THE COURT OR COURT-MARTIAL: WHAT IS THE PROPER VENUE FOR TRYING “ACCOMPANYING” AND “IN THE FIELD” CIVILIAN CONTRACTORS?

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I. INTRODUCTION

In December 2007, Ala Mohammed Ali (“Ali”), a dual citizen of Canada and Iraq, signed a contract with L3 Communications to provide language services to the United States Army Intelligence and Security Command. In early 2008, Ali was deployed to Hit, Iraq to serve as a language interpreter with the 1st Squad, 3d Platoon, 170th Military Police Company. Ali’s job as an interpreter was to accompany the 1st Squad on missions and to be the communicative middleman between the Squad and the Iraqi police. Ali wore the uniform of a soldier but did not carry a weapon. At one point, Ali lived with the Squad itself, although, when the Squad moved, he resided with other interpreters. As an employee, Ali’s supervisor was the L3 Site Manager who operated in Al Asad, Iraq. Nonetheless, the record shows that, in practice, Ali reported to his Staff Sergeant, Butler (“Butler”), the 1st Squad Leader. Despite the convoluted practical circumstances of his employment, Ali was unquestionably a civilian, as he was serving neither as an American nor as an Iraqi military member.

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2 Id.
3 Id.
4 Id.
5 Id.
6 Id.
7 Ali, 71 M.J. at 259.
In February of 2008, not long after his initial deployment, Ali had an altercation with another Iraqi interpreter, Al-Umarry.\(^8\) Though the confrontation started as merely verbal, it escalated when Al-Umarry struck Ali in the head.\(^9\) Butler instructed Ali to wait in his room until the Squad Leader returned.\(^10\) While Butler was gone, Ali stole a knife from him and attacked Al-Umarry, who ended up with four lacerations to his chest.\(^11\) Consequently, Ali was placed on “restricted liberty,” which required him to remain on the military base, and to check in with L3 twice daily, a condition he violated when he travelled to Al Asad shortly thereafter.\(^12\) As a result of this violation, Ali was placed in pre-trial confinement, charged with assaulting Al-Umarry and violating his restricted liberty instruction, and referred to a court-martial—established by the Uniform Code of Military Justice (“UCMJ”)—where he was convicted.\(^13\)

Not long after the incidents involving Ali took place in Iraq, a similar series of events occurred at the Kandahar Airfield (KAF), in Kandahar, Afghanistan. KAF was the place of employment for Sean Brehm, a South African citizen.\(^14\) In July 2010, Brehm signed an employment contract with DynCorp International, LLC, an American-based security contractor that operated in Afghanistan.\(^15\) Brehm’s primary responsibility was to make and coordinate travel arrangements for other contractors.\(^16\) On November 25, 2010, another contractor, J.O., with whom Brehm had a previous dispute, returned to KAF.\(^17\) Brehm engaged him at the airport, and like what occurred between Ali and Al-Umarry, a verbal argument turned physical.\(^18\) It ended with Brehm stabbing J.O.\(^19\) Brehm was arrested, charged pursuant to the Military Extraterritorial Jurisdiction Act (MEJA), and extradited to the United States for trial in the Eastern District of Virginia.\(^20\)

\(^8\) Id. at 259–60.
\(^9\) Id.
\(^10\) Id.
\(^11\) Id.
\(^12\) Id. at 260.
\(^13\) Ali, 71 M.J. at 260.
\(^14\) United States v. Brehm, 691 F.3d 547, 549 (4th Cir. 2012).
\(^15\) Id.
\(^16\) Id.
\(^17\) Id.
\(^18\) Id.
\(^19\) Id.
\(^20\) Brehm, 691 F.3d at 549–550.
Though certain factual distinctions between any two cases are unavoidable, and these two are no different, their similarities are also undeniable—such as, the alleged criminals’ employment as contractors, the locus of the crimes, and the types of crimes committed. Nonetheless, two very different legal mechanisms were used to adjudicate these two cases. The United States military prosecuted Ali using a relatively new conception of the American court-martial system, which until 2006, traditionally had been used to try civilians only “in a time of declared war.”21 Indeed, in 1970, the United States Court of Military Appeals held that a civilian contractor accused of criminal activity in Vietnam could not be court-martialed because the conflict was not a congressionally-declared war, such as World War II.22 Prosecuting civilians by court-martial, then, became something of a rarity in part due to the infrequency with which the United States Congress declares wars.23

Senator Lindsey Graham sought to amend the UCMJ to allow for the court-martial to be used more easily against offending civilians.24 In 2006, he succeeded, and Congress substantially broadened the language of UCMJ § 2(a)(10) (the “Graham Amendment”) to provide for increased court-martial jurisdiction over civilians.25 The main effect of the Graham Amendment was to eliminate the constraint that a congressionally-declared war was the only conflict during which an accompanying civilian could be court-martialed; instead, he or she could be court-martialed during any conflict that the Secretary of Defense deemed appropriate and named a “contingency operation.”26 Because Operation Iraqi Freedom, the conflict during which Ali served, was not a declared war but rather a contingency operation, Ali could be court-martialed as a civilian only because of this

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24 See Warren, supra note 21, at 1272.
25 Paragraph (10) of section 802(a) of title 10, United States Code (article 2(a) of the Uniform Code of Military Justice), is amended by striking “war” and inserting “declared war or a contingency operation.” H.R. REP. NO. 109-702, at 137 (2006).
26 A “contingency operation” is defined as “a military operation that—(A) is designated by the Secretary of Defense as an operation in which members of the armed forces are or may become involved in military actions, operations, or hostilities against an enemy of the United States or against an opposing military force[,]” 10 U.S.C. § 101 (a) (13) (2006).
amendment.\textsuperscript{27}

Brehm, on the other hand—and for reasons not entirely clear—was not referred to a court-martial to be tried in a military court, presided over by a military judge, but to an Article III district court pursuant to MEJA.\textsuperscript{28} Though he pled guilty, reserving the right to appeal the district court’s denial of his motion to dismiss, Brehm was afforded the right to a jury trial, a right Ali did not have under the court-martial.\textsuperscript{29} Brehm was afforded the venue of a civilian court and the procedural benefits that come with it because of MEJA. Like the Graham Amendment, Congress passed MEJA to provide American jurisdiction over civilians working for the U.S. military abroad.\textsuperscript{30} Unlike the Graham Amendment, it sought to close the "jurisdictional gap"\textsuperscript{31} while retaining the core due process protections to the accused offered by the American criminal justice system.

The Ali and Brehm cases show that similar cases can be adjudicated to substantially similar results, but may arrive at those results in very different ways. This Comment explores both routes in an attempt to determine which might best prosecute offenses while simultaneously best honoring the values of the United States Constitution and the Supreme and appellate court precedent that has interpreted them. It argues, and ultimately concludes, that MEJA, though flawed and in need of reform to achieve its prosecutorial potential, is the substantially more constitutionally-sound approach to prosecuting civilians accompanying or employed by the United States military abroad. While MEJA currently leaves much to be desired in terms of its efficiency and effectiveness, it could be easily amended to encourage federal prosecutors to use it more frequently. Moreover, Congress should pass the Civilian Extraterritorial Jurisdiction Act (CEJA) to complement MEJA, which would expand the scope of civilians working with the military who come under Article III court jurisdiction.

