“In Time of Whenever the Secretary Says”:
The Constitutional Case Against Court-Martial Jurisdiction over Accompanying Civilians During Contingency Operations

Anna Manasco Dionne*

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INTRODUCTION

This Note mounts a constitutional case against the recent amendment to the Uniform Code of Military Justice (UCMJ) providing court-martial jurisdiction over defense contractors and other civilians accompanying American armed forces during contingency operations. The amendment provides extraordinarily expansive military jurisdiction, and it exceeds the constitutional authority of Congress. This Note considers and rejects three potential authori-

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ties for the measure: the Fifth Amendment, the Rulemaking Power, and the War Powers. It finds grave objections arising from the plain text of the provisions, materials illuminating the historical understanding of these words, and the constitutional division of military authorities across the federal structure.

As the United States armed forces have become increasingly active in diplomatic and military missions around the globe, they have become progressively more reliant on a large population of accompanying civilians to provide protective, managerial, logistical, janitorial, and other services. A military census of defense contractors at the end of 2006 counted nearly 100,000 civilians supporting Operation Iraqi Freedom; this total rivaled the population of deployed servicemembers supporting that operation. To put this number in historical perspective, it represents a tenfold increase in contract jobs in the fifteen years since Operations Desert Shield and Desert Storm.

Private military firms also represent an enormous economic force. Halliburton, the largest single private provider supporting Operation Iraqi Freedom, “provides supplies for troops and maintenance for equipment under a contract thought to be worth as much as $13 billion.” This fee is in current dollars... roughly two and a half times what the United States paid to fight the entire 1991 Persian Gulf War, and roughly the same as what it spent to fight the American Revolution, the War of 1812, the Mexican-American War, and the Spanish-American War combined.

To be sure, the current reliance on private military support is dramatic and unprecedented.

Unfortunately, the private defense industry has become increasingly prominent for reasons other than its growing size and monetary value; contract employees have played a significant role in grave and disturbing instances of detainee abuse, most infamously the Abu Ghraib prison scandal. Blackwater

3. This figure does not include subcontractors, whose group size is not precisely known. The servicemember population in 2006 consisted of approximately 140,000 troops. Renae Merle, Census Counts 100,000 Contractors in Iraq, WASH. Post, Dec. 5, 2006, at D1.
6. Id.
7. For more information on the troubling issue of detainee abuse, see John Sifton, United States Military and Central Intelligence Agency Personnel Abroad: Plugging the Prosecutorial Gaps, 43 HARV. J. ON LEGIS. 487 (2006); David S. Cloud, Carla Anne Robbins & Greg Jaffe, Red Cross Found Widespread Abuse of Iraqi Prisoners, WALL ST. J., May 7, 2004, at A1 (revealing contents of a confidential Red Cross report provided to the Bush Administration detailing instances of prisoner abuse at various sites in Iraq); The File: Prison Abuse, S.F. CHRON., June 20, 2004, at A17 (re-
USA, a substantial private security firm, became the subject of federal investigations when its employees shot and killed seventeen Iraqi civilians while providing protective services in September 2007. These are, of course, the highest profile problems, but, with a population as large as the current contractor community, there are also more typical transgressions such as assaults and robberies.8

These incidents raise the pressing question of how federal authorities should manage and control the contractor population. Much ink has been spilled in search of the answer; in the light of the unprecedented size of the group and highly-publicized scandals, most recent efforts have been devoted to discerning the most effective disciplinary tool. The sharp focus on immediate pragmatic concerns, however, has obfuscated more fundamental issues. In particular, the constitutional status of and powers over accompanying civilians have gone largely unexamined,9 leaving open basic questions about the boundaries of contractors’ rights as civilians and the military’s authority over contractors in the field. This Note attempts to remedy these shortcomings by illuminating the constitutional dimensions of the dilemma and offering a documentarian rebuttal to the extension of court-martial jurisdiction over civilian contractors.


9. At the time of writing, there are two published articles concerning the expansion of court-martial jurisdiction over civilians during hostile military missions: William C. Peters, On Law, Wars and Mercenaries: The Case for Courts-Martial Jurisdiction over Civilian Contractor Misconduct in Iraq, 2006 BYU L. Rev. 367; and Jackson, supra note 8. The Peters article argues for the exercise of court-martial jurisdiction over civilians in time of war and includes hostile contingency operations such as Operation Enduring Freedom and Operation Iraqi Freedom in that category without treating the fundamental constitutional problem that these missions are not declared wars. The Jackson article reaches the same basic conclusion as this Note regarding the constitutionality of the John Warner National Defense Authorization Act for the Fiscal Year 2007 Amendment (DAB), but it offers an exclusively doctrinal analysis of the issue without original or fresh attention to constitutional problems.
Historically, a limited application of the military law has been the answer to the contractor accountability problem. For many hundreds of years, governments have subjected non-enlisted persons joining their forces in the field to military laws and court-martial jurisdiction. At its inception, the United States chose to do the same on the basis of the Code of Gustavus Adolphus and the British Articles of War. After the Constitution was ratified, Congress derived general authority to make rules for the armed forces from Article I, Section 8, Clause 14 ("the Rulemaking Power") and a more specific permission to except the military from the ordinary civilian justice system from the Fifth Amendment. Congress promulgated rules subjecting all accompanying civilians to military jurisdiction during wartime and civilians accompanying armed forces stationed outside the territorial jurisdiction of the United States to military jurisdiction also during peacetime. Congress continued this tradition when it consolidated the rules of the various armed forces into the UCMJ in 1950. Article 2(10) covered "in time of war, all persons serving with or accompanying an armed force in the field," and Article 2(11) covered the same population when outside the U.S. territories also in peacetime.

11. Id. at 9; William Winthrop, Military Law and Precedents 97-100 (2d ed. 1920). Colonel Winthrop's book, originally published in 1886, is considered the authoritative military law treatise. Winthrop was a Deputy Judge Advocate General in the Army. He once served as the assistant to the first Judge Advocate General (General Holt), and he later authored the Annotated Digest of Opinions of the Judge Advocate General. Military courts continue to cite his work.
13. "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 . . . ." U.S. Const. amend. V. See also Akhil Reed Amar, America's Constitution: A Biography 330 (2005) ("While expressly exempting the military only from the ordinary civilian system of pretrial indictments, the [Fifth] amendment also implicitly recognized that military justice more generally could be governed by a distinct set of procedures across the board; thus, military trials themselves have traditionally operated outside the ordinary Article III rules governing judges and juries.").
This statutory scheme was in tension with constitutional pronouncements from the Supreme Court; since at least the mid-nineteenth century, the Court had found unconstitutional military trials of civilians where civilian courts remained available. In *Reid v. Covert* and *McElroy v. United States ex rel. Guagliardo*, the Court struck down Article 2(11) and held that the Rulemaking Power did not allow military jurisdiction over accompanying civilians overseas during peacetime. Although the Court has observed that the congressional War Powers are broader than the Rulemaking Power, the Court has not commented on the boundaries of Article 2(10), the Fifth Amendment permission, or court-martial jurisdiction over accompanying civilians during wartime.

As a statutory matter, however, Article 2(a)(10) was limited to formal wars. This limitation severely circumscribed military jurisdiction over accompanying civilians because the United States has formally declared war only five

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20. *Reid* involved a military dependent (a soldier's wife), 354 U.S. at 3, and *Guagliardo* involved a defense contractor, 361 U.S. at 282.
22. This limitation is based on the plain language of the statute ("in time of war"), which has animated the case law. See *United States v. Averette*, 19 C.M.A. 363 (1970). In *Averette*, a court-martial convicted a defense contractor stationed in Vietnam of conspiracy to commit larceny. The contractor challenged the exercise of military jurisdiction on appeal, and a divided panel of the Court of Military Appeals held that Article 2(a)(10)'s specification of "in time of war" required a formal declaration of war. The narrowness of the Supreme Court's view counseled the "strict and literal construction of the phrase 'in time of war.'" In the alternative, the court worried, civilians could face court-martial "whenever military action on a varying scale of intensity occurs." *Averette*, 19 C.M.A. at 365. Although the court acknowledged that the Vietnam conflict was a war in the traditional sense of the word, the court refused to allow that understanding to substitute for a formal declaration "at least in the sensitive area of subjecting civilians to military jurisdiction." *Id.* at 365-66. *Averette* controlled subsequent inquiries until Congress amended the UCMJ. The Court of Military Appeals cited it twice: first, in *Zamora v. Woodson*, 19 C.M.A. 403 (1970), to dismiss charges against a civilian which were pending review by a court-martial under Article 2(a)(10) and, second, in *Wiltenbring v. Neurauter*, 48 M.J. 152, 157 n.4 (1998), for the proposition that "in time of war" requires a formal declaration by Congress. The Army Court of Military Review cited *Averette* numerous times. See, e.g., *United States v. Singleton*, 15 M.J. 579, 582 (A.C.M.R. 1983); *United States v. Moss*, 44 C.M.R. 298, 301 (A.C.M.R. 1971); *United States v. Grossman*, 42 C.M.R. 529, 530 (A.C.M.R. 1970). Finally, the Fifth Circuit cited *Averette* in *Cole v. Laird*, 468 F.2d 829, 831 n.2 (5th Cir. 1972), and the Court of Claims discussed *Averette* in *Robb v. United States*, 456 F.2d 768, 770-72 (Cl. Cl. 1972).
times in its history. Since World War II, the United States has had extensive involvement in complex, protracted, and hostile diplomatic and military operations overseas. All this time, however, has technically been peacetime, so the prohibition against court-martialing accompanying civilians has been in effect.

