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John F. O'Connor

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JOHN F. O'CONNOR*

ABSTRACT

In 2006, without recorded debate, Congress amended Article 2(a)(10) of the Uniform Code of Military Justice (UCMJ) in an attempt to create court-martial jurisdiction over certain contractors and other civilians serving with the military in the field. The military has court-martialed one civilian contractor pursuant to this amendment, and tried to court-martial three others, only to back down in the face of constitutional challenges brought in federal court. Congress's attempt to recreate court-martial jurisdiction over civilians—a practice that was dormant for nearly forty years—is likely unconstitutional. Existing Supreme Court precedent does not appear to sanction this newly created jurisdiction. Nor can Article 2(a)(10) be squared with historical practice, which limited the court-martial of civilians to conduct occurring in a theater of war when no civilian court forum was available. Because Congress has created a federal court forum to try offenses committed by civilians accompanying the military overseas, and the military has a practical means to return civilians to the United States for trial in federal court, the narrow circumstances that historically supported a limited number of civilian courts-martial no longer exist.

I. INTRODUCTION

Courts-martial have fewer procedural protections than criminal proceedings in federal district court. A court-martial accused has no Fifth Amendment grand jury right,[1] no Sixth Amendment jury right,[2] no right to

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* Partner, Steptoe & Johnson LLP. B.A., University of Rochester; M.S.Sc., Syracuse University; J.D., University of Maryland School of Law. The author would like to thank Michael Navarre of Steptoe & Johnson LLP for his helpful thoughts on some of the issues addressed in this Article. The views expressed in this Article, however, are solely those of the author, and do not reflect the views of Steptoe & Johnson LLP or its attorneys or clients.

1. U.S. CONST. amend. V (providing for grand jury right for infamous crimes, "except in cases arising in the land or naval forces"). Instead, felony-type offenses are reviewed by a single officer appointed by the commander with jurisdiction to refer the case to a court-martial, and the military officer's recommendations can be accepted or ignored by the military commander. *See* UNIF. CODE OF MILITARY JUSTICE [hereinafter, UCMJ], art. 32, 33 (amended 2006), 10 U.S.C. § 832, 833 (2006).

2. *See Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 123 (1866) (noting that Sixth Amendment jury right does not apply to courts-martial). Instead of this constitutional right, a court-martial accused has a statutory right to elect trial by "members," military personnel hand-picked by the commander convening the court-martial. *See* UCMJ, art. 25 (amended 2006), 10 U.S.C. § 825 (2006). *See generally* Guy P. Glazier, *He Called for His Pipe, and*

a jury of at least six members,[3] and no right to a unanimous guilty verdict.[4] Unlike a defendant in federal district court, who has an automatic right of appeal, a court-martial accused has a right to direct judicial review only if the approved sentence includes a punitive discharge from the service or confinement for one year or more.[5] Indeed, in *United States v. Denedo*,[6] Chief Justice Roberts, writing for himself and three other Justices, responded to complaints about the lesser procedural rights at courts-martial by quipping that "'You're in the Army now' is a sufficient answer" to such complaints.[7]

He Called For His Bowl, and He Called For His Members Three—Selection of Military Juries by the Sovereign: Impediment to Military Justice, 157 MIL. L. REV. 1 (1998) (describing selection of court-martial members and arguing that the process is unconstitutional).

3. *See* Ballew v. Georgia, 435 U.S. 223, 245 (1978) (adopting constitutional right to a jury of at least six members); *see also* UCMJ, art. 16(1)(A) (amended 2006), 10 U.S.C. § 816(1)(A) (2006) (requiring five members for general courts-martial); UCMJ, art. 16(2)(a) (amended 2006), 10 U.S.C. § 816(2)(a) (2006) (requiring three members for special courts-martial). A court-martial accused facing the death penalty has a statutory right to a panel of at least twelve members. UCMJ, art. 25(a) (amended 2006), 10 U.S.C. § 825(a) (2006).

4. *See* Richardson v. United States, 526 U.S. 813, 817 (1999) (noting that a federal court defendant can be convicted only on a unanimous jury verdict); FED. R. CRIM. P. 31(a); *see also* UCMJ, art. 52 (amended 2006), 10 U.S.C. § 852 (2006) (requiring a two-thirds vote to convict in non-capital courts-martial, or three-fourths to convict in order to permit confinement in excess of ten years).

5. *See* UCMJ, art. 66(b) (amended 2006), 10 U.S.C. § 866(b) (2006). Court-martial accuseds receiving no punitive discharge from the service and less than one year of confinement have no entitlement to direct appeal to a court. Instead, a mere summary record is prepared and that summary record is subject only to review by an officer in the Judge Advocate General's office. *See* UCMJ, art. 69 (amended 2006), 10 U.S.C. § 869 (2006). Indeed, as it relates to the right to appellate review, a civilian tried by court-martial has *less* likelihood of receiving direct judicial review than a military accused. For the military accused, most serious offenses receive a punitive discharge as part of the approved sentence, which entitles the accused to a direct appeal of the court-martial through the military appellate courts. Army statistics for fiscal year 2007 show that a punitive discharge was awarded in nearly 71% (546 out of 772 convictions) of all general courts-martial and almost 58% (358 out of 620 convictions) of all special courts-martial. *See* JUDGE ADVOCATE GEN. OF THE ARMY, REPORT OF THE JUDGE ADVOCATE GEN. OF THE ARMY OCT. 1, 2006 TO SEPT. 30, 2007 at app., *available at* http://www.armfor.uscourts.gov/annual/FY07AnnualReport.pdf. Because the jurisdictional maximum for special courts-martial is confinement for one year, all but a handful of special courts-martial that receive appellate review do so solely due to the accused's receipt of a punitive discharge. By contrast, a civilian cannot receive a punitive discharge from the service. Therefore, a civilian can have an appeal right from a court-martial only if he was confined at hard labor for one year or more. *See generally* UCMJ, art. 66(b) (amended 2006), 10 U.S.C. § 866(b) (2006). Thus, civilians would be *less likely* to have a right of direct appellate review from a court-martial conviction than their military counterparts.

6. United States v. Denedo, 129 S. Ct. 2213 (2009).

7. *Id.* at 2228 (Roberts, C.J., concurring in part and dissenting in part).

While Chief Justice Roberts was in dissent, his characterization of the law was generally fair, as the Supreme Court has regularly upheld court-martial procedures that would never pass constitutional muster in the civilian context.[8] Recent legislation, however, purports to resuscitate court-martial jurisdiction over persons not "in the Army now."[9] In 2006, Congress amended Article 2(a)(10) of the Uniform Code of Military Justice[10] to allow the court-martial of civilian contractors and others "serving with or accompanying an armed force in the field" during a declared war or during a "contingency operation," a term that includes operations ranging from the military engagements in Afghanistan and Iraq to non-combat activities such as domestic disaster relief.[11] This amendment purports to revive court-martial jurisdiction over full-fledged civilians,[12] a practice that ended in 1970 as a result of Supreme Court and military

8. *See, e.g.*, Weiss v. United States, 510 U.S. 163, 178–79 (1994) (holding that Constitution did not require that military judges be appointed to fixed terms of office). Justice Scalia, concurring with the judgment, stated, "[b]ut no one can suppose that similar protections against improper influence would suffice to validate a state criminal-law system in which felonies were tried by judges serving at the pleasure of the Executive." *Id.* at 198; *see also* Middendorf v. Henry, 425 U.S. 25, 42–43 (1976) (rejecting use of "civilian" case law to determine whether Fifth Amendment right to counsel applied at summary courts-martial); Parker v. Levy, 417 U.S. 733, 756–57 (1974) (holding that more lenient void for vagueness doctrine was appropriate with respect to offenses punishable by court-martial).

9. *See generally* UCMJ, art. 2 (amended 2006), 10 U.S.C. § 802 (2006).

10. UCMJ, art. 2(a)(10) (amended 2006), 10 U.S.C. § 802(a)(10) (2006).

11. *See id.* A "contingency operation" is a military operation that either: (1) is designated by the Secretary of Defense as one 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 (2) results in the calling up of the reserves or the retention on active duty of servicemembers who otherwise would be eligible to retire or be discharged. *See also* HAROLD C. RELYEA, CONG. RESEARCH SERV., NATIONAL EMERGENCY POWERS, 13–16 (2001) (listing declared national emergencies from 1976 to 2001). The phrase "in the field" is a term of art, and the historical understanding of the meaning of this term is addressed *infra* Part II.A.2. *See generally* 10 U.S.C. § 101(a)(13) (2006).

12. The UCMJ purports to allow court-martial jurisdiction over another class of persons who are technically civilians: "Persons in custody of the armed forces serving a sentence imposed by a court-martial." UCMJ, art. 2(a)(7) (amended 2006), 10 U.S.C. § 802(a)(7) (2006). The Supreme Court upheld such jurisdiction nearly a century ago. *See* Kahn v. Anderson, 255 U.S. 1, 7 (1921). It very well may be that the exercise of this jurisdiction is unconstitutional for the same reasons that Article 2(a)(10) likely is unconstitutional. *See infra* Part III. Regardless, discharged servicemembers in military custody, whose discharges typically arise from the same court-martial from which their sentence to imprisonment arise, are qualitatively different from civilian contractors and other civilians serving with the military in the field. Thus, while the analysis in this Article might be equally applicable to Article 2(a)(7), that is a question beyond the scope of this Article and one on which the author expresses no opinion.

appellate court decisions.[13] Congress has sought to resurrect court-martial jurisdiction over civilians even though a statute already exists that makes federal district court an available forum for misconduct by these civilians.[14]

This amendment to the UCMJ is an important one in light of the military's increased reliance on civilian government employees and contractors to support military operations overseas. While a mere 9,200 civilian contractor personnel supported U.S. military operations in Iraq during the 1991 Gulf War, by 2006 the Army alone was using nearly 60,000 civilian contractor employees to support its operations in Southwest Asia.[15] In all, by 2008, there was one civilian contractor supporting military operations in Iraq for every 1.5 soldiers, while the ratio during the 1991 Gulf War had been about fifty-to-one.[16] Thus, amended Article 2(a)(10) potentially sweeps thousands of civilians within the reach of court-martial jurisdiction; in the absence of amended Article 2(a)(10), those civilians would be subject to criminal trial only in federal district court, where they would enjoy significantly greater procedural rights.

Armed with the mandate of amended Article 2(a)(10), the military has begun attempting to subject civilian contractors serving in Iraq and Kuwait to trial by court-martial. The Army has court-martialed one civilian contractor under amended Article 2(a)(10), the first such court-martial in nearly forty years.[17] The Army and Air Force also pursued court-martial proceedings against three other civilian contractors, only to back off in the face of constitutional challenges brought in federal district court.[18]

The United States' apparent reluctance to litigate the constitutionality of Article 2(a)(10) is understandable, if not defensible, as Article 2(a)(10) is very likely unconstitutional. Existing Supreme Court precedent does not support the revival of courts-martial jurisdiction over civilians serving "in the field."[19] Moreover, even if the Supreme Court were to renounce its existing precedent, neither the Constitution's plain language nor historical practice can sustain Article 2(a)(10), at least in a war where the military has

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13. *See infra* Parts II.A.2 and II.A.3.

14. *See* Military Extraterritorial Jurisdiction Act of 2000, Pub. L. No. 106-523, 114 Stat. 2488 (2000) (codified as amended at 18 U.S.C. §§ 3261–3267 (2006)); *infra* notes 200–202 and accompanying text.

15. U. S. GOV'T ACCOUNTABILITY OFFICE, GAO-07-145, REPORT TO CONGRESSIONAL COMMITTEES, HIGH-LEVEL DOD ACTION NEEDED TO ADDRESS LONG-STANDING PROBLEMS WITH MANAGEMENT AND OVERSIGHT OF CONTRACTORS SUPPORTING DEPLOYED FORCES 1 (2006), *available at* http://www.gao.gov/products/GAO-07-145.

16. JAMES J. CARAFANO, PRIVATE SECTOR, PUBLIC WARS 38 (2008); *see also* David A. Melson, *Military Jurisdiction Over Civilian Contractors: A Historical Overview*, 52 NAVAL L. REV. 277, 279–80 (2005) (discussing the expanded role played by contractors in modern military operations).

17. *See infra* notes 215–18 and accompanying text.

18. *See infra* notes 219–20 and accompanying text.

19. Reid v. Covert, 354 U.S. 1, 34–35 (1957) (plurality opinion).

a reasonable ability to return the accused to the United States for trial in federal court.

Part II of this Article traces the history of the court-martial of civilians in the United States from the American Revolution to the present. An understanding of historical practice is important for two reasons. First, historical practice has informed court decisions upholding or rejecting the court-martial of civilians, and these cases comprise the precedent on which the constitutionality of Article 2(a)(10) likely will be judged.[20] Second, historical practice sheds considerable light on the traditional understanding of the permissible scope of court-martial jurisdiction over civilians accompanying an armed force in the field.[21]

Part III of this Article assesses the constitutionality of Article 2(a)(10) in light of existing precedent and historical practice. Existing precedent points strongly toward the unconstitutionality of court-martial jurisdiction over civilians accompanying the armed forces in the field.[22] While the relevant Supreme Court precedent does not specifically deal with Article 2(a)(10), it holds that Congress's constitutional power to regulate the land and naval forces restricts court-martial jurisdiction to persons who are actually servicemembers.[23] Existing Supreme Court precedent also requires that court-martial jurisdiction be no broader than that absolutely needed for maintenance of discipline in the ranks, a test that likely could not be satisfied as it relates to civilians.[24]

In addition, historical practice from the eighteenth and nineteenth centuries reveals a great reluctance to permit the trial of civilians by court-martial when an available civilian court forum existed.[25] Advances in transportation have greatly increased the practicality of moving personnel to and from the theater of war. Thus, even if a court ignored existing precedent and permitted the court-martial of civilians under the same circumstances in which such courts-martial historically have been permitted, it remains unlikely, in the context of modern war, that a civilian forum will ever be sufficiently unavailable to support the court-martial of civilians serving with the military in a theater of war.

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20. *See, e.g.*, Kinsella v. United States *ex rel.* Singleton, 361 U.S. 234 (1960); Grisham v. Hagan, 361 U.S. 278 (1960); McElroy v. United States *ex rel.* Guagliardo, 361 U.S. 281 (1960); *Covert*, 354 U.S. 1.

21. *See, e.g.*, *Covert*, 354 U.S. 1.

22. *See, e.g.*, *id.*

23. *See, e.g.*, *id.*

24. *See, e.g.*, *id.*

25. *See* United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 22 n.20 (1955).

II. A HISTORY OF COURT-MARTIAL JURISDICTION OVER CIVILIANS ACCOMPANYING MILITARY FORCES IN THE FIELD

A. Eighteenth- and Nineteenth-Century Practice

1. The Army Articles of War

For the first one hundred seventy-five years of the American Republic, it was well understood that courts-martial had jurisdiction to try certain defined classes of civilians.[26] When the Continental Army adopted articles of war in 1775, it borrowed a provision from the British Articles of War[27] and rendered subject to military law "[a]ll suttlers [sic] and retailers to a camp, and all persons whatsoever, serving with the continental army in the field, though not inlisted [sic] soldiers."[28] One year later, the colonial army reissued its Articles of War with no substantive change to this provision other than deleting the term "retailers" and replacing it with the term "retainers."[29] A "sutler" was "[a] person who, as a business, follows an army, and sells provisions and liquor to the troops."[30] The term "retainers to

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26. *See generally* WILLIAM C. DE HART, OBSERVATIONS ON MILITARY LAW, AND THE CONSTITUTION AND PRACTICE OF COURTS MARTIAL, WITH A SUMMARY OF THE LAW OF EVIDENCE, AS APPLICABLE TO MILITARY TRIALS; APPLIED TO THE LAWS, REGULATIONS AND CUSTOMS OF THE ARMY AND NAVY OF THE UNITED STATES 22–25 (1859).

27. 1 WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 98 (2d ed. rev. 1896) (noting that Article 63 of the 1775 Articles of War had been borrowed from corresponding British article).

28. Art. of War of 1775, art. 32, *reprinted in* 2 WINTHROP, *supra* note 27, at 956.

29. Art. of War of 1776, § XIII, art. 23, *reprinted in* 2 WINTHROP, *supra* note 27, at 967. There were other examples in the early American Articles of War in which specified classes of civilians were made subject to trial by court-martial, but none of these other examples endured into the twentieth century. *See generally* Robert Girard, *The Constitution and Court-Martial of Civilians Accompanying the Armed Forces – A Preliminary Analysis*, 13 STAN. L. REV. 461, 482–88 (1961). Most prominently, the 1776 Articles of War had a provision that extended court-martial jurisdiction to cover "[a]ll officers, conductors, gunners, matrosses, drivers, or any other persons whatsoever, receiving pay or hire in the service of the artillery of the United States." *See* Art. of War of 1776, § XVI, art. 1, *reprinted in* 2 WINTHROP, *supra* note 27, at 970. A similar provision could be found in the 1806 Articles of War. *See* Art. of War of 1806, art. 96, *reprinted in* 2 WINTHROP, *supra* note 27, at 985. "Drivers," and possibly "matrosses" and "gunners" accompanying the armed forces in this era were not viewed as soldiers, but as civilian employees. *See* Girard, at 482 n.97. Mattrosses were assistants to artillery gunners. Brief for Petitioner at 39, McElroy v. United States *ex rel.* Guagliardo, 361 U.S. 281 (1960) (No. 21), 1959 WL 101596 at *39 (quoting 2 LOUIS DE TOUSARD, AMERICAN ARTILLERIST'S COMPANION 645 (1809)).

