IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee	)	
v.	)	FINAL BRIEF ON BEHALF OF APPELLANT
Mr. **ALAA MOHAMMAD ALI,** United States Army, Appellant	)	Crim.App. No. 20080559
	)	USCA Dkt. No. 12-0008/AR

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Summary of Argument

> *Slight encroachments create new boundaries from which legions of power can seek new territory to capture. . . . It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.*

Reid v. Covert, 354 U.S. 1, 39-40 (1957).

In a series of cases dating back more than fifty years, the United States Supreme Court has struck down the military's exercise of jurisdiction over civilians and their trial by courts-martial. *See United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955); *Reid v. Covert*, 354 U.S. 1 (1957); *Kinsella v. Singleton*, 361 U.S. 234 (1960); *Grisham v. Hagan*, 361 U.S. 278 (1960); *McElroy v. Guagliardo*, 361 U.S. 281 (1960). In *United States v. Averette*, 41 C.M.R. 363 (1970), the Court of Military Appeals (the predecessor to this Court) rejected the exercise of court-martial jurisdiction over a civilian contractor and explained: "A broader construction of Article 2(10) would open the possibility of civilian prosecutions by military courts

whenever military action on a varying scale of intensity occurs."[1] 41 C.M.R. 363, 365 (C.M.A. 1970). That possibility of civilian prosecutions "whenever military action on a varying scale of intensity occurs" is precisely the concern created by the revised Article 2(a)(10). This Court should apply the framework developed since *Toth* to this case and reject the expansion of military jurisdiction over civilians during "contingency operations."

On October 17, 2006, Congress amended Article 2(a)(10), Uniform Code of Military Justice, (UCMJ) by adding five words: "In time of declared war or a contingency operation, persons serving with or accompanying an armed force in the field." (emphasis added). 10 U.S.C. §802(a)(10) (2006). The application of the words "contingency operation" are at issue in this case.

Some may argue that this modification to Article 2(a)(10) is merely a "slight encroachment" justified by the exigencies of our time. However, the Supreme Court has soundly rejected the logic behind that argument. As this Court explained in *Averette*, "[d]espite the existence of statutory provisions for the exercise of court-martial jurisdiction over civilians in certain circumstances, the Supreme Court in a series of cases beginning

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[1] The court further explained: "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." *Averette*, 41 C.M.R. at 365.

with *Toth v. Quarles* has disapproved the trial by courts-martial of persons not members of the armed forces." *Averette*, 41 C.M.R. at 364 (citation omitted).

Mr. Alaa Mohammad Ali (appellant), a civilian contractor, was tried by General Court-Martial on June 22, 2008, in Baghdad, Iraq. Under Issue I, this brief explains why the Court should reject the exercise of military jurisdiction over Mr. Ali because application of Article 2(a)(10) deprived him of the protections afforded by the Fifth and Sixth Amendments to the United States Constitution. Under Issue II, this brief explains that in addition to violating Mr. Ali's Fifth and Sixth Amendment rights, the application of Article 2(a)(10) in this case was contrary to the historic precedent requiring courts to construe military criminal jurisdiction over civilians in the narrowest terms possible.

Statement of Statutory Jurisdiction

On March 31, 2010, The Judge Advocate General of the Army forwarded appellant's case to the Army Court of Criminal Appeals (Army Court) pursuant to Article 69(d), UCMJ, 10 U.S.C. § 869(d) (2008), for review in accordance with Article 66, UCMJ, 10 U.S.C. § 866 (2008). This Court has jurisdiction over this case under Article 67(a)(3), UCMJ, 10 U.S.C.§ 867(a)(3) (2008).

Statement of the Case

On June 22, 2008, a military judge sitting as a General Court-Martial tried Mr. Ali. Pursuant to his pleas, Mr. Ali was convicted of making a false official statement, wrongful appropriation, and wrongfully endeavoring to impede an investigation, in violation of Articles 107, 121, and 134, UCMJ; 10 U.S.C. §§ 907, 921, and 934 (2008). The military judge sentenced Mr. Ali to five months confinement. After trial, but prior to the convening authority taking action, appellant filed a petition for extraordinary relief with the Army Court, seeking a writ of prohibition on the grounds that his court-martial lacked jurisdiction. Following the denial of his petition by the Army Court, appellant filed a writ-appeal petition with this Court. On November 5, 2008, this Court denied appellant's writ appeal petition. Pursuant to a pretrial agreement, the convening authority approved only so much confinement (115 days) as appellant had already served as of the date of trial.

On July 18, 2011, the Army Court issued its opinion, *United States v. Ali*, 70 M.J. 514 (A. Ct. Crim. App. 2011). (JA 1.) The Army Court affirmed the findings and affirmed only so much of the sentence as includes 115 days of confinement and ordered that appellant be credited with 115 days of confinement credit. On November 18, 2011, this Court granted Mr. Ali's petition.

Standard of Review

For court-martial jurisdiction to vest, there must be jurisdiction over the offense and personal jurisdiction over the accused. *United States v. Harmon*, 63 M.J. 98, 101 (C.A.A.F. 2006)(citing Rule for Courts-Martial (R.C.M.) 201(b)). Jurisdiction is a legal question which this Court reviews de novo. *Harmon*, 63 M.J. at 101; *United States v. Melanson*, 53 M.J. 1, 2 (C.A.A.F. 2000). This standard of review applies to both Issue I and Issue II.

Statement of Facts

Mr. Alaa Mohammad Ali was a civilian contractor. (JA 360, 366.) He was born in Baghdad and is an Iraqi citizen. Mr. Ali is also a citizen of Canada and has lived in that country since 1992. He is not a citizen of the United States. (JA 366.) Mr. Ali's wife and three children also live in Canada. *Id.*

Mr. Ali left Canada for employment with L3/Titan Communications (hereinafter L3 Corporation). (JA 63, 360, 366.) L3 Corporation had a contract to provide interpreters for the Department of Defense and employed Mr. Ali as an Arabic linguist and interpreter. (JA 360, 367.) On December 20, 2007, Mr. Ali and the vice president for contracts for L3 Corporation signed an Independent Contractor Agreement. (JA 324-359, 367.) The Independent Contractor Agreemeent did not contain a provision on the applicability of the UCMJ. (JA 367.) On December 13, 2007,

Headquarters, U.S. Army Intelligence and Security Command issued Mr. Ali a Letter of Identification and Authorization (LOIA). (JA 321, 368.) The LOIA identified Mr. Ali as an employee of Titan Corporation (L3 Corporation) and did not address the applicability of the UCMJ. (JA 322, 368.)

Pursuant to his employment with L3 Corporation, Mr. Ali traveled to Fort Benning, Georgia, prior to traveling to Iraq. (JA 360, 368.) The military judge found that Mr. Ali attended a class[2] during which he was informed by the instructor, a Trial Counsel, that civilians are subject to the UCMJ, but in the Trial Counsel's personal opinion civilians would not be prosecuted by the military but instead by a civilian jurisdiction. (JA 122, 129, 368.)

