

2014

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Recommended Citation

Ouellette, Jesse A. "'In The Field' A Legal Analysis of Military Jurisdiction Over Civilian Contractors Accompanying the Armed Forces During a Contingency Operation for Offenses Committed Outside of an Area of Actual Fighting." *National Security Law Brief* 4, no. 2 (2014): 21-41.

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“IN THE FIELD”
A LEGAL ANALYSIS OF MILITARY JURISDICTION OVER CIVILIAN
CONTRACTORS ACCOMPANYING THE ARMED FORCES DURING A
CONTINGENCY OPERATION FOR OFFENSES COMMITTED OUTSIDE OF
AN AREA OF ACTUAL FIGHTING

JESSE A. OUELLETTE¹

INTRODUCTION

The United States continues to rely heavily on government contractors to supplement work previously undertaken solely by the armed forces during times of conflict.² Our reliance on contractors has steadily increased post-9/11 with Operation Iraqi Freedom, Operation Enduring Freedom, and the overall War on Terror.³ Indeed, we will likely continue to rely on contractors to accompany our armed forces overseas during conflicts for the near future.⁴ This unconventional way of war fighting raises questions surrounding the ability of commanders to subject contractors, who are accompanying military units “in the field,” to the Uniform Code of Military Justice (UCMJ). This paper will present the argument that the language “in the field” appearing in Article 2(a)(10) of the UCMJ should be understood to encompass anywhere that war operations may be involved and not be limited to “an area of actual fighting.”⁵

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2 See Defense Federal Acquisition Regulation Supplement; Contractor Personnel Authorized To Accompany U.S. Armed Forces, 73 Fed. Reg. 16764-01 (proposed Mar. 31, 2008) (to be codified at 48 C.F.R. Pts. 212, 225, and 252) (providing for authorization of contractors to accompany U.S. armed forces deployed outside of the United States (U.S.)). See generally Moshe Schwartz and Jennifer Church, *Department of Defense’s Use of Contractors to Support Military Operations: Background, Analysis, and Issues for Congress*, Congressional Research Service (March 17, 2013) (showing the Department of Defense’s historical employment of military contractors in all areas of operations).

3 See generally, Stephen M. Blizzard, *Increasing Reliance of Contractors on the Battlefield: How Do We Keep From Crossing The Line?*, 2004 Logistics Dimensions Vol. 2., Aug. 2004, at 142 (explaining that while the use of military contractors dates to the 16th century, the abundance of their use in current operations is unprecedented).

4 See generally Joel Mathis, *Blackwater, Private Military Contractors Under Fort Leavenworth Scrutiny*, LAWRENCE JOURNAL-WORLD (Oct. 11, 2007), http://www2.ljworld.com/weblogs/military_matters/2007/oct/11/fort/ (describing the U.S. military’s dependence on private contractors for the foreseeable future).

5 See 10 U.S.C. § 802 Art. 2(a)(10) (2009) (“the following persons are subject to this chapter . . . in time of declared war or a contingency operation, persons serving with or accompanying an armed force in the field”) (emphasis added);

In 2007, Senator Lindsey Graham, who sits on the Senate Armed Services Committee, introduced an amendment to Article 2(a)(10), that provides for “persons serving with or accompanying the armed forces” to be subject to its jurisdiction, not only during a time of “declared war” but also during a “contingency operation.”⁶ The legislation was largely introduced given the fact that Congress has not officially declared war since June of 1942,⁷ a technicality that left a loophole for Article 2(a)(10) applicability to “persons serving with or accompanying an armed force in the field”⁸ in modern conflicts.⁹

In *United States v. Ali*, a 2012 case heard by the Court of Appeals for the Armed Forces (CAAF), the court tried a non-citizen military contractor for an alleged crime under the UCMJ while he was accompanying the Army “in the field” during a deployment in Iraq.¹⁰ In answering the challenge to the court-martial jurisdiction, the CAAF held that jurisdiction was legitimate under Article 2(a)(10) in part because Ali was accompanying the armed forces “in the field.”¹¹ Furthermore, the court was able to hold that the Fifth and Sixth Amendment protections did not apply to Ali given his lack of substantial connections with the United States.¹²

Unlike *Ali*, this paper will analyze whether a United States citizen serving as a contractor with the United States armed forces, outside of the United States and its territories during a contingency operation, may fall under the jurisdiction of the UCMJ for a crime committed outside of an “area of actual fighting,” but nevertheless “in the field,” pursuant to Article 2(a)(10).¹³ Part I of this paper will review how courts have interpreted Article 2(a)(10), specifically looking at the “in time of declared war or a contingency operation . . . persons serving with or accompanying . . . [and the] in the field” requirements.¹⁴ An analysis of the former two requirements will allow a greater understanding of the context of the latter. Furthermore, Part I will conclude that the “in the field” requirement, considering the context of Article 2(a)(10), includes locations not in “the area of actual fighting.”

Part II will criticize the CAAF’s interpretation of “in the field,” set forth in *Ali*, as too narrow.¹⁵ Moreover, Part II will argue that an interpretation of “in the field” requiring an “area of actual fighting” is not only impractical but also severely limits the ability of commanders to maintain

United States v. Ali, 71 M.J. 256, 264 (C.A.A.F. 2012) (holding that the definition for “in the field” is an “area of actual fighting”).

6 See John Warner National Defense Authorization Act For Fiscal Year 2007, Pub. L. No. 109-364 § 552 (2006) (amending 10 U.S.C. § 802 Art. 2(a)(10) by striking “war” and inserting “declared war or a contingency operation”).

7 *Official Declarations of War by Congress*, SENATE HISTORICAL OFFICE, available at http://www.senate.gov/pagelayout/history/h_multi_sections_and_teasers/WarDeclarationsbyCongress.htm.

8 10 U.S.C. § 802 Art. 2(a)(10).

9 See Senate Historical Office, *Official Declarations of War by Congress*, U.S. Senate, http://www.senate.gov/pagelayout/history/h_multi_sections_and_teasers/WarDeclarationsbyCongress.htm (listing all instances of the United States officially declaring war).

10 See *Ali*, 71 M.J. at 259 (explaining that Ali served as an interpreter for a Military Police company serving in Hit, Iraq).

11 *Id.* at 264.

12 *Id.* at 268.

13 *Id.*

14 See 10 U.S.C. § 802 Art. 2(a)(10).

15 See *Ali*, 71 M.J. at 264 (adopting the definition of “an area of actual fighting” for “in the field”).

discipline and mission readiness, with respect to contractors, during operations “in the field.” In addition to criticism of the *Ali* interpretation, Part II will discuss the potential negative repercussions of a broader understanding of “in the field” from the obvious denial of Fifth and Sixth Amendment rights to the potential for misuse of jurisdictional power from commanding officers. Part II will conclude that application of a cost-benefit analysis will show that a broader interpretation of “in the field” is needed, despite the potential negative consequences, to fulfill the purpose of Article 2(a)(10) with respect to maintaining unit discipline and readiness.¹⁶

Part III will emphasize the constitutional justifications of a broader interpretation of “in the field” by interpreting the Fifth Amendment’s exception clause pertaining to cases “arising in the land or naval forces” as applicable not only to members of the armed forces but also to all “person[s]” should their actions create cases “arising in the land and naval forces.”¹⁷ Furthermore, Part III will present the argument that “cases arising in the land or naval forces” encompasses areas “in the field” not just the “area of actual fighting.”¹⁸ Part III will conclude that Congress’ constitutional war powers, along with its power to make rules governing the land and naval forces, and the Fifth Amendment exception to a trial by jury allow for a broader definition of “in the field,” and that a broader definition will justify the UCMJ’s jurisdiction as opposed to trial in an Article III court.

I. THE UNIFORM CODE OF MILITARY JUSTICE ARTICLE 2(A)(10)

Although Article 2(a)(10) was formally implemented in the 1950s, the concept of trying civilians accompanying the armed forces in the field is not new.¹⁹ Indeed, contractors have been accompanying our nation’s armed forces in the field dating back to the Revolutionary War, and the 1775 Articles of War gave military tribunal jurisdiction to non-military personnel serving with the Continental Army “in the field.”²⁰ In the 1950s, Congress replaced the Articles of War with the UCMJ and included within it Article 2(a)(10).²¹ Article 2(a)(10) gives UCMJ jurisdiction to, “in time of declared war or a contingency operation, persons serving with or accompanying an armed force in the field.”²²

A. In Time of Declared War or a Contingency Operation

The language “in time of declared war,” which appeared in the original version of the

16 See WILLIAM WINTHROP, WINTHROP’S MILITARY LAW AND PRECEDENTS 48–49 (2d ed. 1920) (describing courts-martial and acknowledging the President’s power to as Commander-in-Chief to maintain discipline within the military).