30. William C. Anderson, *Popular Words in Law Lexicons*, 4 YALE L.J. 1, 3 (1894); *see also* DE HART, *supra* note 26 at 24–25 ("A *sutler*, which is a term familiar to the army, is a person who, under the authority of the military commander, is permitted to reside in or follow the camp with food, liquors, and small articles of military equipment, or others, for general use or consumption.").

a camp" included officers' servants, and "[c]amp followers attending to the army but not in the public service," such as sutlers, newspaper correspondents, and telegraph operators.[31]

The scope of the third category of civilians rendered amenable to military authority, "persons serving with the [army] in the field,"[32] is not intuitively obvious. Colonel Winthrop, generally viewed as the leading nineteenth-century commentator on military law,[33] viewed this phrase as covering only civilians serving with an army in the field who were actual government employees, such as civilian clerks, laborers, and telegraph operators.[34]

The subjection of these defined classes of civilians to military orders was an outgrowth of two concomitant needs of an eighteenth- and nineteenth-century army in the field: the need for the logistical support these civilians provided, and the equally important need to control these civilians' behavior.[35] As William De Hart observed in his classic 1859 treatise on military law:

> Armies when engaged in active operations, are, at all seasons, accompanied by a large train of followers, who minister to its convenience and comfort. The various description of persons, included under that appellation, have granted to them certain privileges, such as living within the boundaries of the camp, and protection to their persons and property, dependent necessarily upon the essential conditions of good order, quiet, subordination, and fidelity to the state. The great and important interest to the nation involved in the movements of an army, which, for certainty of action, uniformity of conduct, and ultimate success, must rely mainly upon a system of rigid discipline, has caused the rule which applies every where else for the protection of the civilian, to be somewhat modified, or even, for the time, to be entirely set aside—hence, the custom which prevails in the field, of trying persons not connected with the army by courts-martial, must have arisen from, as it depends on, necessity.[36]

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31. 1 WINTHROP, *supra* note 27, at 98–99. Captain De Hart defined a "retainer to the camp" as "one who is connected with the military service, or business of the camp, by pay, or fee," and opined that this term encompassed "clerks, drivers, guides, and many others, who, at times, are employed in the public service, and maintained at the public expense." DE HART, *supra* note 26, at 25.

32. 1 WINTHROP, *supra* note 27, at 99.

33. The Supreme Court has referred to Colonel Winthrop as "the Blackstone of Military Law." Hamdan v. Rumsfeld, 548 U.S. 557, 597 (2006) (plurality opinion); *Covert*, 354 U.S. at 19 n.38.

34. *See* 1 WINTHROP, *supra* note 27, at 99.

35. *See generally* DE HART, *supra* note 26, at 22.

36. *Id.* at 22–23; *see also* 1 WINTHROP, *supra* note 27, at 98 ("Protected as they are by the military arm, they owe to it the correlative obligation of obedience; and a due consideration for the *morale* and discipline of the troops, and for the security of the government against the consequences of unauthorized dealing and communication with the

Indeed, enforcing *military* laws against civilians accompanying an army in the field often was a necessity because there was no applicable civilian criminal law. It has long been recognized that a military force traversing a friendly foreign nation, with the consent of its sovereign, is generally not subject to that nation's internal laws.[37] Similarly, persons participating in an invasion or occupation of enemy territory are immune from the invaded territory's laws.[38]

Moreover, the normal presumption is that federal law does not have extraterritorial effect,[39] meaning that most federal criminal laws would not

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enemy, requires that these persons shall be governed much as are those with whom they are commorant.").

37. *See* Schooner Exch. v. M'Faddon, 11 U.S. (7 Cranch) 116, 139–40 (1812); *see also* Dow v. Johnson, 100 U.S. 158, 165 (1879); Coleman v. Tennessee, 97 U.S. 509, 515–16 (1878) (relying on the holding in *Schooner Exchange* that a military force authorized to traverse friendly foreign territory is not subject to the laws of the friendly foreign territory).

38. *Coleman*, 97 U.S. at 516; *see also* Dostal v. Haig, 652 F.2d 173, 176 (D.C. Cir. 1981) ("The U.S. military, entering Berlin as conquerors, were immune from the jurisdiction of the courts of the conquered country, or would have been if any such courts had remained."); Holmes v. Laird, 459 F.2d 1211, 1216–17 (D.C. Cir. 1972) ("We are also advertent to similar expressions [of immunity] in cases involving troops occupying hostile or conquered territory, where obviously there can be no question of implying waivers of jurisdiction from consent to the presence of the forces." (citing *Dow*, 100 U.S. at 165, and *Coleman*, 97 U.S. at 515) (internal quotations omitted)); Bennett v. Davis, 267 F.2d 15, 18 (10th Cir. 1959) (noting that an American soldier participating in post-World War II occupation of Austria was not subject to Austrian law); Hamilton v. McClaughry, 136 F. 445, 447–48 (C.C.D. Kan. 1905) (observing that American soldier participating in operation to quell the Boxer Rebellion was not subject to Chinese criminal laws); Tennessee v. Hibdom, 23 F. 795, 797 (C.C.M.D. Tenn. 1885) (holding that a Union soldier participating in occupation of Confederate Tennessee was not subject to Tennessee's criminal laws); United States *ex rel.* Karadzole v. Artukovic, 170 F. Supp. 383, 388 (S.D. Cal. 1959) ("There are several cases holding that offenses committed during a period of occupation are answerable to the armies of the occupation and not to another country or state."); *In re* Lo Dolce, 106 F. Supp. 455, 460–61 (W.D.N.Y. 1952) (holding that an American soldier serving behind enemy lines in German-occupied Italy was not subject to Italian criminal laws); United States v. Fleming, 2 C.M.R. 312, 316 (A.B.R. 1951) ("At the outset, it is observed that members of the armed forces which occupy an enemy's territory are not subject to the laws or the jurisdiction of the courts of the enemy.").

39. Small v. United States, 544 U.S. 385, 388–89 (2005); Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155, 173 (1993); Equal Emp't Opp'y Comm'n v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991). Moreover, the federal criminal code was comparatively modest in the eighteenth and nineteenth centuries, with few laws that would capture conduct within a military camp even if the federal criminal code had applied extraterritorially. Stephen Chippendale, *More Harm Than Good: Assessing Federalization of Criminal Law*, 79 MINN. L. REV. 455, 458 (1994) ("For constitutional and political reasons, the federal government possessed extremely limited criminal authority prior to the Civil War. The 1872 recodification of the Postal Act was the first statute to extend federal authority beyond protecting the operations of the national government." (footnotes omitted)); *see also* Roger J. Miner, *Federal Courts, Federal Crimes, and Federalism*, 10 HARV. J.L. & PUB. POL'Y 117,

apply to a civilian accompanying an army in the invasion or occupation of a foreign territory. Even if that were not the case, the travel limitations on an eighteenth- or nineteenth-century army on the march typically would have made it impractical to remit a misbehaving civilian to federal authorities for a trial in federal court. Thus, were it not for the subjection of civilians within the army camp to military law, in many cases there would be no applicable legal regime to regulate these civilians' conduct.[40] The only available options would have been simply expelling the miscreant civilian from the army camp[41]—an option that might not be sufficiently severe in some cases—or the resort to "frontier justice" in a way that the misbehaving civilian might prefer to avoid.[42]

Given commanders' need to have some legal regime available to control the conduct of civilians in their midst, it is not surprising that Congress has repeatedly reenacted provisions subjecting sutlers, retainers to the camp, and others serving with the Army in the field to military law and discipline. In 1806, Congress cleaned up a few grammatical and typographical errors and reenacted, without substantive change, the provision in the 1776 Articles of War subjecting these classes of civilians to military authority.[43] Congress reenacted this provision as Article 63 of the 1874 Articles of War, although the 1874 provision dropped the separate reference to "sutlers," a group of camp followers already encompassed within the term "retainers to the camp."[44] Though Congress amended the statutory language in 1916,[45] 1950,[46] and ultimately in 2006,[47] the concept that courts-martial would have jurisdiction over specified civilians accompanying the military in the field has remained a part of military law

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120 (1987) (describing growth in scope of federal criminal laws).

40. Indeed, it appears that in many cases civilian participants in a military invasion or occupation would have been immune even from civil suit for actions taken as part of the invasion or occupation. *See generally* Underhill v. United States, 168 U.S. 250, 253–54 (1897); Freeland v. Williams, 131 U.S. 405, 417 (1889); *Dow*, 100 U.S. at 165; Ford v. Surget, 97 U.S. 594, 605 (1878). Thus, trial by court-martial often would have been the only available legal option for controlling the behavior of civilians accompanying an army on the march in foreign lands.

41. *See* 1 WINTHROP, *supra* note 27, at 98–99 (noting that commanders sometimes reacted to misconduct by civilians within the army camp by expelling them from the camp).

42. Indeed, Captain De Hart noted that the inapplicability of military law to civilians accompanying an armed force had at times led to "many inconveniences and bad consequences," and "frequently, no doubt, led to the infliction of summary punishments, or to an improper exertion of military authority or law." DE HART, *supra* note 26, at 23–24.

43. Art. of War of 1806, art. 60, *reprinted in* 2 WINTHROP, *supra* note 27, at 981.

44. Art. of War of 1874, art. 63, *reprinted in* 2 WINTHROP, *supra* note 27, at 991; *see also* 1 WINTHROP, *supra* note 27, at 98–99 (noting that the phrase "retainers to the camp" includes camp followers such as sutlers).

45. *See infra* notes 215–18 and accompanying text.

46. *See infra* Part II.C.1.

47. *See infra* notes 203–13 and accompanying text.

in the various iterations of the Army Articles of War and the UCMJ to the present day.[48]

2. Limitations on Court-Martial Jurisdiction Over Civilians

Notably, the statutory language subjecting certain civilians to military authority was virtually unchanged from 1775 to the enactment of the UCMJ in 1950.[49] The UCMJ did not explicitly state that such civilians were amenable to *trial by court-martial* for their breaches of military law, as opposed to trial in some other forum.[50] Nevertheless, it has long been understood that the Article provided for trial by court-martial of the classes of civilians defined in the statute.[51] That said, because subjecting civilians

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48. This Article's historical analysis has focused on Army practice as opposed to court-martial practices in the Navy. This is because Article 2(a)(10) of the UCMJ has its genesis in the Army Articles of War. In addition, the Navy was very much on its own program as respects courts-martial from the nation's birth until enactment of the UCMJ in 1950. While the Articles of War were tinkered with regularly in the eighteenth, nineteenth, and twentieth centuries, the Navy's court-martial rules largely remained static. *See* Frederick Bernays Wiener, *American Military Law in the Light of the First Mutiny Act's Tricentennial*, 126 MIL. L. REV. 1, 25 (1989). In any event, the Navy did not have statutory authority to try any civilians by court-martial until 1943. *See* Girard, *supra* note 29, at 494. That said, the Supreme Court and lower federal courts upheld the court-martial of a number of paymaster clerks, who technically were civilians, on the theory that their relationship with the Navy was so intertwined that they were "in" the Navy for court-martial purposes. *See, e.g.*, McGlensy v. Van Vranken, 163 U.S. 694, 694 (1895); Johnson v. Sayre, 158 U.S. 109, 113–14 (1895); *Ex parte* Reed, 100 U.S. 13, 20 (1879); *In re* Bogart, 3 F. Cas. 796, 800 (C.C.D. Cal. 1873) (No. 1596); United States v. Bogart, 24 Fed. Cas. 1184, 1184–85 (E.D.N.Y. 1869) (No. 14,616). The Army similarly succeeded in convincing one court that an Army paymaster clerk was "in" the Army for court-martial purposes. *In re* Thomas, 23 F. Cas. 931, 931–32 (N.D. Miss. 1869) (No. 13,888). But the Supreme Court later characterized this line of precedent as properly being limited to Navy paymaster clerks based on their unique status within the Navy. *See* McElroy v. United States *ex rel.* Guagliardo, 361 U.S. 281, 285 (1960). Given the limited nature of naval courts-martial of civilians, and the *McElroy* Court's observation that these courts-martial were very much *sui generis*, historical naval practice is of little use in analyzing the constitutionality of Article 2(a)(10).

49. UCMJ art. 66(b) (amended 2006), 10 U.S.C. § 866(b) (1950).

50. *See id.*

51. *See* 1 WINTHROP, *supra* note 27, at 98 ("This provision, which, with some slight modifications, has come down from our original code of 1775, which derived it from a corresponding British article, has always been interpreted as subjecting the descriptions of persons specified, not only to the orders made for the government and discipline of the command to which they may be attached, but also to trial by court-martial for violations of the military code." (footnote omitted)); *see also* DIG. OP. JUDGE ADVOCATES GENERAL OF THE ARMY 152 (1912); DIG. OP. JUDGE-ADVOCATES GENERAL OF THE ARMY 56, at ¶ 161 (1901); GEORGE B. DAVIS, A TREATISE ON THE MILITARY LAW OF THE UNITED STATES 478 (3d ed. rev. 1915) ("The accepted interpretation of this Article is that it subjects (in time of war) the classes of persons specified not only to military discipline and government in

to trial by court-martial is an extraordinary exercise of jurisdiction, the various versions of this statute have been narrowly construed.[52] Although the early versions of the statutory language (i.e., those in effect before 1916) did not expressly restrict court-martial jurisdiction over civilians to times of war, the Article has long been understood implicitly to include such a limitation, and the leading military legal commentators of the era expressed the view that any other construction would be constitutionally suspect.[53]

As Colonel Winthrop explained, the various iterations of what is now Article 2(a)(10) have used terms of art that implicitly limited the exercise of court-martial jurisdiction over civilians in the field to times of war:

> Further, the use of the terms—"to the camp" [a term used to define which retainers were subject to military authority], "in the field" [which limited the persons serving with the army who were subject to military authority],

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general, but also to the jurisdiction of courts-martial (upon the theory, probably, that they are this made, for the time being, a part of the Army)."); DE HART, *supra* note 26, at 22 ("There is another class of persons [sutlers, retainers to the camp, and persons serving with an army in the field], comprising a great number of individuals, who are, under particular circumstances of military service, held amenable to martial law, and liable to be tried by courts-martial."); ISAAC MALTBY, A TREATISE ON COURTS MARTIAL AND MILITARY LAW 31 (1813); Court-martial Jurisdiction, 16 Op. Att'y Gen. 13, 15 (1878) (Article of War rendering civilians accompanying army in the field subject to military orders also rendered them amenable to trial by court-martial); Military Jurisdiction, 14 Op. Att'y Gen. 22, 24 (1872) (opining that civilians accompanying army in hostile Indian territory amenable to trial by court-martial).

52. *See* Offences on Vessels with Letters-of-Marque, 1 Op. Att'y Gen. 177 (1814) ("The jurisdiction of the military tribunals is not to be stretched by implication."); 1 WINTHROP, *supra* note 27, at 100 ("This Article, in creating an exceptional jurisdiction over civilians, is to be strictly construed and confined to the classes specified. A civil offender who is not certainly within its terms cannot be subjected under it to a military trial in time of war with any more legality than he could be subjected to such a trial in time of peace." (footnote omitted)).

53. *See generally* 1 WINTHROP, *supra* note 27 at 101 ("In view of the fact that this article is operative only in and for a time of war, it need hardly be remarked that the mere fact that a civilian is serving, in time of *peace*, in connection with the military administration of the government—as where he is a clerk of the War Department, or at a Military Division of Department headquarters—will not be sufficient to subject him to military trial for offences committed during such service."); *see also* DAVIS, *supra* note 51, at 479 ("The jurisdiction authorized by this Article cannot be extended to civilians employed in connection with the Army in time of peace, nor to civilians employed in such connection during the period of an Indian war but not on the theatre of such war."); DE HART, *supra* note 26, at 23 ("But it must be remembered that the application of such laws to such persons, would not be warranted in time of peace, under the ordinary conditions of camps and garrisons; – and, wherever civil judicature is in force, the followers of the camp, who are accused of crimes punishable by the known laws of the land, must be given up to the civil magistrate.").

> and "according to the rules and discipline of war" [which identified the manner in which civilians were subject to military authority]—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 war.[54]

In particular, the phrase "in the field," has endured as a limitation on court-martial jurisdiction over civilians from the 1776 Articles of War to the present version of Article 2(a)(10) of the UCMJ. In his treatise, Major General George B. Davis, a former Army Judge Advocate General, agreed with Colonel Winthrop's view that the term "in the field" limited court-martial jurisdiction to acts taking place both in time of war and in the theater of battle:

> The discipline authorized by the Article has mainly been applied to the description of "persons serving with the armies of the United States in the field"—that is to say, civilians employed by the United States or serving in a *quasi*-military capacity in connection with troops in time of war and on its theatre. But the mere fact of employment by the government pending a general war does not render the civil employee so amenable. The employment must be in connection with the army in the field and on the theatre of hostilities.[55]

An 1872 opinion by Attorney General Williams similarly observed that the concept of an army "in the field" required a connection with hostile enemy forces:

> 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. . . . When an army is engaged in offensive or defensive operations, I think it 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 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." Possibly the fact that troops are found in a region of country chiefly inhabited by Indians, and remote from the exercise of civil authority, may enter into the description of "an army in the field."[56]

Importantly, Attorney General Williams did not opine that an army's location beyond the jurisdiction of United States courts, standing alone, was sufficient to render civilians accompanying the army subject to court-

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54. 1 WINTHROP, *supra* note 27, at 101.