Mr. Ali arrived in Iraq on January 22, 2008. (JA 360, 368.) L3 Corporation assigned Mr. Ali to work with the 170th Military Police Company as an interpreter in the area around the town of Hit, Iraq. *Id.* Mr. Ali provided translation services for a squad of Military Police; without Mr. Ali, or another interpreter, the squad could not perform its mission to train and advise Iraqi police. (JA 360.) The area around Hit was subject to attack by

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[2] Mr. Ali disputes the military judge's finding that he was present for this class or that he was informed that he would be subject to the UCMJ. The Operation Manager, Mr. Santiago, could not say for certain that Mr. Ali attended the UCMJ class at Fort Benning as the sign-in sheet was lost. (JA 148.)

improvised explosive devices and direct and indirect fire attack. *Id.*

The terms of Mr. Ali's employment allowed him to refuse missions. (JA 58, 370.) Mr. Ali's contract with L3 Corporation discussed termination as a remedy for any dispute and did not discuss military jurisdiction over him. (JA 324, 367.) Mr. Ali's direct supervisor was an L3 Corporation employee who was the site manager for his area. (JA 55-56.) At trial, the former project director for L3 Corporation testified that the military could not discipline L3 Corporation employees. (JA 58.) L3 Corporation, not the Department of Defense, paid Mr. Ali for his services. (JA 59.) Mr. Ali was not allowed to carry a weapon and did not participate in combat operations. (JA 58, 369.)

Prior to the incident giving rise to the charges in this case, Mr. Ali complained to a noncommissioned officer that a fellow interpreter, Mr. Al-Umarryi, had punched him. (JA 220, 370-71.) During a subsequent altercation with Mr. Al-Umarryi, Mr. Ali received a bloody nose and Mr. Al-Umarryi received four cuts to his chest. (JA 221.) Mr. Ali was initially charged with aggravated assault with a dangerous weapon as a result of this incident. (JA 11.) In accordance with a pretrial agreement, the military judge dismissed the aggravated assault charge with prejudice at the conclusion of Mr. Ali's court-martial. (JA 218, 381.)

The Army placed Mr. Ali into pretrial confinement on February 29, 2008. (JA 11.) On April 9, 2008, L3 Corporation terminated Mr. Ali's employment because he could not perform his duties under his contract while confined and thus L3 Corporation could not "bill back" the government for Mr. Ali's services. (JA 64-68.)

On June 11, 2008, the military judge heard testimony and argument on the Defense Motion to Dismiss for Lack of Jurisdiction. (JA 38-213.) On June 13, 2008, the military judge denied the motion, holding that Mr. Ali was subject to military jurisdiction under Article 2(a)(10), UCMJ. (JA 214, 366.) On June 17, 2008, the Army preferred three additional charges against Mr. Ali. (JA 13-15.) On June 21, 2008, the Convening Authority accepted Mr. Ali's offer to plead guilty to the additional charges. (JA 380-83.) Mr. Ali remained in pretrial confinement for 115 days until the date of his court-martial on June 22, 2008. (JA 11, 217.) As part of the pretrial agreement, the Convening Authority agreed to approve no sentence over what Mr. Ali had already served in pretrial confinement. (JA 383.) After his guilty plea, Mr. Ali was permitted to return to Canada.

Additional facts necessary for the disposition of the assigned errors are set forth in the argument below.

ISSUE I.

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

Law and Argument

1. Application Of Article 2(a)(10), UCMJ, To Mr. Ali Deprived Him Of The Protections Afforded By The Fifth And Sixth Amendments To The United States Constitution.

In *Toth*, the Supreme Court held that Congress cannot subject ex-soldier civilians to trial by courts-martial. 350 U.S. at 23. The Court explained that Congress' authority "'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." *Id.* at 15. The Court reasoned that expanding court-martial jurisdiction to civilians, even if their alleged crimes took place while on active military duty, "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." *Id.* Those safeguards include: (1) judges appointed for life, subject only to removal by impeachment, (2) indictment by a "grand jury drawn from the body of the people," and (3) the right to trial by jury, which "was considered so important to liberty of the

individual that it appears in two parts of the Constitution."[3] *Id.* at 16.

a. Article I, Military Courts Lack The Protections Guaranteed By The Fifth and Sixth Amendments To The Constitution.

The *Toth* Court found nothing in the history or constitutional treatment of Article I courts which would entitle them to rank alongside Article III courts. *Id.* Even granting that military personnel possess a "high degree of honesty and sense of justice . . . 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." *Id.* at 17. There is no life tenure for military judges, nor are their salaries constitutionally protected. *Id.*

More importantly, trial by jury is greatly different from trial by military members. *Id.* While military personnel may be especially competent to try soldiers for military infractions,

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[3] *See also* Stephen I. Vladek, *The Laws of War as a Constitutional Limit on Military Jurisdiction*, 4 J. Nat'l Sec. L. & Pol'y 295, 308 (2010):

> [T]hese cases do not just support the conclusion that Congress only has authority to "make rules" for individuals in the armed forces; they establish the equally important idea that the validity of military (versus civilian) jurisdiction turns on the *inapplicability* of the grand- and petit-jury trial rights in Article III and the Fifth and Sixth Amendments.

"the premise underlying the constitutional method for determining guilt or innocence in federal courts is that laymen are better than specialists to perform this task." *Id.* at 18. Jurors chosen from different walks of life may reach completely different conclusions than specialists in any given field, even military specialists. *Id.* Moreover, the members of courts-martial "do not and cannot have the independence of jurors drawn from the general public." *Reid*, 354 U.S. at 36. The "general grant of jury trial for serious offenses is a fundamental right, essential for preventing miscarriages of justice and for assuring that fair trials are provided for all defendants." *Duncan v. Louisiana*, 391 U.S. 145, 157-58 (1968)("[w]e hold that the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which - were they to be tried in a federal court - would come within the Sixth Amendment's guarantee.").

Mr. Ali was also denied the right to a jury of more than five members. Under the UCMJ, the minimum number of military members needed to constitute the necessary quorum for a military panel is five. UCMJ, Art. 29(b). However, in *Ballew v. Georgia*, the Supreme Court held that a criminal trial to a jury of less than six persons substantially threatens Sixth Amendment guarantees. 435 U.S. 223, 243 (1978). In *Ballew*, the defendant was charged with a misdemeanor, for which the Georgia Constitution sanctioned a five person jury. *Id.* The defendant

challenged this provision of the state's constitution as a violation of the U.S. Constitution's Sixth and Fourteenth Amendments. *Id.* The Court agreed, holding that he "established that his trial on criminal charges before a five-member jury deprived him of the right to trial by jury guaranteed by the Sixth and Fourteenth Amendments." *Id.* at 245. The core judgment by the Court that only five jurors violated the Sixth Amendment was unanimous.

Contrary to *Ballew*, none of the members of the military panel were non-military personnel, like Mr. Ali. Only service members are allowed to serve on military panels. Article 25, UCMJ. Mr. Ali's fellow contractors, civilians, foreign nationals, and Iraqi citizens cannot serve as court members. *Id.* Under the UCMJ, a civilian is not guaranteed six members to sit in judgment of him, the benefit of a unanimous verdict, or the "judgment of his peers." *Ballew*, 435 U.S. at 241 (quoting *Apodaca v. Oregon*, 406 U.S. 404, 411 (1972)).

b. The Fifth And Sixth Amendments Apply To Mr. Ali Even Though He Is Not A Citizen Of The United States.

Because Mr. Ali was subjected to the judicial power of the United States of America, he is entitled to fundamental due process rights, a point made emphatically by Chief Justice Rehnquist in *United States v. Verdugo-Urquidez*. 494 U.S. 259 (1990). There the issue was whether a Mexican citizen could claim

protection under the Fourth Amendment for a search by U.S. agents conducted in Mexico. Although the Court held that he could not, it also emphasized that while the defendant's lack of connection with the United States meant he could not claim the protection of the *Fourth* Amendment, he was entitled to fundamental due process rights as he was being subjected to trial by the United States. *Id.* at 278. As the Chief Justice wrote:

> Th[e] text [of the Fourth Amendment], by contrast with the Fifth and Sixth Amendments, extends its reach only to "the people.". . . "[T]he people" protected by the Fourth Amendment, and by First and Second Amendments, and to whom rights and powers are reserved in the Ninth and Tenth Amendments, refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community. The language of these Amendments contrasts with the words "person" and "accused" used in the Fifth and Sixth Amendments regulating *procedure* in criminal cases.

