contractors serving with or accompanying armed forces in the field after a 50-year absence, appears to be well-within its enumerated Article I powers—as augmented by the Necessary and Proper clause—because the amendment acted in such a way as to regulate the armed forces.

III. CONTRACTORS' CONSTITUTIONAL RIGHTS

If Congress had authority to pass the amendments to § 802(a)(10), under what conditions can contractors be subjected to courts-martial without violating their constitutional rights? *Reid* and its progeny made clear that courts-martial of civilians in peacetime is likely to be unconstitutional. As examined further below, however, the court-martial procedures found to be constitutionally infirm in 1957 differ greatly from those in-place today.

Military courts are distinct from the United States federal court system in that military courts stem from Congress' Article I power while federal courts arise out of Article III. Pursuant to its Article I authority, Congress created a separate criminal justice system for overseeing the armed forces, which the UCMJ governs.³⁰ Those persons considered to be “in” the land or naval forces, and therefore subject to Congress' Article I rulemaking powers, are also excepted from certain procedural protections afforded by the Fifth and Sixth Amendments. But importantly, even if a court were to determine that contractors maintain civilian status at all times as a matter of law, it is still possible that the same court could decide that court-martial proceedings sufficiently preserve Fifth and Sixth Amendment rights, and therefore can withstand constitutional challenges.

A. Notice and Waiver

Any individual can waive certain constitutional rights. Perhaps the clearest example for the purposes of this article is the act of enlisting in the military, at which time the recruit subjects himself to military law at the expense of certain rights he would have had in the civilian criminal justice system.³¹

Proper waiver of these rights requires sufficient notice, and the Supreme Court has held that merely being employed by, or serving alongside of an armed force does not subject one to court-martial jurisdiction in peacetime.³² Furthermore, waiver of constitutional rights must be knowing,

of his or her continued connection with the military;

and defining “in the field” as:

^A term judicially construed to mean a military operation with a view toward engaging the enemy or a hostile force. It is not determined by the locality in which the Armed Force is found, but rather by the activity in which the Armed Force is engaged.

These two definitions, combined with the shortcomings of other enforcement mechanisms related to contractor accountability, seem to imply that the Warner amendment is an exercise of “the least possible power adequate to the end proposed.” *Toth*, 350 U.S. at 23 (citing *Anderson v. Dunn*, 19 U.S. (6 Wheat) 204, 230-31 (1821)).

³⁰ See U.S. CONST. art. 1; 10 U.S.C. §§ 802, 940.

³¹ See U.S. CONST. amend. V.

³² See *Grisham v. Hagan*, 361 U.S. 278 (1960); *McElroy v. United States ex rel. Guagliardo*, 361 U.S. 281 (1960).

intelligent, and voluntary.³³ In criminal matters, waiver occurs only when the defendant satisfies those conditions and intentionally relinquishes “a known right.”³⁴

Therefore, contractors and their employees must be aware of the potential implications the amended § 802(a)(10) may have on their conduct overseas.³⁵ Forms of notice contractors may have include company-provided training and deployment letters and the law itself. In addition, since the Warner amendment took effect, the Department of Defense has issued two memoranda regarding its implementation and enforcement. In the first, then-Deputy Secretary of Defense Gordon England reiterated the fact that all DoD contractors are subject to UCMJ jurisdiction.³⁶ The directive instructed senior officers to begin legal proceedings against those contractors who had violated military law, stating that:

DoD contractor personnel (regardless of nationality) accompanying U.S. armed forces in contingency operations are currently subject to UCMJ jurisdiction. Commanders have UCMJ authority to disarm, apprehend, and detain DoD contractors suspected of having committed a felony offense in violation of the [Rules on Use of Force], or outside the scope of their authorized mission, and to conduct the basic UCMJ pretrial process and trial procedures currently applicable to the courts-martial of military service members.³⁷

In 2008, the Secretary of Defense issued a subsequent memorandum outlining commanders’ broad law enforcement authority “to act whenever criminal activity may relate to or affect the commander’s responsibilities.”³⁸ Furthermore, there is also a commonsense parametric dimension: the longer the law stays in effect, the harder it is to say there was no notice (i.e. that the defendant did not know and had no reason to know of the military’s jurisdiction over him).