55. DAVIS, *supra* note 51, at 478 (footnotes omitted).

56. Military Jurisdiction, 14 Op. Att'y Gen. 22, 23–24 (1872).

martial jurisdiction. Rather, his opinion merely stated that an army is "possibly" in the field if it is within hostile territory *and* "remote from the exercise of civil authority."[57] This is a significant qualification; some eighty years later, the Justice Department relied on Attorney General Williams's opinion, as well as an 1866 opinion of the Judge Advocate General of the Army,[58] to argue that an enemy presence was unnecessary to render an army "in the field" for court-martial jurisdiction purposes, and all that was required, even in time of peace, was that the Army was located outside the United States.[59] The Supreme Court, however, rejected this argument and correctly observed that Attorney General Williams's opinion involved a "time of 'hostilities' with Indian tribes," and that the 1866 Judge Advocate General's opinion had been repudiated many times over by later Judge Advocates General.[60]

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57. *See id.* at 24. This view is consistent with Captain De Hart's treatise, which explains that military commanders cannot subject civilians to trial by court-martial for domestic offenses when local courts are running, and that instead such offenders "must be given up to the civil magistrate." DE HART, *supra* note 26, at 23; *see also* Jurisdiction of Court-Martial, 16 Op. Att'y Gen. 48 (1878) (civilian quartermaster clerk working at military post in Nebraska not subject to trial by court-martial).

58. *See* DIG. OP. OF THE J.A.G. OF THE ARMY of Nov. 15, 1866 ("It is held by this Bureau and has been the general usage of the service in times of peace, that a detachment of troops is an army 'in the field' when on the march, or at a post remote from civil jurisdiction.").

59. *See* Brief for Petitioner at 56–58, McElroy v. United States *ex rel.* Guagliardo, 361 U.S. 281 (1960) (No. 21). The principal drafter of the UCMJ, Professor Edmund Morgan, similarly opined with respect to Article 2(10): "[T]he phrase 'in the field' has been construed to refer to any place, whether on land or water, apart from permanent cantonments or fortifications, where military operations are being conducted." *See* 5 EDMUND MORGAN PAPERS, THE COMM. ON A UNIF. CODE OF MIL. JUST. 3765 (citing *In re* Berue, 54 F. Supp. 252 (S.D. Ohio 1944)), *available at* http://pds.lib.harvard.edu/pds/view/13963097?n=3765&imagesize=1200&jp2Res=.25. As the foregoing analysis indicates, Professor Morgan's characterization of the meaning of the term "in the field," with no requirement of a connection between the military operations and an enemy force, does not comport with the historical understanding of that term. Given that provisions of the UCMJ purporting to create court-martial jurisdiction over civilians repeatedly have been struck down by the Supreme Court, *see infra* notes 124–73 and accompanying text—perhaps Professor Morgan's views on the permissibility of the exercise of such jurisdiction should be treated as less than authoritative.

60. *See McElroy*, 361 U.S. at 285–86. For some of the Judge Advocate General opinions rejecting the notion that an army could be "in the field" in time of peace, without connection to an enemy, see DIG. OF OP. OF THE JUDGE ADVOCATES GENERAL OF THE ARMY 151 (1912); DIG. OF OP. OF THE JUDGE-ADVOCATES GENERAL OF THE ARMY 56, at ¶ 162 (1901) ("But the mere fact of employment by the government pending a general war, does not render the civil employee so amenable [to trial by court-martial]. The employment must be in connection with the army in the field and on the theatre of hostilities."); *id.* at 57 ¶ 166 ("Civilians cannot legally be subjected to military jurisdiction by the authority of this Article *after* the war (whether general or against Indians), pending which their offences were

While the Article subjecting civilians serving "in the field" to court-martial jurisdiction was widely understood—both as a matter of statutory construction and constitutional necessity—to apply only in time of war, the prevailing sentiment in the nineteenth century was that no formal declaration of war was necessary. Contemporary Attorneys General, Judge Advocates General, and learned commentators viewed the "time of war" requirement as a practical one that depended on the nature and locus of the Army's operations.[61] Thus, if an army was "in the field," a status that required offensive or defensive operations within a theater of war and with a view toward an enemy,[62] this status itself would satisfy the constitutional requirement that court-martial jurisdiction over civilians occur in time of war because a formal declaration of war as not viewed as necessary.[63]

3. Eighteenth- and Nineteenth-Century Practice in Court-Martialing Civilians

Given the inherent limitations on the Army's power to court-martial civilians, it is not surprising that this power was exercised sporadically in eighteenth- and nineteenth-century America. With few exceptions, the eighteenth- and nineteenth-century courts-martial of civilians tended to occur in functional times of war and in locales where there were no operating civilian courts. George Washington's papers reference a handful of courts-martial of civilians serving with the Continental Army during the American Revolution, as do other contemporary historical records.[64] These

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committed, has terminated. The jurisdiction, to be lawfully exercised, must be exercised *during* the *status belli*."); DIG. OP. JUDGE ADVOCATE GENERAL OF THE ARMY 49 (1880), at ¶ 5 ("The jurisdiction authorized by this Article cannot be extended to civilians employed in connection with the army *in time of peace*, nor to civilians employed in such connection during the period of an Indian war but not on the theatre of such war.").

61. Military Jurisdiction, 14 Op. Att'y Gen. 22, 23 (1872) ("Hostilities with Indians seem to be as much within the[ir] meaning [of 'in the field'] as any other kind of warfare."); DIG. OF OP. OF THE JUDGE ADVOCATE GENERAL OF THE ARMY 49 ¶ 6 (1880) (civilians accompanying military in the field may be court-martialed for conduct in Indian war, so long as the court-martial occurred while hostilities continued); 1 WINTHROP, *supra* note 27, at 101 (opining that "a period of hostilities with Indians is, equally with a period of warfare against a foreign power, a 'time of war,'" even though no formal declaration of war existed); *cf.* Unlawful Traffic with Indians, 13 Op. Att'y Gen. 470, 472 (1871) (unlicensed traders found trading with hostile Indian tribes subject to court-martial under then-existing Army Article of War 56 because "[i]t is not necessary to the existence of war that hostilities should have been formally proclaimed"); Brevet Commissions in the Army, 13 Op. Att'y Gen. 31, 31–32 (1869) (statute permitting promotions in time of war applied to conflicts with Indian tribes).

62. *See* Art. of War of 1806, art. 60, *supra* note 43 and accompanying text.

63. *See* 1 WINTHROP, *supra* note 27, at 101 (noting that the statutory limitation requiring an army to be "in the field" sufficed to limit court-martial jurisdiction to time of war and to acts committed in the theater of war).

64. These references to the court-martial of civilians accompanying the Continental

courts-martial of civilians appear to have occurred in areas of hostilities where colonial courts were not functioning.[65] Similarly, between 1793 and 1798, a number of post-Revolution military tribunals tried civilians for offenses committed in the western frontier "in sparsely settled territories where hostilities with Indian tribes were common and civilian justice incomplete."[66]

In the nineteenth century, the subjection of civilians to trial by court-martial appears to have been exceedingly rare prior to the Civil War, even though the United States fought the War of 1812, the Mexican War, and engaged in regular hostilities with Indian tribes. A more common practice in dealing with misbehaving civilian camp followers was to dismiss them from employment[67] or expel them from the camp.[68] Allowing that the decentralized and informal nature of courts-martial poses challenges in recreating the era's historical record, researchers have identified only seven courts-martial of civilians by the United States Army between 1800 and 1860.[69] Three civilians were tried by court-martial in 1858 at Army encampments in the Utah Territory, where the Army had been deployed to quell defiance of federal authority by Mormon settlers.[70] Two more courts-martial involved the trials of sutlers in the 1830s, both apparently taking place in areas of ongoing or relatively recent Indian hostility.[71] Two other

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Army are collected in the Petitioners' Brief in *McElroy v. United States ex rel. Guagliardo*, a case involving a constitutional challenge to the peacetime court-martial of civilian government employees stationed overseas with the military. *See* Brief for Petitioner at 40 n.25, McElroy v. United States *ex rel.* Guagliardo, 361 U.S. 281 (1960), (No. 21) (citing to the writings of Generals Washington and Wheedon); *see also* Girard, *supra* note 29, at 483.

65. Girard, *supra* note 29, at 483 ("Most of these trials apparently occurred in an area of active hostilities where civilian courts of the struggling colonies were not effectively functioning.").

66. *See id.* at 485–86; *see also* Brief for Respondent at 18–19, United States *ex rel.* McElroy v. Guagliardo, 361 U.S. 281 (1960) (No. 21) (court-martial jurisdiction also extended to citizens during the late eighteenth- and early nineteenth-century Indian Wars).

67. DIG. OP. JUDGE ADVOCATES GENERAL OF THE ARMY 151 (1912) ("*Held* that retainers to the camp, such as officers' servants and the like, as well as camp followers generally, have rarely been subjected to trial by court-martial in our service, but they have generally been dismissed from employment for breaches of discipline by them.").

68. 1 WINTHROP, *supra* note 27, at 98–99.

69. Girard, *supra* note 29, at 489–90.

70. Reply Brief for Appellant and Petitioner on Rehearing at 52, Reid v. Covert, 354 U.S. 1 (1957) (Nos. 701 and 713), 1957 WL 87831, at *52 (discussing *Trader*, *Barnard*, and *Ringsmer* courts-martial).

71. *See id.* at 51–52 (discussing *West* and *Wiese* courts-martial). The Justice Department's research could not pinpoint with certainty the locus of the *West* court-martial, as the historical record indicated only that the trial occurred at "Fort Gibson," and there were several areas named Fort Gibson at the time of trial. *See id.* at 51. However, in the months before trial, Fort Gibson in Gibson City, Illinois had been embroiled in hostilities relating to the Black Hawk War. *Id.* at 51 n.35. The *West* court-martial took place in 1833 at Fort Brooke, Florida, during the Second Seminole War. *Id.* at 51–52.

courts-martial of sutlers took place in 1825 in Norfolk, Virginia and Fort Washington, Maryland.[72] These two courts-martial appear to be anomalies, as they occurred in places where no hostilities were taking place, and do not square with the contemporary understanding that court-martial jurisdiction over civilians was limited to conduct in the field during time of war.[73] Perhaps they are best explained as a function of overeager military commanders ignoring legal niceties in order to deal with agitators in their midst.

The frequency of the Army's court-martial of civilians spiked during the Civil War, a predictable development given the massive scale of that conflict.[74] The civilians subjected to trial by court-martial "consisted mostly of civilian clerks, teamsters, laborers and other employees of the different staff departments, hospital officials and attendants, veterinaries, interpreters, guides, scouts and spies, and men employed on transports and military railroads and as telegraph operators . . . ."[75] Notably, a number of these Civil War civilian courts-martial ended with the convictions being disapproved on the grounds that the accused was merely located in the theater of war and not *serving with* the American forces in the field.[76] Just as predictably, the incidence of courts-martial of civilians reverted to historically rare levels upon the conclusion of the Civil War.[77]

B. 1900-1950: Two World Wars and the Disregard of Limits on Court-Martial Jurisdiction

There is a Latin maxim—*inter arma silent lege*—that translates: "For among arms, the laws fall mute." As Chief Justice Rehnquist explained, "In wartime, reason and history both suggest that this balance [between freedom and order] shifts to some degree in favor of order—in favor of the

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72. *Id.* at 51 (discussing the *Armistead* and *Burchard* courts-martial).

73. *See supra* Part II.A.2.

74. *See generally* 1 WINTHROP, *supra* note 27, at 99–100.

75. *Id.* at 99.

76. *Id.* at 100 n.9. Additionally, in 1863, at the height of the war, Congress passed a statute designed to address frauds against the United States military. Act of Mar. 2, 1863, ch. 67, 12 Stat. 696. This statute criminalized, and made subject to court-martial, a number of financial improprieties by members of the military, and also provided that "any contractor, agent, paymaster, quartermaster, or other person whatsoever in said forces or service" could be tried by court-martial for certain frauds against the United States military. *See generally id.* at 697. There is no record of this provision being used to try a civilian by court-martial. Indeed, the Supreme Court observed nearly a century later that this provision "appears never to have been sustained by any court." *Toth*, 350 U.S. at 14 n.8.

77. *See generally* DIG. OP. JUDGE-ADVOCATES GENERAL OF THE ARMY 56 (1901) ("Individuals, however, of the class termed '*retainers to the camp*,' or officers' servants and the like, as well as camp followers generally, have rarely been subjected to trial in our service. For breaches of discipline committed by them, the punishment has generally been expulsion from the limits of the camp and dismissal from employment.").

government's ability to deal with conditions that threaten the national well-being."[78] This sentiment can be seen in Congress's and the courts' treatment of court-martial jurisdiction over civilians during the two world wars. In 1916, with World War I raging in Europe, and the United States one year from entering the fray, Congress revised and reissued the Articles of War.[79] These revised Articles not only retained court-martial jurisdiction over civilians accompanying the Army "in the field," but purported to add court-martial jurisdiction over civilians accompanying the Army overseas in times of peace and war.[80] This expansion of court-martial jurisdiction to civilians not serving "in the field" was a significant departure from prior practice and went beyond what the Attorneys General, Judge Advocates General, and preeminent treatise writers of the nineteenth century believed the Constitution allowed.[81]

Despite Congress's attempt to expand court-martial jurisdiction over civilians to times of peace, there were no courts-martial of civilians

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78. WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE 222 (1998).

79. *See infra* note 80.

80. *See generally* Art. of War of 1916, ch. 418, § 1342, art. 2, 39 Stat. 650, 651. Article 2(d) of the 1916 Articles of War provided that the following persons were subject to trial by court-martial:

> All retainers to the camp and all persons accompanying or serving with the armies of the United States without the territorial jurisdiction of the United States, and in time of war all such retainers and persons accompanying or serving with the armies of the United States in the field, both within and without the territorial jurisdiction of the United States, though not otherwise subject to these articles.

Id. Congress revised the Articles of War in 1920, but did not change Article 2(d). *See* Art. of War of 1920, ch. 227, 41 Stat. 759, 787.

81. DIG. OP. JUDGE ADVOCATES GENERAL OF THE ARMY 151 (1912) ("The jurisdiction authorized by this article can not be extended to civilians employed in connection with the Army *in time of peace*, nor to civilians employed in such connection during the period of an Indian war, but not on the theater of such war.") (internal citations omitted); *see also* DIG. OP. JUDGE ADVOCATES GENERAL OF THE ARMY 152 (1912); DIG. OP. JUDGE-ADVOCATES GENERAL OF THE ARMY 57 (1901) ("A civil employee of the United States in time of peace is most clearly not made amenable to the military jurisdiction and trial by court martial by the fact that he is employed in an office connected with the administration of the military branch of the government."); DE HART, *supra* note 26, at 23 ("But it must be remembered that the application of such laws to such persons, would not be warranted in time of peace, under the ordinary conditions of camps and garrisons; – and, wherever civil judicature is in force, the followers of the camp, who are accused of crimes punishable by the known laws of the land, must be given up to the civil magistrate."); 1 WINTHROP, *supra* note 27, at 107 ("a statute cannot be framed by which a civilian can lawfully be made amenable to the military jurisdiction in time of peace.") (emphasis removed). *See also supra* notes 40–50 and accompanying text (detailing authorities holding that court-martial jurisdiction over civilians could exist only in time of war).

between 1900 and 1950 other than during declared wars.[82] But as might be expected during large-scale wars, with massive troop movements and the attendant need for civilian support personnel, the Federal Reporter is replete with decisions upholding the Army's power to court-martial civilians during the First and Second World Wars. Many of these decisions are rather pedestrian, with courts merely upholding courts-martial that were well within the long-understood boundaries of court-martial jurisdiction over civilians. For example, in *Ex parte Gerlach*,[83] a case decided in 1917, a civilian seaman had served on a transport vessel bringing supplies to war-torn Europe.[84] Having been discharged of his employment in Europe, Gerlach traveled back from Europe on an Army transport vessel.[85] After initially agreeing to stand watch on this return voyage, Gerlach changed his mind and refused to do so, which led to his trial by court-martial and imprisonment.[86] Judge Augustus Hand upheld the exercise of court-martial jurisdiction over Gerlach, ruling that he was serving "in the field" with the Army at the time of his offense:

> The words "in the field" do not refer to land only, but to any place, whether on land or water, apart from permanent cantonments or fortifications, where military operations are being conducted. In this case he was on an army transport, and peril from submarines existed when he refused to stand watch. The captain in charge of the vessel had, in my opinion, the right to call upon all persons on board to protect the transport in any way that seemed best in view of the danger.[87]

Similarly, in 1945, the Third Circuit upheld the exercise of court-martial jurisdiction over a civilian refrigeration and air conditioning technician who was serving in wartime Eritrea with Army personnel who were recovering scuttled German and Italian vessels.[88] Two years earlier, a federal district court upheld the court-martial of another civilian in Eritrea, even though his employment had ended, because, employed or not, he was still accompanying the Army in the field.[89] During the Second World War, federal courts also upheld Army courts-martial of civilian seamen who had committed offenses aboard government-owned vessels that were

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82. OVERSEAS JURISDICTION ADVISORY COMM., REPORT TO THE SECRETARY OF DEFENSE, THE ATTORNEY GENERAL, AND THE CONGRESS OF THE UNITED STATES 13 (1997), *available at* www.fas.org/irp/doddir/dod/ojac.pdf.

83. *See, e.g., Ex parte* Gerlach, 247 F. 616, 617–18 (S.D.N.Y. 1917).

84. *Id.* at 617.

85. *Id.*

86. *See id.*

87. *Id.* at 617–18.

