IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee,	)	BRIEF OF *AMICI CURIAE* ERIC SCHNAPPER AND JEFFERY BARNUM IN SUPPORT OF APPELLEE
v.	)	
Mr. **ALAA MOHAMMAD ALI,** Contractor, Appellant.	)	Crim. App. Dkt. No. 20080559 USCA DKT. NO. 12-0008/AR

JEFFERY C. BARNUM
Supervised Law Student
University of Washington School of Law

ERIC SCHNAPPER
University of Washington School of Law
William H. Gates Hall
P.O. Box 353020
Seattle, WA 98105
206-616-3167 (office)
206-685-4469 (facsimile)
E-mail: schnapp@u.washington.edu

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Summary of Argument

The Supreme Court has never squarely addressed the issues in this case, although the Court has addressed the constitutionality of court-martialing civilians in different contexts. The Court has however recognized that in the extraordinary circumstance of the battlefield, the government may court-martial certain civilians through the exercise of its war powers.

A formal declaration of war is not required to trigger the national government's war powers. If the conflict requires significant amounts of troops and personnel, it may be considered a *de facto* war, sufficient to trigger the exercise of the war powers.

Although the Court has acknowledged the potential constitutionality of military jurisdiction over civilians at the battlefront, it has also expressed concern over the expansion of military jurisdiction over civilians generally.

In light of the Supreme Court's past opinions and the constitutional interests involved, this Court should adopt a four part test to assess the constitutionality of the exercise of military jurisdiction over civilians accompanying the forces in the field. No one factor is controlling, and each factor may be expressed as a matter of degree.

The four factors to be considered in this constitutional analysis are: (1) the degree to which the accused is accompanying the troops, (2) the proximity to hostilities, (3) the nature of the offense and impact upon mission capability, and (4) the comparative advantages of exercising court-martial jurisdiction.

In this case, appellant's integration with the forces, his location, his actions, and the lack of another forum support the constitutionality of his court-martial.

Statement of Statutory Jurisdiction

Amici Curiae adopts appellee's Statement of Statutory Jurisdiction as set forth on page 3 of appellee's brief.

Statement of the Case

Amici Curiae adopts appellee's Statement of the Case as set forth on pages 3-4 of appellee's brief.

Statement of Facts

Amici Curiae adopts appellee's statement of facts as set forth in appellee's brief on pages 5–9. Where appropriate, additional references to facts will be supplied.

Issue Presented

WHETHER THE MILITARY JUDGE ERRED IN RULING THAT THE COURT HAD JURISDICTION TO TRY APPELLANT AND THEREBY VIOLATED THE DUE PROCESS OF THE FIFTH AND SIXTH AMENDMENTS BY REFUSING TO DISMISS THE CHARGES AND SPECIFICATIONS.

Argument

I. The Supreme Court Has Restricted the Ability to Court-Martial Civilians, But Has Never Spoken Directly About Civilians in Combat

The Supreme Court has never squarely addressed the issue of the constitutionality of court-martialing civilians present in a combat theater. Although the Court has discussed the government's ability to court-martial civilians in other contexts, the Court has not had the opportunity to address the issues raised by this case. Nonetheless, the Court's prior decisions provide some guidance in assessing the constitutional question in the instant case.

A. The Court Limits Military Jurisdiction over Civilians in a Time of War

The first case arose during the Civil War when an Indiana resident was charged with conspiring with the Confederacy and plotting to overthrow the government. *Ex parte Milligan*, 71 U.S. 2, 6-7 (1866). Milligan was alleged to have committed

these acts from 1863 until shortly before his arrest in October 1864. *Id.* *T*he offenses were allegedly committed entirely within the state of Indiana. In granting Milligan's writ of habeas corpus, the Court first noted that Milligan was "in nowise connected with the military service." *Id.* at 121-22. Milligan allegedly acted in Indiana where "the Federal authority was always unopposed, and its courts always open to hear criminal accusations and redress grievances." *Id.* at 121. Although allowing that "on the theatre of active military operations, where war really prevails, there is a necessity to furnish a substitute for the civil authority . . . to preserve the safety of the army and society," *id.* at 127, the Court failed to "see how the *safety* of the country required martial law in Indiana." *Id.* However, even though the Court held the court-martial was unconstitutional, it took care to note that "[e]very one *connected* with [the military] is amenable to the jurisdiction which Congress has created for their government, and, while thus serving, surrenders his right to be tried by the civil courts." *Id.* at 123 (emphasis added). The Court did not clarify who would be considered connected with the military such that their court-martial would be constitutional.