This Comment also argues that the Graham Amendment, in its current form, is unconstitutional. Not only does it break with a long line of Supreme Court precedent that restricts the use of court-martial to try civilians on due process grounds, but it also implicates Congress

\textsuperscript{27} Operation Enduring Freedom in Afghanistan, and Operations Iraqi Freedom and New Dawn in Iraq are all clearly contingency operations according to this statutory definition.

\textsuperscript{28} United States v. Brehm, 691 F.3d 547, 550 (4th Cir. 2012).

\textsuperscript{29} Id.

\textsuperscript{30} H.R. Rep. 106-778, at 5 (2000) (The "jurisdictional gap" refers to the problem that occurs when no law or a law’s failure "allows . . . crimes to go unpunished”).

\textsuperscript{31} Id.
in a law that it may not have had authority to pass in the first place given its restricted rulemaking power. This Comment acknowledges these deficiencies and offers some practical solutions, including a “totality of the circumstances” test that the courts should adopt to ensure the Graham Amendment is not used in a fashion that contravenes the values of the Constitution and applied only in the few circumstances where MEJA and CEJA are inapplicable.

Part II of this Comment provides a historical overview of military justice in the United States, particularly jurisdiction over civilians, in both peacetime and wartime, and both before and after the codification of the UCMJ. Part III explains how an increasing reliance on civilian contractors and the emergence of a “jurisdictional gap” led Congress to create MEJA and the Graham Amendment—two competing, concurrent schemes to bring these civilians under American jurisdiction—and delves into the substance of these schemes. Part IV of this Comment analyzes how the Ali and Brehm cases are illustrative of both the problems and benefits associated with each of the two legislative schemes. Next, Part V of this Comment argues for enhancing the Justice Department’s ability to use MEJA or CEJA with more frequency and to greater prosecutorial effect, while also suggesting a judicially formed standard to limit the use of the Graham Amendment exclusively to situations when MEJA/CEJA cannot be utilized. Part VI summarizes the issues and concludes that though the present system is currently both unconstitutional and inefficient, the above adjustments to the legislative scheme and judicial interpretation of current laws will create a legal regime that promises to expeditiously resolve criminal legal issues involving contractors abroad while simultaneously complying with the Constitution and Supreme Court precedent.

II. A BRIEF HISTORY OF CIVILIAN AND MILITARY COURTS

A. The Early Years: The UCMJ and the Early “Peace-Time” Cases

The American military’s jurisdiction over civilians can be traced to 1775 when the Provisional Congress of Massachusetts Bay codified the Massachusetts Articles of War, which allowed for “all persons whatsoever serving with the Massachusetts Army,” soldiers or otherwise, to be subject to the Articles.32 After the First Continental

Congress, the American Articles of War made the same provision uniform throughout the fledgling American nation.\textsuperscript{33} Shortly thereafter, Article I of the Constitution granted Congress the power to create laws regulating the military.\textsuperscript{34} For 150 years, Congress’s authorization was manifested in the \textit{Articles of War for the Army and Articles for the Government of the Navy for the Navy and Marine Corps}.\textsuperscript{35}

During this time, the Supreme Court frowned upon the use of the court-martial to prosecute civilians. In \textit{Ex parte Milligan}, the Court held that the trying nature of the times alone (i.e., the Civil War) could not provide a legal rationale for the denial of a civilian’s constitutionally protected right to a trial by jury, stating, “[n]o doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government.”\textsuperscript{36} The Court went on to find that the government could not deny Milligan his trial by jury when a civilian court in his home state of Indiana was functioning and capable of adjudicating the same case.\textsuperscript{37}

Later on, and just before the advent of the UCMJ, the Court similarly held that military tribunals could not supplant the civilian courts when the latter were open for business. In \textit{Duncan v. Kahanamoku}, the Court found that Congress could not properly authorize the military to try civilians in military tribunals in Hawaii because of the attack on Pearl Harbor.\textsuperscript{38} In finding the military tribunals unconstitutional, the Court, quoting \textit{Milligan}, held that “civil liberty and this kind of martial law cannot endure together; the antagonism is irreconcilable; and, in the conflict, one or the other must perish.”\textsuperscript{39}

Following World War II, military justice was increasingly necessary to adjudicate crimes and claims due to the significant growth of the American Armed Forces, and the corresponding increase in cases. Congress passed, and President Truman signed, the UCMJ into law in 1950 to aggregate and systematize the legal scheme going forward.\textsuperscript{40}

\textbf{Justice 9} (1955); \textit{William Winthrop, Military Law and Precedents} 97–100 (2d ed. 1920).
\textsuperscript{33} See \textit{American Articles of War of 1775}, art. XXXII, reprinted in \textit{Winthrop, Military Law and Precedents} 953–56 (2d ed. 1920).
\textsuperscript{34} Id.
\textsuperscript{35} Id.
\textsuperscript{36} \textit{Ex parte Milligan}, 71 U.S. 2, 121 (1866).
\textsuperscript{37} Id. at 122–23.
\textsuperscript{38} \textit{Duncan v. Kahanamoku}, 327 U.S. 304, 324 (1946).
\textsuperscript{39} Id. (internal quotation marks omitted).
\textsuperscript{40} See \textit{Dionne}, supra note 32, at 217.
Section 2(a)(10) of the UCMJ provided the military with jurisdiction over civilians in a time of “declared war” so long as they were “serving with or accompanying an armed force in the field.”

Despite the language explicitly permitting court-martial jurisdiction over civilians in a specific circumstance, the Court continued to be circumspect about such use. In *United States ex rel. Toth v. Quarles*, the seminal case on this issue, the Court forbid a court-martial from trying a service member who had been previously discharged and then accused of murder because at the time of the alleged criminal conduct, he was a civilian and no longer an active military member. In the majority opinion, Justice Black saw a great danger in using the court-martial to try civilians, stating:

> [t]here are dangers lurking in military trials which were sought to be avoided by the Bill of Rights and Article III of our Constitution. Free countries of the world have tried to restrict military tribunals to the narrowest jurisdiction deemed absolutely essential to maintaining discipline among troops in active service.\(^{43}\)

The Court then laid down what has become known as the Toth Doctrine, ruling that courts-martial should be “limit[ed] to ‘the least possible power adequate to the end proposed.’”\(^{44}\) Thus, the Court maintained the principles of *Milligan* and *Duncan* that sought to check the power of military justice to adjudicate claims over civilians.