88. Perlstein v. United States, 151 F.2d 167, 169 (3d Cir. 1945).

89. *See In re* Di Bartolo, 50 F. Supp. 929, 933–34 (S.D.N.Y. 1943) (upholding court-martial of recently terminated government contractor who continued to accompany the Army, post-termination, in wartime Eritrea).

transporting troops and supplies to, or engaged in military operations in, the combat theater.[90]

Just as a number of courts upheld world war-era courts-martial that were well within the historical reach of court-martial jurisdiction, a few federal trial courts during this same era rejected courts-martial where the Army went beyond the historically-recognized limits on courts-martial jurisdiction over civilians. These cases tended to be courts-martial of civilians who were serving with the Army but had no connection to hostilities.[91]

Interspersed among these perfectly sensible decisions, however, were a number of federal court decisions that radically departed from the well-understood conception of "in the field" as a limiting concept on the scope of court-martial jurisdiction over civilians. The most striking example may be the Fourth Circuit's 1919 decision in *Hines v. Mikell*,[92] which upheld court-martial jurisdiction over a civilian government employee employed at Fort Jackson, South Carolina during the First World War.[93] Mikell had been employed by the Army as a stenographer at Fort Jackson, an Army camp, or "cantonment," that had been "established for the training of the military forces of the United States for service in the theater of operations overseas."[94] The Fourth Circuit concluded that Mikell was "in the field" for purposes of court-martial jurisdiction because, in its view, basically the entire Army in a time of war was "in the field."[95] As the court explained:

> In time of war, with some exceptions, practically the entire army is "in the field," but not necessarily "in the theater of operations." This would be undoubtedly true in case of war within our borders, and we 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

90. *See* Shilman v. United States, 73 F. Supp. 648, 649 (S.D.N.Y. 1947) (holding that court-martial "clearly had jurisdiction" to try civilian seaman for offenses committed while serving on ship performing "war operations" in North Africa); *In re* Berue, 54 F. Supp. 252, 256 (S.D. Ohio 1944) (upholding court-martial jurisdiction over merchant seaman on vessel which was part of convoy proceeding to Casablanca with Army cargo).

91. *See* Walker v. Chief Quarantine Officer, 69 F. Supp. 980, 987 (D.C.Z. 1943) (holding that civilian employee of War Department performing construction in Panama Canal Zone was not "in the field" with the armed forces because the forces in the Canal Zone were not performing "military operations with a view to an enemy"); *Ex parte* Weitz, 256 F. 58, 58–59 (D. Mass. 1919) (rejecting court-martial jurisdiction over a civilian employed as a driver for a private firm doing construction work at Fort Devens, Massachusetts, on the grounds that the civilian was neither a retainer to the camp nor accompanying or serving with the Army).

92. *See* Hines v. Mikell, 259 F. 28, 35 (4th Cir. 1919).

93. *Id.*

94. *Id.* at 29.

95. *Id.* at 33.

> as a component part of the entire army, the majority of whom were actually engaged on the firing line.[96]

Thus, the Fourth Circuit held that all civilians serving at Fort Jackson were "strictly 'in the field' and subject to military regulations," even though these civilians were engaged solely in training at a domestic base where the local courts were fully functioning.[97]

The extent to which *Hines v. Mikell* departed from the eighteenth- and nineteenth-century understanding of the limits of court-martial jurisdiction cannot be overstated. A number of Civil War court-martial convictions were overturned by Army officials because mere presence in a theater of war was deemed insufficient to subject a civilian to trial by court-martial.[98] Nineteenth-century opinions issued by Attorneys General and Judge Advocates General of the Army held that an army was "in the field" when conducting operations in hostile territory—"military operations with a view to an enemy"[99]—and perhaps that the lack of functioning local courts might be a necessary or relevant factor.[100] Here, neither of these factors historically associated with being "in the field" were present.[101] Instead, the court found that Mikell was "in the field" while performing training functions at a domestic encampment solely because some elements of the Army were fighting a war thousands of miles away.[102]

There were other federal court decisions of this era that construed the "in the field" limitation in such a way as to more or less write it out of the statute in times of war. In *Ex parte Falls*,[103] a federal district court held that a civilian cook for the Army was "in the field," and therefore subject to trial by court-martial, when he left the Army supply vessel on which he worked in Brooklyn before that vessel set sail to a foreign port in 1918.[104] One year later, in *Ex parte Jochen*,[105] a federal district court upheld court-martial jurisdiction over a civilian quartermaster who had been stationed with the Army in South Texas.[106] Implicitly rejecting nineteenth-century opinions to the contrary, the court held that "[w]hether or not . . . civil courts are functioning, has no bearing" on whether Jochen was accompanying the Army "in the field."[107] Moreover, the court rejected the common nineteenth-century understanding that an army was "in the field" only when

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96. *Id.*
97. *Id.* at 35.
98. *See generally* 1 WINTHROP, *supra* note 27, at 100.
99. Military Jurisdiction, 14 Op. Att'y Gen. 22, 23–24 (1872).
100. *See id.* at 24.
101. *See generally Hines*, 259 F. at 32, 34–35.
102. *See id.* at 30, 35.
103. *Ex parte* Falls, 251 F. 415, 416 (D.N.J. 1918).
104. *Id.* at 416.
105. *Ex parte* Jochen, 257 F. 200 (S.D. Tex. 1919).
106. *Id.* at 201, 209.
107. *Id.* at 207.

operating in the vicinity of an enemy force.[108] Instead, the court held that an army was "in the field" when serving in "mobilization, concentration, instruction or maneuver camps as well as service in campaign, simulated campaign or on the march."[109] In 1943, a federal district court upheld court-martial jurisdiction over a civilian cook on a vessel owned by the federal War Shipping Administration for conduct occurring while the vessel was docked in Norfolk, Virginia, finding that service in Norfolk was "in the field" for court-martial purposes.[110] Consistent with the historical tendency for infringements of civil liberties in wartime to recede once hostilities cease, the Supreme Court rejected an expansive court-martial jurisdiction over civilians in the years after World War II's conclusion.[111]

C. *1950–2000: Legislative Expansion and Judicial Contraction of Court-Martial Jurisdiction Over Civilians*

1. Expansion of Court-Martial Jurisdiction Under the UCMJ

In the years immediately following the Second World War, Congress, no doubt influenced by the complaints of returning servicemembers,[112] enacted major legislation designed to modernize court-martial practice. In 1948, Congress enacted the Elston Act, which made a number of reforms to the Army court-martial system, such as allowing enlisted soldiers to serve on courts-martial and creating a rather complicated system of appellate review, culminating in review by a Judicial Council consisting of three Army generals.[113]

But the real watershed moment as relates to court-martial jurisdiction over civilians was the 1950 enactment of the UCMJ, which substantially revamped the court-martial system just two years after enactment of the Elston Act. The UCMJ tossed out the Army Articles of War and the Articles for the Government of the Navy in favor of a single court-martial system applicable to all military services.[114] The UCMJ also greatly

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108. *See id.* at 209.

109. *Id.* The *Jochen* court did hold, in the alternative, that if it was wrong, and an army was "in the field" only "where the armies are in or experiencing actual conflict," that Jochen's service would satisfy this narrower conception of court-martial jurisdiction. *Id.*

110. *See* McCune v. Kilpatrick, 53 F. Supp. 80, 85–86 (E.D. Va. 1943).

111. *See infra* Part II.C.1.

112. Wiener, *supra* note 48, at 25.

113. Selective Service Act of 1948 (Elston Act), ch. 625, §§ 201–38, 62 Stat. 604, 627–44. One eminent military law commentator, with considerable justification, described the appellate review system created by the Elston Act as "fully as complex as the wiring diagram of a large automobile's dashboard." Wiener, *supra* note 48, at 31. One day after passage of the Elston Act, Congress enacted a second statute making the Elston Act, and the Articles of War it amended, applicable to the newly formed Air Force. Act of June 25, 1948, ch. 648, § 2, 62 Stat. 1014.

114. The Articles for the Government of the Navy, which established court-martial

revamped the appellate review process for courts-martial, creating a civilian Article I court (the Court of Military Appeals, now known as the United States Court of Appeals for the Armed Forces) as the final avenue of appeal for court-martial convictions exceeding a stated sentencing threshold.[115] In addition to these changes, the UCMJ continued and expanded the statutory scope of court-martial jurisdiction over civilians. In particular:

> Article 2(10) of the UCMJ continued existing Army practice and subjected to trial by court-martial, "[i]n time of war, all persons serving with or accompanying an armed force in the field."[116]
>
> Article 2(11) of the UCMJ purported to allow, in times of peace and war, trial by court-martial of government employees serving with the armed forces overseas and civilian dependents accompanying their military sponsors overseas.[117]
>
> Article 3(a) of the UCMJ purported to subject to trial by court-martial discharged servicemembers for felony offenses committed in their prior military service if no state or federal court had jurisdiction over the alleged offenses.[118]

Pursuant to these grants of jurisdiction, the United States military court-martialed a number of civilians in the first years of the UCMJ.[119] The Supreme Court, however, did not share Congress's fervor for subjecting civilians to trial by court-martial, as it promptly struck down two of these three UCMJ provisions subjecting civilians to trial by court-martial.[120] A decade after that, the Court of Military Appeals followed suit and construed Article 2(10) in a manner that made it essentially useless as a jurisdictional grant.[121]

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procedures for naval courts-martial, had not been revised in any significant respect since 1862, and even before that had been of little interest in Congress. *See* Wiener, *supra* note 48, at 25 (discussing lack of significant amendment to naval court-martial procedures between 1862 and enactment of the UCMJ in 1950); *see also* John F. O'Connor, *Don't Know Much About History: The Constitution, Historical Practice, and the Death Penalty Jurisdiction of Courts-Martial*, 52 U. MIAMI L. REV. 177, 193–94 (detailing lack of congressional involvement in naval court-martial practice).

115. *See* 10 U.S.C. §§ 859–67 (2006).

116. UCMJ, art. 2(10) (1950).

117. *See id.* art. 2(11).

118. *Id.* art. 3(a).

119. Between 1950 and 1956, the Army tried 2,454 civilians by court-martial, 181 by general court-martial, and another 2,273 by special court-martial or summary court-martial. Girard, *supra* note 29, at 504 n.204.

120. *See infra* Part II.C.2.

121. *See infra* Part II.C.3.

2. The Supreme Court's Rejection of Expanded Court-Martial Jurisdiction Over Civilians

The first UCMJ provision relegated to the jurisdictional scrap heap was Article 3(a), which purported to allow the court-martial of certain discharged servicemembers.[122] In *United States ex rel. Toth v. Quarles*,[123] decided in 1955, the Supreme Court held that a discharged airman could not constitutionally be tried by court-martial for offenses he allegedly had committed while on active duty in Korea.[124] Ordinarily, a decision such as *Toth* might have little bearing on the constitutionality of courts-martial jurisdiction over persons accompanying the military in the field. After all, Article 3(a) of the UCMJ, unlike the court-martial of civilians serving in the field, had no historical pedigree to commend it.[125] In deciding *Toth*, however, the Court adopted an analytical framework that had, and may continue to have, repercussions for the UCMJ's other purported grants of court-martial jurisdiction over civilians.[126]

The *Toth* Court began by acknowledging the importance of the question of court-martial jurisdiction because such jurisdiction "necessarily encroaches on the jurisdiction of federal courts set up under Article III of the Constitution where persons on trial are surrounded with more constitutional safeguards than in military tribunals."[127] The Court then surveyed "the historical background of this country's preference for civilian over military trials" and observed that "[f]ree 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."[128] From that premise, the Court identified the constitutional limit on Congress's power to create 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.* We hold that Congress cannot subject civilians like Toth to trial by court-martial. They, like other civilians, are entitled to have the benefit of safeguards afforded those tried in the regular courts authorized by Article III of the Constitution.[129]

The Court reached this conclusion in part on its view that the constitutional provision that authorized courts-martial—Congress's power

122. UCMJ, art. 3(a) (1950).
123. United States *ex rel.* Toth v. Quarles, 350 U.S. 11 (1955).
124. *Id.* at 13.
125. O'Connor, *supra* note 114, at 177.
126. *See generally Toth*, 350 U.S. 11.
127. *Id.* at 15.
128. *Id.* at 22 n.20.
129. *Id.* at 23 (emphasis added) (footnote and internal quotations omitted).

"[t]o make Rules for the Government and Regulation of the land and naval Forces"[130]—"would seem to restrict court-martial jurisdiction to persons who are actually members or part of the armed forces."[131] The United States argued that the exercise of court-martial jurisdiction over Toth was necessary because his alleged offenses—murder and conspiracy to murder in Korea—could not be tried in United States civilian courts.[132] The Court rejected this argument. As the Court explained, the absence of federal civilian court jurisdiction over Toth's crime was a product of congressional *choice* not to create such jurisdiction, and Congress's policy decisions could not support subjecting Toth to trial by court-martial:

> It is conceded that it was wholly within the constitutional power of Congress to follow this suggestion [from the Judge Advocate General of the Army] and provide for federal district court trials of discharged soldiers accused of offenses committed while in the armed services. This concession is justified. There can be no valid argument, therefore, that civilian ex-servicemen must be tried by court-martial or not tried at all. If that is so it is only because Congress has not seen fit to subject them to trial in federal district courts.[133]

The Supreme Court decided *Toth* largely based on three analytical principles that presumably could apply to courts-martial of *any* civilians and are not necessarily limited to discharged servicemembers.[134] First, the Court opined that Congress's constitutional power to regulate the land and naval forces seemingly carried with it a power to court-martial only actual servicemembers.[135] Second, the constitutional preference for civilian justice over military justice required that any court-martial jurisdiction be confined to "the least possible power adequate to the end proposed."[136] Third, in assessing whether a court-martial was the necessary forum, it would not suffice to argue that if a court-martial lacked jurisdiction there would be no recourse against the accused.[137] If Congress *could* create federal criminal jurisdiction over an offense, its failure to do so would not strengthen the case for court-martial jurisdiction.[138]

Indeed, two years after it decided *Toth*, the Supreme Court relied on the analytical framework it established in that case to begin invalidating Article 2(11) of the UCMJ, which purported to create court-martial jurisdiction over government employees, dependents, and other persons accompanying

130. U.S. CONST. art. I, § 8, cl. 14.
131. *Toth*, 350 U.S. at 15.
132. *Id.* at 20–21.
133. *Id.* at 21 (citations omitted).
134. *See id.* at 15, 21, 23.
135. *See id.* at 15.
136. *Id.* at 23 (quoting Anderson v. Dunn, 19 U.S. (6 Wheat.) 204, 231 (1821)).
137. *See id.* at 21.
138. *See generally id.*

the armed forces overseas.[139] The Court did, however, take a roundabout path to get there. In 1956, the Court decided *Reid v. Covert*[140] and *Kinsella v. Krueger*,[141] and in both cases the Court rejected habeas corpus petitions by women who had been convicted by courts-martial for murdering their servicemember husbands while living with them overseas.[142] Although the Court had decided *Toth* just one year earlier, it distinguished that case on the grounds that Toth had severed all connection to the military, while the wives at issue in *Covert* and *Krueger* had a connection to the military by virtue of their status as dependents of active duty servicemembers.[143]

On rehearing, however, the Supreme Court granted the civilian dependents' habeas corpus petitions, striking down as unconstitutional the portion of Article 2(11) that purported to allow court-martial jurisdiction over capital offenses committed by civilian dependents.[144] Justice Black's opinion for a four-Justice plurality stated that "[t]here are no supportable grounds upon which to distinguish the *Toth* case from the present cases."[145] The plurality opinion further explained that "[t]here is no indication that the Founders contemplated setting up a rival system of military courts to compete with civilian courts for jurisdiction over civilians who might have some contact or relationship with the armed forces."[146] As in *Toth*, the Court relied heavily on its conclusion that the Constitution ordinarily required that those charged with crimes against the United States—and particularly non-servicemembers—be tried in civilian court where all of their constitutional rights would be applicable and enforced.[147]

The *Covert* plurality opinion also addressed issues bearing directly on the permissible reach of the then-existing version of Article 2(10) of the UCMJ. In citing a handful of lower court decisions upholding court-martial jurisdiction over civilians, the plurality argued that "*[t]o the extent that these cases can be justified*," such jurisdiction must arise out of the

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139. *See generally infra* notes 141–42.

140. Reid v. Covert, 351 U.S. 487 (1956).

141. Kinsella v. Krueger, 351 U.S. 470 (1956).

142. *See Covert*, 351 U.S. at 491–92; *Krueger*, 351 U.S. at 473.

143. *See Covert*, 351 U.S. at 491–92 ("We also note that this case is clearly distinguishable from *Toth v. Quarles*, 350 U.S. 11. Toth had returned to the United States and been honorably discharged months before the specifications were filed charging him with an offense committed while a soldier in Korea. The Air Force had relinquished all jurisdiction over Toth before any charge was filed against him. But here, Mrs. Covert was charged, tried, convicted, sentenced and imprisoned pursuant to a valid exercise of court-martial jurisdiction while she was concededly within the provisions of Article 2(11).").

144. *Covert*, 354 U.S. at 30. The *Covert* and *Krueger* cases were consolidated both in the original Supreme Court proceeding (though two separate opinions were issued) and on rehearing, where the Court disposed of both cases in a single decision. *Id.* at 5.

145. *Id.* at 32.

146. *Id.* at 30.

147. *See id.* at 21 ("Under the grand design of the Constitution civilian courts are the normal repositories of power to try persons charged with crimes against the United States.").