17 U.S. CONST. amend. V.

18 U.S. CONST. amend. V.

19 See *Uniform Code of Military Justice*, DEL. CONSULTING GROUP, Nov. 20, 2013, <http://www.ucmj.us/about-ucmj.shtml> (explaining that the Articles of War governed the military until 1951 when the UCMJ was passed); see generally, Blizzard, *supra* note 2, at 161 (explaining that the use of military contractors dates back to the 17th century).

20 See Steven P. Cullen, *Out of Reach: Improving the System to Deter and Address Criminal Acts Committed by Contractor Employees Accompanying Armed Forces Overseas*, 38 PUB. CONT. L.J. 509, 519 (2009) (noting that the judicially system has also historically contemplated extending military justice to civilians accompanying the armed forces).

21 See DEL. CONSULTING GROUP, *supra* note 19.

22 10 U.S.C. § 802(a)(10).

UCMJ, created a very limited area of applicability and lacked foresight into the United States' military conflicts that would arise in the latter part of the 20th century.²³ In *United States v. Averette*, the Court of Military Appeals held that the Article 2(a)(10) language "in a time of declared war" meant a war officially declared by Congress under its Article 1, § 8 power.²⁴ Averette was a civilian tried under the UCMJ during the Vietnam conflict that was never officially declared a war by Congress; therefore, the court held that he could not be subject to UCMJ jurisdiction.²⁵ Recognizing this loophole, and the tendency of the United States to get itself involved in years long military campaigns that were never officially declared wars, in 2007 Congress added "or a contingency operation" to the existing Article 2(a)(10) language.²⁶

Although the 2007 amendment to Article 2(a)(10) did not alter the "in the field" language, it is relevant to discuss because its absence would render the rest of the sentence irrelevant with respect to recent and likely future conflicts.²⁷ The "in time of declared war or contingency operation" language extends the ambiguity of the boundaries of what is considered "in the field."²⁸ While similar questions remain, a contingency operation is arguably murkier when it comes to defining "in the field" than declared wars have been historically.²⁹ The conflicts the United States finds itself in today often do not have a battlefield or uniformed enemy.³⁰ These facts alone make setting a boundary to what is considered "in the field" difficult at the least.³¹ However, adopting a more flexible interpretation, while not changing the definition, would allow commanders to put mission readiness and discipline before all else. Such an interpretation may provide for "in the field" to encompass: any foreign location, while deployed with a military unit, during a contingency operation, where detainment or export for trial by an Article III court would be impractical, unnecessary, or otherwise hinder the objective of the mission.

23 See Cullen, *supra* note 20, at 523 (describing the obstacle raised in *Averette* of most U.S. military conflicts not being officially declared wars and the reform of Article 2(a)(10) as a solution).

24 See *United States v. Averette*, 41 C.M.R. 363, 365 (1970) (holding that "for a civilian to be triable by court-martial in 'time of war,' Article 2(10) means a war formally declared by Congress").

25 See *id.*

26 See 109 Pub. L.No. 364 § 552.

27 See generally Cullen, *supra* note 20, at 514 (illustrating U.S. dependence on military contractors currently and in the future).

28 10 U.S.C. § 802(a)(10).

29 See 10 U.S.C. § 101 (2013) (defining contingency operation broadly as "(A) . . . 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 . . ."); see also Joseph Romero, *Of War and Punishment: "Time of War" in Military Jurisprudence and A Call for Congress to Define Its Meaning*, 51 NAVAL L. REV. 1, 52 (2005) ("[t]he wars of the future will likely take on more untraditional characteristics [from those of the past] as the [Global War on Terror] carries forth.").

30 See generally Richard D. Rosen, *Targeting Enemy Forces in the War on Terror: Preserving Civilian Immunity*, 42 VAND. J. TRANSNAT'L L. 683, 687–88 (2009) (discussing the issue of modern combatants who do not distinguish themselves as combatants through traditional means such as uniforms or insignia).

31 See *id.*

B. Serving With or Accompanying

Courts have been relatively clear as to what constitutes “serving with or accompanying the armed forces.”³² In *Ali*, the CAAF held that:

[T]he ‘test is whether [the accused] has moved with a military operation and whether his presence with the armed force was not merely incidental, but directly connected with, or dependent upon, the activities of the armed force or its personnel’ . . . ‘an accused may be regarded as ‘accompanying’ or ‘serving with’ an armed force, even though he is not directly employed by such a force or the Government, but, instead, works for a contractor engaged on a military’ project.³³

Admittedly, there are practical limits to the Uniform Code of Military Justice (UCMJ) jurisdiction.³⁴ For example, even in an area of military hostilities, the UCMJ cannot reach employees, or more relevantly, contractors of other government agencies when said agencies are not assigned to and serving with the military.³⁵ Nor does the UCMJ provide jurisdiction over civilian contractors, or any person accompanying the armed forces during peace time.³⁶ However, commanders likely need not concern themselves with the mission readiness and discipline of other government agencies that may be working in the same area as the military during an overseas deployment but not assigned to them. Likewise, subjecting contractors to the UCMJ during peace time does not provide the same benefits as it does during war time, or a contingency operation.³⁷ Such agencies are not under the command of military officers and the actions of their employees are jurisdictionally separate from the armed forces.³⁸

The Military Extraterritorial Jurisdiction Act includes dependents among others, as persons subject to the UCMJ.³⁹ However, for the purposes of this analysis, contractors and civilian

32 See *United States v. Ali*, 71 M.J. 256, 264 (C.A.A.F 2012) (quoting *Reid v. Covert*, 354 U.S. 1, 34 n. 61 (1957)); see also *United States v. Burney*, 21 C.M.R. 98, 110 (C.M.A. 1956) (finding that “persons serving with or accompanying the armed forces . . . must be subject to control by the services and to trial by court-martial”).

33 See *Ali*, 71 M.J. at 263.

34 See generally Cullen, *supra* note 20, at 530 (stating that “[O]ne additional shortcoming of using the UCMJ to address contractor employee crimes is its limitation to persons ‘serving with or accompanying an armed force in the field’ . . . even in an area of military hostilities, jurisdiction under UCMJ article 2(a) does not reach to other U.S. government agencies . . . nor does UCMJ jurisdiction cover contract employees working under contract to non-military agencies . . . the UCMJ could not be used as an effective tool to address crimes committed by contractor employees working for other agencies in an area of military hostilities”).

35 See *id.*

36 See 10 U.S.C. § 802(a)(10).

37 See *Reid v. Covert*, 354 U.S. 1, 33 (1957) (finding that differential treatment is a consequence whether or not the individual is subject to the Government’s war powers).

38 See 10 U.S.C. § 802(a)(8) (noting the UCMJ does not apply to personnel of other government agencies unless assigned to and serving with the armed forces).

39 See 18 U.S.C. § 3261(a)(1), (c) (2000); 18 U.S.C. § 3267(2) (2004) (defining accompanying the armed forces to include: “a dependent of . . . a member of the armed forces . . . a civilian employee . . . or . . . a [Department of

employees, not dependents of service members, are in query. With respect to the question presented here, the “serving with or accompanying” language is analyzed in the context of individuals contracted with the military and serving with them “in the field.”⁴⁰ Context matters when exploring the “serving with or accompanying” language.⁴¹ Debatably, and in contrast to their civilian dependent counterparts, contractors may be of a different nature with respect to their significance in modern military missions.⁴² Therefore, the ability to court-martial a contractor when she is serving with or accompanying a unit “in the field” is vital to mission success.⁴³

C. *The In The Field Requirement*

Courts have been less than clear on a universal understanding of what “in the field” may include.⁴⁴ Colonel William Winthrop, famously referred to as the “Blackstone of military law,” described “in the field” to mean within the “theatre of war.”⁴⁵ Winthrop’s definition is debatably one of the broadest offered in any attempt to describe the boundaries of “in the field.” Others have not been so generous; such was the case in *Ali*, where the CAAF adopted the definition “in the area of actual fighting” to be sufficient to determine what is considered “in the field.”⁴⁶ Indeed, there has been little

Defense (DoD)] contractor (including a subcontractor at any tier) or an employee of a DoD contractor (including a subcontractor at any tier) . . . persons residing with such member, civilian employee, contractor, or contractor employee outside the United States . . . [and] persons ‘not a national of or ordinarily resident in the host nation.’”).

40 See 18 U.S.C. § 3261 (a)(1), (c) (2000). Even an expansive reading of UCMJ jurisdiction would limit jurisdiction to contractor employees who work under a contract with the military.

