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LACK OF EXTRATERRITORIAL JURISDICTION OVER CIVILIANS: A NEW LOOK AT AN OLD PROBLEM

A Thesis
Presented to
The Judge Advocate General's School
United States Army

The opinions and conclusions expressed herein are those of the author and do not necessarily represent the views of either The Judge Advocate General's School, The United States Army, or any other governmental agency.

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LACK OF EXTRATERRITORIAL JURISDICTION OVER CIVILIANS: A NEW LOOK AT AN OLD PROBLEM

by Major Susan S. Gibson

ABSTRACT: This thesis examines the military's lack of extraterritorial jurisdiction over civilians. It reviews the history of court-martial jurisdiction over civilians, the UCMJ provisions that ostensibly grant jurisdiction, and the Supreme Court cases limiting that jurisdiction. Although this is an old problem, this thesis argues that the problem has changed as America's international obligations to prosecute multiply and as the military's doctrine changes from reliance on a permanent overseas presence to one of "force projection." This thesis then explores how the United States can gain jurisdiction over civilians: from the possibility of obtaining federal court jurisdiction over all civilians, to the more limited solution of extending court-martial jurisdiction over civilians who are deployed on military operations overseas. In conclusion, this thesis recommends a partial solution based on a limited extension of court-martial jurisdiction over civilians deployed on military operations. This limited extension of court-martial jurisdiction will enable commanders to command the civilian component of their deployed force and it can be supported by the constitutional war powers of the President and Congress.

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Major Susan S. Gibson*

A military spokesperson in Burundi confirmed reports that the Army will take no action against Joseph Dac. Dac, a U.S. Army civilian employee, was being held for prosecution after he fatally shot a Jordanian UN peacekeeper and a U.S. Army Colonel. Dac was deployed to the Burundi peacekeeping mission to maintain complex military communications equipment. The murder weapon was a 9mm pistol that the Army issued to Dac for self-defense.

At a Pentagon briefing, the Army's top lawyer explained that the military could not try civilians by military court-martial except during a declared war. The Attorney General also confirmed that Dac could not be prosecuted in federal court. It seems that few laws have any effect outside the United States.

The UN Secretary General is demanding that the U.S. take steps to prosecute Dac. If the U.S. cannot or will not prosecute Dac, the

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Jordanian government is demanding that Dac be extradited to Jordan to stand trial for the murder of its peacekeeper.

The press release is fictional, but the problem is real. It is the same old problem that the military has been facing for over thirty-five years.[1] Unfortunately, the military keeps trying to solve it in the same old way--by extending federal court jurisdiction over civilians during peacetime.[2] But that solution is targeted at the Army of the past rather than at the Army of the future.

This article looks at the problem of America's lack of extraterritorial jurisdiction over civilians accompanying the force, but looks at it with an eye on current military trends and deployments, and with a view to the future. The old problem arose in Cold War military garrisons in Germany and Japan; as a consequence, the old solutions target that problem.

The new problems arise in world-wide deployments in operations other than war. This article proposes a solution for those overseas military deployments, not for peacetime overseas garrisons. These new military operations are conducted

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1 *See, e.g.*, Reid v. Covert, 354 U.S. 1,35 (1957).

2 H.R. 808, 104th Cong., 1st Sess. (1995); S. 74 104th Cong., 1st Sess. (1995); S. 288, 104th Cong., 1st Sess. (1995); H.R. 4531, 103d Cong., 2d Sess. (1994); S. 129, 103d Cong., 1st Sess. (1993); H.R. 5808, 102d Cong., 2d Sess. (1992); S. 182, 102d Cong., 1st Sess. (1991); S. 147, 101st Cong., 1st Sess. (1989); H.R. 255, 99th Cong., 1st Sess. (1985); S. 1, 94th Cong., 1st Sess. (1975) and H.R. 3907, 94th Cong., 1st Sess. (1975); S. 1744 & 1745, 92nd Cong., 1st Sess. (1971); H.R. 18857, 91st Cong., 2d Sess. (1970); H.R. 18548 & 18548, 91st Cong., 2d Sess. (1970); S. 2007, 90th Cong., 1st Sess. (1967); H.R. 226, 90th Cong., 1st Sess. (1967); S.761 & S.762, 89th Cong., 2d Sess. (1966). *See also*, Hearings Before Subcomm. on Constitutional Rights of the Senate Judiciary Comm., 87th Cong., 2d Sess. 848-852 (1962) (Army presented draft legislation to Dept. of Justice to extend district court jurisdiction over civilians and ex-soldiers).

under constitutional war powers and the new solution springs from that same power. It is a solution founded on constitutional war powers; a solution that is limited in scope, and grounded in military necessity.

In *Reid v. Covert*[3] the Supreme Court stated that "a statute cannot be framed by which a civilian can lawfully be made amenable to the military jurisdiction in time of peace."[4] For years, legal scholars have read this language as a prohibition against military jurisdiction over civilians. Read another way, it becomes a grant of authority--allowing military jurisdiction in the absence of a time of peace.

I. Introduction.

This article begins with a brief description of the problem and the need for change. Next, it presents a historical overview of military jurisdiction over civilians. That history begins in 1775 under the Articles of War. It then progresses to the Uniform Code of Military Justice (UCMJ), and covers the court cases that took away UCMJ jurisdiction over civilians. Then, it discusses the current limits of extraterritorial federal court jurisdiction. The historical analysis ends with a look at past and present proposals to regain extraterritorial jurisdiction over civilians.

After looking at the past, this article moves on to a description of the current problem. This problem is formed by three main forces: (1) new international tribunals and obligations to prosecute, (2) new military doctrines and deployments,

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3 354 U.S. 1 (1957).

4 *Id.* at 35 (quoting WILLIAN WINTHROP, MILITARY LAW AND PRECEDENTS (2d ed. 1920) [hereinafter WINTHROP])

and (3) a new reliance on civilian technicians during deployments. After defining the problem, this article discusses possible solutions to that problem.

The problem can be met in two ways. One, by giving civilians the constitutional rights that the *Reid* Court required for peacetime prosecution; namely, grand jury indictments, trial by jury, and Article III judges--in other words, trial in federal district court. The other option focuses on constitutional war powers and Article I courts-martial.

Finally, this article proposes a solution based on a limited but necessary expansion of court-martial jurisdiction over civilians deployed on military operations. It concludes that the war powers of the President and the Congress will support this limited expansion of court-martial jurisdiction.

A. A Time for Change.

The time for change has come for several reasons. The military has drastically reduced the number of military personnel and civilians assigned overseas. The Cold War strategy of overseas "forward presence" has been replaced by "force projection" doctrine.[5] America has reduced its armed forces and left the military looking for ways to make a smaller force more effective. Technology is the

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5 *See, e.g.*, JOINT CHIEFS OF STAFF, NATIONAL MILITARY STRATEGY OF THE UNITED STATES OF AMERICA 6 (1995) [hereinafter NATIONAL MILITARY STRATEGY]; DEP'T OF THE ARMY, PROGRAM ANALYSIS AND EVALUATION DIRECTORATE, AMERICA'S ARMY--PROJECTING DECISIVE POWER 7 (1994) [hereinafter PROJECTING POWER]; DEP'T OF ARMY, FIELD MANUAL 100-5, OPERATIONS, Ch. 3 (June 1993) [hereinafter FM 100-5].

answer.[6] But, along with this technology comes the civilian technicians to run and maintain these new high-tech weapons and systems. The military can no longer deploy a large force without also deploying civilian support personnel.[7]

Force projection is not the only change in the military's doctrine. America is now projecting its armed forces into operations other than war.[8] Many of these military operations can subject the United States to international obligations to investigate and prosecute violations of treaties or conventions.[9] Yet, many of these

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6 *See, e.g.*, THE FIRST INFORMATION WAR (Alan D. Campen ed. 1992); ALVIN & HEIDI TOFFLER, WAR AND ANTI-WAR (1993).

7 *E.g.*, Elroy Garcia, *Storm Civilians*, SOLDIERS, Aug. 1991, at 10 (indicating approximately 1,600 Army civilian employees deployed to Persian Gulf for Operations Desert Shield and Storm); Telephone Interview with Major Daniel M. Wiley, Office of the Deputy Chief of Staff for Personnel, Headquarters, Army Materiel Command (Mar. 13, 1995) (stating 169 Army Material Command (AMC) civilians deployed for Operation Vigilant Warrior in Persian Gulf, Fall 1994; 94 AMC civilians deployed to Haiti in 1994-95); Memorandum Headquarters Third Infantry Div., Office of the Staff Judge Advocate, Nuremberg Law Center, AETV-BGJA-NBG, to Judge Advocate, USAREUR and 7th Army, subject: After Action Report: Task Force Able Sentry (16 May 1994) [hereinafter AAR: Task Force Able Sentry] (indicating that at least two Army civilians deployed to the Former Yugoslav Republic of Macedonia).

8 *See, e.g.*, NATIONAL MILITARY STRATEGY, *supra* note 5, at 8-12; FM 100-5, *supra* note 5, at Ch. 13; JOINT CHIEFS OF STAFF, PUBLICATION 3-07, JOINT DOCTRINE FOR MILITARY OPERATIONS OTHER THAN WAR (1994).

9 *See, e.g.*, Geneva Convention Relative to the Treatment of Prisoners of War, *opened for signature* Aug. *12, 1949*, art. 130, 6 U.S.T. 3316, 75 U.N.T.S. 134 [hereinafter Geneva POW Convention]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *opened for signature* Aug. *12, 1949*, art. 147, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Civilians Convention]; *See also* similar articles in Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Geneva Shipwrecked Convention]; and Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva Wounded Convention]. All Geneva Conventions of 1949 *reprinted in* DEP'T OF ARMY, PAMPHLET 27-1, TREATIES GOVERNING LAND WARFARE (Dec. 1956)

operations other than war fall into a legal gray area where the traditional law of war may not apply because there is no "international armed conflict" as defined by the Geneva Conventions.[10]

Force projection doctrine will put large units into foreign territory in four to twelve days. Military jurisdiction must be ready to project itself with that force; a force that includes a growing number of critical civilian personnel. The Army will not have time to negotiate extensive status of forces agreements, and any uncertainty or shortcomings in the military's jurisdictional doctrine will be magnified by the pace and complexity of tomorrow's military operations.

The fall of the Soviet Union brought new life to the United Nations (UN). The UN is now willing and able to step in and form international criminal tribunals when a nation-state either cannot or will not prosecute its citizens.[11] If the United States does not take steps to bring its civilians under its jurisdiction, the United

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[hereinafter, DA PAM. 27-1]. *See also*, Question of Responsibility for Attacks on United Nations and Associated Personnel and Measures to Ensure that Those Responsible for Such Attacks are Brought to Justice: Report of the Sixth Committee, U.N. GAOR, 49th Sess., Agenda Item 141, U.N. Doc. A/49/742 (1994) [hereinafter UN Protection of Peacekeepers Convention]. The Convention on the Safety of United Nations and Associated Personnel, which was opened for signature on Dec. 2, 1994, is an annex to the report.

10 *See, e.g.*, Geneva POW Convention, *supra* note 9, at art. 2. All four Conventions have the same article 2 language: "[T]he present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties . . . ."

11 *See, e.g., Secretary-General's Report on Aspects of Establishing an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia*, U.N. SCOR, U.N. Doc. S/25704 (1993); *reprinted in* 32 I.L.M. 1159 (1993). The Security Council established the tribunal by resolution dated May 25, 1993; S. Res. 827; U.N. SCOR, 3217th mtg., U.N. Doc. S/RES/ 827 91993), *reprinted in* 32 I.L.M. 1203 (1993) [hereinafter Int'l Tribunal for Yugoslavia].

States may have no choice but to turn those civilians over to an international tribunal.

The time is ripe for new legislation to expand court-martial jurisdiction over civilians deployed on military operations. America's deployments demand this solution, and the military justice system is now in a unique position to support that change, both constitutionally and politically. The 1984 amendments to the Uniform Code of Military Justice gave the Supreme Court direct review over all military cases.[12] In a series of cases since then, the Supreme Court has repeatedly shown its increasing regard for the military justice system.[13]

The Army's doctrine is changing, its deployments are changing, the military justice system has changed, and America's international obligations to prosecute are increasing. It is time for a new look at the problem of extraterritorial jurisdiction over civilians.

B. A Brief Overview of Military Jurisdiction Over Civilians.

From 1775 to 1949, the Articles of War gave the military jurisdiction over

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12 The Military Justice Act of 1983, Pub. L. No. 98-209, 97 Stat. 1393 permitted direct petitions to the U.S. Supreme Court from the Court of Appeals for the Armed Forces. *See also* UCMJ art. 67a (1984). [The UCMJ comprises §§ 801 to 946 of Title 10, United States Code. All citation to the UCMJ will be in accordance with the articles as numbered in the MANUAL FOR COURTS-MARTIAL, United States (1984).] Previously, civil courts could only consider military habeas corpus petitions on the limited issues of jurisdiction and unlawful punishment. *See* Burns v. Wilson, 346 U.S. 137 (1953), and Dynes v. Hoover, 61 U.S. (20 How.) 65 (1857).

13 *See, e.g.,* Weiss v. United States, 114 S. Ct. 752 (1994). "Today's decision upholds a system of military justice notably more sensitive to due process concerns than the one prevailing through most of our country's history . . . ." *Id.* at 769 (Ginsburg, J. concurring).

civilians accompanying the forces in the field.[14] When the UCMJ was adopted in 1950, Article 2(a)(11) also gave the military jurisdiction over civilians accompanying the forces overseas.[15] The 1950 changes to military jurisdiction reflected their times: a time of huge, forward deployed military communities throughout Europe. The 1950 jurisdictional provisions over civilians clearly applied in peacetime and tied jurisdiction to the United States status of forces agreements.[16]

Starting in 1957, in a line of cases beginning with *Reid v Covert*,[17] the Supreme Court declared UCMJ Article 2(a)(11) jurisdiction unconstitutional as applied to civilians during peacetime.[18] Thirteen years later, in a case involving a

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14 Art. of War art. 32 (1775) provided that "[a]ll suttlers and retainers to a camp, and all persons whatsoever, serving with the continental army in the field, though not inlisted soldiers, are to be subject to the articles, rules, and regulations of the continental army." Art. of War art. 2(d) (1948) provided military jurisdiction over "[a]ll retainers to the camp and all persons accompanying or serving with the armies of the United States without the territorial jurisdiction of the United States, and in time of war all such retainers and persons accompanying or serving with the armies of the United States in the field, both within and without the territorial jurisdiction of the United States, though not otherwise subject to these articles . . . ." Intervening versions of the Articles of War had the same or similar language. *See also* WINTHROP, *supra* note 4, at 953 (appendix containing versions of the Articles of War from 1775 to 1892).

15 UCMJ art. 2(10) & 2(11) (1950) (these UCMJ provisions have not been changed since Congress enacted them in 1950). *See* UCMJ art. 2(10) & 2(11) (1984).

16 *See, e.g.*, Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces, June 19, 1951, 4 U.S.T. 1792, 199 U.N.T.S. 67; UCMJ art. 2(11) & 2(12) (1950) [hereinafter NATO SOFA] reprinted in DEP'T OF ARMY, PAMPHLET 27-24, SELECTED INTERNATIONAL AGREEMENTS, VOL. II, 2-1 (1976) [hereinafter DA PAM. 27-24].

17 354 U.S. 1 (1957).

18 *See Id.* (no court-martial jurisdiction over dependent wives for capital offenses committed overseas in peacetime); Kinsella v. Singleton, 361 U.S. 234 (1960) (no court-martial jurisdiction over civilian dependents for noncapital offenses); Grisham v. Hagan, 361 U.S. 278 (1960) (no jurisdiction over civilian

civilian employee in Vietnam, the United States Court of Appeals for the Armed Forces[19] struck the final blow by holding that UCMJ Article 2(a)(10) jurisdiction "during time of war" only attaches during a congressionally declared war.[20]

Since the courts decided those cases, scholars have written article after article analyzing the civilian jurisdiction cases and suggesting possible solutions.[21] Additionally, various members of Congress have introduced at least seventeen bills to regain jurisdiction over civilians accompanying the forces overseas.[22] Without

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employees for capital offenses); McElroy v. Guagliardo, 361 U.S. 281 (1960) (no jurisdiction over civilian employees for noncapital offenses).

19 Note that on October 5, 1994, the President signed into law Senate Bill 2182, Defense Authorization Act for Fiscal Year 1995, which redesignated the United States Court of Military Appeals as the United States Court of Appeals for the Armed Forces. *See* Nat'l. Def. Auth. Act for Fiscal year 1995, Pub. L. No. 103-337, 108 Stat. 2663, 2831 (to be codified at 10 U.S.C. § 941). This article will refer to the court by its new name.

20 United States v. Averette, 19 C.M.A. 363, 41 C.M.R. 363 (1970).

21 *See, e.g.*, Peter D. Ehrenhaft, *Policing Civilians Accompanying the United States Armed Forces Overseas: Can United States Commissioners Fill the Jurisdictional Gap?*, 36 GEO. WASH. L. R. 273 (1967); Robinson O. Everett and Laurent R. Hourcle, *Crime Without Punishment -- Ex-Servicemen, Civilian Employees and Dependents*, 13 JAG L. REV. 184 (1971) [hereinafter Everett, *Crime Without Punishment*]; Robinson O. Everett, *Military Jurisdiction Over Civilians*, 1960 DUKE L. J. 366 (1960) [hereinafter Everett, *Military Jurisdiction*]; Robert Girard, *The Constitution and Court-Martial of Civilians Accompanying the Armed Forces--A Preliminary Analysis*, 13 STAN. L. REV. 461 (1961); Gregory A. McClelland, *The Problem of Jurisdiction Over Civilians Accompanying the Forces Overseas--Still With Us*, 117 MIL. L. R. 153 (1987); Note, *Criminal Jurisdiction Over Civilians Accompanying American Armed Forces Overseas*, 71 HARV. L. REV. 712 (1958).

22 H.R. 808, 104th Cong., 1st Sess. (1995); S. 74 104th Cong., 1st Sess. (1995); S. 288, 104th Cong., 1st Sess. (1995); H.R. 4531, 103d Cong., 2d Sess. (1994); S. 129, 103d Cong., 1st Sess. (1993); H.R. 5808, 102d Cong., 2d Sess. (1992); S. 182, 102d Cong., 1st Sess. (1991); S. 147, 101st Cong., 1st Sess. (1989); H.R. 255, 99th Cong., 1st Sess. (1985); S. 1, 94th Cong., 1st Sess. (1975) and H.R. 3907, 94th Cong., 1st Sess. (1975); S. 1744 & 1745, 92nd Cong., 1st Sess. (1971); H.R. 18857, 91st Cong., 2d Sess. (1970); H.R. 18548 & 18548, 91st Cong., 2d Sess. (1970); S. 2007, 90th Cong., 1st Sess. (1967); H.R. 226, 90th Cong., 1st Sess. (1967); S.761 &

exception, these bills focus on gaining jurisdiction over civilians during peacetime and place that jurisdiction in the federal district courts.[23]

One current military proposal has shifted away from a peacetime federal court focus. This proposal will expand court-martial jurisdiction over civilians by changing the definition of "time of war" to a broader and looser concept of "time of armed conflict."[24] While this effort is a step in the right direction, it does not go far enough. Many of the military's recent deployments are not international armed conflicts, or any type of "armed conflict" in the traditional sense. There was no "enemy" in Rwanda or Haiti, and no armed conflict during Operation Desert Shield as the military built up for Operation Desert Storm.

The military must take a new look at the problem of extraterritorial jurisdiction over civilians; it must identify the area of most need and focus its efforts there. This article will identify that area and define its limits.

The analysis begins with a review of the history of court-martial jurisdiction over civilians: what we had, and how and why we lost it.

S.762, 89th Cong., 2d Sess. (1966). *See also*, Hearings Before Subcomm. on Constitutional Rights of the Senate Judiciary Comm., 87th Cong., 2d Sess. 848-852 (1962) (Army presented draft legislation to Dept. of Justice to extend district court jurisdiction over civilians and ex-soldiers).

23 *Id.*

24 *Proposed Amendments to the Uniform Code of Military Justice*, printed in Dep't of Defense Legislative Reference Service, Misc. 2625(014) (Dec. 2, 1994 (9:30 am)) at 1-2 [for internal Dep't of Defense Official Use Only] [hereinafter *Proposed UCMJ Amendments*].

II. The Rise and Fall of Court-Martial Jurisdiction Over Civilians.

Over the course of American history, the courts have considered military jurisdiction over civilians on a regular basis. This section chronicles that history. It begins with a explanation of the various types of military jurisdiction, and then focuses on court-martial jurisdiction over civilians under the Articles of War and the UCMJ. After reaching the point in history where the military lost jurisdiction over civilians, this section goes on to look at the limits of extraterritorial federal jurisdiction over those civilians. Finally, it chronicles three recent efforts to expand jurisdiction over civilians: extending federal court jurisdiction, court-martial jurisdiction, and tribunal jurisdiction.

In many ways, the historical application of court-martial jurisdiction over civilians is "water under the bridge." A critical analysis of the history and precedents in this area will not change those precedents, regardless of how "right" or logical that analysis may be.[25] This article will not argue whether the Supreme Court decisions were correct or incorrect; they are no longer open for argument. Rather, through a study of history and precedents, this article seeks to identify the constitutional limits of court-martial jurisdiction over civilians.

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25 Many of the authors cited *supra* note 21 argued that the Supreme Court's civilian jurisdiction analysis was incorrect, and each of the Court's civilian jurisdiction cases contains strong and well reasoned dissents. *See, e.g.*, Everett, *Military Jurisdiction*, *supra* note 21, and McElroy v. Guagliardo, 361 U.S. 234 (1960) (consolidated concurring and dissenting opinions). However, over thirty-five years later, the precedents stand as law, regardless of the logic of these many arguments.

A. *Types of Military Jurisdiction.*

There are four types of military jurisdiction: (1) military law, (2) martial law, (3) military occupation government, and (4) military tribunals.[26] All four types of jurisdiction are relevant to this article; however, its primary focus is on military law.

Military law is the purest form of military jurisdiction and is typified by the use of courts-martial to try members of the armed forces. Courts-martial are formed under Article I of the Constitution, which gives Congress the power to "make rules for the Government and Regulation of the land and naval Forces."[27] Since 1950, courts-martial have been governed by the Uniform Code of Military Justice.[28] Prior to the UCMJ, courts-martial were tried in accordance with the Articles of War.

