THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

U N I T E D S T A T E S, Appellee	)	REPLY BRIEF ON BEHALF OF APPELLANT
v.	)	Crim. App. No. 20080559
Mr. **ALAA MOHAMMAD ALI,** United States Army, Appellant	)	USCA Dkt. No. 12-0008/AR

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Introduction

> [C]onsiderations of discipline provide no excuse for new expansion of court-martial jurisdiction at the expense of the normal and constitutionally preferable system of trial by jury.
>
> Determining the scope of the Constitutional power of Congress to authorize trial by court-martial presents another instance calling for limitation to "the least possible power adequate to the end proposed."

United States ex rel. Toth v. Quarles, 350 U.S. 11, 22-23 (1955)(quoting *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 230-31 (1821)).

This Court should reject the oversimplified government argument that jurisdiction over Mr. Ali depends on "one factor: the status of the accused." Government Brief (GB) at 11. That "one factor" analysis would require this Court to reject Supreme Court precedent limiting court-martial jurisdiction over civilians to "the least possible power adequate to the end

proposed." *Toth*, 350 U.S. at 23; *Reid v. Covert*, 354 U.S. 1, 39-40 (1957) (plurality opinion); *Kinsella v. Singleton,* 361 U.S. 234, 239-40 (1960); *Grisham v. Hagan*, 361 U.S. 278, 280 (1960). In order to determine whether or not Mr. Ali was a part of the armed forces for jurisdictional purposes, this Court should apply the three part *Toth* framework.[1] Important factors in that analysis include the availability of civilian courts, the availability of other methods to address civilian misconduct in Iraq, and the overly broad statutory definition of "contingency operation." The *Toth* framework represents a "landmark" that controls how the courts analyze Congressional efforts to expand court-martial jurisdiction over civilians such as Mr. Ali. *See Kinsella,* 361 U.S. at 239; *United States v. Averette*, 41 C.M.R. 363, 364-65 (1970). This Court should apply that framework to this case and reject court-martial jurisdiction over Mr. Ali.

Government incantations of "manifest military necessity" cannot justify depriving Mr. Ali of the protections afforded by the Fifth and Sixth Amendments to the United States Constitution. *See Toth*, 350 U.S. at 23. The government has not disputed that jurisdiction could have been vested in a civilian court that would have provided those protections. Because the military chose as a matter of convenience to apply court-martial jurisdiction over Mr. Ali, this Court should reject that

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[1] *See* brief of amici curiae (AC) at 6-8.

jurisdiction. The government asks this court to rely on the "unreviewable discretion" of the executive to decide when and where to apply court-martial jurisdiction to a civilian.

The government argument relies upon inapposite precedent. Mr. Ali was never a member of the armed forces as in *United States v. Solorio*. 483 U.S. 435, 441 (1987). He was not an enemy unlawful combatant as in *Ex parte Quirin*. 317 U.S. 1 (1942). Finally, Mr. Ali lacked functional military status as in *Ex parte Reed*. 100 U.S. 13 (1879).

The government brief ignores the "deeply rooted and ancient opposition . . . to the extension of military control over civilians." *Reid*, 354 U.S. at 33. The Founders had a deep distrust of military jurisdiction over civilians based on their understanding of history and their own experiences. *Id.* at 27. This distrust is embedded in Article III and the Fifth and Sixth Amendments. *Id.* at 21. "[T]he jurisdiction of military tribunals is a very limited and extraordinary jurisdiction derived from the cryptic language in Art. I, § 8, and, at most, was intended to be only a narrow exception to the normal and preferred method of trial in courts of law." *Id.* at 20-21. The government presents an incomplete historical and legal analysis when it asks this Court to ignore the availability of civilian courts to try Mr. Ali, or other measures to address civilian misconduct in Iraq. *See Ex parte Milligan*, 71 U.S. 2, 120-21 (1866)("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.").

1. The Government Ignores The Limited Nature Of Mr. Ali's Connection To The Military.

In *United States v. Averette*, this Court acknowledged the *Toth* framework and rejected government arguments for a jurisdictional "shortcut . . . in the sensitive area of subjecting civilians to military jurisdiction." 41 C.M.R. 363, 364-65 (1970). The government begins its argument with the very type of "shortcut" this Court rejected in *Averette*. The government compares Mr. Ali to the Navy paymaster in *Ex parte Reed*. 100 U.S. 13 (1879). Parroting language from *Reed*, the government asserts that if Mr. Ali "were not part of the land and naval forces for purposes of court-martial jurisdiction, it may well be asked who is." 100 U.S. at 22; GB at 1-3. However, the government omits the analytical framework that the *Reed* Court utilized prior to concluding, "[i]f these officers are not in the naval service, it may well be asked who are." *Reed*, 100 U.S. at 22. Before concluding that the Navy paymaster was "in the naval service," the Court explained:

> Their appointment must be approved by the commander of the ship. Their acceptance and agreement to submit to the laws and regulations for the government and discipline of the navy

> must be in writing, and filed in the department. They must take an oath and bind themselves to serve until discharged. The discharge must be by the appointing power, and approved in the same manner as the appointment. They are required to wear the same uniform of the service; they have a fixed rank; they are upon the payroll, and are paid accordingly. They may also become entitled to a pension . . . .