Unfortunately, this framework left a substantial accountability deficit for civilians accompanying the military overseas. Regular federal criminal jurisdiction did not have the extraterritorial reach to provide for prosecution of crimes, and, without a formal declaration of war, the military could not prosecute crimes under Article 2(10) either. As a result, dependents and contract employees accompanying the armed forces faced few, if any, legal consequences for criminal behavior.

In 2000, Congress attempted to provide a disciplinary apparatus by passing the Military Extraterritorial Jurisdiction Act (MEJA). The MEJA extended federal criminal jurisdiction to accompanying civilians who commit crimes when (and only when) the host country does not exercise domestic criminal jurisdiction. The MEJA aimed to “provide overseas commanders with a new tool to solve the rare, but previously vexing, issues of dealing with serious criminal misconduct by civilian personnel who cannot be tried under the UCMJ.” To that end, the MEJA authorized special pretrial procedures for the exercise of federal criminal jurisdiction abroad, including procedures allowing accused persons to appear before federal magistrate judges by telephone and to receive defense counsel from the Judge Advocate General ranks.

The MEJA did not effectively address the accountability deficit, and the reality of few MEJA prosecutions and no military jurisdiction effectively preserved contractors’ immunity from criminal liability. As Peter Singer wrote in 2003:

\[N\]ot one private military contractor has been prosecuted or punished for a crime in Iraq (unlike the dozens of U.S. soldiers who have), despite the fact that more than 20,000 contractors have now spent almost two years there. Either every one of them happens to be a model citi-

23. The War of 1812, the Mexican-American War, the Spanish-American War, World War I, and World War II.
25. Technically, the MEJA creates a new offense, which is essentially the extraterritorial commission of any act that would be a crime if committed within the territorial jurisdiction of the federal courts. See id.
28. See infra notes 88-94 and accompanying text.
zen, or there are serious shortcomings in the legal system that governs them.\textsuperscript{29}

In response to this problem, the 109th Congress and President Bush quietly but dramatically asserted military jurisdiction over accompanying civilians. Nestled deep in the Fiscal Year 2007 Defense Authorization Bill (DAB),\textsuperscript{30} an amendment sponsored by Senator Lindsey Graham (R-S.C.)\textsuperscript{31} (the DAB Amendment) subjects accompanying civilians to the UCMJ not only during declared wars but also during "contingency operations."\textsuperscript{32} A contingency operation is 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; or
(B) results in the call or order to, or retention on, active duty of members of the uniformed services under [this Code] or any other provision of law during a war or during a national emergency declared by the President or Congress.\textsuperscript{33}

This definition may include any hostilities that the Secretary of Defense declares it to include. Traditionally, the moniker has applied not only to hostilities abroad, such as Operation Iraqi Freedom and Operation Enduring Freedom (both of which the bill specifies by name),\textsuperscript{34} but also to foreign peacekeeping and relief efforts.\textsuperscript{35} Because the definition covers national emergencies, it may also encompass domestic crises involving reserve components like the National Guard.\textsuperscript{36}

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\textsuperscript{29} Singer, supra note 5, at 127.


\textsuperscript{32} DAB, § 552, 120 Stat. 2217 (2006) ("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.'").


\textsuperscript{34} DAB, § 355, 120 Stat. 2162 (2006).

\textsuperscript{35} Examples include Operation Uphold Democracy (Haiti), Operation Restore Hope (Somalia), Operation Support Hope (Rwanda), Operations Joint Endeavor, Joint Guard and Joint Forge (former Yugoslavia), and Operation Strong Support (hurricane relief in Central America).

\textsuperscript{36} The National Guard has been deployed for events such as the L.A. riots, Hurricane Andrew in 1992, the Great Flood of 1993 along the upper Mississippi River, the Oklahoma City bombing in 1995, the September 11th terrorist attacks in 2001, Op-
The DAB Amendment represents a major shift in legal accountability for civilian military personnel. The MEJA subjected them to regular federal criminal procedures and causes of action, complete with the regular complement of due process protections. The DAB Amendment, however, subjects them to the more extraordinary military justice system of courts-martial, which has a limited set of procedural protections. Whereas the MEJA attached only when host countries decline jurisdiction, the DAB Amendment applies at the discretion of the Secretary of Defense. This shift brings with it a host of related procedural

eration Winter Freeze (a border patrol operation) in 2004-2005, and severe winter weather events and wildfires in 2007.

37. The military courts are extraordinary for two primary reasons. First, they involve a broader category of substantive criminal law than do civilian courts. The UCMJ criminalizes failure to behave as an officer and a gentleman, disrespect toward senior officers, cruelty toward subordinates, damaging military property, and drunkenness on duty. See Parker v. Levy, 417 U.S. 733, 750 (1974) ("[The UCMJ] regulates a far broader range of the conduct of military personnel than a typical state criminal code regulates the conduct of civilians ... "). Second, the UCMJ provides a more limited set of procedural protections than do the Constitution and statutes that govern civilian courts. The UCMJ provides a military accused many rights which are analogous to the entitlements of a civilian defendant, including the rights

to be informed of the charges against him; to cross-examine witnesses for the Government; to challenge members of the court for cause or peremptorily; to have a specified number of members compose general and special courts-martial; to be represented by counsel; not to be compelled to incriminate himself; to have involuntary confessions excluded from consideration; to have the court instructed on the elements of the offense, the presumption of innocence, and the burden of proof; to be found guilty of an offense only when a designated number of members concur in a finding to that effect; to be sentenced only when a certain number of members vote in the affirmative; and to have an appellate review.

United States v. Clay, 1 C.M.A. 74, 77-78 (1951). The UCMJ diverges from the civilian criminal law in crucial ways. The system of military trials has "traditionally operated outside the ordinary Article III rules governing judges and juries." AMAR, supra note 13, at 330. Defendants do not enjoy the regular complement of constitutional due process guarantees; they are not entitled to trial by jury, and, when juries ("panels") are used, they are composed of military servicemembers, not civilians. Justice Black wrote of courts-martial in Reid:

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

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concerns; for example, the availability of witnesses—particularly expert witnesses—is extremely limited in courts-martial abroad and more readily available in domestic civilian trials.

This extraordinary measure was not nearly as well publicized as the problem that provoked it, and the military has just recently prosecuted the first case. Apparently, only one military law scholar squarely supports the extension of court-martial jurisdiction as the preferred solution to contractor immunity. Most of the commentary either raises or mollifies practical concerns about the reach of the DAB Amendment. On the one hand, the provision, if applied broadly, could precipitate difficulties because of the breadth of behaviors that are criminalized by military law. On the other hand, some experts and contractors contend that this provision will have few significant consequences. Concerns about military prosecution for minor infractions may be exaggerated.

cannot have the independence of jurors drawn from the general public or of civilian judges.

Reid v. Covert, 354 U.S. 1, 36 (1957).


40. See Peters, supra note 9.
and unlikely to come to pass. One prominent defense contractor has argued that most civilians in Iraq are not, for statutory purposes, “accompanying the forces” or supporting the military mission because they participate in construction and development work, not direct conflict assistance. As the Blackwater incident revealed, this detail may turn out to be a significant limitation on the reach of the amendment. The DAB Amendment may also be unnecessary to the extent that, in conflict zones, problems may be handled by transferring or removing contractors, not holding hearings or pressing charges. Of course, Abu Ghraib seems to refute this particular trivialization. Indeed, the recurrence of high profile scandals may mean that any mechanism for punishing contractors will become increasingly attractive to law enforcement officials. At the very least, such scandals create a strong public pressure to bring perpetrators to justice, and the DAB Amendment supplies a powerful new device for pursuing that goal.