The second type of military jurisdiction, which is often confused with courts-martial, is martial law. Martial law is used during national emergencies *within the United States* and its territories. It supplants the civilian legal system and allows the military to try civilians in the area of the emergency.[29]

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26 MANUAL FOR COURTS-MARTIAL, UNITED STATES, Part I, Preamble, para. 2 (1984) [hereinafter MCM]. *See also* McClelland, *supra* note 21, at 161-62.

27 U.S. CONST. art. I, § 8, cl. 14.

28 Congress originally enacted the UCMJ on May 5, 1950, and it was contained in 64 Stat. 108, 50 U.S.C. §§ 551-736 (1952).

29 *See, e.g.*, Duncan v. Kahanamoku, 327 U.S. 304 (1946) (defining limits of martial law imposed in Hawaii after attack on Pearl Harbor); *Ex Parte* Milligan, 71 U.S. 2 (1866) (upholding martial law imposed in Indiana during Civil War). For a discussion of the distinction between military law and martial law, *see Ex parte* Jochen, 257 F. 200 (S.D. Tex. 1919).

Occupation law is the third type of jurisdiction. An occupying military force uses occupation law to supplement or replace the civilian legal system. It is similar to martial law except martial law is exercised within the United States and occupation law is exercised in occupied foreign territory. The United States has tried United States citizens in occupied foreign territory;[30] however, the United States now rarely finds itself in the position of occupying power.[31]

The fourth type of jurisdiction is perhaps the most misunderstood. Military tribunals or military commissions are creatures of international law and are most often used to enforce the law of war. Military tribunals can try United States citizens[32] and foreign citizens.[33] Constitutionally, they find their way into American jurisprudence by way of the President's powers as Commander-in-Chief.[34]

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30 Madsen v. Kinsella, 343 U.S. 341 (1952) (upholding jurisdiction over US military wife tried by military commission in occupied Germany in 1950 for murder of her husband).

31 1907 Hague Convention No. IV Respecting the Laws and Customs of War on Land, Oct. 18, 1907, art. 2, 36 Stat. 2277, T.S. No. 539, *reprinted in* DA PAM. 27-1, *supra* note 9, at 2. ("Territory is considered occupied when it is actually placed under the authority of the hostile army.") *But see* DEP'T OF DEFENSE, FINAL REPORT TO CONGRESS, CONDUCT OF THE PERSIAN GULF WAR 610 (1992) (indicating that coalition forces "acted briefly as an occupying power" in Iraq).

32 *Ex parte* Quirin, 317 U.S. 1 (1942) (Upholding tribunal over four German saboteurs taken into custody in New York City after landing by submarine. In habeas petition, one contended that he was a US citizen and could not be tried by military commission. The Court found his citizenship to be irrelevant).

33 *In re* Yamashita, 327 U.S. 1 (1946) (upholding jurisdiction over Japanese General tried by military commission for violations of law of war committed in the Philippines during WWII).

34 Madsen v. Kinsella, 343 U.S. 341, 348 (1952). For a discussion of the uses of military tribunals, *see* Robinson O. Everett & Scott L. Silliman, *Forums for Punishing Offenses Against the Law of Nations*, 29 WAKE FOREST L. REV. 509 (1994) and Mark S. Martins, *National Forums for Punishing Offenses Against International Law: Might Our Own Soldiers Have Their Day in the Same Court?*, __ WAKE FOREST L. REV. __ (1995).

B. *Jurisdiction Over Civilians Under the Articles of War*

From the first American Articles of War, adopted in 1775, civilians were subject to court-martial jurisdiction when they were accompanying the armed forces in the field. Numerous court cases and Judge Advocate General's Opinions expound upon the limits of this jurisdiction.

Article XXXII of the 1775 Articles of War provided that "[a]ll suttlers and retailers to a camp, and all persons whatsoever, serving with the continental army in the field, though not inlisted soldiers, are to be subject to the articles, rules, and regulations of the continental army."[35] In 1806, Congress enacted the first complete revision of the Articles of War since the adoption of the Constitution.[36] Article 60 of the 1806 version was virtually identical to the 1775 Article.[37] Successive versions of the Articles of War contained similar provisions, which courts consistently interpreted to give the military court-martial jurisdiction over civilians who were accompanying the Army in the field.[38]

In 1916, the Articles of War expanded jurisdiction over civilians by granting court-martial jurisdiction over civilians accompanying the force overseas, even if

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35 Art. of War art. XXXII (1775) *reprinted in* WINTHROP, *supra* note 4, at 954.

36 Frederick B. Wiener, *Courts-Martial and the Bill of Rights: The Original Practice I*, 72 HARV. L. REV. 1 (1958). *See also* WINTHROP, *supra* note 4, at 103.

37 "All sutlers and retainers to the camp, and all persons whatsoever, serving with the armies of the United States in the field, though not enlisted soldiers, are to be subject to orders, according to the rules and discipline of war." Art. of War, art. 60 (1806), *reprinted in* WINTHROP, *supra* note 4, at 980.

38 WINTHROP, *supra* note 4, at 98.

they were not "in the field."[39] In addition, Article 2(d) provided jurisdiction during "time of war" over all "persons accompanying or serving with the armies of the United States in the field, both within and without the territorial jurisdiction of the United States, ..."[40] Although both grants of jurisdiction remained in the Articles of War until Congress replaced them with the UCMJ in 1950,[41] only the second, "time of war" provision was ever tested in the federal courts.[42]

Under the Articles of War, the federal courts entertained several habeas corpus petitions on the issue of whether the military could try civilians by court-martial. Invariably, the answer was yes. If the courts found a lack of jurisdiction, it was because (1) a particular civilian did not fall within the meaning of "persons accompanying or serving with" the military, or (2) the army was not "in the field."

In 1865, The Judge Advocate General opined that a Civil War contract surgeon was subject to military jurisdiction because he was "employed with the army in the field in time of war" even though he was "not a military officer and [had] no military rank or status."[43] Following the Civil War, a federal court struck down court-martial jurisdiction over a contractor who was apparently charged with fraud.[44] In this case, the court held that a contractor providing supplies to the military did not have sufficient connections to the military to be tried by court-

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39 Art. of War (1916). *See also* FREDERICK B. WIENER, CIVILIANS UNDER MILITARY JUSTICE 227-31 (1967).

40 Art. of War art. 2(d) (1948). The wording of Art. 2(d) was first adopted in the 1916 Articles of War.

41 *See* Art. of War 1920 and 1948. *See also* WIENER, *supra* note 39, at 227-28.

42 *See* WIENER, *supra* note 39, at 229 and n.8.

43 Op. JAG, Army, *as digested in* Dig. Ops. JAG 1880, at 102. *See also* Hines v. Mikell, 259 F.28, 34 (1919) (discussing the case of Dr. Bryan).

44 *Ex parte* Henderson, 11 F. Cas. 1067 (D. Ky. 1878) (No. 6349).

martial. The court did, however, endorse court-martial jurisdiction over "camp retainers" or others who "serve with the armies in the field."[45]

At about the same time, the Supreme Court decided *Ex parte Reed*, a habeas corpus petition from a civilian Navy paymaster.[46] Reed was charged with "malfeasance" in his duties as paymaster on the *USS Essex*, which was stationed off Brazil.[47] In upholding court-martial jurisdiction over Reed, the Court looked at Reed's connections to the Navy and found that if Navy paymasters "are not in the naval service, it may well be asked who are."[48]

During World War I, several civilians brought habeas corpus petitions to the federal courts to contest their court-martial convictions. In each case, the federal courts upheld the Article of War that granted court-martial jurisdiction over civilians. In *Ex Parte Jochen*,[49] the judge succinctly summed up the state of the law: "That it is not necessary that a person be in uniform in order to be a part of the land forces, I think clear, not only upon considerations of common sense and common judgment, but upon well-considered and adjudicated authority."[50]

Jochen is a fairly typical case of the period. Jochen was serving as quartermaster with the army in Texas, which was patrolling the Mexican border to

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45 *Id.* at 1069.

46 100 U.S. 13 (1876)

47 *Id.* at 20.

48 *Id.* at 22. The Court also noted that Reed had signed a letter agreeing "to be subject to the laws and regulations for the government of the Navy and the discipline of the vessel." Justice Clark would later comment on this fact from *Reed* and propose that all civilians consent to court-martial jurisdiction as a condition of employment. McElroy v. Gualiardo, 361 U.S. 281, 286 (1960).

49 257 F. 200 (S.D. Tex. 1919).

50 *Id.* at 204.

protect against "German influences in Mexico."[51] Jurisdiction rested on the fact that Jochen was serving with the army in the field during a time of war.[52] The *Jochen* court recognized that the defendant would normally enjoy his constitutional right to a jury trial. However, the district court reasoned that under the Fifth Amendment, if Jochen was "a member of the land and naval forces Congress has the plenary power to subject him to military law, and the guaranties of the Constitution for trial by jury are wholly inapplicable."[53]

Numerous other cases from World War I produced the same result. Two civilian ship's cooks were court-martialed for desertion.[54] A civilian auditor working in the quartermaster office at Camp Jackson, South Carolina was serving "in the field" and could lawfully be court-martialed.[55] The World War I jurisdictional line was finally drawn in *Ex Parte Weitz*,[56] when the Army attempted to court-martial a government contractor's driver who was working for the contractor at Camp Devons, Massachusetts. In that case, the court found that Weitz's contacts with the Army were too remote to sustain jurisdiction.[57]

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51 *Id.* at 202.

52 Under Article 2 of the 1916 Articles of War, during wartime it was immaterial whether the service was within or outside of the United States.

53 *Jochen*, 257 F. at 203.

54 *Ex parte* Falls, 251 F. 415 (D. N.J. 1918); McCune v. Kilpatrick, 53 F. Supp. 80 (E.D. Va. 1943). In *McCune*, the court looked at the additional issue raised by the fact that McCune was never informed that he would be subject to military jurisdiction. The court was unmoved and held that his knowledge was irrelevant; all that mattered was that he was serving "in the field." *McCune*, 53 F. Supp. at 84-85.

55 Hines v. Mikell, 259 F. 28 (4th Cir. 1919).

56 256 F. 58 (D. Mass. 1919).

57 *Id.* at 59. The court further explained that "[t]o hold otherwise would be to subject to military law a very large body of civilian employees, never directly coming in contact with military authority, and not heretofore generally supposed to be subject thereto." *Id.*

During World War II, the federal courts again routinely upheld the military's claims of jurisdiction over civilians. A district court upheld jurisdiction over Mr. DiBartolo, a civilian employee of Douglas Aircraft Company, for crimes he committed while on contract to maintain British and American aircraft in North Africa.[58] The Third Circuit also upheld Mr. Perlstein's court-martial conviction. Mr. Perlstein's case is unique because he committed his crimes after he was fired from his job and while the military was transporting him back to the United States.[59] Because of these unique facts, the case turned not on Perlstein's employment status, but on whether he was "accompanying the forces" within the meaning of Article 2.[60]

Although a cynic might think that the wartime cases were merely a reflection of their times, the federal courts took their constitutional responsibilities seriously. The following language reflects an attitude that is common in these cases:

> It is in keeping with the traditions of this peace-loving nation that its civil courts should not readily surrender a civilian to the jurisdiction of the military. Expediency and even necessity should not dispense with a painstaking examination to determine whether one whose liberties the civil courts have been charged to guard inviolate has been properly brought to justice in a military tribunal.[61]

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58 *In re* Di Bartolo, 50 F. Supp. 929 (S.D.N.Y. 1943).

59 Perlstein v. United States, 151 F.2d 167 (3d Cir. 1945).

60 *Id.* at 169.

61 *Di Bartolo*, 50 F. Supp. at 932. *See also* McCune v. Kilpatrick, 53 F. Supp. 80, 83-84 (E.D. Va. 1943). "The civil courts may not surrender a civilian to the jurisdiction of the military for expediency, convenience or even necessity, for to do so would destroy those constitutional rights and privileges guaranteed to citizens of this country." *Contra,* Robert Girard, *The Constitution and Court Martial of*

The courts upheld these wartime cases, not because they were abdicating their constitutional responsibility, but because these were *wartime* cases. War changes the scope of constitutional war powers,[62] and thereby changes the reach of court-martial jurisdiction.

C. Jurisdiction Over Civilians Under the UCMJ.

Article 2 of the UCMJ grants jurisdiction over civilians in the following three situations:

> Article 2(a)(10) In time of war, persons serving with or accompanying an armed force in the field.
>
> Article 2(a)(11) Subject to any treaty or agreement . . . or to any accepted rule of international law, persons serving with, employed by, or accompanying the armed forces outside the United States . . . .
>
> Article 2(a)(12) Subject to any treaty or agreement . . . or to any accepted rule of international law, persons within an area leased by or otherwise reserved or acquired for the use of the United States which

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Civilians Accompanying the Armed Forces--A Preliminary Analysis, 13 STAN. L. REV. 461 (1961). According to Girard, the federal courts' "wartime acceptance of military jurisdiction seems too uncritical. Few explicitly considered the constitutional issues involved, and then only in the most fragmentary way." Girard, at 498.

62 *See, e.g.*, Youngstown Sheet and Tube v. Sawyer, 343 U.S. 579 (1952); Korematsu v. United States, 323 U.S. 214 (1944); The Prize Cases, 67 U.S. (2 Black) 635 (1862).

is under the control of the Secretary concerned and which is outside the United States . . . .

Article 2(a)(11) was the first to come under constitutional attack. Article 2(a)(10) was then subjected to an attack of over-precise semantics. Article 2(a)(12) has lain dormant and presumed dead since the Supreme Court decisions striking down Article 2(a)(11). This article covers these provisions in the historical order of their judicial review rather than in the order they are presented in the UCMJ.[63]

1. Article 2(a)(11)--When Congress debated on and passed Article 2(a)(11) of the UCMJ, the Congressmen and scholars who testified did not see an expansion of jurisdiction over civilians. In fact, Article 2(a)(11) differs from Article 2 of the Articles of War only by the addition of the treaty or agreement provisions, and by the addition of the phrase "employed by." As we have seen, however, persons employed by the military were already being court-martialed under the Articles of War.

In the 1949 congressional debates on the UCMJ, Article 2(a)(11) did not generate much discussion. During one debate, Senator Kefauver noted that a wife who was accompanying her husband overseas would be subject to court-martial, "just as she is subject to [the Articles of War] today."[64]

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63 UCMJ art. 18 (1984) also grants court-martial jurisdiction over civilians "who by the law of war [are] subject to trial by a military tribunal . . . ." *See supra* notes 169-171 and accompanying text.

64 96 CONG. REC. 1360, (1950), *reprinted in* CONG. FLOOR DEBATE ON UNIFORM CODE OF MILITARY JUSTICE 202 (1949) (reprint available in the library of The Judge Advocate General's School, U.S. Army, Charlottesville, Va.).

It is with this history that the Supreme Court agreed to hear the habeas corpus petitions of Mrs. Covert and Mrs. Krueger, two military wives who were court-martialed for murdering their husbands--one in Germany the other in Japan. Near the end of the Supreme Court's 1955-56 term, the Justices considered these two challenges to Article 2(a)(11) in back-to-back arguments.[65] In both cases, the Court considered the argument that trial by court-martial denied these women their constitutional right to a jury trial. In both cases, the Court disagreed.

Writing for the Court in *Covert* and in *Krueger*, Justice Clark noted that courts-martial under the UCMJ included "the fundamental guarantees of due process."[66] He went on to note that these cases were tried outside United States territory and that it was "'clearly settled' that the constitutional provisions of Article III and the Fifth and Sixth Amendments 'do not apply to territory belonging to the United States which has not been incorporated into the Union.'"[67]

Once Justice Clark decided that the Constitution did not apply outside the United States, he did not need to consider whether Congress could subject these civilians to courts-martial under its power to "make rules for the Government and Regulation of the land and naval Forces."[68] Congress could choose any means of trial that met the basic requirements of due process.[69]

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65 Reid v. Covert, 351 U.S. 487 (1956); Kinsella v. Krueger, 351 U.S. 470 (1956) (these two cases were consolidated for reargument the following year; Supreme Court reversed in Reid v. Covert, 354 U.S. 1 (1957)). [Throughout this article, the first cases will be indicated by the names *Covert* and *Krueger*, while the second, consolidated opinion will be indicated by the name *Reid*.]

66 *Krueger*, 351 U.S. at 474.

67 *Id.* at 475 (quoting Balzac v. Porto Rico, 258 U.S. 298, 304-305 (1922)).

68 *Id.* at 476, (quoting U.S. CONST. art. I, § 8, cl. 14).

69 *Id.* at 476.

Justice Frankfurter filed a reservation to the Court's opinions.[70] He was concerned about "the pressure under which the Court work[ed] during its closing weeks" that precluded a more thorough review of the issues.[71] He also mentioned the Court's failure to "rest its decision upon the congressional power 'To make Rules for the Government and Regulation of the land and naval Forces' . . . ."[72] In a brief dissent, three additional Justices expressed their concern about the "far-reaching" consequences of these opinions.[73] They too wanted more time to consider the case and write their dissents.[74] As it turned out, they never had the opportunity, or even the need, to do so.

In 1957, the Court consolidated the *Covert* and *Krueger* cases, and granted reconsideration. With more time, additional arguments, and a new Justice,[75] the Court reversed its prior position and struck down Article 2(a)(11) as it applied to civilian dependents accompanying the force who were tried by court-martial for capital offenses in peacetime.[76]

At the beginning of the Court's plurality opinion it "reject[ed] the idea that when the United States acts against citizens abroad it can do so free of the Bill of Rights."[77] With that said, the Court not only overturned its prior holdings, it also

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70 *Id.* at 481.
71 *Id.* at 483-85.
72 *Id.* at 482.
73 *Id.* at 485-86.
74 *Id.*
75 Justice Brennan replaced Justice Minton prior to reargument.
76 Reid v. Covert, 354 U.S. 1 (1957) (*Covert* and *Krueger* were consolidated for reconsideration).
77 *Id.* at 5.

set in motion a series of cases that would eat away at Article 2(a)(11) of the UCMJ, bite by bite.[78]

Although there was no opinion of the Court in *Reid v. Covert*,[79] by the time the Court took up the habeas corpus petitions in *Kinsella v. Singleton*[80] and two other civilian court-martial cases, the Court had reached a consistent five member majority.[81]

Once the Court determined that the Constitution applied outside the United States, it undertook a constitutional review of court-martial jurisdiction over civilians. The Court's new constitutional analysis focused on Congress's Article I power to "make rules for the Government and Regulation of the land and naval

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78 Kinsella v. Singleton, 361 U.S. 234 (1960) (no court-martial jurisdiction over civilian dependents for noncapital offenses)[hereinafter cited under name of *Singleton* to avoid confusion with Kinsella v. Krueger]; Grisham v. Hagan, 361 U.S. 278 (1960) (no jurisdiction over civilian employees for capital offenses); McElroy v. Guagliardo, 361 U.S. 281 (1960) (no jurisdiction over civilian employees for noncapital offenses). For an interesting discussion on how the order of the cases (dependent wife capital case first) possibly affected the outcome of the Court's reasoning, *see* Everett, *Military Jurisdiction*, *supra* note 21, at page 411-12.

79 Justice Black announced the opinion of the Court, with Chief Justice Warren and Justices Douglas and Brennan joining; Justices Frankfurter and Harlan each concurred in the result; Justices Clark and Burton joined in dissent, and Justice Whittaker took no part in the case. *Reid*, 354 U.S. at 1.

80 361 U.S. 234 (1960).

81 Four Justices filed separate concurring and dissenting opinions. Justice Harlan, joined by Justice Frankfurter, dissented to the cases striking down jurisdiction in noncapital cases, and concurred in the cases striking down jurisdiction in the capital case. Justice Whittaker, joined by Justice Stewart, concurred in the case striking down jurisdiction over dependents and dissented to the cases striking down jurisdiction over employees. McElroy v. Guagliardo, 361 U.S. 234 (1960) (consolidated dissenting and concurring opinion for *McElroy*, *Singleton*, and *Grisham*). Interestingly, the majority opinions were written by Justice Clark, one of the dissenters in the second *Reid* case. By 1960, he apparently considered himself bound by stare decisis.

Forces."[82] The Court reasoned that if the civilian cases fell within Congress's power to regulate the Armed Forces, Congress could make civilians "amenable to the Code."[83] If not, the civilians were entitled to "the safeguards of Article III and the Fifth and Sixth Amendments."[84]

As a result, the issue in each case was whether courts-martial of civilians accompanying the armed forces in time of peace were "cases arising in the land and naval Forces."[85] The Court saw this as an issue of "*status*, namely, whether the accused in the court-martial proceeding is a person who can be regarded as falling within the term 'land and naval Forces.'"[86]

As in *Reid*, the *Singleton* Court concluded that dependent wives were not sufficiently connected with the military to "demonstrate a justification for court-martial jurisdiction."[87] Accordingly, it was not necessary for Congress to subject these women to court-martial to effectively "govern" the land and naval forces.[88]

Although the Court's "justification" language in *Singleton* appeared to announce a balancing test that the military could meet by proving sufficient military connections and an adequate need for jurisdiction, the Court did not address that possibility in the civilian employee court-martial cases.[89] In *Grisham*

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82 *See Reid*, 354 U.S. at 19; *Singleton*, 361 U.S. at 238-49.
83 *Singleton*, 361 U.S. at 247.
84 *Id.* at 246.
85 U.S. CONST. amend. V.
86 *Singleton*, 361 U.S. at 241.
87 *Id.* (quoting Justice Frankfurter's concurring opinion in *Reid*, 254 U.S. at 46-47).
88 *Id.*
89 Justice Whittaker's concurring and dissenting opinion addressed many of the balancing concerns in the civilian employee cases: the closer ties with the

v. Hagan,[90] a habeas corpus petition from a civilian employee charged with premeditated murder, the Court "carefully considered the Government's position as to the distinctions between civilian dependents and civilian employees."[91] The Court could not, however, find any "valid distinctions between the two classes of persons."[92]

In the companion case of *McElroy v. Guagliardo*,[93] the Court considered the issue of jurisdiction over civilian employees charged with noncapital offenses. The Court considered the historical "materials supporting trial of sutlers and other civilians by courts-martial,"[94] but found them "too episodic, too meager, to form a solid basis in history, preceding and contemporaneous with the framing of the Constitution, for constitutional adjudication."[95]

Furthermore, the Court was unconvinced by the historical evidence of courts-martial of civilians during the Revolutionary Period. The Court found these courts-martial to be "inapplicable" because they occurred "during a period of war."[96] The courts-martial of civilians on the Western Frontier were disregarded for the same reason: they occurred "in a time of 'hostilities.'"[97]

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military, the history of jurisdiction over civilian employees, and the "practical necessities and the lack of alternatives" to court-martial. *McElroy*, 361 U.S. at 259-77 (consolidated dissenting and concurring opinions).