41 See generally Katherin J. Chapman, *The Untouchables: Private Military Contractors’ Criminal Accountability Under the UCMJ*, 63 VAND. L. REV. 1047, 1059 (2010) (advocating for the UCMJ to apply to combat contractors given the unique services they provide to U.S. forces in modern day contingency operations. Also focusing on several justifications for UCMJ jurisdiction over said contractors given their status may be akin to mercenaries under international law).

42 See *Reid v. Covert*, 354 U.S. 1, 32 (1957) (stating that “Mrs. Covert and Mrs. Smith had never been members of the army, had never been employed by the army, had never served in the army in any capacity . . . [t]he mere fact that these women had gone overseas with their husbands should not reduce the protection the Constitution gives them . . . [t] here have been a number of decisions in the lower federal courts which have upheld military trial of civilians “performing services” for the armed forces ‘in the field’ during time of war”) (emphasis added).

43 See generally Cullen, *supra* note 20, at 530 (describing the essential services that security and support contractors provide to the armed forces during contingency operations).

44 See, e.g., *United States v. Ali*, 71 M.J. 256, 264 (C.A.A.F. 2012) (finding “[a]lthough the Supreme Court in *Reid v. Covert* analyzed the provisions of Article 2(11), the Court did distinguish and discuss the “in the field” requirement of then Article 2(10)”; *United States v. Burney*, 21 C.M.R. 98, 109 (C.M.A. 1956) (stating “[t]he phrase ‘in the field’ has been taken to imply military operations with a view to an enemy”). Compare *McCune v. Kilpatrick*, 53 F. Supp. 80 (E.D.V.A. 1943) (holding that a ship transporting goods during wartime was “in the field”) and *Hines v. Mikell*, 259 F. 28, 34 (4th Cir. 1919) (“We think, in view of the technical and common acceptance of [“in the field”], this question is not to be determined by the locality in which the army may be found, but rather by the activity in which it may be engaged at any particular time.”), with *Ex parte Falls*, 251 F. 415 (D.N.J. 1918) (holding that a civilian cook serving on a ship which was carrying war supplies was “in the field”) and *Ex parte Gerlach*, D.C., 247 F. 616, 617 (S.D.N.Y. 1917).

45 See *Covert*, 354 U.S. at 20 n.38; *Ali*, 71 M.J. at 264 (stating, “Colonel Winthrop broadly defined the phrase to mean ‘the period and pendency of war and to acts committed in the theater of war’”).

46 See *Ali*, 71 M.J. at 264 (holding “we see no reason not to adopt this interpretation of ‘in the field,’ which requires an area of actual fighting, for our analysis of Article 2(a)(10) . . . there is little doubt that 1st Squad was in an area of actual fighting and thus, in the field”).

effort to push the limits of a definition of “in the field,” and understandably given the general hesitancy of Article III courts to yield to or expand the jurisdiction of military courts.⁴⁷ However, there exists a sufficient body of cases to lend support to the idea that the scope of “in the field” should at least be widened to foreign and sometimes domestic locations during a time of war or contingency operation.⁴⁸

In *Hines v. Mikell*, a case from the early 20th century, a civilian stenographer employed by the Army at an army base was charged with violating the laws of war and tried via court-martial.⁴⁹ Mikell appealed his charges, arguing that he was not subject to military law as the unit he was serving with was not serving “in the field.”⁵⁰ On a petition for habeas corpus, the Fourth Circuit held that restricting the definition of “in the field” to apply only to those directly operating against the enemy would not be “keeping with the necessities of our military establishment.”⁵¹ Furthermore, the court reasoned that the phrase “in the field” is not “determined by the locality in which the army may be found, but rather by the activity in which it may be engaged at any particular time.”⁵² This rationale undoubtedly gives courts large playing fields in determining what types of activities constitute “in the field,” as an armed force may be in a locality far from the “area of actual fighting,” but nevertheless engaged in activities, which constitute “war operations” within the “theatre of war,” a concept discussed in greater detail in the next section.

The *Hines* court cited the United States Army Regulations in giving examples of field operations, even during peace time:

[I]n time of peace a department commander is charged . . . with the duty of preparing for war all the troops and all the military resources of his department, and with the administration of all the military affairs

47 See *Covert*, 354 U.S. at 34–35 (1957) (“The Government urges that the concept ‘in the field’ should be broadened to reach dependents accompanying the military forces overseas under the *conditions of world tension* which exist at the present time [W]e reject the Government’s argument that present threats to peace permit military trial of civilians accompanying the armed forces overseas in an area where *no actual hostilities* are under way. The exigencies which have required military rule on the battlefield are *not* present in areas where *no conflict exists*. Military trial of civilians ‘in the field’ is an extraordinary jurisdiction and it should not be expanded at the expense of the Bill of Rights.”) (emphasis added).

48 See *United States v. Burney*, 21 C.M.R. 98, 126–27 (C.M.A. 1956) (noting the impracticability of providing indictment by a grand jury and trial for accused persons in foreign countries); see also *In re Berue*, 54 F. Supp. 252, 255 (S.D. Ohio 1944) (extending jurisdiction to a merchant seaman who was not a member of the United States armed forces); see also *Hines v. Mikell*, 259 F. 28, 31 (4th Cir. 1919) (defining “field” as “the actual field of operations against the enemy; not necessarily the immediate field of battle”); see *Covert*, 354 U.S. at 8 (finding that Article III § 2 applies to the crime committed outside the jurisdiction of any State “in the district where the offender is apprehended”).

49 See *Hines* 259 F. 28 at 29 (establishing that civilians can be subject to the jurisdiction of a military court-martial for working on a military base).

50 See *id.*

51 See *id.* at 34 (ruling that “[t]o restrict the term ‘serving with armies of the United States in the field’ to those persons only who may be employed with an army when *immediately operating against the enemy* would be a construction not in accordance with the spirit of our military law, and not in keeping with the necessities of our military establishment”) (emphasis added).

52 *Id.*

of his department . . . [h]e will annually concentrate his tactical division, or portions thereof, and secure for himself, and his division staff, as much practice as possible in the actual handling and supply of troops *in the field* . . . [t]he object of such inspections is to determine the preparedness of organizations for war service, and the capacity of brigade commanders and all other officers for the exercise *in the field* of command appropriate to their rank.⁵³

Although Article 2(a)(10), instituted much later than the decision of this case, explicitly rules out jurisdiction over “persons serving with or accompanying an armed force” during peace time, some questions remain: would contractors accompanying military units in training during a contingency operation be considered “in the field” for purposes of Article 2(a)(10)?⁵⁴ What if the training were within the United States? Regarding the latter, in *Hines*, the court is clear: from this statute it appears that Congress is of the opinion that any portion of the Army confined to field training in the United States should be treated as “in the field.” There are other statutes almost too numerous to mention which clearly indicate that troops in cantonments in this country are “in the field.”⁵⁵

It would seem logical that if military bases inside of the United States are considered “in the field,” then military bases outside of the United States would certainly qualify as well, especially given that the availability for trial under an Article III court would presumably be much more difficult in the latter, and indeed, this is what the court found.⁵⁶

In *United States v. Burney*, a 1956 case of a civilian military contractor serving with the Air Force overseas, the Court of Military Appeals held that the contractor’s trial by court-martial was constitutional.⁵⁷ When taking on the definition of “in the field,” the court upheld the definition set forth in *Hines*.⁵⁸ Although debatably “an area of actual fighting” may imply an action, it clearly limits the scope to a specific location, and therefore does not agree with the finding in *Hines*.⁵⁹ If “in the field” is relevant to activity and not location, the definition adopted by the *Ali* court not only falls short of precedent, but also strips commanders of authority to court-martial contractors serving under their supervision when issues arise outside of an area of *actual fighting*.⁶⁰

53 See *id.* at 31 (emphasis added).

54 See 10 U.S.C. § 802 Article 2(a)(10); DELAWARE CONSULTING GROUP, *supra* note 19 (explaining that the 101 articles passed by the UCMJ were written over a century before *Hines* was decided).

55 *Hines*, 259 F. 28 at 34.

56 See *id.* at 33 (holding that “those who entered the cantonment took the first step which was to lead them to the firing line, and they were then as much ‘in the field’ in pursuance of such training as those who were encamped on the fields of Flanders awaiting orders to enter the engagement”).

57 See *United States v. Burney*, 21 C.M.R. 98, 127 (C.M.A. 1956) (holding that it is unconstitutional for former members of the military to be court-martialed).