Id. at 265-66 (emphasis added)(citation omitted).

The Chief Justice drew a sharp distinction between Fourth Amendment rights, on one hand, and the Fifth and Sixth Amendment rights on the other. Justice Kennedy, concurring in the judgment, echoed this distinction of ensuring fundamental rights for an accused: "The United States is prosecuting a foreign national in a court established under Article III . . . . All would agree, for instance, that the dictates of the Due Process

Clause of the Fifth Amendment protect the defendant." *Id.* at 278.

Mr. Ali is entitled to fundamental trial rights under the Fifth and Sixth Amendments despite his lack of U.S. citizenship. Mr. Ali's eligibility for these fundamental rights does not hinge on his status as a non-resident alien, but on what entity is prosecuting the case: the United States. Seen in this light, the expansion of Article 2(a)(10) violates Mr. Ali's fundamental rights and contravenes the Equal Protection Doctrine just as it would a U.S. citizen civilian.

c. The Necessary And Proper Clause Can Not Be Used To Extend Court-Martial Jurisdiction To Civilians.

In *Reid*, the Court recognized the significant improvements in the military justice system following the first two world wars; however, the Court still found courts-martial failed to afford an accused the same protections as civil courts, most importantly, "trial by jury before an independent judge after an indictment by a grand jury." 354 U.S. at 37. Moreover, the Court noted that the reforms to the military justice system were "merely statutory," and Congress or the President could reinstate former practices whenever they desired. *Id.* The Court further held the term 'land and naval Forces' under Article I of the Constitution refers to members of the armed forces and not their civilian wives, children and other dependents. *Id.* at 19-

20. Thus, dependents of the military could not constitutionally be tried by military authorities for capital offenses committed overseas. *Id.* at 5, 19-20.

The Court's reasoning in *Reid* mirrored that in *Toth*. *Id.* at 20-21. "Article III and the Fifth, Sixth, and Eighth Amendments establish the right to trial by jury, to indictment by a grand jury and a number of other specific safeguards." *Id* at 21. Civil courts were intended to be the normal repository to try persons with crimes against the United States, whereas Article I courts were "intended to be only a narrow exception to the normal and preferred method. . . ." *Id.* Thus, "[h]aving run up against the steadfast bulwark of the Bill of Rights," the Necessary and Proper Clause could not be used to extend the scope of Congress's authority to regulate the land and naval forces under Article I by extending court-martial jurisdiction to civilian dependents for capital offenses. *Id.*

In 1960, the Court expanded *Reid* to include non-capital offenses committed by civilian dependents of service members. *Kinsella v. Singleton*, 361 U.S. 234 (1960). And in two companion cases decided the same day as *Kinsella*, the Court held there is no constitutional distinction for purposes of court-martial jurisdiction between civilian dependents and civilian employees for capital offenses, *Grisham v. Hagan*, 361 U.S. 278 (1960), or non-capital offenses, *McElroy v. Guagliardo*, 361 U.S. 281

(1960). The common theme linking these cases is the Court's refusal to expand military jurisdiction to include civilians. These opinions would influence the Court of Military Appeals' decision in *Averette*, 41 C.M.R. 363.

d. The Court Should Apply The *Toth* Framework And Reject A Broad Reading Of Article 2(a)(10).

Applying the *Toth* framework, this Court in *Averette* set aside the court-martial conviction of a civilian contractor for lack of jurisdiction. 41 C.M.R. at 363. Mr. Averette, a contractor working for the U.S. Army in Vietnam, had been convicted of conspiracy to commit larceny and attempted larceny of 36,000 United States government-owned batteries. *Id.* He was convicted under the then-existing language of Article 2(10), which authorized jurisdiction over civilians serving with the force "in time of war." *Id.* In reversing Mr. Averette's conviction, the Court held that the "in time of war" language in Article 2(10) required a congressionally declared war, which the Vietnam conflict was not. *Id.* at 365. This strict and literal construction was a "result of the most recent guidance in this area from the Supreme Court. . . ." *Id.* This Court noted that in a series of cases beginning with *Toth v. Quarles*, the Supreme Court had disapproved trial by courts-martial for persons not members of the armed forces, and that "[a] broader construction of Article 2(10) would open the possibility of civilian

prosecution by military courts whenever military action on a varying scale of intensity occurs." *Id.*

The Supreme Court has not yet had the present issue squarely before it: that is, whether the military may exercise Article I court-martial jurisdiction over civilians during a time of declared war or, as in Mr. Ali's case, absent a declaration of war but during "contingency operations." Because constitutional protections apply equally in times of war as well as in times of peace, the outcome must be the same as in *Toth, Reid,* and subsequent precedent. As the Supreme Court stated 150 years ago in *Ex parte Milligan*, "The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances." *Milligan*, 71 U.S. 2, 120-121 (1866).[4] In *Milligan*, the Supreme Court held

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[4] Mr. Ali was not court-martialed as an enemy combatant, or as the result of violating a law of war on behalf of an enemy government, and his case therefore does not present issues governed by other Supreme Court precedent. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 521-22 (2004)(stating *Milligan* did not affect the Court's holding that the government had authority to seize enemy combatants where the outcome of *Ex Parte Milligan* turned in large part on the fact that Milligan was not a prisoner of war); *Ex parte Quirin*, 317 U.S. 1 (1942)(holding that the Constitution authorizes military commissions to try citizens charged with law of war offenses committed on behalf of an enemy government). *See also* Vladek, *supra* note 3, at 300 ("*Quirin* held that the Fifth and Sixth Amendments do not constrain offender jurisdiction of military courts so long as it is exercised over 'enemy belligerents' charged with committing 'offenses . . . against the law of war.'").

that military authorities were without power to try civilians not in the military or naval service by declaring martial law in an area where the civil administration was not deposed and the courts were open. *Id.* In the *Milligan* Court's view, allowing "[the Constitution's] provisions [to] be suspended during any of the great exigencies of government. . . . leads directly to anarchy or despotism. . . ." *Id.* at 121.

The Supreme Court reiterated this concern in *Reid*. Rejecting the argument that expansion of military jurisdiction over civilian dependents was "only slight, and that the practical necessity for it is very great," the Court stated, "[s]light encroachments create new boundaries from which legions of power can seek new territory to capture" and "[i]t is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon." *Reid*, 354 U.S. at 39-40. Accordingly, it is this Court's duty to be watchful of the constitutional rights of Mr. Ali and other civilians who would be subject to trial by courts-martial. The application of military jurisdiction over Mr. Ali is not based on Mr. Ali's citizenship but that he is a civilian serving with the armed forces during a contingency operation. The military judge's ruling allows court-martial of civilians,

whether U.S. citizens or non-U.S. citizens.[5] Finding Mr. Ali's court-martial lacked jurisdiction would also be consistent with the Supreme Court's desire to limit military jurisdiction to "the least possible power adequate to the end proposed." *Toth*, 350 U.S. at 22-23.

e. The *Toth v. Quarles* And *Reid v. Covert* Framework Control The Analysis Of This Case.