90 361 U.S. 278 (1960) (Grisham was found guilty of unpremeditated murder and sentenced to life).

91 *Id.* at 280.

92 *Id.*

93 361 U.S. 281 (1960).

94 *Id.* at 284.

95 *Id* (quoting *Reid*, 354 U.S. at 64 (Frankfurter, J. concurring)).

96 *Id.*

97 *Id.* at 285-86.

In the remainder of the *McElroy* opinion the Court undertook the seemingly legislative task of proposing other ways for the military to gain jurisdiction over these civilian employees. Justice Clark suggested that the military "follow a procedure along the line of that provided for pay-masters' clerks . . . in *Ex Parte Reed.*"[98] In *Reed*,[99] a civilian Navy paymaster had "agree[d] in writing 'to submit to the laws and regulations for the government and discipline of the navy.'"[100] The *Reed* Court did not, however, rely solely on Reed's written agreement. The Court upheld jurisdiction over Reed because he was "in the naval service of the United States," as contemplated in the statute.[101]

Furthermore, in 1812 the Court recognized that Congress, through its constitutional powers, must give a court jurisdiction.[102] A defendant cannot give a court jurisdiction over himself.[103] A defendant may waive his right to a jury trial and other constitutional rights,[104] but unless Congress has the authority to grant

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98 *Id.*

99 100 U.S. 13 (1879).

100 *McElroy*, 361 U.S. at 285 (quoting *Ex parte* Reed, 100 U.S. 13, 19 (1879)).

101 *Reed*, 100 U.S. at 21-22.

102 United States v. Hudson and Goodwin, 10 U.S. (7 Cranch) 32 (1812). "Of all the Courts which the United States may . . . constitute, one only, the Supreme Court, possesses jurisdiction derived immediately from the constitution . . . . All other Courts created by the general Government possess no jurisdiction but what is given them by the power that creates them, and can be vested with none but what the power ceded to the general Government will authorize them to confer." *Id.* at 33.

103 *See In re* Berue, 54 F. Supp. 252 (1944). "It is elementary that consent cannot confer jurisdiction." *Id.* at 256. This is why jurisdiction can always be raised on appeal; it is never "waived."

104 Patton v. United States, 281 U.S. 276 (1930) (allowing defendant to waive his right to jury trial). Even though the Court will allow defendants to waive these rights at trial, the question remains whether the right to indictment and jury trial can be waived by contract. Waiver by contract would also raise other issues, such as whether the employee would have the right to the advice of counsel before

court-martial jurisdiction over civilians there simply is no jurisdiction. The military may be able to fashion a contractual consent to jurisdiction, but it is certainly not as simple as Justice Clark's opinion implies.[105]

Justice Clark then suggested that the military "incorporate those civilian employees who are to be stationed outside the United States directly into the armed services, either by compulsory induction or by voluntary enlistment."[106] This "solution" is also fraught with difficulties, both legal and practical.[107]

As a result of the *Reid* and *Singleton* line of cases, Article 2(a)(11) has become a historical relic: neither used nor usable since 1960.

2. Article 2(a)(10)--The practical demise of Article 2(a)(10) jurisdiction came from the Court of Appeals for the Armed Forces ten years after the completion of the Supreme Court's annihilation of Article 2(a)(11). Perhaps not so coincidentally,

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signing the waiver, whether employment could be conditioned upon the waiver of these constitutional rights, etc.

105 The Court decided *Reed* in 1879, long before its cases concerning "knowing and voluntary" waivers of constitutional rights. *See also* Peter D. Ehrenhaft, *Policing Civilians Accompanying the United States Armed Forces Overseas: Can United States Commissioners Fill the Jurisdictional Gap?*, 36 GEO. WASH. L. REV. 273, 281 (1967) (discussing the problem of "advance waiver of procedural rights" and jurisdiction)

106 McElroy v. Gualiardo, 361 U.S. 281, 286 (1960).

107 Professor Everett made this comment about Justice Clark's suggestion: "Thus, the culmination of a series of cases which express a desire to protect American citizens from the alleged abuses of courts-martial is the suggestion that more American citizens be drafted into the armed services, where they will be subject not only to courts-martial, but also to all other liabilities and responsibilities of a serviceman. Everett, *Military Jurisdiction, supra* note 21, at 409.

it also came only one year after the Supreme Court took military jurisdiction to an all-time low with *O'Callahan v. Parker.*[108]

In *United States v. Averette,*[109] the Court of Appeals for the Armed Forces considered the case of a contractor who was working for the Army in Vietnam. Averette was court-martialed under Article 2(a)(10)'s grant of jurisdiction over civilians serving with the force "in time of war." He was convicted "of conspiracy to commit larceny and attempted larceny of 36,000 United States Government-owned batteries."[110] The military court overturned Averette's conviction, holding that jurisdiction "in time of war" required a congressionally declared war.

In a surprisingly short opinion, the military court chronicled the history of jurisdiction over civilians, from the 1775 Articles of War, through *Toth v. Quarles,*[111] through the *Reid* cases, and on to *O'Callahan.* The military court then examined *Latney v. Ignatius,*[112] a 1969 habeas corpus petition heard by the D.C. Court of Appeals.

Latney was a civilian seaman living on board ship in DaNang harbor who was charged with fatally stabbing a shipmate during a bar fight in DaNang. The

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108 395 U.S. 258 (1969) In *O'Callahan,* the Court limited court-martial jurisdiction over service members to cases that were sufficiently "service-connected." In 1987, *O'Callahan* was overturned by Solorio v. United States, 483 U.S. 435 (1987), and the military once again exercised jurisdiction over service members based on their military status alone.

109 19 C.M.A. 363, 41 C.M.R. 363 (1970).

110 *Id.* at 363.

111 350 U.S. 11 (1955) (overturning court-martial jurisdiction over ex-serviceman for murder committed in Korea while on active duty; discharge from the military terminated military jurisdiction).

112 416 F. 2d 821 (D.C. Cir. 1969).

Latney court noted that the *Reid* cases were limited to peacetime, and that Vietnam was "a time of undeclared war which permits some invocation of the war power under which Article 2(a)(10) was enacted."[113] However, the district court struck down court-martial jurisdiction because "the spirit of *O'Callahan* . . . precludes an expansive view of Article 2(10) . . . ."[114] The court then found Latney's military contacts to be too tenuous to support court-martial jurisdiction.[115]

While the military court did not find any of these cases individually controlling in *Averette*, the court seemed to view the cases as the writing on the wall. And this writing clearly spelled the Supreme Court's desire to limit military jurisdiction to "*the least possible power adequate to the end proposed.*"[116]

The military court admitted that in prior cases it held that the Vietnam conflict was a "time of war" for other purposes, such as tolling the statute of limitations.[117] However, "[a]s a result of the most recent guidance in this area from the Supreme Court" (presumably *O'Callahan*) the military court "believe[d] that a strict and literal construction of the phrase 'in time of war' should be applied."[118]

The *Averette* holding continues to control military jurisprudence. Rule for Courts-Martial 103(19) now defines time of war as "a period of war declared by Congress or the factual determination by the President that the existence of

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113 *Id.* at 823.
114 *Id.*
115 *Id.*
116 O'Callahan v. Parker, 395 U.S. 258, 265 (1969) (quoting Toth v. Quarles, 350 U.S. 11, 22-23 (1955)).
117 *Averette*, 41 C.M.R. at 365.
118 *Id.*

hostilities warrants a finding that a 'time of war' exists . . . ."[119] During Operation Desert Storm, a court of military review relied on Rule for Courts-Martial 103(19) and held that the Persian Gulf conflict was not a "time of war" for court-martial purposes.[120]

Congress has not declared war since World War II. Since that time, nations have been reluctant to declare or admit to being "at war."[121] The UN Charter does not use the term "war," rather, it speaks in terms of "threats to peace" or "breaches of the peace."[122] In both the Persian Gulf conflict and Haiti, the UN gave member states the authority to "use all necessary means" to restore peace.[123] These were acts of "collective security" and not of any nation declaring "war" on another.

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119 MCM, *supra* note 26, R.C.M. 103(19). *See also* MCM, *supra* note 26, R.C.M. 103(9) discussion (noting that "'time of war' as used in Article 106 may be narrower than in other punitive articles, at least in its application to civilians.") Along with jurisdiction over civilians, several other MCM provisions are affected by "time of war." Under Article 43, the statute of limitations for several offenses is affected. Desertion (art. 85), disobedience of an officer (art. 90), and misbehavior of a sentinel (art. 113) become capital offenses. Three offenses exist only during time of war: Improper use of countersign (art 101), misconduct as a prisoner (art. 105), and Spying (art. 106). "Time of war" can also be used as an aggravating factor for sentencing in other articles.

120 United States v. Castillo, 34 M.J. 1160, 1168 (N.M.C.M.R. 1992); *see also* Message, Headquarters, Dep't. of Army, DAJA-CL, subject: Time of War Under the UCMJ and MCM (081900Z Feb 91) ("For purposes of the UCMJ and the MCM, Operation Desert Storm, in and of itself, does not warrant a finding that time of war exists . . . .").

121 *See* DEP'T OF ARMY, PAMPHLET 27-161-2, INTERNATIONAL LAW, Vol. I, pg. 16-25 (Oct. 1962).

122 U.N. CHARTER art. 1.

123 S.C. Res. 940, U.N. SCOR, 3413th mtg., U.N. Doc. S/RES/940 (1994) (authorizing States to "form a multinational force" and "to use all necessary means" to return the "legitimately elected President" to Haiti); S.C. Res. 678, U.N. SCOR, 2963rd mtg., U.N. Doc. S/RES/678 (1990) (authorizing member states to "use all necessary means . . . to restore international peace and security in the area").

The days of a court taking judicial notice of the fact that the United States is "at war" are over.[124] Operations other than war and the delicacies of politics and diplomacy, particularly under the UN, preclude formal declarations of war and restrain the President in his ability to recognize a "time of war."

Consequently, any jurisdictional provisions that apply only in "time of war" are obsolete.

3. Article 2(a)(12)--There is no record that the military has ever asserted jurisdiction over "persons within an area leased by or otherwise reserved or acquired for the use of the United States which is . . . outside the United States . . ." If the military tries to use this article to court-martial civilians during peacetime, the *Reid* cases would certainly apply.

On an interesting note, in *United States v. Erdos,* the Fourth Circuit extended federal court jurisdiction over a rented American Embassy compound in the Republic of Equatorial Guinea.[125] Although the language of *Erdos* appears to extend federal court jurisdiction over military installations overseas, there is no record that the military has ever tried to apply the *Erdos* precedent to those installations.

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124 *See In re* Berue, 554 F. Supp. 252 (1944). In *Berue,* the court took "judicial notice of the fact that the United States of America [was] at war with the Axis Powers." *Id.* at 254.

125 474 F.2d 157 (4th Cir.), *cert. denied* 414 U.S. 876 (1973). The court held that 18 U.S.C. § 7, which extends U.S. jurisdiction over "[any] lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof," granted jurisdiction over a United States citizen who was accused of murdering another citizen on embassy grounds.

D. Extraterritorial Jurisdiction Under Federal Law.

As early as 1812, the Supreme Court confirmed that there is no common law criminal jurisdiction in the federal courts.[126] Only the Supreme Court "possesses jurisdiction derived immediately from the constitution."[127] The lower federal courts are created by Congress and they "possess no jurisdiction but what is given them by the power that creates them."[128]

In *United States v. Noriega*[129] the district court set out a two part test for claims of extraterritorial jurisdiction. The court must answer "1) whether the United States has the power to reach the conduct in question under traditional principles of international law; and 2) whether the statutes under which the defendant is charged are intended to have extraterritorial effect."[130]

Under part one of the test, Congress can reach the conduct of United States citizens abroad; the principle of jurisdiction based on nationality is firmly established in American and international law.[131] The question then becomes whether Congress intends to extend federal court jurisdiction over persons who

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126 Hudson v. Goodwin, 10 U.S. (7 Cranch) 32, 33 (1812).
127 *Id.*
128 *Id.*
129 746 F. Supp. 1506 (S.D. Fla. 1990).
130 *Id.* at 1512.
131 *See, e.g.*, Skiriotes v. Florida, 313 U.S. 69, 73 (1941), "The United States is not debarred by any rule of international law from governing the conduct of its own citizens upon the high seas or even in foreign countries when the rights of other nations or their nationals are not infringed." *See also* Lauritzen v. Larsen, 345 U.S. 571 (1953) and *Noriega*, 746 F. Supp. at 1512, n.4, and authorities cited therein.

commit crimes outside United States territory. Congress can extend this jurisdiction either expressly or by implication.[132]

Congress has passed several criminal statutes that apply within the "special maritime and territorial jurisdiction of the United States."[133] These statutes cover most common felonies such as assault, theft, robbery, murder, and manslaughter. However, they only apply on the high seas or other "waters within the admiralty and maritime jurisdiction of the United States," on "lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof," on federal lands within the United States, in U.S. aircraft flying over the seas, and in spacecraft.[134]

Many attorneys are surprised to find that the United States cannot generally try citizens for felonies they commit on foreign territory. For confirmation, one need only look back to the public outcry and related writings after My Lai, when several ex-servicemen were not prosecuted for the murders of Vietnamese civilians because no United States court had jurisdiction.[135]

As the law stands, if a United States national cannot be tried by the foreign country where he commits the crime, he "may escape punishment altogether."[136]

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132 United States v. Bowman, 260 U.S. 94 (1922).

133 18 U.S.C.A. § 7 (West 1994).

134 *Id.*

135 *See generally* Everett, *Crime Without Punishment, supra* note 21; Note: *Jurisdictional Problems Related to the Prosecution of Former Servicemen for Violations of the Law of War*, 56 VA. L. REV. 947 (1970); *Cf.* Jordan Paust, *After My Lai: The Case for War Crime Jurisdiction Over Civilians in Federal District Courts*, 50 TEX. L. REV. 6 (1971). Paust argues that a "federal district court may apply the international law of war under existing statutes to trials of civilians."

136 Toth v. Quarles, 350 U.S. 11, 20 (1955).

When Justice Black acknowledged this fact in 1955 in *Toth v. Quarles*, he also noted that jurisdiction was lacking "only because Congress has not seen fit to subject them to trial in federal district courts."[137]

Some statutes have express or implied extraterritorial application through the theory of long-arm jurisdiction. For these offenses, it is the locus of the *effect* of the crime and not where the crime originated that matters. The Supreme Court recognized this theory as early as 1804.[138]

Unfortunately, most common felonies are crimes against persons that only "affect the peace and good order of the community" where they are committed.[139] According to the Supreme Court, if Congress wants statutes outlawing common felonies to have extraterritorial application, "it is natural for Congress to say so in the statute."[140]

E. Efforts to Extend Jurisdiction over Civilians

1. Extending Federal Court Jurisdiction--Since 1962, legislators have repeatedly introduced bills to extend jurisdiction over civilians and ex-service

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137 *Id.* at 21.

138 Church v. Hubbart, 6 U.S. (2 Cranch) 187 (1804). Perhaps the most famous recent application of long arm jurisdiction was seen when the U.S. tried Panamanian General Manuel Noriega in federal court for an "international conspiracy to import cocaine . . . into the United States." United States v. Noriega, 746 F. Supp. 1506, 1510 (1990).

139 United States v. Bowman, 260 U.S. 94, 98 (1922).

140 *Id.* Congress has passed some criminal statutes that have extraterritorial effect, but they tend to be limited in scope. *See, e.g.*, 18 U.S.C.S. § 1116 (Law. Co-op. 1994) (murder of internationally protected persons), and 18 U.S.C.S. § 2331 (Law. Co-op. 1994) (international terrorism); 18 U.S.C.A. § 7 (West 1994) (special maritime and territorial jurisdiction).

members,[141] the military has conducted lengthy studies,[142] and legal scholars have written numerous articles addressing this jurisdictional void.[143] However, the void remains unfilled.

In 1995, legislators introduced three bills to extend federal court jurisdiction over service members and civilians serving with or accompanying the military outside the United States. Each of these bills would give the military the authority to arrest civilians for any of the "special maritime and territorial jurisdiction" offenses and to turn those civilians over to the United States or to the host nation for trial.[144]

Even if Congress passes any of these bills, the United States would still face many practical problems in federal court. A federal court subpoena would not reach foreign witnesses and evidence, and the United States would have to use extradition treaties, or other means, to return the offenders to the United States for trial.[145]

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141 *See* bills cited *supra,* note 2.

142 *See, e.g.*, Audit Report, Dep't of Defense Office of the Inspector General, Report 91-105, subject: Civilian Contractor Overseas Support During Hostilities (June 26, 1991); E.A. Gates & Gary V. Casida, Report to the Judge Advocate General by the Wartime Legislation Team (Sept. 1983) (unpublished report, on file with The Judge Advocate General's School, U.S. Army, Charlottesville, Va.) [hereinafter WALT Report].

143 *See* sources cited *supra* note 21. *See also* Paust, *supra* note 135; Note: *Jurisdictional Problems Related to the Prosecution of Former Servicemen for Violations of the Law of War*, *supra* note 135.

144 S. 74, 104th Cong., 1st Sess. (1995); S. 288, 104th Cong., 1st Sess. (1995); H.R. 808, 104th Cong., 1st Sess. (1995).

145 *See infra* notes 318-327; 333-338 and accompanying text.

2. Extending Court-Martial Jurisdiction--In 1982, The Judge Advocate General of the Army established the Wartime Legislation Team to study the application of military law during combat operations.[146] For twelve months, the team conducted an extensive review of military justice[147] and made various recommendations, including several to extend court-martial jurisdiction over civilians and ex-soldiers.[148] None of these jurisdictional suggestions became law.

Currently, the military is proposing legislation to change the "in time of war" language in UCMJ Article 2(a)(10).[149] This change would extend court-martial jurisdiction over "persons serving with or accompanying an armed force in the field" during a time of "armed conflict." As proposed, "armed conflict" is defined as military operations "against an enemy" or "against an organized opposing foreign armed force regardless of whether or not a war or national emergency has been declared by the President of the United States or the Congress . . . ."[150]

This proposed change is an attempt to bypass the Court of Appeals for the Armed Forces's holding in *Averette* that the Vietnam conflict was not a "time of war" for jurisdictional purposes.[151] Although the change will cover some of the military's recent deployments, it still leaves a jurisdictional gap during most peace operations, humanitarian missions, and other operations other than war where there is no

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146 E. A. Gates and Gary V. Casida, *Report to the Judge Advocate General by the Wartime Legislation Team*, 104 MIL. L. REV. 139 (1984).

147 The full report, with all appendices, is over four inches thick. WALT Report, *supra* note 142.

148 Gates and Casida, *supra* note 146, at 148.

149 *Proposed UCMJ Amendments*, *supra* note 24.

150 *Id.*

151 United States v. Averette, 19 C.M.A. 363, 41 C.M.R. 363 (1970).

"enemy."[152] It also leaves a gap during foreign military buildups such as Operation Desert Shield, where the military deployed 1260 civilians to Saudi Arabia long before the military engaged in military operations "against an enemy" or an "opposing foreign armed force."[153]

3. Extending Tribunal Jurisdiction--When the UN recently established an international tribunal to prosecute violations of international humanitarian law in the former Yugoslavia[154] the subject of using national military tribunals came back into the legal debate.[155] Although the Supreme Court has sanctioned the use of American military tribunals to prosecute citizen civilians,[156] these cases point out that military tribunals "have been constitutionally recognized agencies for meeting many urgent governmental responsibilities *related to war*."[157] Indeed, every

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152 Haiti changed from a military operation "against an enemy" to a peacekeeping operation while personnel were in the air en route to Haiti. *See, e.g., Mission to Haiti; Words of Clinton and His Envoys: A Chance to Restore Democracy*, N.Y. TIMES, Sept. 20, 1994, at A14.

153 There were 799 civilian contractors and 461 Department of the Army civilians deployed on Operation Desert Shield between 1 Nov. 1990 and 15 Jan 1991. Logistics Management Institute, Contractor Support During Operation Desert Shield/Storm, briefing slides, Lieutenant General Mears, 10 May 1993 (on file with Office of the Deputy Chief of Staff for Logistics, Director of Plans and Operations, DALO-PLP, U.S. Army, Pentagon)[hereinafter Contractor Support].

154 *See* Int'l Tribunal for Yugoslavia, *supra* note 11.

155 *See generally* Everett and Silliman, *supra* note 34, and Martins, *supra* note 34. In November 1994, the University of Virginia School of Law Center for National Security Law and the Duke University School of Law Center on Law, Ethics and National Security cosponsored a forum on "Deterring Humanitarian Law Violations: Strengthening Enforcement." One of the panel discussions focused on National Tribunals and Military Commissions as an enforcement mechanism. Panel Discussion, Presenter, Robinson O. Everett, Discussants Lieutenant Colonel Steven Lepper and Major Mark Martins, at The Judge Advocate General's School, Charlottesville, Va. (Nov. 5, 1994).

156 Madsen v. Kinsella, 343 U.S. 341 (1952); *Ex parte* Quirin, 317, U.S. 1 (1942).

157 *Madsen*, 343 U.S. at 346 (emphasis added).

modern Court-sanctioned use of military tribunals and commissions has been during a declared war[158] or military occupation following war.[159]

The power to convene military tribunals stems from the war powers and the international law of war,[160] and those tribunals are authorized to try persons for violations of the law of war.[161] Military tribunals have not been tested during military operations other than war. If they derive their legitimacy from the President's war powers and if they are formed to enforce the law of war, by definition they are subject to the existence of an "enemy" and an "international armed conflict." Without these, arguably there is no international law of war to enforce.[162]

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158 *Quirin*, 317 U.S. at 1 (upholding military commission trial of German saboteurs); *In re* Yamashita, 327 U.S. 1 (1946) (upholding military commission trial of Japanese General for war crimes).

159 *Madsen*, 343 U.S. 341 (upholding trial of military wife by military commission in occupied Germany). The Court noted that the "President has the . . . responsibility . . . of governing any territory occupied by the United States by force of arms." *Id.* at 348.