The Court affirmed *Milligan*'s holding in a case involving American citizens in Hawai'i during World War II. *Duncan v. Kahanamoku*, 327 U.S. 304, 324 (1946). Immediately after the

Japanese attack on Pearl Harbor, the government imposed martial law on Hawai'i, and, in doing so, entirely displaced the civilian courts with military tribunals. *Id.* at 307. The first defendant, White, was a stockbroker and neither he nor his company had any ties to the military. *Id.* at 309. White was charged with embezzling stock from another civilian. Because the civilian courts were not yet operational, White was tried by military tribunal and convicted on August 25, 1942 – a date which the Court noted was "more than eight months after the Pearl Harbor attack." *Id.* The second defendant, Duncan, a civilian shipfitter at the Navy Yard in Honolulu, brawled with two Marine sentries on February 24, 1944-"more than two years and two months after the Pearl Harbor attack." *Id.* at 310. Although the Hawaiian courts had by then been permitted to resume their normal functions, Duncan was tried by a military tribunal because he assaulted a military member. The government contended "that Hawaii had become part of an active theatre of war constantly threatened by invasion from without [and] that . . . martial law had validly been established." *Id.* at 311. The Court expressed skepticism about the military necessity of such drastic measures, noting "that at the time the alleged offenses were committed the dangers apprehended by the military were not sufficiently imminent to cause them to require civilians to evacuate the area or even to evacuate any of the

buildings necessary to carry on the business of the courts." *Id.* at 313. The Court eventually invalidated the exercise of military jurisdiction on statutory rather than constitutional grounds. However, the Court's statutory interpretation was made with an eye to the potential constitutional issues associated with complete martial law. The Court concluded that Congress could not have "intended to authorize the supplanting of courts by military tribunals." *Id.* at 324. Yet, even here, the Court specifically noted that *Duncan* did not "involve the well-established power of the military to exercise jurisdiction over members of the armed forces, [and] those directly connected with such forces . . . ." *Id.* at 313.

B. The Court Invalidates Military Jurisdiction Over Civilians During Peacetime

After World War II, the Court examined several cases involving different classes of civilians: civilians who had committed offenses during their uniformed service but were subsequently discharged, civilian dependents of service members, and civilian employees of the United States accompanying the forces overseas. In each case, the Court further limited the ability of the government to constitutionally court-martial civilians.

The first case in this series involved Robert Toth, who allegedly committed murder in September 1952 while serving in

Korea as a member of the Air Force. *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 13 (1955). Toth was thereafter honorably discharged before any court-martial proceedings were initiated against him. *Id.* Five months after his discharge, Toth was arrested and transported back to Korea to be court-martialed. *Id.* The Court held that the military could not constitutionally subject a civilian to court-martial, even though his alleged acts occurred during his time of service if he was a civilian by the time the court-martial process began. *Id.* at 23. In doing so, the Court rejected the argument that "the discipline of the Army is going to be disrupted, its morale impaired, or its orderly processes disturbed" by subjecting Toth to a civilian trial rather than a court-martial. *Id.* at 22.

In the next case the Court held it was unconstitutional to court-martial civilian dependents of service members during peacetime. *Reid v. Covert* concerned defendants accused of killing their service member spouses while stationed overseas. 354 U.S. 1, 3-4 (1957) (plurality opinion). The Court again rejected the government's assertions that courts-martial of dependents were requisite to maintain good order and discipline among the service members. *Id.* at 32; *id.* at 47 (Frankfurter, J., concurring) ("[T]he notion that discipline over military personnel is to be furthered by subjecting their civilian dependents to the threat of capital punishment imposed by court-

martial is too hostile to the reasons that underlie the procedural safeguards of the Bill of Rights for those safeguards to be displaced."). The Court also noted that, although the events occurred while overseas on military bases, "neither Japan nor Great Britain could properly be said to be an area where active hostilities were under way." *Id.* at 33-34 (plurality opinion). Again, the Court took special pains to note that "[f]rom a time prior to the adoption of the Constitution the extraordinary circumstances present in an area of actual fighting have been considered sufficient to permit punishment of some civilians in that area by military courts under military rules." *Id.* at 33. Although *Reid* was limited to capital crimes, the Court later extended its holding to all crimes involving dependents accompanying service members overseas during peacetime. *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234, 248 (1960).