In its next term, the Court again prohibited the use of the court-martial to prosecute a civilian. In *Reid v. Covert*, Clarice Covert was accused of murdering her husband, an active Air Force member, while they both resided at an American Air Force base in England.\(^{45}\) Though she was convicted by court-martial, the Supreme Court overturned the conviction for reasons similar to those in its recent opinion in *Toth*.\(^{46}\) The Court found incredulous the idea that the Framers would have permitted military jurisdiction over a civilian such as Covert, writing:

> [t]he idea that the relatives of soldiers could be denied a jury trial in a court of law and instead be tried by court-martial under the guise of regulating the armed forces would have seemed incredible to those men, in whose lifetime the right of the military to try *soldiers* for any offenses in time of peace

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43. *Id.* at 22.
44. *Id.*
46. *Id.*
had only been grudgingly conceded.\textsuperscript{47}  

It is useful to understand why the Court was so forceful in restricting courts-martial of civilians to the most exceptional circumstances, and Justice Black’s language again proves instructive:  

Courts-martial are typically \textit{ad hoc} bodies appointed by a military officer from among his subordinates. They have always been subject to varying degrees of “command influence.” In essence, these tribunals are simply executive tribunals whose personnel are in the executive chain of command. Frequently, the members of the court-martial must look to the appointing officer for promotions, advantageous assignments and efficiency ratings—in short, for their future progress in the service. Conceding to military personnel that high degree of honesty and sense of justice which nearly all of them undoubtedly have, the members of a court-martial, in the nature of things, do not and cannot have the independence of jurors drawn from the general public or of civilian judges.\textsuperscript{49}  

Justice Black did, if albeit grudgingly, make a concession that in “extraordinary” war-time circumstances, courts-martial of civilians may be allowed, so long as the accused was “serving in the field” as UCMJ \textsection 2(a)(10) specifies.\textsuperscript{50} Nonetheless, Justice Black found that the Covert’s prosecution in 1950s Great Britain did not meet this contextual requirement, writing, “the exigencies which have required military rule on the battlefront are not present in areas where no conflict exists.”\textsuperscript{50} So while Justice Black did strongly reaffirm the \textit{Tooth} Doctrine, he left the door open to Congress and the courts to utilize \textsection 2(a)(10) for the strict use its plain language permitted. Shortly thereafter, the Court, for the first time, was confronted with a case involving the court-martial of civilian contractors working with the military. In \textit{McElroy v. United States ex rel. Guagliardo}, and similar to \textit{Tooth} and \textit{Covert}, the Court found that in peacetime the military could not use the court-martial to try a civilian; so, contractors are civilians despite their employment by the Armed Forces.\textsuperscript{51}  

B. The “War-Time” Cases and Clarification of the \textsection 2(a)(10) Language

In short, there is no lack of Supreme Court precedent on how to interpret \textsection 2(a)(10) in times of peace. The Court seems to have made

\textsuperscript{47} Id. at 23.  
\textsuperscript{48} Id. at 36.  
\textsuperscript{49} Id. at 34–35.  
\textsuperscript{50} Id.  
clear that using a court-martial to try a civilian is not constitutionally permissible in peace-time. But what about “war-time?” As noted earlier in this Comment, the lack of declared wars had left § 2(a) (10) essentially inoperable since the very war (and the last congressionally-declared one) that inspired its passage. Nonetheless, two cases have helped clarify how the statute should be implemented during war-time.

United States v. Averette has proven the most instructive on defining the previously required “in a time of war” language of § 2(a) (10). In finding that the defendant Averette, a civilian, could not be tried by court-martial for conspiracy to commit larceny and attempted larceny, the Court of Military Appeals (CMA) restricted its holding to deciding the exact meaning of the language at issue. In determining that “in a time of war” referred only to declared wars, the CMA went no further, and did not profess an opinion on, whether the court-martial of civilians in a time of war was constitutionally permissible. It did cite Reid v. Covert, however, for the proposition that Congress’s war powers are considerably broader than its powers to regulate the armed forces, implying that in a time of war, the court-martial of civilians might be allowed.

One case, United States v. Burney, on which the majority opinion relied in Ali, stated that “in the field” refers to the “activity” a civilian is engaged in, not merely the location of where it occurs, and that the “activity” in this sense is one that “impl[ies] military operations with a view to an enemy.” Burney also states that “serving with” or “accompanying” the Armed Forces depends on whether a civilian’s movement is not “incidental, but directly connected with, or dependent upon, the activities of the armed force or its personnel.” This implies that when the movement is superfluous to the activities of the army, the movement would not meet the requirement of § 2(a) (10). Interestingly, and at odds with Averette, Burney states that the term “in time of war,” does not necessitate a formal declaration of

53 Id. at 366.
54 Id.
55 Id. at 364 (“The Supreme Court pointed out in Reid v. Covert, supra, that the constitutional grants of legislative authority to the Congress, collectively referred to as the war powers, are considerably more extensive than the authority in Article I, section 8, clause 14, of the Constitution to prescribe rules for the government of the armed forces standing alone.”).
57 Id. at 110.
58 Id.
war by Congress. Instead, it states that the language refers to the “actualities of the situation.” The courts have otherwise been relatively silent in exploring the meaning of the statutory language of § 2(a)(10) as it applies to “war-time.”

Given vagaries in the case law, such as splits like those between Averette and Bumney, what emerged was a developed, but now dated, “peace-time” jurisprudence that has little immediately applicable value to the United States’ current military involvement, and the ever-increasing reliance on civilian contractors for a variety of purposes abroad. More recently, it became necessary to reevaluate the statutory scope of § 2(a)(10). This reevaluation created two judicial schemes for dealing with the issue of civilians serving with the military abroad: the MEJA and the Graham Amendment.

III. MEJA AND THE GRAHAM AMENDMENT: TWO COMPETING, CONCURRENT ATTEMPTS TO ASSERT JURISDICTION OVER CIVILIANS ABROAD

Of the two schemes, MEJA was enacted first, in 2000. Its purpose, as stated, was to “establish Federal criminal jurisdiction over offenses committed outside the United States by persons employed by or accompanying the United States Armed Forces.” The need for the legislation arose from the aforementioned “jurisdictional gap.” That gap arose because the conflicts in which the United States are currently involved are not congressionally declared wars and § 2(a)(10) cannot be used. The House Judiciary Committee determined that such a jurisdictional gap “undermined deterrence and resulted in injustice.” Thus, MEJA was established to provide jurisdiction over the more than 58,000 civilian employees working for the Department of Defense (DoD). Not only does MEJA provide jurisdiction over these civilians, but it also provides the processes for implementation, including those regarding initial proceedings and eventual removal of a suspect to the United States. The Judiciary Committee found the Act to be constitutional pursuant to Article I, Section 8, Clauses 10, 14, 16, and

59 Id. at 109.
60 Id.
63 Id. at 5.
64 Id at 22.
65 Id.
18 of the Constitution.\textsuperscript{67} MEJA went into effect in November of 2000,\textsuperscript{68} but a review of cases citing to the statute reveals that it has been used infrequently.

