IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,	)	BRIEF OF *AMICI CURIAE*
Appellee,	)	JOHN F. O'CONNOR, MICHAEL
	)	J. NAVARRE, AIR FORCE
v.	)	APPELLATE DEFENSE DIVISION,
	)	AND NAVY-MARINE CORPS
MR. ALAA MOHAMMAD ALI,	)	APPELLATE DEFENSE DIVISION
Civilian,	)	
Appellant.	)	Crim. App. No. 20080559
	)	
	)	USCA Dkt. No. 12-0008/AR

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INTRODUCTION

The Supreme Court has given Congress wide berth in devising a court-martial system for the trial of servicemembers. The Court has, in the name of military deference, permitted a number of practices in courts-martial that would never pass constitutional muster in a civilian judicial system.[1] *Amici* submit that one reason why the Supreme Court has been so deferential to Congress in this regard is the extremely narrow reach of courts-martial, as the one area where the Court has been decidedly non-deferential to Congress has been efforts by Congress to subject civilians to trial by court-martial.

Article 2(a)(10) of the Uniform Code of Military Justice, as amended in 2006, disrupts this delicate constitutional balance by taking away the very premise — the limited jurisdictional reach of courts-martial — that informs the judiciary's deferential constitutional review. This limited jurisdictional reach is a reflection of the significant deprivation of constitutionally-guaranteed rights that occurs when a civilian is subjected to a court-martial rather than a

[1] *See, e.g.*, *Parker v. Levy*, 417 U.S. 733, 756-57 (1974) (upholding UCMJ Articles 133 and 134); *Middendorf v. Henry*, 425 U.S. 25, 28 (1976) (upholding denial of right to counsel at summary courts-martial); *Weiss v. United States*, 510 U.S. 163, 197 (Scalia, J., concurring) ("But no one can suppose that similar protections against improper influence [as exist in the military justice system] would suffice to validate a state criminal-law system in which felonies were tried by judges serving at the pleasure of the Executive.").

civilian criminal trial. For instance, unlike a civilian tried in a civilian court, a court-martial accused has no Fifth Amendment grand jury right,[2] no Sixth Amendment jury right,[3] no right to a jury of at least six members,[4] and no right to a unanimous verdict on guilt.[5] Whatever value one might place on each of these procedural protections in terms of their contribution to the truth-seeking function of civilian criminal trials, the Supreme Court has repeatedly held that these rights are not to be cast aside lightly by subjecting civilians to trial by court-martial. Rather, if there is a reasonably-available means of disciplining civilians accompanying the armed forces overseas, the Supreme Court has held that the Government must use those means.

Indeed, a civilian tried by court-martial has a lesser likelihood of receiving appellate judicial review than a servicemember tried by court-martial, as a civilian cannot receive the punitive discharge that is often the gateway to judicial review. Mr. Ali received appellate judicial review as

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[2] *Compare* U.S. Const. amend. V *with* UCMJ art. 32, 33, 10 U.S.C. § 832, 833.

[3] *Compare* U.S. Const. amend. VI *with Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 123 (1866), and UCMJ art. 25, 10 U.S.C. § 825.

[4] *Compare Ballew v. Georgia*, 435 U.S. 223, 245 (1978), *with* UCMJ art. 16, 10 U.S.C. § 816.

[5] *Compare Richardson v. United States*, 526 U.S. 813, 817 (1999) *and* Fed. R. Crim. P. 31(a) *with* UCMJ art. 52, 10 U.S.C. § 852.

a matter of grace, based on the Judge Advocate General of the Army's unreviewable exercise of his prerogative to certify Mr. Ali's case for review.

Amici submit that the Government cannot meet its constitutional burden with respect to Mr. Ali's court-martial. Court-martial jurisdiction is not the least possible power adequate to the end of preserving discipline among active duty servicemembers, which is the test the Government must meet. The Government has at its disposal a number of lesser, non-prosecutorial tools for dealing with misconduct by civilian contractors. But even if the Government concluded that a prosecution was necessary, the Government's own actions demonstrate that it had every ability to bring Mr. Ali to trial in a civilian court if Congress elected to vest such a court with jurisdiction, which is all that is necessary to preclude court-martial jurisdiction as a constitutional matter.[6]

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[6] The court of criminal appeals assumed that Mr. Ali was not triable in federal district court under MEJA because of his dual Iraqi-Canadian citizenship. *United States v. Ali*, 70 M.J. 514, 516 n.4 (A. Ct. Crim. App. 2011). This assumption seems justified. It is unclear to *amici* whether Mr. Ali was amenable to trial in federal district court on the grounds that some or all of his alleged criminal conduct took place in the special maritime and territorial jurisdiction of the United States. *See United States v. Passaro*, 577 F.3d 207 (4th Cir. 2009). Regardless, the Supreme Court has been clear that whether Congress *has* created Article III jurisdiction is not relevant to the constitutional inquiry. All that matters is that Congress *could have* created Article III jurisdiction. *See* note 14, *infra*.