The framework the Supreme Court first set forth in *Toth* and developed in *Reid* and subsequent cases, controls the analysis of this case. In finding the military had jurisdiction to try Mr. Ali, both the military judge and the Army Court relied on *United States v. Burney*, 21 C.M.R. 98 (C.M.A. 1956). (JA 6, 373.) However, a close examination of *Burney* reveals that its internal logic and the precedent upon which it relies were held inapposite in *Reid* and subsequent cases.

Burney, an employee of the Philco Television and Radio Corporation, maintained the Air Force technical equipment at an Air Force Base in Japan in 1954. *Burney*, 21 C.M.R. at 104-05. A game of "Russian Roulette" resulted in his conviction of assault with a dangerous weapon and a sentence to pay a fine of $750.00 and to be confined at hard labor until the fine was paid, but the confinement could not exceed twelve months. The Court distinguished *Burney* from *Toth v. Quarles*, which was decided

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[5] *See* discussion pp. 27-31, *infra*.

while Burney's petition was pending, by the different Articles of the UCMJ at issue. *Id.* In *Toth*, the Court had held as unconstitutional Article 3(a), 50 U.S.C. § 533 (1950), the statute that conferred military jurisdiction to try former members of the military. *Toth*, 354 U.S. at 13-14. Burney, in contrast, was subjected to court-martial jurisdiction under Article 2(11), 50 U.S.C. § 552.[6] Since a different provision was at issue, the *Burney* Court found *Toth* inapplicable and held that "jurisdiction is demanded" in light of the "constitutional construction, Congressional amendment, and Supreme Court precedent." *Id.* at 125.

In reaching this conclusion, the *Burney* Court relied on a few federal district court and circuit court cases including *Krueger v. Kinsella*, 137 F.Supp. 806 (S.D. W.Va. 1956), which held a civilian spouse amenable to court-martial jurisdiction for killing her spouse overseas and that Article 2, UCMJ, conferring jurisdiction, was constitutional. *Burney*, 21 C.M.R. at 105. However, the decision in *Krueger v. Kinsella,* was later

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[6] Article 2(11), provided: "subject to the provisions of any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, *all* persons serving with, employed by, or accompanying the armed forces without the continental limits of the United States" shall be subject to the code. 50 U.S.C. § 552 (emphasis added). The Current version, now Article 2(a)(11), does not include the word "all" before "persons."

reversed by the Supreme Court in *Reid*. 354 U.S. at 5; *see also Kinsella v. Singleton*, 361 U.S. at 239.

Reid obliterates the reasoning in *Burney*. The *Burney* Court relied upon the history of the American Revolution and the issuance of military orders authorizing the punishment of women and camp followers, finding such history "sufficient to establish quite clearly that our founding fathers knew . . . that sutlers, retainers to the camp, and all persons serving with the armies in the field would be subject to military jurisdiction." *Burney*, 21 C.M.R. at 108. But significantly, these instances predate the adoption of the Constitution and the Bill of Rights. The Court in *Reid* viewed the historical evidence differently than the *Burney* Court, determining, "it seems clear that the Founders had no intention to permit the trial of civilians in military courts, where they would be denied jury trials and other constitutional protections . . . ." *Reid*, 354 U.S. at 30. There is no indication the Founders contemplated that a rival military court system should compete with civilian courts for jurisdiction over civilians who might have some contact or relationship with the military. *Id.* Moreover, Justice Frankfurter found such historic extracts to be "too episodic, too meager, to form a solid basis in history, preceding and contemporaneous with the framing of the Constitution . . . ." *Reid*, 354 U.S. at 64 (Frankfurter, J., concurring); *see also*

McElroy, 361 U.S. at 285-86 (explaining that authorities citing hostilities with the Indian tribes were too episodic to have any weight).

Also contrary to *Reid*, the *Burney* Court relied on the premise that "the Constitution is territorial in its application, and not personal." *Burney*, 21 C.M.R. at 113. In *Reid*, the Supreme Court explicitly rejected the principle relied upon in *Burney*: "[W]hen the Government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land." *Reid*, 354 U.S. at 5-6.

Finally, the *Burney* Court found it "not too much to demand obedience" from civilians, and concluded that they must be subject to the Code, "albeit they are civilians who - when tried by a military court - *are denied a trial by jury*," *Burney*, 21 C.M.R. at 111 (emphasis added). In reviewing the identical issue, the Supreme Court did not consider this encroachment on the Bill of Rights and other safeguards to be so slight. *Reid*, 354 U.S. at 39-40. "[M]ilitary trial of civilians is inconsistent with both the letter and spirit of the Federal Constitution." *Id.* at 22.

Thus, *Reid* destroyed *Burney's* logical underpinnings. Consequently, the military judge and the Army Court erred when

they relied on *Burney* to reject Mr. Ali's jurisdictional challenge. After Reid and the cases that followed, it is clear that this Court should now explicitly renounce the reasoning relied upon in *Burney*. *See Reid*, 354 U.S. at 5-6; *Averette*, 41 C.M.R. at 364.

For similar reasons, the federal cases upholding jurisdiction over civilians during the First and Second World Wars are neither dispositive nor authoritative. *See Hines v. Mikell*, 259 F. 28 (4th Cir. 1919); *Perlstein v. United States*, 151 F.2d 167 (3d Cir. 1945); *Ex parte Gerlach*, 247 F. 616 (S.D.N.Y. 1917); *Ex parte Falls*, 251 F. Supp. 415 (D.N.J. 1918); *Ex parte Jochen*, 257 F.Supp. 200 (S.D. Tex. 1919); *In re Di Bartolo*, 50 F. Supp. 929 (S.D.N.Y. 1943); *McCune v. Kilpatrick*, 53 F. Supp. 80 (E.D. Va. 1943); *In re Berue*, 54 F.Supp. 252 (S.D. Ohio 1944); *Shilman v. United States*, 73 F. Supp. 648 (S.D.N.Y. 1947). These cases pre-date the Supreme Court's decisions in both *Toth* and *Reid*, and either do not conduct a constitutional analysis in light of the Fifth and Sixth Amendments or rely upon principles and precedent that the Supreme Court has subsequently cast aside.

For instance, the district court in *Berue* relied upon the Supreme Court's decision in *In re Ross*, 140 U.S. 453, (1891), which had approved consular power to try Americans abroad. *In re Berue*, 54 F. Supp. at 256. However, the Supreme Court, in

overturning its previous decision which relied on *Ross*, heaved *Ross* aside, noting that Congress had buried the consular system of trying Americans: "[w]e are not willing to jeopardize the lives and liberties of Americans by disinterring it. At best, the *Ross* case should be left as a relic from a different era." *Reid*, 354 U.S. at 12. Therefore, federal cases predating the *Toth* and *Reid* decisions are not helpful in analyzing the jurisdiction issue in this case. Instead, this Court should apply the framework laid out in *Toth* and *Reid*.

2. Congress And The Military Could, If They Choose, Provide For Good Order and Discipline In The Armed Forces Without Resorting To Military Jurisdiction Over Civilians.

The military judge found that military jurisdiction over civilians is necessary to maintain good order and discipline of the force. (JA 377.) However, the existence of available alternatives which guarantee the necessary constitutional protections demonstrates that such jurisdiction is unnecessary and that subjecting civilians to court-martial jurisdiction is not the exercise of "the least possible power adequate to the end proposed." *See Toth*, 350 U.S. at 22-23 (citation omitted).

