CIVILIAN COURT-MARTIAL JURISDICTION AND *UNITED STATES V. ALI*: A RE-EXAMINATION OF THE HISTORICAL PRACTICE

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In 2000, civilian contractors working for Dyncorp during the United States Army's peacekeeping operations in Bosnia-Herzegovina were investigated for human trafficking and prostitution.[1] Because there was no option of prosecuting the contractors in federal district court or by courts-martial, the only possible venue for prosecution was the Bosnian government, which declined to prosecute.[2] With no other options, the contractors were returned to the United States without prosecution.[3]

Fast forward to 2009; assume that the same contractors are implicated in similar allegations of human trafficking and prostitution, but this time in Joint Base Balad, Iraq. Despite changes to the Uniform Code of Military Justice (UCMJ) to extend court-martial jurisdiction in such situations, the recent court decision of United States v. Ali *would likely prevent court-martial jurisdiction over this criminal conduct.[4] Instead, the military commander must persuade the local United States Attorney in each contractor's home district to prosecute the case in local federal district court.*

I. INTRODUCTION

Civilian contractors serving with the United States military overseas exist in a legal gray zone, with jurisdictional problems limiting options for prosecuting their criminal misconduct.[5] Oftentimes, they are exempt from host-nation prosecution under the terms of a status of forces agreement—an agreement between the United States and the host-nation that outlines the terms and conditions under which American forces operate in the host-nation's territory.[6] Until recently, prosecution in the United States was not possible in these situations unless the statute in question applied extraterritorially.[7] Given the potential for serious criminal conduct to go unpunished, Congress passed the Military Extraterritorial Jurisdiction Act (MEJA) in 2000, which created

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1. *See Hopes Betrayed: Trafficking of Women and Girls to Post-Conflict Bosnia and Herzegovina for Forced Prostitution*, 14 HUMAN RIGHTS WATCH, no. 9, Nov. 2002, at 54–56 [hereinafter *Hopes Betrayed*], *available at* http://www.hrw.org/reports/2002/bosnia/Bosnia1102.pdf.

2. *See id.* at 64–65.

3. *See id.* at 62–67.

4. *See generally* United States v. Ali, 71 M.J. 256 (C.A.A.F. 2012), *cert. denied*, 133 S. Ct. 2338 (2013) (holding that a person's status is necessary to determine jurisdiction).

5. Brittany Warren, Note, *"If You Have a Zero-Tolerance Policy, Why Aren't You Doing Anything?": Using the Uniform Code of Military Justice to Combat Human Trafficking Abroad*, 80 GEO. WASH. L. REV. 1255, 1263 (2012).

6. *See* INT'L & OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., OPERATIONAL LAW HANDBOOK 120 (Major William Johnson et al. eds., 2013) (noting United States policy to maximize United States jurisdiction in overseas operations and that American personnel are subject to exclusive United States jurisdiction during combat).

7. *See* H.R. Rep. No. 106-778, at 5 (2000) (noting that many serious crimes did not have extraterritorial effect and a jurisdictional gap had been created for overseas military operations).

jurisdiction in United States district court for felony offenses committed by civilians accompanying United States forces overseas.[8] Despite good intentions, MEJA has not worked well in practice—very few prosecutions have been brought and generally only the most serious misconduct has resulted in criminal prosecution, particularly because the decision to prosecute is made by the United States Attorney in the defendant's home district and because of the difficulty of prosecuting conduct taking place overseas.[9]

Given these shortcomings, Congress's second effort was a bit more substantial and controversial. In a little-noticed move that caught military leaders by surprise,[10] in the National Defense Authorization Act of 2007, Congress amended Article 2(a)(10) of the Uniform Code of Military Justice to create court-martial jurisdiction for civilians "serving with or accompanying an armed force in the field" during a "time of declared war and in a contingency operation."[11] This move created the potential to address this jurisdictional gap, as courts-martial could take place on location overseas and the process would be overseen by a commander with an interest in maintaining order and discipline during overseas operations.[12]

The extension of court-martial jurisdiction to civilians is not without controversy, given the fact that not all constitutional protections found in civilian prosecutions are afforded to servicemembers facing a court-martial.[13] In the 1950s, the Supreme Court famously restricted the exercise of court-martial jurisdiction over civilians in the cases of *United States ex rel. Toth v. Quarles*, in which the Court invalidated the exercise of jurisdiction against a discharged servicemember for a murder he allegedly committed while in uniform,[14] and in *Reid v. Covert*, in which the Court invalidated the court-martial convictions of two wives who accompanied their servicemember husbands overseas.[15] The Court reversed the convictions because these civilians were deprived of their Fifth and Sixth Amendment rights in a non-Article III court,[16] with no apparent need to maintain good order and discipline

8. Military Extraterritorial Jurisdiction Act of 2000, Pub. L. No. 106-523, 114 Stat. 2488 (codified as amended at 18 U.S.C. § 3261 (2012)). In the House Report on the proposed legislation, the Report notes that "there is a 'jurisdictional gap' that, in many cases, allows [crimes committed by civilians accompanying the Armed Forces overseas] to go unpunished." H.R. Rep. No. 106-778, at 5.

9. Geoffrey S. Corn, *Bringing Discipline to the Civilianization of the Battlefield: A Proposal for a More Legitimate Approach to Resurrecting Military-Criminal Jurisdiction Over Civilian Augmentees*, 62 U. MIAMI L. REV. 491, 513–15 (2008).

10. *Id.* at 491.

11. 10 U.S.C. § 802(a)(10) (2012), *amended by* John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. 109-364, § 552, 120 Stat. 2083, 2217.

12. *See id.*

13. *See* Reid v. Covert, 354 U.S. 1, 9–10 (1957) (plurality opinion); United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 13 (1955).

14. *Toth*, 350 U.S. at 13–14.

15. *Reid*, 354 U.S. at 2–5. In *Reid*, a plurality determined that any exercise of jurisdiction over dependents was unconstitutional. *Id.* at 5. Justices Frankfurter and Harlan concurred in the result based on the capital nature of the offenses. *See id.* at 41, 49 (Frankfurter, J., concurring), 65 (Harlan, J., concurring).

16. *Id.* at 18–19, 36–37 (plurality opinion); *Toth*, 350 U.S. at 15–17.

in the face of hostilities or imminent hostilities to justify these deprivations.[17] After these cases, court-martial jurisdiction against civilians who accompany United States forces was severely restricted and limited to periods of declared war.[18] As a result, commanders charged with maintaining order and discipline in an overseas operation had two bad options—they could try to persuade the United States Attorney to take the case, assuming that witnesses were able to travel to the United States to testify, or seek host-nation prosecution.[19]

Unsurprisingly, the first civilian contractor to face a court-martial under the newly-amended Article 2(a)(10) argued vigorously that his court-martial was unconstitutional.[20] Mr. Alaa Ali was a civilian interpreter assigned to the "170th Military Police Company, stationed in Hit, Iraq."[21] He worked for a squad of military police soldiers, accompanied them on their combat patrols, and wore the same military uniform—but did not carry a weapon.[22] In the course of performing his duties, Mr. Ali had an altercation with a fellow Iraqi interpreter, which ultimately resulted in Mr. Ali stabbing his colleague four times in the chest.[23] Mr. Ali was apprehended and ultimately convicted at court-martial for charges related to this offense.[24] He pleaded guilty and was ultimately sentenced to 115 days of confinement.[25] The case eventually reached the Court of Appeals for the Armed Forces (CAAF), where the CAAF upheld the constitutionality of the exercise of jurisdiction in Mr. Ali's case and the Supreme Court denied certiorari.[26]

While the CAAF upheld Mr. Ali's conviction and the constitutionality of Article 2(a)(10), the court severely restricted Article 2(a)(10)'s reach.[27] The court interpreted Article 2(a)(10) as applicable only in an "area of actual fighting," thereby significantly limiting the provision's application.[28] Under such a requirement, the contractors described at the outset of this Article, who engaged in human trafficking and prostitution on a base that had not recently faced regular attack or who were executing peace-keeping operations, would not be subject to court-martial jurisdiction.[29]

In this Article, I argue that this "area of actual fighting" interpretation is better served by a broader approach that is consistent with the historical

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17. *Reid*, 354 U.S. at 32–33; *Toth*, 350 U.S. at 22–23.