In addition, the Court might prefer to resolve this case on statutory grounds. Article 2(a)(10) is limited to persons serving "in the field." The historical understanding of that term requires not only active hostilities[7] but the unavailability of civilian courts. Here, the Government had the ability to turn Mr. Ali over to civilian authorities, and a civilian criminal court could have tried Mr. Ali had Congress vested one with jurisdiction. Therefore, the Court could construe "in the field" in a manner consistent with historical understanding, historical practice, and recent precedent and hold, without reaching the constitutional issue, that Mr. Ali was not "in the field" for purposes of Article 2(a)(10).

INTEREST OF *AMICI*

Amici John F. O'Connor and Michael J. Navarre are attorneys with the law firm of Steptoe & Johnson LLP. They represented in habeas corpus proceedings two of the three civilian contractors, other than Mr. Ali, who the Government took preliminary steps to try by court-martial under amended Article 2(a)(10). They

[7] The court of criminal appeals concluded in cursory fashion that Mr. Ali committed his offenses "during a time of actual hostilities" and "in a location where actual hostilities were taking place." *Ali*, 70 M.J. at 519. The court of criminal appeals did not state its view whether hostilities were ongoing by June 2008 at Victory Base Camp, where Mr. Ali was tried, or the standard on which its conclusion is based. Because it seems clear that civilian courts were logistically available, *amici* do not address the fact-intensive question of whether "hostilities" existed at the place of trial.

likely would provide similar representations in the future if their services were requested.[8] As a result, these *amici* have an interest in providing analysis to this Court so that any precedent resulting from this case is consistent with the constitutional and statutory limitations on court-martial jurisdiction.

Amici Air Force Appellate Defense Division and Navy-Marine Corps Appellate Defense Division represent on appeal persons convicted by, respectively, Air Force and Navy/Marine Corps courts-martial, and are authorized to file an *amicus* brief pursuant to CAAF Rule 26.

ARGUMENT

I. UCMJ Article 2(a)(10) Is Unconstitutional as Applied to Mr. Ali

The constitutionality of Mr. Ali's court-martial is guided by a series of Supreme Court decisions from the 1950s and 1960s[9] in which the Court identified constitutional limits to the

[8] Mr. O'Connor also has published scholarship analyzing the constitutional and statutory construction issues associated with Article 2(a)(10). *See* John F. O'Connor, *Contractors and Courts-Martial*, 77 Tenn. L. Rev. 751 (2010).

[9] *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955); *Reid v. Covert*, 354 U.S. 1 (1957); *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).

exercise of court-martial jurisdiction over civilians. These cases can be distilled into three relevant principles.

First, the trial of civilians by court-martial is highly disfavored in our constitutional scheme. "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."[10] Congress's constitutional power to create court-martial jurisdiction is "limit[ed] to the least possible power adequate to the end proposed."[11] Indeed, to the extent it can ever be constitutionally justified,[12] the "[m]ilitary trial of civilians 'in the field' is an extraordinary jurisdiction and it should not be expanded at the expense of the Bill of Rights."[13]

Second, when assessing whether a court-martial was a necessary forum, as opposed to trial in an Article III court, it does not suffice to argue that if a court-martial lacked

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[10] *Toth*, 350 U.S. at 22 n.20; *Covert*, 354 U.S. at 33 ("The *Milligan*, *Duncan* and *Toth* cases recognized and manifested the deeply rooted and ancient opposition in this country to the extension of military control over civilians.") (plurality opinion).

[11] *Toth*, 350 U.S. at 23; *see also McElroy*, 361 U.S. at 286 ("[W]e believe that the *Toth* doctrine, that we must limit the coverage of Clause 14 to 'the least power adequate to the end proposed,' to be controlling." (internal citation omitted)).

[12] *Covert*, 354 U.S. at 33 (plurality opinion).

[13] *Id.* at 35.

jurisdiction there would be no recourse against the accused.[14] If Congress *could have* created federal district court jurisdiction, in a federal court that was open and to which the civilian reasonably could have been brought, its failure to create such jurisdiction does not strengthen the case for court-martial jurisdiction.[15]

Third, Congress's constitutional power to regulate the land and naval forces includes the power to create court-martial jurisdiction over servicemembers but not over civilians.[16] The constitutional power to create court-martial jurisdiction over

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[14] *Toth*, 350 U.S. at 21.

[15] *Id.*

[16] *Id.* at 15 ("[Article I, § 8, cl. 14 of the Constitution] would seem to restrict court-martial jurisdiction to persons who are actually members or part of the armed forces."); *see also Covert*, 354 U.S. at 19-20 ("But if the language of Clause 14 is given its natural meaning, the power does not extend to civilians . . . ." (footnote omitted)) (plurality opinion); *Singleton*, 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)); *id.* at 240-41 ("The test for jurisdiction, it follows, is one of *status*, namely, whether the accused in the court-martial proceeding is a person who can be regarded as falling within the term 'land and naval Forces.'"); *Solorio v. United States*, 483 U.S. 435, 439 (1987) ("This view [that court-martial jurisdiction is based on the military status of the accused] 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 for 'cases arising in the land or naval forces.'" (citations omitted)).

civilians, if such power exists, arises from Congress's "war powers."[17]

When these three principles are applied to Mr. Ali, his court-martial cannot be constitutionally justified.