The Military Extraterritorial Jurisdiction Act [hereinafter MEJA] was signed into law on November 22, 2000. 18 U.S.C. §§ 3261 et seq. It provides for federal jurisdiction over certain prescribed persons who engage in any conduct outside the United States that would have constituted an offense punishable by

imprisonment for more than one year if that conduct had occurred within the special and territorial jurisdiction of the United States. *Id.* Offenses that meet this definition include, but are not limited to, certain aggravated assaults, arson, theft of a value in excess of a $1000, homicide, kidnapping, selling obscene material, robbery, and certain sexual assault/abuse offenses or offenses related to the exploitation of minors. *See generally Report of the Advisory Committee on Criminal Law Jurisdiction over Civilians Accompanying the Armed Forces in Time of Armed Conflict* (Apr. 18, 1997) [hereinafter *Report of Advisory Committee*].[7]

One category of persons covered by the reach of MEJA includes "civilians employed by or accompanying the armed forces" outside the United States. 18 U.S.C. § 3261(a)(2000). This jurisdiction includes non-citizens. *Cf. United States v. Brehm*, 2011 WL 1226088 (E.D. Va. 2011)(unpub.)(upholding MEJA prosecution of South African employed by DoD contractor in Afghanistan).

Congress chose to exclude from MEJA nationals of the host nation in which they are employed. 18 U.S.C. § 3267(1)(c) and (2)(c). MEJA was intended to forego the need to resort to military jurisdiction over civilians such as Mr. Ali and, but

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[7] *Available at* www.fas.org/irp/doddir/dod/ojac.pdf (last visited Dec. 29, 2011).

for the fact Mr. Ali holds Iraqi (as well as Canadian) citizenship, MEJA would apply. MEJA is clearly a more suitable jurisdictional instrument for a case of this nature. Federal District Courts would observe Mr. Ali's Fifth and Sixth Amendment Rights. Employing MEJA would negate concerns regarding the deprivation of fundamental rights inherent in trying civilians in military courts. If it chose, Congress could easily extend MEJA to cover an accused such as Mr. Ali. Furthermore, the convenience of applying military jurisdiction to Mr. Ali cannot trump the protections of the Fifth and Sixth Amendments.

There are other options as well. As an alternative, the military could follow *Ex parte Reed*, which permitted trial by courts-martial of civilian paymasters' clerks who were required to agree in writing to submit to the laws and regulations of the government and discipline of the navy. *McElroy*, 361 U.S. at 284-86 (discussing *Ex parte Reed*, 100 U.S. 13 (1879)).Alternatively, the military could replace civilian employees with military personnel if disciplinary problems require military control. *Id.* at 287. 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. *Id.* As the Court stated in *Reid*, "the business of soldiers is to fight and prepare to fight wars, not to try civilians for their alleged crimes." 354 U.S. at 35.

3. The Revised Article 2(a)(10) Revives The Danger Of Military Prosecution Of Civilians "Whenever Military Action On A Varying Scale Of Intensity Occurs." *See Averette*, 41 C.M.R. at 365.

In its opinion, the Army Court asserts that the revised Article 2(a)(10) narrowly limits military jurisdiction over civilians. *See Ali*, 70 M.J. at 520; (JA 9-10). In an effort to distinguish *Averette*, the Army Court asserts:

> Under the current version of Article 2(a)(10) . . . there is no such danger of the broad application of the UCMJ to civilians because Congress has chosen to specifically limit the exercise of military jurisdiction over civilians by requiring either a formal declaration of war by Congress or the existence of a "contingency operation," as that term is narrowly defined by statute. 10 U.S.C. § 101(a)(13)(2000).

Ali, 70 M.J. at 520; (JA 8.)

However, a review of the statutory definition of "contingency operation," as well as some examples of such operations, compels the opposite conclusion: the revised Article 2(a)(10) opens the door to a broad application of military jurisdiction over thousands of civilians inside as well as outside the United States.

The statutory definition of "contingency operation" is anything but narrow:

> (13) The term "contingency operation" means a military operation that—
>
> (A) is designated by the Secretary of Defense as an operation in which members of the armed forces are or may become involved

> in military actions, operations, or hostilities against an enemy of the United States or against an opposing military force; or
>
> (B) results in the call or order to, or retention on, active duty of members of the uniformed services under section . . . 12302 . . . of this title . . . or any other provision of law during a war or during a national emergency declared by the President or Congress.

10 U.S.C. § 101(a)(13)(2006).

Comparing the broad definition of "contingency operation" with the circumstances following the September 11, 2001, terrorist attacks leads to the conclusion that Article 2(a)(10) applies during domestic military operations as well as overseas combat operations in Iraq. On September 14, 2001, the President issued Proclamation 7463, declaring: "A national emergency exists by reason of the terrorist attacks at the World Trade Center, New York, New York, and the Pentagon, and the continuing and immediate threat of further attacks on the United States." 66 Fed. Reg. 48199. The President invoked, 10 U.S.C. § 12302, which is part of the definition of contingency operation quoted above. *Id.* Also on September 14, 2001, the President issued Executive Order 13223, "Ordering the Ready Reserve of the Armed Forces to Active Duty. . . ." 66 Fed. Reg. 48201. The Ready Reserve is also part of the definition of "contingency operation."

As part of the homeland security response to the national emergency, the Department of Defense initiated "Operation Noble Eagle." Each of the armed services engaged in significant operations within the United States. For example, since the beginning of the operation, the United States Air Force has flown "tens of thousands of sorties" while providing combat air patrols over New York, Washington, D.C., and other cities to include providing air cover support for special security events such as the Winter Olympics and the Super Bowl. The Air National Guard has had a significant role in intercepting possible air threats over the United States. Operation Noble Eagle continues to this day.[8]

Because of the broad statutory definition, "Operation Noble Eagle" qualifies as a "contingency operation" and therefore could subject civilians supporting the operation to military jurisdiction. Under the broad definition the Army Court applied to Mr. Ali, these civilian personnel are "in the field"[9] because, as the President declared in Proclamation 7463, the United States was and is under "the continuing and immediate threat of further attacks . . . ." 66 Fed. Reg. 48199. Similarly, under

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[8] U.S. Air Force Fact Sheet, Operation Noble Eagle, *available at* http://www.afhso.af.mil/topics/factsheets/factsheet.asp?id=18593 (last visited Dec. 29, 2011).

[9] Without explanation as to the source of its definition for "in the field," the Army Court emphasizes the fact that Mr. Ali "was subject to attack by enemy forces" while in Iraq and that he was therefore "in the field." *See Ali*, 70 M.J. at 518; (JA 7.)

the broad definition of "accompanying the armed forces" applied to Mr. Ali, many civilians accompany the armed forces during domestic operations such as Noble Eagle. These civilians are subject to the broad reach of Article 2(a)(10).

Far from limiting the exercise of military jurisdiction over civilians, the definition of "contingency operation," as applied through Article 2(a)(10), revives the concern this Court expressed in *Averette* as to "the possibility of civilian prosecutions by military courts whenever military action on a varying scale of intensity occurs." 41 C.M.R. at 365. In *Reid*, the Court found that whether a civilian is overseas or in the United States makes no difference to their status: in either location, they are not members of the "land and naval forces."[10] *See Reid*, 354 U.S. at 19-20. Logically, it follows that if Mr. Ali can be subjected to military jurisdiction during a qualifying contingency operation overseas, the same is true of civilians in the United States.[11]

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[10] The Court explained: "The wives of servicemen are no more members of the 'land and naval Forces' when living at a military post in England or Japan than when living at a base in this country . . . ." *Reid*, 354 U.S. at 20.