The focus on practical worries has meant that serious constitutional problems with the expansion of court-martial jurisdiction have gone largely unexamined. It is apparent at first glance that the DAB Amendment is in tension with contractors’ constitutional rights to a jury trial. The reach of those rights and the boundaries of the exception for the military justice system in the Fifth Amendment, however, are less clear. The other relevant constitutional provisions that empower Congress raise additional thorny issues. Given the reality that the military regularly engages in protracted and large-scale hostilities without formal declarations of war, may Congress extend military jurisdiction over accompanying civilians under the Rulemaking Power? If not, are contingency operations sufficiently like formal wars such that Congress may claim War Powers authority for the DAB Amendment? Does either provision establish authority for depriving contractors of the jury trial guarantee? If there is a Fifth Amendment concern and neither the Rulemaking Power nor the War Powers empower Congress to allow the Executive to court-martial civilians supporting hostile missions, grave constitutional defects attach.

This Note takes a documentarian approach to these questions. The documentarian approach combines the textual, historical, and structural methods of

44. See Peters, supra note 9.
45. Article 1, Section 8, Clause 11 provides Congress’s War Powers.
Although each method is conceptually self-contained, their common roots in the constitutional script mean that they need not be mutually exclusive where, as here, none is sufficient to answer a particular question. Rather, there is a strong argument for employing the methods together: "The American People ratified the Philadelphia Constitution not clause by clause, but as a single document." At its best, documentarian analysis "braid[s] arguments from text, history and structure into an interpretive rope whose strands mutually reinforce."

The core advantage of privileging documentarian analysis over doctrinal analysis of judicial precedent is that documentarian analysis considers arguments and materials that have not yet figured into the doctrine because the doctrine emerged from different facts, is old, or both. As a result, documentarian analysis offers and examines a wider range of arguments regarding a question, whereas doctrinal analysis places more emphasis on predicting the outcome of a question on the basis of previous judicial decisions.

Nevertheless, this Note considers the relevant jurisprudence where documentarian analysis has animated the case law. It also makes a special effort to indicate where the doctrine seems to have diverged from the Constitution. To be clear, however, this Note treats judicial doctrine as a secondary source. The

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46. Akhil Reed Amar, *The Supreme Court 1999 Term, Foreword: The Document and the Doctrine*, 114 Harv. L. Rev. 26, 26 & n.2 (2000-2001) ("[Documentarians] seek inspiration and discipline in the amended Constitution's specific words and word patterns, the historical experiences that birthed and rebirthed the text, and the conceptual schemas and structures organizing the document."). The textual method privileges the plain text of the Constitution, and it seeks to resolve questions of constitutional law by understanding the plain meaning of the words. Reasoning from history attempts to understand constitutional provisions in the light of records and materials that illuminate their intended meaning. The structural method privileges the structure of the government created by the Constitution, and it resolves questions of constitutional law by reference to the relationships the Constitution creates between and among branches, governments, and officials. For the classic explication of this last method, see Charles L. Black, Jr., *Structure and Relationship in Constitutional Law* (1969). For an explanation of different interpretive methodologies, see Philip Bobbitt, *Constitutional Fate* (1982).

47. Amar, *supra* note 46, at 29. See also id. at 26 & n.2 (endorsing the documentarian approach as a combination of methods); Black, *supra* note 46, at 31 ("[S]o long as we continue to look on our Constitution as a part of the law applicable in court, just so long the work of sheer textual interpretation will be a great part—probably the greatest part—of judicial work in constitutional law. There is ... a close and perpetual interworking between the textual and the relational and structural modes of reasoning, for the structure and relations concerned are themselves created by the text, and inference drawn from them must surely be controlled by the text.").


49. For a thorough doctrinal analysis of the DAB Amendment, see Jackson, *supra* note 8.
Constitution controls the analysis directly. A thorough doctrinal analysis of the question has been presented elsewhere.\textsuperscript{50} This Note concludes that military jurisdiction over accompanying civilians during contingency operations conflicts with contractors' civilian rights and exceeds the constitutional authority of Congress. It rejects Fifth Amendment, Rulemaking Power, and War Powers authority for the DAB Amendment because it finds intractable constitutional difficulties in reconciling the DAB Amendment with the text, structure, and history of these provisions. In the light of these flaws, this Note suggests that improved departmental use of federal criminal jurisdiction under MEJA presents a preferable solution to the immediate accountability deficit.

This Note proceeds in two parts. Part I provides a brief history of legal accountability for civilians accompanying the armed forces, and Part II examines the constitutionality of the DAB Amendment in the context of its three key provisions.

I. A SHORT HISTORY OF LEGAL ACCOUNTABILITY FOR ACCOMPANYING CIVILIANS

The United States has always subjected certain accompanying civilians to military laws and court-martial jurisdiction. The "first Articles of War drafted on American soil for American troops" were the Massachusetts Articles of War, which the Provisional Congress of Massachusetts Bay adopted on April 5, 1775.\textsuperscript{51} The Thirty-first Article provided: "All sellers and retailers to a camp, and all persons whatsoever serving with the Massachusetts Army in the field, though not enlisted Soldiers, are to be subject to the Articles, Rules and Regulations of the Massachusetts Army."\textsuperscript{52} Mere months later, the First Continental Congress enacted the first American Articles of War with a nearly identical Article.\textsuperscript{53} Subsequent national Articles included equivalent language.\textsuperscript{54}

50. See id.


52. Reprinted in Winthrop, supra note 11, app. at 947, 950. Sellers, retailers, and persons serving with the army in the field typically included officers' servants, camp-followers, newspaper correspondents, telegraph operators, civilian clerks, teamsters, laborers, hospital officials and attendants, veterinaries, interpreters, guides, scouts, spies, railroad operators, etc. Id. at 98-99.

53. See American Articles of War of 1775, art. XXXII, reprinted in Winthrop, supra note 11, app. at 953, 956.

54. See American Articles of War of 1776, § XIII, art. 23, reprinted in Winthrop, supra note 11, app. at 961, 967; American Articles of War of 1806, § I, art. 60, reprinted in Winthrop, supra note 11, app. at 976, 981; American Articles of War of 1874, art. 63, reprinted in Winthrop, supra note 11, app. at 986, 991.
After the Philadelphia Constitution was ratified, Congress derived authority to promulgate military laws from Article I, Section 8, Clause 14. For more than 150 years, these laws consisted of the Articles of War for the Army and Articles for the Government of the Navy for the Navy and Marine Corps. In 1949, because the rapidly increasing size of the armed forces during World War II precipitated an explosion in the number of courts-martial, Congress passed legislation consolidating these laws into the UCMJ and establishing a single court-martial system covering all of the United States Armed Forces. President Truman signed the UCMJ into law on May 5, 1950. Article 2(10) provided for court-martial jurisdiction over accompanying civilians in time of war, and Article 2(11) covered accompanying civilians when outside the U.S. territories in peacetime. Although the UCMJ comfortably passed congressional muster and President Truman hailed it as "tangible evidence of the achievements possible by the coordinated teamwork of [the forces]," the provisions for military jurisdiction over civilians were the subject of some concern. Multiple witnesses at congressional hearings expressed principled and pragmatic concerns about military jurisdiction over civilian populations.

55. "The Congress shall have the power... to make rules for the government and regulation of the land and naval forces." U.S. Const. art. I, § 8, cl.14. To be clear, the Constitution's grant of authority to Congress to establish the court-martial system is entirely separate from its establishment of the judicial power in Article III. See Dynes v. Hoover, 61 U.S. (20 How.) 65, 75 (1857). As a result, it is a "basic legal proposition" that "the court-martial system is a separate jurisdiction wholly apart from the civil federal judiciary." Aycock & Wurfel, supra note 10, at 15.


61. See, e.g., Uniform Code of Military Justice: Hearing on H.R. 2498 Before the H. Comm. on Armed Servs, 81st Cong. 768 (1949) (statement of Richard L. Tedrow, Esq.) (advocating "severely" limiting jurisdiction over civilians by providing it only "where there are actual wartime operations going on"); id. at 817 (statement of Robert D. L'Heureux, Chief Counsel, Senate Banking and Currency Committee and former Judge Advocate General attorney) (expressing concern that the provisions extending jurisdiction over civilians were too broad); Uniform Code of Military Justice: Hearings on S. 857 and H.R. 4080 Before the S. Comm. on Armed Services, 81st Cong. 256 (1949) (statement of Maj. Gen. Thomas H. Green, Judge
The political hesitations percolated against a backdrop of legal reluctance; historically, the Supreme Court had very narrowly interpreted military jurisdiction over civilians. On primarily textual and historical grounds, the Court was particularly hostile to the use of military justice systems to try civilians where civilian courts remained available. In the landmark 1866 case *Ex Parte Milligan*, the Court refused to allow a military commission to try an American civilian when a civilian court (in his home state of Indiana) was available to try him. The Court relied on the plain text of the Fourth, Fifth, and Sixth Amendments, as well as an extensive historical analysis of the supremacy of civil law over martial law rooted in those provisions. It concluded that “[o]ne of the plainest constitutional provisions was . . . infringed” when Milligan was court-martialed and denied a jury trial. In *Duncan v. Kahanamoku*, the Court disallowed military trials of civilians in Hawaii while it was under martial law after the attack on Pearl Harbor and declared that civilian courts were unjustifiably shut. The Court described a wealth of pre-Revolutionary and American historical evidence that “the founders of this country are not likely to have contemplated complete military dominance” of civil law. The Court added a complementary observation on the structure of American government, finding that “[l]egislatures and courts are not merely cherished American institutions; they are indispensable to our government. Military tribunals have no such standing.”