"Government's 'war powers.'"[148] Because the wives at issue in *Covert* and *Krueger* were not in "an area where active hostilities were under way at the time [they] committed their offenses," the plurality concluded that the Government's war powers could not support their trial by court-martial.[149] Although the Government did not try to justify the court-martial of these civilian dependents based on Article 2(10), it did urge "that the concept 'in the field,'" a term used prominently in Article 2(10), "should be broadened to reach dependents accompanying the military forces overseas under the conditions of world tension which exist at the present time."[150]

The plurality rejected this invitation:

> [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 underway. The exigencies which have required military rule on the battlefront 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. We agree with Colonel Winthrop, an expert on military jurisdiction, who declared: "*a statute cannot be framed by which a civilian can lawfully be made amenable to the military jurisdiction in time of peace.*"[151]

Indeed, the *Covert* plurality directly addressed Article 2(10) in a footnote in which it observed that "[e]xperts 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."[152] Moreover, the plurality opined that any court-martial jurisdiction over civilians in the field could not exceed that set forth in the then-existing version of Article 2(10):

> 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."[153]

While the four-Justice plurality in *Covert* opined that the Constitution prohibited all courts-martial of civilian dependents,[154] Justices Frankfurter

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148. *Id.* at 33 (emphasis added).
149. *Id.* at 34.
150. *Id.*
151. *Id.* at 35 (footnotes omitted) (quoting WINTHROP, *supra* note 27 at 107).
152. *Id.* at 34 n.61.
153. *Id.* at 34 n.61 (citation omitted).
154. *See id.* at 7–8.

and Harlan filed separate opinions concurring in the result solely on the grounds that the offenses at issue were punishable by death.[155]

In 1960, the Supreme Court issued a trio of decisions in which it invalidated Article 2(11) in its entirety, striking down the Article as it applied to both government employees and civilian dependents, regardless of whether the charged offense was punishable by death.[156] The Court reiterated what it had held in *Toth*, that neither Congress's constitutional grant of power to regulate land and naval forces[157] nor the Necessary and Proper Clause[158] included a power to court-martial those not in the land and naval forces.[159] The Court repeated its observation in both *Kinsella* and *Toth* that courts-martial must be "restricted 'to the narrowest jurisdiction deemed essential to maintaining discipline among troops in active service.'"[160] In none of these cases was the fact that the federal civilian courts had *no* jurisdiction over the alleged offenses sufficient to justify a trial by court-martial for civilian defendants.[161] As in *Toth*, Congress's failure to create federal court jurisdiction over the accuseds' offenses did not mean that court-martial jurisdiction was constitutionally necessary—if punishment for these offenses was necessary, Congress's remedy was to either carry these civilians as active-duty servicemembers or make their offenses triable in federal district court.[162]

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155. *See id.* at 41 (Frankfurter, J., concurring in the result); *id.* at 65 (Harlan, J., concurring in the result).

156. *See* Grisham v. Hagan, 361 U.S. 278, 280 (1960) (court-martial of government employee for capital offense); Kinsella v. United States *ex rel.* Singleton, 361 U.S. 234, 249 (1960) (court-martial of civilian dependent for non-capital offense); McElroy v. United States *ex rel.* Guagliardo, 361 U.S. 281, 283–84 (1960) (court-martial of government employee for non-capital offense).

157. U.S. CONST. art. I, § 8, cl. 14.

158. U.S. CONST. art. I, § 8, cl. 18.

159. *See Kinsella*, 361 U.S. at 239–40 ("It was said [in *Toth*] that the Clause 14 provision itself does not empower Congress to deprive people of trials under Bill of Rights safeguards . . . ." (internal quotations omitted)); *id.* ("We were therefore not willing to hold that power to circumvent those safeguards [afforded civilians in civilian trials] should be inferred through the Necessary and Proper Clause.") (quoting *Toth*, 350 U.S. at 21–22).

160. *Id.* (quoting *Toth*, 350 U.S. at 22).

161. *See generally id.*

162. *See generally McElroy*, 361 U.S. at 286–87 (referring to *Kinsella*, 361 U.S. at 245–46, for a description of such available alternative procedures). As one possible solution to the military's asserted need to punish conduct by government employees serving with the military overseas, the Court suggested in *McElroy* that Congress might use the "alternative types of procedure available to the Government in the prosecution of civilian dependents" – essentially vesting jurisdiction in the federal district courts for offenses committed overseas. *Id.* (noting that the enlistment of civilian employees as "specialists" also would solve the Army's jurisdictional dilemma because such accuseds would no longer be civilians with a right to avoid trial by court-martial).

As it relates to the current version of UCMJ Article 2(a)(10), and its applicability to contractors supporting the military, the Court's decision in *McElroy v. United States ex rel. Guagliardo*[163] is most instructive.[164] In *McElroy*, the Government argued that the Constitution permitted the court-martial of civilians "in the field" and that the constitutional concept of "in the field" could sustain Article 2(11) as a mechanism for court-martialing government employees and dependents located overseas.[165] In making this argument, the Government engaged in a lengthy reinterpretation of the historical materials relating to whether an armed force was "in the field" and urged that an army, and the civilians accompanying it, were "in the field" whenever it was *either* engaged in offensive or defensive operations *or* located beyond the jurisdictional reach of the United States courts.[166] The Government summarized its argument as follows:

> Thus, the historical concept of "in the field" does not turn on peace or war but rather on the location of the military as a group apart in a defensive or offensive posture, or away from its own civil jurisdiction. Accordingly, the general historical rationale which justifies military jurisdiction over civilians with forces in the field justifies the exercise of court-martial jurisdiction under Article 2(11) over civilians who serve with or are employed by the forces in territory where the United States is not sovereign. The basic reason why these forces have been sent over-seas is that they may be placed in a military posture with respect to a possible or potential enemy.[167]

The Court was not moved by the Government's attempt to recast the historical materials.[168] While the Court acknowledged prior courts-martial of sutlers and other civilians located outside the jurisdiction of the United States courts, the Court noted these courts-martial were permitted not solely because there were no functioning United States courts in the vicinity, but because these courts-martial occurred during war or hostilities with Indian

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163. 361 U.S. 281, 283–84 (1960).

164. *Id.* at 283–84.

165. Brief for Petitioner at 61 n.41, McElroy v. United States *ex rel.* Guagliardo, 361 U.S. 281 (1960) (No. 21), 1959 WL 101596 at *39 ("The Uniform Code of Military Justice uses the concept of 'in the field'—in connection with court-martial jurisdiction over civilians—only for 'time of war' (Article 2(10)). But the *constitutional* concept, as distinguished from its present statutory usage, is not so limited, and that concept supports the validity of Article 2(11). For, as we have pointed out, the latter provision covers troops stationed away from American civil jurisdiction."). The employees had been serving with the military in Morocco and occupied Berlin, respectively. *See McElroy*, 361 U.S. at 282–83.

166. Brief for Petitioner, *supra* note 165, at 52-61.

167. *Id.* at 60–61.

168. *See McElroy*, 361 U.S. at 284–85.

tribes in the frontier territories.[169] The Court also cited approvingly to Colonel Winthrop's view that "a civilian . . . cannot legally be made liable to the military law and jurisdiction, in time of peace."[170] Moreover, the *McElroy* Court expressed doubt that historical incidents of the court-martial of sutlers and other civilians could provide support for the constitutionality of court-martial jurisdiction over civilians.[171] In the Court's view, adopting language from Justice Frankfurter's concurrence in *Covert*, the historical materials were "too episodic, too meager, to form a solid basis in history, preceding and contemporaneous with the framing of the Constitution, for constitutional adjudication."[172]

3. The (Temporary?) End of Courts-Martial of Civilians "in the Field"

By 1960, the Supreme Court had struck down, in their entirety, both Article 3(a) of the UCMJ (creating court-martial jurisdiction over discharged servicemembers) and Article 2(11) (creating court-martial jurisdiction over government employees and civilians dependents accompanying the military overseas).[173] These decisions did not overtly strike down Article 2(10), which provided for courts-martial of civilians accompanying the military in the field in time of war.[174] Unlike Articles 3(a) and 2(11), however, Article 2(10) of the UCMJ was well-grounded in

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169. *See id.* at 284–86 ("Furthermore, those trials during the Revolutionary Period, on which it is claimed that court-martial jurisdiction rests, were all during a period of war, and hence are inapplicable here.") The *McElroy* Court also stated:

> To be sure, the 1872 opinion of the Attorney General, dealing with civilians serving with troops in the building of defensive earthworks to protect against threatened Indian uprisings, is entitled to some weight. However, like the other examples of frontier activities based on the legal concept of the troops' being 'in the field,' they are inapposite here. They were in time of 'hostilities' with Indian tribes or were in 'territories' governed by entirely different considerations.

Id. at 285–86.

170. *Id.* at 284 (quoting 1 WINTHROP, *supra* note 27, at 105).

171. *See id.*

172. *Id.* (quoting Reid v. Covert, 354 U.S. 1, 64 (1957) (Frankfurter, J., concurring)). The Government also tried to rely on prior Supreme Court decisions endorsing the naval court-martial of paymaster clerks, who served on ships but were not technically enlisted into the Navy. *Id.* at 284–85 (citing Johnson v. Sayre, 158 U.S. 109 (1895); *Ex parte* Reed, 100 U.S. 13 (1879)). The *McElroy* Court distinguished these cases, observing that these paymaster clerks were amenable to trial by court-martial not because they were "in the field" with the military, but because a Navy paymaster clerk's unique status rendered him "'in' the armed services for purposes of Clause 14 even though he had not formally been inducted into the military." *Id.* at 285 (quoting *Covert*, 354 U.S. at 23).

173. *See supra* Part II.C.2.

174. UCMJ art. 2(a)(10), 10 U.S.C. § 802(a)(10) (2006).

American history dating back to the nation's birth, both statutorily and in terms of longstanding (if irregular) practice.[175] That said, the Warren Court's efforts to narrow court-martial jurisdiction did not end at rejecting the UCMJ's expanded jurisdiction over civilians. Nine years after it finished off Congress's attempt to create court-martial jurisdiction over government employees, civilian dependents, and discharged soldiers, the Warren Court turned to the scope of court-martial jurisdiction over servicemembers. In a majority opinion by Justice Douglas that was openly disdainful of the military justice system,[176] the Court's 1969 decision in *O'Callahan v. Parker* held that the military could not even court-martial servicemembers unless their offense was connected to their military service.[177]

Against this backdrop of judicial hostility to the institution of courts-martial, the United States Court of Military Appeals—then the court of last resort for direct judicial review of court-martial convictions[178]—issued a decision in 1970 that, while not overtly striking down Article 2(10), made that article useless as a practical matter. In *United States v. Averette*,[179] the Court of Military Appeals held that the "time of war" limitation placed on courts-martial under Article 2(10) required a war declared by Congress, thereby depriving the military of jurisdiction to court-martial civilians accompanying the United States in Vietnam.[180]

The majority's approach in *Averette* suggests a court that found its result inevitable given the Warren Court's attitude toward court-martial jurisdiction. The majority began by defensively asserting something that was not even at issue: that, in the court's view, neither *O'Callahan*[181] nor the Supreme Court's personal jurisdiction decisions from 1955 to 1960[182] controlled whether Article 2(10) could be applied constitutionally in the context of a *formally* declared war.[183] Turning to the issues actually presented by the case, the majority opinion in *Averette* acknowledged that a large body of case law, though not specifically in the context of court-

175. *See* 1 WINTHROP, *supra* note 27, at 99 (discussing civilians who served with the Army in the field were subject to trial by court-martial).

176. *See, e.g.*, O'Callahan v. Parker, 395 U.S. 258, 265–66 (1969) ("[C]ourts-martial as an institution are singularly inept in dealing with the nice subtleties of constitutional law . . . . A civilian trial, in other words, is held in an atmosphere conducive to the protection of individual rights, while a military trial is marked by the age-old manifest destiny of retributive justice.").

177. *See id.* at 272–73.

178. In 1983, Congress for the first time provided for direct Supreme Court review of cases reviewed by the United States Court of Military Appeals, now known as the United States Court of Appeals for the Armed Forces. 28 U.S.C. § 1259 (amended 2006).

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

180. *Id.*

181. *See O'Callahan*, 395 U.S. 258.

182. *See supra* Part II.C.2.

183. *Averette*, 41 C.M.R. at 364.

martial jurisdiction over civilians, had construed the phrase "time of war" to include undeclared wars.[184] Nevertheless, in a nod to the Warren Court's professed disdain for the military justice system, the *Averette* majority stated that "[a]s a result of the most recent guidance in this area from the Supreme Court we believe that a strict and literal construction of the phrase 'in time of war' should be applied."[185] The court concluded by recognizing the counterintuitive nature of its decision:

> We emphasize our awareness that the fighting in Vietnam qualifies as a war as that word is generally used and understood. By almost any standard of comparison—the number of persons involved, the level of casualties, the ferocity of the combat, the extent of the suffering, and the impact on our nation—the Vietnamese armed conflict is a major military action. But such a recognition should not serve as a shortcut for a formal declaration of war, at least in the sensitive area of subjecting civilians to military jurisdiction.[186]

While the majority opinion in *Averette* based its holding on statutory construction, which theoretically leaves open the possibility of corrective legislation, the court reserved judgment on all constitutional issues.[187] Indeed, the court left open the possibility that a declaration of war might not be sufficient to permit the court-martial of civilians covered by Article 2(10).[188]

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184. *Id.* at 365.

185. *Id.*

186. *Id.* at 365–66. The United States Court of Claims subsequently followed *Averette*'s holding and ruled that Article 2(10) required a formal declaration of war for court-martial jurisdiction over civilians to attach. Robb v. United States, 456 F.2d 768, 771 (Cl. Ct. 1972). In so holding, the court acknowledged that it was "greatly influenced" by *Averette*, a decision by a court with "special competence" in administering the military justice system. *Id.* Indeed, the concurring opinion by Judge Nichols, while acknowledging the wisdom in following the Court of Military Appeals' decision, was hardly a ringing endorsement of *Averette*'s reasoning: "Ordinarily, it is prudent to declare that a decision we choose to follow has a basis in reason, but in the special circumstances we have here, that is not the case." *Id.* at 772 (Nichols, J., concurring). Like *Averette* and *Robb*, the D.C. Circuit issued a decision one year before *Averette* in which it explained that the Warren Court's court-martial jurisdiction cases suggested that Article 2(10) should be narrowly construed. *See generally* Latney v. Ignatius, 416 F.2d 821, 823 (D.C. Cir. 1969). *Latney*, however, arguably differed from *Averette* and *Robb* in that there does not even appear to be a colorable argument that Latney was "in the field," as he was a merchant seaman whose work brought him to Vietnam but who was not assimilated into military operations. *See generally id.*

187. *See Averette*, 41 C.M.R. at 365.

188. *Id.* ("We do not presume to express an opinion on whether Congress may constitutionally provide for court-martial jurisdiction over civilians in time of a declared war when these civilians are accompanying the armed forces in the field.").

In any event, the practical effect of *Averette* was that it ended all courts-martial of civilians under Article 2(10).[189] At the time the Court of Military Appeals decided *Averette*, the Supreme Court did not have certiorari jurisdiction over Court of Military Appeals decisions.[190] Therefore, the United States could not seek further review of *Averette* even if it were so inclined. There also was no attractive roadmap for mounting a future challenge to *Averette*'s holding. If the Government wanted to seek an overruling of *Averette*, either through another case in the Court of Military Appeals or in the Supreme Court (after the Supreme Court received certiorari jurisdiction in 1983), the Government would have had to proceed with a court-martial that had a zero chance of success at the trial level. Any military judge would have had to dismiss charges brought against a civilian under Article 2(10) on the authority of *Averette*. From there, the Government would have had to take an appeal to the relevant service's intermediate appellate court[191]—then called courts of military review—where the Government assuredly would have lost again based on *Averette*. Only after completing these two fool's errands could the Government have challenged the soundness of *Averette* before the Court of Military Appeals, a court that could actually do something about *Averette*.[192] Given the military's focus on defending the country instead of engineering test cases, no such effort to revisit *Averette* occurred.[193]

D. Congressional Attempts to Reinstate Jurisdiction Over Crimes By Civilians Accompanying the Military Overseas

By 1970 the judiciary had effectively gutted Congress's efforts to authorize courts-martial of civilians under the UCMJ.[194] In responding to the Government's complaint that courts-martial were necessary to bring these civilians to justice, the Supreme Court suggested other mechanisms for addressing misconduct overseas by dependents and civilian

189. *See infra* notes 190–93.

190. *See supra* note 179.

191. UCMJ art. 62, 10 U.S.C. § 862 (2006) (providing for Government appeals to military justice system's intermediate appellate courts of court-martial rulings dismissing charges against an accused).

192. *See* UCMJ art. 67, 10 U.S.C. § 867 (2006) (setting forth appellate jurisdiction of United States Court of Appeals for the Armed Forces, formerly known as the United States Court of Military Appeals).

193. *See* Eugene R. Fidell, *Criminal Prosecution of Civilian Contractors By Military Courts*, 50 S. TEX. L. REV. 845, 850 (2009).