160 Duncan v. Kahanamoku, 327 U.S. 304 (1946). In *Duncan*, the Court was examining the use of martial law to try U.S. civilians in Hawaii during WWII. In narrowing the issue, the Court recognized the "well-established power of the military to exercise jurisdiction over . . . [persons] charged with violating the laws of war. We are not concerned with the recognized power of the military to try civilians in tribunals established as a part of a temporary military government over occupied enemy territory . . . ." *See also Madsen*, 343 U.S. at 341; *Yamashita*, 327 U.S. at 1; *Quirin*, 317, U.S. at 1.

161 *See* sources cited *Id.* *See also* UCMJ art. 18 (1984) ("courts-martial also have jurisdiction to try any person who *by the law of war* is subject to trial by a military tribunal"(emphasis added)); UCMJ art. 106 (1984) ("Any person who *in time of war* is found . . . acting as a spy . . . shall be tried by a general court-martial or by a military commission . . . ."(emphasis added)).

162 The Geneva Conventions of 1949 apply "to all cases of declared war or of any other armed conflict which may arise between two or more" states. Geneva POW Convention, *supra* note 9, at art. 2; Geneva Civilians Convention, *supra* note 9, at art. 2 (the same language is found in art. 2 of all four conventions).

The military's current operations call for numerous overseas deployments that may not support the use of military tribunals. Nation assistance, peacekeeping, humanitarian assistance, disaster relief, and security assistance are all listed in the Army's operations manual.[163] None of these operations involve "armed conflict" and they do not trigger the international law of war.

It is also unlikely that the U.S. military will soon find itself in a military occupation where it could set up an occupation tribunal.[164] Occupation "presupposes a hostile invasion."[165] The invader then "substitute[s] its own authority for that of the legitimate government in the territory invaded."[166] When a foreign nation invites the United States' military into its territory for peacekeeping, humanitarian assistance, or nation assistance, the United States is not a "hostile invader," nor does it seek to replace the existing government's authority with its own.

Additionally, the cases upholding the use of tribunals over United States citizens not only occurred during declared war or occupation, they also occurred before the Court's decision in *Reid.* Prior to *Reid*, the Court was of the opinion that the Constitution had little extraterritorial application.[167] If the military attempted

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163 FM 100-5, *supra* note 5, Ch. 13; *see also* DEP'T OF ARMY, FIELD MANUAL 100-23, PEACE OPERATIONS (Dec. 1994) [hereinafter FM 100-23].

164 The coalition forces were technically "occupiers" in Iraq during the Persian Gulf conflict. DEP'T OF DEFENSE, FINAL REPORT TO CONGRESS, CONDUCT OF THE PERSIAN GULF WAR 610 (1992). However, the military did not set up any occupation courts or military tribunals. If current events are any indication, future tribunals will be conducted under UN auspices, particularly for UN operations.

165 DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE, para. 355 (July 1956) [hereinafter FM 27-10].

166 *Id.*

167 *See In re* Ross, 140 U.S. 453 (1891).

to try United States citizens by military tribunal today, it is possible that the Court would apply the *Reid* reasoning and overturn the convictions.[168]

Article 18 of the UCMJ also grants courts-martial jurisdiction over "any person who by the law of war is subject to trial by a military tribunal . . . ."[169] The military is more likely to use Article 18 to court-martial a civilian than to go through the process of forming a military tribunal. If the military court-martialed a civilian under Article 18, the military courts could read the "law of war" language in Article 18 to require a congressionally declared war in accordance with *Averette*.[170] To date, Article 18 remains untested.

As the law stands, the military cannot court-martial civilians under Article 2(a)(10) in the absence of a declared war. The military cannot court-martial civilians under Article 2(a)(11) or (12) in peacetime because of the *Reid* line of cases. Military tribunals may be an option, but at best they can only be used during international armed conflict to enforce the law of war.[171] There are few

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168 Constitutionally, tribunals do not have the same legitimacy as courts-martial. Tribunals are formed under the President's authority as Commander in Chief. Courts-martial are formed under Congress's express Article I power to regulate the military *and* conducted pursuant to rules promulgated by the President under his authority as Commander in Chief. Because the President and Congress act together to form courts-martial, courts-martial have greater constitutional validity than tribunals. *See generally* Youngstown Sheet and Tube v. Sawyer, 343 U.S. 579 (1952) (Jackson, J. concurring, at 635-38).

169 UCMJ art. 18 (1984). *See also* UCMJ art. 21 (1984) "The provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals."

170 United States v. Averette, 19 C.M.A. 363, 41 C.M.R. 363, 365 (1970).

171 *Cf.* Everett and Silliman, *supra* note 34, at 510. The authors theorize that tribunals can be used during peacekeeping and peace-enforcement operations. However, the use they advocate is limited to prosecuting foreign nationals. Note

federal laws that reach into foreign territory, and trial in federal court is fraught with practical and legal difficulties.

III. Why is Lack of Jurisdiction a Problem?

A. The International Trend--Obligations to Prosecute.

1. The Geneva Conventions and Protocol I--Each of the Geneva Conventions requires the signatories to the Conventions "to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention . . . ."[172]

Each nation must also search for persons who may have committed grave breaches of the conventions and bring those persons "before its own courts."[173] If a nation prefers, it may allow the person to be tried by another nation. In either event, the intent of the Geneva Conventions is clear: the United States must

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also that "war crimes" is a very narrow class of crimes under the Geneva Conventions. Crimes against United States coalition-forces personnel or friendly host nation personnel do not constitute "war crimes" (e.g., if a U.S. civilian shot a Saudi soldier or Kuwaiti civilian during Operation Desert Storm it would not be a war crime).

[172] Geneva POW Convention, *supra* note 9, at art. 129. The other three Conventions contain identical language. *See* Geneva Civilians Convention, *supra* note 9, at art. 146; Geneva Shipwrecked Convention, *supra* note 9, at Art. 50; and Geneva Wounded Convention, *supra* note 9, at art. 49.

[173] *Id.* (Geneva Conventions at articles cited above). Grave breaches are offenses such as murder, torture, willful assault, depriving POW or civilian of a fair trial, unlawful deportation or transfer of civilians, etc. *See, e.g.*, Geneva POW Convention, *supra* note 9, at art. 130, Geneva Civilians Convention, *supra* note 9, at art. 147.

prosecute or extradite any person who has allegedly committed a grave breach of the Conventions.[174]

Protocol I to the Geneva Conventions also requires military commanders to take action against persons "under their command and *other persons under their control*" who violate the Geneva Conventions or Protocol I.[175]

When the Senate ratified the Geneva Conventions in 1955, the Department of Justice informed the Senators that the requirement to enact legislation "can be met by existing legislation enacted by the Federal Government within its constitutional powers."[176] The powers listed were the power to "define and punish . . . offenses against the law of nations,"[177] and the power "to make rules for the government and regulation of the land and naval forces."[178]

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174 *Id. See also* PICTET, COMMENTARY, IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR, INTERNATIONAL COMMITTEE OF THE RED CROSS, GENEVA 590-594 (1958); "Most national laws and international treaties . . . refuse the extradition of accused who are nationals of the State detaining them. In such cases Article 146 clearly implies that the State detaining the accused person must bring him before its own courts." PICTET, at 593.

175 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, *opened for signature* Dec. 12, 1977, art. 87, 16 I.L.M. 1391, 1125 U.N.T.S., (emphasis added) [hereinafter Protocol I], *reprinted in* DEP'T OF ARMY, PAMPHLET 27-1-1, PROTOCOLS TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 (Sep. 1979). The United States signed Protocol I on December 12, 1977, subject to three understandings (which are not relevant here). The U.S. has not yet ratified Protocol I. In 1993, the U.S. promised to review the decision not to ratify Protocol I. A review is ongoing. Int'l Law Div. Note, *Law of War Treaty Developments*, ARMY LAW., Aug. 1994, at 57.

176 REPORT OF THE COMMITTEE ON FOREIGN RELATIONS, GENEVA CONVENTIONS FOR THE PROTECTION OF WAR VICTIMS, S. EXEC. REP. NO. 9, 84th Cong., 1st Sess. at 27 (1955).

177 U.S. CONST., art. I, § 8, cl. 10.

178 U.S. CONST., art. I, § 8, cl. 14.

Presumably, the Department of Justice was relying on the Uniform Code of Military Justice to fulfill the United States obligations under the Geneva Conventions. After all, in 1955 the military could court-martial civilians accompanying the forces, and the UCMJ does criminalize most, if not all, of the Geneva Convention grave breaches.[179] Currently, the *Reid* cases and *Averette*[180] have foreclosed most courts-martial of civilians in the absence of a declared war. Furthermore, without a declared war, *Reid* and *Averette* may prevent the military from using military tribunals or courts-martial to prosecute United States civilians for war crimes as provided in UCMJ Article 18.

The United States takes the position that civilians accompanying its armed force receive protection under the Geneva Conventions as prisoners of war,[181] and commanders are instructed to provide those civilians with Geneva Convention

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179 *C.f.* HOWARD S. LEVIE, TERRORISM IN WAR--THE LAW OF WAR CRIMES (1993). "One wonders what presently extant provision of Federal criminal law provides for punishing a person who is charged with 'compelling a prisoner of war to serve in the forces of a hostile Power, or willfully depriving a prisoner of war of the rights of fair and regular trial' . . . ." *Id.* at 237.

180 United States v. Averette, 19 C.M.A. 363, 41 C.M.R. 363 (1970) (holding that UCMJ art. 2 "time of war" jurisdiction requires congressionally declared war).

181 U.S. ARMY MATERIEL COMMAND, AMC CIVILIAN DEPLOYMENT GUIDE 41, March 1994 [hereinafter AMC CIVILIAN DEPLOYMENT GUIDE]. This position is supported by the language in art. 4, para. A(4) of the Geneva POW Convention, *supra* note 9, which states that "[p]ersons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors [etc.] . . .[who] have received authorization from the armed forces which they accompany" are treated as POWs if captured. The paragraph goes on to require that they be issued a Geneva ID card. *See also* Stephen R. Sarnoski, *The Status Under International Law of Civilian Persons Serving with or Accompanying Armed Forces in the Field*, ARMY LAW., Dec. 1994, at 29; Memorandum, Office of the Judge Advocate General, DAJA-KL, to Deputy Chief of Staff for Logistics, subject: Contractor Personnel in Contingency Operations, para. 1b (25 Mar. 1992).

identification cards.[182] Consequently, the United States could find itself in an embarrassing international incident: demanding Geneva Convention protections for civilians, while at the same time, not taking the appropriate steps to ensure that it can comply with the Conventions' requirements with respect to controlling these same civilians. Granted, the Geneva Conventions allow the United States to turn the offenders over to a third signatory State for trial.[183] However, the problem of choosing another "appropriate" country could create an international incident of its own.

2. Other International Obligations to Prosecute--Recent world events are accelerating the pace of UN deployments. Multinational deployments with a multitude of missions are the order of the day. As the UN and the world community move to bring order to troubled nations we see a corresponding trend to bring the law and criminal responsibility to transgressing individuals.

This section outlines some of the international agreements that seek to increase individual responsibility. Each agreement calls for nation-states to prosecute transgressors or to turn them over to a party who will prosecute. Each agreement or proposal is more far-reaching than the last.

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182 DEP'T OF DEFENSE DIRECTIVE 1404.10, EMERGENCY-ESSENTIAL (E-E) DoD U.S. CITIZEN CIVILIAN EMPLOYEES, para. D3, April 10, 1992 [hereinafter DoD DIR. 1404.10].

183 *See, e.g.* Geneva POW Convention, *supra* note 9, at art. 129. *See also* LEVIE, *supra* note 179. When the International Committee of the Red Cross inquired about the United States ability to prosecute violators, the American Red Cross answered that "in the unlikely event that a person might not be punishable . . . because of a lack of jurisdiction . . . it is the U.S. Government's opinion that such person could be turned over to another [nation] . . . ." *Id.* at 237.

a. Internationally Protected Persons--The Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons is a multilateral agreement from 1973 that provides for the protection of heads of state, ministers of foreign affairs, and diplomatic personnel.[184] Under its terms, States must enact legislation to criminalize any attack or threat on protected persons or on their "official premises," "private accommodation" or "means of transport."[185]

States must not only provide for jurisdiction over these offenses when they are committed on the State's territory, they must also provide for jurisdiction "when the alleged offender is a national of that State."[186] In several other provisions, the agreement requires States to either prosecute the offenders "without exception whatsoever and without undue delay" or extradite them to another State for prosecution.[187]

In accordance with the agreement, Congress criminalized attacks on internationally protected persons. Uncharacter-istically, Congress provided for jurisdiction over any person "present within the United States, irrespective of the place where the offense was committed or the nationality of the victim or the alleged offender."[188] Thus, we see that Congress appreciates its ability to exercise extraterritorial jurisdiction in accordance with its treaty obligations.

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184 Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, *opened for signature* Dec. 14, 1973, 28 U.S.T. 1975, art. 1. (entered into force 1977; ratified by the United States 1976).

185 *Id.* at art. 2.

186 *Id.* at art. 3.

187 *Id.* at art. 7. *See also Id.* at art 6.

188 18 U.S.C.S. § 1116 (Law. Co-op. 1994).

b. Protection of UN Peacekeepers--In December 1994, the UN adopted the Convention on the Safety of United Nations and Associated Personnel, and opened it for signature.[189] The Convention addresses many of the peacekeeping issues that fall outside of the customary law of war and the Geneva Conventions. For example, it addresses the status of captured UN peacekeeping personnel,[190] and crimes committed against those personnel.[191]

The Convention requires every signatory state to criminalize certain offenses against UN peacekeepers, such as murder, assault, and kidnapping.[192] States must also establish jurisdiction over their nationals who commit any of the listed offenses.[193] Any state that fails to establish or exercise its jurisdiction must extradite the alleged offender to a state that has jurisdiction to try the offender.[194]

The United States signed the Peacekeepers Convention in December 1994.[195] However, the President will not present it to the Senate for ratification until the executive branch completes its article-by-article analysis and drafts implementing legislation.[196]

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189 UN Protection of Peacekeepers Convention, *supra* note 9.

190 *Id.* at art. 8.

191 *Id.* at art. 9.

192 *Id.*

193 *Id.* at art. 10, para. 4.

194 *Id. See also Id.* at art. 15: "To the extent that the crimes set out in article 9 are not extraditable offences in any extradition treaty existing between States Parties, they shall be deemed to be included as such therein."

195 *See* U.S. Dep't of State, *Dep't of State Dispatch, Treaty Actions*, vol. 6, no. 7, (Feb. 13, 1995) *available in* LEXIS, Nexis Library, Current News File (indicating that the U.S. signed the Convention on Dec. 19, 1994).

196 Telephone Interview with Lieutenant Colonel Steven J. Lepper, Deputy Legal Counsel to the Chairman of the Joint Chiefs of Staff (Mar. 22, 1995).

c. *International Tribunal for Yugoslavia*--In 1993, the UN formed an international tribunal "for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia."[197]

The tribunal has the power to prosecute persons for grave breaches of the Geneva Conventions;[198] for violations of the customary laws of war; and for genocide and crimes against humanity.[199] Collectively, these powers reach a full range of crimes, to include murder, rape, aggravated assault, destruction of property, and plunder of public or private property.[200]

The Statute of the International Tribunal provides for concurrent national and international jurisdiction and for the application of double jeopardy principles.[201] However, the statute explicitly provides for the tribunal to have "primacy over national courts."[202] The procedural rules instruct the prosecutor to request jurisdiction from a national court if it appears that the proceedings are not impartial, if the investigation or proceedings are "designed to shield the accused from international criminal responsibility," or if a nation is not "diligently" prosecuting the case.[203]

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197 Int'l Tribunal for Yugoslavia, *supra* note 11.

198 For a discussion of grave breaches, see *supra* note 173.

199 Int'l Tribunal for Yugoslavia, *supra* note 11, at 32 I.L.M. 1159, 1192-1194 [all subsequent cites to I.L.M. pagination].

200 *Id.*

201 *Id.* at arts. 9 & 10, pg. 1994-95.

202 *Id.* at art. 9, pg. 1194. The tribunal is authorized to request primary jurisdiction,(art. 9) and states must transfer an accused to the tribunal upon its request (art. 29).

203 *International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991: Rules of Procedure and Evidence*, Rule 9,

Obviously, if a nation cannot try an offender because that nation lacks jurisdiction, the tribunal will request that the offender be surrendered to its jurisdiction. The tribunal has no mechanism to force the surrender; however, Rule 11 instructs the tribunal to report any denial to the UN Security Council.[204]

There is no way to predict how Congress, the President, or the American public would react to the possibility of turning a United States citizen over to an international tribunal. The response would probably depend on the facts of the offense. If the offense is a heinous crime without any apparent justification, perhaps there will be little concern. If the facts are more controversial, the response could be quite different. For example, a murder charge could turn on a disputed claim of self-defense, on an interpretation of the rules of engagement, or on a claim of superior orders.

In either case, the specter of the United States being "forced" to surrender a portion of its sovereign rights to an international tribunal will not sit well on the American psyche. When the cause of that surrender is a simple failure to pass appropriate legislation, the prospect is even more unsettling.

d. Future International Tribunals--All indications are that international tribunals will continue to play a significant and ever increasing role in international relations. At the same time the UN formed the International Tribunal for the former Yugoslavia, it was forming at least two other tribunals: the

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U.N. Doc. IT/32 (1994), reprinted in 33 I.L.M. 484 (1994) (The rules were adopted February 11, 1994 and entered into force March 14, 1994.)

204 *Id.* Rule 11.

International Tribunal for Rwanda, and a standing International Criminal Tribunal.

The UN Security Council established the International Tribunal for Rwanda in November 1994.[205] While the Rwanda tribunal is very similar to the tribunal for the former Yugoslavia, it has the additional mandate to prosecute any "serious violations" of common Article 3 of the Geneva Conventions.[206] The Rwandan tribunal has approximately the same jurisdictional provisions as the tribunal for Yugoslavia.[207]

The intent of the Rwandan tribunal statute is clear. No person should escape punishment for criminal acts. With the Rwanda tribunal, we also see the added dimension of enforcement of common Article 3 of the Geneva Conventions; a confirmation of the trend for ever increasing criminal responsibility, even in non-international conflicts.

The UN is also working on an international, standing tribunal. The prospect of forming a standing international criminal tribunal has been an issue since 1945;

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205 S.C. Res 955, SCOR, 3453rd mtg., U.N. Doc. S/Res/955 (1994); *reprinted in United Nations: Security Council Resolution 955 (1994) Establishing the International Tribunal for Rwanda*, 33 I.L.M. 1598, 1600 (1994) [hereinafter Int'l Tribunal for Rwanda]. The statute governing the tribunal is annexed to the Security Council Resolution.

206 *Id.* at art. 4. (The provisions of Article 3 are common to all four Geneva Conventions of 1949; they set basic humanitarian standards. Common article 3 applies "[i]n the case of armed conflict not of an international character . . . ." *See, e.g.*, Geneva Civilians Convention, *supra* note 9, at art. 3.

207 *See* Int'l Tribunal for Rwanda, *supra* note 205, at art. 5-9.

however, the process was stalled by Cold War politics.[208] Now that the Cold War has ended, the UN is again pushing for a standing international tribunal.

Along with the draft statute for the International Criminal Tribunal, the UN International Law Commission drafted a Code of Crimes Against the Peace and Security of Mankind.[209] Under the draft code, if an alleged perpetrator is found in a State, that State "shall either try or extradite him."[210] For extradition, a State "shall give special consideration" to the State where the crime was committed.[211]

There are those, no doubt, who think the United States should subject its citizens to these international tribunals if the United States expects other nations to do so. This article does not take a stand on the political wisdom of that argument. However, the United States should be in a position to *make that decision* based on the facts of the case.

Unless Congress passes legislation to give the United States jurisdiction over its citizens, the United States has only two options: turn those citizens over to an international tribunal, or let then escape punishment altogether.[212] With these

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208 James Crawford, *The ILC's Draft Statute for an International Criminal Tribunal*, 88 AM. J. INT'L. L. 140, 141 (1994).

209 *Report of the International Law Commission*, 43rd. Sess., 29 April-19 July 1991, 46th Sess., Supp. (No. 10), U.N. Doc. A/46/10, *reprinted in* COMMENTARIES ON THE INTERNATIONAL LAW COMMISSION'S 1991 DRAFT CODE OF CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND (M. Cherif Bassiouni ed., 1993).

210 *Id.* at art. 6.

211 *Id.*

212 The Geneva Conventions, *supra* note 9 also allow the United States to turn those individuals over to a third country for prosecution of violations of the Conventions. *See, e.g.*, Geneva Civilians Convention, *supra* note 9, at art. 146 (the remaining three Conventions have similar provisions).

options, world opinion could effectively force the United States into accepting the tribunal's jurisdiction, regardless of the circumstances of the alleged offense.

B. Who are the Civilians Accompanying the Force?

There are at least three types of civilians accompanying the armed forces: (1) family members; (2) civilians hired directly by the military, and (3) civilians who are providing services pursuant to a contract with the military.[213]

1. *Family Members*--During peacetime, family members accompany the armed forces in numerous countries throughout the world, to include Germany, Italy, Turkey, England, Korea, Japan, and Panama. However, as the United States reduces the number of troops stationed overseas, the number of family members decreases accordingly.[214]

The *Reid* cases closed the door to court-martial jurisdiction over family members during peacetime.[215] The United States could extend federal court jurisdiction over family members overseas; however, despite repeated attempts, Congress has not passed appropriate legislation.[216]

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213 There are other non-governmental civilians such as reporters, and relief and aid society personnel who follow, or even precede, military deployments. However, a discussion of their role and place during modern deployments is beyond the scope of this article. For a discussion regarding the military's ability to control reporters during deployments, see Nation Magazine v. Dep't of Defense, 762 F. Supp. 1558 (S.D.N.Y. 1991) (court discusses, without deciding, military's ability to limit press access to the battlefield).

214 From 1989 to 1996, the Army will decrease its troops in Europe from 213,000 to 65,000 personnel. PROJECTING POWER, *supra* note 5, at 7.

215 *See* Reid v. Covert, 354 U.S. 1 (1957); Kinsella v. Singleton, 361 U.S. 234 (1960).

216 *See* bills cited *supra* note 2.

2. *Employees and Contractors*--The Army has two types of civilians employees accompanying the force: (1) Department of the Army Civilians (DACs), whom the Army hires directly, and (2) contractor personnel, who work for a company that has contracted with the government to provide services. These civilians are at virtually every military post overseas, where they perform a variety of tasks from maintaining highly technical weapons systems to writing software.