After the UCMJ took effect, the Court continued to restrict peacetime military jurisdiction over accompanying civilians. In *Toth v. Quarles*, the Court restricted the exercise of military jurisdiction over veterans. The Air Force court-martialed Toth after his honorable discharge for a crime he allegedly committed during his service in Korea. Toth challenged his conviction in a habeas proceeding, and the Court held that neither the text nor the structure of the Constitution permitted such expansive military jurisdiction, which “necessarily encroaches on the jurisdiction of federal courts set up under Article III . . . .”

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63. Id. at 119-21.
64. Id. at 122.
65. 327 U.S. 304 (1946).
66. Id. at 322.
67. Id.
69. Id.
70. Id. at 15.
Although Toth tested the applicability of the UCMJ to veterans rather than accompanying civilians, it remains significant evidence of the commitment of the Court to a narrow view of the congressional Rulemaking Power and to the subordination of the military to civilian authority. The Toth Court offered a general pronouncement: "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.'" Known as the "Toth doctrine," this commitment has controlled subsequent questions of congressional authority to extend military jurisdiction during peacetime.

Shortly after Toth, the Court struck down Article 2(11) on textual, historical, and structural grounds in Reid v. Covert. A court-martial convicted Mrs. Covert of killing her husband, an Air Force serviceman, on an air base where they lived in England, and she appealed to the federal courts. The Court held that, because she could not fairly be said to be "in" military service, she should not lose her jury trial right and that the Rulemaking Power did not authorize Congress to allow military authorities to try her. The Court found no historical evidence suggesting that due process guarantees should give way to the Rulemaking Power and extensive precedent suggesting the opposite. The Court reiterated the Framers' emphasis on subordinating the military to civilian authorities: "The tradition of keeping the military subordinate to civilian authority may not be so strong in the minds of this generation as it was in the minds of those who wrote the Constitution." The Court also cited Colonel William Winthrop's authoritative treatise.

Crucially, the Court seemed to suggest that Reid might be limited to dependents and thus left a door ajar regarding other accompanying civilians: "[T]here might be circumstances where a person could be 'in' the armed services for purposes of Clause 14 even though he had not formally been inducted into the military or did not wear a uniform." The DAB Amendment probes this open question.

Three years later, the Court expanded the prohibition of peacetime military jurisdiction over civilians, again, on textual and historical grounds. The Court extended the rule of Reid against the exercise of military jurisdiction over dependents to those accused of non-capital offenses, and the Court held that military authorities could not constitutionally exercise jurisdiction over civilian

71. Id. at 23 (quoting Anderson v. Dunn, 19 U.S. (6 Wheat.) 204, 230-31 (1821)).
73. 354 U.S. 1 (1957).
74. Id. at 19-40.
75. Id. at 23.
76. Id. at 35.
77. Id. at 22-23.
employees accused of crimes overseas. The crucial contractor case, Guagliardo, involved two peacetime military prosecutions of accompanying civilians: in the first, an electrical lineman was convicted by court-martial of larceny and conspiracy to commit larceny; in the second, an auditor was convicted by court-martial of sodomy. The reasoning was the same overlay of textual, historical, and structural concerns as in Toth and Reid. The Court found no historical precedent supporting court-martial jurisdiction over civilians assisting peacetime operations, and, citing Col. Winthrop's treatise for the opposite proposition, the Court held that court-martial jurisdiction over civilians during peacetime violated the jury trial guarantee of the Constitution.

Toth, Reid, Kinsella, and Guagliardo comprise a peacetime jurisprudence, and the Court made clear that the congressional War Powers are broader than the Rulemaking Power. The Court expressly acknowledged the long-standing tradition and practical reasons supporting military jurisdiction over civilians accompanying armed forces during war. This doctrine provides guidance on the question of the constitutionality of military jurisdiction over accompanying civilians during conflict, but it does not engage the issue precisely. United States v. Averette most recently considered that question, but a lower court resolved it as a matter of statutory interpretation. The Court of Military Appeals held that UCMJ's provision for military jurisdiction over civilians "in time of war" provided jurisdiction only after a formal, congressional declaration of war. In short, the Supreme Court doctrine is uncertain, at best, on the constitutional aspects of the question the DAB Amendment raises.

Because so few overseas conflicts are technically wars, the federal government since Averette has continued to struggle with how to hold accompanying civilians accountable for criminal behavior. Over the years, seven pieces of legislation were introduced in Congress, and none gathered enough support to be-


80. Because the Court found no difference between civilian employees accused of capital crimes while accompanying the military and dependants accused of the same, it disposed of the other contractor case, Grisham, briefly and by virtue of Reid. See Guagliardo, 361 U.S. at 283-84.

81. 361 U.S. at 282-83.

82. Id. at 284.

83. Reid v. Covert, 354 U.S. 1, 33-34 & n.59 (1957).

84. Reid, 354 U.S. at 33.


86. Id. at 365.
come law. In 1995, Congress directed the Departments of Justice and Defense to study the problem jointly. The resulting task force recommended two jurisdictional extensions: first, an extension of court-martial jurisdiction to accompanying civilians during contingency operations (essentially the DAB Amendment) and, second, an extension of federal criminal jurisdiction to accompanying civilians abroad (essentially the MEJA). The Departments supported only the MEJA-like solution, and it garnered support in Congress.

The MEJA's extension of federal criminal jurisdiction did not provide the accountability mechanism that its drafters had hoped. This failure was for several reasons. First, the statute left unspecified myriad logistical details, which made it difficult to implement straightaway. Second, the statute only applied to felonies and left some offenses uncovered. Third, the statute initially only applied to Department of Defense affiliates and preserved the accountability deficit for contractors of the Central Intelligence Agency, State Department, and Department of the Interior. The Abu Ghraib prison scandal called attention to this shortcoming, as early Justice Department interest in using the MEJA to prosecute the perpetrators was thwarted when the media revealed that some of the participating private contractors technically worked for the CIA and the Department of the Interior. As a result of this loophole, although the involved soldiers were court-martialed, the contract employees were not prosecuted. Congress attempted to close this loophole in 2004 by extending the MEJA to


88. See Fallon & Keene, supra note 26, at 280-91 (explaining the uncertainty regarding whether military law enforcement may apprehend a civilian without encountering posse comitatus problems, whether there will be a sufficient nexus between extraterritorial criminal acts and the United States such that the application of American law would not offend the Due Process Clause of the Fifth Amendment, venue rules under the MEJA, applicability of extradition treaties, and the right to defense counsel).


employees and contractors of other federal agencies. The amendments, however, limited MEJA coverage to Defense Department missions abroad and left a sizeable population of contractors supporting diplomatic missions with yet another loophole. Finally, and perhaps most importantly, the MEJA has been ineffective in closing the accountability gap because the Justice Department hesitated to exercise jurisdiction under the statute. In January 2007, it was reported that the federal government has not exercised MEJA jurisdiction at all since 2000.

Currently, the DAB Amendment allows the military to exercise jurisdiction during contingency operations, which are commenced upon the designation of the Secretary of State or upon the declaration of a national emergency by the President or Congress. At a minimum, this definition includes hostilities and conflicts that may be popularly referenced as wars even though they are not formal wars. At its broadest, this definition may mean the inclusion of foreign peacekeeping and relief efforts, as well as domestic crises involving armed forces reserve components. The DAB Amendment provides jurisdiction that is concurrent with Article III courts’ jurisdiction. When contractors facilitating contingency operations abroad misbehave, they are subject both to federal criminal penalties under the MEJA (if the host country declines to exercise criminal jurisdiction) and military penalties under the UCMJ. When contractors facilitating domestic contingency operations misbehave, they are subject both to regular criminal prosecutions and military laws.

This scheme is unprecedented, and it demands a constitutional analysis. Such efforts are especially imperative in the light of limited doctrinal guidance from the Supreme Court. To that end, Part II considers the textual, historical, and structural arguments against the DAB Amendment.