Reid distinguished its circumstances from *Madsen v. Kinsella*. In *Madsen*, the Court had upheld the exercise of military jurisdiction over a civilian dependent during a military occupation. *Madsen v. Kinsella*, 343 U.S. 341, 343 (1952). The defendant murdered her husband in 1949 while accompanying him to his duty station in occupied Germany. *Id.* at 343-44. The *Madsen* Court noted that, even in the absence of hostilities, the fact that the United States was the military

occupier, and the defendant was not amenable to civilian jurisdiction for this offense, provided sufficient justification to try the defendant in a military tribunal. *Id.* at 356. *Reid* did not overrule *Madsen*, but recognized its application to situations when the armed forces are acting as occupiers. *Reid*, 354 U.S. at 35 n.63.

Finally, in *McElroy v. United States ex rel. Guagliardo*, 361 U.S. 281 (1960), and *Grisham v. Hagan*, 361 U.S. 278 (1960), the Court extended *Reid* to include civilian employees accompanying the forces overseas for both capital (*Grisham*) and noncapital offenses (*Guagliardo*). The defendants in these cases were accompanying U.S. forces in Morocco, Germany, and France in the 1950s, when these areas were neither under military rule nor the scene of actual hostilities. Although one of the defendants in *Guagliardo* was accused of stealing from the supply depot, the Court held that the military could not court-martial a civilian in peacetime simply because he was employed by the Air Force and his actions had an adverse impact on his employer. *Guagliardo*, 361 U.S. at 286. The Court further observed that the historic practice of court-martialing civilians occurred "during the Revolutionary Period, . . . during a period of war, and hence are inapplicable here." *Guagliardo*, 361 U.S. at 284. The Court rejected the notion that mere presence overseas rendered a civilian "in the field." *Id.* at 285. Again, the Court noted

that the phrase being "in the field" referred to an area of active hostilities. *Id.* at 285-86.

Overall these decisions both reflect a reluctance to uphold the constitutionality of subjecting civilians to courts-martial during peacetime and yet recognize that the extraordinary circumstances presented in the face of actual hostilities could justify court-martial jurisdiction over certain civilians.

II. During Times of War or Active Hostilities, Civilians May Be Court-Martialed In Limited Circumstances

Although the Court has been hesitant to extend court-martial jurisdiction to civilians in peacetime, the Court has recognized that "[f]rom a time prior to the adoption of the Constitution the extraordinary circumstances present in an area of actual fighting have been considered sufficient to permit punishment of some civilians in that area by military courts under military rules." *Reid*, 354 U.S. at 33.

Colonel Winthrop, "the 'Blackstone of Military Law,'" *Reid,* 354 U.S. at 19 n.38, notes the practical underpinnings of the rule:

> Protected as they are by the military arm, [civilians] 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 enemy, requires that these persons shall be governed much as are those with whom they are commorant.[1]

[1] "Commorant" is defined as "abiding, dwelling, resident." Oxford English Dictionary

Winthrop, *supra*, at 98. While Winthrop states that jurisdiction in this instance should be "confined both to the period and pendency of war and to acts committed on the theatre of war," he notes that "war" is equally present when there is a "period of hostilities." *Id.* at 101.

The first American article of war to address court-martial of civilian was article 31 of Massachusetts Articles of War of 1775 (itself based upon an earlier British Army Regulation), which provided that "[a]ll sellers and retailers to a camp, and all persons whatsoever serving with the Massachusetts Army in the field, though *not* enlisted Soldiers, are to be subject to the Articles, Rules and Regulations of the Massachusetts Army."[2] This provision was adopted (without any major substantive changes) by the Continental Congress in 1775 and again in 1776. The Congress of the United States followed suit, enacting it in 1806 and again in 1874. When Congress amended the Articles of War in 1916, and when it created the Uniform Code of Military Justice in 1950, it provided for military jurisdiction over

[2] The Massachussets Articles of War of 1775, art. 31 (emphasis added), *reprinted in* William Winthrop, *Military Law & Precedents* 956 (2d ed. 1920 reprint).

civilians who were "accompanying or serving with" the forces in the field.[3]

However, merely identifying the historical pedigree of the power to court-martial civilians does not identify the source of the constitutional authority to do so. There are two potential sources of authority: Congress' ability "To Make Rules for the Government and Regulation of the land and naval Forces," U.S. Const. art. I, § 8, cl. 14, andthe government's war powers, contained both in Article I, § 8 and Article II, § 2.