194. As noted previously, the only exception was Congress's provision for court-martial jurisdiction over "persons in custody of the armed forces serving a sentence imposed by a court-martial" – essentially servicemembers who had been court-martialed and had their discharge from the military become final while still serving the sentence to imprisonment imposed by the court-martial. *See supra* note 11.

employees.[195] The Court observed that Congress had the power to formally assimilate civilian employees into the uniformed services as "specialists" akin to the Navy's Seabees construction battalions.[196] The Court also referenced Congress's power to create jurisdiction in Article III courts for those accused of crimes overseas who are not amenable to trial by court-martial.[197]

Congress responded to the jurisdictional gap caused by these court decisions by considering a number of different bills that would have created federal court jurisdiction over offenses committed by civilians accompanying the military overseas.[198] After several bills floundered without passage, Congress enacted the Military Extraterritorial Jurisdiction Act, or MEJA, in 2000.[199] In its current form, MEJA provides for federal district court jurisdiction over felonies committed overseas by certain current or discharged servicemembers, civilian dependents, and civilians employed by the armed forces overseas, including contractors at any level, so long as their employment relates to supporting the mission of the Defense Department overseas.[200] Since MEJA's enactment, a handful of discharged servicemembers and civilian contractors have been prosecuted in federal court for offenses allegedly committed while serving with military forces overseas.[201]

Despite its creation of federal district court jurisdiction under MEJA, Congress also sought to revive court-martial jurisdiction over civilians through its 2006 amendment to Article 2(a)(10) of the UCMJ.[202] This amendment to Article 2(a)(10) seeks to legislatively overrule *Averette*[203] in

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195. *See McElroy*, 361 U.S. at 286–87.

196. *See id.*

197. *See Toth*, 350 U.S. at 21 (noting Congress's power to create such jurisdiction in Article III courts); *see also Kinsella*, 361 U.S. at 245 (noting that Congress had not acted to provide for Article III jurisdiction over the civilians not amenable to trial by court-martial).

198. *See* Gregory A. McClelland, *The Problem of Jurisdiction Over Civilians Accompanying the Forces Overseas – Still With Us*, 117 MIL. L. REV. 153, 199–201 (1987) (detailing a number of failed bills to create federal court jurisdiction over civilians accompanying the military overseas); Fredrick A. Stein, *Have We Closed the Barn Door Yet? A Look at the Current Loopholes in the Military Extraterritorial Jurisdiction Act*, 27 HOUS. J. INT'L L. 579, 591 (2005) ("In fact, in the forty-plus years since the *Covert* decision, twenty-seven bills have been introduced in Congress to fill the void.").

199. *See* 18 U.S.C. §§ 3261–67 (2006); *see generally* Glen R. Schmitt, *Closing the Gap in Criminal Jurisdiction Over Civilians Accompanying the Armed Forces Abroad—A First Person Account of the Creation of the Military Extraterritorial Jurisdiction Act of 2000*, 51 CATH. U. L. REV. 55 (2001) (comprehensive account of the events leading up to MEJA's enactment).

200. *See* 18 U.S.C. § 3261 (2006).

201. *See, e.g.*, United States v. Arnt, 474 F.3d 1159, 1162 (9th Cir. 2007); United States v. Green, No. 5:06CR-19-R, 2008 WL 4000868, at *6–7 (W.D. Ky. Aug. 26, 2008).

202. *See* 10 U.S.C. § 802(a)(10) (2006).

203. *Averette*, 41 C.M.R. at 365.

order to authorize courts-martial of civilians accompanying the armed forces "in the field" when there has been no formal declaration of war.[204] Mechanically, the amendment accomplishes this goal by striking the phrase "war" from Article 2(a)(10) of the UCMJ, which the *Averette* court construed as requiring a formally declared war,[205] and replacing it with "declared war or a contingency operation."[206] Thus, as amended, Article 2(a)(10) provides that the following persons are subject to the UCMJ: "In time of declared war or a contingency operation, persons serving with or accompanying an armed force in the field."[207]

There is virtually no legislative history with respect to this amendment.[208] The amendment was added to the Senate's version of the 2007 defense authorization bill late in the legislative process through a floor amendment offered by Senator Lindsey Graham (R-SC), and the amendment passed unanimously without debate.[209] The House merely accepted this amendment without debate or comment.[210] A "contingency operation" is defined by statute as a military operation that either: (1) is designated by the Secretary of Defense as one 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 (2) results in the calling up of the reserves or the retention on active duty of servicemembers who otherwise would be eligible to retire or be discharged.[211] Contingency operations have included the military operations in Afghanistan and Iraq, and also can include noncombat national emergencies (e.g., Hurricane Katrina) if the event in question results in calling up the reserves or temporarily stopping military discharges and retirements.[212] Thus, depending on how the other limiting concept in Article 2(a)(10)—the requirement that the military be "in the field"—is construed, the elimination of the requirement of a declared war could result in courts-martial of civilians with no connection whatsoever to the combat environment.[213]

The military's use of amended Article 2(a)(10) has not, in this author's view, been particularly praiseworthy. The military's first use of amended

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204. *See* UCMJ art. 2(a)(10) (2008), 10 U.S.C. § 802(a)(10) (2006).

205. *Averette*, 41 C.M.R. at 365.

206. *See* UCMJ art. 2(a)(10) (2008), 10 U.S.C. § 802(a)(10) (2006).

207. *Id.*

208. *See* Kara M. Sacilotto, *Jumping the (Un)Constitutional Gun?: Constitutional Questions in the Application of the UCMJ to Contractors*, 37 PUB. CONT. L.J. 179, 185–86 (2008) (discussing enactment of amendment to Article 2 (a)(10) of the UCMJ).

209. *Id.*

210. *Id.*

211. 10 U.S.C. § 101(a)(13) (2006).

212. *See* Sacilotto, *supra* note 209, at 185; *see also* RELYEA, *supra* note 11, at 13–16 (2001) (listing declared national emergencies from 1976 to 2001).

213. *See generally* 10 U.S.C. § 806(a)(10) (2006).

Article 2(a)(10) involved the court-martial of Alaa Mohammed Ali, a civilian contractor with dual Canadian–Iraqi citizenship who had supported the Army as an interpreter in Iraq.[214] Ali pleaded guilty to misappropriating a knife, obstruction of justice, and making a false official statement, and he received a sentence of five months' imprisonment.[215] Because the principal route to appellate review—a punitive discharge from the service—is unavailable to a civilian, and his imprisonment did not reach the statutory one-year threshold, Ali had no ability to obtain direct judicial review of his court-martial. [216] Ali nevertheless sought appellate review in the military appellate courts, which by statute had no jurisdiction, and his petition was predictably denied.[217]

After the *Ali* court-martial, the military set its sights on American citizen contractors accompanying the armed forces overseas. In three separate incidents, the military threw civilian contractors into pretrial confinement or otherwise restricted their liberty at overseas bases pending plans to court-martial them under amended Article 2(a)(10).[218] Each of these actions by the military was met with petitions for writs of habeas corpus filed in federal district court, and in each case the Defense Department quickly dropped plans to proceed with courts-martial rather than defending against a constitutional challenge in federal court.[219] Of

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214. *See generally* Emma Schwartz, *First Contractor Charged Under Military Justice System*, U.S. NEWS & WORLD REPORT (Apr, 5, 2008), http://www.usnews.com/news/iraq/articles/2008/04/05/first-contractor-charged-under-military-justice-system.html; Press Release, Commander, Multi-National Corps-Iraq, Civilian Contractor Convicted at a Court-Martial, No. 20080623-01 (Jun. 23, 2008), http://www.usf-iraq.com/?option=com_content&task=view&id=20671&Itemid=128 (noting that first civilian court-martial under the amended UCMJ Art. 2(a)(10) resulted in a sentence of five months confinement).

215. *See* Press Release, Civilian Contractor Convicted at a Court-Martial, *supra* note 214, at 1.

216. *See generally* UCMJ art. 66(b) (amended 2006), 10 U.S.C. § 866(b) (2006).

217. Ali v. Austin, Misc. No. 09-8001/AR (C.A.A.F. Nov. 5, 2008), http://www.armfor.uscourts.gov/journal/2008Jrnl/2008Nov.htm (summary disposition denying writ-appeal petition).

218. Petitioner's Petition for a Writ of Habeas Corpus at 3, Adolph v. Gates, (No. 1:09-cv-00135) (D.D.C. Jan. 23, 2009); Petitioner's Petition for a Writ of Habeas Corpus, Breda v. Gates, (No. 1:09-cv-00210) (D.D.C. Feb. 4, 2009); Petitioner's Petition for a Writ of Habeas Corpus at 5, Price v. Gates, (No. 1:09-cv-00106) (D.D.C. Jan. 16, 2009). *See* Megan McCloskey, *Civilian Challenging His Expected Court-Martial*, LAS VEGAS SUN (Jan. 22, 2009), *available at* http://www.lasvegassun.com/news/2009/jan/22/civilian-challenging-his-expected-court-martial. The author of this Article was lead counsel for the petitioners with respect to the *Price* and *Adolph* petitions.

219. *See* Petition for Writ of Habeas Corpus at 12–13, Price v. Gates, No. 1:09-cv-00106 (D.D.C. Jan. 26, 2009); Voluntary Dismissal Without Prejudice of Petitioner's Petition for Writ of Habeas Corpus at 1–2, Adolph v. Gates, (No. 1:09-cv-00135) (D.D.C. Feb. 26, 2009), *available at* http://www.caaflog.com-a.googlepages.com/adolphdismissal.pdf; United States' Motion to Dismiss Petitioner's Petition for a Writ of Habeas Corpus, Breda v. Gates, (No. 09-cv-210) (D.D.C. Feb. 18, 2009), *available at*

course, the Defense Department's decision not to go forward with these courts-martial provided only partial solace to the civilian contractors involved, who were all placed in pretrial confinement or had their freedom of movement curtailed, without the benefit of a bail hearing, based on planned court-martial proceedings that the military, when pushed, decided not to defend.[220]

III. THE CONSTITUTIONALITY OF COURT-MARTIALING CIVILIANS ACCOMPANYING THE MILITARY "IN THE FIELD"

While this Article's review of the history of court-martial jurisdiction over civilians might seem something like a forced march, it is a necessary one in order to analyze the constitutionality of the current form of Article 2(a)(10). This is true for two reasons. First, the prior judicial treatment of court-martial jurisdiction over civilians is the precedential landscape a court will have to navigate, distinguish, or reject in determining whether Congress has the constitutional power to create the court-martial jurisdiction set forth in Article 2(a)(10). Second, if a court found that existing precedent did not control the question, historical practice concerning court-martial jurisdiction over civilians and the historical understanding of Congress's powers in this regard surely would enter into the constitutional analysis.

Taking these issues one at a time, it is this author's view that the existing judicial precedent creates a significant, and perhaps insurmountable, obstacle to the enforcement of Article 2(a)(10). Moreover, even if a court were to cast aside existing precedent as *dicta*, or the Supreme Court repudiated existing case law in this area, there is little in the historical practice or in the historical understanding of Congress's powers to support the constitutionality of Article 2(a)(10) in the context of modern warfare.

A. Supreme Court Precedent as an Obstacle to Enforcement of Article 2(a)(10)

While the Supreme Court's court-martial jurisdiction decisions from 1955 to 1960 did not directly address the constitutionality of what was then Article 2(10) and is now Article 2(a)(10), these decisions arguably resulted in holdings that bar such courts-martial. At a bare minimum, these cases established an analytical structure for considering court-martial jurisdiction that would have to be completely disregarded, or repudiated by the Supreme Court, in order to uphold Article 2(a)(10).

In *Toth*, the Supreme Court struck down court-martial jurisdiction over a discharged airman on the theory that Congress's constitutional power to

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http://www.caaflog.com-a.googlepages.com/Breda.pdf.

220. *See supra* notes 218–19.

regulate the land and naval forces[221] "would seem to restrict court-martial jurisdiction to persons who are actually part of the armed forces."[222] Two years later, the plurality opinion in *Covert*[223] noted that prior lower court decisions had upheld the court-martial of civilians, and mused that "[t]o the extent that these cases can be justified . . . they must rest on the Government's 'war powers,'" and not on Congress's power to regulate the land and naval forces.[224] As a plurality opinion, *Covert* lacks precedential value[225] and also stops far short of endorsing the prior case law upholding courts-martial of civilians, even in time of war.[226] Nevertheless, even if the plurality opinion in *Covert* could be misread as accepting some degree of court-martial jurisdiction over civilians, that opinion clearly would not sanction the court-martial of civilians other than in the context of war.[227] Moreover, in 1960, a majority of the Court reaffirmed in *Kinsella* that the Constitution's grant of power to Congress to regulate the land and naval forces did not authorize the court-martial of civilians.[228]

Subsequent Supreme Court case law appears to treat the Court's jurisdiction cases from 1955 to 1960 as effecting a blanket prohibition on the court-martial of civilians. In *O'Callahan v. Parker*,[229] the 1969 case in which the Court imposed a service-connection test on the court-martial of servicemembers, the Court described its prior decisions as holding "that court-martial jurisdiction cannot be extended to reach any person not a member of the Armed Forces at the times of both the offense and the trial."[230] As if to punctuate that its prior decisions were not limited to their precise facts, the Court offered a further explanation of its precedent, stating: "These cases decide that courts-martial have no jurisdiction to try those who are not members of the Armed Forces, no matter how intimate the connection between their offense and the concerns of military discipline."[231]

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221. U.S. CONST. art. I, § 8, cl. 14.

222. United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 15 (1955).

223. Reid v. Covert, 354 U.S. 1, 33 (1957).

224. *Id.* at 33.

225. *See* CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 81 (1987) ("As the plurality opinion [of a prior case] did not represent the views of a majority of the Court, we are not bound by its reasoning." (footnote omitted)).

226. *See Covert*, 354 U.S. at 33.

227. *See generally id.*

228. Kinsella v. United States *ex rel.* Singleton, 361 U.S. 234, 240 (1960) ("The holding of [*Toth*] may be summed up in its own words, namely, that "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."").

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

230. *Id.* at 267.

231. *Id.*

The easy response is that *O'Callahan* itself was wrongly decided and overruled by the Supreme Court eighteen years later in *Solorio v. United States*.[232] As a result, any language pulled from the majority opinion in *O'Callahan* is arguably suspect both for this reason and because the opinion itself is gratuitously intemperate.[233] In this author's view, this is a fair point. However, in rejecting *O'Callahan*'s service-connection test, the *Solorio* Court, if anything, endorsed the observations in *O'Callahan* concerning the personal jurisdiction of courts-martial. As the Court explained in *Solorio*:

> In an unbroken line of decisions from 1866 to 1960, this Court interpreted the Constitution as conditioning the proper exercise of court-martial jurisdiction over an offense on one factor: the military status of the accused. This view was premised on what the Court described as the "natural meaning" of Art. I, § 8, cl. 14, as well as the Fifth Amendment's exception [from the right of grand jury presentment] for "cases arising in the land or naval forces."[234]

Indeed, as for the "natural meaning" of Congress's constitutional power to regulate the land and naval forces, the *Solorio* Court cited approvingly[235] to the *Covert* plurality's observation that "the power granted does not extend to civilians . . . . The term 'land and naval Forces' refers to persons who are members of the armed services and not to their civilian wives, children and other dependents."[236] One could argue that the *Solorio* Court's analysis is *dictum*, designed merely to show that restricting court-martial jurisdiction over *servicemembers* had no longstanding precedential support.[237] Nevertheless, the language actually used by the *Solorio* Court, at a bare minimum, is an uncritical acknowledgement of the Court's existing precedent rejecting court-martial jurisdiction over civilians.[238]

The best argument against a blanket constitutional prohibition on the court-martial of civilians is that this is almost surely not what the Constitution's Framers intended or understood. When the Framers drafted the Constitution, and the states ratified it, the Army Articles of War contained an explicit provision allowing for the court-martial of certain civilians accompanying an army in the field.[239] The Framers had just endured the American Revolution, where a handful of civilians were in fact court-martialed under this provision.[240] This court-martial jurisdiction over

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232. *See* Solorio v. United States, 483 U.S. 435 (1987).
233. *See id.*; *see, e.g.*, *O'Callahan*, 395 U.S. at 265–66.
234. *Solorio*, 483 U.S. at 439 (citations omitted).
235. *See id.*
236. *Covert*, 354 U.S. at 19–20.
237. *See generally Solorio*, 483 U.S. 439.
238. *See id.*
239. *See supra* notes 27–34 and accompanying text.
240. *See supra* notes 64–65 and accompanying text.

civilians remained a feature of the Army Articles of War following adoption of the Constitution and was reenacted in 1806 and multiple times thereafter.[241]

Since the Framers certainly believed that some limited court-martial jurisdiction over civilians was constitutionally permissible, a holding to the contrary can rest only on an acknowledgement that this was a "new" restriction on congressional power, discovered and/or created long after adoption of the Constitution and likely in contravention of the Framers' contemporaneous understanding. A more defensible argument for the unconstitutionality of Article 2(a)(10), one that will be explored below and more fully in Part III.C, is that the Constitution did not, and does not, provide a blanket prohibition on the court-martial of civilians. Rather, the Constitution permits—and always has permitted—the court-martial of civilians in certain narrowly defined circumstances, but those circumstances simply no longer exist. In any event, given the Supreme Court's characterization as a holding of the Court its view that the "land and naval Forces" includes only actual servicemembers,[242] there seems little basis for this limitation on Congress's powers being disturbed at a level lower than the Supreme Court itself.

The other important analytical construct from the 1955–1960 court-martial jurisdiction cases is the Supreme Court's observation that Congress's power to authorize courts-martial must be "limit[ed] to the least possible power adequate to the end proposed."[243] As the Court explained in both *Toth*[244] and *Kinsella*,[245] this principle means that courts-martial must be limited "to the narrowest jurisdiction deemed absolutely essential to maintaining discipline among troops in active service."[246] It is difficult to see how Article 2(a)(10) could pass this test.