93. See Posting of Glenn Schmitt to NavyTimes.com, http://www.navytimes.com/community/opinion/army_backtalk_contractors_071126/ (Mar. 9, 2008) (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.”); see also Chris Lombardi, Law Curbs Contractors in Iraq, A.B.A. J. E-REPORT, May 14, 2004, available at 3 No. 19 ABAJEREP1 (Westlaw).
95. It is not yet clear how the Defense and Justice Departments will prosecute crimes where they share jurisdiction. They are working to establish guidelines for how to manage such situations.
II. The Documentarian Case Against Subjecting Civilians to Military Jurisdiction During Contingency Operations

A congressional power to extend court-martial jurisdiction to civilians supporting contingency operations may emanate from one of two constitutional provisions: either the Rulemaking Power provided by Article I, Section 8, Clause 14, or the War Powers. Therefore, defense contractors must be "in" the armed forces for the purposes of Rulemaking Power (and thereby exempted from the Fifth Amendment’s guarantee), or contingency operations must be close enough substitutes for formally declared wars to trigger the War Powers and ameliorate the concern about implicating due process rights. In the latter scenario, the congressional or executive authorizations of force and support that approve such operations must be constitutionally acceptable substitutes for a formal declaration of war. This Note considers each rationale in turn. It concludes that both approaches invoke a notion of congressional power that is incompatible with the plain text of the Constitution (understood in the proper historical context) and the structure of the government it provides.

A. No War Powers Authority: Contingency Operations Are Not Wars

The congressional War Powers emanate from Article I, Section 8, which provides that Congress "shall have the power to... declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water;
to raise and support armies . . . ; to provide and maintain a navy . . . . ”97 Partly because these powers are among the most expansive provided to Congress and partly because the Rulemaking Power speaks only to the regulation of the forces (not civilians),98 the War Powers provide the basis for court-martial jurisdiction over civilians during wartime.99 In order for Congress to invoke the War Powers now to provide court-martial jurisdiction over civilians during contingency operations, contingency operations must be the equivalent of, or at least a good substitute for, a formally declared war. Indeed, reliance on the War Powers to justify extraordinary government action outside of war would seem an impermissible aggrandizement of those powers. This Part contends that such war-contingency operation equivalence is textually, historically, and structurally impossible to sustain.

The prevailing view assumes that the constitutional grant of War Powers is meant to regulate a certain class of activities identifiable by practical, task-based characteristics and widespread public perception. On this logic, conflicts become wars when soldiers are fighting and when the public and media begin to refer to them as wars. This reasoning supposes that, in practice, the choice between war and peace is not binary but may be fairly represented along a continuum. This is not how the Constitution conceives of the choice. Even conceding that the War Powers are among the government’s broadest powers, the DAB Amendment remains too broad in light of the relevant documentarian concerns. Contingency operations are not the constitutional equivalent of wars.

First, a contingency operation gains its status either from designation by the Secretary of Defense or from the declaration of a national emergency by Congress or the President,100 while a war gains its status only by declaration from Congress.101 This difference is constitutionally substantial: While elected representatives of the people control the use of the designation “war,” an un-

98. Clause 14 provides “The Congress shall have power . . . to make rules for the government and regulation of the land and naval forces . . . .” Id.
99. See Reid v. Covert, 354 U.S. 1, 33 & n.59 (1957) (“To the extent that [cases upholding military trial of accompanying civilians during time of war] can be justified, insofar as they involved trial of persons who were not ‘members’ of the armed forces, they must rest on the Government’s ‘war powers.’”).
101. This Note does not engage the extensive debate over whether Congress or the President controls the ability to make war. Rather, it focuses on the significance of the ability to declare war. It proposes, on the basis of Article I, Section 8, that Congress must “declare” a war in order for it to exist as a formal, legal matter. See also William Michael Treanor, Fame, the Founding, and the Power To Declare War, 82 CORNELL L. REV. 695, 698 (1997) (citing historical materials suggesting that at the time of the founding, “[t]he phrase ‘declare war’ had a fixed meaning in international law; it did not mean to start war, but rather to classify a conflict as a war for legal purposes”).
representative executive official may unilaterally control the use of the label "contingency operation." At the very least, the idea that a single official appointed by the President may, by mere designation, subject tens of thousands of civilians to martial law runs afoul of the explicit delegation by the Constitution to Congress to designate war. On a broader reading, the DAB Amendment's reliance on executive discretion runs counter to the reservation by the Constitution of declaratory authority to a representative and deliberative body.

Either way, "none doubt that Congress must vote to declare war if America is to declare it." This power may not be placed in the hands of a single official. Whatever authority to commit American troops to hostilities the executive may claim, the text expressly delegates to the legislature the power to designate a conflict as a war. On pain of repetition, to be clear, this fact does not necessarily mean that Congress must declare war for a conflict to be constitutional; the point is much more limited. It is that, if a conflict is to be a war for the purposes of setting aside constitutional guarantees, the Constitution specifies that Congress must designate it so.

Even those who generally place little or no emphasis on a congressional declaration of war share the view that this formality is necessary to set aside civil liberties. For example, Professor John Yoo has argued for a broad view of the executive's authority to make war. He has suggested that a congressional declaration is not necessary for large-scale hostile military operations to proceed against an enemy or to preserve the authority of Congress vis-à-vis the authority of the President, but he has specified that a congressional declaration remains essential to preserving limits on the powers of the government against citizens:

One important area where a declaration of war remains significant is domestic civil liberties. The Supreme Court has held as constitutional certain deprivations of liberties in wartime only because a declaration of war has been issued; in fact, one of the rights in the Bill of Rights can only be suspended during wartime. The declaration of war plays an important role in limiting the power of the federal government as it affects citizens, but it does not perform that function with regard to the executive branch.

This insistence that a congressional declaration is essential to set aside civil liberties in the name of war does not permit the substitution of executive designations for the legislative formality.

Furthermore, contingency operations cannot constitutionally substitute for wars because the Constitution reserves wars as extraordinary events, or, at least,

significantly more extraordinary than contingency operations. "War" typically refers exclusively to hostilities, while "contingency operation" may include not only hostilities but also a wide variety of other circumstances. In 1997, the Defense Department described its participation in contingency operations:

Over the past decade, the United States has conducted an array of major contingency operations of the following types: peace operations, disaster relief, humanitarian assistance, noncombatant evacuation, maritime escort, counterterrorism, reprisals, deterrence of aggression, intervention to support democracy, sanctions enforcement, no-fly zone enforcement, migrant rescue and support, search and rescue, and deployments to quell domestic civil disturbances.  

Consequently, contingency operations are qualitatively and quantitatively different from wars. The qualitative point is that there is a fundamental difference between a war and a rescue mission, or a war against an enemy and a deployment to quash civil unrest. The one typically involves a threat to interests of the United States, while the other needs no such trigger or justification. The quantitative point is that the definition of contingency operation includes many more missions than the definition of war has historically encompassed. Congress has only declared five wars in the history of the United States, but the federal government has designated more than ten times that number of contingency operations since 1991. For example, just in 1996,

[C]ontingency operations included crisis response in the Persian Gulf and Taiwan Straits; humanitarian relief and peace operations in the former Republic of Yugoslavia; enforcement of the no-fly zone over southern Iraq; humanitarian relief in northern Iraq; and noncombatant evacuations from Liberia and the Central African Republic.

These differences are by design; only extraordinary and unusual events were meant to qualify as wars. William Michael Treanor has argued that, at the time of the founding, "declare war" referred to the exclusive authority of Congress to designate a war, meaning "to classify a conflict as a war for legal pur-


106. Letter from GAO to James Inhofe, Chairman, S. Subcomm. on Military Readiness and Mgmt. Support (July 6, 2000), http://www.gao.gov/archive/2000/ns0016a.pdf ("Since the end of the Persian Gulf War in 1991, U.S. Armed Forces have been involved in more than 50 contingency operations abroad."). During the Bush Administration, these have included Operation Iraqi Freedom, Operation Enduring Freedom (Afghanistan), and Operation Noble Freedom (U.S. military bases worldwide). Clinton Administration contingency operations included Operation Uphold Democracy (Haiti); Operation Restore Hope (Somalia); Operation Support Hope (Rwanda); Operations Joint Endeavor, Joint Guard and Joint Forge (former Yugoslavia); and Operations Provide Comfort II, Southern Watch, and Northern Watch (Southwest Asia).

poses;” he has further argued that the Framers appreciated that few hostilities would achieve such status.\textsuperscript{108} James Madison described war as “among the greatest of national calamities,”\textsuperscript{109} and Publius remarked on the rarity of formal war.\textsuperscript{110} Also, the young United States participated in several hostilities that were not sufficiently involved, protracted, or costly to become formal wars.\textsuperscript{111} Nevertheless, the Framers chose the congressional declaration, rather than any qualifying measure, as the hallmark of a formal war. At the very least, then, the Framers understood war as atypical and grave.