18. *See* United States v. Averette, 41 C.M.R. 363, 365 (C.M.A. 1970) (limiting the exercise of court-martial jurisdiction over civilians to periods of declared war), *superseded by statute as stated in* United States v. Ali, 71 M.J. 256 (C.A.A.F. 2012), *cert. denied*, 133 S. Ct. 2338 (2013).

19. *See Hopes Betrayed*, *supra* note 1, at 64–65.

20. *Ali*, 71 M.J. at 258–59.

21. *Id.* at 259.

22. *Id.* at 259–60.

23. *Id.*

24. *Id.* at 260–61.

25. *Id.* at 258.

26. *Id.* at 259.

27. *See id.*

28. *Id.* at 264.

29. *See supra* notes 3–4 and accompanying text; *see infra* notes 160–64 and accompanying text.

interpretation of the phrase "in the field" and that also addresses the specific reason for the extension of jurisdiction over civilians—to maintain good order, discipline, and mission accomplishment when American forces are facing hostilities.[30] The primary consideration that justifies the court-martial system as a whole is the need to maintain discipline in the armed forces.[31] As a result, military courts should primarily consider whether an exercise of civilian contractor jurisdiction meets the needs of discipline in the armed forces.[32] Accordingly, the courts should abandon a standard that only authorizes courts-martial against civilians when UCMJ offenses are committed in an area of actual fighting (the standard articulated in *Ali*) and should instead adopt a broader standard—"military operations with a view to an enemy."[33] This latter standard is more historically grounded, more easily applied, and better allows commanders to address misconduct such as the human trafficking allegations spelled out at the outset of this Article.[34] This latter interpretation better meets congressional intent while remaining within constitutional bounds.[35]

This Article will proceed by first examining both Supreme Court case law[36] and the CAAF ruling in *Ali*.[37] Next, the Article will review the area of actual fighting standard and examine historical and hypothetical situations in which the standard falls short.[38] Finally, the Article will conclude by examining the boundaries and limits of a military operations with a view to an enemy standard.[39]

II. THE SUPREME COURT LOOKS AT CIVILIAN COURT-MARTIAL JURISDICTION: *UNITED STATES EX REL. TOTH V. QUARLES* AND *REID V. COVERT*

The current contours of court-martial jurisdiction over civilians were established by the Supreme Court cases of *Toth* and *Reid*, decided in 1955 and 1957, respectively.[40] The basic framework that the Court applied in each case centered on two key issues: (1) the constitutionality of depriving a civilian of basic due process protections afforded in a criminal trial, including the right to be heard before an Article III court, the right to a grand jury indictment, and the

30. *See Ali*, 71 M.J. at 264; discussion *infra* Part IV.D–E.

31. *See* United States v. Burney, 21 C.M.R. 98, 106 (C.M.A. 1956).

32. *See Ali*, 71 M.J. at 264; *Burney*, 21 C.M.R. at 109–10.

33. *See Burney*, 21 C.M.R. at 109–10 (adopting this interpretation in dicta after canvassing the historical record).

34. *See id.*

35. *See id.*

36. *See* discussion *infra* Part II.

37. *See Ali*, 71 M.J. at 258–70; discussion *infra* Part III.

38. *See* discussion *infra* Part IV.C–E; *see also Ali*, 71 M.J. at 264.

39. *See* discussion *infra* Part V; *see also Burney*, 21 C.M.R. at 109–10.

40. Reid v. Covert, 354 U.S. 1 (1957) (plurality opinion); United States *ex rel.* Toth v. Quarles, 350 U.S. 11 (1955).

right to a jury trial;[41] and (2) the authority of Congress to legislate for civilian jurisdiction under Article I, § 8 of the Constitution.[42] Ultimately, the Court decided against the Government on both issues.[43]

In *Toth*, the Air Force recalled a civilian who had been honorably discharged from active duty to be tried for a murder allegedly committed while serving as an airman in Korea.[44] The Supreme Court reviewed the conviction, ultimately concluding that the court-martial was unconstitutional.[45] The Court rejected the assertion that Congress had authority under Article I, § 8 of the Constitution to legislate in this area, concluding that Congress did not have authority based on its power to "make Rules for the Government and Regulation of the land and naval Forces."[46] The Court examined the Government's justification for abrogating Mr. Toth's jury trial right—the need to maintain discipline—but concluded that the justification was inappropriate in Mr. Toth's situation: "It is impossible to think that the discipline of the Army is going to be disrupted, its morale impaired, or its orderly processes disturbed, by giving ex-servicemen the benefit of a civilian court trial when they are actually civilians."[47] Ultimately, the Court stated that the exercise of court-martial authority should be limited to "the least possible power adequate to the end proposed," e.g., discipline.[48]

In *Reid*, decided two years later, the Court revisited the court-martial of two military spouses living overseas with their servicemember husbands, both of whom were charged with and convicted of murdering their husbands.[49] They were court-martialed pursuant to Article 2(11) of the UCMJ, which allowed for court-martial jurisdiction over civilians accompanying forces outside the United States.[50] This slightly different factual scenario forced the Court to address the fact that civilians accompanying military forces had historically been subject to court-martial.[51] The Court reversed the conviction with a four-member plurality opinion that disapproved the use of courts-martial against civilian dependents generally, and a two-member concurring opinion that prohibited civilian jurisdiction over capital offenses.[52] The Court distinguished the

41. *Reid*, 354 U.S. at 36–37; *Toth*, 350 U.S. at 15–17.
42. *Reid*, 354 U.S. at 20–22; *Toth*, 350 U.S. at 13–15.
43. *Reid*, 354 U.S. at 39–40; *Toth*, 350 U.S. at 22–23.
44. *Toth*, 350 U.S. at 13.
45. *Id.* at 17.
46. *Id.* at 14–15 (quoting U.S. CONST. art. I, § 8).
47. *Id.* at 22.
48. *Id.* at 23 (quoting Anderson v. Dunn, 19 U.S. (6 Wheat.) 204, 231 (1821)).
49. Reid v. Covert, 354 U.S. 1, 3–4 (1957) (plurality opinion).
50. *Id.* at 3.
51. *Id.* at 20–29.
52. *Id.* at 41, 45 (Frankfurter, J., concurring) ("In making this adjudication, I must emphasize that it is only the trial of civilian dependents in a capital case in time of peace that is in question."), 65 (Harlan, J., concurring) ("I concur in the result, on the narrow ground that where the offense is capital, Article 2(11) cannot constitutionally be applied to the trial of civilian dependents of members of the armed forces overseas in times of peace." (footnote omitted)).

exercise of jurisdiction in earlier cases by focusing on the fact that hostilities were present:

> There 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*. 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."[53]

The Court then rejected the Government's argument that civilians residing in areas of potential hostilities due to the Cold War could be court-martialed: "The exigencies which have required military rule on the battlefront are not present in areas where no conflict exists."[54]

Three years after *Reid*, the Supreme Court put the final nails in the coffin of dependent and civilian employee jurisdiction under Article 2(11) for those civilians accompanying the armed forces overseas.[55] In three opinions decided on the same day, the Court invalidated the exercise of jurisdiction under Article 2(11) against dependents for noncapital cases,[56] and civilian employees for both capital[57] and noncapital cases.[58] *Kinsella v. United States ex rel. Singleton*, the primary opinion, noted and rejected the argument that the needs of discipline provided a rationale for civilian jurisdiction, stating that the same "necessities" that were "rejected" in the *Reid* opinion were also present in the case of noncapital prosecutions.[59]

Overall, *Toth* and *Reid* provide the contours from which we can analyze subsequent exercises of jurisdiction in today's era. The cases allow for civilian court-martial jurisdiction as a possibility, but the exercise of jurisdiction will be closely scrutinized under "the least possible power adequate to the end proposed" standard.[60] The Government can justify the exercise of jurisdiction due to disciplinary needs (as seen in *Toth*) or under an exercise of the Government's war powers during a time of hostilities (as seen in *Reid*).[61] Interestingly, while espousing a strict standard of review, the Court in *Reid* did distinguish a number of cases in the lower courts that would seem to provide

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53. *Id.* at 33 (plurality opinion) (footnote omitted).

54. *Id.* at 35.

55. *See* Kinsella v. United States *ex rel.* Singleton, 361 U.S. 234, 248–49 (1960).

56. *Id.*

57. Grisham v. Hagan, 361 U.S. 278, 280 (1960).

58. McElroy v. United States *ex rel.* Guagliardo, 361 U.S. 281, 282 (1960).

59. *Kinsella*, 361 U.S. at 243–44.