58 *Id.* at 109 (“The phrase ‘in the field’ has been taken to imply military operations with a view to an enemy and the question of whether an armed force is ‘in the field’ is determined by the activity in which it may be engaged at a particular time, not by the locality in which it may be found.”) (internal quotations omitted).

59 See *United States v. Ali*, 71 M.J. 256 at 264 (differing from *Hines* because the *Hines* court held that the term in the field applies broadly to any persons of the military or accompanying the military within or without the United States no matter if actual fighting is occurring).

60 See *id.* (ruling that “‘in the field’ . . . requires an area of actual fighting”); *but see Burney*, 21 C.M.R. 98 at 103 (stating that “the phrase ‘in the field’ . . . is determined by the activity in which it may be engaged at a particular time,

In the 1944 case titled *In re Berue*, a merchant sailor, contracted with the Army, and serving aboard a ship, was court-martialed for misbehavior while the vessel was underway on the high seas.⁶¹ The sailor filed for a writ of habeas corpus which was heard by the District Court for the Southern District of Ohio, Eastern Division.⁶² The court denied the writ and dismissed the sailor’s petition, holding the court-martial lawful.⁶³ In part of the court’s opinion, it cited a 1917 case, *Ex parte Gerlach*, in its definition of “in the field” as “any place, whether on land or water, apart from permanent cantonments or fortifications, where military operations are being conducted.”⁶⁴

Although the “apart from permanent cantonments or fortifications” language was distinguished by *Ex parte Mikell*, and later overturned by *Hines*, the rest of the language remains valid precedent.⁶⁵ Surely any place on land or water where military operations are being conducted includes “areas of actual fighting,” but it often includes areas where no fighting is occurring at all.⁶⁶ Indeed, the military engages in operations on land and water when it administers humanitarian aid, conducts training, mapping, exploration, testing of equipment, and routine patrols; none of these exercises fall into an area of “actual fighting” although they may occur during a time of declared “war or a contingency operation.”⁶⁷ Examples such as the latter demonstrate how the court in *Ali* sets too narrow a definition for “in the field.” Adopting the *Ali* definition leaves no speedy and effective remedy when civil and criminal issues arise in all areas where “actual fighting” and practical access to Article III courts is virtually non-existent.⁶⁸

Furthermore, given the understanding of “in the field” as set forth in *Gerlach*, *Hines*, and

not by the locality in which it may be found”) (citing *Hines v. Mikell*, 259 F. 28 (4th Cir. 1919)).

61 See *In re Berue*, 54 F. Supp. 252, 254 (S.D. Ohio 1944) (during the voyage on the high seas, the petitioner had an incident with officers and members of the crew, resulting in him being placed in chains and demoted).

62 *Id.*

63 See *id.* at 256 (finding the court-martial was lawful since the petitioner was “accompanying or serving with the Armies of the United States in the field”).

64 See *id.* at 255 (explaining that “in the field” refers to “any place, whether on land or water, apart from permanent cantonments or fortifications, where military operations are being conducted”) (citing *Ex Parte Gerlach*, 247 F. 616, 617 (1917)).

65 See *Ex parte Mikell*, 253 F. 817 (E.D.S.C. 1918) (stating that “in the field” does not include areas thousands of miles removed and where there is no military conflict); *Hines*, 259 F. 28 (holding that the term “in the field” may only be determined by the scope of activity that is being engaged in and not by the locality).

66 See *U.S., Australian Joint Forces to Conduct Talisman Saber Exercise*, U.S. PAC. FLEET PUB. AFF., July 9, 2013, <http://www.cpf.navy.mil/news.aspx/010131> (describing a joint military exercise carried out by U.S. and Australian forces, *in a field training area*, outside of *an area of actual fighting*).

67 10 U.S.C. § 802 Article 2(a)(10); see *Navy Sub Mapping Arctic Ocean Seafloor*, ENVTL. NEWS NETWORK (July 1, 1998) <http://www.cnn.com/TECH/science/9807/01/arctic.yoto/> (illustrating a U.S. Navy expedition to map Arctic Ocean seabed which will provide scientists with three-dimensional images); see also Barbra Starr, *General Asks for U.S. Warships in Typhoon Relief*, CNN, Nov. 13, 2003, <http://www.cnn.com/2013/11/12/us/philippines-typhoon-aid/index.html> (describing the U.S. Marines’ humanitarian aid mission following typhoon Haiyan in 2013 to provide shelter, food, water, and sanitation to thousands of displaced people); French, *US Forces Detain 12 Suspected Somali Pirates*, NDTV, Jan. 8, 2013, <http://www.ndtv.com/article/world/french-us-forces-detain-12-suspected-somali-pirates-314936> (highlighting a U.S. warship’s presence off the Somali coast to patrol, deter, and if necessary, detain suspected enemy pirates).

68 See *Ali*, 71 M.J. 256 at 264 (defining “in the field” as “serving with or accompanying an armed force in the field during a contingency operation”).

Burney, it would logically follow that a military contractor accompanying the armed forces in any area that is or may become involved in war operations *during a contingency operation* is by the very nature of the activity “in the field.”⁶⁹

II. ERDMANN’S OPINION IN ALI AND THE REPERCUSSIONS OF EXPANDING “IN THE FIELD”

In *Ali*, Judge Erdmann, relied on Colonel Winthrop and the *Burney* court in adopting a definition of “in the field.”⁷⁰ He stated, “[w]e see no reason not to adopt [the *Burney*] interpretation of ‘in the field,’ which requires an area of actual fighting, for our analysis of Article 2(a)(10).”⁷¹ The CAAF considered *Ali* to be serving with the armed forces “in the field” and his trial by court-martial was held to be valid on additional grounds.⁷² However, it is not the result of the case, but the rationale that is of concern in this analysis. The CAAF’s opinion in *Ali* does not necessarily go in detail as to whether the UCMJ could apply to a contractor who is outside of the area of “actual fighting.”⁷³

A. On the Theatre Of War

In *Ali*, the government referenced Winthrop in his description of “in the field.”⁷⁴ The full excerpt from Military Law and Precedents reads:

Further, the use of the terms ‘to the camp,’ ‘in the field,’ ‘according to the rules and discipline of war,’ is deemed clearly to indicate that the application of the Article is confined both to the period and pendency of war and to acts committed on the theatre of the war.

This broad definition does not completely agree with the courts adoption of the *Hines* definition of an “area of actual fighting.”⁷⁵ A closer examination of what Winthrop meant by the “theatre of war,” reveals a greater scope than simply the “area of actual fighting.”⁷⁶ In part of the same passage

69 See *United States v. Burney*, 21 C.M.R. 98 at 103 (stating that ‘in the field’ will not be determined by the locality but by the activity in which it may be engaged at that time); *Hines*, 259 F. 28 at 31 (agreeing with *Burney* by interpreting “in the field” to encompass military bases within the United States and outside of the United States); *Ex parte Gerlach*, 247 F. 616 at 617 (defining “in the field” as “any place, whether on land or water, apart from permanent cantonments or fortifications, where military operations are being conducted”).

70 See *Ali*, 71 M.J. at 264.

71 *Id.*

72 See *id.* (finding that Congress had constitutional authority to create a provision subjecting persons accompanying an armed force in the field during a contingency operation to military jurisdiction).

73 See *id.* (holding only that where there is actual fighting, an individual accompanying or serving with an armed force is “in the field”).

74 See *id.* at 264 (“Colonel Winthrop broadly defined the phrase to mean the ‘period and pendency of war and to acts committed in the theatre of war.’”).

75 See *Ali*, 71 M.J. 256 at 264 (“[I]n the field means in an area of actual fighting”) (citing *United States v. Burney*, 21 C.M.R. 98, 109-10 (C.M.A. 1956)).