The historical evidence lends some support to a stronger claim that the Framers desired to \textit{preserve} formal war as rare and that this preference animated the design of the constitutional structure of government. That the Framers chose the congressional designation to distinguish wartime from peacetime in the light of the foregoing historical materials has led some scholars to draw this inference; John Hart Ely has argued that the Framers empowered only Congress to declare war expressly to “reduce the number of occasions on which we would become . . . involved” in war and to achieve their wish that “peace would . . . be the customary state of the new republic.”\textsuperscript{112} Others have relied on evidence suggesting that the Framers delegated the ability to declare war to Congress out of a concern that political temptations might make the executive too likely to be too bellicose.\textsuperscript{113} The worry was that an ambitious or fame-seeking President might be more likely to take the country to war than would the more populous, deliberative, and representative legislature. Madison, at least, articulated this concern.\textsuperscript{114} Regardless of whether one agrees only with the milder argument that the

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\textsuperscript{108} Treanor, \textit{supra} note 101, at 698.
\textsuperscript{109} \textsc{John Hart Ely}, \textit{War and Responsibility} \textit{3} (1993) (citing remarks by Madison at the Federal Convention of 1787).
\textsuperscript{110} \textsc{The Federalist} No. 25 (Alexander Hamilton).
\textsuperscript{111} See \textup{T}reanor, \textit{supra} note 101, at 724 (“[B]efore it was twenty-five years old, [the United States] had engaged in a series of wars with Native Americans; launched military actions against the Barbary states; and fought the world’s two most formidable military powers [including] France, in the undeclared naval ‘Quasi-War’ of 1798 to 1800 . . . .”); \textit{see also} Ely, \textit{supra} note 109, at 3 (noting that “most [wars] weren’t [declared]” at the time of the founding); \textsc{Louis Fisher}, \textit{Historical Survey of the War Powers and the Use of Force, in The U.S. Constitution and the Power to Go to War} \textit{11}, \textit{14-15} (Gary M. Stern \& Morton H. Halperin eds., 1994) (describing early engagement in undeclared wars).
\textsuperscript{112} Ely, \textit{supra} note 109, at 3.
\textsuperscript{113} \textit{See William Michael Treanor, The War Powers Outside the Courts, in The Constitution in Wartime} \textit{156} (Mark Tushnet ed. 2005); \textit{T}reanor, \textit{supra} note 101.
\textsuperscript{114} Madison wrote: In no part of the constitution is more wisdom to be found than in the clause which confides the question of war or peace to the legislature, and not to the executive department . . . . [T]he trust and the temptation would be too great for any one man: not such as nature may offer as the
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Framers understood formal war to be rare or endorses the stronger claim that they structured the federal government to make war extraordinary, it is clear that the Framers envisioned war and the related powers as exceptional.

The substitution by the DAB Amendment of contingency for war cannot be reconciled with this vision. A War Powers rationale for the amendment attempts to trigger the great War Powers while avoiding the exacting requirements of the Constitution for declaring war; it elevates contingency operations to war status without obtaining the necessary endorsement of the elected representatives of the people. The DAB Amendment invokes the War Powers to govern a class of regular and frequent military missions instead of exercising that enormous authority specifically and with discretion. This regime is the antithesis of the Constitution’s treatment of war as extraordinary and entered only by Congress. Contingency operations cannot constitutionally substitute for wars, and the War Powers cannot authorize the DAB Amendment.

This conclusion grows stronger when domestic contingency operations, such as hurricane relief efforts, are considered. These operations are qualitatively even more unlike wars than are the complicated, hostility-wrought overseas missions, and their inclusion in the comparison increases the quantitative gulf between the ever-growing practice of engaging in contingency operations and the extremely rare practice of declaring war. The inclusion of domestic relief operations sharpens the contrast between wars and contingency operations, accentuates the inability of contingency operations to substitute for declared wars constitutionally, and heightens the fragility of the War Powers rationale for the DAB Amendment. Even if, as a practical matter, it is unlikely that the military would exercise court-martial jurisdiction over civilians supporting domestic relief missions, the permission of the DAB Amendment for the military to do so remains unsound.

Nevertheless, advocates of court-martiaing accompanying civilians might attempt to save the DAB Amendment from these objections. They could posit that, because Congress authorizes appropriations for large-scale contingency operations (and perhaps even authorizes the use of military force generally), such legislative action is declaration enough. On this reasoning, congressional resource commitments indicate a legislative appreciation of large-scale hostili-

prodigy of many centuries, but such as may be expected in the ordinary successions of magistracy . . . . It is in war, finally, that laurels are to be gathered, and it is the executive brow they are to encircle. The strongest passions, and most dangerous weaknesses of the human breast; ambition, avarice, vanity, the honorable or venial love of fame, are all in conspiracy against the desire and duty of peace.

James Madison, “Helvidius” Number 4, in 15 THE PAPERS OF JAMES MADISON 106, 108 (Robert A. Rutland et al. eds., 1985); see also Letter from James Madison to Thomas Jefferson, Apr. 2, 1798, in 6 THE WRITINGS OF JAMES MADISON 312-13 (G. Hunt ed. 1906) (“The Constitution supposes, what the history of all governments demonstrates, that the executive is the branch of power most interested in war, and most prone to it. It has accordingly with studied care, vested the question of war in the legislature.”).
ties and secure the participation of the legislature in the "war"-making decision. Such authorizations simply are not declarations of war. Contingency operations remain contingency operations because a majority of congresspersons, for whatever reason, has not assigned them the exceptional "war" designation. The core documentarian problem remains.

In the simplest terms, the War Powers cannot justify the expansion by the DAB Amendment of military jurisdiction because contingency operations are not and cannot be wars. Contingency operations are fundamentally different from wars. Wars are meant to be among the most extraordinary of events, not peacekeeping, rescue, or humanitarian missions. The Constitution reserves the ability to declare that a conflict is a war to the deliberations of Congress, not to the discretion of the President or his appointed officials. However hostile, protracted, or complex, contingency operations are not wars because Congress has not declared them wars. Contingency operations cannot legitimately trigger the War Powers. The War Powers cannot provide authority for giving the executive blanket discretion to court-martial civilians during any military operation it designates.

B. No Rulemaking Authority: Defense Contractors Are Not in the Armed Forces

The congressional ability to regulate the military also cannot provide such authority. The Rulemaking Power arises out of Article I, Section 8, Clause 14, which states: "The Congress shall have power... to make rules for the government and regulation of the land and naval forces."

This language suggests that Congress can only provide for military jurisdiction over the land and naval forces, not accompanying civilians who are not part of the forces. The text of the Rulemaking Power is properly read as contemplating only two populations: civilian and military. There is no place for a third, hybrid group that is sometimes civilian and sometimes military. Historically, defense contractors have been considered as serving "with," not "in" the armed forces. All armed forces regulations in place during colonial times, the Founding, and America's early years contemplated "sellers and retailers to a camp" and regulated "all persons whatsoever serving with [the continental army] in the field."

These individuals were never addressed as "in" the forces; they were always referred to as serving "with" the forces. The unwavering discipline of this language signifies the rigidity of the legal distinction. Although contractors and soldiers perform similar, related tasks and may be in similar danger, similarity and proximity are not circumstances that transform a civilian into a member of the forces for the duration of the conflict.

116. See, e.g., American Articles of War of 1775, art. XXXII, reprinted in Winthrop, supra note 11, app. at 956; American Articles of War of 1776, § XIII, art. 23, reprinted in Winthrop, supra note 11, app. at 967; American Articles of War of 1806, § I, art. 60, reprinted in Winthrop, supra note 11, app. at 981; American Articles of War of 1874, art. 63, reprinted in Winthrop, supra note 11, app. at 991.
This reading of the Rulemaking Power is supported by and is consistent with the Fifth Amendment, which also distinguishes the military and the civilian classes. The Fifth Amendment provides, in relevant part, “[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger . . . .” On its face, the exception is limited to cases arising in the forces. According to Col. Winthrop, the historical understanding of this exception for those “in” the forces is that it does not pertain to any civilians:

[The Fifth Amendment] clearly distinguishes the military from the civil class as separate communities. It recognizes no third class which is part civil and part military—military for a particular purpose or in a particular situation, and civil for all other purposes and in all other situations—and it cannot be perceived how Congress can create such a class, without a disregard of the letter and spirit of the organic law. In light of the historical understanding of these provisions, they appear to contemplate the ways in which civilian contractors are like soldiers and reject those similarities as the basis for legal equivalence.

This interpretation is the only interpretation that is consistent with the other relevant Constitutional provisions: Article III, Section 2, the Fifth Amendment, and Sixth Amendment. These provisions are sweeping, as they reference “all crimes,” “no person,” and “all criminal prosecutions.” They cannot be squared with a reading of the Rulemaking Power that would allow some crimes and some criminal prosecutions of civilians to be tried by a court-martial without a jury. They are particularly incompatible with a reading of the Rulemaking Power that would permit such exceptions at the discretion of the Secretary of Defense.