As an initial matter, the Supreme Court has "seriously question[ed]" whether military necessity is even a relevant issue when it comes to court-martialing civilians, given its prior holding that Congress's power to regulate the land and naval forces simply does not extend to court-martialing civilians.[247] Moreover, the Supreme Court held in its jurisdiction decisions of the 1950s and 1960s that the military could not satisfy this test even though there existed no other means for subjecting the civilians at issue to United States law.[248] While the Supreme Court found Congress's failure to create federal court jurisdiction did not support an extension of

241. *See supra* notes 43–48 and accompanying text.

242. *See Kinsella*, 361 U.S. at 240 (citing *Toth*, 390 U.S. at 15).

243. *Toth*, 350 U.S. at 23; *see also* McElroy v. United States *ex rel.* Guagliardo, 361 U.S. 281, 286 (1960) (quoting with approval the same language from *Toth*).

244. *See Toth*, 350 U.S. at 22–23.

245. *See Kinsella*, 361 U.S. at 240.

246. *Id.* at 240 (citing *Toth*, 350 U.S. at 22).

247. *Kinsella*, 361 U.S. at 244.

248. *See McElroy*, 361 U.S. at 286; *Toth*, 350 U.S. at 21.

court-martial jurisdiction to civilians in these cases, the current existence of a readily available means to try civilians in federal court under MEJA severely undermines any claim by the military that it *needs* court-martial jurisdiction, if such an inquiry is even appropriate.[249] The question, therefore, is not whether the military has a need to punish the civilian misconduct in question, but why such civilian misconduct must be punished in a court-martial setting, when a perfectly usable federal court forum remains available under MEJA?

Indeed, the Secretary of Defense's direction with respect to Article 2(a)(10) is that the Defense Department must advise the Justice Department of any contractor misconduct that constitutes a federal felony offense, so the Justice Department can decide whether to proceed with a federal court proceeding under MEJA.[250] The Secretary of Defense has further directed that military commanders may proceed with a court-martial in such cases only if the Justice Department declines federal court prosecution.[251] Thus, courts-martial may proceed under Article 2(a)(10) only in two situations: (1) where the United States has a federal court forum available to it under MEJA but decides not to proceed in federal court; or (2) where the offense at issue is one for which Congress has decided not to provide a federal court forum.[252] These are both instances where the United States has *chosen* to deprive itself of a federal civilian court forum, through legislation or prosecutorial discretion, and it is difficult to conclude that the United States government's own policy choices create the sort of necessity required for the extraordinary exercise of court-martial jurisdiction over civilians, at least under the Supreme Court's existing precedent.[253]

Looking at the problem of necessity more broadly, imagine that MEJA did not exist and that, for whatever reason, it was impossible to create a

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249. If the Constitution does not grant Congress the power to create court-martial jurisdiction over persons not actually members of the land and naval Forces, the needs of military discipline presumably would not even enter the equation. *See Kinsella*, 361 U.S. at 240; *Toth*, 350 U.S. at 15.

250. Memorandum from the Secretary of Defense Regarding UCMJ Jurisdiction Over DoD Civilian Employees, DoD Contractor Personnel, and Other Persons Serving With or Accompanying the Armed Forces Overseas During Declared War and in Contingency Operations (Mar. 10, 2008), http://www.justice.gov/criminal/hrsp/docs/03-10-08dod-ucmj.pdf [hereinafter SECDEF Memorandum]; *see also* Charles T. Kirchmaier, *Command Authority Over Contractors Serving With or Accompanying the Force*, 12 ARMY LAW., 35–36 (describing guidance in SECDEF Mem.).

251. SECDEF Memorandum, *supra* note 250, attach. 2 at ¶ 4.

252. *See generally* SECDEF Memorandum, *supra* note 250.

253. *Kinsella*, 361 U.S. at 244 (rejecting court-martial jurisdiction over non-capital offenses because "it would place in the hands of the military an unreviewable discretion to exercise jurisdiction over civilian dependents simply by downgrading the offense, thus stripping the accused of his constitutional rights and protections"); *Toth*, 350 U.S. at 21 (rejecting court-martial jurisdiction over discharged airman where Congress had not created federal court jurisdiction over him but concededly could have done so).

federal court forum for civilians accompanying the military in the field. Even under that alternative universe, the United States military still would have difficulty showing that the trial of civilians by court-martial, with its associated diminution of rights, satisfies the constitutional principle that court-martial jurisdiction must be limited "to the narrowest jurisdiction deemed absolutely essential to maintaining discipline among troops in active service."[254] From the time the Court of Military Appeals decided *Averette*[255] until the amendment of Article 2(a)(10) in 2006, the military had no power whatsoever to court-martial civilians accompanying the military overseas.[256] For the first thirty of those thirty-six years, the United States did not even have the ability to try these civilians in federal district court unless their conduct occurred in the United States' special maritime and territorial jurisdiction[257] or violated one of the few federal laws with extraterritorial effect.[258] Nevertheless, the military managed to get by without the ability to prosecute government employees and civilian contractors in courts-martial, even if (prior to 2000) it meant that no federal court could take action with respect to their misconduct.

Since 2006, the military has, to this author's knowledge, tried only one civilian by court-martial.[259] As the Supreme Court noted with respect to the court-martial of civilian dependents, such a low number of civilian courts-martial strongly suggests that denying this power to the military would not create a crisis in the ranks.[260] Thus, the military's apparent ability to survive since 1970 with no capacity to court-martial civilians serving with the military overseas, the fact that the military has conducted only one such court-martial since Congress amended Article 2(a)(10) in 2006, and the availability of a federal court forum under MEJA suggest that court-martial jurisdiction over civilians is not "absolutely essential to maintaining discipline among troops in active service."[261]

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254. *Kinsella*, 361 U.S. at 240 (citing *Toth*, 350 U.S. at 22).

255. United States v. Averette, 41 C.M.A. 363 (C.M.A. 1970).

256. *See supra* notes 186–213 and accompanying text.

257. *See* 18 U.S.C. § 7 (2006) (setting forth special maritime and territorial jurisdiction in which federal criminal statutes ordinarily apply); *see also supra* notes 186–202 and accompanying text (describing absence of courts-martial jurisdiction over civilians from issuance of *Averette* through enactment of MEJA in 2000).

258. *See supra* note 39.

259. *See supra* notes 215–18 and accompanying text.

260. *See Kinsella*, 361 U.S. at 244 ("Even if the necessity for court-martial jurisdiction be relevant in cases involving deprivation of the constitutional rights of civilian dependents, which we seriously question, we doubt that the existence of the small number of noncapital cases now admitted by the Government in its brief here, when spread over the world-wide coverage of military installations, would of itself bring on such a crisis." (footnote omitted)); *see also Toth*, 350 U.S. at 22 ("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.").

261. *Toth*, 350 U.S. at 22.

B. Historical Practice Does Not Support the Constitutionality of Article 2(a)(10)

As discussed in Part III.A., existing Supreme Court precedent poses a substantial obstacle to a constitutional argument that Article 2(a)(10) of the UCMJ may be employed to subject civilians to trial by courts-martial. As a result, the Government's best approach in trying to save Article 2(a)(10) is likely not to try to *satisfy* the tests set out in existing Supreme Court precedent, but to *avoid* these tests either by waving off the language in these cases as *dicta*, despite the Court's contrary characterization,[262] or arguing that the Warren Court's analysis of court-martial jurisdiction is flawed and ought to be overruled.

That the Supreme Court might be willing to distance itself from its prior court-martial jurisdiction precedent is not exactly an unfathomable notion. The Warren Court's attitude toward the court-martial system was radically different from those of prior and later iterations of the Supreme Court, with the Court considerably more deferential to claims of military necessity since at least the mid-1970s.[263] Indeed, in two recent cases, the Roberts Court has reaffirmed its inclination to defer to Congress's judgment when exercising its power to regulate the land and naval forces and to raise armies.[264] Beyond that, the context of the Court's court-martial jurisdiction cases could not have been worse for the Government. The Court established its analytical construct for assessing the constitutionality of courts-martial jurisdiction in cases where Congress had radically expanded court-martial jurisdiction to cover groups of civilians—discharged soldiers, dependents, and civilian employees serving in time of peace—for which there was no longstanding historical precedent.[265] Therefore, it is not beyond the realm of possibility that the Supreme Court might one day cast aside its court-martial jurisdiction jurisprudence in favor of a different, less inherently hostile approach. This is particularly true as it relates to groups, such as civilians

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262. In *Kinsella*, the Court characterized *Toth* as "holding" that the Constitution's grant of power to Congress 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." *Kinsella*, 361 U.S. at 240 (quoting *Toth*, 350 U.S. at 15).

263. *See also* Steven B. Lichtman, *The Justices and the Generals: A Critical Examination of the U.S. Supreme Court's Tradition of Deference to the Military, 1918–2004*, 65 MD. L. REV. 907, 915 (2006); Diane H. Mazur, *Rehnquist's Vietnam: Constitutional Separatism and the Stealth Advance of Martial Law*, 77 IND. L.J. 701, 704 (2002). *See generally* John F. O'Connor, *Statistics and the Military Deference Doctrine: A Response to Professor Lichtman*, 66 MD. L. REV. 668, 686–95 (2007).

264. *See* Winter v. Natural Res. Def. Council, 129 S. Ct. 365, 377 (2008) (citing Gilligan v. Morgan, 413 U.S. 1, 10 (1973) and Goldman v. Weinberger, 475 U.S. 503, 507 (1986)); Rumsfeld v. Forum for Acad. & Inst. Rights, Inc., 547 U.S. 47, 58 (2006) (citing Rostker v. Goldberg, 453 U.S. 57, 70 (1981)).

265. *See supra*, Part II.C.2 (discussing Supreme Court's court-martial jurisdiction decisions from 1955 to 1960).

serving with the military "in the field," for which there is at least some historical practice on which to draw.[266]

The problem, though, is that if one throws out the Warren Court's approach to court-martial jurisdiction, that analytical model must be replaced with something else, and there are no good candidates that would seem to render Article 2(a)(10) constitutional. When the Rehnquist Court cast aside the Warren Court's service-connection test for court-martialing soldiers, it did so based on the plain language of Clause 14—Congress's grant of power to regulate the "land and naval Forces"[267]—and also considered whether historical practice shed any light on the issue.[268] With respect to Article 2(a)(10), the Constitution's plain language and historical practice, like existing precedent, support a finding of unconstitutionality.

In *Solorio*, the Supreme Court eliminated the service-connection test for court-martialing soldiers because, in its view, the plain language of Clause 14 limited *who* may be subject to trial by court-martial—those in a "military status"—but did not limit the types of offenses for which those in a military status may be court-martialed.[269] With respect to civilian contractors and others serving with the military, however, the Constitution's plain language cuts the other way. This plain language granting Congress the power to regulate "the land and naval Forces" supports the Warren Court's view, apparently endorsed in *Solorio*, that this grant of power "would seem to restrict court-martial jurisdiction to persons who are actually members or part of the armed forces."[270]

In addition, while historical practice suggests that there are some circumstances that would support the constitutional subjection of civilians to trial by court-martial, the historical materials seem to limit such courts-martial to situations that no longer exist. As Colonel Winthrop explained, the most typical historical punishment for misbehavior by civilians accompanying an army was "expulsion from the station or beyond the lines."[271] In those few instances where summary expulsion from the camp was inadequate, the general practice was to turn the offender over to civil

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266. *See supra* Part II.A.2 (detailing historical practice regarding court-martial of civilians serving "in the field").

267. U.S. CONST. art. I, § 8, cl. 14.

268. *See Solorio*, 483 U.S. at 445.

269. *Id.* at 439–40.

270. *Kinsella*, 361 U.S. at 240 (quoting *Toth*, 350 U.S. at 15); *see also Solorio*, 483 U.S. at 439–40 (holding that jurisdiction for courts-martial depends on whether the accused's status falls within the term "land and naval Forces"). *But see Covert*, 354 U.S. at 33 (suggesting that "[t]o the extent that [prior courts-martial of civilians during time of war] can be justified, . . . they must rest on the Government's 'war powers,'" and not Congress's power to regulate the land and naval forces.) But the *Covert* plurality's conditional language is itself telling, as it does not seem that Congress's other war powers (such as the power to declare war) would better justify courts-martial of civilians in the absence of a formal declaration of war.

271. 1 WINTHROP, *supra* note 27, at 99.

authorities for civilian prosecution. As Captain De Hart explained in his 1859 treatise:

> But it must be remembered that the application of [military] laws to [civilian followers of the army], would not be warranted in time of peace, under the ordinary conditions of camps and garrisons—and, wherever civil judicature is in force, the followers of the camp, who are accused of crimes punishable by the known laws of the land, must be given up to the civil magistrate.[272]

Similarly, in 1814, Attorney General Rush opined that a statute permitting court-martial of civilians serving on vessels operating under a letter of marque[273] applied only when the vessel was out of the United

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272. DE HART, *supra* note 26, at 23; *see also* L.K. Underhill, *Jurisdiction of Military Tribunals in the United States Over Civilians*, 12 CALIF. L. REV. 75, 83 (1924) ("[T]he expression 'in the field' meant at the base of operations and in advance thereof; in other words, that this jurisdiction was conferred in order to provide a tribunal capable of trying these persons in places where the courts of the United States and the states were not open."). Indeed, from before the Constitution's adoption until the UCMJ became effective in 1951, the Articles of War contained a provision that required a military commander, on application from civilian authorities, to turn over *soldiers* to civil authority for prosecution of serious civilian criminal offenses. *See* Art. of War of 1776, § 10, art. 1, *reprinted in* 2 WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 964–65 (2d ed. rev. 1896); Army Article of War of 1806, art. 33, *reprinted in* 2 WINTHROP at 979; Army Art. of War of 1916, art. 74, ch. 418, 39 Stat. 662; *see also* Frederick Bernays Wiener, *Courts-Martial and the Bill of Rights: The Original Practice I*, 72 HARV. L. REV. 1, 12 (1958) ("In time of peace, soldiers accused of civilian offenses were still required to be turned over to the civil authorities on request."). As Colonel Winthrop explained, this provision reflected the notion that "the precedence of civil jurisdiction is favored in the law." 2 WINTHROP, *supra* note 27, at 697. The precedence of civil jurisdiction over military law can also be seen in Supreme Court case law prohibiting the subjection to civilians to military tribunals other than courts-martial during time of war. *See, e.g.*, Duncan v. Kahanamoku, 327 U.S. 304, 311–12, 324 (1946) (Hawaiians not subject to military court during World War II where the civilian courts "had always been able to function"); *Milligan*, 71 U.S. at 121 (U.S. citizen could not be subjected to trial by military commission "where the courts are open and their process unobstructed"). Notably, *Milligan* and *Duncan* were decided after the end of the Civil War and the Second World War, respectively, and essentially overruled prior Supreme Court decisions issued during those wars that upheld the use of military tribunals to try American civilians. Hirabayashi v. United States, 320 U.S. 81, 92–93 (1942) (upholding petitioner's conviction by military court for violating curfew imposed on Japanese-Americans); *Ex parte* Vallandingham, 68 U.S. 243, 253–54 (1863) (refusing to disturb military commission trial of civilian for supporting the Confederate cause). As Chief Justice Rehnquist observed, there has long been a tendency for courts to permit conduct in wartime that, on reflection after cessation of hostilities, the courts find inconsistent with constitutional principles. *See* REHNQUIST, *supra* note 78, at 221–22.

273. "Letters of marque" were the government's written authorizations for privateers to wage a private war against vessels of another country. EDWIN S. CORWIN, THE CONSTITUTION AND WHAT IT MEANS TODAY 110–11 (14th ed. 1978).

States' territorial waters.[274] He reached this conclusion based on his observation that "the ordinary courts of law of the country are competent to afford redress" for crimes committed within the United States' territorial waters.[275] Thus, the statutes permitting the court-martial of civilians have been narrowly construed,[276] and generally applied only when two elements existed: (1) the civilians were accompanying an army in offensive or defensive operations in a theater of war; *and* (2) there was no civil authority available to prosecute the civilians' misconduct.[277] This is all consistent with the Warren Court's observation that the civilian trial of civilians is constitutionally preferred to the military trial of civilians.[278]

As such, the recorded Revolutionary War courts-martial of civilians occurred when colonial courts were not fully functional.[279] There also were a few nineteenth-century courts-martial of civilians involved in frontier operations or deep within Indian country, again where no civil court forum was available.[280] There was an uptick in civilian courts-martial during the Civil War, when the criminal laws of the seceding states did not apply to the invading and occupying Union force.[281] The historical evidence that could be marshaled to support a different historical understanding of court-martial jurisdiction consists of two 1825 courts-martial of civilians—one in Maryland and one in Virginia—for which there is no evidence of either combat operations or nonfunctioning local courts.[282] These events, however, appear to be historical anomalies: instances where Army commanders acted contrary to the well-understood limitations on court-martial jurisdiction over civilians.[283] Even if that were not so, the idea that court-martial jurisdiction extends to civilians in time of peace when a civilian court forum is perfectly available has been repeatedly repudiated by courts and learned commentators.[284]

Applying this historical practice to the modern American military, the circumstances that historically have been found sufficient to permit the court-martial of civilians largely do not exist today, and might never exist again. The historical prerequisites for the court-martial of civilians accompanying the military have been not only the civilian's presence in a

274. Offences on Vessels with Letters-of-Marque, 1 Op. Att'y Gen. 177 at 177 (1814).

275. *Id.*

276. *See generally* 1 WINTHROP, *supra* note 27, at 100.

277. *See generally id.*

278. *See Toth*, 350 U.S. at 22 ("There are dangers lurking in military trials which were sought to be avoided by the Bill of Rights and Article III of our Constitution. Free countries of the world have tried to restrict military tribunals to the narrowest jurisdiction deemed absolutely essential to maintaining discipline among troops in active service.").