Many of the cases examining civilian amenability to courts-martial *necessarily* rested on the powers conferred by the "Make Rules" clause because they occurred during a time of peace and far from any hostilities. *See, e.g.*, *Singleton*, 361 U.S. at 236 (accused was the spouse of a soldier stationed in Germany); *Grisham*, 361 U.S. at 278 (accused was a civilian employee living in France). Although the underlying alleged criminal conduct in *Toth* occurred closer to the battlefield, the Court limited its inquiry to the applicability of the "Make Rules" Clause (as supplemented by the Necessary and Proper Clause). *Toth*, 350 U.S. at 14.

Although the Court has given only passing scrutiny to justifying a civilian's court-martial under the government's war

[3] The Court of Military Appeals traced the history of this provision "without difficulty" from approximately 1493 until 1956. *United States v. Burney*, 21 C.M.R. 98, 107-10 (1956).

powers, it is the more appropriate source of constitutional authority in this case. Justice Black, writing for the plurality in *Reid*, remarked that the exercise of military jurisdiction over civilians "can be justified, insofar as they involved trial of persons who were not 'members' of the armed forces, [by] the Government's 'war powers.'" *Reid*, 354 U.S. at 33. Justice Black explained that when engaging "an actively hostile enemy, military commanders necessarily have broad power over persons on the battlefront." *Id.* He noted, however, that this broad power required some proximity to actual hostilities. "The exigencies which have required military rule on the battlefront are not present in areas where no conflict exists." *Id.* at 35.

III. The Government's War Powers Include Areas of Active Hostilities Even Without a Declaration of War

Although Justice Black states that proximity to hostilities is critical to trigger the government's war powers, he did not indicate that a formal declaration of war was required. Indeed, Colonel Winthrop recognized that "a declaration of war by Congress is not absolutely necessary to the legal existence of a status of foreign war." Winthrop, *supra*, at 668; *see also id.* at 668 n.20 ("Declarations of war or similar formal notices are held by modern writers on International Law not to be necessary to the initiation of a *status belli*.").

In *Bas v. Tingy*, 4 U.S. 37 (1800), the Court held that a statute creating certain salvage rights regarding an American vessel "re-taken from the enemy" applied to a ship recaptured after it had been seized by a French privateer. Although the Court concluded that the term "enemy" referred to a nation with which the United States was at war, it concluded that the hostilities that were then occurring between the United States and France constituted a war, even in the absence of a formal declaration. This decision, coming only eleven years after the ratification of the Constitution, supports a similar interpretation of what constitutes a war under Article I.

The problem remains to define when the circumstances surrounding a particular state of conflict transform an isolated military skirmish into a *de facto* state of war sufficient to bring the national government's war powers into effect. Military courts have long wrestled with this particular question because there are many provisions in the Uniform Code of Military Justice (UCMJ) which depend on a state of war to become operative. *E.g.*, Article 43(a),(e),(f), UCMJ (suspension of the statute of limitations in a "time of war"). For example, the Court of Military Appeals looked to a long list of factors in determining that the Korean conflict was a *de facto* war, including the nature of the conflict, the number of American troops deployed, and the amount budgeted for the particular

conflict. *United States v. Bancroft*, 11 C.M.R. 3, 5 (C.M.A. 1953). Other, non-military courts have also addressed this issue for over 200 years. *See United States v. Prosperi*, 573 F. Supp. 2d 436, 446 (D. Mass. 2008) (holding the Iraq and Afghanistan conflicts equate to a "state of war"); *see also* Kathryn E. Kovacs, *A History of the Military Authority Exception in the Administrative Procedure Act,* 62 Admin. L. Rev. 673, 717 n.333 (2010) (collecting cases).[4] But it is clear that for constitutional purposes a conflict can constitute a war even in the absence of a formal declaration of hostilities.