76 See WINTHROP, *supra* note 16, at 101 (outlining his understanding of “theatre of war”).

where the aforementioned excerpt is derived, Winthrop gives an example of a situation that took place during a period of hostilities with the American Indians, in which a quartermaster’s clerk was arrested on a charge of fraud against the government.⁷⁷ At the time of his arrest, the civilian clerk was serving with the Army within the proximity of the enemy but “with whom no hostilities whatever were at the time pending.”⁷⁸ A similar situation may exist today, with respect to contingency operations lacking the characteristics of conventional war, where greater jurisdiction is needed over military contractors.⁷⁹ In citing this example, Winthrop admits that it is not always easy to determine if an offence occurred in the “theatre of war.”⁸⁰

Additionally, Winthrop states that “in the field” encompasses both “*the period and pendency of war and . . . acts committed on the theatre of the war.*”⁸¹ *Merriam-Webster* defines theatre of war as “the entire land, sea, and air area that is or may become involved directly in war operations.”⁸² A similar definition is given by Lieutenant General Richardson in *Duncan v. Kahanamoku*:

[A]n active theatre of war is that area which is or may become actively involved in the conduct of the war. A theatre of operations is that part of an active war theatre which is needed for the operations either offensively or defensively, according to the missions assigned or a combination of the missions; and it includes also the administrative agencies which are necessary for the conduct of those operations [sic].⁸³

The *Merriam-Webster* and Lt. Gen. Richardson definitions give a broad scope to the meaning of the “theatre of war.” Understanding the “theatre of war” in this way gives a much broader spectrum of jurisdiction to Winthrop’s definition of “in the field” than the *Ali* court’s narrow adoption of an “area of actual fighting.”⁸⁴ Essentially, any act in violation of the UCMJ by a military contractor, while accompanying the armed forces during a contingency operation, that occurs anywhere war operations may be involved would be considered “in the field” and susceptible to UCMJ

77 *Id.*

78 *Id.*

79 *Cf. id.* (arguing that “[a] period of hostilities with Indians is, equally with a period of warfare against a foreign power, a ‘time of war;’ and it has been specifically held by the Attorney General that civil employees of the War Department—‘serving with the army in the Indian country during offensive or defensive operations against the Indians’ are amenable to military trial for offences committed pending such service”). *But see id.* (concerning *Indian* wars, “the jurisdiction created . . . should be extended with special caution over civilians serving with troops during an *Indian war*, for the reason that the theatre of such a war is commonly restricted in extent and that its duration is ordinarily but brief as compared with other wars”) (emphasis added).

80 *See id.* (“[I]t may not always readily be determined whether a war was in a proper sense pending at the date of the offence, or whether the *locus* of the offence was, properly speaking, the theatre of such a war.”).

81 *Id.*

82 *Theater of War Definition*, MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY, 1221 (10th ed. 1998).

83 *Duncan v. Kahanamoku*, 327 U.S. 304, 344 n.3 (1946) (testimony of Lt. Gen. Robert C. Richardson, Jr., U.S.A., Commanding General of the Central Pacific Area); *but see* *United States v. Ali*, 71 M.J. 256, 264 (C.A.A.F. 2012) (“Experts on military law, the Judge Advocate General and the Attorney General have repeatedly taken the position that ‘in the field’ means in an area of actual fighting.”) (citing *Reid v. Covert*, 354 U.S. 1, 34 n.61 (1957)).

84 *Id.*

jurisdiction.⁸⁵

Furthermore, during times of conflict around the world, especially with the War on Terror currently underway, all deployed armed forces may be “in the field” but not necessarily in the “theatre of war.”⁸⁶ It is also conceivable that armed forces engaged in mission preparation or training operations within the United States may be considered “in the field” during a contingency operation.⁸⁷ However, subjecting civilian military contractors to military courts, within the United States, and not during a time of martial law, would be more difficult to justify given the availability of Article III courts within the homeland.⁸⁸

Naturally, the aforementioned conclusion will raise deep concern from proponents of a more limited allocation of judicial power over civilians by military courts; such was the case in *Covert*.⁸⁹ However, in *Covert* the civilians being tried were dependents of members of the armed service accompanying the military overseas during a “time of peace,” and in cases such as *United States ex rel. Toth v. Quarles* and *Milligan* the accused were either not connected with military service or were ex-military being tried for accusations which occurred during the time of prior service.⁹⁰ The question being analyzed here involves military contractors during a contingency operation, not a time of peace. This distinction is important to make because of the essential role military contractors provide to military units around the world, especially during contingency operations.⁹¹ Indeed, without military contractors, a military unit may be rendered incapable of carrying out its mission; because of this, it is of utmost importance that commanders have full power to court-martial contractors accompanying their unit.⁹²

85 See *Solorio v. United States*, 483 U.S. 435, 450–51 (1987) (holding that jurisdiction of a court-martial depends solely on the accused’s status as member of armed forces, and not on “service connection” of the offense charged); see also *Covert*, 354 U.S. at 22–23 (1957) (“[W]e need not attempt here to precisely define the boundary between ‘civilians’ and members of the ‘land and naval Forces.’ We recognize that there might be circumstances where a person could be ‘in’ the armed services for purposes of Clause 14 even though he had not formally been inducted into the military or did not wear a uniform.”).

86 See *Hines*, 259 at 33 (“In time of war, with some exceptions, practically the entire army is ‘in the field,’ but not necessarily ‘in the theater of operation’”).

87 See *id.* (“[W]e can conceive of no reason why the army in America engaged in training and preparing for service on the firing line overseas should not be considered and treated as a component part of the entire army, the majority of whom were actually engaged on the firing line.”).

88 See *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866) (holding that citizens not connected with military service cannot be tried by a military court when Article III courts are available).

89 See *Covert*, 354 U.S. at 35 (“[W]e reject the Government’s argument that present threats to peace permit military trial of civilians accompanying the armed forces overseas in an area where no actual hostilities are under way. The exigencies which have required military rule on the battlefield are not present in areas where no conflict exists. Military trial of civilians ‘in the field’ is an extraordinary jurisdiction and it should not be expanded at the expense of the Bill of Rights.”).

90 See *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 23 (1955) (rejecting court-martial jurisdiction over civilian ex-service member for accusations supposedly committed during his time of service); *Milligan*, 71 U.S. (4 Wall.) at 17 (involving a citizen who had never been a part of the armed forces or a resident of Confederate state); *Covert*, 354 U.S. at 45 (“[I]t is only the trial of civilian dependents in a capital case in time of peace that is in question.”).

91 See *Chapman*, *supra* note 41, at 1059 (discussing the pros and cons of the increasingly ubiquitous use of military contractors in combat zones).

92 Cf. *United States v. Ali*, 71 M.J. 256, 275 (C.A.A.F. 2012) (recounting how the absence of a military contractor

B. Negative Repercussions of Expanding In the Field

A broader application of the Article 2(a)(10) “in the field” language would undeniably deprive civilian contractors of their Fifth and Sixth Amendment rights to a jury trial in an Article III court for crimes committed in a wider arena than simply “an area of actual fighting.”⁹³ Additionally, expanding the definition may potentially invite abuse from commanding officers seeking to apply military judicial remedies to cases that may be wholly unrelated to the success of a mission.⁹⁴ Courts have been appropriately cautious when setting the limits of military jurisdictions over civilians.⁹⁵ Should the Supreme Court ever weigh in on a sound definition of “in the field,” it would also likely do so with great caution.⁹⁶

Much literature has been devoted to the debate over the constitutionality of Article 2(a) (10) as a whole; however, less has been written over the extent of jurisdiction to which “in the field” encompasses.⁹⁷ Depriving a U.S. citizen of her Fifth and Sixth Amendment rights is an enormous power. This deprivation is an obvious consequence of military jurisdiction over crimes committed by U.S. citizens serving with or accompanying the armed forces “in the field” and would stretch even further should “in the field” be defined as any location where military operations could commence.⁹⁸ Therefore, the means must justify the end. Depriving a private citizen of her Fifth and Sixth Amendment rights must be justified as vital to the interests of the military in any given mission. Such a determination may be made by distinguishing the types of civilian persons who should fall under military jurisdiction while accompanying or serving with the armed forces and the activities they perform “in the field.”⁹⁹

The Status Test, as outlined in *Covert*, attempted to clarify Congress’ power to circumscribe Fifth and Sixth Amendment rights by limiting its jurisdiction to do so strictly over members of the

who had performed translation rendered the U.S. Army unit he was serving with “mission incapable” for five days).

93 See *Covert*, 354 U.S. at 34 n.61 (“We believe that Art. 2(10) sets forth the maximum historically recognized extent of military jurisdiction over civilians under the concept of ‘in the field.’”).

94 See *id.* at 1 (holding that UCMJ jurisdiction over civilian dependents of service members in peace time was unconstitutional).

95 See *id.* at 21 (“By way of contrast the jurisdiction of military tribunals is a *very limited* and extraordinary jurisdiction derived from the cryptic language in Art. I, § 8, and, at most, was intended to be only a *narrow exception* to the normal and preferred method of trial in courts of law.”) (emphasis added).

96 See generally Kara M. Sacilotto, *Jumping the (Un)constitutional Gun?: Constitutional Questions in the Application of the UCMJ to Contractors*, 37 PUB. CONT. L.J. 179, 211 (2008) (describing the potential unconstitutionality of extending UCMJ jurisdiction over civilians while Article III courts are open).