60. Reid v. Covert, 354 U.S. 1, 86 (1957) (Clark, J., dissenting); United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 23 (1955) (quoting Anderson v. Dunn, 19 U.S. (6 Wheat.) 204, 231 (1821)) (internal quotation marks omitted).

61. *See Reid*, 354 U.S. at 38–40 (plurality opinion); *Toth*, 350 U.S. at 22 (rejecting "considerations of discipline" as a reason for expanding court-martial jurisdiction because the needs of discipline were not furthered in Toth's case).

for expanded civilian jurisdiction (to which we shall return shortly).[62] From this background, we can turn our focus to the exercise of jurisdiction against Mr. Ali, a civilian accompanying the United States Army in Iraq.[63]

III. *UNITED STATES V. ALI* OVERVIEW

The case of *United States v. Ali* provided the first test of the amended Article 2(a)(10).[64] Mr. Ali was a civilian interpreter assigned to the 170th Military Police Company in Hit, Iraq.[65] He was assigned to a squad of military police soldiers and accompanied them on their missions.[66] He wore the same military uniform but was not issued a weapon.[67] More importantly, Mr. Ali was a dual Iraqi-Canadian citizen, which exempted him from jurisdiction in a United States district court under MEJA due to his host-nation citizenship.[68] Over the course of performing his duties, Mr. Ali had an altercation with a fellow Iraqi interpreter that ultimately resulted in Mr. Ali stabbing his colleague four times in the chest.[69] Mr. Ali was apprehended and ultimately convicted at court-martial for charges related to this offense.[70] He pleaded guilty and was ultimately sentenced to 115 days of confinement.[71]

The facts of the case presented a perfect test case for the Government. Under the terms of MEJA, Mr. Ali was exempt from prosecution in United States federal court because he was a host-nation citizen.[72] In addition, the Government was able to demonstrate a close nexus between his work and actual combat and showed a direct impact of Mr. Ali's offenses on the unit's combat mission.[73] As a result, Mr. Ali's situation presented a very strong case for meeting the terms of Article 2(a)(10) and dispensing with the constitutional guarantees for a criminal trial due to the needs of discipline, which the *Toth* Court had recognized was a valid exception.[74]

The CAAF addressed three issues on appeal: (1) whether Article 2(a)(10) applied to Mr. Ali and provided a legal basis for the exercise of jurisdiction; (2) whether Congress had the authority under Article I, § 8 of the Constitution

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62. *Reid*, 354 U.S. at 33 n.59; *see infra* text accompanying notes 108–15.
63. United States v. Ali, 71 M.J. 256, 259 (C.A.A.F. 2012), *cert. denied*, 133 S. Ct. 2338 (2013).
64. *See id.*
65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.*
69. *Id.* at 259–60.
70. *Id.* at 260.
71. *Id.* at 258. While ultimately not convicted for the assault for reasons not disclosed in the record, Mr. Ali was convicted "of making a false official statement, wrongful appropriation, and wrongfully endeavoring to impede an investigation, in violation of Articles 107, 121, and 134 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 907, 921, [and] 934 (2006)," respectively. *Id.*
72. *Id.* at 270.
73. *See id.* at 263–64.
74. *See id.* at 270; *see also* United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 13–20 (1955).

to provide for the extension of jurisdiction; and (3) whether the exercise of court-martial jurisdiction violated Mr. Ali's Fifth and Sixth Amendment rights.[75] The latter two issues track the Supreme Court decision in *Toth*, in which the Court held that a statute providing for the exercise of jurisdiction over an airman who had been discharged was unconstitutional on these two grounds.[76]

Judge Erdmann, writing for the court, dispensed with the first issue after conducting a factual analysis of whether Mr. Ali met the terms of Article 2(a)(10) and concluded that Mr. Ali was, in fact, subject to the UCMJ.[77] In addressing Article 2(a)(10), the court determined that Mr. Ali was in the field as required by Article 2(a)(10) because he was in an area of actual fighting, which is the interpretation the CAAF adopted.[78] On the remaining two issues, however, opinions began to diverge. Judge Erdmann concluded that Ali was not entitled to Fifth and Sixth Amendment protections due to the fact that he was not a United States citizen and was not being tried within the United States: "Ultimately, we are unwilling to extend constitutional protections granted by the Fifth and Sixth Amendments to a noncitizen who is neither present within the sovereign territory of the United States nor has established any substantial connections to the United States."[79] Next, Judge Erdmann dispensed with the issue of the authority of Congress by simply concluding that the exercise of jurisdiction was within Congress's "war powers."[80]

Chief Judge Baker, concurring in the result, took sharp issue with Judge Erdmann's approach, which precluded constitutional rights based on Ali's citizenship and location of the trial.[81] Instead, he began with an extensive analysis of Congress's authority to act, ultimately concluding that Congress had authority under "the combination of the Rules and Regulations [of the Armed Forces] Clause, [Congress's] war powers, and the Necessary and Proper Clause."[82] From this baseline, Chief Judge Baker concluded that Ali was "sufficiently integrated" into the armed forces so as to qualify for the protections under the UCMJ in lieu of the constitutional protections.[83]

Judge Effron took an even narrower approach with respect to the issue of congressional authority.[84] Instead of focusing on Congress's war powers, Judge

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75. *Ali*, 71 M.J. at 259 n.3.

76. *See Toth*, 350 U.S. at 13–20.

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

78. *Id.*

79. *Id.* at 268.

80. *See id.* at 269–70 (quoting Reid v. Covert, 354 U.S. 1, 33 (1957) (plurality opinion)) (internal quotation marks omitted).

81. *See id.* at 271–75 (Baker, C.J., concurring in part and in the result).

82. *Id.* at 276.

83. *Id.* at 277 ("It seems to me that if a civilian is sufficiently integrated into the United States Armed Forces to qualify for court-martial jurisdiction under Article 2(a)(10), UCMJ, then that same person is sufficiently integrated so as to be entitled to those Fifth and Sixth Amendment rights embedded in the UCMJ.").

84. *See id.* at 280 (Effron, J., concurring in part and in the result).

Effron focused on the fact that Mr. Ali was exempt from civilian prosecution under MEJA because he was an Iraqi-Canadian citizen and, thus, a host-country national exempt under the terms of MEJA.[85] Judge Effron concluded that MEJA's exclusion of host-country nationals was appropriate, noting the exclusion "reflects congressional sensitivity to the interests of a host country in prosecuting its own citizens, an appropriate consideration under the military and foreign affairs powers of Congress."[86] Because of this "unique statutory niche" created out of deference to the nation hosting American forces, extension of jurisdiction to Mr. Ali constituted "the least possible power adequate to the end proposed."[87] Judge Effron specifically limited approval of jurisdiction to situations in which prosecution was not available under MEJA.[88] He concluded that the issue of jurisdiction over civilians other than host-country nationals—who are subject to prosecution under MEJA—continues to be an open question.[89]

IV. MAINTAINING DISCIPLINE DURING HOSTILITIES: THE CORE OF THE *UNITED STATES EX REL. TOTH V. QUARLES* HOLDING

It is tempting to adopt a simple meta-narrative upon reviewing *Toth* and its progeny—courts-martial are inherently flawed due to their lack of constitutional protections and their use should be restricted whenever possible.[90] While it is understandable why one would adopt this meta-narrative, it masks the countervailing policy considerations and overlooks the reasons why courts-martial were utilized in the first place—to maintain discipline and enforce the law in the armed forces during periods of hostilities.[91] If courts-martial are restricted unduly, then one risks creating zones of indiscipline—indeed, lawlessness—when acts such as the alleged human trafficking in Bosnia go unprosecuted.[92]

A re-examination of the history of these cases reveals, on the other hand, that a more nuanced and balanced approach was envisioned. This is seen in a series of cases upholding civilian court-martial jurisdiction during hostilities that were distinguished in *Reid* and by the Supreme Court in *Duncan v. Kahanamoku*, in which the Court said that the practice of court-martialing civilians during hostilities was well-established.[93] A closer examination of these cases, in conjunction with the historical record, indicates that while the

85. *Id.*
86. *Id.*
87. *Id.* (majority opinion) (internal quotation marks omitted)
88. *Id.*
89. *Id.* at 282.
90. *See infra* Part IV.E.
91. *See infra* Part IV.E.
92. *See infra* Part IV.E.
93. Reid v. Covert, 354 U.S. 1, 13 (1957) (plurality opinion); Duncan v. Kahanamoku, 327 U.S. 304, 313–14 (1946).