IV. The Constitutionality of Court-Martial Jurisdiction over Civilians in a Time of War Requires Weighing Four Factors

As noted by the Supreme Court in *Duncan*, the mere existence of a *status belli* (either *de jure* or *de facto*) is not sufficient to justify the exercise of military jurisdiction over all civilians. 327 U.S. at 324. Although the Court has acknowledged the historical basis for court-martialing

[4] The Court of Military Appeals declined to interpret the previous version of Article 2(a)(10) as applicable during a *de facto* war. *United States v. Averette*, 41 C.M.R. 363, 365 (C.M.A. 1970). The *Averette* court explicitly did not decide whether Congress could constitutionally subject civilians to court-martial jurisdiction in a *de facto* war. *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."). Of course, Congress did exactly that when it amended Article 2(a)(10) to permit court-martial during time of a contingency operation in addition to a declared war.

civilians, it has expressed a proper reluctance to expand the "in the field" category. *See, e.g.*, *Reid*, 354 U.S. at 35 ("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 urge that four factors be considered in determining whether the court-martial of a civilian is constitutional. The four factors are: (1) the degree to which the accused was accompanying the forces, (2) the degree of proximity to hostilities, (3) the nature of the offense, and (4) the comparative advantages of a court-martial over another forum. No single factor is controlling, and the individual factors are not binary but have varying degrees of magnitude.

A. Degree to Which Accused Is Accompanying the Troops

This factor is designed to capture how "directly connected" the accused was with the rest of the military unit. As the degree of the accused's integration with the military unit increases, so does the justification for the constitutionality of the exercise of military jurisdiction. Integration largely depends upon the type of work the accused performed and its importance to the mission. It may also include where the accused was quartered and where the accused messed.

For example, the spouses in *Reid* and *Kinsella* were both present on a military base, but were not actually integrated

into the military unit. Similarly, the stockbroker in *Duncan* and the defendant in *Milligan* had no connection whatsoever with the military. A tangential connection may also be insufficient—a contractor's employee who gets into a car accident on a military base does not merely because of that accident have a sufficient connection to the military unit to justify court-martial. *Ex parte Weitz*, 256 F. 58, 58-59 (D. Mass. 1919).

Lower court decisions illustrate this factor. The Third Circuit found a civilian sufficiently integrated with the forces in the port city of Massawa, Eritrea, to support court-martial jurisdiction. *Perlstein v. United States*, 151 F.2d 167, 170 (3d Cir. 1945). The port of Massawa was "then a military base occupied by American and British troops." *Id.* at 167-68. In Massawa, a salvage operation was underway, raising Italian and German ships scuttled before the fall of the port, presumably hampering the use of the harbor for allied shipping. *Id.* at 168. The civilian who was court-martialed was responsible for the air conditioning and refrigeration systems for the salvage crew, and although he was not directly involved with the raising of the ships, the court nonetheless found that his association with the operation was "was as close as if he had and his contribution to its successful completion was of considerable importance." *Id.* Likewise, the defendant in *Ex parte Gerlach* was sufficiently integrated because he travelled with a military

transport, and was ordered to stand watch while the ship was transiting submarine infested waters, an order he ultimately refused. *Ex parte Gerlach*, 247 F. 616, 617 (S.D.N.Y. 1917). *See also In re Di Bartolo*, 50 F. Supp. 929 (S.D.N.Y. 1943) (accused employed as airplane mechanic at depot in Eritrea).

B. Proximity to Hostilities

Proximity to the actual hostilities is an important factor in finding the imposition of court-martial jurisdiction constitutional. The closer the accused is to actual hostilities, the greater the potential for loss of life or mission impact, and, correspondingly, the greater the need for a commander to demand adherence to military norms and orders.

The proximity to hostilities factor is most like the "in the field" requirement of Article 2(a)(10). Various versions of the test have existed over the years: being in the field "impl[ies] military operations with a view to the enemy," 14 Op. Att'y Gen. 23 (1872), or "area[s] of actual fighting." *Reid*, 354 U.S. at 34 n.61.