97 See generally Brittany Warren, *The Case of the Murdering Wives: Reid v. Covert and the Complicated Question of Civilians and Courts-Martial*, 212 MIL. L. REV. 133 (2012) (arguing against the use of UCMJ over civilians); see also Anna Manasco Dionne, *“In Time of Whenever the Secretary Says”: The Constitutional Case Against Court-Martial Jurisdiction over Accompanying Civilians During Contingency Operations*, 27 YALE L. & POL’Y REV. 205 (2008) (discussing reasons why the UCMJ should not apply to civilians during a contingency operation); *The Case for Court-Martial Jurisdiction over Civilians Under Article 2(a)(10) of the Uniform Code of Military Justice*, ARMY LAW, Oct./Nov. 2002, at 31 (making the case for UCMJ jurisdiction over civilians accompanying the armed forces in the field).

98 See *United States v. Ali*, 71 M.J. 256, 264 (C.A.A.F 2012).

99 Compare *Reid v. Covert*, 354 U.S. 1 (1957) (considering UCMJ jurisdiction over civilian dependents), with *Ali*, 71 M.J. at 258 (examining UCMJ jurisdiction over non-national civilian contractor providing a critical service in the field).

armed forces.¹⁰⁰ It is an uphill argument to assert that dependents of servicemembers fall into the latter category. However, it is much more convincing to assert that private military contractors, when serving with the armed forces “in the field,” by characterization of the services they provide.¹⁰¹ Nevertheless, subjecting said contractors to military jurisdiction under an expanded umbrella of “in the field” would indeed deprive them of a jury trial in an Article III court for crimes committed outside of “an area of actual fighting.”

Civilians accompanying the armed forces during a time of declared war or contingency operation are subject to the authority of a commissioned military officer when Article 2(a)(10) applies, and therefore, exposed to said officer’s potential mishandling of jurisdictional power.¹⁰² This is a large reality that is of utmost concern with an expanded understanding of “in the field.” It would certainly not meet the ends of mission success if a civilian dependent, accompanying a servicemember during a time of declared war or contingency operation, were subjected to the means of a court-martial for an offense wholly unrelated to the mission of the unit.¹⁰³

Although there are extensive safeguards in place to prevent abuse of power within the UCMJ, these safeguards may not prevent a commander from choosing to try a civilian under the UCMJ when an Article III court would be more appropriate for said person, and the alleged crime.¹⁰⁴ Indeed there have been scenarios where civilians have been wrongfully brought before a court-martial within the past century.¹⁰⁵ However, the United States’ increased dependency on civilian military

100 See *Covert*, 354 U.S. at 19–20 (limiting Congressional power over “land and naval forces” to include only members of the armed services and not their civilian wives, children, or other dependents).

101 See *id.* at 22–23 (“[W]e need not attempt here to precisely define the boundary between ‘civilians’ and members of the ‘land and naval Forces.’ We recognize that there might be circumstances where a person could be ‘in’ the armed services for purposes of Clause 14 even though he had not formally been inducted into the military or did not wear a uniform.”); see also Cullen, *supra* note 20, at 513–14 (describing the different types of military contractors and services they provide, highlighting the security contractor and the high potential of ‘use of force’ they may administer).

102 See 10 U.S.C. §§ 802, 822–26.

103 See *Covert*, 354 U.S. 1 (holding that “the provisions of the Uniform Code of Military Justice extending court-martial jurisdiction to persons accompanying the armed forces outside the continental limits of the United States could not be constitutionally applied to trial of civilian dependents of members of the armed forces overseas, in times of peace, for capital offenses”).

104 See *Military Justice Fact Sheets: The Military Justice System, the Uniform Code of Military Justice and the Manual for Courts Martial*, HEADQUARTERS MARINE CORPS, [http://www.hqmc.marines.mil/Portals/135/MJFACTSHTS\[1\].html](http://www.hqmc.marines.mil/Portals/135/MJFACTSHTS[1].html) (last visited Feb. 19, 2014) (stating that “there are extensive safeguards to protect against abuse of authority. In the opinion of many legal scholars, the UCMJ has not only kept pace with innovations in civilian criminal jurisprudence, but has actually led the way, establishing more safeguards to protect the rights of those accused of criminal offenses. The UCMJ and MCM are primarily kept current with the basic principles of American jurisprudence through two standing committees, The Code Committee and the Joint Service Committee on Military Justice.”).

105 See Katherine Jackson, *Not Quite A Civilian, Not Quite A Soldier: How Five Words Could Subject Civilian Contractors in Iraq and Afghanistan to Military Jurisdiction*, 27 J. NAT’L ASS’N ADMIN. L. JUDICIARY 255, 255–56 (2007) (stating that “sorting out when civilians can and cannot be subject to court-martial jurisdiction, the situation the United States now faces seems entirely unprecedented. Contractors today serve in capacities that make them a hybrid as yet untested under the Constitution—the civilian-soldier. They are not soldiers, but they are not quite civilians either . . . [t] heir work represents greater military and political efficiency and efficacy in many ways. It also represents a development that the civilian criminal justice system has not been well equipped to deal with.” (citing Griff Witte, *New Law Could Subject Civilians to Military Trial: Provision Aimed at Contractors, but Some Fear it Will Sweep Up Other Workers*, WASH.

contractors in modern times highlights an issue that is unprecedented, at least in its own history.¹⁰⁶ Understanding the most obvious potential negative repercussions a wider interpretation of “in the field” may create, and considering the growing privatization of warfare, the benefits of a wider interpretation far outweigh the cost to civil liberty civilian contractors would have to pay for wrongs committed while accompanying or serving with the armed forces “in the field.”¹⁰⁷ Indeed, in order to ensure discipline, unit readiness, accountability, and justice “in the field” during a contingency operation, a broader interpretation is needed to fulfill the purpose of Article 2(a)(10).¹⁰⁸

III. CONSTITUTIONAL JUSTIFICATION FOR THE USE OF UCMJ JURISDICTION OVER MILITARY CONTRACTORS “IN THE FIELD” BUT NOT NECESSARILY IN “AN AREA OF ACTUAL FIGHTING.”

Interpreting the scope of the Article 2(a)(10) language “in the field” as encompassing any area that is or may become involved in war operations, is amongst other things, within the enumerated and implied war powers given to Congress by the United States Constitution.¹⁰⁹ In past cases dealing with military trials of civilian contractors, serious questions have been raised as to those contractors’ Fifth and Sixth Amendment rights to trial by jury.¹¹⁰ The Sixth Amendment of the United States Constitution provides: “[i]n all criminal prosecutions, the accused shall enjoy the

Post, Jan. 15, 2007, at A1; Michael J. Davidson, *Ruck Up: An Introduction to the Legal Issues Associated with Civilian Contractors on the Battlefield*, 29 PUB. CONT. L.J. 233, 263 (Winter 2000); Jason McLure, *Abuse Case Prosecution Falls Apart: Evidence of Alleged Rape by Iraq Contractor Elusive*, 29 LEGAL TIMES 1, May 29, 2006, at 1).

106 See Jackson, *supra* note 105, at 255 (noting the current legal framework does not fit the changing face and role of the civilian contractor used by the U.S. military today).

107 See generally P.W. Singer, *War, Profits, and the Vacuum of Law: Privatized Military Firms and International Law*, 42 COLUM. J. TRANSNAT’L L. 521 (2004) (discussing the rise and use of the privatized military industry in the 21st century). See generally Katherin J. Chapman, Note, 63 VAND. L. REV. 1047, 1079 (2010) (discussing the needs and benefits of holding private military contractors accountable for their actions under the UCMJ when serving with the U.S. armed forces during a contingency operation in the field).

108 See 10 U.S.C. § 802(a)(10) (applying the statute to persons “serving with or accompanying” military forces in the field during war or contingency operations).

109 See U.S. CONST. art. I, § 8, cl. 14 (“The Congress shall have Power To ...make Rules for the Government and Regulation of the land and naval Forces”); *United States v. Ali*, 71 M.J. 256, 273 (C.A.A.F. 2012) (tracing the source of Congressional power in this sense beyond the Rules and Regulations Clause and pointing to, among other powers, the Necessary and Proper Clause); *Duncan v. Kahanamoku*, 327 U.S. 304, 346 n. 3 (1946) (testimony of Lt. Gen. Robert C. Richardson, Jr., U.S.A., then Commanding General of the Central Pacific Area) (stating the theater of operations includes areas necessary for offensive or defensive operations).