A. Exercise of Court-Martial Jurisdiction Over Mr. Ali Is Not Within the "Least Possible Power Adequate to the End Proposed"

The "end" to be preserved through the exercise of court-martial jurisdiction is the "maint[enance of] discipline among troops in active service." *Toth*, 350 U.S. at 22 n.20. The Constitution limits the exercise of court-martial jurisdiction to the "least possible power adequate to" achieving this end,[18] or the "narrowest jurisdiction deemed absolutely essential" to maintaining discipline among those in active military service. *Id.*

Thus, if the military reasonably can preserve discipline in some way other than subjecting civilians to trial by court-martial, then the exercise of court-martial jurisdiction over such civilians is unconstitutional. The Government has available to it a number of tools for addressing misconduct by accompanying civilians. Historically, the most common remedy has been expelling the civilian from the base camp and directing

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[17] *Covert*, 354 U.S. at 33 (plurality opinion).

[18] *Toth*, 350 U.S. at 23; *see also* note 11, *supra*.

that he or she cease working under government contracts,[19] a remedy that was available to the Government pursuant to DFARS § 252.225-7040(h)(1) (June 2006). Commanders in Iraq could address misconduct by contractors by restricting base privileges, barring them from a base or the Area of Responsibility, or revoking their SOFA status. But even when administrative remedies are insufficient, the Government's constitutional obligation is to pursue a civilian trial if it is at all feasible.

The Supreme Court squarely held in *Toth* and *Singleton* that if Congress reasonably *could* provide an Article III forum for the trial of civilians accompanying the military overseas, a court-martial is unconstitutional because the needs of military discipline could be satisfied through civilian prosecution.[20] It

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[19] *See* 1 Winthrop, *supra*, at 98-99; 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.").

[20] *Singleton*, 361 U.S. at 246 (noting potential for "prosecution in the United States for more serious offenses when authorized by Congress"); *Toth*, 350 U.S. at 21 ("It is conceded that it was wholly within the constitutional power of Congress to follow this suggestion [from the Army Judge Advocate General] and provide for federal district court trials of discharged soldiers . . . . 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." (citations omitted)).

seems clear that Congress *could have* created civilian court jurisdiction over the offenses with which Mr. Ali was charged by not excluding him from the coverage of MEJA. Under the reasoning of *Toth* and *Singleton*, the availability of a civilian court that could have been vested with jurisdiction precludes the trial of Mr. Ali by court-martial.

Developments since *Toth* and *Singleton* have only strengthened Mr. Ali's argument. As we have noted above, the "availability" of a civilian court is not a question of whether Congress has provided a court with jurisdiction, but rather one of logistics: whether the military reasonably could get Mr. Ali to an Article III court if Congress had chosen to vest one with jurisdiction. Advances in transportation since *Toth* and *Singleton*, if anything, have greatly improved the Government's ability to transport personnel back to the United States from overseas. Here, the Government's own actions in Iraq demonstrate the logistical feasibility of delivering Mr. Ali to a civilian court if Congress had created federal district court jurisdiction.

Mr. Ali's charges arose out of an altercation on 23 February 2008 at an Army combat outpost near Hit, Iraq. *Ali*, 70 M.J. at 516. Within three days, Mr. Ali was moved to Victory Base Camp, a cluster of camps (including Camp Victory and Camp Liberty) surrounding the Baghdad International Airport. *Id.* at

516-17. He was placed in pretrial confinement at Victory Base Camp on 29 February 2008, and tried by court-martial at Baghdad, Iraq on 22 June 2008. *Id.* During this general time frame, the U.S. military regularly transported personnel back to the United States from Iraq. Indeed, the United States on several occasions transferred persons apprehended in Iraq back to the United States for the specific purpose of trying them in the United States.

Consider, for example, the case of civilian contractor Ira Waltrip. Waltrip supported the military's mission at Camp Liberty, one of the bases within Victory Base Camp, and was convicted under MEJA in the United States District Court for the Eastern District of Virginia for possession of child pornography in Iraq.[21] Between the time Mr. Ali was placed in pretrial confinement and Mr. Ali's court-martial, the U.S. Government investigated and arrested Waltrip at Camp Liberty (April 2008),[22] transported him to Kuwait, where he was then flown by commercial airline to Virginia (April 30, 2008),[23] charged him in federal

[21] Statement of Facts at 1, *United States v. Waltrip*, No. 1:08-CR-283, Dkt. 19 (E.D. Va. July 22, 2008).

[22] *Id.* at 2-3.