Court was skeptical of courts-martial, the Court continued to see a place for them.[94] I suggest that the proper constitutional use for courts-martial of civilians was, and continues to be, necessary in order to maintain discipline in the armed forces during hostilities.

Under this approach, a requirement that the offense take place in an area of actual fighting, as was held by the *Ali* court, ultimately undermines the ability to maintain discipline.[95] While the area of actual fighting standard was suggested in dicta by the *Reid* plurality, the standard is contradicted by the historical record and previous case law distinguished by *Reid*.[96] In addition, as will be discussed in this section, the area of actual fighting standard creates the potential for "zones of lawlessness," where the commander is practically unable to maintain order and discipline.[97] Instead, the better standard is the historical one—court-martial jurisdiction is authorized during hostilities, defined as "military operations with a view towards an enemy."[98]

A. The First Ingredient: Requirement of Hostilities

The hostilities aspect of the exercise of court-martial jurisdiction is not readily apparent in *Toth* and its progeny, but it exists nonetheless.[99] Of the five Supreme Court cases (*Toth*, *Reid*, *Singleton*, *Grisham*, and *Guagliardo*), only one (*Toth*) involved events that took place during a time of hostilities.[100] The *Reid* Court specifically commented on the fact that hostilities were required, but there was a lack of hostilities in Great Britain and Japan:

> In the face of an actively hostile enemy, military commanders necessarily have broad power over persons on the battlefront. 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. But neither Japan nor Great Britain could properly be said to be an area where active hostilities were under way at the time Mrs. Smith and Mrs. Covert committed their offenses or at the time they were tried.[101]

In a footnote, the Court further stated:

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94. *See Reid*, 354 U.S. at 37–39; *Duncan*, 327 U.S. at 315–24.

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

96. *See Reid*, 354 U.S. at 35.

97. *See infra* Part IV.E.

98. *See infra* Part IV.A.

99. *See, e.g.*, United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 13 (1955).

100. *See id.* at 24–25 (Reed, J., dissenting). Toth was recalled to active duty on April 8, 1953, to face charges of murder alleged to have occurred on September 27, 1952. *Id.* These dates are within the pendency of the Korean conflict. *Milestones: 1945–952: The Korean War, 1950–1953*, U.S. DEPARTMENT OF ST., OFF. OF HISTORIAN, http://history.state.gov/milestones/1945-1952/korean-war-2 (last visited Mar. 24, 2014).

101. *Reid*, 354 U.S. at 33–34 (footnotes omitted).

> Article 2(10) of the UCMJ . . . provides that in *time of war* persons serving with or accompanying the armed forces in the field are subject to court-martial and military law. 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."[102]

Interestingly, each of these Supreme Court cases was decided under Article 2(11) (providing for jurisdiction over civilians accompanying the armed forces overseas), and the Supreme Court has never passed on the constitutionality of Article 2(10) (providing for jurisdiction over civilians accompanying forces in the field during a "time of war"), the predecessor Article to the one utilized in *Ali*.[103]

B. The Second Ingredient: The Discipline Nexus

In addition to actual hostilities, the *Toth* case makes clear that a disciplinary nexus is necessary to justify court-martial jurisdiction.[104] After noting the constitutional deficiencies of courts-martial compared to trial in an Article III forum, the Court specifically recognized that discipline provided a legitimate reason for jurisdiction over civilians: "Free countries of the world have tried to restrict military tribunals to the narrowest jurisdiction deemed absolutely essential to maintaining discipline among troops in active service."[105] But in Mr. Toth's case, the Court concluded:

> Army discipline will not be improved by court-martialing rather than trying by jury some civilian ex-soldier who has been wholly separated from the service for months, years or perhaps decades. Consequently considerations of discipline provide no excuse for new expansion of court-martial jurisdiction at the expense of the normal and constitutionally preferable system of trial by jury.[106]

Immediately after this analysis, the Court established the familiar rubric for court-martial jurisdiction: "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*,'"—the end proposed being, of course, the need for discipline.[107]

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102. *Id.* at 34 n.61 (citations omitted).

103. United States v. Ali, 71 M.J. 256, 262 (C.A.A.F. 2012), *cert. denied*, 133 S. Ct. 2338 (2013); *see* McElroy v. United State *ex rel.* Guagliardo, 361 U.S. 281, 282–83 (1960); Grisham v. Hagan, 361 U.S. 278, 278 (1960); Kinsella v. United States *ex rel.* Singleton, 361 U.S. 234, 234 (1960); *Reid*, 354 U.S. at 3; *Toth*, 350 U.S. at 14–15.

104. *See Toth*, 350 U.S. at 22–23.

105. *Id.* at 22.

106. *Id.* at 22–23.

107. *Id.* at 23 (quoting Anderson v. Dunn, 19 U.S. (6 Wheat.) 204, 230–31 (1821)).

Despite this restrictive language, there were a number of lower court cases approving the use of court-martial jurisdiction over civilians.[108] These cases were distinguished by the *Reid* plurality as justified exercises of jurisdiction over "civilians performing services for the armed forces 'in the field' during *time of war*."[109] The plurality noted that the exercise of jurisdiction in these cases was justified by the Government's "war powers."[110] A close examination of these cases suggests that the disciplinary and hostilities nexus can be very slight, as many of the cases involve conduct taking place nowhere near the hostilities.[111] In particular, four cases stand out for their lack of a nexus to actual fighting. In *Perlstein v. United States*, the Third Circuit upheld the conviction for larceny of an air conditioner technician who worked at a ship and port salvage operation in an African port during World War II because he was determined to be in the field.[112] Similarly, in *Hines v. Mikell*, the Fourth Circuit found that a stenographer assigned to Camp Jackson, South Carolina, during World War I was "in the field" because Camp Jackson was "a temporary cantonment, where troops [were] assembled from the various sections for the purpose of training preparatory for service in the actual theater of war."[113] Also decided during World War I, *Ex parte Jochen* extended the term "in the field" to include operations on the United States–Mexico border in Texas during World War I due to German-incited tensions with Mexico.[114] Here, the court defined "in the field" broadly, including as "service in mobilization, concentration, instruction or maneuver camps as well as service in campaign, simulated campaign or on the march."[115] Finally, in *Ex parte Gerlach*, the court upheld a contractor's conviction for refusing an order to stand watch while crossing the Atlantic, defining "in the field" to mean "any place, whether on land or water, apart from permanent cantonments or fortifications, where military operations are being conducted."[116]

Further, *Hines*, *Jochen*, and *Gerlach* were distinguished by the Supreme Court in 1946 in *Duncan*.[117] In *Duncan*, the Supreme Court invalidated the military tribunal of civilians in Hawaii under martial law.[118] The Court,

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108. *See, e.g.*, Perlstein v. United States, 151 F.2d 167, 168–69 (3d Cir. 1945); Hines v. Mikell, 259 F. 28, 35 (4th Cir. 1919); *Ex parte* Jochen, 257 F. 200, 204–05 (S.D. Tex. 1919).

109. Reid v. Covert, 354 U.S. 1, 33 (1957) (plurality opinion).

110. *Id.*

111. *See, e.g.*, *Perlstein*, 151 F.2d at 170 (holding that a civilian contractor was subject to military discipline, despite being away from the hostilities when he committed the offenses).

112. *Id.* at 169–70.

113. *Hines*, 259 F. at 35.

114. *Ex parte* Jochen, 257 F. 200, 207–09 (S.D. Tex. 1919).

115. *Id.* at 209 (internal quotation marks omitted). After issuing this expansive definition, the court held, in the alternative, that if Articles of War "have application only where the armies are in or expecting actual conflict, that the conditions on the border during the period of Jochen's service were such as that, in the more limited sense as well, the armies with which he was serving were 'in the field.'" *Id.*

116. *Ex parte* Gerlach, 247 F. 616, 617 (S.D.N.Y. 1917).