In addition to proximity to actual hostilities, proximity to *likely* hostilities is also sufficient. *See Grewe v. France*, 75 F. Supp. 433, 437 (E.D. Wis. 1948) ("At the time involved, although open hostilities had ceased, it was highly essential that the commanding officer of our forces maintain strict discipline . . . over our own troops and those accompanying

them. Underground opposition to our forces was almost to be expected."); *In re Berue*, 54 F. Supp. 252, 255 (S.D. Ohio 1944) ("[W]here the armed forces of belligerent nations meet in armed conflict as a matter of common occurrence, with consequent loss of life and property, [is] 'in the field.'"); *see also Gerlach*, 247 F. at 617 (transiting submarine infested waters).

Because proximity to hostilities is but one factor in determining the constitutionality of a civilian's court-martial, a lack of proximity to the hostilities may not extinguish the ability to court-martial a civilian. In two separate cases, one from each World War, courts upheld court-martial jurisdiction over merchant seaman who attempted to desert at a port within the United States. *McCune v. Kilpatrick*, 53 F. Supp. 80, 85 (E.D. Va. 1943); *Ex parte Falls*, 251 F. 415, 416 (D.N.J. 1918). Although the district court judge in *McCune* briefly addressed the potential for hostile action, noting the journey "is fraught with grave dangers from the land, the sky and the sea," *McCune*, 53 F. Supp. at 84, both decisions seemed to rest upon the vitality of the shipment and the necessity of the defendant's services to effect the delivery of the shipment.

Identifying where "the boundary-line runs between civil and military jurisdiction . . . is difficult." 14 Op. Att'y. Gen. 23 (1872). It likely even more difficult today with the impact of technology and warfighting on the deployment of the military.

Today, planes depart from Whiteman Air Force Base in Missouri, strike targets anywhere on the planet, and return to Missouri once the mission is complete. Naval ships are vulnerable not only in hostile waters, but also while refueling in ostensibly neutral countries. Operators sitting in the Las Vegas desert pilot unmanned aerial vehicles half a world away in Afghanistan. Nonetheless, as a factor determining the applicability of military jurisdiction, the closer the accused gets to facing fire, the greater the need for adherence to commander's direction, and the greater the justification to try the accused at a court-martial.

C. Nature of the Offense and Its Impact upon Mission Capability

Another factor to consider in assessing the constitutionality of court-martial jurisdiction over civilians is the extent to which the civilian's conduct impacted the operational capability of the military force.[5] For example, if an accused was passing bad checks to individuals outside the combat theater (in violation of Article 123a, UCMJ), the resulting impact is far different than if an accused assaults a member of the supported military unit. Offenses such as

[5] This is *not* to suggest the offense must be "service-connected" under the strictures set out in *O'Callahan v. Parker*, 395 U.S. 258, 272-73 (1969), *overruled by Solorio v. United States*, 483 U.S. 435 (1987). Rather, it is a recognition that military necessity would be difficult to establish unless there was some impact upon the mission.

desertion, *McCune*, 53 F. Supp. at 85; *Falls*, 251 F. at 415, failing to obey a lawful order, *Gerlach*, 247 F. at 617, theft, *Perlstein,* 151 F.2d at 168; *di Bartolo*, 50 F. Supp. at 929, reckless endangerment, *Grewe*, 75 F. Supp. at 434, or assault, *Burney*, 21 C.M.R. at 103-04, qualify as having impacted the military unit. However, this is also a question of degree, and is only one part of the overall four factor t.

D. Comparative Advantage of Exercising Court-Martial Jurisdiction

Utilization of a court-martial may offer several comparative advantages over an alternative forum: speed, ability to conduct the proceedings in theater, and the court-martial participants-especially the panel members-understand the stresses of combat. Of course, the clearest advantage comes when there is no other forum available. *See, e.g.*, *Madsen*, 343 U.S. at 345 (noting lack of civilian jurisdiction over offense).

Speedy and efficient court-martial proceedings promote good order and discipline because they both quickly deter future undisciplined behavior and decrease the impetus for unit members to take justice into their own hands. "Delay in prosecution will not only degrade effectiveness and discipline but will have a viral effect that breeds additional violations of the code--violations which may escalate in severity and eventually lead to the total loss of discipline and order." David Loveless, *Combat*

Implications, International Considerations, and Military Commission Self-Application: A Proposal to Create A Combat Exception in the Military Rules of Evidence, 48 S. Tex. L. Rev. 1135, 1141 (2007). In contrast, an investigation and trial in an alternative forum, such as a district court, may take years to resolve.