[23] *Id.* at 3.

district court (May 7, 2008),[24] and proceeded with Waltrip's initial federal court appearance (May 29, 2008).[25]

Similarly, three months after Mr. Ali's court-martial, the Government apprehended three civilian contractors for offenses taking place in or around Al-Asad Air Base in Iraq. *United States v. Broussard*, No. 08-cr-0367, 2010 WL 582778, at *1 (W.D. La. Feb. 17, 2010). Like Mr. Ali, these contractors were brought to Victory Base Camp (Camp Liberty in this case) and placed in pretrial confinement. *Id.* Unlike Mr. Ali, however, these defendants were transported a few weeks later to the United States where they were tried under MEJA in an Article III court where they had all of the procedural rights ordinarily afforded civilian defendants in civilian court. *Id.* at *1-2.

The Government's demonstrated ability to transport Waltrip and the defendants in *Broussard* back to the United States for a federal district court trial precludes, as a constitutional matter, the subjection of a civilian such as Mr. Ali to a trial by court-martial.

There are other examples of persons apprehended in Iraq and brought to the United States for trial. Several soldiers charged with detainee abuse at Abu Ghraib prison were

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[24] Complaint at 1, *United States v. Waltrip*, No. 1:08-CR-283, Dkt. 1 (E.D. Va. May 7, 2008).

[25] Initial Appearance Form at 1, *United States v. Waltrip*, No. 1:08-CR-283, Dkt. 8 (E.D. Va. May 29, 2008).

apprehended in Iraq but brought to the United States for trial at Fort Hood, Texas.[26] First Lieutenant Michael Behenna was charged in Iraq with committing a murder on 16 May 2008,[27] had his Article 32 hearing at Camp Speicher near Tikrit on 20 September 2008,[28] but was returned to the United States in November 2008[29] where he was tried by court-martial at Fort Campbell, Kentucky.[30] Four soldiers convicted of notorious offenses against Iraqis at Mahmudiyah, Iraq were apprehended in Iraq, had an Article 32 hearing in Iraq,[31] but were brought back to Fort Campbell, Kentucky for trials by court-martial in 2006

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[26] *See United States v. England*, No. ARMY 20051170, 2009 WL 6842645, at *1 (A. Ct. Crim. App. Sept. 10, 2009); *Harman Gets Six Months in Abu Ghraib Scandal*, USA Today, May 17, 2005, *available at* http://www.usatoday.com/news/nation/2005-05-17-harman-convicted_x.htm; *Graner Sentenced to 10 Years*, CNN.com, Jan. 16, 2005, *available at* http://edition.cnn.com/2005/LAW/01/16/graner.court.martial/.

[27] *United States v. Behenna*, 70 M.J. 521, 523 (A. Ct. Crim. App. 2011).

[28] *See* Vanessa Gera, *US Soldier Fights Accusations of Killing Iraqi*, USA Today, Sept. 22, 2008, *available at* http://www.usatoday.com/news/world/2008-09-22-4046606660_x.htm.

[29] Joe Mozingo, *An Unlikely Witness Provides One Last Hope for Soldier in Murder Case*, L.A. Times, Sept. 14, 2009, *available at* http://www.latimes.com/news/nationworld/world/la-fg-iraq-killing14-2009sep14,0,3351673,full.story.

[30] *Id.*

[31] Paul von Zielbauer, *Investigator Recommends Courts-Martial for 4 Soldiers*, N.Y. Times, Sept. 4, 2006, *available at* http://www.nytimes.com/2006/09/04/world/middleeast/04abuse.html?fta=y.

and 2007.[32] That these soldiers were tried by court-martial is irrelevant to the constitutional question; all that matters is that the military forces in Iraq, and in particular at Victory Base Camp, were not so disconnected from logistical support that they were unable to bring persons apprehended in Iraq back to the United States for a trial.

The lesson of *Toth*, *Covert*, *Singleton*, *Grisham*, and *McElroy* is that the Constitution does not permit the Government to make choices, through Congress's decisions in creating federal court jurisdiction or through the Executive's charging decisions, as to whether to afford a civilian a civilian trial or to try him by court-martial.[33] If the Government *can* create a legal regime that allows for a civilian trial of a civilian, the Government *must* do so. The undeniable logistical availability of transportation back to the United States therefore precludes the trial of Mr. Ali by court-martial.

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[32] *See, e.g.*, *United States v. Spielman*, No. ARMY 20070883, 2011 WL 2638746, at *1 (A. Ct. Crim. App. June 28, 2011), *vacated*, 70 M.J. 381 (C.A.A.F. 2011).

[33] *Singleton*, 361 U.S. at 244-45 (holding that the Executive's "unreviewable discretion" to decide whether to prosecute a civilian in a civilian court or by court-martial is constitutionally intolerable).