117. Duncan v. Kahanamoku, 327 U.S. 304, 307 (1946).

118. *Id.* at 314.

however, distinguished the previous exercises of jurisdiction over civilians, stating: "Our question does not involve the *well-established* power of the military to exercise jurisdiction over members of the armed forces [or] those directly connected with such forces . . . ."[119] The only time that a court invalidated court-martial jurisdiction during hostilities was the Supreme Court's decision in *Toth*, which is explainable by the complete lack of any nexus to discipline because Mr. Toth had been discharged.[120] The fact that the Supreme Court cited and distinguished the cases cited in the previous paragraph *twice* within a dozen years seems to indicate that the Court intended the broad jurisdictional framework during hostilities to be unaffected by the *Toth* line of cases—so long as there was some nexus to discipline.[121]

C. What Is the Genesis of the Area of Actual Fighting Standard?

The cases cited in the previous section affirmed broad exercises of jurisdiction, which, while exercised during hostilities, were not necessarily close to any actual fighting. Their appearance in footnote 59 of *Reid* is particularly difficult to reconcile with the standard established in the plurality opinion—that the phrase "in the field" means in an area of actual fighting.[122] This section will examine this area of actual fighting formulation, which served as the basis for the standard the CAAF adopted in *Ali*. Upon closer review, the standard is neither justified by the historical authorities nor by the case law distinguished in *Reid*, as discussed above.[123]

After citing the cases discussed earlier supporting broad court-martial jurisdiction, the *Reid* plurality turned to the reason why such cases could be justified—because they were "'in the field' during time of war":[124] "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."[125] The plurality further stated in footnote 61: "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."[126] Interestingly, not one of the cited authorities in footnote 61 actually utilizes the area of actual fighting formulation.[127] The cited authorities include treatises, opinions of the Judge Advocate General, Attorney General Opinions, and one

119. *Id.* at 313 & n.7 (emphasis added) (footnotes omitted).
120. *See* United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 13 (1955).
121. *See supra* notes 107–18 and accompanying text.
122. Reid v. Covert, 354 U.S. 1, 34 & n.61 (1957) (plurality opinion).
123. *See id.*
124. *Id.* at 33 (emphasis omitted).
125. *Id.* at 33–34 (footnotes omitted).
126. *Id.* at 34 & n.61.
127. *Id.*

federal district court case.[128] The majority of these support a broader formulation: military operations with a view to an enemy.[129] The next several subsections will parse out the specific authorities cited to support the area of actual fighting standard.

1. Attorney General Opinions

The 1872 Attorney General Opinion of George Williams provides an excellent window into the exercise of jurisdiction during limited wars.[130] This opinion, in addition to serving as the genesis of the military operations with a view to an enemy standard, is grounded in the context of the Indian Wars, which further helps outline the contours of the standard.[131] In the opinion, the Attorney General described the factual situation in detail:

> Serving with troops in the Indian country, at posts and camps in Kansas, Colorado, New Mexico, and the Indian Territory, where, as at Camp Supply and Fort Sill, defensive earthworks are deemed necessary and have been built by the troops; where within twelve months several soldiers have been killed by hostile Indians; where lookouts are kept posted at all times, and other precautions are constantly deemed necessary; at Fort Larned, where within the past two months soldiers near the fort were killed or wounded by hostile Indians; and at Fort Hays, where some seven picket-guard stations are kept upon the neighboring line of the Kansas Pacific Railway to protect it from Indians, and where Indians are believed at all times to be in a semi-hostile attitude, as they are all over the interior country occupied by troops, between the Mississippi Valley and the Pacific Ocean.[132]

According to Attorney General Williams, civilians accompanying the force under these circumstances were in the field:

> To determine when an army is "in the field," is to decide the question raised. These words imply military operations with a view to an enemy. Hostilities with Indians seem to be as much within their meaning as any other kind of warfare. To enable the officers of an army to preserve good order and discipline is the object of this article, and these may be as necessary in the face of hostile savages as in front of any other enemy. When an army is engaged in offensive or defensive operations, I think it is safe to say that it is an army "in the field."
>
> To decide exactly where the boundary-line runs between civil and military jurisdiction, as to the civilians attached to an army, is difficult; but it is quite evident that they are within military jurisdiction, as provided for in

128. *See id.*
129. Military Jurisdiction, 14 Op. Att'y Gen. 22 (1872).
130. *See id.* at 23.
131. *See id.*
132. *Id.*

> said article, when their treachery, defection, or insubordination might endanger or embarrass the army to which they belong in its operations against what is known in military phrase as "an enemy."[133]

This opinion is significant for recognizing that periods of limited hostilities would suffice to trigger civilian court-martial jurisdiction.[134] In addition, this formulation by Attorney General Williams suggests a much broader use of civilian jurisdiction than that suggested by *Reid*.[135]

2. Treatises

Footnote 61 cites Winthrop's *Military Law and Precedents*,[136] Davis's *A Treatise on the Military Law of the United States*,[137] and Dudley's *Military Law and the Procedure of Courts-Martial*.[138] Winthrop, not surprisingly, spent the most time discussing civilian jurisdiction.[139] According to Winthrop, the terms used in Article 63 are "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."[140] In addition, hostilities with Indians qualified, but "it 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."[141] He then cited one case of a quartermaster's clerk arrested for fraud while serving near "a band of Indians a portion of whom had previously been hostile but with whom no hostilities whatever were at the time pending."[142] Jurisdiction was held to be inappropriate in this situation.[143]

Davis and Dudley offer little additional guidance.[144] Davis employs a formulation similar to Winthrop: "The employment must be in connection with the army in the field and on the theatre of hostilities."[145] Dudley simply notes that jurisdiction is authorized when "in time of war, when with the armies in the field."[146] Davis notes that a civilian who had acted as a guide during a hostile movement was properly held amenable to jurisdiction.[147] Like Winthrop, Davis emphasized that the Article is not applicable during times of peace and over

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133. *Id.* at 23–24.
134. *See id.* at 22–24.
135. *See id.*
136. WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 100–02 (2d ed. 1920).
137. GEORGE B. DAVIS, A TREATISE ON THE MILITARY LAW OF THE UNITED STATES 478 (3d ed. 1915).
138. EDGAR S. DUDLEY, MILITARY LAW AND THE PROCEDURE OF COURTS-MARTIAL 413 (2d ed. 1908).
139. *See* WINTHROP, *supra* note 136, at 81–109.
140. *Id.* at 101.
141. *Id.*
142. *Id.*
143. *Id.*
144. *See infra* notes 145–48.
145. DAVIS, *supra* note 137, at 478.
146. DUDLEY, *supra* note 138, at 413.
147. DAVIS, *supra* note 137, at 479.

civilians not employed "on the theatre of such war."[148] Interestingly, Davis notes the caution that should be extended during limited wars: "In view of the limited theatre of Indian wars this exceptional jurisdiction is to be extended to civilians, on account of offenses committed during such wars, with even greater caution than in a general war."[149]

In sum, the academic writers seem to coalesce around requiring jurisdiction during hostilities, but only when located within the theater of operations.[150]

3. Opinions of the Judge Advocate General

Footnote 61 also cites nine opinions of the Judge Advocate General as reported in annual digests.[151] None of these provide for the area of actual fighting cited in footnote 61, and the relevant opinions provide for the familiar "in time of war and in the theater of war" formulation.[152]

4. Walker v. Chief Quarantine Officer

Finally, footnote 61 cross-references the case of *Walker v. Chief Quarantine Officer*.[153] This case concerned an American citizen who was denied permission to leave the Panama Canal Zone during World War II.[154] In *Walker*, the court utilized the military operations with a view to an enemy standard from the 1872 Attorney General Opinion and distinguished *Falls*, *Gerlach*, *Jochen*, and *Hines*.[155]

D. Does the Area of Actual Fighting Provide a Workable Standard?

In short, the *Reid* plurality's area of actual fighting formulation appears to be a gloss of the authorities cited in footnote 61—and not a very accurate one at that.[156] It is possible that the plurality was attempting to provide an interpretive

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148. *Id.*

149. *Id.*

150. *See* discussion *supra* notes 145–47.

151. *See* Reid v. Covert, 354 U.S. 1, 34 n.61 (1957) (plurality opinion).

152. Dig. Ops. J.A.G. 151 (1912); *see also* Dig. Ops. J.A.G. 563 (1901) (stating that a post trader "might perhaps become liable to trial by court martial if employed on the theatre of an Indian war"); Dig. Ops. J.A.G. 56 (1901) (noting that military discipline could be applied to "civilians serving in a quasi military capacity in connection with troops, in time of war and on its theatre"); Dig. Ops. J.A.G. 599–600 (1895) (noting that military tribunals could exercise jurisdiction over post traders only where "'in the field' or on the theatre of war" and not during time of peace); Dig. Ops. J.A.G. 48 (1880) (stating that military jurisdiction could be exercised "in time of war and on its theatre" when a civilian's "employment [was] in connection with the army in the field and on the theatre of hostilities").