Still, even if it remains possible for a contractor to have insufficient notice to provide an effective waiver of his rights, the court-martial process may yet provide safeguards which, even substituted for the procedural and substantive rights granted by the Article III federal criminal justice system, sufficiently protect the contractor’s rights such that they will withstand constitutional scrutiny.

B. Sufficiency of Substitutes

A major tenet of the *Reid* holding was the recognition that “every person who comes within the jurisdiction of courts-martial is subject to military law—law that is substantially different from

³³ *Iowa v. Tovar*, 541 U.S. 77 (2004) (citing *Brady v. United States*, 397 U.S. 742 (1970)).

³⁴ *United States v. Olano*, 507 U.S. 725, 733 (1993).

³⁵ See *Hammond*, *supra* note 4 (discussing legal issues a contracting firm must consider in light of this provision).

³⁶ See *Sept. 2007 Memo*, *supra* note 1.

³⁷ See *Sept. 2007 Memo*, *supra* note 1 (recognizing MEJA’s concurrent jurisdiction over civilians who commit criminal offenses while accompanying the armed forces); see also 18 U.S.C. § 3261 (2012).

³⁸ See *March 2008 Memo*, *supra* note 27, at 1–2.

the law which governs civilian society.”³⁹ The Supreme Court in *Reid* and in other case was chiefly concerned with the right of the accused to a fair trial. In short, *Reid* determined that the exercise of court-martial jurisdiction in that case was unconstitutional because the court-martial process denied the military dependents accused of capital crimes a grand jury indictment in accordance with the Fifth Amendment, and a jury process compliant with the Sixth Amendment and Article III of the United States Constitution.⁴⁰ Since the *Reid* decision in 1957 and its progeny, however, the military justice system has refined its procedure to align more closely with criminal procedure in federal courts.⁴¹ Those standing accused before a court-martial are afforded the right to counsel, right to speedy trial, protection against self-incrimination, and presumption of innocence.⁴² That the rights awarded an accused defense contractor facing court-martial mirror and sometimes even exceed the rights provided a criminal defendant in federal court implies that the court-martial process has likely evolved to the point that subjecting contractors in overseas contingency operations to the UCMJ will withstand constitutional scrutiny.⁴³

i. The Fifth Amendment Right to Indictment

The Fifth Amendment of the United States Constitution mandates a pre-trial grand jury investigation in federal criminal suits, but does not afford the same blanketed safeguard in military proceedings. The Fifth Amendment provides that “[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger”⁴⁴ Thus, military courts are not required to conduct a grand jury investigation prior to court-martial proceedings, as they serve to adjudicate cases that arise in the land or naval forces.

However, in place of a grand jury investigation and indictment, military courts conduct so-called Article 32 investigations for all charges, the conviction of which may result in more than one year in prison.⁴⁵

The primary purpose of the investigation required by Article 32 . . . is to inquire into the truth of the matters set forth in the charges, the form of the charges, and to secure information on which to determine what disposition should be made of the case. The investigation also serves as a means of discovery. The function of the investigation is to ascertain

³⁹ *Reid*, 354 U.S. at 38.

⁴⁰ *Id.* at 21–22.

⁴¹ See, e.g., Colonel Francis Gilligan, *The Bill of Rights and Service Members*, ARMY LAW, Dec. 1987, at 3–4.

⁴² See MANUAL FOR COURTS-MARTIAL UNITED STATES (2012) [hereinafter MCM].

⁴³ See James B. Roan & Cynthia Buxton, *The Military Justice System in the New Millennium*, 52 A.F. L. REV. 105, 185–86 (2002).

⁴⁴ U.S. CONST. amend. V. (emphasis added).