B. The Exercise of Court-Martial Jurisdiction Over Civilians Might Require a Formal Declaration of War

The Supreme Court held in *Toth* and its progeny that any power to create court-martial jurisdiction over civilians must arise from Congress's constitutional "war powers," and not from its power to regulate the land and naval forces.[34] This suggests that the power to court-martial civilians derives from Congress's power to declare war, which Congress did not do with respect to the Iraq invasion. *See* U.S. Const. art. 1, § 8 cl. 11.

This appears to have been the view of this Court's majority in *United States v. Averette*, 19 C.M.A. 363, 365-66, 41 C.M.R. 363, 365-66 (1970). While acknowledging that the Vietnam conflict "qualifies as a war as that word is generally used and understood,"[35] the Court nonetheless construed then-Article 2(10) as requiring a formal declaration of war "[a]s a result of the most recent guidance in this area from the Supreme Court."[36] Thus, it appears that this Court concluded in *Averette* that a strict limitation of then-Article 2(10) to formally-declared wars was necessary to conform the Article to the constitutional

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[34] *See* note 16, *supra*.

[35] *Averette*, 19 C.M.A. at 365, 41 C.M.R. at 365.

[36] *Id.*

limits on court-martial jurisdiction identified by the Supreme Court.[37]

II. Mr. Ali Was Not Serving in the Field at the Time of His Court-Martial, As Required By Article 2(a)(10)

As an alternative to deciding this case on constitutional grounds, the Court may prefer to resolve it as a matter of statutory construction. The doctrine of constitutional avoidance holds that "[i]f [one plausible construction of a statute] would raise a multitude of constitutional problems, the other [plausible construction] should prevail — whether or not those constitutional problems pertain to the particular litigant before the Court." *Clark v. Martinez*, 543 U.S. 371, 380-81 (2005); *see also United States v. Fosler*, 70 M.J. 25, 232 (C.A.A.F. 2011).

As we have argued above, the exercise of court-martial jurisdiction over Mr. Ali raises grave constitutional questions. Moreover, Congress's decision not to render Mr. Ali subject to MEJA does not alter the constitutional analysis. But even if MEJA's statutory limitations affected the constitutional analysis, the doctrine of constitutional avoidance counsels that this Court construe Article 2(a)(10)'s "in the field" component

[37] *Id.* at 365-66 ("But such a recognition [that the Vietnam conflict was generally understood to be a war] should not come as a shortcut for a formal declaration of war, at least in the sensitive area of subjecting civilians to military jurisdiction.").

in a way that eliminates constitutional questions not only with respect to Mr. Ali, but also for contractors who are unquestionably subject to MEJA prosecution.

A reasonable construction of the term "in the field" as used in Article 2(a)(10) — perhaps the *most reasonable* construction — is that the term involves two requirements: (1) military operations with a view toward an enemy; *and* (2) circumstances that make it logistically impractical to turn the accused over to civilian authorities. This construction is faithful to historical understanding and practice and avoids the constitutional questions that a broader construction of the statute would implicate. *Amici* believe that the Government cannot satisfy the second component of this test.

A. Historical Understanding and Practice Support a Construction of "in the Field" that is Limited to Circumstances Where it is Logistically Impractical to Turn a Civilian Over to Civilian Authorities

A persistent theme in American jurisprudence, one that colors the historical understanding here, is that "the precedence of civil jurisdiction is favored in the law." 2 Winthrop, *supra*, at 697. Consequently, statutory provisions creating court-martial jurisdiction over civilians are "to be strictly construed and confined to the classes specified." 1 Winthrop, *supra*, at 100. Among the important statutory restrictions on the exercise of court-martial jurisdiction is

that jurisdiction is limited to civilians serving "in the field," a limitation that has endured since the 1775 Articles of War adopted by the Continental Army.[38]

Thus, although the early Articles of War permitted the court-martial of civilians serving "in the field" during time of war, it was well understood that where civilian adjudication was available, a civilian trial was required.

As Captain De Hart explained in his classic treatise:

> But it must be remembered that the application of such [military] laws to such persons [as camp followers] 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*.

William C. De Hart, *Observations on Military Law, and the Constitution and Practice of Courts-Martial* 23 (1859) (emphasis added).

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[38] *See* American Articles of War of 1775, art. 32 ("All suttlers and retailers to a camp, and all persons whatsoever, serving with the continental army in the field, though not inlisted [sic] soldiers, are to be subject to the articles, rules, and regulations of the continental army."), *reprinted at* 2 Winthrop, *supra*, at 956; American Articles of War of 1776, § XII, art. 23 ("All suttlers and retainers to a camp, and all persons whatsoever, serving with the armies of the United States in the field, though no inlisted [sic] soldier, are to be subject to orders, according to the rules and discipline of war."), *reprinted at* 2 Winthrop, *supra*, at 967.