During Operation Desert Shield, the military deployed 800 contractor personnel and 450 DACs to the Persian Gulf.[217] During Desert Storm these numbers increased to 950 contractor personnel and 750 DACs.[218] Thirty-four contractor personnel even crossed the Iraqi border during the ground offensive.[219] Contractors maintained highly technical weapons systems such as Apache helicopters, Bradley Fighting Vehicles, Abrams tanks, laser target designators, multiple launch rocket systems, and Patriot missiles.[220]

Department of the Army Civilians also repaired military equipment, weapons, and communications systems. In addition, they performed vital logistics missions. Army civilians "sped up the process of getting parts and other support from 60 logistics agencies at Army installations worldwide."[221]

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217 Contractor Support, *supra* note 153.
218 *Id.*
219 *Id.*
220 *Id.*
221 Garcia, *supra* note 7, at 10.

When the military again deployed troops to the Persian Gulf in the fall of 1994 for Operation Vigilant Warrior, at least 160 DACs deployed with the troops.[222] During that same time, nearly 100 DACs deployed to Haiti with the United States military.[223]

In *McElroy* and *Grisham*, the Supreme Court decided that for jurisdictional purposes civilians employees were the same as family members; during peacetime they could not be tried by court-martial.[224] Then, in 1970, the military court held that UCMJ Article 2 "time of war" jurisdiction only applies if Congress declares war.[225] As with family members, Congress can vest federal courts with jurisdiction over these civilians. Congress and the President could also exercise their constitutional war powers to bring civilians deployed on military operations under court-martial jurisdiction.

C. Changes in American Military Doctrine.

The past five years have brought great changes to the American military. The force is smaller. It tends to be stationed in the United States, and then deployed where it is needed. Deployments have increased in both number and variety. In short, numbers, force structure, and mission requirements have all

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222 Telephone Interview with Major Daniel M. Wiley, Office of the Deputy Chief of Staff for Personnel, Headquarters, Army Materiel Command (Mar. 13, 1995).

223 *Id.*

224 McElroy v. Gualiardo, 361 U.S. 281 (1960); Grisham v. Hagan, 361 U.S. 278 (1960).

225 United States v. Averette, 19 C.M.A.363, 41 C.M.R. 363 (1970) (interpreting UCMJ art. 2(a)(10) (1984), which states that "[i]n time of war, persons serving with or accompanying an armed force in the field" are subject to court-martial).

changed. However, the extraterritorial jurisdiction debate is much the same: focused on traditional armed conflicts or large overseas military bases.

1. *A Smaller, U.S. Based Military*--In 1989, the Army had 770,000 active duty soldiers and 403,000 civilian employees.[226] By 1995 those numbers were down to 510,000 and 270,000, respectively.[227] The Army expects to reach its final downsizing in 1996, with 495,000 soldiers.[228] Civilians are expected to reach their final downsizing in 2001, with 233,000 personnel.[229]

Much of this force reduction occurred in Europe. From a Cold War high of 858 installations[230] and 216,000 soldiers[231] in Europe, the Army is moving toward a total of 277 installations[232] and 65,000 soldiers[233] in Europe by 1999.[234] To put it in the Army's terminology, the Army is moving from a large, "forward deployed" Army with almost 32 percent of the force in Europe, to a smaller, "power projection" Army with over 75 percent of the force in the United States.[235] These changes in force size and force location create corresponding changes in the military's need for jurisdiction over civilians accompanying those forces.

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226 PROJECTING POWER, supra note 5, at 7.
227 *Id.*
228 *Id.*
229 *Id.*
230 *Id.*
231 DEPARTMENT OF THE ARMY, ARMY FOCUS 1994--FORCE XXI 9 (1994) [hereinafter ARMY FOCUS 1994].
232 PROJECTING POWER, *supra* note 5, at 8.
233 ARMY FOCUS 1994, *supra* note 231, at 10.
234 PROJECTING POWER, *supra* note 5, at 8.
235 *Id.* at 7.

2. *Force Projection*--Force projection doctrine is the new cornerstone of the military's post Cold War strategy. This section describes force projection doctrine, and the sub-category of force projection logistics--an area manned largely by civilians.

a. *Force Projection Doctrine*--Under the United States Cold War strategy, the military permanently stationed large numbers of military forces overseas,[236] primarily in Europe. As part of that permanent stationing arrangement, American military and civilian personnel are covered by detailed status of forces agreements (SOFAs).[237]

The Army's new doctrine calls for a much smaller overseas presence. Under force projection doctrine, the Army's goal is to move a light brigade from the United States to any country in the world in four days and a light division in twelve days.[238] A light division would put approximately 10,500 soldiers and support personnel in a foreign country in less than two weeks.

These rapid deployments into foreign nations for operations other than war create new twists in the legal status of those forces while they are in a foreign country. Quite simply, SOFAs and military law have not kept pace with current military operations. Without a traditional military operation and without the time

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236 ARMY FOCUS 1994, *supra* note 231, at 9.

237 NATO SOFA, *supra* note 16. Similar agreements are in effect in Korea and Japan.

238 ARMY FOCUS 1994, *supra* note 231, at 10.

to negotiate a SOFA, operational lawyers are literally making it up as they go along.[239]

b. *Force Projection Logistics*--The modern American army consumes a tremendous amount of supplies and services. For example, during the 100-hour ground offensive in Operation Desert Storm, "a single division consumed 2.4 million gallons of fuel transported on 475 5,000-gallon tankers."[240] Clearly, logistics are key to successful force projection. The Army's new Logistic Support Elements were formed to meet this growing logistical need in operations throughout the world.

The concept of Logistic Support Elements (LSEs) goes far beyond just supplying fuel. Logistic Support Elements provide aviation and vehicle repair, missile maintenance, test measurement, and diagnostic equipment. They maintain software systems, provide assistance in science and technology, and provide contracting support.[241]

In early 1994, the Army leadership approved the LSE concept plan.[242] The LSE proposal listed only one major disadvantage: the "ramifications of deploying civilians to a combat area."[243] Under the approved LSE concept, the Army

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239 *See, e.g.*, Brian H. Brady, *The Agreement Relating to a United States Military Training Mission in Saudi Arabia: Extrapolated to Deployed Forces?*, ARMY LAW., Jan. 1995, at 14. *See also* numerous Judge Advocate After Action Reports on file with the Center for Law and Mil. Operations, The Judge Advocate General's School, Charlottesville, Va. [hereinafter CLAMO].

240 FM 100-5, *supra* note 5, at 12-2.

241 Memorandum, Office of the Deputy Chief of Staff for Operations and Plans, DAMO-FDF, to Commander, U.S. Army Materiel Command, subject: Logistics Support Element (LSE) (2 Feb. 1994). This memorandum approved the LSE concept plan and ordered its implementation.

242 *Id.*

243 *Id.*

identified 1,276 personnel to deploy with the LSE as needed.[244] The majority of those personnel are civilians.[245]

Under Department of Defense guidance, the Army must code civilian personnel in "deployable" positions as "emergency essential."[246] As the terminology implies, emergency essential civilians are those civilians who are critical to the military mission.[247] The military must train emergency essential civilians in the law of war and the UCMJ.[248] Before emergency essential civilians deploy with the force the military must issue them appropriate equipment,[249] and a Geneva Convention identification card.[250] When they deploy, they receive danger pay.[251] The theater commander can also decide whether to give them sidearms (and weapons training) for their personal defense.[252]

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244 Jon M. Schandelmeier, *The Logistics Support Element*, ARMY LOGISTICIAN, July-Aug. 1994, at 19; Message, Army Material Command, Operations Support Directorate (101500Z Feb 94), subject: Logistics Support Element (LSE) [hereinafter LSE message].

245 *Id.* *See also* AMC CIVILIAN DEPLOYMENT GUIDE, *supra* note 181, at 7. "When fully deployed, the LSE will have limited depot capability consisting of approximately 1300 personnel, the majority being civilians."

246 LSE Message, *supra* note 244.

247 DoD DIR. 1404.10, *supra* note 182, at para. D1. Civilians are only deployed if they are "specifically required to ensure the success of combat operations or the availability of combat-essential systems."

248 *Id.* at 9h.

249 *Id.* The Directive states civilians should be given "protective equipment." Other references indicate that civilians will be issued chemical defensive equipment (chemical protective masks and protective clothing), and that they may also be issued military uniforms, canteens, ponchos, and other items of military individual equipment. AMC CIVILIAN DEPLOYMENT GUIDE, *supra* note 181, at 27 and App. A.

250 DoD DIR. 1404.10, *supra* note 182, at 9c.

251 *Id.* at 9b.

252 *Id.* at 9h.

Understandably, commanders are reluctant to arm civilians. This reluctance is caused in part by their lack of jurisdiction over these civilians.[253] The Army's civilian deployment handbook states that civilians are not subject to the UCMJ except in a declared war.[254] Rather, they are subject to the "normal administrative disciplinary procedures," such as suspension or dismissal.[255] In other words, if a deployed civilian murders someone with a weapon issued by the United States Army, the only thing the commander can do is suspend him from work and start removal proceedings.[256]

The military could also turn that civilian over to the host nation for prosecution. However, in many recent deployments, that would not be a viable option. In an armed conflict, such as Operation Desert Storm, when civilians crossed the border into Iraq, Iraq became the "host nation." Obviously, the United States will not turn a U.S. citizen over to the enemy for trial.[257] Even in situations where there is no "enemy," such as Haiti and Rwanda, the host nation may not have a functioning court system to conduct a trial.

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253 Telephone interview with Colonel John D. Altenburg Jr., Staff Judge Advocate, XXVIII Airborne Corps and Fort Bragg (Mar. 23, 1995). According to Colonel Altenburg, commanders are also concerned about their ability to verify that civilians are appropriately trained on the weapons and on the rules of engagement.

254 AMC CIVILIAN DEPLOYMENT GUIDE, *supra* note 181, at 37. As discussed, *supra* note 169-171 and accompanying text, UCMJ art. 18 (1984) grants court-martial jurisdiction over "any person who by the law of war is subject to trial by a military tribunal . . . ." Consequently, the AMC CIVILIAN DEPLOYMENT GUIDE may not be entirely accurate--the military may be able to court-martial a civilian in some circumstance short of a declared war.

255 *Id.*

256 *See generally* 5 U.S.C.S. §§ 7511-7514 (Law. Co-op. 1994); 5 C.F.R. § 752.401 et. seq. (1995) (outlining civilian employee removal procedures).

257 There is the possibility of using a military tribunal or a court-martial under UCMJ art. 18 (1984) to try cases that occur during international armed conflict. *See supra* notes 169-171 and accompanying text.

During Operations Desert Shield and Desert Storm, almost 1600 civilians were deployed to Saudi Arabia.[258] While the Saudi's are a friendly host nation with a functioning court system, they operate under Islamic law. Many of the punishments under Islamic law, such as severing of hands and stoning to death, are abhorrent to most Americans. Under Islamic law, if a person is found guilty of murder, the victim's family can demand the murderer's execution.[259]

One need only look back to the recent case of the American youth who was caned in Singapore to get a feel for the reaction of the American public to these types of punishment.[260] A murder or theft trial in an Islamic country during a military deployment could have two added dimensions that the Singapore case was missing: (1) the punishment could be much more cruel and severe, and (2) the punishment would be meted out on a citizen whom the United States sent on an official mission, rather than on a citizen who chose to go to the country for his own purposes.

3. *Operations Other Than War*--Operations other than war create new problems for military lawyers. The Geneva Conventions contain the main body of the law of war. Unfortunately, the Conventions were written in 1949 to regulate the conduct of traditional international armed conflicts.[261]

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258 Garcia, *supra* note 7, at 10.

259 Steven J. Lepper, *A Primer on Foreign Criminal Jurisdiction,* 1994 A. F. L. Rev. 169, 181.

260 *See, e.g., Crime and Punishment: Should America be More Like Singapore?*, NEWSWEEK, Apr. 18, 1994, at 18.

261 Geneva Conventions, *supra* note 9. Under Article 2, the Conventions apply "to all cases of declared war or of any other armed conflict which may arise between two or more" States, and to "all cases of partial or total occupation of the territory" of another State. Under Article 3, basic humanitarian rights are

Current military doctrine lists seven "military operations other than war not involving the use or threat of force:" humanitarian assistance, nation assistance, support to counter drug operations, arms control, support to civil authorities, evacuation of noncombatants, and peacekeeping.[262] By definition, these are not combat operations.[263] Add to these at least six operations other than war that involve "the use or threat of force:" deterrence missions, peace enforcement, counter-terrorism, enforcement of sanctions, support to insurgencies and counterinsurgencies, and evacuation of noncombatants.[264]

An operation other than war can take the form of any of the thirteen operations listed above; it can be a combination of two or more of those operations; or it can be an operation other than war in conjunction with a traditional armed conflict.[265] Thus, a single military "operation" can contain a peace enforcement operation along with a humanitarian assistance operation.[266] For the peace enforcement operation, the Geneva Conventions and the law of war will apply. For the humanitarian assistance operation, the law of war will not apply, and at best, only common article 3 of the Geneva Conventions applies.[267]

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protected during non-international armed conflict, like civil war. (Articles 2 and 3 are identical in all four Conventions.).

262 Joint Chiefs of Staff, Publication 3-07, Joint Doctrine for Military Operations Other than War (1994) [hereinafter Joint Pub. 3-07]. "[T]hese operations by definition do not involve combat . . . ." *Id.* at I-10

263 *Id.* at I-10.

264 *Id.* at I-9

265 *Id.* at I-11. *See also* FM 100-23, *supra* note 163 listing other operations such as preventive diplomacy (deployment to deter violence), observation missions to monitor truces and cease-fires, supervision of protected zones, etc.

266 Joint Pub 3-07, *supra* note 262, at I-11.

267 *See* Geneva Conventions, *supra* note 9, at art. 3 (listing basic humanitarian principles that apply during non-international armed conflicts).

Aside from the issue of when the military is under the "law of war," these composite operations create a multitude of other legal problems; such as the status of the force, rules of engagement, security assistance, and fiscal law distinctions. The operation should not be further complicated by issues of personal jurisdiction over civilians accompanying the force.

If the military has jurisdiction only over civilians accompanying the force during "armed conflict,"[268] jurisdictional distinctions will be based on subtle differences in mission description. For civilians performing combat service support in a theater of mixed operations, the military may not be able to distinguish which mission those civilians are supporting at any given time.

D. *Constraints on the United States Ability to Negotiate New Status of Forces Agreements.*

Force projection and operations other than war affect the types of SOFAs that the military can negotiate. Accordingly, this section focuses on how the lack of jurisdiction over civilians constrains the United States' ability to negotiate new SOFAs; and on how it constrains the United States' ability to maneuver within the bounds of an agreement once it is negotiated.

1. *Foreign Criminal Jurisdiction and Status of Forces Agreements*--In 1812, in the case of the *Schooner Exchange,* Chief Justice Marshall laid out a succinct expression of the general rule of sovereign jurisdiction: "The jurisdiction of the

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268 *See* discussion of proposed change to UCMJ art. 2, *supra* note 149-152 and accompanying text.

nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself."[269]

Over the years, several theories of military jurisdiction have evolved to deal with this general rule that a foreign nation has the right to exercise exclusive jurisdiction within its own borders. Some of these theories are based on reality--when a hostile force enters and captures territory in a nation, that nation is no longer in a position to exercise jurisdiction over that captured territory.[270] Other theories recognize the general rule and deal with its effects through negotiated international agreements.

When U.S. forces enter a foreign country during an armed conflict, the law of war allows the U.S. to apply the "law of the flag." That is, the U.S. force applies its own law to its own personnel.[271] If the U.S. force stays in a country, it becomes an occupying force, and again, the force applies its own laws to its forces and possibly to the territory it occupies.[272] However, if a U.S. force enters a friendly foreign nation, with that nation's consent, the U.S. force is subject to foreign jurisdiction

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269 Schooner Exchange v. M'Fadden, 11 U.S. (7 Cranch) 116, 136 (1812).

270 *See* Coleman v. Tennessee, 97 U.S. 509 (1878). "The fact that war is waged between two countries negatives the possibility of jurisdiction being exercised by the tribunals of the one country over persons engaged in the military service of the other . . . .Aside from this want of jurisdiction, there would be something incongruous and absurd in permitting an officer or soldier of an invading army to be tried by his enemy, whose country he had invaded." *Id.* at 516.

271 *Id. See also* Lepper, *supra* note 259, at 170-71.

272 According to the 1907 Hague Convention, *supra* note 31, at art. 42. "[t]erritory is considered occupied when it is actually placed under the authority of the hostile army." The Geneva Civilians Convention, *supra* note 9, at art. 64, requires the occupying power to keep the laws of the occupied territory in effect if they do not jeopardize the security of the occupying force. *See also* FM 27-10, *supra* note 165, at para. 374. Personnel of the occupying force are not subject to the laws of the occupied territory unless the force consents to the jurisdiction.

unless the U.S. negotiates an agreement with the host nation.[273] These agreements normally take the form of SOFAs.

Status of forces agreements are bi-lateral or multi-lateral international agreements regarding the legal status of the forces while they are in a foreign country. These agreements apply to the military and to civilian members of the force and may also apply to family members accompanying the force.[274]

Whenever possible, the United States negotiates SOFAs with friendly host nations. The United States has detailed, mature agreements in effect for forces

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273 *See* MCM, *supra* note 26, R.C.M. 201(d) discussion. It is interesting to note that in the *Schooner Exchange*, the Court held that under customary international law in 1812, if a friendly force entered the territory of a friendly country, those forces are entitled to a form of sovereign immunity, or "free passage," that "implies a waiver of all jurisdiction over the troops during their passage." *Schooner Exchange*, 11 U.S. at 139-140. However, by 1957, the Supreme Court was citing the *Schooner Exchange* to uphold Japan's jurisdiction over a U.S. soldier, under the theory that a sovereign nation has exclusive jurisdiction within its borders unless it waives that jurisdiction. Wilson v. Girard, 354 U.S. at 529. *See also* Lepper,*supra* note 259, at 170-71.

274 Along with jurisdiction, SOFAs often regulate other matters. Some of the more common provisions provide for duty-free import and export of personal belongings, supplies, and military equipment; waivers of passport and visa requirements; immunity from taxation and tolls; registration and licensing of vehicles and drivers; and procedures for settling damage claims. *See generally* NATO SOFA, *supra* note 16; Agreement Under Article VI of the Treaty of Mutual Cooperation and Security Between the United States of America and Japan, Regarding Facilities and Areas and the Status of United States Armed Forces in Japan with Agreed Minutes, Jan. 19, 1960, 2 U.S.T. 1652, *reprinted in* DA PAM. 27-24, *supra* note 16, at 2-93; Agreement Under Article IV of the Mutual Defense Treaty Between the United States of America and the Republic of Korea, regarding Facilities and Areas and the Status of United States Armed Forces in the Republic of Korea, July 9, 1966, 2 U.S.T. 1677, *reprinted in* DA PAM. 27-24, *supra* note 16, at 2-109 [hereinafter Korean SOFA]; *Comprehensive Review of the Whole Question of Peace-keeping Operations in all Their Aspects - Model status-of-forces agreement for peace-keeping operations*, U.N. GAOR, 45th Sess., Agenda item 76, U.N. Doc. A/45/594 (1990) [hereinafter UN Model SOFA].

stationed in all NATO countries, in Korea, and in Japan.[275] For political or practical reasons, however, the U.S. cannot always negotiate a comprehensive agreement. For example, U.S. troops have been in Saudi Arabia since the 1930s, yet the U.S. still does not have a formal SOFA with the Saudi Arabian government.[276] Consequently, the U.S. resolves status of forces issues in Saudi Arabia by stretching existing small mission agreements and by resorting to custom and negotiation.[277]

2. New SOFAs and New Issues--United States troops increasingly work under United Nations SOFAs[278] or under vague agreements like those in Saudi Arabia.[279] Force projection and operations other than war may also hinder the military's ability to negotiate new agreements.

In many cases the military simply does not have an opportunity to negotiate an agreement before forces are on the ground.[280] In some instances, like Haiti, the

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275 *See* SOFAs cited *Id.*

276 Brady, *supra* note 239, at 14.

277 *See Id.* and authorities cited therein.

278 *See* UN Model SOFA, *supra* note 274. Note, however, that the model SOFA itself has no legally binding effect. It is exactly what its name implies: a model. Most UN SOFAs follow the model very closely. *See, e.g.*, Agreement Between the Government of Bosnia and Herzegovina and the United Nations on the Status of the United Nations Protection Force in Bosnia and Herzegovina (May 15, 1993); Agreement Between the United Nations and the Government of Haiti on the Status of the United Nations Mission in Haiti (Feb. 1995, unsigned draft) (both SOFAs on file with the CLAMO).

279 *See generally* Brady, *supra* note 239.

280 The SOFA for the multi-national force in Haiti was not signed until December 1994. Forces were on the ground in Haiti in mid-September. *Compare, Mission to Haiti: In Perspective; The G.I.s Are in Haiti: Now for the Hard Part,* N.Y. TIMES, Sept. 20, 1994 at A12; *with,* Agreement Between the Governments Participating in the Multinational Force ("MNF") Authorized Pursuant to Security

United States enters a nation in transition or turmoil and must choose with whom it will negotiate.[281] In other countries, like Somalia, there may not be a government that is capable of concluding an agreement.[282]

Under a mature SOFA, the rules are detailed and settled.[283] With a vague SOFA, or with no SOFA at all, the military needs room for case-by-case negotiation during the operation or deployment.

Many recent SOFAs are patterned on the UN Model SOFA,[284] which is much shorter and less detailed than the NATO SOFA. The UN Model SOFA also relies heavily on the Convention on the Privileges and Immunities of the United Nations.[285] Essentially, the Convention grants diplomatic immunity to UN

Council Resolution 940 and the Republic of Haiti on the Status of MNF Forces in Haiti (Dec. 8, 1994) [hereinafter Haiti MNF SOFA](on file with the CLAMO).

281 The choice of a negotiating partner is often a function of America's reason for entering the country. For instance, in Haiti the United States chose to negotiate with President Aristide because it was the United States position that President Aristide represented the government of Haiti and the coalition forces were entering Haiti to restore the legitimate government.

282 In countries like Haiti and Somalia, the realities of the situation on the ground may make some status of forces concerns irrelevant; it is hard to be concerned about who will have jurisdiction when the host nation does not have a functioning police force or court system.