153. *See Reid*, 354 U.S. at 34 n.61; Walker v. Chief Quarantine Officer, 69 F. Supp. 980, 987 (D.C.Z. 1943).

154. *Walker*, 69 F. Supp. at 981.

155. *See id.* at 987 (quoting Military Jurisdiction, 14 Op. Att'y Gen. 22, 23 (1872)).

156. *See Reid*, 354 U.S. at 33, 34 & n.61.

gloss to the language courts traditionally used: "in time of war and in the theater of war."[157] If that is the case, the Court, in effect, substituted the word "area" for the word "theater."[158] Such a substitution is not helpful and adds to confusion over the standard's applicability—which will likely become a greater issue as courts try more civilian contractor cases. Specifically, how close does the fighting actually have to be before a court can say that a civilian is in an "area" of actual fighting? Mr. Ali's case seems pretty straightforward because he accompanied his squad on patrol and the patrol actually saw combat.[159] But how far does "area" extend? Does it extend to a civilian who works strictly on a base that sees occasional mortar or rocket shelling? Does it extend to a base that is on heightened alert due to potential attacks but which has not received an attack in three months? Six months? Twelve months? What about a logistical and staging base within the theater of operations that does not see fighting but from which combat missions regularly launch? What about peacekeeping missions in which military personnel are on a combat footing due to the potential for imminent violence? These questions demonstrate that "area" is a highly malleable word that does not provide sufficient clarity as to how close the actual fighting has to be.

For example, consider a slightly altered scenario for Mr. Ali's crimes—the facts of which were presented at the outset of this Article.[160] Assume that Mr. Ali was assigned to Joint Base Balad (formerly known as Logistics Support Area Anaconda), the primary logistical hub in Iraq.[161] While primarily a logistical hub, it was also a significant special operations forces headquarters, its airfield accommodating many combat flights.[162] The base had as many as 25,000 troops at its zenith, and many never left the base during their time in Iraq.[163] While the base had received heavy mortaring in the past, by 2008, such attacks were infrequent and ineffective.[164] Let's assume that Mr. Ali works solely on Joint Base Balad, serving as an interpreter during interactions with local Iraqis—his work considered critical to maintaining good relations with local Iraqis to avoid further attacks. Mr. Ali never leaves Joint Base Balad, conducting his translation work only on the base. In such a case, can Mr. Ali be said to be in an area of actual fighting? This would be a hard case to make, especially if the base had received no mortar attacks in the several months prior to his offenses. But how important is it that Mr. Ali be *in* an area of actual fighting? He would meet the framework of being involved in "military

157. Dig. Ops. J.A.G. 151 (1912); *supra* Part IV.C.3.

158. *See Reid*, 354 U.S. at 33, 34 & n.61; *supra* Part IV.C.3.

159. United States v. Ali, 71 M.J. 256, 259–60 (C.A.A.F. 2012), *cert. denied*, 133 S. Ct. 2338 (2013).

160. *See id.*; *supra* notes 1–3 and accompanying text.

161. *Joint Base Balad*, GLOBAL SECURITY.ORG, http://www.globalsecurity.org/military/world/iraq/balad-jbb.htm (last visited Apr. 9, 2014).

162. *Id.*

163. *Id.*

164. Richard Tomkins, *Feature: Mortar Attacks Fade in Iraq*, SPACE WAR: YOUR WORLD AT WAR (Oct. 28, 2008), http://www.spacewar.com/reports/Feature_Mortar_attacks_fade_in_Iraq_999.html.

operations with a view to an enemy."[165] His offense of stabbing another interpreter would certainly impact the military's ability to complete its mission and is likely to affect discipline and morale among the servicemembers there. The UCMJ should apply to Mr. Ali no differently at Balad than if he were assigned to a military police squad seeing regular combat.

Even further undermining the *Ali* plurality's area of actual fighting formulation are the cases cited in *Reid* that were discussed earlier.[166] Many of these cited cases would not meet the area of actual fighting formulation under even the broadest interpretation: the court-martial conviction of a technician working in a ship salvage operation in an African port during World War II, a civilian working on the Texas–Mexico border during World War I, and a stenographer in a cantonment camp in South Carolina during World War I.[167] Indeed, it is questionable that some of these cases would be held constitutional should they be heard today, but the fact of the matter stands that the Supreme Court twice distinguished these cases during the course of establishing strict limits on the exercise of military jurisdiction over civilians, suggesting that such jurisdiction during hostilities is broader than generally thought.[168]

E. Maintaining Discipline During Hostilities and Area of Actual Fighting: Modern Scenarios

Opponents of civilian jurisdiction present a ready-made alternative to enforcing order and discipline—MEJA prosecutions.[169] Unfortunately, MEJA is an imperfect vehicle, especially because it requires reluctant United States Attorneys to agree to accept cases referred by the overseas commander—cases likely to be relatively minor, yet highly complex due to the geographic issues involved.[170] While many of these difficulties with MEJA are resource-based and might be remedied with more resources devoted to MEJA prosecutions, MEJA remains an imperfect solution.[171] It is not hard to imagine a significant variety of situations in which MEJA prosecution either is not possible or will not sufficiently address the command's need to maintain order and discipline in a combat zone.[172] For example, in his concurring opinion, Judge Effron recognized that the host-nation has an interest in the prosecution of its nationals, thus justifying an exception to MEJA and the resulting exercise of

165. *See* United States v. Burney, 21 C.M.R. 98, 110 (C.M.A. 1956).

166. *See supra* notes 108–16 and accompanying text.

167. *See supra* notes 111–17 and accompanying text.

168. *See* Reid v. Covert, 354 U.S. 1, 42–43 (1957) (plurality opinion); United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 14–16 (1955).

169. *See* United States v. Ali, 71 M.J. 256, 270 (C.A.A.F. 2012), *cert. denied*, 133 S. Ct. 2338 (2013) (addressing defense arguments that the reasonable availability of an Article III forum negated the need for court-martial by providing for a forum with the requisite constitutional protections).

170. Corn, *supra* note 9, at 514.

171. *See id.* at 513–14.

172. *See id.*

court-martial jurisdiction over Mr. Ali.[173] As a result, Judge Effron's analysis depended not on whether Mr. Ali's offenses took place in an area of actual fighting, but instead, on other valid considerations that might support the exercise of jurisdiction in a zone of hostilities.[174] Judge Effron attempted to limit the exercise of jurisdiction to the "unique statutory niche" in which MEJA does not apply; similar "niches" exist that also would potentially fall outside the bounds of MEJA, yet require prosecution to maintain discipline.[175] Other examples based on military war experiences in recent years include several different categories of cases that should be considered.[176]

1. Cases Involving Violations of Military Regulations and Orders

As part of their conditions of employment, civilians are subject to military regulations, and in particular, General Order Number One (GO1).[177] This order outlines the baseline requirements for conduct in theater not only to maintain discipline, but also to accomplish the mission and provide for the safety and well-being of all personnel serving in the theater of operations.[178] This order prohibits activities such as sexual contact with local nationals (which often carries significant consequences—particularly in Muslim countries), prohibition of alcohol, and prohibition of black-marketing.[179] Civilian contractors are also generally subject to rules regarding force protection to ensure that the military is able to secure civilian contractors against enemy threats.[180]

Under the UCMJ, servicemembers face UCMJ punishment for violations of these orders under a number of punitive articles—violation of a lawful order is punishable at court-martial, and understandably so.[181] In contrast, civilians accompanying the force face no such criminal liability—MEJA only covers felony offenses under the United States Code and an extension of MEJA jurisdiction to civilian violations of GO1 is not possible.[182] As a result, civilians caught in violation of GO1 are generally fired, sent home, and barred

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173. *Ali*, 71 M.J. at 280 (Effron, J., concurring in part and in the result).

174. *Id.* at 281–82.

175. *Id.* at 280.

176. *See infra* Part IV.E.1–4.

177. Memorandum from the Dep't of Defense to All Combined/Joint Force (CJTF) – 82 Personnel (June 8, 2007), *available at* http://timemilitary.files.wordpress.com/2012/03/cjtf822020go2023120820june202007.pdf (providing an example of a GO1).

178. *Id.*

179. *See id.*

180. *See id.*

181. 10 U.S.C. § 892 (2012).