Additionally, court-martials are deployable and regularly take place in or near a combat theater. In-theater court-martials offer several advantages. First, they permit the members of the affected unit to view the proceedings. Second, they bring the proceeding and investigatory team closer to the evidence and non-military witnesses. Also, they minimize the operational impact because witnesses do not have to be absent from their fighting units any longer than is necessary. Third, they provide an opportunity for the victims to view the proceedings and gain an understanding for the administration of justice partly on their behalf. If a trial was held stateside, the local victims may never see the proceedings, and the local district court may not be able to compel the presence of required witnesses.

Finally, those involved in the court-martial, particularly the members of the court-martial panel, have some understanding of the environment in which the alleged offenses took place. This knowledge not only permits prosecution of offenses whose

impact may not be readily apparent to civilian prosecutors and jurors, but also permits defenses and mitigating circumstances unique to the combat environment. This depth of understanding has caused defendants in the civilian criminal system to attempt to re-enlist in order to be tried in a justice system familiar with the "fog of war." *United States v. Green*, 654 F.3d 637, 644 (6th Cir. 2011), *cert. denied*, 132 S. Ct. 1056 (2012).

V. Neither Party Advances The Correct Standard for Determining When The constitution Permits A Civilian To Be Court-Martialed

A. The Government Fails to Articulate a Clear Test for the Constitutionality of the Exercise of Court-Martial Jurisdiction over Civilians

Although the government appreciates the potential constitutional pitfalls, GB at 36 ("The term 'in the field' is crucial to the constitutionality of the statute"), it fails to articulate a clear test for assessing the constitutionality of the exercise of military jurisdiction over civilians. The government seems to assert that the test involves only one factor, whether the accused is a part of the land and naval forces. GB at 11. That standard is inconsistent with the requirement in *Reid* and *Guagliardio*'s requirement for the presence of some form of hostilities.

By grounding the exercise of court-martial jurisdiction in the government's war powers, and by using the four factor test,

the Court will avoid the potential overbreadth in the government's proposal.

B. Appellant's Proposal Does Not Permit Exercise of Court-Martial Jurisdiction over Civilians Under any Circumstances

Conversely, although appellant brings an as-applied challenge, appellant's proposed test for jurisdiction would render the court-martial jurisdiction over civilians per se unconstitutional. Appellant grounds his challenge on a theory that the *potential* existence of an alternative forum extinguishes court-martial jurisdiction. AB at 25-26. Appellant claims that if Congress wished, it "could easily extend MEJA to cover an accused such as Mr. Ali." Because Congress could always theoretically create jurisdiction over a class of civilians, this proposal would compel the conclusion that the court-martial of a civilian is unconstitutional under any circumstances. Appellant's position is inconsistent with the historical practice of exercising military jurisdiction over civilians in the extraordinary context of the battlefront.

VI. Appellant Was Appropriately Subject to Court-Martial Jurisdiction

In the present case, by discerning a *de facto* state of war, and by applying the four factors discussed *supra*, the Court should find the appellant was properly subject to military jurisdiction.

A. Operation Iraqi Freedom Was a *De Facto* War

Operation Iraqi Freedom has required an immense commitment of financial resources and personnel (including recall of reservists). Even though the Iraqi army was defeated, American forces were still engaged in a difficult counter-insurgency operation at the time of the offense and trial. Accordingly, a *de facto* state of war existed at the time of the offense and trial. *See also United States v. Prosperi*, 573 F. Supp. 2d 436, 450-54 (D. Mass. 2008) (concluding a state of war existed for the purposes of the Wartime Suspension of Limitations Act).