[11] The military services may choose to limit the exercise of such jurisdiction over civilians by regulation. However, as the Court explained in *Reid*, the military and for that matter Congress and the President are free to change such regulations at any time. 354 U.S. at 37. Furthermore, as the Court points out, status not location determines whether military jurisdiction applies. *Id.* at 20.

Contrary to well established Supreme Court precedent, the revised Article 2(a)(10) would subject civilians to military jurisdiction even while the Federal and State courts remain open. *See Duncan v. Kahanamoku*, 327 U.S. 304, 319, 324 (1946) (emphasizing that because military tribunals lack procedural safeguards, civilians cannot be subjected to military jurisdiction even while martial law is in effect in Hawaii); *Milligan*, 71 U.S. at 121 (explaining that "where the courts are open and their process unobstructed," citizens cannot be subjected to military jurisdiction). The Court should apply the *Toth* framework to this case and reject the expansion of military jurisdiction over civilians during "contingency operations."

ISSUE II.

WHETHER THE COURT-MARTIAL HAD JURISDICTION OVER THE APPELLANT PURSUANT TO ARTICLE 2(a)(10), UNIFORM CODE OF MILITARY JUSTICE.

Law and Argument

If the Court declines to rule on Constitutional grounds, then this Court should still find that the court-martial lacked jurisdiction pursuant to Article 2(a)(10), UCMJ. As in *Averette*, this Court should reject "a broad[ ] construction of Article 2(10)." *See Averette*, 41 C.M.R. at 365. The strict and literal construction the Court applied in *Averette* was a "result of the most recent guidance in this area from the Supreme Court." *Id.*

The Court in this case should similarly apply the narrowest possible interpretation of Article 2(a)(10) which in turn inevitably leads to the conclusion that the court-martial lacked jurisdiction over appellant and the offenses.

1. The Court-Martial Lacked Personal Jurisdiction.

A court-martial must have personal jurisdiction over the accused at the time of his trial. R.C.M. 201(b)(4); *see also*, UCMJ, Art. (3)(a). Mr. Ali was fired on April 9, 2008. (JA 64.) and was not arraigned on the charges until May 29, 2008. (JA 22.) Assuming personal jurisdiction did attach at one time, once Mr. Ali was no longer employed by L3 Corporation or otherwise accompanying or serving with the force, the military lacked personal jurisdiction to try Mr. Ali.

Mr. Ali's case is analogous to the facts in *Toth v. Quarles*. Mr. Toth had been honorably discharged from the service when the government brought charges against Mr. Toth and brought him back to Korea to be court-martialed. By the time of his arrest, Mr. Toth had no relationship with the military. The Supreme Court explained, "[T]he 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." *Toth*, 350 U.S. at 15.

Applying the Supreme Court's reasoning in *Toth* to Mr. Ali's case, the military cannot exercise jurisdiction over him. At the

time of his trial, Mr. Ali had been fired from L3 Corporation and no longer had any connection to the U.S. military. He was no longer working as a translator, nor did he have any other ties to the military or United States government. At trial, Mr. Ali's only "association" with the military was his pretrial confinement, which - being involuntary - cannot create an "association" with the U.S. military where none existed before.[12]

Mr. Ali's case may also be compared to that of a reservist or ex-soldier not under Title 10 status at the time of the offense. Like a reservist, Mr. Ali needs to have a status, *at trial*, which subjects him to military jurisdiction. Many cases have dealt with jurisdiction over reservists or ex-soldiers, and while it is settled law that a reservist may be recalled to active duty for trial, certain criteria must still be met.

In *Smith v. Vanderbush,* the Court found no jurisdiction over an ex-soldier who was not flagged and whose term of service was allowed to expire. 47 M.J. 56, 57 (C.A.A.F. 1997). The Court looked at "whether court-martial jurisdiction, once initiated, continues despite an otherwise valid administrative discharge issued prior to adjudication of findings and sentence." *Id.* at 59. The Court answered in the negative, finding that

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[12] Mr. Ali's pretrial detention was also unconstitutional as it did not conform to the requirements of the Bail Reform Act of 1984, 18 U.S.C. § 3141, et seq. *See United States* v. Salerno, 481 U.S. 739, 755 (1987)(upholding constitutionality of Bail Reform Act against a facial challenge.).

"[a]rraignment alone . . . is not sufficient as a matter of law to mandate continuation of court-martial jurisdiction throughout trial." *Id.* at 60.

The issue courts examine when deciding whether there is jurisdiction over reservists or former soldiers is whether they are subject to the UCMJ not only at the time of the offense *but also at the time of trial*. *United States v. Schuering,* 36 C.M.R. 480, 483 (C.M.A. 1966). Thus, even if this Court finds that Mr. Ali was subject to the Code at the time of the offense, he was no longer subject to the code at the time of trial because, like the petitioner in *Vanderbush*, there is no mechanism for extending jurisdiction here. Jurisdiction fails because Mr. Ali was not a member or even a de facto member of the armed forces. *Reid,* 354 U.S. at 22-23.

2. Jurisdiction Fails Because Mr. Ali Had No Military Status.

Mr. Ali does not have a military status. An unbroken line of decisions since 1866 interprets the Constitution as conditioning the proper exercise of court-martial jurisdiction over an offense on the military status of the accused. *Gosa* v. *Mayden*, 413 U.S. 665, 673 (1973) (plurality opinion); *see Kinsella*, 361 U.S. at 240-41, 243; *Grafton* v. *United States*, 206 U.S. 333, 348 (1907); *Johnson* v. *Sayre*, 158 U.S. 109, 114 (1895); *Smith* v. *Whitney*, 116 U.S. 167, 183-85 (1886); *Coleman* v. *Tennessee*, 97 U.S. 509, 513-14 (1879); *Milligan*, 71 U.S. at

123; *cf. Toth*, 350 U.S. at 15; *Kahn* v. *Anderson*, 255 U.S. 1, 6-9 (1921); *Givens* v. *Zerbst*, 255 U.S. 11, 20-21 (1921). Mr. Ali has never possessed any "military status." He is a Canadian-Iraqi citizen who has no direct connection to the Department of Defense. Neither his contract nor his Letter of Identification and Authorization subject him to the UCMJ. (JA 367-68.) Most significantly, he was never a member of the "land and naval forces" of the United States.

On October 3, 2011, nearly five years after Congress revised Article 2(a)(10) and over two-and-a-half years after placing Mr. Ali in pretrial confinement, the Army added a chapter to its military justice regulation entitled, "Procedures Related to Civilians Subject to Uniform Code of Military Justice Jurisdiction under Article 2(a)(10)." Army Reg. 27-10, Legal Services: Military Justice [hereinafter AR 27-10], ch. 27 (Oct. 3, 2011). This new chapter, while purporting to provide procedures for prosecuting civilians, in fact illuminates the incompatibility of civilian status with a system designed to apply to actual members of the armed forces. Out of necessity, the regulation acknowledges some of the most obvious differences in status between civilians and military personnel and attempts to work around the lack of military status of civilians. For example, the regulation attempts to equate civilian GS grades with "military grade equivalents." *See Id.* at Table 27-1.

However, as in Mr. Ali's case, there is no means of determining a contractor's equivalent rank for purposes of selecting panel members in accordance with Article 25(d)(1). *See* AR 27-10, para. 27-4.