Indeed, so strong was the preference for civilian trials that the 1776, 1806, and 1874 Articles of War even required that *commissioned officers and soldiers* be turned over to civil authority, on request of the injured party, for a civilian trial for crimes involving injury to the person or property of an American citizen.[39] Notably, these provisions extended only to uniformed personnel and did not include civilians accompanying a military force. *Amici* submit that the reasonable conclusion to be drawn from the exclusion of civilian camp followers from these turnover provisions is that it was well understood that courts-martial lacked jurisdiction in the first instance over civilians when prosecution in civilian court was reasonably available. Thus, unlike uniformed soldiers, there were no competing fora for the prosecution of civilians, as a civilian trial was required when civilian courts were available.

Attorney General Rush reaffirmed the contemporary understanding as to the statutory reach of court-martial jurisdiction in an 1814 opinion concerning civilians serving on ships operating under letters-of-marque.[40] At the outbreak of

[39] American Articles of War of 1776, *supra* note 38, § X, art. 1; American Articles of War of 1806, art. 33, *reprinted in* 2 Winthrop, *supra*, at 979; American Articles of War of 1874, art. 59, *reprinted in* 2 Winthrop, *supra*, at 990.

[40] "Letters of marque" are the government's written authorization 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).

the War of 1812, Congress had authorized letters-of-marque to assist in the war against Great Britain, and had provided by statute that any offenses committed by the personnel serving aboard a ship operating under a letter-of-marque "shall be tried and punished in such manner as the like offences are or may be tried and punished when committed by any person belonging to the public ships of war of the United States."[41] The statute did not include any explicit geographic limitation on this amenability to court-martial.

In response to an inquiry from the Secretary of the Navy, the Attorney General stated that the proper construction of the statute nevertheless did not extend to offenses committed aboard a ship that was located within the United States:

> [T]he punishment by court-martial of offences committed on board of letters-of-marque is contemplated only when such offences happen out of the jurisdiction of the United States. The reason for the distinction may probably have been, that, unless the authority of the court-martial had been recognised for offences committed on board of these vessels when abroad, no punishment could have followed them — it being matter of great doubt how far the common code of the United States extends on the high seas; but for all such offences as may take on board of them while they are within the jurisdictional limits of the United States, or their territories, the ordinary courts of law of the country are competent to afford redress. The

[41] Act of June 26, 1812, ch. 107, § 15, 2 Stat. 759, 763 (1812).

> jurisdiction of the military tribunals is not to be stretched by implication.[42]

Attorney General Rush's opinion is perfectly in line with the contemporary understanding that court-martial jurisdiction existed over civilians only when it was not practical to deliver the civilian to friendly civilian authorities.

Attorney General Williams reached a similar conclusion nearly sixty years later, opining that the term "in the field" implied "military operations with a view to an enemy," and that "[p]ossibly 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.'"[43]

As would be expected considering the limited scope of the term "in the field," courts-martial of civilians were exceedingly rare in the early days of the Republic. A more common response to misconduct by civilians accompanying an armed force was expulsion from the camp.[44] With few exceptions, the eighteenth-and nineteenth-century courts-martial of civilians occurred in functional times of war and in locales where there were no operating civilian courts. George Washington's papers

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

[43] Military Jurisdiction, 14 Op. Att'y Gen. 22, 23-24 (1872).

[44] *See* note 19, *supra*.

reference a handful of courts-martial of civilians serving with the Continental Army during the American Revolution, as do other contemporary historical records.[45] These courts-martial generally appear to have occurred "in an area of active hostilities where civilian courts of the struggling colonies were not effectively functioning."[46]

Similarly, even though the period spanned the War of 1812, the Mexican War, and ongoing hostilities with Indian tribes, historians have identified only six courts-martial of civilians during the entire period from 1800 to 1860. These courts-martial generally involved military operations on the frontier, where civil courts were non-existent or not functioning.[47] Thus, early historical practice matched the opinions of Attorneys

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[45] *See* Brief for Petitioners at 40 n.25, *McElroy*, 361 U.S. 281 (1960) (No. 21) (Justice Department brief collecting citations), *available at* 1959 WL 101596.

[46] Robert Girard, *The Constitution and Court-Martial of Civilians Accompanying the Armed Forces – A Preliminary Analysis*, 13 Stan. L. Rev. 461, 483 (1961).

[47] *See* O'Connor, *Contractors and Courts-Martial*, *supra*, at 765-66 (describing the six courts-martial of civilians between 1800 and 1860 that have been identified by researchers). Two courts-martial during this period took place in areas where there were no hostilities with an enemy force and where local courts were running. *Id.* (referencing the Armistead and Burchard courts-martial). *Amici* presume the convening authorities simply overstepped their jurisdictional authority in these cases. In any event, two inexplicable exercises of court-martial jurisdiction is "too episodic, too meager, to form a solid basis in history" to overcome the well-understood limitations on the statutory grant of court-martial jurisdiction over civilians serving "in the field." *See McElroy*, 361 U.S. at 284.

General and treatise writers that court-martial jurisdiction was not available over civilians when civilian courts were available.