B. Appellant was deeply integrated into the 170th Military Police Company

Appellant performed a job vital to the success of the mission of the 170th Military Police (MP) Company, which was to train local Iraqi police. JA 96. As the squad translator, appellant translated for the squad leader in his discussions with police station commanders, and for the rest of the team while they conducted classes for Iraqi police personnel. *Id.* Without a translator, the squad "couldn't do the mission." *Id.* When accompanying the soldiers on their mission, appellant wore exactly what the other members of the unit wore: the Army Combat uniform, body armor, Kevlar helmet and ballistic eye protection. *Id.* When at the Combat Outpost, appellant lived and ate with the soldiers in his unit. JA 97. His living arrangements were

identical to any other member of the 170th MP Company. JA 98. Appellant was thoroughly integrated into the unit, not only was he nearly indistinguishable from the other soldiers of the 170th MP Company, but primarily because he daily worked with them and was a critical part of their team.

C. Appellant Was Proximate to Hostilities

In this case appellant was directly on the front lines. He traveled with his assigned military unit, the 170th Military Police (MP) Company, in their assigned duties outside the Combat Outpost (COP). JA 96. In doing so, appellant was exposed to the same risks as the members of the 170th MP: various types of improvised explosive devices, ordnance, and small arms fire. JA 73, 96. Temporary respite from the stress of battle came only when appellant and his military colleagues returned to the COP behind various defensive structures and four manned checkpoints. JA 91-92.

D. Appellant's Conduct Negatively Impacted Operational Capability

Appellant negatively affected the military performance of various military units. First, and most obviously, when appellant attacked Mr. Habeeb Kadhum Al-Umarryi, he not only injured another person, but he also disabled a military police company by incapacitating its interpreter for seven days. JA 82-83, 221. The interpreter is critical to the success of the

mission of the 170th MP company. JA 89. Second, by attacking a fellow member of the team within the relative safety of the COP, appellant degraded the security relied upon by the other occupants of COP 4. JA 221. Third, when appellant stole SSG Butler's "Bench Made" knife, he likewise undermined the trust and security of the COP and the military unit. *Id.* Finally, appellant hindered the orderly military investigation of the incident when he hid the knife beneath the floor of a shower trailer and when he lied to military investigators about where he obtained the knife. JA 221-22.

E. A Court-Martial was the Most Advantageous Way to Address Appellant's Infractions

The record suggests that the antagonism between appellant and Mr. Ul-Marrayi sprang from personal differences. JA 220-21, 362. However, the attack took place in the presence of other interpreters, some of whom were Iraqi. JA 362. Given the state of civil unrest in Iraq at the time of appellant's attack, it was vital to re-impose order rapidly and revive the discipline necessary to prevent future attacks and execute the mission. Here, the military justice system worked rapidly to resolve the situation, requiring only 120 days from the date of offense to

conviction. JA 11, 216. Additionally, it does not appear as though another forum was practically available.[6]

Conclusion

For the foregoing reasons, we ask this Court to affirm the Army Court of Criminal Appeals.

Respectfully Submitted,

/s/

Jeffery C. Barnum,
Supervised Law Student,
University of Washington School of Law

/s/

Eric Schnapper
University of Washington School of Law
William H. Gates Hall
P.O. Box 353020
Seattle, WA 98105
206-616-3167 (office)
206-685-4469 (facsimile)
E-mail: schnapp@u.washington.edu

[6] The Army Court of Criminal Appeals concluded that because appellant was an Iraqi citizen, he was exempt from the Military Extraterritorial Jurisdiction Act. *United States v. Ali*, 70 M.J. 514, 516 n.4 (A. Ct. Crim. App. 2011). *See also* GB at 28 n.120, Brief of *amicus curiae* in support of appellant at 3 n.6.

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/s/

Eric Schnapper
University of Washington School of Law
William H. Gates Hall
P.O. Box 353020
Seattle, WA 98105
206-616-3167 (office)
206-685-4469 (facsimile)
E-mail: schnapp@u.washington.edu

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I certify that the foregoing brief was electronically filed with the Court, and that a copy of the foregoing brief was electronically sent to the following persons on 22 March 2012:

John D. Riesenberg, CPT, U.S. Army
Appellate Government Counsel

Peter Kageleiry, Jr., LTC, U.S. Army
Appellate Defense Counsel

John F. O'Connor, Steptoe & Johnson, LLP
Amicus Curiae in support of Appellant

/s/

Eric Schnapper
University of Washington School of Law
William H. Gates Hall
P.O. Box 353020
Seattle, WA 98105
206-616-3167 (office)
206-685-4469 (facsimile)
E-mail: schnapp@u.washington.edu