Id. (citing Navy Regulations of Aug. 7, 1876). The Supreme Court later held that *Ex parte Reed* is limited to the unique status of nineteenth-century Navy paymasters. *See McEleory v. United States ex rel. Guagliardo*, 361 U.S. 281, 284-85 (1960).

Instead of supporting the government argument, *Reed* highlights the government's attempt to take a shortcut to jurisdiction by overstating Mr. Ali's connection to the military.[2] Mr. Ali was hired and paid by L3 Corporation. Mr. Ali took no oath, held no rank, and was free to refuse missions. He could also quit his job at any time. L3 fired Mr. Ali after the Army placed him in pretrial confinement because L3 could not "bill back" the Army for Mr. Ali's services. Without citing to any statutory, regulatory, or judicial authority, the government also asserts that Mr. Ali had a "technical" Army chain of command and thus is subject to military jurisdiction. GB at 6, 37. Contrast the informal arrangement of a "technical" chain of command, with the Navy paymaster's oath, obligation to serve

[2] Compare appellant's brief (AB) at 5-8.

until discharged, and written agreement to be subject to the discipline of the Navy. In contrast to the Navy paymaster, Mr. Ali was not subject to orders from the military chain of command, took no oath, and signed no agreement to be subject to military jurisdiction. The consequence for refusing to go on a mission or disobeying military orders was termination of his contract.

Reed also illustrates appellant's point that the military has within its power the ability to implement alternatives that are "adequate to the end proposed" and that avoid abrogating the Fifth and Sixth Amendments. *See Toth*, 350 U.S. at 22; AB at 24-26; AC 8-14. If court-martial jurisdiction over civilian interpreters is critical to the military mission, then *Reed* serves as precedent for how to accomplish that goal. *Guagliardo*, 361 U.S. at 286-87 (1960).[3] The government's argument can only succeed if this Court is willing to take the type of jurisdictional "shortcut" rejected by both *Toth* and *Averette*. *See Averette*, 41 C.M.R. at 365-66.

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[3] In the past, both the Navy and the Army have implemented programs which incorporate civilian expertise into the active military. The Navy's World War II era construction battalions (Seabees) are a good example. *Guagliardo*, 361 U.S. at 286-87. "The increased cost to maintain these employees in a military status is the price the Government must pay in order to comply with constitutional requirements." *Id.* 287.

2. The Government's "One Factor" Analysis Misapplies The *Toth* Line of Cases.

The government asserts that "whether Congress's act of subjecting a person to court-martial jurisdiction falls within its power under Article I, §8, Clause 14 is based on one factor: the status of the accused." GB at 11. The government argues that the "only question is whether there is 'sufficient proximity, physical and social . . .to the land and naval forces . . . to demonstrate a justification for court-martial prosecution." *Compare* GB at 27, *with Kinsella*, 361 U.S. at 241 (quoting *Reid*, 354 U.S. at 46-47) (Frankfurter, J., concurring)). However, the language on which the government relies is from a *one-Justice concurrence* in *Reid*, and was merely described, not endorsed in *Singleton*. The government Justice Frankfurter's concurrance out of context and drops the words "as reasonably" in order to alter the meaning:

> The prosecution by court-martial . . . [of] civilian dependents . . . abroad is hardly to be deemed, under modern conditions, obviously appropriate . . . . I do not think that the proximity, physical and social, of these women to the 'land and naval Forces' is, with due regard to all that has been put before us, so clearly demanded by the effective 'Government and Regulation' of those forces *as reasonably* to demonstrate a justification for court-martial jurisdiction . . . .

Reid, 354 U.S. at 46-47 (Frankfurter, J., concurring) (emphasis added); compare GB at 27.