MEJA’s underutilization has happened for several reasons. Though it was amended in 2004, MEJA initially covered only civilians and contractors working with the DoD.\textsuperscript{69} Many more federal civilian contractors work for other executive offices such as the State Department, the Central Intelligence Agency (CIA), and the Department of the Interior; none of these agencies fall under MEJA’s purview.\textsuperscript{70} Additionally, MEJA does not support jurisdiction over civilian host country nationals (i.e., citizens of the country in which the civilian works, like Ali in Iraq).\textsuperscript{71} People like Ali cannot be prosecuted under MEJA because host country nationals are excluded from MEJA jurisdiction under § 18 U.S.C. 3267(1)(C).\textsuperscript{72} Lastly, the Justice Department has underutilized MEJA because it will not take any cases unless it receives referrals from the DoD.\textsuperscript{73} This is further complicated by the fact that the DoD has not shown great interest in referring cases involving civilians and civilian contractors to the Justice Department.\textsuperscript{74} Essentially, because of problems not only with its statutory language but also with practical issues regarding its implementation, MEJA has failed to plug the jurisdictional gap that was the reason for its creation.

It is in this context of MEJA’s underutilization, the increasing use of civilians abroad for military operations, and the number of incidents involving these civilian contractors in Iraq and Afghanistan\textsuperscript{75} that Congress passed the Graham Amendment.\textsuperscript{76} As noted earlier in this article, the Graham Amendment changes the language of UCMJ § 2(a)(10) only minimally. Nevertheless, that minimal change has spawned a potentially great effect; no longer is the court-martial for civilians restricted to use during formally-declared wars. Court-martial can now be used to adjudicate crimes of civilians during all

\begin{itemize}
\item \textsuperscript{67} H.R.Rep. No. 106-778, at 14.
\item \textsuperscript{68} 18 U.S.C. § 3261 (2006).
\item \textsuperscript{69} See Dionne, supra note 32, at 221–22.
\item \textsuperscript{70} Id.
\item \textsuperscript{71} 18 U.S.C. § 3267(1)(C) (2006).
\item \textsuperscript{72} Id.
\item \textsuperscript{73} See Dionne, supra note 32, at 222.
\item \textsuperscript{74} Id. 32 at 222 n.93.
\item \textsuperscript{75} See Moshe Schwartz, Cong. Research Serv., R40835, The Department of Defense’s Use of Private Security Contractors in Iraq and Afghanistan: Background, Analysis, and Options for Congress 1–9 (2009) for a summary of major incidents and other background information.
\item \textsuperscript{76} See Dionne, supra note 32, at 211.
\end{itemize}
contingency operations. This means that the military can assert court-martial jurisdiction over civilians as long as the Secretary of Defense says it can. This expansive use of the court-martial in a time that is not a congressionally-declared war is a stark departure from the string of cases that follow the Toth Doctrine. Implicitly, the Graham Amendment questions the civilian courts’ ability to lead the way in civilian contractor jurisprudence.

IV. THE PRACTICAL AND CONSTITUTIONAL IMPLICATIONS OF BREHM AND ALI WITH REGARDS TO MEJA AND THE GRAHAM AMENDMENT

The Brehm and Ali cases are illustrative of the practical potential for these respective statutory schemes; they show that it is possible to successfully adjudicate crimes committed by civilians working with the armed forces abroad. Nonetheless, both cases also show how difficult these prosecutions can be when the alleged crime happens in murky factual situations. These cases were prosecuted successfully, the record shows, likely because their relevant facts were so straightforward. In less cut-and-dry circumstances, it is unclear if both schemes would work as effectively, and indeed, the limited scholarly literature already cited on the subject demonstrates ways in which both schemes might fail practically to adjudicate more complicated cases.

Besides their practical and prosecutorial implications, the cases also reveal how each scheme might or might not fit within the Toth Doctrine. In short, as Brehm shows, MEJA provides a statutory scheme that will flourish in some cases—such as the instant one—but may struggle mightily in others. Because of MEJA uses the civilian court system, however, it is consistent with Toth, and seems to be constitutional both facially and, in cases like Brehm, as applied. Conversely, as Ali shows, the Graham Amendment immediately affronts Toth and is constitutionally suspect in a way that MEJA is not.

A. The Case of Sean Brehm

The facts surrounding Brehm made it ripe for adjudication under

77 Id.
78 See id. at 237.
79 See supra Part I; see also infra Part IV.A-B.
MEJA. First, Brehm’s contract was with DynCorp, who in turn had contracted with the DoD. As a civilian contractor of the DoD, Brehm fell firmly within MEJA’s definition of who falls under its jurisdiction. Additionally, Brehm’s alleged crime occurred at the KAF Airport in full view of an Army Criminal Investigation Division (CID) agent. The agent and two other contractors were able to intervene and stop the assault from continuing before bringing Brehm into custody. Given the CID agent’s fortuitous intervention, it is possible—but not certain given the sparseness of the record below—that he was able to expediently and accurately create a record of the incident that could be used in any investigation and the court case to follow. This is important because one of the criticisms of MEJA is that it is too difficult for the Justice Department—the agency tasked with prosecuting MEJA cases—to frequently prosecute MEJA cases due to the lack of referrals from the DoD.

This lack of referrals can be attributed to the DoD’s disinterest, or stretched resources, and contributes directly to the dearth of prosecutions under the law. Due to the CID’s intervention, it is likely that the DoD had no option but to investigate and refer the case to the Justice Department for prosecution. Once that was done, the procedures required by MEJA were seemingly followed, with a Magistrate Judge issuing an arrest warrant, then holding a telephonic conference, ordering extradition, and referring the case to a grand jury for indictment all within a one month period. In short, given Brehm’s status as an employee of DynCorp—and thus, the DoD—as well as the particular and somewhat serendipitous circumstances of the CID’s presence during the crime, the case was workable within the

81 Id.
84 Id.
85 Id. (stating that he was only at the KAF Airport to pick up a witness to another case, independent of anything involving Sean Brehm).
86 See Dionne, supra note 32, at 222.
87 Id. at 222 n.93 (citing Glenn Schmitt, Hold Contractors Accountable, NAVYTIMES.COM (Mar. 9, 2008), http://www.navytimes.com/community/opinion/army_backtalk_contractors_071126/ (explaining that “[t]he Defense Department’s position is that it is too busy fighting the war to investigate the acts of contractors, even those who work directly for the military. And the Justice Department takes the position that it will prosecute only cases that the Defense Department refers to it.”).
context of MEJA’s practical underpinnings.89

Just as importantly, the case provides a convincing argument that
MEJA is constitutionally permissible. Both the Eastern District of
Virginia and the Fourth Circuit have convincingly refuted arguments
that the scheme is unconstitutional as applied in certain factual
contexts. The two constitutional challenges Brehm presented to the
court were that MEJA’s provision violated his due process rights under
the Fifth Amendment, and that it exceeded Congress’s enumerated
powers.90

With regards to Brehm’s due process challenge, generally the
United States can enforce its laws beyond its territory.91 The dispositive
test to determine whether jurisdiction is proper under a specific law,
and thus not offensive to Brehm’s due process rights, is whether there
is a “sufficient nexus” between him, his activities, and the United
States.92 Factors that determine whether an actor outside of the
territorial United States has a sufficient nexus with the country are:

(1) the defendant’s actual contacts with the United States,
including his citizenship or residency; (2) the location of the
acts allegedly giving rise to the alleged offense; (3) the
intended effect a defendant’s conduct has on or within the
United States; and (4) the impact on significant United
States interests.93

If an actor’s relationship with the United States is so contrived or
tenuous as to make a legal proceeding “arbitrary or fundamentally
unfair,” jurisdiction would not be proper.94

Between his employment by DynCorp and his access to KAF by
virtue of his and DynCorp’s relationship with the DoD—both of which
led to the assault of his victim—Brehm established a “relationship”
with the United States.95 Furthermore, the court found that by
harming another contractor, on an American Air Force base, and
requiring the resources of both the CID and the American court
system to adjudicate the alleged crime, Brehm’s activities clearly
established a sufficient nexus between him and the United States.96

The importance of this determination cannot be understated.