B. More Recent Precedent Construing "in the Field" Supports a Narrow Application of that Phrase by this Court

There were no courts-martial of civilians in the first half of the twentieth century other than during declared wars.[48] Most federal court decisions considering the propriety of the court-martial of civilians during the First and Second World Wars were decided in a manner consistent with the historical understanding we have discussed above. That is, courts-martial were upheld where the civilian was serving with a military unit engaged in operations with a view toward an enemy *and* where friendly civilian courts were not available,[49] and court-martial jurisdiction was rejected when these criteria were not met.[50]

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[48] Overseas Jurisdiction Adv. Comm., *Report to the Sec. Def., the Att'y Gen., and the Congress of the United States* 13 (1997), *available at* www.fas.org/irp/doddir/dod/ojac.pdf.

[49] *See, e.g.*, *Perlstein v. United States*, 151 F.2d 167, 169 (3d Cir. 1945) (upholding court-martial jurisdiction over civilian serving with Army personnel to recover scuttled German and Italian vessels in Eritrea); *Shilman v. United States*, 73 F. Supp. 648, 649 (S.D.N.Y. 1947) (upholding court-martial jurisdiction over civilian 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 that was part of convoy proceeding to Casablanca with Army cargo); *In re Di Bartolo*, 50 F. Supp. 929, 933-34 (S.D.N.Y. 1943) (upholding court-martial jurisdiction over government contractor accompanying the Army in wartime

There were a few decisions in this era, however, that more or less wrote "in the field" out of the Army Articles of War, upholding court-martial jurisdiction over civilians who were nowhere near a theater of war and were located in places where American civilian courts were perfectly available. Most notable of these decisions was *Hines v. Mikell,* 259 F. 28, 35 (4th Cir. 1919), where the Fourth Circuit upheld the court-martial of a civilian stenographer working at Fort Jackson, South Carolina on the theory that during a time of war, "practically the entire army is 'in the field,' but not necessarily 'in the theater of operations.'" *Id.* at 33.[51] The Fourth Circuit's broad conception of court-martial jurisdiction over civilians in *Hines*, an outlier even in its day, is not compatible with the

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Eritrea); *Ex parte Gerlach*, 247 F. 616, 617-18 (S.D.N.Y. 1917) (upholding court-martial jurisdiction over civilian returning to U.S. on Army transport vessel traveling through waters populated by enemy submarines).

[50] *See, e.g.*, *Walker v. Chief Quarantine Officer*, 69 F. Supp. 980, 987 (D.C.Z. 1943) (holding civilian employee of War Department performing construction work in Panama Canal Zone was not "in the field"); *Ex parte Weitz*, 256 F. 58, 58-59 (D. Mass. 1919) (rejecting court-martial jurisdiction over a civilian working at Fort Devens, Massachusetts).

[51] *See also McCune v. Kilpatrick*, 53 F. Supp. 80, 85-86 (E.D. Va. 1943) (upholding court-martial of civilian cook on vessel owned by War Shipping Administration for conduct occurring while ship was docked in Norfolk, Virginia); *Ex. Parte Jochen*, 257 F. 200, 207 (S.D. Tex. 1919) (upholding court-martial of civilian quartermaster serving with the Army in south Texas); *Ex parte Falls*, 251 F. 415, 416 (D.N.J. 1918) (upholding court-martial of civilian cook for leaving his vessel in Brooklyn).

Supreme Court decisions of the 1950s and 1960s that dictated a much narrower reach of court-martial jurisdiction.

In *Reid v. Covert*, 354 U.S. at 33 n.59, in the course of striking down application of Article 2(11) to capital offenses, the plurality noted prior federal court cases allowing the court-martial of civilians serving "in the field." The Court expressed some skepticism as to whether it is ever constitutional to court-martial civilians,[52] and added that these handful of federal court cases, "to the extent that these cases can be justified,"[53] must rest on Congress's war powers and "[t]he exigencies which have required military rule on the battlefront."[54] Presumably, these "exigencies" include the inability to turn an offending civilian over to friendly civil authorities. As a result, the *Covert* plurality rejected the Government's efforts to expand the concept of "in the field" to apply to non-combat situations, as "[m]ilitary trial of civilians 'in the field' is an extraordinary jurisdiction and it should not be expanded at the expense of the Bill of Rights." *Id.* at 35.

[52] *Covert*, 354 U.S. at 19 ("But if the language of Clause 14 is given its natural meaning, the power granted does not extend to civilians . . . ." (footnote omitted)).

[53] *Id.* at 33.

[54] *Id.* at 35.