⁴⁵ MCM, *supra* note 42, at R.C.M. 405.

and impartially weigh all available facts in arriving at conclusions and recommendations, not to perfect a case against the accused.⁴⁶

In many ways, an Article 32 investigation provides an accused with more rights than a grand jury investigation. First, the accused has a right to be present at the Article 32 investigation, whereas an accused in federal court may not attend grand jury proceedings. Second, the accused may be represented by counsel at the Article 32 investigation. Third, the accused may present evidence and witnesses to support a defense. Fourth, the accused may cross-examine government witness and review government evidence at the Article 32 investigation.⁴⁷ Assuming an accused defense contractor can assert his Fifth Amendment rights, these procedural safeguards, at least in the abstract, appear to present an adequate substitute that protects those rights before a military court.

ii. Sixth Amendment Rights

The Sixth Amendment contains six guarantees “[i]n all criminal prosecutions.”⁴⁸ Assuming, as the Supreme Court seemed to in *Reid*, that a court-martial against a defense contractor is a ‘criminal prosecution’ within the meaning of the Amendment and not merely an adjudication of military law, an accused contractor:

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, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.⁴⁹

Of all of these guarantees, the Supreme Court has been most concerned about the right to a trial by jury of one’s peers.⁵⁰

Military “juries” are comprised of “members” selected from among “persons who in the opinion of the convening authority are best qualified for the duty by reason of their

⁴⁶ MCM, *supra* note 42, at R.C.M. 405.

⁴⁷ Compare MCM, *supra* note 42, at R.C.M. 405(f) and *United States v. Marrie*, 43 M.J. 35, 40 (1995) with FED. R. CRIM. P. 6. See also *United States v. Garcia*, 59 M.J. 447, 450-51 (2004) (prohibiting waiver of Article 32 investigation absent consent of the accused).

⁴⁸ U.S. CONST. amend. VI.

⁴⁹ *Id.*

⁵⁰ See *Reid*, 354 U.S. at 22; U.S. CONST. amend. VI. See also U.S. CONST. art. III, § 2, cl. 3 (“Trial of all Crimes, except for Cases of Impeachment, shall be by Jury . . .”). The MCM already provides by rule the other rights contained in the Sixth Amendment. See MCM, *supra* note 42, at R.C.M. 304(e), 305(f), 308, 405(g), 405(h), 506, 602-03, 701(e), 703, 707, 806 (providing for a speedy and public trial, notice of accusation, confrontation, compulsory process, right to counsel, and a listing of the rights of the accused during pre-trial proceedings).

age, education, training, experience, length of service, and judicial temperament.”⁵¹ Because military personnel and DoD contractors now often operate as a “unified force” and as “part of the same unique communit[y],”⁵² members of the armed forces and the contractors who accompany them in the field share daily experiences in the combat environment.⁵³ And, as the Sixth Amendment’s provision for “trial in the vicinity of the crime” safeguards against “the unfairness and hardship involved when an accused is prosecuted in a remote place,”⁵⁴ (i.e., away from combat conditions and among a group of people who likely have never faced combat) the court-martial “member” selection process creates a “jury” of peers that could satisfy the constitutional threshold for impartiality.

Recent amendments have further aligned the court-martial “jury” with its federal counterpart much more than was the case when *Reid* and its progeny were decided. First, in 2005, the requisite number of “members” for court-martial of a capital crime was increased to twelve.⁵⁵ In 1984, the Manual for Courts-Martial was amended to require a unanimous vote for conviction of a capital crime.⁵⁶ In addition, the United States Court of Appeals for the Armed Forces underwent substantial adjustments since *Reid* and its progeny, solidifying its status as an independent authority separate from military influence.⁵⁷

IV. CONCLUSION

On its face, the amended § 802(a)(10) appears to allow the constitutional exercise of court-martial jurisdiction over DoD contractors serving overseas in contingency operations, concurrent with federal criminal authority under MEJA. There are, however, several remaining issues not discussed or raised only in passing above that could leave application of the provision susceptible to as-applied challenges.

First is the potential breadth of what could constitute a “contingency operation.”⁵⁸ Two possible scenarios that might constitute contingency operations in which convening a court-martial against an offending contractor under § 802(a)(10) could lead to a robust constitutional debate

⁵¹ MCM, *supra* note 42, at R.C.M. 501-02.

⁵² *March 2008 Memo*, *supra* note 27, at 1-2.