Mr. Ali's lack of military status is glaringly apparent: specific provisions of the UCMJ and Manual for Courts-Martial cannot even be applied to him or other civilians. For example, Mr. Ali's status as a civilian is inconsistent with R.C.M. 1003, "Punishments." Unlike a soldier, Mr. Ali could not forfeit pay and allowances as part of his court-martial sentence because he never received pay and allowances from the Army. Most significantly, Mr. Ali was not subject to a punitive discharge[13] because he was not a member of the armed forces. The new chapter 27 of AR 27-10 acknowledges some of these obvious differences in status between military and civilian personnel and simply incorporates them into the regulation. *See, e.g.*, AR 27-10,

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[13] Because Mr. Ali was not subject to a punitive discharge, he was arguably entitled to less post-trial due process than members of the military. The Army Court and this court have jurisdiction in this case only because The Judge Advocate General of the Army chose to forward the case pursuant to Article 69(d), UCMJ. But for this discretionary decision, Mr. Ali would not have been afforded review of his case in the appellate courts. *See* Article 66(b)(limiting review of courts-martial by the Courts of Criminal Appeals to cases in which the approved sentence includes a punitive discharge or confinement for one year or more).

para. 27-11 (limiting punishment to a fine, restriction, and confinement.).

The new chapter also compounds the already significant Constitutional shortcomings of Article 2(a)(10). In accordance with his contract, Mr. Ali had the right to refuse to participate in any mission, thus illustrating Mr. Ali's civilian as opposed to military status. (JA 58, 370.) The new chapter, however, states: "The ranking military commander . . . may give contractors and their employees orders, whether or not within the scope of the contract, that are enforceable under the UCMJ if reasonably necessary to protect the armed force and accomplish a military mission." AR 27-10, para. 27-3d(1)(b). A reasonable interpretation of this provision is that it bestows power on military commanders to press unwilling civilians into the armed forces as required to "accomplish a military mission." *See id.* This overreaching provision illustrates perfectly the Supreme Court's warning in *Reid*: "Slight encroachments create new boundaries from which legions of power can seek new territory to capture." 354 U.S. at 39-40.

The applicability of Articles 133 and 134, UCMJ, to Mr. Ali is also extremely dubious given his lack of military status. In *Parker v. Levy*, an Army officer challenged Articles 133 and 134 as void for vagueness under the due process clause of the Fifth Amendment. 417 U.S. 733 (1974). The Court denied this challenge

explaining that "the military constitutes a specialized community governed by a separate discipline from that of the civilian." *Id.* at 744 (quoting *Orloff v. Willoughby*, 345 U.S. 83, 94 (1953)). The Court also emphasized in *Parker* the significance of the Presidential commission "reposing special trust and confidence" in the officer. *Id.* Mr. Ali, in contrast, received no Presidential commission and never swore an oath as required by all soldiers whether officer or enlisted. Mr. Ali was never a member of the "specialized community" which legitimizes Articles 133 and 134. Mr. Ali had no military status.

3. The Court-Martial Lacked Subject Matter Jurisdiction.

The Supreme Court in *O'Callahan v. Parker*, 395 U.S. 258 (1969), held a 'service connection' was required in order to exercise courts-martial jurisdiction over service members. Several years later, in *Relford v. Commandant, U.S. Disciplinary Barracks, Ft. Leavenworth*, the Court set out a twelve-factor test to establish the required service connection. 401 U.S. 355, 365 (1971). While the Court later abandoned this test in *Solorio v. United States*, 43 U.S. 435 (1987), the "*Relford* factors" are still instructive and useful in determining where the status of the non-military individual is unclear. Moreover, *Solorio* never addressed how military jurisdiction, assuming it is constitutionally valid, is applied to civilians tried by

military courts. Therefore, where there is no clear status evidenced by an enlistment contract or commission, the *Relford* twelve factor test is instructive to determine whether a civilian and his or her offenses are sufficiently connected to the military to subject him or her to court-martial jurisdiction.[14]

Applying this analysis to Mr. Ali's case compels the conclusion that no service connection exists. Several of the factors do not apply at all. The U.S. military presence in Iraq as an occupying force ended in June 2004; thereafter, the interim Iraqi government requested the U.S. forces remain in Iraq. The offenses did not occur during a time of war. Though Mr. Ali worked as an interpreter for a military police unit, the acts charged were not connected to his duties as an interpreter.

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[14] The twelve factors as articulated by the Supreme Court are: (1) the serviceman's proper absence from the base, (2) the crime's commission away from the base; (3) its commission at a place not under military control; (4) its commission within our territorial limits and not in an occupied zone of a foreign country; (5) its commission in peacetime and its being unrelated to authority stemming from the war power; (6) the absence of any connection between the defendant's military duties and the crime; (7) the victim's not being engaged in the performance of any duty relating to the military; (8) the presence and availability of a civilian court in which the case can be prosecuted; (9) the absence of any flouting of military authority; (10) the absence of any threat to a military post; (11) the absence of any violation of military property; and (12) the offenses being among those traditionally prosecuted in civilian courts. *Relford*, 401 U.S. at 365.

4. Mr. Ali Was Not "Serving With Or Accompanying An Armed Force" Under The UCMJ.

The terms "serving with" and "accompanying" are not defined in Article 2(a)(10), UCMJ, the MCM, or case law, leaving their meaning and scope ambiguous. While legislative history can often resolve such ambiguity, there is no legislative history for the 2006 amendment inserting these terms into Article 2, UCMJ. Thus, one must examine other statutory provisions for guidance in defining these terms.

The term "serving with or accompanying an armed force" is defined in two acts of Congress: MEJA and the North Atlantic Treaty Organization Status of Forces Agreement[15] (NATO SOFA). Both MEJA and the NATO SOFA can help define the statutory terms at issue here, and provide insight into Congressional intent regarding the scope of UCMJ jurisdiction under Article 2(a)(10) (to include any limitations) over civilians.

One category of persons subject to MEJA jurisdiction includes "civilians employed by or accompanying the armed forces" outside the United States. 18 U.S.C. §3261(a) (2000). "Employed by" the Armed Forces includes DoD civilian employees, to include employees of non appropriated fund (NAF) instrumentalities, as well as DoD contractors or subcontractors

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[15] Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces, June 19, 1951, 4 U.S.T. 1792, 199 U.N.T.S. 67 [hereinafter NATO SOFA].

at any level and employees of either contractors or subcontractors. *Id.* at § 3267. Those "accompanying the armed forces outside the United States" consist of persons who are dependents of and reside with (1) members of the military, (2) DoD civilian and NAF employees, and (3) DoD contractors and subcontractors at any tier outside the United States. *Id.* Section 1088 of the Ronald W. Reagan National Defense Authorization Act (Pub. L. 108-375), passed in October 2004, further extended MEJA's definition of persons "employed by the Armed Forces outside the U.S." to include employees, contractors (and subcontractors at any tier) and contractor employees of any Federal agency or provisional authority whose employment relates to supporting the DoD mission. *Id.*

The NATO SOFA is another useful guide in defining the jurisdictional outer limits of Article 2(a)(10), UCMJ. Under the NATO SOFA, contractor personnel fall within the definition of 'civilian component' defined in Art. I.1.(b) - yet as with MEJA, the NATO SOFA specifically excludes host country nationals:

> [C]ivilian personnel accompanying a force of a Contracting Party who are in the employ of an armed service of that Contracting Party, and who are not stateless persons, nor nationals of any State which is not a Party to the North Atlantic Treaty, *nor nationals of, nor ordinarily resident in, the State in which the force is located.*

NATO SOFA, art. I.1.(b)(emphasis added). The NATO SOFA not only parallels the "exclusionary language" of MEJA pertaining to the exercise of criminal jurisdiction by another nation over nationals of the host nation, but is also in concert with the intent of the "exclusionary language" in Coalition Provisional Authority (CPA) Order No. 17,(Revised)(June 27, 2004).[16]

This exclusionary language reflects a policy of deference to international agreements, existing foreign jurisdiction, and respect for host nation sovereignty. Presumably, nationals of the host nation are subject to the host nation's criminal jurisdiction. At first glance, CPA Order No. 17 stood for the proposition that coalition forces (to include civilian contractor and other "augmentees") were immune from Iraqi legal process for their conduct during the period in which the CPA was in effect. *Id.* However, much like the language excluding persons that are nationals of the host nation from the reach of MEJA, the CPA also included similar language excluding from the category of persons immune from the Iraqi legal process under CPA Order No. 17 those persons that are nationals of the host-nation, namely Iraqi citizens. This further signifies the importance of host-nation sovereignty (where applicable).[17] MEJA,

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[16] *Available at* http://www.iraqcoalition.org/regulations/ (last visited Jan 5, 2012).