279. *See generally supra* notes 64–66 and accompanying text.

280. *See supra* notes 69–71 and accompanying text.

281. Coleman v. Tennessee, 97 U.S. 509, 515 (1878).

282. *See supra* notes 72–73 and accompanying text.

283. *See generally id.*

284. *See supra* Part II.A.2.

theater of war, facing a hostile enemy force, but also the absence of an available civilian forum.[285] In enacting MEJA, Congress has created a federal civilian forum for the trial of contractors and other civilians accompanying the military in the field.[286] Of course, as prior Supreme Court decisions have observed, the fact that Congress admittedly *has the power* to create a federal civilian forum is probably enough to preclude court-martial jurisdiction,[287] though the actual existence of such a forum only strengthens the point.

At least as important as an existing civilian forum, more recent United States military engagements have not involved the large campaign-style wars that characterized its nineteenth-century wars and both world wars, where an army was essentially an autonomous island, separated by logistical realities from friendly civil authority. More recent military engagements instead have involved United States control of the skies and waters, with regular rotations of military units and personnel, and regular administrative transportation between the United States and the theater of operations. In such a situation, there is not only an *existing* civilian forum for trying civilian contractors but also a reasonably *available* forum for such trials back in the United States. Thus, the changing nature of war, with more-readily-available transportation in and out of theater, has created an availability of civil jurisdiction that places the present-day court-martial of civilians on a far different footing than the narrow circumstances where the unavailability of civilian courts historically had been viewed as permitting the court-martial of civilians. These days, a federal court forum for trying a misbehaving civilian is but an administrative flight away.

Indeed, as far back as 1957, the United States paid this debt to reality in *Reid v. Covert*,[288] acknowledging that the changing face of American warfare affected the availability of court-martial jurisdiction over civilians: "And with the passing of the frontier, the extension of civil jurisdiction throughout the country, and the end of the Indian wars, it is probably true that, barring unusual circumstances, it was no longer possible to be 'in the field' in the United States."[289] That change has continued and, with the enactment of MEJA and reasonably available ingress and egress from the modern-day theater of war, it is equally unlikely that, again barring unforeseen circumstances, the United States military is ever again "in the field" in the same way as that which justified the court-martial of civilians in the eighteenth and nineteenth centuries.

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285. *See supra* notes 53–77 and accompanying text.

286. *See supra* notes 200–02 and accompanying text.

287. *See Toth*, 350 U.S. at 21.

288. *Covert*, 354 U.S. 1.

289. Reply Brief for Appellant and Petitioner on Rehearing at 56, Reid v. Covert, 354 U.S. 1 (1957) (Nos. 701 and 713), 1957 WL 87831 at *56.

C. *The Arguments For Ignoring Precedent and Historical Practice Are Unavailing*

The best argument in favor of the constitutionality of Article 2(a)(10) is that neither existing precedent nor historical practice should be controlling in the context of modern war. The first step in this argument is to dispose of the apparent blanket prohibition on the court-martial of civilians announced in *Toth* and *Kinsella*[290] by characterizing it as *dicta* and, even better, showing that the Framers certainly did not understand the Constitution as creating a blanket prohibition on the court-martial of civilians.[291]

If that effort were successful, and a court accepts that the Constitution permits the court-martial of at least *some* civilians, the next step is to show that the class of civilians subject to trial by court-martial includes civilians deployed with the armed forces in the field. Such an argument invariably relies on the military's substantial need to control the behavior of civilians in its midst. Military operations in Afghanistan and in the second Iraq war resulted in an exponential increase in the presence of civilian contractors on the battlefield, and with this increased presence comes an increased need to prosecute civilians for in-theater misconduct.[292] Moreover, to the extent military necessity is relevant, the military deference doctrine arguably supports an extremely deferential review of Congress's determination that the needs of military readiness and discipline justify a limited exercise of court-martial jurisdiction over civilians serving in the field.[293]

In attempting to sidestep existing precedent and historical practice, the Government could contend, with substantial justification, that such precedent and practice were based on the court-martial system that existed in the distant past and not on the current court-martial system. When the Supreme Court decided its court-martial jurisdiction cases in the 1950s and 1960s,[294] courts-martial did not have judges,[295] and direct Supreme Court review of courts-martial was unavailable.[296] While not expressly necessary to its holdings, the Warren Court sprinkled into its court-martial jurisdiction

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290. *See Kinsella*, 361 U.S. at 240 (1960) ("The holding of [*Toth*] may be summed up in its own words, namely, that 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." (internal quotations omitted)).

291. *See supra* notes 42, 64–65 and accompanying text.

292. *See generally* CARAFANO, *supra* note 16, at 38.

293. *See, e.g.*, *Rumsfeld*, 547 U.S. at 58; *Solorio*, 483 U.S. at 447; Goldman v. Weinberger, 475 U.S. 503, 508 (1986); *see also* Mazur, *supra* note 263, at 704 (maintaining that the military deference doctrine largely was a creation of then-Justice Rehnquist in the 1970s); O'Connor, *supra* note 263, at 673–78.

294. *See supra* Part II.C.2.

295. The position of military judge was created in 1968. Military Justice Act of 1968, Pub. L. No. 90-632, § 826, 82 Stat. 1335, 1336.

296. The Supreme Court was granted certiorari review over courts-martial in 1983. Military Justice Act of 1983, Pub. L. No. 98-209, § 10, 97 Stat. 1393, 1405–06.

decisions a healthy dose of criticism of courts-martial as vehicles of justice.[297] More recent Supreme Court decisions, however, have expressed much greater confidence in the ability of courts-martial to dispense justice,[298] and the Government could argue that the increased procedural protections in courts-martial reduces the harm to civilians forced into trial in that forum. Thus, the argument goes, the Constitution should tolerate greater court-martial jurisdiction over civilians (based on enhanced need by the military and reduced prejudice to the civilian accused) than it would have tolerated in the distant past.[299]

This is by no means a frivolous argument, although this author ultimately finds it unavailing. As an initial matter, arguments about military necessity and improved court-martial procedures are dead on arrival unless a court is first willing to reject the analysis in *Toth* and *Kinsella* that appear to create a blanket constitutional prohibition on the court-martial of civilians.[300] If the Constitution never permits the court-martial of civilians, then military necessity never enters the equation,[301] and the military deference doctrine would not apply because there are no relevant military

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297. *See, e.g.*, *Covert*, 354 U.S. at 38 ("Military law is, in many respects, harsh law which is frequently cast in very sweeping and vague terms. It emphasizes the iron hand of discipline more than it does the even scales of justice.") (citations omitted); *id.* at 39 ("In summary, 'it still remains true that military tribunals have not been and probably never can be constituted in such way that they can have the same kind of qualifications that the Constitution has deemed essential to fair trials of civilians in federal courts.'" (quoting *Toth*, 350 U.S. at 17)); *Toth*, 350 U.S. at 22 ("There are dangers lurking in military trials which were sought to be avoided by the Bill of Rights and Article III of our Constitution.").

298. *See, e.g.*, Schlesinger v. Councilman, 420 U.S. 738, 758 (1975) ("[I]mplicit in the congressional scheme embodied in the Code is the view that the military court system generally is adequate to and responsibly will perform its assigned task. . . . [C]ongressional judgment must be respected and that it must be assumed that the military court system will vindicate servicemen's constitutional rights."); *see also Weiss*, 510 U.S. at 179 (noting that "Congress has taken affirmative steps to make the system of military justice more like the American system of civilian justice").

299. *See generally* David L. Snyder, *Civilian Military Contractors On Trial: The Case for Upholding the Amended Exceptional Jurisdiction Clause of the Uniform Code of Military Justice*, 44 TEX. INT'L L.J. 65, 90–91 (2008) (arguing that the Supreme Court's court-martial jurisdiction cases are inapplicable to amended Article 2(a)(10) in part because of reforms to the court-martial system); Cara-Ann M. Hamaguchi, *Between War and Peace: Exploring the Constitutionality of Subjecting Private Civilian Contractors to the Uniform Code of Military Justice During "Contingency Operations,"* 86 N.C. L. REV. 1047, 1059–60 (2008) (arguing that improvements to military justice system support constitutionality of amended Article 2(a)(10)).

300. *See supra* note 291.

301. In *Kinsella*, the Court "seriously question[ed]" whether military necessity is at all relevant to whether Congress possesses a constitutional power to court-martial civilians, which makes sense if the Constitution bars, without exception, all courts-martial of civilians. *Kinsella*, 361 U.S. at 244.

judgments to be analyzed.[302] Thus, while a blanket constitutional prohibition on the court-martial of civilians seems at odds with the Framers' contemporary understanding, it is difficult to see how any court other than the Supreme Court could cast away the analytical framework established in *Toth* and *Kinsella*, and even the Supreme Court might find *stare decisis* sufficient to discourage revisiting existing precedent.

Moreover, the notion of a blanket constitutional prohibition on the court-martial of civilians is not merely a relic of the Warren Court. As recently as 1987, by which time courts-martial had military judges and direct review by the Supreme Court,[303] the Court noted in *Solorio* that "the military status of the accused" had long been its touchstone for amenability to trial by court-martial.[304] Thus, although the Framers likely would be surprised to hear that the Constitution they created included a complete bar on the court-martial of civilians,[305] it is by no means assured that the Court will overrule its precedent in this regard.

But even if this blanket prohibition does not apply, an argument based on changed times and changed court-martial procedures seems unlikely to succeed. To state the undeniable fact that court-martial practice has become more "civilianized" since the 1950s[306] gives short shrift to the procedural rights that continue to remain unavailable in the court-martial context, a list that includes the Fifth Amendment right to grand jury presentment, the Sixth Amendment right to a jury, the right to a unanimous verdict, and the automatic right of appeal.[307] As for a claim that the increased presence of contractors creates an enhanced need for court-martial jurisdiction, the Supreme Court considered and rejected a similar argument in its prior court-martial jurisdiction cases.[308] When the Government argued fifty years ago that increased deployment of dependents and government employees overseas made it necessary to permit their trial by court-martial, the

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302. *See* O'Connor, *supra* note 263, at 678–79 (discussing limitations on military deference doctrine).

303. *See supra* notes 296–97 and accompanying text.

304. *See Solorio*, 483 U.S. at 439 ("In an unbroken line of decisions from 1866 to 1960, this Court interpreted the Constitution as conditioning the proper exercise of court-martial jurisdiction over an offense on one factor: the military status of the accused.").

305. *See supra* notes 240–42 and accompanying text.

306. *See generally Weiss*, 510 U.S. 163 (noting the creation of the office of military judge).

307. *See supra* notes 1–5 and accompanying text (noting some procedural protections available in federal court that are not available in courts-martial); *see also Weiss*, 510 U.S. at 178–79 (no due process right to a military judge with a fixed term of office); 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, 525–26 (2009) (without opining on Article 2(a)(10)'s ultimate constitutionality, noting that "the more straightforward argument suggests the Court would strike down this jurisdiction," in part because of the deprivation of federal court rights in a court-martial).

308. *See, e.g., McElroy*, 361 U.S. at 286–87.

Supreme Court scoffed, noting that Congress could create a federal court forum to deal with such misconduct,[309] or could make civilians performing work for the military actual members of the armed forces.[310] These solutions remain available and, at least with respect to creating an available federal court forum, have been adopted.

Moreover, modernization is a two-way street. While it is true that courts-martial are, for better or worse, more "civilianized" than in the distant past, it is also true that the military has a much greater ability to remand a misbehaving civilian to civil authorities for trial in a civilian court, where the constitutional protections ordinarily afforded civilian defendants remain in force. The existence of a federal court forum for the trial of civilians accompanying the military overseas,[311] along with tremendous advances in available and regular transportation to and from the theater of war, severely undermines any argument that the exercise of court-martial jurisdiction over civilians is in any way necessary.

Indeed, the weakness of any claim of military necessity, particularly when balanced against the constitutional deprivations involved, is punctuated by the military's ability to thrive in the last forty years with just a single court-martial of a civilian,[312] even though a federal court forum was largely unavailable for most of this period.[313] Therefore, to the extent military necessity is a relevant issue, even a deferential review has limits, and the more it appears that trial by court-martial is a forum choice instead of a court of last resort, the less tenable a claim of necessity becomes. This is particularly true in light of the American constitutional tradition that civilians are to be tried in civilian courts.[314]

What all this means is that there is no compelling basis for abandoning the Supreme Court's existing precedent regarding court-martial jurisdiction. The Constitution's plain language, American legal tradition, and historical practice all point toward the same result as existing precedent—that Article 2(a)(10) cannot be constitutionally applied in the context of modern war. Granted, a rejection of the analytical framework set forth in *Toth*,[315] *Covert*,[316] *McElroy*,[317] and *Kinsella*[318] could result in a more modest

309. *See Kinsella*, 361 U.S. at 246.

310. *See McElroy*, 361 U.S. at 286–87 ("The increased cost to maintain these employees in a military status is the price the Government must pay in order to comply with constitutional requirements.").

311. *See supra* notes 200–02 and accompanying text.

312. *See supra* notes 215–20 and accompanying text.

313. *See supra* notes 189–94 and accompanying text.

314. *See* Duncan v. Kahanamoku, 327 U.S. 304, 312, 324 (1946); *Ex parte Milligan*, 71 U.S. 2, 121 (1866).

315. *See generally Toth*, 350 U.S. 11.

316. *See generally* Covert, 354 U.S. 1.

317. *See generally McElroy*, 361 U.S. 281.

318. *See generally Kinsella*, 361 U.S. 234.

opinion striking down Article 2(a)(10). If the Court abandoned a blanket prohibition in favor of a ruling that endorsed the eighteenth- and nineteenth-century historical practice but went no further, it would legitimize prior courts-martial that the Framers undoubtedly thought were permissible, while striking down Article 2(a)(10) based on the changed circumstances of modern warfare.

Indeed, such an analysis could dispose of the issue entirely on nonconstitutional grounds. A court reasonably could—and probably should—construe the term "in the field" consistently with the historical understanding requiring both a state of war *and* the practical unavailability of a civilian criminal forum. Given that this state of affairs likely does not exist in the post-MEJA world, such an approach would be consistent with the courts' preference to construe statutes in a way that renders them constitutional.[319] Regardless of whether a challenge to Article 2(a)(10) were decided on constitutional or statutory grounds, it seems that the unique eighteenth- and nineteenth-century circumstances that were viewed as sufficient to allow the court-martial of civilians—war plus an absence of available civil authority—are unlikely to recur.

IV. CONCLUSION

The point of this Article is not that civilians should be exempt from trial by court-martial because courts-martial are unfair. To the contrary, this author is a firm believer in courts-martial as truth-finding bodies.[320] Of course, a cynic could note that a criminal defendant sometimes might be more interested in a forum's available procedural protections—of which there are fewer in a court-martial[321]—than in its utility as a truth-seeking body. Thus, the issue is not substantive "fairness," but whether civilians who would rather take their chances in federal district court can be forced to stand trial by court-martial, in a proceeding governed by rules borne out of the unique relationship between the United States military and its uniformed personnel, and where an all-military jury might have animus toward a civilian defendant.

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319. *See* Nw. Austin Mun. Util. Dist. No. One v. Holder, 129 S. Ct. 2504, 2513 (2009) ("[I]t is a well-established principle governing the prudent exercise of this Court's jurisdiction that normally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case." (quoting Escambia Cnty. v. McMillan, 466 U.S. 48, 51 (1984) (per curiam))); Clark v. Martinez, 543 U.S. 371, 381 (2005) (noting that the canon of constitutional avoidance "is a tool for choosing between competing plausible interpretations of statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts.").

320. *See generally* David A. Schlueter, *The Court-Martial: An Historical Survey*, 87 MIL. L. REV. 129, 165–66 (1980) (defending the fairness and utility of the court-martial system).

321. *See supra* notes 1–5 and accompanying text.

The real puzzle behind the amended Article 2(a)(10) is its timing. From 1970 until Congress enacted MEJA in 2000, the United States had no ability to prosecute civilians accompanying the military outside the United States' territorial jurisdiction—in federal court or by court-martial—unless the offense violated one of the few federal criminal statutes with extraterritorial effect.[322] Yet Congress did not purport to revive court-martial jurisdiction over these civilians until 2006, by which time Congress had already created largely overlapping federal district court jurisdiction under MEJA. It very well might be that Congress amended Article 2(a)(10) out of a fervor to react to the massive amount of contractor support of military operations in Iraq, and occasional allegations of contractor wrongdoing,[323] without fully contemplating either the constitutionality of its proposed amendment or the real-world necessity for the amendment in light of MEJA.

Regardless, there is little to suggest that a court-martial forum constitutionally may be forced on civilians accompanying the military overseas. Neither the Constitution's text, nor precedent, nor historical practice supports extension of court-martial jurisdiction over civilians on the modern battlefield, since regular administrative transportation typically exists to deliver personnel from the theater of war to the home front, where civilians can be tried in federal district court. That said, the United States survived thirty years from 1970 to 2000 with no practical way to prosecute most contractor misconduct occurring overseas, and has now survived a full forty years having conducted a single (dubious) court-martial of a civilian.[324] The military similarly will survive being deprived of a court-martial power that it does not legitimately have, and which it went without for most of the past four decades.

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322. *See supra* notes 195–221 and accompanying text.

323. *See generally* Ian Kierpaul, Comment, *The Mad Scramble of Congress, Lawyers, and Law Students After Abu Ghraib: The Rush to Bring Private Military Contractors to Justice*, 39 U. TOL. L. REV. 407 (2008).

324. *See supra* notes 195–221 and accompanying text.