283 For example, under the NATO SOFA there are three types of jurisdiction: (1) exclusive host nation jurisdiction over acts that are punishable only by the laws of the host nation, (2) exclusive sending state jurisdiction over offenses that are punishable only by the laws of the sending state, and (3) concurrent jurisdiction for all offenses that are punishable by the laws of both states. The NATO SOFA then lays out detailed rules for determining which nation has the primary right to exercise jurisdiction over the concurrent offenses. NATO SOFA, *supra* note 16, at art VII. The Japanese and Korean SOFAs have similar provisions.

284 *See, e.g.*, Haiti MNF SOFA, *supra* note 280.

285 Convention on the Privileges and Immunities of the United Nations, Feb. 13, 1946, 21 U.S.T. 1418, 1 U.N.T.S. 15 and 90 U.N.T.S. 327 (corrigendum to

delegates, deputy delegates, advisers, technical experts, and secretaries of delegations,"[286] and to "experts . . . performing missions for the United Nations."[287]

The UN Model SOFA gives many members of the United Nations peace-keeping operation this "diplomatic immunity."[288] However, personnel who are "assigned to the military component of the United Nations peace-keeping operation" are not covered by the Convention on Privileges and Immunities.[289] Therefore, when the United States sends military and civilian personnel on UN peacekeeping missions, they are covered only by the terms of the UN SOFA.

The criminal jurisdiction provisions of the Model SOFA are strikingly simple when compared to the scheme laid out in the NATO SOFA. Military personnel "are subject to the exclusive jurisdiction" of their State.[290] If a civilian is accused of a crime, the UN Special Representative or UN Commander "shall conduct any necessary . . . inquiry and then agree with the Government whether or not criminal proceedings should be instituted."[291] If they cannot reach an agreement, the issue is "submitted to a tribunal of three arbitrators."[292]

The simplicity of the Model SOFA's jurisdictional scheme certainly seems appealing. For military personnel, it is the best the military could ask for.

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vol. 1) (ratified by the United States in 1970)[hereinafter Convention on Privileges and Immunities].

286 *Id.* at § 16.
287 *Id.* at § 22.
288 UN Model SOFA, *supra* note 274, at para. 4.
289 Convention on Privileges and Immuniteies, *supra* note 285, at § 27.
290 *Id.* at § 47(b).
291 *Id.* at § 47(a).
292 *Id.* at § 47(a) & § 53.

However, because the U.S. does not have jurisdiction over its civilians, the UN SOFA leaves the U.S. only two choices: either (1) turn the civilian over to the host nation for prosecution, or (2) let the offender go unpunished. If the United States cannot reach an agreement with the host nation and finds itself in arbitration over jurisdiction, it is in the weakest possible bargaining position. The United States can only offer administrative sanctions against the civilian.

A case from Saudi Arabia serves to illustrate the weakness of America's bargaining position. In 1991, Mr. Sands, a civilian employed by the U.S. Army, was suspected of murdering his wife on a military installation in Saudi Arabia.[293] The agreements in effect in Saudi Arabia gave primary jurisdiction over U.S. civilians to the Saudi government.[294] However, the United States negotiated with the Saudi government for jurisdiction because of concerns over whether Sands would receive a fair trial (and concerns over the possible punishments) under Islamic law.[295]

Normally, the United States would have no jurisdiction over Sands and therefore little negotiating power. With Sands, however, the United States had unique circumstances: Sands was retired from the Army and thereby subject to court-martial jurisdiction.[296] Without some fortuitous circumstance that allows trial by court-martial, such as that in the *Sands* case, the United States could not

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293 Sands v. Colby, 35 M.J. 620 (A.C.M.R. 1992).

294 *See* Lepper, *supra* note 259, at 181; Brady, *supra* note 239, at 18.

295 *See* Lepper, *supra* note 259, at 181 and sources cited therein; *Sands*, 35 M.J. at 620.

296 UCMJ art. 2(a)(4) (1984) provides jurisdiction over "[r]etired members of a regular component of the armed forces who are entitled to pay." The Army court relied on United States v. Overton, 24 M.J. 309 (C.M.A.), *cert. denied* 484 U.S. 976 (1987), which upheld UCMJ art 2 (a)(2), to extend court-martial jurisdiction over a retired Marine who had transferred to the Marine Corps Reserves.

promise to prosecute a civilian. The United States would then be, in effect, negotiating for immunity from prosecution.

A world power known for its human rights advances and founded on the principle of the rule of law cannot enter a foreign nation for all the right reasons and then demand immunity for its citizens for all the wrong reasons. If the United States does not pass appropriate legislation, a single civilian incident could give America's enemies a powerful propaganda weapon: the image of American bullies with a double standard is not the image the United States wants to project.

In summary, the United States is taking an increasing number of civilian personnel into operations other than war. These civilians are performing critical functions and cannot be replaced by military personnel. United States policy allows the military to arm these civilians. Some SOFAs call for case-by-case agreement or arbitration over jurisdiction if a civilian commits an offense. Yet, lack of legislation deprives the United States of the ability to exercise jurisdiction over the civilians it deploys.

IV. Analysis of Possible Solutions.

Solutions to the jurisdictional problem can take many forms and fall into several classifications. Solutions can be classified by types of personal jurisdiction. For example, jurisdiction based on nationality would cover every U.S. citizen; jurisdiction over all civilians accompanying the force outside of United States' territory would cover employees, family members, and contractors; and jurisdiction over civilians accompanying the forces during armed conflict or military operations would cover civilians deployed on military operations.

The solutions can also be classified by type of court. For instance, the United States can gain jurisdiction by expanding federal court jurisdiction, or by expanding court-martial jurisdiction.

In addition, individual solutions and classifications can be mixed: a constitutional amendment to allow trial by court-martial; federal court jurisdiction based on nationality; or any multitude of possibilities. However, regardless of the chosen solution, it must meet the Supreme Court's concerns as laid out in the *Reid* cases.[297]

Put simply, the Supreme Court listed four problems in the civilian court-martial cases: (1) no Article III judges, (2) no grand jury indictment, (3) no trial by jury, and (4) no war powers exception for courts-martial during peacetime. A solution can be framed based on the war powers issue alone. Otherwise, the solution must address the first three constitutional issues.

This section addresses the possible solutions by constitutional type: solutions that meet the first three constitutional requirements versus a solution based on constitutional war powers.

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297 Reid v. Covert, 354 U.S. 1 (1957); Kinsella v. Singleton, 361 U.S. 234 (1960); McElroy v. Gualiardo, 361 U.S. 281 (1960); Grisham v. Hagan, 361 U.S. 278 (1960).

A. Federal Court Jurisdiction.

Federal court jurisdiction can reach every United States citizen and national, or Congress can limit that jurisdiction in almost any way it chooses.[298] As a result, Congress can fashion a complete or a partial solution to fill the jurisdictional gaps. In this area, Congress is limited only by its political will and by international law.

At one extreme, Congress can base federal court jurisdiction on nationality.[299] Congress has the power to legislate over American citizens residing abroad,[300] and the Supreme Court has held that a citizen can be required to return to the United States and testify under subpoena.[301] Congress could subject United States' citizens to criminal penalties for violations of all federal laws, or for violations of only particular provisions,[302] regardless of where those violations occurs.[303]

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298 *See Ex parte* McCardle, 74 U.S. (7 Wall.) 506 (1868) (deciding that under Article III, Congress can withdraw a particular class of cases from Supreme Court review). *See also* U.S. CONST, art. III. Except for those cases listed under the Supreme Court's jurisdiction in Article III, Congress has the power to form (or not form) "inferior Courts" and to regulate appellate jurisdiction. *See also* Hudson v. Goodwin, 10 U.S. (7 Cranch) 32, 33 (1812) (confirming that lower federal courts are created by Congress and "possess no jurisdiction but what is given them by the power that creates them").

299 *See* 8 U.S.C.A. § 1101(22) (West 1970) (defining "national of the United States" as a "citizen of the United States, or a person who, though not a citizen of the United States, owes permanent allegiance to the United States.")

300 *See, e.g.*, Skiriotes v. Florida, 313 U.S. 69 (1941) (stating that "[t]he United States is not debarred by any rule of international law from governing the conduct of its own citizens upon the high seas or even in foreign countries when the rights of other nations or their nationals are not infringed." *Id.* at 73.); Cook v. Tait, 265 U.S. 47 (1924) (upholding Congress' power to subject a citizen residing abroad to U.S. income tax).

301 Blackmer v. United States, 234 U.S. 421 (1932).

302 *See, e.g.*, 18 U.S.C.S. § 1116 (Law. Co-op. 1994) and 18 U.S.C.S § 2331 (Law. Co-op. 1994), for examples of statutes extending federal court criminal jurisdiction based on nationality or universality.

1. Advantages of Federal Court Jurisdiction--The greatest advantage to federal court jurisdiction is that it meets all of the Supreme Court's constitutional concerns. Other advantages vary with the scope of the jurisdiction: the more expansive the jurisdiction, the greater the advantage. Jurisdiction based on nationality would completely fill the jurisdictional void. Jurisdiction over all persons accompanying the armed forces would fill the particular void left by the *Reid* cases.

a. Jurisdiction Based on Nationality--Federal court jurisdiction based on nationality provides the most comprehensive solution to the jurisdictional problem. It could cover every U.S. national at all times: civilian employees, family members, contractor personnel, soldiers, reporters, relief society workers, even U.S. tourists.[304] Jurisdiction could not be defeated by a soldier's discharge,[305] or by the end of a civilian's employment relationship. Furthermore, it would meet every present or future international obligation to prosecute.[306]

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303 *See, e.g.*, 18 U.S.C.S. § 1116 (Law. Co-op. 1994) (criminalizing offenses against internationally protected persons "irrespective of the place where the offense was committed or the nationality of the . . . alleged offender.").

304 8 U.S.C.A. § 1101(22) (West 1970) defines "national of the United States" as "a citizen of the United States, or a person who, though not a citizen of the United States, owes permanent allegiance to the United States."

305 *See* Toth v. Quarles, 350 U.S. 11 (1955) (holding that discharged soldiers cannot be court-martialed for crimes committed while on active duty; in dicta, the Court noted that Congress could provide for ex-servicemen to be tried in federal district court).

306 Note, however, that the Geneva Conventions (and many other treaties) are not self-executing; that is, they cannot be enforced without proper legislation to criminalize the grave breaches. Handel v. Artukovic, 601 F. Supp. 1421 (C.D. Cal. 1985). Furthermore, as early as 1812, the Supreme Court held that there was no common law federal jurisdiction for criminal offenses. "The legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the Court that shall have jurisdiction of the offense." United States v. Hudson &

Aside from its comprehensive nature, this solution also has the advantage of evidentiary certainty. The statute would not need a complicated triggering mechanism or a list of factors to determine whether jurisdiction had attached. The United States could prove jurisdiction merely by proving nationality.

This jurisdictional certainty would be a great advantage during SOFA negotiations. It would make the initial SOFA easier to negotiate and draft. In addition, the United States would have an advantage in any later negotiation or arbitration over individual cases.

b. All Civilians Accompanying the Force Overseas--After striking down court-martial jurisdiction over civilians in the *Reid* cases,[307] the Court indicated that Congress could provide for federal courts in the United States to hear the civilian cases.[308] Since 1962, several Senators and Representatives have unsuccessfully introduced bills to extend federal court jurisdiction over civilians accompanying the forces.[309]

This option shares many of the advantages of jurisdiction based on nationality. It covers all classes of civilians accompanying the armed forces overseas, and the prosecution can easily prove the family, employment, or contractual relationship that supports jurisdiction. In addition, Congress can grant federal courts jurisdiction over any crimes committed by personnel while they are

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Goodwin, 10 U.S. (7 Cranch) 32 (1812). *See also* U.S. CONST. art. I, § 9, cl. 3 (prohibition on ex post facto laws).

307 Reid v. Covert, 354 U.S. 1 (1957); Kinsella v. Singleton, 361 U.S. 234 (1960); McElroy v. Gualiardo, 361 U.S. 281 (1960); Grisham v. Hagan, 361 U.S. 278 (1960).

308 *Id.* at 245-46.

309 *See* bills cited *supra* note 2.

accompanying the armed forces. In this way, jurisdiction does not end when the person returns to the United States or severs connections with the military.[310] Federal Court jurisdiction over civilians accompanying the force also meets most of the United States international obligations to prosecute.

Jurisdiction over all civilians accompanying the forces would fit within the existing framework of the NATO SOFA and similar agreements. Like jurisdiction based on nationality, it would put the United States in an excellent negotiating posture for future SOFAs. The United States could negotiate to take jurisdiction over a particular civilian under a UN SOFA or to take jurisdiction in situations like those in the *Sands* case in Saudi Arabia.[311]

2. Disadvantages of Federal Court Jurisdiction--With so many obvious advantages, federal court jurisdiction, of one kind or another, would seem to be the ideal solution. Unfortunately, expansion of federal court jurisdiction also poses several problems of its own. The most practical disadvantage is that despite repeated attempts, Congress has failed to pass even modest legislation to expand federal court jurisdiction to cure the problems caused by the *Reid* cases.[312]

Although jurisdiction based on nationality would provide the most comprehensive solution, given Congress's past reluctance to expand jurisdiction, it

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310 *See* Toth v. Quarles, 350 U.S. 11 (1955). (denying court-martial jurisdiction over discharged soldier accused of murder). It is "wholly within the constitutional power of Congress to . . . provide for federal district court trials of discharged soldiers accused of offenses committed while in the armed services." *Id.* at 21.

311 Sands v. Colby, 35 M.J. 620 (A.C.M.R. 1992). *See supra* notes 293-296 and accompanying text.

312 *See* bills cited *supra* note 2.

is unlikely that Congress's first step would be so revolutionary. Furthermore, such an enormous expansion of jurisdiction would require an equally enormous expansion of resources to effectively exercise that jurisdiction. If Congress does pass legislation, it is more likely that Congress would only expand federal court jurisdiction over civilians accompanying the forces.

Senator Inouye has introduced legislation to extend jurisdiction over civilians accompanying the forces at least four times in the past seven years.[313] His bill would extend federal court jurisdiction over "any person . . . serving as a member of the armed forces outside the United States, or . . . serving with, employed by, or accompanying the armed forces outside of the United States."[314] It would apply to the common felonies that are covered under the "special maritime and territorial jurisdiction of the United States."[315] Every other legislative proposal is similar to Senator Inouye's bill.[316] Each provides for federal court jurisdiction over a limited class of serious offenses; none has passed.

Legislation similar to Senator Inouye's bill would also fail to meet the needs of military good order and discipline. It would not cover offenses such as disobedience of orders[317] and it would put military good order and discipline into

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313 S. 74, 104th Cong., 1st Sess. (1995); S. 129, 104th Cong., 1st Sess. (1993); S. 182, 102d Cong., 1st Sess. (1991); S. 147, 101st Cong., 1st Sess. (1989).

314 S. 74, 104th Cong., 1st Sess. (1995).

315 *Id. See also* 18 U.S.C. § 7 (Law. Co-op. 1994) (defining special maritime and territorial jurisdiction crimes).

316 *See* bills cited *supra* note 2.

317 During the peacekeeping mission in Macedonia, an American civilian employee violated the commander's policy against consuming alcoholic beverages. The employee was sent home early and was given a letter of reprimand. *See* AAR: Task Force Able Sentry, *supra* note 7.

the hands of federal District Attorneys hundreds, perhaps thousands, of miles away.

If Congress does pass legislation to expand federal court jurisdiction, the next issue would be how and where to try the cases. If Congress does not set up Article III courts outside of the United States (even assuming a sovereign nation would allow Article III courts on its soil), the cases would have to be tried in the United States. That simple statement poses two barriers: (1) getting custody of the person, and (2) obtaining the necessary evidence.

a. Custody of the Person and Extradition--Traditionally nations gain custody of persons within the territory of another sovereign by extradition, exercised according to treaty.[318] The United States currently has 104 extradition treaties in effect.[319]

Put simply, if the U.S. requests the return of a fugitive under an extradition treaty, the foreign state determines whether the extradition treaty applies to the particular crime,[320] and whether cause for arrest exists. If so, the fugitive may be

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318 *See generally* GERHARD VON GLAHN, LAW AMONG NATIONS, Ch. 12 (Extradition) (6th ed. 1992); and Alona E. Evans, *Extradition and Rendition: Problems of Choice, in* INTERNATIONAL ASPECTS OF CRIMINAL LAW: ENFORCING UNITED STATES LAW IN THE WORLD COMMUNITY 1 (Richard B. Lillich ed., 1981) [hereinafter INT'L ASPECTS OF CRIM. LAW].

319 18 U.S.C.S. § 3181 (Law. Co-op. 1994).

320 Under the theory of double criminality, an act must be criminal in the country requesting extradition and the country where the accused is found. G. Nicholas Herman, et. al., *Double Criminality and Complex Crimes, in* INTERNATIONAL CRIMINAL LAW: A GUIDE TO U.S. PRACTICE AND PROCEDURE 365 (Ved P. Nanda & M Cherif Bassiouni eds., 1987) [hereinafter INT'L CRIM. LAW: A GUIDE]. In addition, some extradition treaties also contain a limited list of extraditable crimes. *See* VON GLAHN, *supra* note 318, at 285.

turned over to the requesting nation.[321] There are, of course, many other issues relating to extradition.[322]

While extradition is the internationally and legally accepted method of obtaining custody of an alleged wrongdoer, it is not the only means of getting that person into a United States court. Recent cases have established that if the United States obtains custody of a person by acting outside the scope of an established extradition treaty, that fact alone will not defeat the jurisdiction of the federal court.

In *United States v. Alvarez-Machain*,[323] the Supreme Court held that a federal court could try a defendant who was kidnapped and brought to the United States for trial. The Court had stated this principle in prior cases.[324] However, the *Alvarez-Machain* case was different because the Court was faced with a case where United States officials were responsible for the kidnapping.[325]

In essence, the Court was not concerned about how the United States gained custody of the defendant. As long as the extradition treaty itself did not limit the

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321 VON GLAHN, *supra* note 318, at 286-87. *See also* 76 Am. J. Int'l L. 154 (1982) (summarizing modern extradition procedures).

322 *See generally* sources cited *supra* note 318. See also Paul B. Stephan III, *Constitutional Limits on International Rendition of Criminal Suspects, in* INT'L ASPECTS OF CRIM. LAW, *supra* note 318, at 34; and G. Nicholas Herman, et. al., *Double Criminality and Complex Crimes, in* INT'L CRIM. LAW: A GUIDE, *supra* note 320, at 365.

323 112 S. Ct. 2188 (1992).

324 Ker v. Illinois, 119 U.S. 436 (1886).

325 "The District Court concluded that [U.S.] DEA agents were responsible for respondent's abduction, although they were not personally involved in it." *Alvarez-Machain,* 112 S. Ct. at 2190.

jurisdiction of the court in the case of forcible abduction, "the court need not inquire as to how respondent came before it."[326]

In *Alvarez-Machain,* the defendant was a Mexican citizen. The Court has yet to address the issue of a forcible abduction of a United States citizen from a foreign country. It has, however, upheld jurisdiction in a forcible abduction case played out across state lines within the United States. The Court affirmed jurisdiction, despite objections based on due process and possible violations of federal kidnapping laws.[327] Without addressing the specific issue of citizenship, the Court in *Alvarez-Machain* relied in part on the interstate kidnapping case.

Of course, formal extradition is the preferred method of obtaining custody. Yet, custody is only part of the battle. If the U.S. can get the defendant into federal court, it then faces the constitutional and court-made rules of procedure and rules of evidence.

b. *Federal Criminal Procedure*--From the very first stages of a federal prosecution, federal procedural rules pose obstacles to any exercise of extraterritorial jurisdiction. There are no United States Magistrates overseas to issue arrest warrants.[328] If an arrest is made without a warrant, the Supreme

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326 *Id.* at 2193. The Court also rejected the argument that the kidnapping violated customary international law and that the extradition treaty must be interpreted consistent with international law. *Id.* at 2195.

327 Frisbie v. Collins, 342 U.S. 519 (1952).

328 18 U.S.C.S. § 3041 (Law. Co-op. 1994) lists authorized magistrates. Military magistrates are not federal magistrates within the meaning of the statute. *See also* DEP'T OF ARMY REG. 27-10, MILITARY JUSTICE, Ch. 9 (8 Aug. 1994) [hereinafter AR 27-10]. Paragraph 9-1b of the regulation states that "[t]here is no relationship between the Military Magistrate Program and DA's implementation of the Federal Magistrate System to dispose judicially of . . . minor offenses

Court requires a magistrate's hearing within forty-eight hours.[329] At this hearing, the defendant must be informed of his right to retain counsel, and counsel must be appointed if the defendant is indigent.[330]

There is also the question of whether the United States has the authority to make arrests in a foreign country; and if so, who has the authority to arrest and detain the person.[331] Add to this the question of whether bail will be an option;[332]

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committed on military installations." This passage indicates that the Army does not consider a military magistrate to have the powers of a federal magistrate.

329 County of Riverside v McLaughlin, 500 U.S. 44 (1991). Under the federal rules, the court can extend many of the time limits if the government can prove extraordinary circumstances that require the extension in the interests of justice, FED. R. CRIM. P. 5(c), or prove that the defendant was absent or unavailable, 18 U.S.C.A. § 3161(h)(3) (West 1993). Yet, as every trial practitioner knows, when the government must prove something like "extraordinary circumstances" or "unavailability" the case is put at risk. There is never a guarantee that the judge will agree with the government's assessment of the circumstances. Federal law also provides special rules for extradition cases. However, the majority of the rules apply to the extradition of persons from the United States to other countries. *See generally* 18 U.S.C.A. §§ 3181-3196 (West 1993). The statutes that address extradition to the United States speak in terms of returning that person "to the jurisdiction from which he has fled." 18 U.S.C.A. § 3183 (West 1993).

330 FED. R. CRIM. P. 5(c). During a deployment overseas, it is unlikely that a civilian defense counsel will be available. If there is a defense counsel present, chances are she will be a military attorney who is only authorized to represent military personnel. AR 27-10, para. 6-2. Although the regulation could be changed to allow military counsel to represent civilians, once an attorney-client relationship is formed, that counsel may be required to continue that representation. If trial is then held in federal court in the United States, that military counsel would no longer be available to perform services for the deployed soldiers.

331 Senator Inouye's bill would allow the military police to "apprehend and detain" any person subject to jurisdiction under the bill. S. 74, 104th Cong., 1st Sess. (1995).