110 See *Kinsella v. United States ex rel Singleton*, 361 U.S. 234 (1960) (declining to authorize the prosecution of a dependent wife of a soldier stationed in Germany for a noncapital offense); *Reid v. Covert*, 354 U.S. 1 (1957) (declining to extend the power to dependent wives of soldiers stationed overseas during times of peace for capital offenses); *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955) (extending the protections to ex-servicemen); *Hines v. Mikell*, 259 F. 28 (4th Cir. 1919) (dealing with a civilian contractor); *In re Berue*, 54 F. Supp. 252 (affirming defendant’s prosecution because he was accompanying or serving with the army in the theater); *United States v. Ali*, 71 M.J. 256 (C.A.A.F. 2012) (discussing application to a foreign national working as a contractor in the theater of war in Iraq); *United States v. Averette* (1990), 41 C.M.R. 363 (finding “in the time of war” to mean a war declared by Congress); *United States v. Burney*, 21 C.M.R. 98 (C.M.A 1956) (noting the accused was a civilian employee stationed abroad with the military in Japan).

right to a speedy and public trial, by an impartial jury of the *State and district wherein the crime shall have been committed*, which district shall have been previously ascertained by law”¹¹¹

If “in the field” involves a locus outside of any state and district, and a crime is committed there by a contractor, does the Sixth Amendment apply? For the purposes of this analysis and its inquiry into military contractors serving with the armed forces “in the field,” the Fifth Amendment exception clause may provide a remedy to this dilemma. Furthermore, focusing on the controversial Fifth Amendment exception and interpreting it in an extensive scope provides what is perhaps the most compelling argument for a broader understanding of “in the field” than the one articulated in *Ali*.¹¹²

A. *The Fifth Amendment Exception Clause*

The Fifth Amendment of the United States Constitution grants the right of trial by jury to any person who “shall be held to answer for a capital or otherwise infamous crime,” unless certain exceptions exist.¹¹³ These exceptions are cases “arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger.”¹¹⁴ It is important to note that the Fifth Amendment does not list the “arising in” exception as applying only to the armed forces.¹¹⁵ Irrefutably, the language unambiguously states “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.”¹¹⁶ Therefore, if a crime is committed by a person, such as a civilian contractor, and it “arises in” the land or naval forces, said contractor may be exempt from the Fifth and Sixth Amendment jury provisions.¹¹⁷ Indeed, this is exactly what the UCMJ under Article 2(a)(10) provides.¹¹⁸ Respecting the question being analyzed here, a crime “arising in” the land and naval forces must logically comprise one committed by a contractor accompanying or serving with the armed forces “in the field,” and would therefore fall under the Fifth Amendment exception clause.

Scholars have alluded that certain jurisprudence may be correct in arguing that cases “arising in” the land or naval forces should be, at least, limited to cases involving actual service members of said forces.¹¹⁹ Justice Black, writing for the Supreme Court in *U.S. ex rel. Toth v. Quarles* reasoned

111 U.S. CONST. amend. VI (emphasis added).

112 See generally Stephen I. Vladeck, *Military Courts and Article III*, (forthcoming 2013) (on file with author) (analyzing the jurisprudence, controversy, and consequences of military courts).

113 U.S. CONST. amend. V.

114 *Id.*

115 See *id.* (noting the phrase arising in applies to all the clauses that follow from “land” through “public danger”).

116 *Id.* (emphasis added).

117 See *United States v. Ali*, 71 M.J. 256, 270 (C.A.A.F. 2012) (affirming the lower court’s decision).

118 See 10 U.S.C. § 802(a)(10).

119 See *Toth v. Quarles*, 350 U.S. 11, 15 (1955) (stating that “the word ‘arise,’ ‘to proceed, to issue, to spring,’ and a case arising in the land or naval forces upon a fair and reasonable construction of the whole article, appears to us to be a case proceeding, issuing or springing from acts in violation of the naval laws and regulations committed while in the naval forces or service”); Stephen I. Vladeck, *Military Courts and Article III*, at 22 (forthcoming 2013) (manuscript on file with author) (discussing Justice Black’s opinion in *Toth*).

that the natural meaning of “to make rules . . . [to regulate] the land and naval forces” necessarily applies to those who are “actually members or part of the armed forces.”¹²⁰ Justice Black also noted that the language of the make rules clause “would seem” to restrict Courts-martial to service members, and that “[t]here is compelling reason for construing the clause this way.”¹²¹ However, in *Covert*, Justice Black recognized that a person could be a part of the armed services but not necessarily inducted therein.¹²² Could it not be said that a military contractor serving with a military unit during a contingency operation “in the field” meets this threshold? The answer may be found by applying the closeness test in *Kinsella*.¹²³ There, Justice Harlan argued in his dissent that:

[T]he true issue on this aspect of all such cases concerns the closeness or remoteness of the relationship between the person affected and the military establishment . . . [i]s [whether] that relationship close enough so that Congress may, in light of all the factors involved, appropriately deem it ‘necessary’ that the military be given jurisdiction to deal with offenses committed by such persons[.]¹²⁴

Based upon actions alone, a military contractor may easily pass the aforementioned closeness test and be found necessarily within the jurisdiction of the military when serving with the armed forces “in the field.” The Constitution has given Congress the power to make rules regulating the land and naval forces, and for non-Article III courts to hear cases arising therein.¹²⁵ In *Ali*, the CAAF held that a civilian contractor accompanying a unit “in the field” was sufficient for military jurisdiction.¹²⁶ Accordingly, in the context of Article 2(a)(10), a case arising “in the field” must also “arise in” the land and naval forces. Furthermore, given that the UCMJ governs the land and naval forces, it would not seem within the spirit of Article 2(a)(10) for a case arising within it to not “arise in” the land and naval forces.¹²⁷

B. Necessary and Proper War Powers

Given that Congress has the power for non-Article III courts to hear cases, and that “in the field,” within the context of Article 2(a)(10), necessarily “arises in” the land and naval forces, it must follow that a broader jurisdiction of “in the field” is both essential and within the constitutional

120 See *Toth*, 350 U.S. at 15 (stating that “for given its natural meaning, the power granted Congress ‘To make Rules’ to regulate ‘the land and naval Forces’ would seem to restrict court-martial jurisdiction to persons who are actually members or part of the armed forces”).

121 *Id.*

122 *Id.* at 35.

123 See *Kinsella v. United States*, 361 U.S. 234 (1960).

124 *Id.* at 257 (Harlan, J., dissenting).

125 See U.S. CONST. art. I, § 8, cl. 14 (“To provide and maintain a Navy”).

126 See *United States v. Ali*, 71 M.J. 256, 270 (C.A.A.F. 2012) (“We hold that Ali falls within the scope of Article 2(a)(10) and that the congressional exercise of jurisdiction, as applied to Ali, a non-United States citizen Iraqi national, subject to court-martial outside the United States during a contingency operation, does not violate the Constitution.”).

127 10 U.S.C. § 802 art. 2(a)–(e).

powers of Congress to define.¹²⁸ A broader scope of “in the field” is needed given scenarios such as the one raised here: a United States citizen, serving as a contractor with the United States armed forces outside of the United States and its territories, during a contingency operation.

Congress may justify allowing UCMJ jurisdiction over military contractors, serving with the armed forces, in locations outside of the “area of actual fighting,” and during a declared war, through Congress’ war powers. In *Ali*, Judge Erdmann referenced *Covert* where the Supreme Court held that Congress’ war powers give it the authority to subject civilians performing services for the military “in the field” (during a time of war) to courts-martial jurisdiction.¹²⁹ In *Covert*, Justice Black further stated that:

[T]o the extent that these cases can be justified . . . trial of persons who were not ‘members’ of the armed forces . . . must rest on the Government’s ‘war powers.’ In the face of an actively hostile enemy, military commanders necessarily have broad power over persons on the battlefield. From a time prior to the adoption of the Constitution the extraordinary circumstances present in an area of actual fighting have been considered sufficient to permit punishment of some civilians in that area by military courts under military rules.¹³⁰

However, in *Covert*, Justice Black’s response was to the government’s argument for UCMJ jurisdiction over civilians during a time where “threats to peace” existed, not a declared war or contingency operation.¹³¹ Justice Black’s reasoning in *Covert* does not necessarily rule out a scenario where “the field” may include locations outside of the area of actual fighting, in such a circumstance, UCMJ jurisdiction may provide the same benefits it has on the battlefield of traditional wars.¹³² Indeed, in his opinion in *Youngstown*, Justice Black recognized that the “theatre of war” is an expanding concept.¹³³ Therefore, it is not only conceivable, but within Congress’ war powers to define “in the field” as both encompassing *areas of actual fighting* as well as areas outside of actual fighting when a military contractor is accompanying a military unit during a contingency

128 U.S. CONST. art. I, § 8, cl. 14; U.S. CONST. amend. V; 10 U.S.C. § 802 art. 2(a)–(e); see *Reid v. Covert*, 354 U.S. 1, 33 (1957) (“To the extent that these cases can be justified, insofar as they involved trial of persons who were not ‘members’ of the armed forces, they must rest on the Government’s ‘war powers.’”) (citing *Perlstein v. United States*, 151 F.2d 167 (3rd Cir. 1945)); see also *Hines v. Mikell*, 259 F. 28; *Ali*, 71 M.J. 256 at 269 (“We hold that *Ali* falls within the scope of Article 2(a)(10) and that the congressional exercise of jurisdiction, as applied to *Ali*, a non-United States citizen Iraqi national, subject to court-martial outside the United States during a contingency operation, does not violate the Constitution.”).