[17] The right to prosecute an offense committed by a civilian serving with or accompanying the force is normally governed by a

CPA Order 17, and other applicable legislation and international agreements are carefully tailored not to upset existing jurisdictional schemes (to include those provided for by international agreements) and thus reach only those situations and persons not already covered by an existing framework of criminal law.

Interpreting Article 2(a)(10)'s jurisdictional language in light of identical language contained in MEJA and the NATO SOFA, it is evident that Mr. Ali is a member of a class of persons that Congress intended to exclude from the definition of "serving with or accompanying an armed force in the field;" hence, he is beyond the reach of Article 2(a)(10), UCMJ. *See Report of the Advisory Committee*, pgs 61-22.

Neither the Iraqi government nor the Canadian government has been offered the opportunity to accept or decline prosecution of Mr. Ali. Both are viable options for the prosecution of Mr. Ali's case in lieu of court-martial. In

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status of forces agreement (SOFA) between states (i.e., the U.S. and the host nation). In cases involving offenses punishable by the laws of both states resulting in concurrent jurisdiction, the NATO SOFA grants the sending state primary jurisdiction over offenses committed against the security, person, or property of the sending state. Otherwise, the primary right rests with the host nation. See NATO SOFA, art. VII §§ 2 & 3. Mr. Ali is of dual citizenship (Canadian and Iraqi); hence, this situation is one in which the US would have neither primary nor exclusive jurisdiction. Though there is no established SOFA between the U.S. and Iraq, the criminal courts of Iraq are operational, and Iraq has the ability to extend its criminal jurisdiction to this matter.

further consideration of host nation sovereignty, MEJA also provides that no person can be prosecuted under its provisions if the foreign government is prosecuting the person for the same conduct, unless the Attorney General or Deputy Attorney General approves the U.S. prosecution. MEJA, 18 U.S.C. § 3261(b).

5. The United States Forces In Iraq Were Not "In The Field" Under The UCMJ.

In *Averette*, the Court narrowly construed the meaning of Article 2(a)(10) so as to avoid "the possibility of civilian prosecution by military courts whenever military action on a varying scale of intensity occurs." 41 C.M.R. at 365. Similarly, in this case, the Court should narrowly construe the meaning of "in the field" consistent with the historical understanding of the term. As previously noted, the Supreme Court has struck down the military's exercise of jurisdiction over civilians in a long line of cases. *See Toth*, 350 U.S. 11; *Reid* 354 U.S. 1; *Kinsella*, 361 U.S. 234; *Grisham*, 361 U.S. 278; *McElroy*, 361 U.S. 281. This Court must construe "in the field" as "requiring both a state of war and the practical unavailability of a civilian criminal forum;"[18] to do otherwise is to ignore the historical precedent requiring the narrowest construction of statutes purporting to extend military

[18] John F. O'Connor, *Contractor's and Courts-Martial*, 77 Tenn. L. Rev. 751, 801 (2010).

jurisdiction over civilians. *See generally Milligan*, 71 U.S. 2; *Averette*, 41 C.M.R. at 363-65.

In *Averette*, this Court followed historical precedent by narrowly construing "in time of war" to mean "a war formally declared by Congress." 41 C.M.R. at 365. The Court explained:

> We emphasize our awareness that the fighting in Vietnam qualifies as a war as that word is generally used and understood. . . . 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.

Id. at 365-66.

Similarly, in this case, no one would dispute that United States forces were engaged with an enemy in Iraq or that those forces were "in the field" as that term is "generally used and understood." *See id.* However, that does not lead to the conclusion that those forces were "in the field" consistent with the long line of precedent limiting military jurisdiction over civilians. *See Milligan*, 71 U.S. at 120-21; *Reid*, 354 U.S. at 36-37; *McElroy*, 361 U.S. at 284. If it is to be read consistent with historical precedent, the term "in the field" must be narrowly construed so as to require both: (1) a contingency operation; and (2) the practical unavailability of a civilian criminal forum. *See Averette*, 41 C.M.R. at 365.

The common understanding of "in the field" the military judge applied in this case was incomplete. (JA 372-74.) The

military judge ignored the practical availability of civil authority as a factor in determining subject matter jurisdiction. (JA 368-74.) As in *Reid*, this Court must reject the argument that expansion of military jurisdiction over civilians is "only slight, and that the practical necessity for it is very great." *See Reid*, 354 U.S. at 39-40. As the Supreme Court stated 150 years ago in *Milligan*, "The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances." *Milligan*, 71 U.S. at 120-21.

The military judge in Mr. Ali's case correctly identified the historic principle that military jurisdiction over civilians must be "strictly construed." (R. at AE LI.) Strangely, however, the military judge then jumped to the conclusion that permitting the exercise of military criminal jurisdiction over Mr. Ali, despite the ready availability of civil authority, is somehow consistent with this principle. *Id.* This Court must repudiate this unnecessary and dangerous expansion of military criminal jurisdiction over civilians. To do otherwise is to ignore the dictates of Supreme Court precedent and would "lead[] directly to anarchy or despotism." *See Milligan*, 71 U.S. at 121.

Because civilian courts were open and available to try Mr. Ali, the military lacked subject matter jurisdiction over him.

The designation of a military action as a "contingency operation" does not change the fact that in an age of modern communication and transportation, civil criminal jurisdiction will almost always be readily available.[19] This Court must narrowly construe the term "in the field" consistent with the historical understanding of the term as including an absence of available civil authority. The court-martial, therefore, lacked subject matter jurisdiction.

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[19] *See*, for example, the military judge's finding in this case, that while logistically intensive, "[o]ral depositions in the United States for trials in Iraq are not an uncommon occurrence." (JA 226.)

Conclusion

WHEREFORE, Mr. Ali respectfully requests this Honorable Court set aside the findings and sentence and dismiss the charges against him.

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CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

1. This brief complies with the type-volume limitation of Rule 24(c) because this brief contains 10,899 words.

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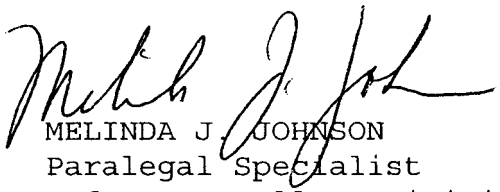
CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the forgoing in the case of United States v. Ali, Crim. App. Dkt. No. 20080559, Dkt. No. 12-0008/AR, was delivered to the Court and Government Appellate Division on January 5, 2012.



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