89 Id.
90 Id. at *4.
92 See Brehm, 2011 WL 1226088, at *4 (internal citations omitted).
93 Id.
94 Id.
95 Id. at *5.
96 Id.
Whether the United States could establish facts to create a sufficient nexus between the country and the accused is a concern that the Department of Justice directly raised during the law’s passage. Here, the court articulately and cogently describes how Brehm, even though not a citizen of the United States, has more than sufficient contacts given his employment with DynCorp, and by proxy the DoD, and how his actions directly affect the interests and resources of the United States.

Additionally, the Eastern District of Virginia persuasively held that Congress’s enactment of MEJA does not violate its enumerated powers as granted by the Constitution. Citing the seminal case, United States v. Curtis Wright, and numerous cases that have followed it, the court ruled that Congress, pursuant to its powers granted by Article I, Section 1 of the Constitution had the power to enact MEJA. As the court points out, powers reserved to the states by the Constitution do not include the right to enforce federal criminal laws extraterritorially. Because this was a power never granted to the states, it falls firmly within those “necessary and proper” for the federal government to exercise. Though the Fourth Circuit agreed ultimately with the district court’s ruling, specifically with regards to the “sufficient nexus” between Brehm’s actions and the United States, the court did not rule on MEJA’s constitutionality as per Section 1 of Article I of the Constitution. Instead, it found MEJA as valid under Article I, Section 8, Clauses 12 and 18. These clauses provide Congress not only the directive to “raise and support Armies,” but also the mandate to make any laws necessary and proper to their maintenance. Thus, the Fourth Circuit found MEJA fell within Congress’s right and was constitutional as applied to Brehm, who did not challenge the law facially on appeal.

Both the district court and the Fourth Circuit decisions make

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99 Brehm, 2011 WL 1226988, at *6 (citing United States v. Plummer, 221 F.3d 1298, 1304 (11th Cir. 2000); United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 315-16 (1936)).
100 Id.
101 Id.
102 United States v. Brehm, 691 F.3d 547, 551 (4th Cir. 2012).
103 Id.
104 U.S. CONST. art. I, § 8, cl. 12, cl. 18.
105 Brehm, 691 F.3d at 551.
clear that MEJA can serve an effective purpose to prosecuting crime-committing civilian contractors serving with the military abroad, given the right circumstances. Here, because of Brehm’s crime’s straightforward nature he was expeditiously stopped, investigated, and brought to the United States to face trial. More importantly, both the district court and the Fourth Circuit dealt convincingly with the constitutional problems and found MEJA well within Congress’s rulemaking powers. In short, Brehm provides a practical and procedural template for how to use MEJA legally and to its intended effect. Nonetheless, analysis of Ali below will show that problems with the law exist and also make the utilization of courts-martial appealing in ways that MEJA is not.

B. The Case of Ala Mohammed Ali

Unlike Sean Brehm, Ala Ali had no chance at all to be adjudicated under MEJA. Because Ali was an Iraqi national, MEJA had no jurisdiction over him.\textsuperscript{106} Without the Graham Amendment to § 2(a)(10), there would be no way for the United States to adjudicate Ali’s alleged crime.\textsuperscript{107} So from a practical perspective, the Graham Amendment was necessary if the United States wanted to have a role in trying Ali for assault. Unfortunately, besides the facts recited in Ali’s appeals, there is no easily accessible record of the actual court-martial.\textsuperscript{108} All that can be told from the record is that the crime was committed in February 2008, and that in June of 2008, sometime after Ali’s motion to dismiss for lack of jurisdiction was not granted, he was charged with additional crimes.\textsuperscript{109} Sometime between June 2008 and July 18, 2011, when Ali appealed the denial of his motion to dismiss, he was court-martialed and ordered to serve five months confinement.\textsuperscript{110} Though the majority opinion of the Court of Appeals for the Armed Forces (CAAF; the highest appellate court tasked with reviewing courts-martial) references the opinion of this proceeding and the opinion of the military judge during the court-martial, no


\textsuperscript{109} Id. at 517.

\textsuperscript{110} Id. at 514.
2014]  COMMENT  1211

citation is provided. 111

In short, while there is ample record of the appellate process on
Ali’s motion to dismiss, and the reasons for its denial, the court-martial
record is not available to the public. This is problematic for a number
of reasons. From a practical perspective, with no record of the court-
martial, it is impossible to see if it was expeditious or slow, efficient to
adjudicate the crime, or bogged down by procedural difficulties. In
theory, the court-martial, a more ad-hoc body and process, should be
able to operate efficiently but without any record, it is impossible to
tell. Furthermore, though the due process protections of a court-
martial are limited, there is no way to know if they were adhered to.
They may well have been, but without a record, it is again, impossible
to tell. Finally, given the novelty of the proceeding (the first court-
martial of a civilian under the Graham Amendment and likely the first
at all since Averette), the lack of a record creates a knowledge deficit for
both outsiders studying the case and for those military judges and
attorneys that could learn from it. Nonetheless, from a prosecutorial
perspective, it succeeded, as Ali was found guilty of the crime.

Additionally, there are concerns that the Army Court of Criminal
Appeals (the military appellate court directly below the CAAF) misapplied the facts in Ali concerning some of the longstanding
language in § 2(a)(10). Most questionable is the determination of the
Army Court of Criminal Appeals and the CAAF that Ali was “in the
field” during the incident with Al-Umaryi. 112 Judge Erdman, writing the
opinion for the CAAF, correctly cited to Burney for the proposition that “in the field” means an area of actual fighting. 113 He wholly failed
to substantiate, however, that this was the area where the incident
occurred. He cited to the (unreported) military judge’s determination
to that effect because the missions in which Ali was involved required
“mission preparations, safety brief, accountability, convoy to the
mission site in up-armedored HMMWVs, training of Iraqi Police . . . [and] conduct[ing] patrols with the Iraqi police.” 114 What the military and
then Judge Erdman describes seems to be fairly standard precautionary procedures for operating in Iraq. 115 Though he states, again without citation, that Ali’s unit was stationed at a combat outpost subject to regular attacks, Judge Erdman fails to state that the place in

111  Ali, 71 M.J. at 260.
112  Id. at 264.
113  Id.
114  Id.
which the assault on Al-Umaryi took place was an area of actual fighting at the time of the assault. It may very well have been, as the base may have been subject to enemy attack at the time. Nonetheless, the posture Judge Erdman takes is both unapologetically vague and expansive. Under his determination, a history of combat in a large area could mean court-martial jurisdiction over a civilian contractor there, even if the area was one of relative peace at the time.