182. *See* 18 U.S.C. § 3261(a) (2012) (providing for MEJA jurisdiction for felony conduct that would have been criminal had it been engaged in within the jurisdiction of the United States). GO1 violations are prosecuted as violations of the UCMJ; if civilians accompanying the force do not meet the terms of the Article, then they are not subject to the UCMJ and violations of GO1 are not prosecutable under MEJA. *See* 10 U.S.C. § 892.

from returning to the theater of operations.[183] While this outcome is comparable to the punishment received by soldiers for pedestrian GO1 violations (for example, a typical alcohol violation by a soldier is likely to result in nonjudicial punishment involving loss of rank, loss of pay, and extra duties), it is not difficult to imagine GO1 violations warranting more serious punishment.[184] For example, consider a hypothetical in which a civilian contractor runs an alcohol smuggling ring that leads to widespread alcohol use among soldiers or a civilian whose sexual relations with an Afghani female result in her honor killing. Even if such cases were prosecutable under MEJA, would a district court judge or civilian jury be able to appreciate the importance of this case to the command and the effect on discipline and mission accomplishment? Will an Assistant United States Attorney be willing to take such a seemingly trivial case? Will a delayed adjudication back in the United States send the necessary message to the soldiers and civilians working in the theater of operations? Without prompt and effective adjudication in theater, will the command be able to effectively maintain order? I suggest that MEJA is an imperfect tool to maintain discipline in such situations.

2. Situations in Which Prosecution in the United States Is Difficult or Impossible

Supposing that civilian misconduct is prosecutable as a felony under the United States Code, logistical considerations may make it difficult, if not impossible, to try a case in the United States. Prosecution under MEJA invariably entails witnesses traveling to a courtroom to testify in person in order to satisfy the accused's Confrontation Clause rights.[185] Several hurdles exist. First, non-United States nationals cannot be compelled to travel to the United States to testify and may, in fact, be reluctant to do so.[186] For example, the stabbing victim in *Ali* was a non-United States national, although the record does not indicate whether he was willing to travel to the Unites States to testify.[187] Similarly, if a large number of personnel is required to travel to the United States to testify, there might be significant impacts to the operational mission due to the absence of these personnel as well as the need to divert transportation resources from mission requirements in order to meet litigation timelines and judicial orders.

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183. *See, e.g.*, *Hopes Betrayed*, *supra* note 1, at 64–66 (noting that individuals accused of sexual trafficking in Bosnia were fired and returned to the United States).

184. *See generally* Gina Cavallaro, *Army Cracks Down as Drug, Alcohol Cases Rise*, ARMY TIMES (June 8, 2009, 5:31 AM), http://www.armytimes.com/article/20090608/NEWS/906080318/Army-cracks-down-drug-alcohol-cases-rise (noting a case-by-case approach to alcohol violations).

185. *See* U.S. CONST. amend. VI; Military Extraterritorial Jurisdiction Act of 2000, Pub. L. No. 106-523, 114 Stat. 2488 (codified as amended at 18 U.S.C. § 3261 (2012)).

186. *See* United States v. Filippi, 918 F.2d 244, 247 (1st Cir. 1990) ("The government has no power to compel the presence of a foreign national residing outside the United States." (citation omitted)).

187. United States v. Ali, 71 M.J. 256, 259 (C.A.A.F. 2012), *cert. denied*, 133 S. Ct. 2338 (2013).

Similar to this situation are criminal offenses which have an acute impact on morale, discipline, or mission-accomplishment within the theater. For example, consider the case of a civilian who lies in wait and rapes a soldier in the female latrines on a logistical base such as Joint Base Balad—such a case would cause an understandably grave concern for both commanders and soldiers. In such a case, a court-martial taking place where the crime was alleged to have been committed would better ensure prompt, timely, and effective justice. While a prosecution in the United States under MEJA is possible, the command's interest in protecting the morale and discipline of soldiers and civilians directly supporting combat missions in Iraq and Afghanistan provides sufficient justification for court-martial jurisdiction.[188]

3. Host-Nation Interests and Considerations May Require In-Theater Prosecution

A third consideration that may justify an in-theater court-martial is the position of the host-nation.[189] Frequently, the United States military operates in countries with a functioning government whose sovereignties have been recognized by the United States Government—as was the case during much of the American operation in Iraq and is currently the case in Afghanistan.[190] These sovereign governments frequently have an interest in crimes committed by American personnel on their soil, although the United States is often reluctant to concede jurisdiction over United States personnel.[191] The option of returning a civilian to the United States for trial overlooks the sovereign rights and interests of the host nation, particularly when the case involves host-nation victims. For example, allegations of civilian criminal misconduct arising out of the Abu Ghraib scandal were referred to the Eastern District of Virginia, but no prosecutions of civilians have taken place.[192] In that case, an in-country court-martial might have demonstrated that the United States takes Iraqi interests seriously and would have facilitated the mending of relations between the two nations as a result of this incident. In response to such situations, host nations have increasingly pressed for increased jurisdiction over United States personnel and for restrictions on American missions, and understandably so,

188. *See* Alan F. Williams, *The Case for Overseas Article III Courts: The Blackwater Effect and Criminal Accountability in the Age of Privatization*, 44 U. MICH. J.L. REFORM 45, 71–72 (2010).

189. *See generally* Kirit Radia, *Iraq Wants Changes to U.S. Exit Plan*, ABC NEWS (Oct. 21, 2008), http://abcnews.go.com/International/story?id=6078046& (stating United States and Iraqi negotiations "clashed over whose legal jurisdiction would prosecute U.S. soldiers accused of crimes in Iraq").

190. *See* David Zucchino, *U.S., Afghan Officials Discuss Troops' Post-2014 Legal Jurisdiction*, L.A. TIMES (Dec. 15, 2012), http://articles.latimes.com/2012/dec/15/world/la-fg-wn-us-afghan-talks-20121215.

191. *Id.*

192. Rebecca DeWinter-Schmitt, *Six Years on Abu Ghraib Victims Still Fighting for Justice*, HUFFINGTON POST (Apr. 30, 2010, 9:26 AM), http://www.huffingtonpost.com/amnesty-international/six-years-on-abu-ghraib-v_b_558339.html.

given their sovereign prerogative.[193] During negotiations over the extension of troops in Iraq, the issue of jurisdiction was ultimately the "deal-breaker."[194] It is very likely that a more effective enforcement scheme against civilian contractors, perhaps one that provided for in-country courts-martial, would have resulted in more friendly negotiations, both with Iraq and with other countries where the United States seeks to conduct operations in the future. It is likely that in future operations, similarly situated nations will adopt the Iraqi position and either deny permission to conduct operations in their sovereign jurisdiction or require that both United States military and contract personnel be subject to host-nation jurisdiction as a condition of their permission to conduct operations.[195] Either of these positions will limit the United States' options in future deployments.

4. Peacekeeping Operations and Operations in Support of Combat Operations

Armed forces are on a combat footing not only where the fighting is actually occurring, but also in other contexts as well. Possible scenarios in which the military might adopt a heightened state of combat readiness include (1) military logistics and staging operations in nations adjacent to the fighting, such as Kuwait or Pakistan, particularly if there is a significant threat of attack; (2) military operations taking place in peaceful sectors of nations where fighting is taking place, such as operations that took place in the Kurdish region of Iraq; and (3) transportation operations in the air or on the high seas in direct support of contingency operations.[196] In addition, the military might adopt a combat footing in a peacekeeping or peace enforcement mission such as Bosnia or Kosovo, where there is a threat of attack sufficient that the commander could decide to implement a heightened state of readiness.[197] In my deployment to Bosnia, where no combat was occurring, soldiers were nevertheless required to be on a combat footing: (1) they carried a weapon and ammunition at all times; (2) they wore a full combat uniform when leaving base, including body armor and helmet; (3) they could not leave base except for mission-related reasons and with enough vehicles and weaponry to defend against attack; (4) they lived on bases that were fortified and guarded against intrusion; and (5) they, along with civilians, were subject to a GO1 prohibiting alcohol.

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193. *See* Lara Jakes & Rebecca Santana, *Iraq Withdrawal: U.S. Abandoning Plans to Keep Troops in Country*, WORLD POST (Oct. 15, 2011, 9:23 PM), http://www.huffingtonpost.com/2011/10/15/iraq-withdrawal-us-troops_n_1012661.html.

194. *Id.*

195. *See* Zucchino, *supra* note 190.

196. *See* Thom Shanker, *Hagel Lifts Veil on Major Military Center in Qatar*, N.Y. TIMES (Dec. 11, 2013), www.nytimes.com/2013/12/12/world/middleeast/hagel-lifts-veil-on-major-military-center-in-qatar.html.