Rather, having confronted the jury trial guarantee, the congressional Rulemaking power must give way. The jury trial is among the most fundamental and precious entitlements guaranteed by the Constitution. Fervent colonial objection to adjudication by unrepresentative imperial officers and British denial of jury trials had been a root cause of the Revolution. Jury trial guarantees

117. U.S. CONST. amend. V.
118. Winthrop, supra note 11, at 106.
119. “The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the congress may by law have directed.” U.S. CONST. art. III, § 2, cl. 3.
120. U.S. CONST. amend. V.
121. “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed . . . .” U.S. CONST. amend. VI.
122. See Amar, supra note 13, at 233-34; see also The Declaration of Independence para. 20 (U.S. 1776).
featured prominently in all post-independence governance texts.123 The jury trial guarantee was so essential that “[e]very state that penned a constitution between 1775 and 1789 featured at least one express affirmation of the jury trial, typically celebrating the jury with one or more of the following words: ‘ancient,’ ‘sacred,’ ‘inviolate,’ ‘great,’ and ‘inestimable.’”124 The jury trial guarantee has been referred to as “[t]he dominant strategy to keep agents of the central government under control”125 and a “paradigmatic image underlying the Bill of Rights.”126 Of special importance to the DAB Amendment analysis, the jury trial guarantee was particularly precious in the case of criminal trials. Leonard Levy has determined that this guarantee was the “only right secured in all state constitutions penned between 1776 and 1787.”127 As a result, “Article III sensibly laid down a uniform federal rule . . . that also tracked [the] unanimous consensus of American states . . . ”128

It seems difficult to overstate the importance of the jury trial guarantee in the light of the wealth of historical materials amplifying the textual emphasis of it. There is no historical or other evidence that the congressional Rulemaking Power is of equal importance. In a clash between the Rulemaking Power and the jury trial guarantee, it is the former that must yield. The text of the Rulemaking Power cannot be stretched far enough to permit Congress to abridge the jury trial guarantee for a growing population of civilian military personnel merely by amending a spending bill.

The DAB Amendment offends more constitutional provisions than the Fifth Amendment guarantees to civilians; the DAB Amendment also trespasses the exception in the Fifth Amendment to the grand jury requirement for cases arising in the armed forces. This exception is specifically provided for cases arising in the forces, not cases “connected to,” “related to,” or “because of” the forces. Mere connectedness cannot be sufficient to convert the parties from civilians to military servicemembers and thereby remove the case from civilian courts. Such a drastic conversion (and implication of the Sixth Amendment and Article III) cannot be accomplished so implicitly.

In his authoritative treatise on military law, Col. Winthrop describes how statutes extending court-martial jurisdiction to certain civilians (discharged officers) during peacetime might be saved from constitutional objections such as these by reference to the dual powers of the Rulemaking Power and the con-

123. See U.S. Const. art. III, § 2; U.S. Const. amend. V, VI; AMAR, supra note 13, at 234 (“Every state constitution after independence contained multiple guarantees of jury trial.”).

124. See AMAR, supra note 13, at 330.


126. Id. at 1190.


128. AMAR, supra note 13, at 234.
gressional power to "raise armies." The argument is that, "notwithstanding" that former officers "have become civilians," such statutes place them "in the army for a temporary or special purpose, and, by the same act, provid[e] for their government while so placed . . . so that their offences shall be punishable as 'cases arising in the land forces.'" As Col. Winthrop points out, however, even assuming that Congress can place individuals in the armed forces by mere declaration, the basic documentarian problems remain. To reiterate, these include: the historical objection, outlined above, that civilians serving with the army in the field have always been considered with, not in, the forces; the conflict with the jury trial guarantee of the Sixth Amendment; and the conflict with the Rulemaking Power and the separation by the Fifth Amendment of military from civilian procedures. Arguments that contractors are "far more characteristic of a 'soldier' than of a 'civilian"" miss the point that the Constitution neither provides nor contemplates such a continuum. The expanded Rulemaking Power argument fails.

Others argue that the Necessary and Proper Clause saves expansive military jurisdiction from constitutional objections. The government took this position in Reid. The argument was that the two Clauses provide a "broad grant of authority 'without limitation' authorizing Congress to subject all persons, civilians and soldiers alike, to military trial if 'necessary and proper' to govern and regulate the land and naval forces." This pairing, however, does not overcome the textual problem. The Court said that the Necessary and Proper Clause could not extend the Rulemaking Power beyond the class described in its terms: the "land and naval forces." Justice Black also rejected this reading on structural grounds as conflicting with the Bill of Rights because the reading would bring the Rulemaking Power into conflict with the Fifth Amendment guarantee of indictment by a grand jury and the Sixth Amendment guarantee of a jury trial. For these reasons, the DAB Amendment cannot be justified with reference to the Rulemaking Power and the Necessary and Proper Clause.

Although this analysis is sufficient to resolve the question, there is an additional reason to reject the Necessary and Proper Clause approach: military jurisdiction over accompanying civilians is definitively unnecessary for effective

129. See Winthrop, supra note 11, at 105-06.
130. Id.
131. Judicial doctrine suggests otherwise. See id. at 106.
132. Peters, supra note 9, at 410.
133. "The Congress shall have power to . . . make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States or in any department or officer thereof." U.S. CONST. art. I, § 8, cl. 18.
135. Id. at 21.
136. Id.
regulation of the armed forces. Because the MEJA provides for the prosecution of accompanying civilians in domestic civilian courts, it is a solution for the accountability deficit to which the DAB Amendment purports to respond. Whether the Department of Justice utilizes the solution optimally is immaterial for the purposes of the constitutional analysis; its availability undoes any necessity rationale for the DAB Amendment. In the case of domestic contingency operations, the availability of regular federal criminal prosecution renders military jurisdiction unnecessary. The Necessary and Proper Clause, therefore, cannot supplement the rulemaking authority to provide military jurisdiction over civilians supporting contingency operations.

In summary, the textual and historical objection to a Rulemaking Power rationale for the DAB Amendment is quite comprehensive. It draws not only on the text of the Clause, but also on other portions of Article I, Article III, the Bill of Rights, and materials illuminating the importance of the guarantees provided therein.

In light of the breadth of this documentarian objection to the DAB Amendment, it is unsurprising that the objection is consonant with the jurisprudential hostility to military trials of civilians. Constitutional concerns animated the Toth doctrine of limiting the Rulemaking Power to “the least possible power adequate to the end proposed.” Justice Black’s opinion for the Reid majority provided an extensive textual and historical explanation for the Court’s insistence that military dependents living on bases overseas be tried by civilian courts. The core of the Reid reasoning is that the Sixth Amendment evinces a colonial experience filled with distrust of military rule and martial law, and this experience caused the Framers to place special importance on civilian law courts and trials by jury. Justice Black cites the complaints in the Declaration of Independence that King George III had “affected to render the Military independent of and superior to the Civil Power” and “deprive[ed] [colonists], in many cases, of the benefits of trial by jury.” He also leans heavily on the fact that, in the Framers’ lifetime, “the right of the military to try soldiers for any offenses in time of peace had only been grudgingly conceded.”

On this basis, Justice Black concludes that the Framers cannot have intended to allow Congress to deny the jury trial guarantee merely by “making rules” for the armed forces under Article I, Section 8, Clause 14. This reasoning has controlled subsequent cases.

Reid, however, briefly diverges from its own documentarian conclusion. In limiting the case to its facts, Justice Black expressly clarified that other accompanying civilians might be different from dependents: “[T]here might be cir-

138. The textual analysis is at Reid, 354 U.S. at 19-20. The historical analysis follows.
140. Reid, 354 U.S. at 23.
cumstances where a person could be 'in' the armed services for the purposes of Clause 14 even though he had not formally been inducted into the military or did not wear a uniform."

Indeed, it might seem that if Justice Black is correct that the text leaves the door ajar for a non-military individual to come under the ambit of the Rulemaking Power, a defense contractor accompanying forces engaged in a hostile operation would have to qualify. The distinction between peacetime and wartime is not as neat in practice as it is in the Constitution. Furthermore, American forces are regularly and increasingly committed to hostilities that are not understood as wars and to hostilities that are popularly understood as wars but that are not formal wars. As a result, one could argue that, even in the light of the foregoing textual analysis and historical materials, civilians who are accompanying the armed forces during bellicose hostilities and subject to all of the typical exigencies of the battlefield should be considered "in" the armed services.

This argument fails for two reasons. First, it seems as though Justice Black cannot be correct in this regard. If the words of the Constitution are to be given their plain meaning, people who are not members of the military cannot be "in" the armed forces for the purposes of the Rulemaking Power. In the Justice's own words:

The Constitution does not say that Congress can regulate 'the land and naval forces and all other persons whose regulation might have some relationship to maintenance of the land and naval forces.' There is no indication that the Founders contemplated setting up a rival system of military courts to compete with civilian courts for jurisdiction over civilians who might have some contact or relationship with the armed forces. Courts-martial were not to have concurrent jurisdiction with courts of law over non-military America."