But even more disconcerting than the informational deficit from a lack of record, or than Judge Erdman’s expansionist view of § 2(a)(10), is that this prosecutorial victory was at the expense of both the constitutional principles reflected in the Toth Doctrine and Ali’s due process rights. With almost remarkable casualness, Judge Erdman breezed through the questions of whether the Graham Amendment, as applied to Ali, violates the Constitution.116

Judge Erdman stated that there is a history of Supreme Court jurisprudence that denies aliens, like Ali, the same constitutional protections that American citizens enjoy.117 Judge Erdman cited these cases for the proposition that, unless aliens enter the United States, spend a significant amount of time in the country, and develop substantial connections with the country, they cannot enjoy the due process rights that citizens enjoy.118 While mindful of the Toth Doctrine, he stated that the cases in that line of jurisprudence are distinguishable from Ali because they all involved American citizens, not aliens.119 This argument is deficient for three reasons.

First, Judge Erdman too quickly determined that Ali does not have sufficient connections to the United States. Judge Erdman’s statement that, “[n]either Ali’s brief pre[-]deployment training at Fort Benning, Georgia, nor his employment with a United States corporation outside the United States constitutes a ‘substantial connection’ with the United States as envisioned in Verdugo-Urquidez,” is itself problematic for multiple reasons.120 Though the tests are somewhat different (“sufficient nexus” vs. “substantial connection”), Ali’s connections to the United States are at least as strong as, if not stronger than, Brehm’s.121 Ali has connections for the same reason Brehm was deemed to have a sufficient nexus to the United States—his

116 Ali 71 M.J. at 269–70.
117 Id. at 267 (citing United States v. Verdugo-Urquidez, 494 U.S. 259 (1990); Johnson v. Eisentrager, 339 U.S. 763, 783 (1950)).
118 Id.
119 Id. at 269.
120 Id. at 268.
121 See Vladeck, supra note 107.
employment by an American contractor doing business with the DoD during an American military operation.

Furthermore, Judge Erdman’s citation to the Verdugo-Urquidez case is also problematic because the constitutional rights at issue in that case were distinctive from those germane in Ali. In Verdugo-Urquidez, the rights at issue were the defendant’s Fourth Amendment rights against unreasonable search and seizure, which the Supreme Court distinguished from the rights protected by the Fifth Amendment. Such a distinction undercuts Judge Erdman’s reliance on the older case as a compelling authority.

Finally, to the extent that Verdugo-Urquidez is instructive, the Court also made clear that a main reason the defendant in that case had no substantial connection to the United States was that his sole entrance into this country was involuntary, made only after he was arrested in Mexico and brought to the United States. Ali on the other hand, as previously stated, had voluntarily entered the United States for pre-deployment training.

The second constitutional problem with Judge Erdman’s opinion is its misunderstanding of the Toth Doctrine and, accordingly, its unwarranted disregard of the Supreme Court’s opinion in Boumediene v. Bush. Judge Erdman stated that although he is aware of Toth and the cases that follow it, they were inapplicable because they involved American citizens who “indisputably enjoyed the protections of the Fifth and Sixth Amendments.” Though the citizens at issue in the Toth line of cases were American, no distinction was made between their rights as Americans and the rights of aliens.

Nonetheless, even if Judge Erdman is correct that the Toth Doctrine and its due process guarantees for civilians categorically did not previously apply to aliens, he failed to adequately confront how the 2006 ruling in Boumediene v. Bush changes this calculus. Boumediene examined whether the government had the power to suspend the rights of inmates at the prison in Guantanamo Bay to have expeditious

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122 Ali, 71 M.J. at 267.

123 United States v. Verdugo-Urquidez, 494 U.S. 259, 264 (1990). (“Before analyzing the scope of the Fourth Amendment, we think it significant to note that it operates in a different manner than the Fifth Amendment, which is not at issue in this case. The privilege against self-incrimination guaranteed by the Fifth Amendment is a fundamental trial right of criminal defendants.”).

124 Id. at 272–73.

125 Ali, 71 M.J. at 268.

126 Id. at 269.

127 See Vladeck, supra note 107 (explaining that Boumediene changes the analysis on how Constitutional rights apply to aliens abroad).
habeas corpus proceedings. In finding that the right to habeas could not be suspended in this situation, Justice Kennedy, writing for the Court, stated that “questions of extraterritoriality [in the application of constitutional rights] turn on objective factors and practical concerns, not formalism.” Practical concerns may have been an impediment to recognizing due process rights in Alé—though that is unlikely if the Supreme Court was willing to grant them to the “dangerous” Guantanamo inmates—but Judge Erdman fails to take them into consideration at all, relegating his analysis of Boumediene to an unhelpful footnote that fails to grapple with the core holding stated above. Thus, Judge Erdman misunderstands the significance of Toth, especially in light of Boumediene.

Finally, Judge Erdman’s majority opinion paid almost no attention to whether Congress, through the Graham Amendment, had the authority to grant the military court-martial jurisdiction over civilians for contingency operations and not just formally-declared wars as it previously had done. Judge Erdman stated that, “[t]he Supreme Court has cited Congress’s ‘war powers’ as the constitutional source of authority and justification for federal court decisions which ‘upheld military trial of civilians performing services for the armed forces ‘in the field’ during time of war,’ citing to Reid v. Covert.” This argument is sweeping, and Judge Erdman acknowledged as much in a footnote. He provided no meaningful explanation about why he is looking solely to a “War Powers” explanation for a case arising during a contingency operation and not a declared war. Contingency operations are fundamentally different from wars in both their designation and their character. It cannot follow that Congress has the power to assert war powers over civilians during conflicts that are not by definition or character, wars.

It is also questionable whether Congress had the rulemaking

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129 Id. at 764.
130 Id. at 770.
131 Alé, 71 M.J. at 269 n.25.
132 Id.
133 Id. at 269 n.27.
134 See Dionne, supra note 32, at 211, 224–29 (explaining that contingency operations are designated solely by the Secretary of Defense and can range from a combat operation like Operation Enduring Freedom, to humanitarian relief operations like those in the former Yugoslavia and civilian evacuation missions in Libya).
authority pursuant to Article III of the Constitution to pass the Graham Amendment in the first instance, an issue that Judge Erdman failed to consider. Congress’s rulemaking power allows it "to make Rules for the Government and Regulation of the land and naval Forces." As Dionne notes, this rulemaking authority sets up a dichotomy; Congress has the power to regulate both civilians and the military, but to regulate them separately. There is no “hybrid” category that is part civilian, part military. Depending on which category one belongs to, the Fifth Amendment either guarantees a person a jury trial or it does not. Civilians are guaranteed such jury trials but military members are not. Ali, a civilian, is entitled to a jury trial pursuant to this credited understanding of the rulemaking authority and the Fifth Amendment. The Graham Amendment is an unconstitutional exception to these longstanding rules. Judge Erdman failed, as he does in explaining the Graham Amendment’s language and its relation to Toth and Boumediene, to reconcile the Graham Amendment’s provisions that empower the government to deny this right with its lack of conformity to generally understood congressional rulemaking authority.