197. Steven Beardsley, *Active Duty US Troops to Do Kosovo Peacekeeping*, MILITARY.COM NEWS (Mar. 14, 2013), www.military.com/daily-news/2013/03/14/active-duty-us-troops-to-do-kosovo-peacekeeping.html.

While the peacekeeping scenario did not exist during the development of the historical practice of court-martial jurisdiction, the principles stated above can still apply in peacekeeping operations.[198] In situations in which troops are on a combat footing due to the potential for imminent attack, Congress and the military forces have strong justification to enforce discipline along the same terms that were discussed in the scenarios above.[199] These are military operations with a view to an enemy—the enemy being the parties responsible for the threat of attack.[200] The exercise of civilian contractor jurisdiction not only promotes good order, discipline, and mission accomplishment, but also garners host-nation and international support through the enforcement of discipline over all personnel—military and civilian.

V. HOW FAR CAN THE MILITARY GO? LIMITS TO MILITARY OPERATIONS WITH A VIEW TO AN ENEMY

If courts were to utilize the 1872 Attorney General Williams standard of military operations with a view to an enemy, there would be obvious concern about the limits to such a standard.[201] Would contractors working at Whiteman Air Force Base in Missouri, supporting B-2 bombing missions to Afghanistan, be subject to the UCMJ?[202] Would dependents in Germany, living on a base directly supporting operations in Afghanistan, be subject to court-martial jurisdiction? When one considers *Hines*—when the Army court-martialed a stenographer at Camp Jackson during World War I—it appears that the military could define "in the field" without limit.[203]

While even Attorney General Williams conceded in 1872 that determining the limits of jurisdiction was "difficult," particularly in the case of limited war, some hard boundaries can be set.[204] Williams stated: "When an army is engaged in offensive or defensive operations, I think it safe to say that it is an army 'in the field.'"[205] This sentence can be a good starting point—in effect, it requires one to consider the degree to which military forces have assumed a combat footing.[206] Civilians at Whiteman Air Force Base or Army bases in Germany are not on a combat footing; while they might be directly supporting a combat mission, they go home at night, do not carry a weapon, and generally

198. DAVIS, *supra* note 137, at 59–60.

199. *Id.* at 60.

200. ROLLIN A. IVES, A TREATISE ON MILITARY LAW AND THE JURISDICTION, CONSTITUTION, AND PROCEDURE OF MILITARY COURTS 60 (2d ed. 1881).

201. *Id.*

202. *See* Michael Kilian, *Stealth Bombers Go the Distance*, CHI. TRIB. (Oct. 26, 2001), http://articles.chicagotribune.com/2001-10-26/news/0110260239_1_b-2s-stealth-bombers-diego-garcia (describing the mission from Missouri to Afghanistan to conduct bombing runs).

203. Hines v. Mikell, 259 F. 28, 33 (4th Cir. 1919).

204. Military Jurisdiction, 14 Op. Att'y Gen. 22, 23 (1872).

205. *Id.*

206. *Id.*

carry on normal activities when in a non-duty status.[207] Further, recall Winthrop's interpretation of Article 63 as limiting jurisdiction to "the period and pendency of war and to acts committed on the theatre of the war."[208] Acts committed on an Army base in Germany or Air Force base in Missouri would not qualify as a theater of war, as they are not in the zone of hostilities or even immediately adjacent to a zone of hostilities.[209]

Further certainty is possible by comparing two of the cases cited in footnote 59 of *Reid* and discussed earlier in this Article—*Hines* and *Jochen*.[210] Under the limits stated above, Mr. Mikell, the stenographer at Camp Jackson, South Carolina, would be exempt from jurisdiction (despite the Fourth Circuit's decision to the contrary).[211] While the camp where Mr. Mikell worked served as a training base for soldiers preparing to ship off to war, there was no proximity to hostilities or even potential hostilities.[212] Interestingly, the *Hines* trial court employed a similar standard to the one advocated in this Article.[213] In that case, the trial court stated:

> [In the field] means in the actual field of operations against the enemy; not necessarily the immediate field of battle, but the field of operations, so to say; the field of war; the territory so closely connected with the absolute struggle with the enemy that it is a part of the field of contest.[214]

Adopting this standard, the trial court ruled that the Army did not have jurisdiction.[215] Only when the Fourth Circuit expanded the definition of in the field to include a "temporary cantonment, where troops are assembled from the various sections for the purpose of training preparatory for service in the actual theater of war" was the court able to approve of jurisdiction in that case.[216] Surprisingly, the *Reid* court still distinguished this case in footnote 59, despite this highly expansive definition.[217] Under the military operations with a view towards an enemy standard, however, as elaborated in the previous paragraph, Mr. Mikell would not be subject to jurisdiction under reasoning similar to that articulated by the trial court.[218]

On the other hand, Mr. Jochen, who was working with forces stationed on the Texas–Mexico border to avert conflict with Mexico during World War I, might be subject to jurisdiction, even though there were ultimately no hostilities

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207. *See generally supra* Part IV.E (describing combat footing procedures).
208. WINTHROP, *supra* note 136, at 101; *see supra* notes 139–41 and accompanying text.
209. *See* Military Jurisdiction, 14 Op. Att'y Gen. at 23; *supra* text accompanying notes 139–41.
210. *See supra* notes 113–14 and accompanying text.
211. *See* Hines v. Mikell, 259 F. 28, 29 (4th Cir. 1919).
212. *See id.* at 34.
213. *See id.* at 31 (quoting *Ex parte* Mikell, 253 F. 817, 821 (E.D. S.C. 1918)).
214. *Id.*
215. *Id.* at 29.
216. *Id.* at 35.
217. *See* Reid v. Covert, 354 U.S. 1, 33 n.59 (1957) (plurality opinion); *Hines*, 259 F. at 35.
218. *Hines*, 259 F. at 35.

with Mexico.[219] According to the *Jochen* court, "border conditions were so acute that mobilization of the militia . . . became necessary" as a result of German spies and propaganda.[220] There were military operations with a view to an enemy—Mexico—even though no actual fighting actually took place.[221] This case, however, is made more complicated by the fact that it takes place within the United States.[222] In such circumstances, the military would be hard pressed to show that the needs of discipline required a court-martial in lieu of a civilian prosecution in a nearby federal district court. In such circumstances, the *Toth* conclusion—that "[i]t is impossible to think that the discipline of the Army is going to be disrupted, . . . or its orderly processes disturbed, by giving [a civilian] the benefit of a civilian court trial"—would be appropriate to apply.[223] In Mr. Jochen's case, the military could not exercise court-martial jurisdiction unless it could show that discipline would be disrupted, notwithstanding the ongoing hostilities.

This discussion of these cases helps us to formulate the outer limits of military operations with a view to an enemy. When military forces assume a combat footing (for either offensive or defensive operations) during a period or pendency of war against an actual or potential enemy in the theater of war, civilians accompanying these forces are subject to court-martial jurisdiction. Further protecting against potential for abuse, courts should also apply the discipline backstop enunciated in *Toth*: when no possible disciplinary purpose is served by the exercise of court-martial jurisdiction, civilian court-martial jurisdiction violates the Constitution.[224]

VI. CONCLUSION

While the constitutional rights of civilians are an important consideration in establishing the contours of court-martial jurisdiction, courts must not overlook the needs of discipline and mission, either. Rather, courts should balance both considerations in a thoughtful and reasonable way. To date, the debate has overlooked significant case law from World Wars I and II and case law that was well known to the Supreme Court at the time and distinguished by the Court.[225] These cases suggest that the calculus is significantly altered when hostilities or imminent hostilities are entered into the equation. Failure to consider these cases creates a situation in which the resulting balance of rights against the needs of the command becomes skewed and gives rise to the potential for discipline and mission accomplishment to suffer. It also results in

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219. *Ex parte* Jochen, 257 F. 200, 209 (S.D. Tex. 1919).
220. *Id.* at 208.
221. *Id.* at 202.
222. *Id.*
223. United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 22 (1955).
224. *Id.* at 43–44 (Reed, J., dissenting).
225. *See supra* Part IV.

the potential for further zones of impunity where criminal acts go unpunished. The needs of justice would be better served by focusing on the heart of the need to exercise court-martial jurisdiction—to maintain discipline in the face of hostilities—instead of engaging in a series of restrictive interpretations of the UCMJ that limit the options of the commander in a way that is not necessarily related to the constitutional considerations involved.