129 See *Ali*, 71 M.J. 256 at 269 (holding that a non-United States citizen, falls within the scope of Article 2(a)(10) and that the congressional exercise of jurisdiction, subject to court-martial outside the United States during a contingency operation, does not violate the Constitution).

130 *Covert*, 354 U.S. at 21 (citing *Perlstein*, 151 F.2d 167).

131 See *id.* at 35 (“We reject the Government’s argument that *present threats to peace* permit military trial of civilians accompanying the armed forces overseas in an area where no actual hostilities are under way.”) (emphasis added).

132 See *Ali*, 71 M.J. 256 at 264 (“[C]olonel Winthrop broadly defined the phrase to mean ‘the period and pendency of war and to acts committed in the theater of war.’”).

133 See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952).

operation.¹³⁴

Congress may further derive its authority for a broader jurisdiction of “in the field” through the Necessary and Proper clause.¹³⁵ Article I § 8, of course, gives power to Congress “to make all Laws which shall be *necessary and proper* for carrying into Execution [its] *foregoing Powers*, and *all other Powers* vested by [the] Constitution in the Government of the United States, or in any *Department or Officer thereof*.”¹³⁶ Surely the Department of Defense is included in “any Department” and given that the UCMJ was created to govern cases arising in the land and naval forces, Congress has the power to broaden the jurisdiction of the Article 2(a)(10) language “in the field.”¹³⁷

Furthermore, a broadening of the jurisdiction of “in the field” would be a non-frivolous extension of current precedent which has already passed the constitutional test.¹³⁸ In *Ali*, the CAAF held that Congress, through its war powers, may subject persons to the UCMJ when serving with the armed forces in the field during a contingency operation.¹³⁹ As mentioned previously, the *Ali* court relied on the Supreme Court in *Covert* in coming to this conclusion.¹⁴⁰ Therefore, the debate over Congress’ power to subject civilian contractors to military courts within the context of Article 2(a)(10) is all but settled, remaining unsettled is a firm understanding of “in the field” when applied to modern conflicts. Although reasonable minds may differ as to how “in the field” should be interpreted, it may be agreed that if Congress holds the constitutional power to implement Article 2(a)(10), they must also have the ability to define the scope of the language set forth within it. Given the aforementioned reasons, it is probable that interpreting “in the field” as anywhere that war operations may be involved and not limited to “an area of actual fighting,” although controversial, is constitutional.

CONCLUSION

In summary, the United States is continuing to fight unconventional wars, dissimilar from conventional conflicts; this battlefield seems to know no bounds. Indeed, the contingency operations being fought today bring forward new complications that challenge doctrinal warfare, among these

134 *E.g.*, 10 U.S.C. § 802 art. 2(a)(10).

135 *See* U.S. CONST. art. I, § 8, cl. 18. (“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.”).

136 *Id.* (emphasis added).

137 *See* 10 U.S.C. § 802 art. 2(a)–(e) (defining persons who are subject to this chapter as the armed and naval forces); *id.* at art. 2(a)(10).

138 *Cf.* *Reid v. Covert*, 354 U.S. 1, 33 (holding that the UCMJ may not be extended to dependents of service members accompanying the armed forces overseas *during a time of peace* but not discussing its application to persons serving with or accompanying the armed forces during a time of declared war or contingency operation).

139 *See* *United States v. Ali*, 71 M.J. 256 at 269 (“Thus, there have been a number of decisions by lower courts during the twentieth century upholding court-martial jurisdiction over civilians accompanying or serving with the armed forces “in the field.”).

140 *Cf.* *Covert*, 354 U.S. at 22 (holding that “it is a persuasive and reliable indication that the authority conferred by Clause 14 [of the U.S. Constitution] does not encompass persons who cannot fairly be said to be ‘in’ the military service”).

are the expanding frontiers of the “theatre of war” and the continued reliance on civilian contractors who provide a cheap yet expert array of services to our armed forces.¹⁴¹ How these civilian contractors will be held to answer for crimes they commit while accompanying the armed forces during these contingency operations is an evolving issue. However, given the historical precedent outlined above, and the need for a broader definition, a United States citizen, serving as a contractor with the United States armed forces, outside of the United States and its territories, during a contingency operation, may fall under the jurisdiction of the UCMJ for a crime committed outside of an “area of actual fighting” but nevertheless “in the field,” pursuant to Article 2(a)(10).

The provision of a swift and effective system of justice over civilian contractors when Article III courts are either not available, or export of violators for trial under them would impede the objectives of an overall mission, is greatly within the interest of the United States. Article 2(a)(10) of the UCMJ fills the gap in jurisdiction created between Article III and military courts respecting civilians accompanying or serving with the military in the field during a time of declared war or contingency operation.¹⁴² Congress’ authority to create such a law has been deemed within the constitutional authority given to it under numerous clauses.¹⁴³ However, in the most recent opinion on the issue, the *Ali* court interprets “in the field” much too narrowly.¹⁴⁴ A broader understanding of the “in the field” language must exist to permit for the necessary jurisdiction of military courts over civilian contractors accompanying the armed forces during the modern contingency operations the United States is currently engaged in, and will likely be engaged in for the foreseeable future.

In the 1956 case *United States v. Burney*¹⁴⁵ concerning a civilian contractor who was court-martialed for an offense committed while serving with the armed forces, Judge Latimer, delivering the opinion of the court, impeccably illustrated the reasoning behind the need for Article 2(a)(10):

Putting aside the authorities and military customs existing from time immemorial and discussed above, there is a sound core of logic underlying the principle that, in time of conflict, persons serving with or accompanying the armed forces, whether within or without the United States and its territories, must be subject to control by the services and to trial by court-martial. Those persons move with and often support combat troops. They may perform laborious tasks, technical maintenance work, administrative duties, or logistical functions, and failure on their part to perform their duty may be disastrous. In addition, they acquire much valuable information and they may be a

141 See generally Cullen, *supra* note 20, at 514 (discussing the practical limits of jurisdiction under UCMJ article 2(a)).

142 See 10 U.S.C. § 802 art. 2(a)(10).

143 10 U.S.C. § 822; see *Covert*, 354 U.S. at 21 (“In both cases jurisdiction was exercised by a military tribunal pursuant to an Act of Congress authorizing such jurisdiction over all persons accompanying the armed forces outside the territorial jurisdiction of the United States. The distinction that in one case the trial was by court-martial and in the other by a military commission is insubstantial.”); *Solorio v. United States*, 483 U.S. 435 (1987).

144 See *United States v. Ali*, 71 M.J. 256, 264 (C.A.A.F. 2012) (“We see no reason not to adopt this interpretation of ‘in the field,’ which requires an area of actual fighting, for our analysis of Article 2(a)(10).”).

145 *United States v. Burney*, 21 C.M.R. 98 (1956).

fertile source of valuable intelligence data for the enemy. They receive benefits and protection from the military arm while performing their tasks, and their efforts are essential to the accomplishment of the military mission. The security of the nation may depend on their activities, and they should answer to their immediate protector for any transgressions. *They need not volunteer for the service, but once they do, they willingly place themselves in an assignment where the success or failure of the mission of the particular armed force may be governed by their conduct, behavior, and strict compliance with orders.* It is just as necessary that they be governed by the demands of the military situation as the very troops they serve. Even a premature disclosure of their presence in an area may awaken an enemy to the presence of American combat troops. It is not too much, then, to demand obedience to military law from them, and to conclude that they must be subject to the provisions of the Code, albeit they are civilians who—when tried by a military court—are denied a trial by jury.¹⁴⁶

In the spirit of the latter, and given the aforementioned reasons, a broader scope of “in the field” encompassing anywhere that war operations may be involved is necessary to ensure the success of missions carried out by the armed forces and the crucial support network of civilian contractors whom accompany and serve with them, more so now than ever, “in the field.”

146 See *id.* at 127 (holding that persons serving with or accompanying the armed forces, whether within or without the United States and its territories, must be subject to control by the services and to trial by court-martial).