To their credit, though they concurred in the result, two other CAAF judges grappled with the constitutional implications of the Graham Amendment in a significantly more strenuous fashion than Judge Erdman did. Chief Judge Baker wrote an opinion that concurred with the result, but did so for slightly different reasons. He found that Congress did have authority to pass the Graham Amendment, but with more consideration for congressional authority than Judge Erdman’s belief that Congress had authority solely on the basis of Article I War Powers. Chief Judge Baker, while circumspect about extending court-martial over civilians pursuant to the due process protections of the Fifth Amendment and the Supreme Court’s caution as expressed through the Toth line of cases, saw a combination of legal authorities providing the constitutional basis for the Graham

136 See Dionne, supra note 32, at 229. But see Murphy v. Garrett, 729 F. Supp. 461, 469, 472-73 (W.D. Pa. 1990), for the proposition that military jurisdiction is less intrusive if a civilian is a reservist in the military. Judge Diamond did, however, qualify that this holding is limited to the “peculiar facts of the instant suit.” Id. at 473.
137 See U.S. CONST. amend. V (“No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger, . . .”).
138 See Dionne, supra note 32, at 219.
140 See id.
Amendment as it applied to Ali. Relying on a smattering of Congress’s War Powers, Boumediènes call for a functional approach to the extension of constitutional rights, and a tradition of a very limited use of court-martial over civilians during combat operations, Chief Judge Baker wrote that there was proper authority for the use of the Graham Amendment, in this case, “in this context.” The authority comes from a combination of the “Rules and Regulations Clause, the war powers, and the Necessary and Proper Clause.” Thus, he held that Congress had the authority necessary enact the Graham Amendment but seemed to believe its application should be restricted to far narrower circumstances than did Judge Erdman.

While Chief Judge Baker’s concurrence is far more convincing than the majority’s, it runs into similar constitutional problems. It fails to explicitly spell out that the circumstances in Ali’s case warranting such an extreme departure from the typical understanding of Congress’s rulemaking authority. Nowhere in the concurrence does it confront head-on the argument that the Graham Amendment was a congressional exercise of power that denies due process rights guaranteed civilians under the Fifth Amendment. C.J. Baker attempts to reconcile this conflict by stating that Ali’s due process rights under the court-martial were no different than those American servicemen and women would receive in their own potential court-martial. He fails, however, to explicate why that matters, since Ali is clearly not an enlisted serviceman.

The other concurrence, by Senior Judge Effron, comes even closer to hitting the right mark than either of the previous two opinions. For Judge Effron, Ali’s court-martial is constitutional only to the extent that Ali was not under MEJA’s jurisdiction because of his designation as a host-country national, as a citizen of Iraq, working in Iraq. Because there was no other jurisdiction to try Ali, his court-martial complied with the Toth Doctrine in that the Graham Amendment was being used to the “least possible power” because there was no other venue to do so. Thus, essentially because there was no other option, court-martial jurisdiction was proper over Ali.

While Judge Effron’s opinion comes closest to correctly  

141 *Id.* at 274-76.
142 *Id.* at 276.
143 *Id.*
144 *Id.*
145 *Ali* 71 M.J. at 276 (S.J. Effron, concurring) (emphasis added).
146 *Ali* 71 M.J. at 280.
interpreting Supreme Court precedent in this area of jurisprudence, it does fail to take into account the full breadth of the Toth Doctrine. As one scholar has pointed out, it particularly fails to reconcile the holding in McElroy v. United States ex rel. Guagliardo.\(^\text{147}\) In that case, the Supreme Court disallowed court-martial jurisdiction over civilians abroad even though there was no other available forum to try them.\(^\text{148}\) If the Court declined to exercise court-martial jurisdiction over civilians in Guagliardo, it is unclear why the situation in Ali should be treated any differently.

V. THE WAY FORWARD: REVISIONS TO MEJA AND THE GRAHAM AMENDMENT THAT WOULD INCREASE EFFICIENCY AND GUARANTEE CONSTITUTIONALITY

An analysis of the foregoing opinions has revealed congressional resolve to deal with the problem of impunity for civilians serving with the military abroad. It has also shown that in creating legal schemes to solve the problem, Congress may have overlooked serious constitutional issues that were born with them. With regards to MEJA, the problems are solely practical, and while practical issues exist with the Graham Amendment, the greater concerns are constitutional. Both must be resolved. Civilian impunity, especially as it relates to contractors, continues to be a problem in the Middle East whether the crimes are trivial\(^\text{149}\) or more serious.\(^\text{150}\) Fortunately, there are ways to reform both legislative schemes to increase their efficiency and constitutionality in an effort to ameliorate this problem consistent with this country’s traditional legal values.

With regards to MEJA, the statute itself must be revised to eliminate the provision excluding host-country nationals from its jurisdiction. In his concurrence, Judge Effron accurately states that this provision “reflects congressional sensitivity to the interests of a host country in prosecuting its own citizens, an appropriate consideration under the military and foreign affairs powers of Congress.”\(^\text{151}\) This

\(^{147}\) See Vladeck, supra note 107.


purpose, however, is independently satisfied by a different provision of MEJA, which precludes the United States from prosecuting a civilian if the foreign government, with jurisdiction recognized by the United States (as Iraq would have had over Ali), has begun its own prosecution first.\footnote{152} So long as the Justice Department was careful to make sure that the host country had the first opportunity to prosecute civilian wrongdoers, it would likely be able to assuage Judge Effron’s concern without generally precluding its ability to prosecute host country nationals.

In addition to revising this statutory language, Congress should also pass the Civilian Extraterritorial Jurisdiction Act (CEJA). CEJA was introduced by the House in the 110th Congress, and was passed there, but the Senate failed to do so as well and since then little has been done to reignite its potential passage.\footnote{153} Its purpose is to bring more non-DoD employed contractors under the jurisdiction of the American federal courts.\footnote{154} For example, because MEJA requires that the civilian’s employment “relates to supporting the mission of the [DoD] overseas” if a contractor is implied by another federal agency with no connections to the DoD, MEJA will not provide jurisdiction.\footnote{155} Thus, if a contractor’s employment supports another agency’s mission overseas, such as the State Department’s or CIA’s, the civilian will fall into the “jurisdiction gap.”\footnote{156} The effect of this restriction is to create cases that focus on the minutiae of a contractor employee’s designation. In other words, “[c]ases that would otherwise be straightforward can turn into complex investigations focusing not just on the underlying criminal conduct, but also on the scope of the defendant’s employment, his or her specific work duties, and other jurisdiction-related facts.”\footnote{157} The specter of civilian impunity is even more daunting because this employment information is often classified and difficult for the Department of Justice to obtain.\footnote{158}

CEJA would close this jurisdictional gap and provide for

\footnote{152} 18 U.S.C. § 3261(b) (2006).
\footnote{153} CHARLES DOYLE, CONG. RESEARCH SERV., R42358, CIVILIAN EXTRATERRITORIAL JURISDICTION ACT: FEDERAL CONTRACTOR CRIMINAL LIABILITY OVERSEAS (2012).
\footnote{154} Id.
\footnote{156} See Dionne, supra note 32, at 222.
\footnote{158} Id.
jurisdiction regardless of which agency’s mission the civilian is supporting.\(^{159}\) It would also provide greater oversight of such prosecutions.\(^{160}\) CEJA has the support of the Justice Department, State Department, at least one non-governmental organization, and contractors themselves.\(^{161}\) At a time when the military is drawing down its numbers in Iraq and Afghanistan, and increasing the numbers of contractors it uses,\(^{162}\) it is imperative to have a constitutional and efficient statutory scheme in place to adjudicate potential crimes they commit. The above-mentioned revision to MEJA, as well as the enactment and implementation of CEJA, would provide that scheme.