McElroy is the most instructive Supreme Court case concerning the proper statutory construction of Article 2(a)(10). Though *McElroy* concerned Article 2(11), the Government's brief not only conceded that absence from the reach of civilian courts was a factor in the "in the field" analysis, it argued that this was the *overriding* consideration:

> 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. . . . And, clearly, American civil law, in its territorial phase, cannot be present where these troops are.[55]

Indeed, the Government argued in *McElroy* that with the disappearance of the American frontier, where there were no available civilian courts, a military force likely would never again be "in the field" within the United States:

> 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 such as invasion, internal chaos, or great emergency — it was no longer possible to be "in the field" in the United States (*i.e., in an area where civilian courts could not operate*).[56]

The *McElroy* Court rejected the Government's attempt to eliminate the requirement of hostilities from the construction

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[55] Brief for Petitioners at 60-61, *McElroy*, 361 U.S. 281 (1960) (No. 21) (Justice Department brief), *available at* 1959 WL 101596.

[56] *Id.* at 60 (emphasis added).

of "in the field," but also embraced the Government's notion that an important part of this concept is location at a place where U.S. civilian courts cannot reach. In particular, the Court explained that Attorney General Williams's opinion and historical practice involved "frontier activities" that "were in time of 'hostilities' with Indian tribes or were in 'territories' governed by entirely different considerations." *McElroy*, 361 U.S. at 285-86.

This Court's most complete discussion of the meaning of "in the field" was in *United States v. Burney*, 6 C.M.A. 776, 21 C.M.R. 98 (1956). Although it involved the constitutionality of Article 2(11), *Burney* provided lengthy *dicta* concerning the Court's views on the meaning and constitutionality of several UCMJ provisions purporting to allow the court-martial of civilians. Despite the abundance of authorities urging a more narrow conception of the term, this Court relied solely on *Hines v. Mikell*, 259 F. at 34, as support for the notion that "'in the field' is determined by the activity in which it may be engaged at any particular time, not by the locality where it is found." *Burney*, 6 C.M.A. at 787-88, 21 C.M.R. 109-10.

This Court decided *Burney* after the Supreme Court had decided *Toth*, but before it had decided *Covert*, *Singleton*, *McElroy*, and *Grisham*. Thus, this Court did not have the benefit of the plurality opinion in *Covert* stating that jurisdiction

under Article 2(10), if it can be justified, is an "extraordinary jurisdiction" that should be narrowly construed, *Covert*, 354 U.S. at 35, or the Supreme Court's observation in *McElroy* that prior courts-martial of civilians "in the field" were justifiable not just because they involved hostilities, but also because they involved "frontier activities" where civilian court adjudication would have been impossible. *McElroy*, 361 U.S. at 285-86.

Indeed, this Court's *dicta* in *Burney* explicitly was informed by the Court's then-view that the analysis in *Toth* was more or less limited to its facts, and had no application to other UCMJ provisions respecting court-martial jurisdiction over civilians. *Burney*, 6 C.M.A. at 782-83, 21 C.M.R. at 104-05. It also bears mention that virtually every statement made in *Burney* concerning the Court's robust conception of court-martial jurisdiction over civilians was later rejected by the Supreme Court, and this Court specifically disagreed with *Burney*'s construction of Article 2(10) on the "time of war" issue that was before it in *Averette*, 19 C.M.A. at 365, 41 C.M.R. at 365. Thus, the *dicta* in *Burney* appears to be a best effort at predicting the development of the law in an area that was in considerable flux, and future decisions did not follow the more expansive jurisdictional course suggested by this Court's *dicta*.

Thus, the most reasonable construction of "in the field," as used in Article 2(a)(10), and the only plausible construction that does not involve serious constitutional questions, is one that requires both presence in an area of hostilities and the logistical impracticability of turning an accused civilian over to civil authorities. As *amici* have explained in addressing the constitutional issues, there is little question that military authorities reasonably could have turned Mr. Ali over to civilian authorities for prosecution had Congress made Mr. Ali amenable to prosecution under MEJA. This practicability is demonstrated by the number of civilians and soldiers apprehended in Iraq but then returned to the United States for either prosecution under MEJA or a stateside court-martial.

Moreover, amenability to prosecution must exist not only at the time of offense, but also at the time of trial,[57] and Victory Base Camp would not qualify as "in the field" based on regularly-available transportation back to the United States *even if* other parts of Iraq may have so qualified. Therefore, *amici* suggest that one reasonable way to resolve Mr. Ali's case is to avoid the grave constitutional questions posed by amended Article 2(a)(10) and hold that Mr. Ali was not "in the field" as that term is used in the statute.

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[57] *United States v. Harmon*, 63 M.J. 98, 101 (C.A.A.F. 2006).

CONCLUSION

Wherefore, *Amici* respectfully submit that the Court should set aside the findings and sentence against Mr. Ali and direct dismissal of the charges against him.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULES 24(c), 26(d), and 37

1. This brief complies with the type-volume limitation of Rules 24(c) and 26(d) because this brief contains 6,992 words.

2. This brief complies with the typeface and type style requirements of Rule 37 because this brief has been prepared in a monospaced typeface using Microsoft Word Version 2010 with Courier New, using 12-point type with no more than 10½ characters per inch.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing brief was delivered by email to the Court, the U.S. Army Government Appellate Division, and Mr. Ali's detailed appellate counsel on January 12, 2012.

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