⁵³ *See also Reid*, 354 U.S. at 86 (Clark, J., dissenting). Somewhat related to the jury selection process is the numerical composition of a criminal jury. The Supreme Court has held that, in a federal trial, six jurors is constitutional while five is not. *See Ballew v. Georgia*, 435 U.S. 223, 225, 232–33, 239–40 (1978) (citing empirical research showing that juries of fewer than six persons are less likely to “foster effective group deliberations,” “make critical contributions,” and “overcome the biases of [their] members to obtain an accurate result.”). Different considerations attend “jury pool” composition for military trials, however, including that their members’ training and expertise that allow for juries comprised of five members. *See* MCM, R.C.M. 501–02; *Hearings on H.R. 5957 Before Subcomm. of the House Comm. on Armed Servs.*, 81st Cong., 1st Sess. 94 (1949) (recognizing that, because of the expertise of their members, military juries may be comprised of fewer than six members).

⁵⁴ *United States v. Cores*, 356 U.S. 405, 407 (1958).

⁵⁵ MCM, *supra* note 42, at R.C.M. 501.

⁵⁶ MCM, *supra* note 42, at R.C.M. 1004.

⁵⁷ *See, e.g., Jonathan Lurie, MILITARY JUSTICE IN AMERICA: THE U.S. COURT OF APPEALS FOR THE ARMED FORCES* (University Press of Kansas 2001).

⁵⁸ *See supra* note 26 and accompanying text.

are where a) the Secretary of Defense designates as a contingency operation a program in which members of the armed forces and accompanying contractors *may become* involved in military actions, but open hostilities have not yet commenced;⁵⁹ and b) contractors are assigned to projects alongside members of the military called to, or retained on active duty subsequent to the President's or Congress' declaration of a "national emergency" that does not fit the meaning of a "public danger" under the Fifth Amendment.⁶⁰ In either case, the justifications for courts-martial of contractors as analyzed above could be more difficult to sustain.

Second is the looming question regarding UCMJ's concurrent jurisdiction with MEJA. In *Ex Parte Milligan*, the Supreme Court denied the military's right to assert jurisdiction over a civilian, stating, "[m]artial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction."⁶¹ Although MEJA's application has been infrequent and the law arguably has been somewhat ineffective,⁶² claims that court-martial jurisdiction is necessary may be undercut somewhat by the fact that, at least in theory, MEJA allows federal courts to claim jurisdiction over defense contractors who commit crimes in the field. Still, the practical dimensions of the administration of justice, including difficulties federal prosecutors often have in gathering evidence and locating witnesses,⁶³ combined with the specific and narrow triggers for court-martial jurisdiction under § 802(a)(10) and the fact that the DoD guidance for exercising that authority provides substantial deference to the Department of Justice and federal criminal procedures,⁶⁴ together make it likely that courts will defer to the reasonable determinations to prosecute some contractors' transgressions under the UCMJ. It is also noteworthy that, since *Milligan* and even in *Reid*, the Supreme Court has repeatedly acknowledged the possibility that courts-martial of civilians are appropriate in some instances.

Finally, despite extensive reform of the military justice system since *Reid*, key differences between a court-martial and a federal criminal trial still exist, making it possible to argue that they would infringe a contractor's constitutional rights. Notably, the presiding judge is a military officer who lacks life tenure and can be removed at will, and the fact that civilians and contractors are not eligible to become court members.

Nevertheless, the law as it stands will subject contractors to courts-martial in certain instances. The March 2008 memo recognizes that failure to employ discretion in asserting its jurisdiction will undermine its authority and will compromise the sound basis upon which the Warner amendment was passed.⁶⁵ Indeed, court-martialing contractors need not be generally thought of as a last resort for commanders in the field. However, individual cases should be carefully considered, with the above-discussed constitutional questions in mind, so that justice may be properly served for instances of illegal acts committed by contractors serving alongside our unified force in combat operations overseas.⁶⁶

⁵⁹ See 10 U.S.C. § 101(a)(13)(A).

⁶⁰ See 10 U.S.C. § 101(a)(13)(B).

⁶¹ See *Ex Parte Milligan*, 71 U.S. 2, 127 (1866).

⁶² See *supra* note 15 and accompanying text.

⁶³ See *id.*

⁶⁴ See *March 2008 Memo*, *supra* note 27, at 2.

⁶⁵ See *March 2008 Memo*, *supra* note 27, at 2.

⁶⁶ Hammond, *supra* note 4, at 34 (discussing the legal issues contracting firms should consider).