The constitutional infirmities that face the Graham Amendment are not so easily resolved by congressional action. As judges, scholars, and legal bloggers have noted, the law implicates fundamental issues of Congress’s ability to pass this law, as well as the military’s ability to deny due process rights.\(^{163}\) Nonetheless, looking to the Toth line of cases provides some indication of how the Graham Amendment may be salvaged and used in a limited fashion. In particular, McElroy provides an insight into how the military may use the Graham Amendment in a constitutional fashion going forward.

As stated above, McElroy stands for the Toth proposition that the use of court-martial be limited to the “least possible power.”\(^{164}\) It did, however, see a constitutional way to submit military employees, who would traditionally be thought of as civilians, to the jurisdiction of the court-martial. To do so, it offered the example of paymasters in the Navy.\(^{165}\) During the Revolutionary War, the paymasters were thought to be of vital importance to the war effort. Any criminal disputes involving them needed expedient resolution. Accordingly, civilians who held the paymaster position signed a waiver that granted the Navy jurisdiction over them for the duration of the conflict.\(^{166}\) For that period, they would be enlisted into the American military and be held to court-martial jurisdiction.\(^{167}\)

\(^{159}\) Id.


\(^{161}\) Id. at 2.

\(^{162}\) Id.

\(^{163}\) See generally Dionne, supra note 32; see also Vladeck, supra note 107.


\(^{165}\) Id. at 284–85.

\(^{166}\) Id.

\(^{167}\) Id.
A similar scheme could be utilized by the American military. For those contractors over whom it would want to potentially have court-martial jurisdiction, the military could require a waiver of a jury trial, which would include a notice that they have received, read, and understand that if they commit a crime, they could be court-martialed pursuant to § 2(a)(10). The Supreme Court has never ruled directly on whether a jury trial waiver so far in advance of a criminal trial in these sorts of unique circumstances would be valid and legally enforceable, though recently the Roberts Court has been circumspect about allowing the waiver of a defendant’s trial rights in a more prosaic legal context.\textsuperscript{168} Furthermore, to protect the person waiving constitutional rights, the Supreme Court has held previously that “in the civil no less than the criminal area, ‘courts indulge every reasonable presumption against waiver.’”\textsuperscript{169} Furthermore, “[w]aivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences.”\textsuperscript{170}

These holdings could present some difficulty in the contractor context. If these waivers were to be ruled valid and enforceable, they could not be merely included in the contracts signed by contractors, they would have to be adequately explained to the contractor by a member of the company’s human resources or legal department. Another obstacle is that many foreign contractors probably speak little or no English. Thus, the waiver and the explanation would have to be in the contractor’s native language to be understood, and thus, valid and enforceable. If those requirements could be accommodated, however, the contractor may be able to validly waive his or her right to a trial by jury as a term of employment.

Additionally, judges should only allow the use of waivers, pursuant to the Toth line of cases “to the least possible power,” and thus only in situations where prosecution under MEJA and CEJA would be impractical, which would also conform to Boumediene’s rule. In order to determine whether the use of court-martial satisfies both Toth and Boumediene, the courts should employ a “totality of the circumstances” test.

Totality-of-the-circumstances tests are ubiquitous in American

\textsuperscript{170} Brady v. United States, 397 U.S. 742, 748 (1970).
legal jurisprudence. They are used in everything from Fourth Amendment cases to cases involving the discharge of student loans. They seek to create a proper legal determination on a given case after reviewing a number of deliberative balancing factors. To create a totality of the circumstances test for the current problem, courts should consider factors that reveal whether the use of court-martial violates Toth and is being used more than for the “least possible power” necessary, as well as considering whether the court-martial is being used in violation of Boumediene. Such factors to evaluate these circumstances could be, but are not limited to: (1) the context in which the contractor signed the notice and waiver described above, and whether it was willingly signed with adequate knowledge, rather than being coercive; (2) the complexity of the investigation and whether, because of sensitive timing issues with regards to evidence, the Justice Department may not be able to expediently provide the necessary resources to successfully complete an investigation and prosecution; (3) whether the military can substitute for the Justice Department and adequately provide not only such a timely and robust investigation, but also an approximation of the due process rights that the civilian would otherwise receive if his crime was adjudicated by an Article III court; and (4) whether necessity calls for an expedient resolution of the case to restore morale to the local population or the military unit affected. The combination of a knowledgeable and informed waiver and an incisive totality of the circumstances test would ensure that the Graham Amendment is used in a way that is consistent with longstanding (Toth) and recent (Boumediene) precedent seeking to ensure that the due process rights of civilians serving abroad as contractors are not violated. Unfortunately, it would not obviate the concern expressed above that Congress did not have the authority in the first place to pass the Graham Amendment. Nonetheless, it would go very far in ensuring that the courts do not overutilize a procedure that is supposed to be exceedingly limited in these circumstances, especially when there is a concurrent legislative scheme that provides for similar adjudication.

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172 Id.
173 Julie Swedlack & Kelly Prettner, Discharge or No Discharge: An Overview of Eighth Circuit Jurisprudence in Student Loan Discharge Cases, 36 WM. MITCHELL L. REV. 1679, 1680 (2010).
VI. CONCLUSION

This Comment’s focus is on a distinctly modern problem, but the legal issues surrounding it are as old as our republic. The problem of jurisdiction over civilians working with the military abroad went on for far too long without resolution. The lack of regulation of these people led to crimes under this country’s flag that, because of legal failures, the United States could not adequately address. Doubtlessly, this affected our reputation as a country that upholds justice, both on these missions abroad and at home.

Those that threw in their lot and passed MEJA and the Graham Amendment should be commended for their willingness to tackle a problem that, if allowed to go on, would further sully our reputation, and more importantly, stand in the way of delivering justice. Nonetheless, in their haste to resolve this issue, the creators failed to carefully consider the effects of the laws that they were passing. The cases of Sean Brehm and Ala Mohammed Ali displayed how both MEJA and the Graham Amendment were capable of achieving successful prosecutions, but they also revealed serious flaws in these dual schemes. Legal innovation is important, and here it is necessary, but it can never come at the expense of our constitutional principles. The proposals outlined above would make considerable headway in eliminating the practical and legal problems these schemes present, while, hopefully, allowing for increased utilization and prosecutions of civilians who commit crimes while working for our military.