332 U.S. CONST. amend. VIII, states that "excessive bail shall not be required . . . ." The Supreme Court has held that an accused has a right to be released on bail if he can give "adequate assurance that he will stand trial." Stack v. Boyle, 342 U.S. 1 (1951).

and if so, who will determine whether to grant bail. These and many other procedural matters will arise if a defendant is arrested in a foreign country and held for extradition to the United States for trial in federal court. The military may find it difficult to meet many of these requirements under the best of circumstances--in the midst of a military operation it may be impossible.

c. *Subpoenas and Evidence*--The Sixth Amendment guarantees every accused the right "to be confronted with the witnesses against him; [and] to have compulsory process for obtaining witnesses in his favor . . . ."[333] The prosecution, too, must be able to secure evidence to prove its case. In the United States, witnesses and evidence are obtained through an uncomplicated subpoena process.[334]

However, subpoenas only work if they can be enforced, and they can only be enforced if the courts have jurisdiction to exercise their contempt power. Generally, federal courts have no jurisdiction over foreign nationals outside of the United States. Consequently, the court cannot compel foreign nationals to travel to the United States to testify,[335] and federal subpoenas will not normally reach documents or other evidence located in foreign nations.[336]

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333 U.S. CONST. amend. VI.

334 FED. R. CRIM. P. 17.

335 Fed. R. Crim. P. 17(e)(2) provides that a "subpoena directed to a witness in a foreign country shall issue . . . and be served as provided in Title 28, U.S.C. § 1783." The statutory provision only provides for a subpoena over United States "citizens or nationals in a foreign country." 28 U.S.C.S. § 1783 (Law. Co-op. 1994).

336 *Id. Cf.* Bruce Zagaris & Constantine G. Papavizas, *Recent Decisions by United States Courts on the Exercise of Subpoena Powers to Secure Evidence Abroad in Criminal Matters, in* INT'L CRIM. LAW: A GUIDE, *supra* note 320, at 301; and Sigmund Timberg, *Obtaining Foreign Discovery and Evidence in U.S. Antitrust Cases: The Uranium Cartel Maelstrom, in* INT'L ASPECTS OF CRIM. LAW, *supra* note 318, at 90. These two articles explore the reach of U.S. subpoena power over

The federal rules do provide for foreign depositions; however, the foreign nation must "permit" the deposition process.[337] Then, even if the foreign nation permits the deposition, in a criminal proceeding, the prosecution cannot use a deposition without the defendant's consent.[338]

Status of forces agreements or treaties could provide for compulsory process to secure evidence and witnesses, but negotiating the necessary agreements would be a long and uncertain undertaking. Even so, coming back to the original problem of jurisdiction during military operations, these procedures may still not be adequate to address the practical realities of securing evidence and witnesses during an armed conflict or other military operation.

Often, time is of the essence if the government hopes to obtain evidence during military operations. Witnesses are killed or "disappear" and evidence is lost or destroyed. Recent events in Somalia, Rwanda, and Haiti show how mobile a refugee population can be. Any procedural rules for trials in these circumstances must meet the realities of the situation on the ground. Otherwise, the ability to prosecute will be meaningless.

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foreign nationals and foreign corporations that have connections to the United States. Both articles point out that many nations consider United States efforts to enforce its subpoena power abroad to be an affront to their national sovereignty.

337 18 U.S.C.A. § 3507 (West 1993).

338 *See generally* Idaho v. Wright, 497 U.S. 805 (1990) and Ohio v. Roberts, 448 U.S. 56 (1980) (defining extent of defendant's confrontation rights in criminal prosecutions).

Trial by court-martial represents the other possible tribunal for exercising jurisdiction. Courts-martial have the advantage of being standing tribunals.[339] Plus, the military has a long history of holding courts overseas and dealing with the custody and evidence problems that arise in foreign countries.[340] In addition to their procedural advantages, courts-martial have an important practical advantage: the international community is accustomed to allowing military courts-martial to operate on foreign soil.[341]

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339 Technically, courts-martial are not "standing courts" because each court-martial is "created" when it is convened. *See* MCM, *supra* note 26, R.C.M. 503(a). Practically, the procedures for convening a court-martial are quite simple, and the MCM provides rules of procedure and evidence for all courts-martial.

340 UCMJ art. 7 (1984) grants "[c]ommissioned officers, warrant officers, petty officers, and noncommissioned officers [the] authority to . . . apprehend persons subject to this chapter . . . ." *See also* MCM, *supra* note 26, R.C.M. 302. The UN Model SOFA authorizes the host government to arrest civilians who are members of the peace-keeping operation, and then turn them over to the custody of a UN representative. UN Model SOFA, *supra* note 274, at paras. 41 & 42. Similarly, the NATO SOFA provides for "[t]he authorities of the receiving and sending States [to] assist each other in the arrest of members of a force or civilian component . . . and handing them over to the authority which is to exercise jurisdiction." NATO SOFA, *supra* note 16, at art. VII5(a).

341 The NATO SOFA, *supra* note 16, at art. VII1(a) states that "the military authorities of the sending State shall have the right to exercise *within the receiving State* all criminal and disciplinary jurisdiction conferred on them by the law of the sending State over all persons subject to the military law of that State . . . ." (emphasis added); the Korean SOFA, *supra* note 274, does not explicitly provide for courts-martial to be held in Korea. However, art. XXII implies that such is the case, through provisions for custody and for investagatory assistance. Likewise, the UN Model SOFA, *supra* note 274. at arts. 41 & 44 implies that courts-martial can be held in the host nation. Common sense would also imply that a grant of jurisdiction to the military authorities also carries with it the concomitant grant of authority to exercise that jurisdiction through a court-martial. *See also* The Schooner Exchange, 11 U.S. (7 Cranch) 116, 140 (1812). "The grant of a free passage therefore implies a waiver of all jurisdiction over the troops during their passage, and permits the foreign general to use that discipline, and to inflict those punishments which the government of his army may require." While the waiver of all jurisdiction is no longer implied, the logic of the Court's argument still holds: when a commander is given jurisdiction, that grant of jurisdiction implies that the commander has the right to discipline his army.

With those observations, this section brings the jurisdictional problem full circle: court-martial jurisdiction is in many ways the best method for exercising jurisdiction over civilians overseas. However, if the military intends to court-martial civilians, court-martial procedures must be changed to meet the requirements of Article III and the Fifth and Sixth Amendments; or, the United States must base court-martial jurisdiction over civilians on constitutional war powers.

B. Court-Martial Jurisdiction Over Deployed Civilians.

Civilians deployed on military operations represent a small subset of the civilians associated with the military. However, for military and international reasons, they are a critical sub-set. Commanders must be able to exercise effective command and control over all members of the force who are deployed on military operations--both military and civilian.[342] In addition, military operations place civilians in numerous situations that can trigger the United States international obligations to prosecute or extradite those civilians.[343]

1. Advantages of Court-Martial Jurisdiction--The major advantage of court-martial jurisdiction over civilians is that it can be based on the war powers of the President and Congress. When the President and Congress exercised their constitutional powers to provide for courts-martial, they designed those courts to meet the exigencies of the battlefield and suited them to operate on foreign soil.

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342 During Operations Desert Shield and Desert Storm, "[t]here was a widely perceived lack of command and control over contractors." Contractor Support, *supra* note 153.

343 *See supra* notes 172-212 and accompanying text.

In the *Reid* cases, the Supreme Court indicated, time and again, that the military cannot subject civilians to courts-martial during *peacetime*. As the Court confirmed, trial by court-martial must be tied to Congress's power to "make rules for the government and regulation of the land and naval forces."[344] Likewise, the Fifth Amendment requirement for a grand jury indictment is suspended for "cases arising in the land or naval forces . . . ."[345]

In *Reid*, the Court "recognize[d] that there might be circumstances where a person could be 'in' the armed services for purposes of [Article I, section 8,] Clause 14 even though he had not formally been inducted into the military . . . ."

Clearly, in the Court's opinion, dependent wives did not fall into this category. When Congress provided for Article I court-martial power over all civilians accompanying the forces overseas in peacetime, Congress passed the breaking point of their war powers. Conversely, a limited and necessary extension of jurisdiction over civilians deployed on military operations overseas is within Congress's war powers to regulate the forces.

Jurisdiction over deployed civilians will meet America's most critical need to have jurisdiction over civilians during military operations in unfamiliar and possibly hostile countries. As American military forces decrease their permanent overseas presence and concentrate at posts and bases in the United States, fewer civilians will be assigned to permanent overseas bases. "Force projection" deployments will become the norm. This, in turn, will decrease the need for

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344 U.S. CONST. art. I, § 8, cl. 14.
345 U.S. CONST. amend. V.

peacetime jurisdiction over civilians and increase the need for jurisdiction over civilians during deployments.

2. Disadvantages of Court-Martial Jurisdiction --Although Congress can expand court-martial jurisdiction over deployed civilians with only minor changes to the UCMJ, it may be difficult for Congress to muster the necessary political support for *any* change. This jurisdictional problem has been with us for several decades and solutions have been proposed at regular intervals.[346]

Also, because court-martial jurisdiction during deployments is a limited expansion of jurisdiction, it will leave gaps that more comprehensive solutions could fill. The United States would continue to lack jurisdiction over civilian employees and family members stationed at permanent overseas garrisons, and over ex-service members.

Even for civilians deployed on military operations, the military may lose jurisdiction once the civilians return to the United States. Consequently, civilians could commit crimes and escape punishment if the crimes are not discovered until after their return from the deployment. It may be possible to close the "returning civilian gap" with federal court jurisdiction. However, federal courts would still lack effective subpoena powers, as discussed earlier.

Triggering jurisdiction over civilians deployed on military operations would require a long definition or a complicated list of triggering factors. Alternatively, the statute could leave the definitional problems to the courts. Either way,

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346 *See* bills cited *supra* note 2.

jurisdiction would be based on fairly subjective criteria that the prosecution would be required to prove at each court-martial. After which, the government could count on the issue being re-litigated on appeal.[347]

V. Proposed Solution--Court-Martial Jurisdiction Over Civilians Deployed on Military Operations -- A Limited Solution Based on Constitutional War Powers.

Court-martial jurisdiction over civilians deployed on military operations is not the perfect nor the ideal way to fill the jurisdictional void. However, reaching for the ideal solution is neither practical nor necessary. There are very few perfect laws in a democracy where every solution tends to represent a compromise. This proposed solution is no different: it too represents a compromise between constitutional war powers and individual rights.

Court-martial jurisdiction will give the United States jurisdiction over a much smaller class of civilians, but it will be necessary and meaningful jurisdiction supported by effective trial procedures. Unlike federal courts, courts-martial are designed to protect individual rights while still providing the means to try cases in the midst of an ongoing military operation in foreign territory.

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347 In Sands v. Colby, 35 M.J. (A.C.M.R. 1992), Sands filed a writ of mandamus and a stay of proceedings (after arraignment but before trial) to challenge the jurisdiction of the court-martial. See cases cited in *Sands* for court's authority to issue writs of mandamus for lack of jurisdiction. *Id.* at 621. If the military judge at trial finds no jurisdiction, the government can file an interlocutory appeal. UCMJ art. 62 (1984).

In the area of criminal jurisdiction and procedure, each solution must balance the needs of society against the rights of the individual. In *Toth v. Quarles*, Justice Black articulated how the military and Congress should balance these competing interests:

> Determining the scope of the constitutional power of Congress to authorize trial by court-martial presents another instance calling for limitation to "*the least possible power adequate to the end proposed.*"[348]

Under *Toth*, the question is whether court-martial jurisdiction is necessary for the military mission.

Court-martial jurisdiction over civilians during overseas military operations adds only a narrow category of civilians, but these civilians represents the crucial core of the jurisdictional void. The United States reputation and international obligations demand that, at a minimum, these civilians be subject to the laws of the United States and subject to the control of the military commander. America's modern military missions require court-martial jurisdiction over deployed civilians.

Without courts-martial under war powers, the only practical alternative is the alternative suggested by Justice Black in *Reid*: "If our foreign commitments become of such nature that the Government can no longer satisfactorily operate within the bounds laid down by the Constitution, that instrument can be amended by the method which it prescribes."[349]

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348 Toth v. Quarles, 350 U.S. 11, 23 (1955).
349 Reid v. Covert, 354 U.S. 1, 14 (1957).

The United States has not yet reached the point where it must resort to constitutional amendments to meet its foreign commitments. It is not necessary to try these cases in federal court, to drastically change courts-martial procedure, or to amend the Constitution.

A. Constitutionality of Court-Martial Jurisdiction.

Court-martial jurisdiction over deployed civilians can be supported by historical analogy, and it can be supported constitutionally through the combined war powers of the President and Congress. In addition, modern courts-martial bear little resemblance to the days when "military justice [was] a rough form of justice emphasizing summary procedures, speedy convictions and stern penalties . . . ."[350]

1. Military Necessity--"From a time prior to the adoption of the Constitution the extraordinary circumstances present in an area of actual fighting have been considered sufficient to permit punishment of some civilians in that area by military courts under military rules."[351] In *Reid*, Congress simply went too far; the Court rejected the government's contention that Congress could expand the concept of jurisdiction over civilians accompanying the army "in the field" to include jurisdiction over wives and other civilians in peacetime.

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350 *Id.* at 35-36. *See also* Weiss v. United States, 114 S. Ct. 752 (1994). "The care the Court has taken to analyze petitioners' claims demonstrates once again that men and women in the Armed Forces do not leave constitutional safeguards and judicial protection behind when they enter military service. Today's decision upholds a system of military justice notably more sensitive to due process concerns than the one prevailing through most of our country's history . . . ." *Id.* at 769 (Ginsburg, J. concurring).

351 *Reid*, 354 U.S. at 33. The Court cites to the Art. of War (1775), *reprinted in* WINTHROP, *supra* note 4, at 953 for support of this statement.

The Court did not, however, indicate that the military could only court-martial civilians during a declared war. Rather, the plurality opinion in *Reid* spoke about the lack of "actual hostilities," of "areas were no conflict exists," and of areas without "active hostilities."[352] In *McElroy*, the Court endorsed the constitutionality of court-martial jurisdiction over civilians during the "Indian uprisings . . . based on the legal concept of the troops' being 'in the field'" during "hostilities."[353]

Clearly, the Court did not close the door on all court-martial jurisdiction over civilians. The Court merely forced courts-martial back to their constitutional roots. If courts-martial are not tied to the power of Congress to make rules and regulations for the military or to the President's powers as commander in chief, they are not constitutional.

Before the *Reid* cases, the military limited its jurisdiction over civilians to wartime or to those times when civilians were with the Army "in the field." Colonel Winthrop, whom the Supreme Court called "[t]he recognized authority on court-martial jurisdiction,"[354] defined the limits of jurisdiction over "persons serving with the armies in the field."[355] He then admonished military practitioners regarding the use of this jurisdiction: "This Article, in creating an exceptional jurisdiction over civilians, is to be strictly construed and confined to the classes specified."[356]

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352 *Reid*, 354 U.S. at 34-35.

353 McElroy v. Gualiardo, 361 U.S. 281, 285-86 (1960). *See also* WINTHROP, *supra* note 4, at 101.

354 *McElroy*, 361 U.S. at 284.

355 WINTHROP, *supra* note 4, at 99.

356 *Id.* at 100. Winthrop makes his point by noting several cases where the Judge Advocate General disapproved war-time courts-martial because the defendants were not actually "serving with the army." *Id.* at 100 and n.9.

In *Toth* and *Singleton*, the Supreme Court echoed Colonel Winthrop's admonition: "[T]he Clause 14 'provision itself does not empower Congress to deprive people of trials under Bill of Rights safeguards' . . . . [M]ilitary tribunals must be restricted 'to the narrowest jurisdiction deemed absolutely essential to maintaining discipline among troops in active service' . . . ."[357]

If Congress and the military had heeded Colonel Winthrop's advice, the *Reid* cases may never have occurred. If Congress and the military now heed his advice, civilians deployed with the armed forces "in the field" could once again be tried by court-martial. The military must step back, define its jurisdictional needs, and confine courts-martial over civilians to their constitutional limits.

Unfortunately, the limits of constitutional war powers cannot be measured with precision. However, a conservative and reasoned expansion of court-martial jurisdiction over deployed civilians is within those constitutional limits. Civilians who deploy into operations are essential to the military mission.[358] Their numbers are limited and they perform specific, specialized tasks.

As the law now stands, jurisdictional issues are driving military decisions. As Alexander Hamilton noted in *The Federalist,* the founders designed the

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357 *McElroy*, 361 U.S. at 239-40 (quoting Toth v. Quarles, 350 U.S. 11, 21-22 (1955)).

358 *See* DoD DIR. 1404.10, *supra* note 182. *See also* Audit Report, Dep't of Defense Office of the Inspector General, Report 91-105, subject: Civilian Contractor Overseas Support During Hostilities (June 26, 1991), which states "[i]f contractors leave their jobs during a crisis or hostile situation, the readiness of vital defense systems and the ability of the Armed Forces to perform their assigned missions would be jeopardized." Audit Report at 1.

Constitution to allow jurisdiction to flow from military necessity rather than dictate military decisions:

> The authorities essential to the common defence are these: to raise armies; to build and equip fleets; to prescribe rules for the government of both; to direct their operations; to provide for their support. These powers ought to exist without limitation, *because it is impossible to foresee or define the extent and variety of national exigencies, or the correspondent extent and variety of the means which may be necessary to satisfy them. . . .* This power ought to be co-extensive with all the possible combinations of such circumstances; and ought to be under the direction of the same councils which are appointed to preside over the common defence.[359]

2. The War Powers Equation--In many cases, the Supreme Court has agreed with Hamilton's observation that Congress should be given great power over military matters. Even in cases that pit the Bill of Rights against Congress's powers to regulate the military, the Court has recognized that military necessity must prevail--but only in cases of true necessity. If constitutional principles can be expressed as mathematical equations, the variables would be shown thus:

IF	Congressional and Presidential War Powers	+	Military Necessity	>	Individual Rights	**THE N**	The Action is Constitutional

359 THE FEDERALIST NO. 23 (Alexander Hamilton).

As with any equation, begin with the known and solve for the unknown; with law and precedent, courts work from analogy. There are many examples of military actions being weighed against individual rights, and several significant cases that explore the limits of presidential and congressional war powers. An examination of these cases produces insights into why the Supreme Court found court-martial jurisdiction over civilians in peacetime unconstitutional, and into why the Court will uphold court-martial jurisdiction over civilians deployed with the armed forces on military operations.

In *Parker v. Levy*,[360] the Supreme Court upheld the conviction of an Army Captain who was tried by court-martial for conduct unbecoming an officer for making public anti-war statements to enlisted soldiers during the Vietnam war. Captain Levy contended that his speech was protected under the First Amendment and that UCMJ Article 133 (conduct unbecoming an officer) was void for vagueness. The Court recognized that "members of the military are not excluded from the protection granted by the First Amendment;"[361] however, according to the Court, "the different character of the military community and of the military mission requires a different application of those protections."[362]

In *Parker v. Levy* the Supreme Court first stated the often quoted phrase that "the military is, by necessity, a specialized society separate from civilians society." On the basis of the military's separate and specialized nature, the Court has gone on to uphold many other military actions in the face of Bill of Rights challenges.[363]

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360 417 U.S. 733 (1974)

361 *Id.* at 758.

362 *Id.*

363 *See, e.g.*, Goldman v. Weinberger, 475 U.S. 503 (1986) (Army uniform regulations survived freedom of religion challenge -- military can prevent wearing

However, in each case, the Court comes back to the underlying justification for these infringements on individual constitutional rights: "[I]t is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise."[364] The Court grants great deference to the military to pursue that mission.[365]

In each war powers case the Court focused on the military mission, and whether the infringement on individual rights was necessary to meet that mission. In *Reid* and *Singleton*, the Court "did not think 'that the proximity . . . of these

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of yarmulke. Court deferred to professional judgment of commanders about need for uniformity.); Brown v. Glines, 444 U.S. 348 (1980) (Air Force regulation requiring prior approval before a petition could be circulated on post survived freedom of speech and association challenge. Allowed because of commander's need to insure that speech does not interfere with overriding military mission.); Korematsu v. United States, 323 U.S. 214 (1944) (Japanese internment during WWII allowed under war and emergency powers.); Katcoff v. March, 755 F.2d 223 (2d Cir. 1985) (Army Chaplain Corps does not violate separation of church and state; allowed because of military necessity to support free exercise of religion, especially during overseas deployments.); Nation Magazine v. Dep't of Defense, 762 F.Supp. 1558 (S.D.N.Y. 1991) (military logistic or security concerns may allow military to limit journalists' access to information). *Compare*, Anderson v. Laird, 466 F.2d 283 (D.C. Dir. 1972) (Mandatory chapel attendance at West Point struck down. Court could not find legitimate mission-related reason for attendance that could override freedom of religion and entanglement challenge.).

364 *Parker*, 417 U.S. at 743 (quoting Toth v. Quarles, 350 U.S. 11, 17 (1955)).

365 *See* cases cited *supra* note 363. The extreme high point of deference to the military came in *Korematsu*, 323 U.S. at 214 (the Japanese internment case). In his concurring opinion, Justice Frankfurter described the interface between war powers and the Constitution: "If a military order . . . does not transcend the means appropriate for conducting war, such action by the military is . . . constitutional . . . ." *Id.* at 225 (Frankfurter, J. concurring). While the *Korematsu* case has been discredited over the years because of its extreme deference to the military, the underlying principles still hold.

women to the 'land and naval Forces' [was] . . . clearly demanded by the effective 'Government and Regulation' of those forces . . . .'"[366]

In *Youngstown Sheet and Tube v. Sawyer*[367] the Supreme Court reviewed President Truman's actions in seizing privately owned steel mills during a nation-wide steel strike. In *Youngstown,* President Truman was relying, in part, on his war powers to keep a supply of steel flowing to the Korean war effort.[368] Over time, the case has been cited more for Justice Jackson's concurring opinion than for its actual holding. Justice Jackson saw presidential and congressional power in terms of constitutional additions and subtractions of power. According to Justice Jackson, when the President and Congress add their powers together, the President's "authority is at its maximum, for it includes all that he possesses . . . plus all that Congress can delegate."[369]

If Congress and the President were to act together to expand court-martial jurisdiction over civilians deployed on military operations, according to Justice Jackson's equation, they would be at their "maximum" power. Justice Jackson goes on to say that if the President and Congress are acting together and the Court finds their combined acts unconstitutional "it usually means that the Federal Government as an undivided whole lacks power."[370]

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366 Kinsella v. Singleton, 361 U.S. 234, 241 (1960) (quoting Reid v. Covert, 354 U.S. 1, 46-47 (1957)).