If this analysis is correct, then there can be no population not in the armed forces that may be reached with the Rulemaking Power.

Even if Justice Black is correct that the Rulemaking Power may reach some military affiliates, however, it cannot reach contractors for historical reasons. Because soldiers were not even subject to court-martial jurisdiction for civil crimes committed during wartime at the time the Constitution was drafted, the Constitution cannot possibly accommodate congressional attempts to subject civilians to military jurisdiction during contingency operations. Only in 1863 did Congress authorize the trial of soldiers by court-martial for the crimes of murder, manslaughter, arson, rape, robbery, and larceny. Prior to 1863, service members who committed such crimes were tried in state courts; the circumstances of the Civil War necessitated swifter and more effective disciplinary

142. Reid, 354 U.S. at 23.
143. Id. at 30 (emphasis added).
144. 12 Stat. 731, 736 (1863).
mechanisms. Furthermore, Congress only extended court-martial jurisdiction over soldiers for civil crimes during wartime by using its War Powers; it may not now use its lesser Rulemaking Powers to extend military jurisdiction over civilians for crimes committed during contingency operations. It seems that such a reach would inevitably offend the Constitution as originally understood and constructed.

In short, the practical reality that current periods are neither wartime nor peacetime does not undo the documentarian case against expanding military jurisdiction over civilians. Rather, in the light of the text, historical materials, and jurisprudence they animate, the suggestion that the Rulemaking Power might reach some nonmilitary individuals seems untenable. Nevertheless, even if the speculation contrariwise in *Reid* is engaged, there is no historical support for an argument that the Rulemaking Power can reach defense contractors supporting contingency operations abroad.

Structural problems complement the textual and historical constitutional objection to a Rulemaking Power rationale for the DAB Amendment. The simplest structural difficulty is that, if civilians accompanying forces engaged in contingency operations are "in" the armed services for the purposes of the Rulemaking Power, there is little (if any) difference between the congressional regulatory powers and the War Powers. Indeed, the ability to use the Rulemaking authority to provide for court-martial jurisdiction over both the civilian and the military classes enables Congress to achieve the same result as it could by declaring war; Congress would declare martial law over a group of civilians. In this way, the vision of the Rulemaking Power that underlies the DAB Amendment effectively equates peacetime and wartime police powers over accompanying civilians. That enables Congress to abridge civil liberties when it would otherwise be powerless to do so.

Proponents of the DAB Amendment might respond that as long as Congress remains the decider, the constitutional structure remains undisturbed. This argument misses the mark. It is insufficient that Congress is the key actor because the Constitution does not recognize all congressional actions as being the same. As articulated above, there are qualitative differences between a designation of a contingency operation and a declaration of war. The DAB Amendment allows Congress to gain advantages that are appropriately restricted to the more exacting mechanism. This permission is inconsistent with the constitutional structure of congressional authorities.

The collapse of distinct congressional powers is also inconsistent with the careful division in the Constitution of military authority. While Congress has the power to declare war, the President is the Commander in Chief. Furthermore, while Congress has the power to appropriate funds for military spending,

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146. See supra Section II.A.

147. See generally AMAR, supra note 13, at 117-19 (explaining the Constitution's limitation on military powers).

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the President "superintend[s] actual disbursements." In addition to the clear horizontal balance, there is an implied vertical balance, as state militias would be able, at least in theory, to respond in the event of an attempted national coup. The Framers' concern that the military be kept subordinate to civilian authorities animated these measures, and the Constitution guards its War Powers carefully. This effort to preserve "freedom from fear of our own military" cannot abide the extension of martial law over civilians by mere congressional rulemaking; the one is the antithesis of the other.

A further structural difficulty arises because the DAB Amendment subjects civilians to military jurisdiction when civilian courts remain open. This scheme overlays the Rulemaking Power with the Article III judicial power and violates the Constitution's separation of the two powers. Traditionally, the military justice system has operated entirely separately from the federal judiciary. Courts-martial are agencies of the executive, "provided by Congress for the President as Commander-in-chief," not inferior courts; they serve "to aid him in properly commanding the army and navy and enforcing discipline therein," not to impose criminal liability pursuant to the traditional rule of law. The two disciplinary systems are, by design, unconnected and with different purposes. By providing court-martial jurisdiction over accompanying civilians where federal criminal jurisdiction already exists thanks to the MEJA, the DAB Amendment upsets this structure. A military justice system tailored to exerting control ends up conflicting with a civilian system committed to due process.

This structural objection has animated judicial doctrine. By giving courts-martial "concurrent jurisdiction with courts of law over non-military America," the DAB Amendment precipitates precisely the outcome that Justice Black found objectionable in Reid; it upsets a careful balance between martial and civil law. The Supreme Court has held since Ex Parte Milligan that the constitutional structure of government does not allow military trials where civilian courts remain available.

148. Id. at 115.
149. See id. at 118.
150. Id. at 119.
151. See generally Winthrop, supra note 11, at 49 (explaining that courts-martial are not a part of the judiciary but an agency of the executive department provided by the Congress).
152. Id. See also Dynes v. Hoover, 61 U.S. (20 How.) 65, 79 (1857) ("Congress has the power to provide for the trial and punishment of military and naval offences in the manner then and now practiced by civilized nations; and . . . 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 . . . the two powers are entirely independent of each other.").
153. Reid v. Covert, 354 U.S. 1, 30 (1957).
154. 71 U.S. (4 Wall.) 2 (1866).
In summary, there are fatal documentarian objections to a regulatory rationale for the DAB Amendment. The provision of court-martial jurisdiction over civilians exceeds the authority to regulate individuals "in" the armed forces. It also transgresses the guarantees embodied in the Fifth and Sixth Amendments and in Article III. The jury trial guarantee is among the most precious of those enshrined in the Constitution. The DAB Amendment cannot be rescued from this clash by reference to the congressional power to raise armies or to "make all Laws which shall be necessary and proper for carrying into Execution [its] foregoing Powers." The DAB Amendment also runs counter to the constitutional structure of government. In particular, the DAB Amendment violates both the separation of rulemaking from warmaking authority and the separation of civilian from martial courts.

CONCLUSION

The problem of contractor discipline is grave, but the constitutional objections to the latest policy response are graver. The extension of military jurisdiction over accompanying civilians cannot be justified by reference to the congressional War Powers because contingency operations cannot constitutionally substitute for wars. The Constitution makes war an extraordinary event, so designated by the exclusive provision of the elected representatives of the people. No military mission can rise to this status without a congressional declaration. Frequent diplomatic and relief operations fall especially short. Certainly, the unilateral action of the Secretary of Defense cannot substitute for deliberative congressional action to invoke the War Powers. A War Powers rationale for the DAB Amendment transgresses this constitutional limitation; it would allow the Secretary to claim the authority of the Congress for the military. On that reasoning, the military could court-martial accompanying civilians not in time of war but "in time of whenever the Secretary says."

The expansion of military jurisdiction also exceeds Congress's Article I, Section 8, Clause 14 authority to regulate the armed forces. By its terms, the Rulemaking Power only permits Congress to regulate the forces, and accompanying civilians historically have been considered as serving with, not in, the forces. Furthermore, a reading of the Rulemaking Power to permit the DAB Amendment brings that provision into conflict with the jury trial guarantee. It is the former that must yield. The Constitution cannot abide a congressional authority to implicate the jury trial right by mere rulemaking or at the sole discretion of a single executive appointee. The Rulemaking Power rationale also confronts serious structural problems of which the most intractable is that it effectively equates peacetime and wartime police powers over accompanying civilians. It thus enables Congress to abridge civil liberties that it otherwise could not and upsets the constitutional division of military authorities among the coordinate branches. The provision by the DAB Amendment of concurrent court-martial and civilian jurisdiction also precipitates a structural conflict between

the Rulemaking Power and the Article III judicial power. Altogether, a Rulemaking Power rationale for the DAB Amendment violates the constitutional principle of subordinating the military to civilian authority.

This Note is a comprehensive documentarian case against the DAB Amendment. It contends not only that there is no constitutional basis for such extraordinary power but also that such overreaching transgresses multiple Constitutional provisions, diverges from historical practices and understandings, and upsets the balance of power among the co-ordinate branches of the federal government. It complements doctrinal objections to the DAB Amendment and heightens the fragility of the DAB Amendment. These objections suggest that the provision of military jurisdiction over civilians supporting contingency operations is constitutionally unsound.

In light of these objections, improved departmental use of the MEJA may offer a better solution, at least for now, to the contractor accountability problem. Although shortcomings inherent in the MEJA may make it unlikely to provide a complete remedy, improved use of the federal criminal law may address part of the problem. That there have been so few MEJA prosecutions suggests that the statute is currently underused. At the very least, the MEJA solution avoids the grave constitutional difficulties that the DAB Amendment confronts.

156. Jackson, supra note 8.