367 343 U.S. 579 (1952).

368 Id. at 587.

369 *Id.* at 635 (Jackson, J. concurring).

370 *Id.* at 636 (Jackson, J. concurring).

The Article I powers of Congress include the power to "raise and support Armies"[371] and the power to "make Rules for the Government and Regulation of the land and naval Forces."[372] The President has his Article II powers as executive and Commander in Chief,[373] as well as his foreign affairs power.[374] The Fifth Amendment requires grand jury indictments for all cases except those that "aris[e] in the land or naval forces."[375]

> These provisions show that Congress has the power to provide for the trial and punishment of military and naval offences . . . and that the power to do so is given without any connection between it and the 3d article of the Constitution defining the judicial power of the United States; indeed, that the two powers are entirely independent of each other.[376]

When Congress and the President act together to authorize courts-martial jurisdiction, their actions are in complete accord with their constitutional powers. Unfortunately, the *Reid* cases are an example of the President and Congress going too far--the government as a whole lacked the power to court-martial civilians during peacetime. The military connection was too tenuous; the need too remote.

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371 U.S. CONST. art. I § 8, cl. 12.

372 U.S. CONST. art. I § 8, cl. 14.

373 U.S. CONST. art II §§ 1 & 2.

374 U.S. CONST. art II § 2, cl. 2. *See also* United States v. Curtiss-Wright, 299 U.S. 304 (1936) (classic commentary on the expansiveness of President's foreign affairs power).

375 Note that the Fifth Amendment does not speak about *persons* in the land and naval forces, it speaks about *cases* arising in the land and naval forces. U.S. CONST. amend. V.

376 Dynes v. Hoover, 61 U.S. (20 How.) 65, 79 (1857).

Conversely, jurisdiction over civilians during military operations is a limited and necessary expansion of court-martial jurisdiction. The civilians are necessary to accomplish the military mission,[377] and jurisdiction over those civilians is necessary to insure mission accomplishment and to meet America's international obligations.

International obligations alone will not justify an expansion of court-martial jurisdiction. The *Reid* case itself closed the door on any such theory. When the *Reid* Court looked at the issue of whether trial by court-martial could be justified by the United States' international status of forces agreements, its answer was clear: "The obvious and decisive answer to this, of course, is that no agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution."[378]

While a treaty cannot "confer power on the Congress," the United States international obligations are relevant to the scope and success of the military mission. Today's military operations must succeed on several levels. The United States must win the military war, win the media and propaganda war,[379] and win

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377 *See* DoD DIR. 1404.10, *supra* note 182, at para D1. Civilians are only deployed if they are "specifically required to ensure the success of combat operations or the availability of combat-essential systems."

378 Reid v. Covert, 354 U.S. 1 (1957). *See also* LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 228 (2nd ed. 1988).

379 For an interesting essay on the impact of media and propaganda on modern warfare, see TOFFLER, *supra* note 6, at Chapter 18. *See also* Brigadier General Michael C. Wholley, Director, Judge Advocate Division, Headquarters Marine Corps, Address at The Judge Advocate General's School, U.S. Army, Charlottesville, Va. (Mar. 24, 1995). Brigadier General Wholley noted that CNN is now with the military on every operation. As he put it, "it should not make a difference in how we operate--it just makes it more important to do it right." He

national and international support. For example, Operation Desert Storm could have been put in jeopardy if an American civilian had committed a war crime or other serious felony and escaped punishment. An event like that could have easily upset the delicate balance of interests that held the coalition forces together.

3. Courts-Martial Have Changed Since 1957-- Over the past four decades, Congress and the military have made numerous due process improvements to the military justice system.[380] Some of the most significant changes have occurred in the past ten years alone. The Supreme Court noticed these developments and has shown its approval in several recent cases. The change in attitude, however, was slow in coming.

After *Reid*, the Supreme Court's opinion of the court-martial system reached its nadir in 1969, when the Court decided *O'Callahan v. Parker*.[381] In *O'Callahan*, the Court held that the military could only court-martial service members when their offenses were adequately service connected.[382]

It is impossible to read *O'Callahan* without noticing how much the *O'Callahan* opinion echoes the *Reid* cases and the Court's general dissatisfaction with courts-martial. In fact, in *O'Callahan*, the dissatisfaction rises to the level of palpable disdain. The Court begins by stating that "courts-martial as an institution

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also commented that U.S. military operations are judged on the moral component of the operation as well as whether they achieve their military objectives.

380 *See generally* Walter T. Cox III, The Army, The Courts, and the Constitution: The Evolution of Military Justice, Speech delivered at the United States Army History Institute (Mar. 19, 1987), *in* 118 MIL. L. REV. 1 (1987); Gates & Casida, *supra* note 146, at 140.

381 395 U.S. 258 (1969).

382 *Id.* at 272.

are singularly inept in dealing with the nice subtleties of constitutional law."[383] The Court adds the finishing touch with its comparison of courts-martial to civil trials: "A civilian trial . . . is held in an atmosphere conducive to the protection of individual rights, while a military trial is marked by the age-old manifest destiny of retributive justice."[384]

In the past ten years, the Supreme Court has shown its increasing approval of court-martial procedures. The assent from the depths began with *Solorio v. United States* in 1987.[385] In the first paragraph of *Solorio*, the Supreme Court expressly overruled its *O'Callahan* decision. The Court then noted that the Constitution gives Congress, and not the courts, the power to regulate the military. The Court went on to cite a long list of cases where they had deferred to the "congressional authority to raise and support armies and make rules and regulations for their governance . . . ."[386]

More recently, the Supreme Court looked at "whether the current method of appointing military judges violates the Appointments Clause of the Constitution, and whether the lack of a fixed term of office for military judges violated the Fifth Amendment's Due Process Clause."[387] The Court noted that several changes to the UCMJ had "changed the system of military justice so that it has come to more closely resemble the civilian system."[388] After several other favorable observations on the military justice system, the Court upheld the appointment of military judges,

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383 *Id.* at 265.
384 *Id.* at 266.
385 Solorio v. United States, 483 U.S. 435 (1987).
386 *Id.* at 447-48.
387 Wiess v. United States, 114 S. Ct. 752, 754-55 (1994).
388 *Id.* at 759.

and concluded that the "provisions of the UCMJ . . . sufficiently preserve judicial impartiality so as to satisfy the Due Process Clause."[389]

Perhaps the most striking change from the Court's earlier comment that courts-martial "are singularly inept in dealing with the nice subtleties of constitutional law,"[390] came in 1994 in its own subtle way. In *Davis v. United States*,[391] a military accused made an equivocal request for counsel during an interrogation. What is remarkable is that the Court used a military court-martial case to make a constitutional distinction in a rights waiver case--a constitutional distinction that will now apply to all criminal cases in the United States.[392]

The *Davis* and *Solorio* cases made their way to the Supreme Court through one of many congressional improvements to the military justice system: those cases were heard on direct appeal. Prior to the 1984 changes to the UCMJ, federal courts reviewed courts-martial through habeas corpus petitions only[393]--and it was a very limited review standard. Federal courts reviewed court-martial only for lack of jurisdiction and illegal punishment.[394] Numerous other changes have favorably transformed courts-martial proceedings and military jurisprudence.[395]

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389 *Id.* at 762.

390 O'Callahan v. Parker, 395 U.S. 258, 265 (1969).

391 114 S. Ct. 2350 (1994).

392 After noting that the Court of Appeals for the Armed Forces applied the Supreme Court's Fifth Amendment cases to all military prosecutions, the Supreme Court "proceed[ed] on the assumption that our precedents apply to courts-martial just as they apply to state and federal criminal prosecutions." *Id.* at 2354, n.*.

393 UCMJ art. 67a (1984). *See also* Cox, *supra* note 380, at n.14 (discussing the Military Justice Act of 1983 which allows direct petitions to the Supreme Court).

394 Dynes v. Hoover, 61 U.S.(20 How.) 65, 82-83 (1857).

395 *See generally* Cox, *supra* note 380; Gates & Casida, *supra* note 146, at 140; John R. Howell, *TDS: The Establishment of the U.S. Army Trial Defense*

Although the military justice system has changed greatly, it still does not provide for grand juries, trial by jury, or Article III judges. However, the more courts-martial resemble American civil trials, the more palatable court-martial jurisdiction over civilians will be--for Congress, for the Court, and for the American public. The military justice system in place today grants every defendant "a fair trial in a fair tribunal . . . ."[396]

B. Triggering Court-Martial Jurisdiction

Defining when civilians will be subject to court-martial jurisdiction is perhaps the most difficult aspect of fashioning a limited jurisdictional solution. As discussed previously, the government can prove jurisdiction based on nationality or jurisdiction based on an employment or familial relationship with facts. In contrast, the government must prove jurisdiction during overseas military operations by looking at several factors. By nature, the proof will be more subjective than objective.

Fortunately, Congress has already defined those deployments that trigger war powers in the War Powers Resolution.[397] Under the War Powers Resolution,

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Service, 100 Mil. L. Rev. 4 (1983) (discussing numerous improvements such as UCMJ art. 31 (1984) right against self-incrimination, right to representation, creation of an independent trial judiciary, direct review by civilian judges of Court of Appeals for the Armed Forces and by Supreme Court, etc.)

396 Weiss v. United States, 114 S. Ct. 752, 761 (1994) (quoting *In re* Murchison, 349 U.S. 133, 136 (1955)).

397 50 U.S.C.S. §§ 1541-1548 (Law. Co-op. 1994). The War Powers Resolution has never been tested in court and many scholars question whether it is constitutional. However, the most serious constitutional issues stem from the fact that the Resolution is seen as a Congressional attempt to limit the President's war powers or that it could be viewed as a legislative veto. The War Powers Resolution sets up a classic power struggle between the President and Congress. These

"[i]n the absence of a declaration of war" the following situations implicate an exercise of constitutional war powers: when forces are introduced (1) "into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances," (2) into a "foreign nation, while equipped for combat, except for deployments which relate solely to supply, replacement, repair, or training of such forces," or (3) into a foreign nation "in numbers which substantially enlarge United States Armed Forces equipped for combat already located in a foreign nation . . . ."[398]

While no President has ever acknowledged the constitutionality of the War Powers Resolution, every President has reported to Congress, "consistent with the War Powers Resolution"[399] when troops were deployed in one of the above three instances.[400]

It is neither necessary nor prudent to tie jurisdiction to a presidential report under the War Powers Resolution. Rather, the War Powers Resolution factors

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particular constitutional concerns will not, however, affect any expansion of jurisdiction during military deployments based on the War Powers Resolution triggering factors. In the area of jurisdiction there will not be a power struggle; Congress and the President would be working together to exert their combined powers to expand jurisdiction. For a general discussion of the constitutional issues raised by the War Powers Resolution, *see* STEPHEN DYCUS, ET. AL., NATIONAL SECURITY LAW 119-137 (1990), and sources cited therein.

398 50 U.S.C.S. § 1541(a) (Law. Co-op. 1994).

399 *See, e.g.*, Ellen C. Collier, Library of Congress, Congressional Research Service, *The War Powers Resolution: Fifteen Years of Experience* (Aug. 3, 1988) (listing all War Powers Resolution Reports from 1973-1991).

400 *But see* Crockett v. Reagan, 558 F. Supp. 893, *aff'd per curiam*, 720 F.2d 1355 (D.C. Cir. 1983), *cert. denied* 467 U.S. 1251 (1984) (29 members of Congress brought suit to force President to submit War Powers Resolution report to Congress regarding deployment of forces to El Salvador; case presents political question not subject to judicial review; may have been different if Congress had acted as a whole).

merely provide a functional model to determine when forces are deployed on military operations. Furthermore, the War Powers Resolution model provides a historical reference and a body of law.

The War Powers Resolution model covers most, if not all, recent military deployments. Presidents have submitted reports "consistent with the War Powers Resolution" for Grenada, Panama, Desert Shield, Desert Storm, Provide Comfort (humanitarian assistance in Iraq), Somalia, Macedonia, and Haiti, among others.[401] These operations cover the spectrum of military operations other than war: from humanitarian assistance in Somalia and Iraq, through peacekeeping in Macedonia, nation-building in Haiti, and including international armed conflicts in Kuwait and Iraq.[402]

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401 *See* President's Letter to Congressional Leaders on Haiti, 30 WEEKLY COMP. PRES. DOC. 1823 (Sept. 21, 1994); President's Letter to Congressional Leaders on Rwanda, 30 WEEKLY COMP. PRES. DOC. 1602 (Aug. 1, 1994); President's Letter to Congressional Leaders on the Former Yugoslav Republic of Macedonia, T29 WEEKLY COMP. PRES. DOC. 1302 (July 9, 1993); President's Letter to Congressional Leaders on the Situation in Somalia, 28 WEEKLY COMP. PRES. DOC. 2338 (Dec. 10, 1992); Collier, *supra* note 399; (listing Presidential War Powers reports from 1973-1991, including reports for Grenada, Panama, Desert Shield, and Desert Storm).

402 Congress has "pre-authorized" deployments under the UN Participation Act, 22 U.S.C.S. § 287d-1 (Law. Co-op. 1994), for missions that "are specifically directed to the peaceful settlement of disputes . . . ." Consequently, the President may not be required to report under the War Powers Resolution. However, troops on these operations are armed for combat (self-defense) and the deployment should still fall within the War Powers Resolution factors. To dispel any doubts, the jurisdictional statute or implementing regulations should specifically include peacekeeping missions authorized under the UN Participation Act. United Nation deployments under 22 U.S.C. § 287d) easily fall within the War Powers Resolution factors. (§ 287d actions fall under U.N. CHARTER art. 42--"actions to maintain or restore international peace and security").

Military training and readiness exercises in foreign nations are specifically excluded from the War Powers reporting requirements.[403] Consequently, the United States would not gain court-martial jurisdiction over civilians accompanying the forces for overseas training exercises. While some military attorneys will see this as an unacceptable jurisdictional gap, it is a gap that is necessary to preserve court-martial jurisdiction.

There is a strong urge to add court-martial jurisdiction over civilians in every conceivable "war powers" circumstance. The problem lies in the fact that the limits of constitutional war powers are uncertain. In trying to grab too much, the military could lose everything. *Reid* should teach that lesson if nothing else.

D. Administrative and Procedural Details.

1. Approval Authority--Congress and the President should place additional safeguards on the military's ability to court-martial civilians. To counter any fear of the military "running rampant" over civilians, the statute or implementing regulations should require high-level approval before a civilian can be tried by court-martial.

Current Army Regulations recognize that some cases should be tried by court-martial only in extraordinary circumstances. For example, the Army must follow special procedures before it can court-martial a reserve or retired soldier. For retirees, the regulation requires Department of the Army approval before charges can be referred to a court-martial,[404] and the Assistant Secretary of the

403 50 U.S.C.S. § 1543(a)(2).
404 AR 27-10, *supra* note 328, at para. 5-2b(3).

Army must approve the action before the Army can order the retired soldier to active duty to face trial.[405] Reservists can only be tried while on active duty, and the Secretary of the Army must approve any orders to active duty before a reservist can be "sentenced to confinement or deprived of liberty."[406]

Civilians too should be subject to court-martial only in extraordinary circumstances. Secretarial approval for any court-martial would guarantee that extraordinary circumstances are present. In addition, secretarial approval would place court-martial power over civilians into the hands of the civilians--clearly an appropriate place for that power to reside for both practical and constitutional reasons.

2. Notice and Training--The Department of Defense already requires the military to give all emergency essential civilians "law of war training, and training in the Uniform Code of Military Justice . . . ."[407] When civilians are actually subject to the UCMJ, however, this training will take on new importance. The military should design and implement a comprehensive training program for all emergency essential civilian personnel and civilian contract personnel.

This training is not only wise from a military standpoint, it may also be constitutionally advisable. In *Parker v. Levy*, the Supreme Court rejected a claim that Article 134 of the UCMJ (the general article) was void for vagueness.[408] In so

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405 *Id.*

406 *Id.* at para. 21-8a.

407 DoD DIR. 1404.10, *supra* note 182, at 9h. *See also* AMC CIVILIAN DEPLOYMENT GUIDE, *supra* note 181, at 39, which requires civilians to receive training on the UCMJ, Geneva Conventions, Code of Conduct, Rules of Engagement, Status of Forces agreements, etc.

408 Parker v. Levy, 417 U.S. 733 (1974).

doing, it noted that "the military makes an effort to advise its personnel of the contents of the Uniform Code, rather than depending on the ancient doctrine that everyone is presumed to know the law."[409] The Court went on to note that Article 137 of the UCMJ required "that the provisions of the Code be 'carefully explained to each enlisted member' . . . ."[410] If deployed civilians are made subject to the Code, Congress should amend Article 137 to include those civilians in the training requirement.

This is not to say that jurisdiction could be defeated by a lack of training or knowledge. In *Parker v. Levy*, the Court's statement about training was dicta; it was an officer who was tried by court-martial, and the Article 137 training requirements do not apply to officers.

Civilians who were tried during World War I argued that they could not be tried by court-martial because they did not knowingly subject themselves to military jurisdiction. In the case of a merchant seaman, the district court compared court-martial jurisdiction to federal court jurisdiction: "Assuredly one who committed a crime without knowing that he was . . . subject to [federal court] jurisdiction . . . could not . . . contest the jurisdiction upon that ground. It is proper, therefore, to determine the question of jurisdiction upon the facts and circumstances; it cannot rest upon knowledge or consent."[411]

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409 *Id.* at 751.

410 *Id.* (quoting UCMJ art 137(a)(1)).

411 *In re* Berue, 54 F. Supp. 252, 256 (S.D. Ohio 1944). In another WWII case, a ship's cook fared no better with his lack of knowledge argument: "The history of the application of military law to civilians does not disclose . . . a case in which . . . it was necessary to establish such knowledge in order to prove military jurisdiction over civilians. Congress did not say all persons knowingly

3. When Would Jurisdiction End?--Jurisdiction under UCMJ Article 2 is stated in terms of personal jurisdiction based upon status. As a consequence, jurisdiction normally ends when that status ends. A statute that grants court-martial jurisdiction over civilians employees accompanying the force on overseas deployments would normally end when the deployment ends, when the civilian is no longer overseas, or when the employment ends.

In *Toth v. Quarles*, the Supreme Court looked at the question of when jurisdiction ends for service members.[412] Toth served in the Air Force in Korea, received an honorable discharge, and returned to the States. Five months later he was arrested and returned to Korea to be court-martialed for murder. The military based its court-martial jurisdiction on a statute that granted jurisdiction over an ex-serviceman for serious offenses committed "while in a status in which he was subject to this code . . . ."[413] On a petition for habeas corpus, the Court ordered Toth's release.

The Court rejected the argument that jurisdiction over ex-servicemen could "be sustained on the constitutional power of Congress 'To raise and support Armies,' 'To declare War,' or to punish 'Offences against the Law of Nations.'"[414] Likewise, jurisdiction could not "rest on the President's power as commander-in-chief, or on

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accompanying or serving the army in the field." McKune v. Kilpatrick, 53 F. Supp. 80, 89 (E.D. Va. 1943).

412 Toth v. Quarles, 350 U.S. 11 (1955).

413 *Id.* at 13. Jurisdiction was based on UCMJ art. 3(a) (1950) which stated that "any person charged with having committed, while in a status in which he was subject to this code, an offense against this code, punishable by confinement of five years or more and for which the person cannot be tried in the courts of the United States . . . shall not be relieved from amenability to trial by courts-martial by reason of the termination of said status." *Id.* at n.2.

414 *Id.* at 13-14.

any theory of martial law."[415] These constitutional powers, if "given [their] natural meaning . . . restrict court-martial jurisdiction to persons who are actually members or part of the armed forces."[416]

If the Court applies the *Toth* rationale to the question of jurisdiction over civilians deployed with the military, jurisdiction would end when the status of "civilian deployed with the military" ends. Therefore, status would cease at the end of the employment,[417] at the end of the military operation, or when the civilian returned to the states and was no longer "deployed." The military could retain jurisdiction during the deployment by simply not discharging employees or contractors while they were deployed. Any terminations could take effect once the civilian returned to the United States.

Unfortunately, civilians in the *Toth* circumstances--where the crime is not discovered until they have returned to the United States or terminated their employment relationship--will escape trial by court-martial. Equally unfortunate, under current laws, they will also escape trial in federal court.

VI. Conclusion.

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415 *Id.* at 14.

416 *Id.* at 15.

417 *But see* Perlstein v. United States, 151 F.2d 167, (1945). Termination of employment did not defeat jurisdiction over a civilian contractor during WWII. The ex-contractor was charged with stealing some jewelry while he was awaiting military transportation to return to the States. The court found that the language of article 2 of the Articles of War, was controlling. That statute granted jurisdiction over all civilians who were "accompanying or serving with the armies . . . in time of war." Consequently, the military retained jurisdiction because the ex-contractor was still "'accompanying' the Army at the time of the offense . . . ." *Id.* at 168-69.

Civilians have served with the armed forces since the Revolutionary War. Today, civilians deploy on operations to Kuwait, to Macedonia, and to Haiti, and they will continue to deploy wherever they are needed. It is time for the military to take the first step toward giving commanders the ability to command the civilian component of their force.

A limited expansion of court-martial jurisdiction over civilians deployed on overseas military operations will give commanders the ability to command at a time when they need it most--during deployments in hostile or uncertain circumstances. Commanders need jurisdiction over deployed civilians, and it is that need that makes the jurisdiction constitutional.

In the *Reid* cases, the Supreme Court took away the military's ability to court-martial civilians stationed at peacetime overseas garrisons. However, the *Reid* cases did not mark a shift in legal reasoning so much as they marked a shift in military court-martial policy. Prior to *Reid*, the federal courts heard many habeas corpus petitions from civilians, but these were all from civilians who were court-martialed during wartime. The courts upheld jurisdiction in almost every case.

It is time to shift military courts-martial back to their constitutional roots--back to constitutional war powers and the needs of military commanders. A limited, reasoned expansion of court-martial jurisdiction over civilians deployed on military operations takes courts-martial back to those constitutional beginnings. It is necessary, it is proper, and it will withstand constitutional review.

This limited expansion of court-martial jurisdiction will not solve the whole problem. But it is a start--and it starts with the most critical need.