The concurrence in *Reid* explained that "modern conditions" made it less reasonable for the military to deprive civilian dependents of the protections under Article III and the Fifth and Sixth Amendments. *Id.* (quoted by *Kinsella*, 361 U.S. at 241). Rather than supporting the government contention that the "only question" is Mr. Ali's proximity to military forces, the *Reid* concurrence supports appellant's argument that because Article III courts were open and accessible, military jurisdiction over Mr. Ali is unjustified. *Compare* GB at 27, *with* AB at 46-47, and AC at 10-14. By asserting that the "only question" is Mr. Ali's proximity to "land and naval Forces," the government is seeking to induce this Court to *de facto* overrule the holdings in *Toth*, *Reid*, *Singleton*, *Guagliardo*, and *Grisham* concerning the constitutional limits on court-martial jurisdiction.

3. The Government's "One Factor" Analysis Misapplies *Solorio*.

The *Solorio* decision applies to "persons who are actually members of the Armed Services." *Solorio*, 483 U.S. at 441. In that context, the *Solorio* Court explained that "the Constitution . . . condition[s] the proper exercise of court-martial jurisdiction over *an offense* on one factor: the *military* status of the accused." *Id.* at 439 (emphasis added). To emphasize this point, the *Solorio* Court explained: "In an unbroken line of decisions from 1866 to 1960, the Court interpreted the Constitution as conditioning the proper exercise of court-

martial jurisdiction over an offense on one factor: the military status of the accused." *Id.*

Contrary to the government's position, *Solorio* does not undermine the *Toth* line of cases or render the *Toth* framework as mere dicta in the context of court-martial jurisdiction over civilians. *See* GB at 22, n. 102. If anything, *Solorio* reaffirms the jurisdictional framework in *Toth*, while recognizing that the Court has never endorsed court-martial jurisdiction over an accused unless he was viewed as an actual member of the land and naval forces. *Solorio*, 483 U.S. at 439.

Without offering support for its conclusion, the government asserts that the importance of Fifth and Sixth Amendment protections "does not dictate jurisdictional consequences . . . ." GB at 22-23. That conclusion is unsupported and is directly contradicted by the *Toth* line of cases. Much more than mere dicta, the principle of limiting military jurisdiction over civilians has been a backstop against "encroachments" both "slight" and not so slight since before the drafting of the United States Constitution. *See Reid*, 354 U.S. at 39-40.

Solorio overturned *O'Callahan v. Parker*, not the *Toth* line of cases. *Solorio*, 483 U.S. at 440-41 ("[T]he *O'Callahan* Court held that a serviceman's off-base sexual assault on a civilian with no connection with the military could not be tried by court-martial. On reexamination of *O'Callahan*, we have decided that

the service connection test announced in that decision should be abandoned.") The *Solorio* decision acknowledges that in certain contexts there are limits on Congressional authority to extend court-martial jurisdiction: "Whatever doubts there might be about the extent of Congress' power under Clause 14 . . . that power surely embraces the authority to regulate the conduct of persons who are *actually members* of the Armed Services." *Solorio*, 483 U.S. at 441 (emphasis added).

The government cites to *Solorio* for the much broader proposition that "[J]udicial deference . . . is at its apogee when legislative action under congressional authority to raise and support armies and make rules and regulations for their governance is challenged." GB at 11 (citing *Solorio*, 483 U.S. at 447). Congress may enjoy broad authority when, as in *Solorio*, military jurisdiction is applied to "actual[] members of the Armed Forces." However, judicial deference is at its nadir when Congress attempts to extend court-martial jurisdiction over civilians thereby depriving them of the protections of the Fifth and Sixth Amendments. 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 with *Toth v. Quarles*, has disapproved the trial by courts-

martial of persons not members of the armed forces." 41 C.M.R. at 364.

4. The Government Asks This Court To Ignore The Broad Statutory Definition Of "Contingency Operation" And Instead Rely Upon The Unreviewable Discretion Of The Executive Branch To Limit Court-Martial Jurisdiction Over Civilians.

The government argues that the "terms of Article 2(a)(10) . . . . pose no danger of military prosecutions of civilians" in any scenario other than that found in this case. GB at 32. The government cannot point to any evidence that Congress intended to limit Article 2(a)(10) in such a manner. The government interpretation ignores the plain meaning of "contingency operation" as defined in 10 U.S.C. § 101(a)(13). *See* AB at 27-31. The statutory definition of contingency operation encompasses a broad range of overseas and domestic operations such as Operation Noble Eagle. AB at 27-30.

The government analysis of *Reid* undermines its argument that Article 2(a)(10) respects the limits on Congressional authority to expand court-martial jurisdiction over civilians. The government argues that "Article 2(a)(10) is specifically designed to 'meet the maximum historically recognized extent of military jurisdiction over civilians in the field.'" GB at 32 (citing *Reid*, 354 U.S. at 34, n. 61)(explaining that experts in military law have taken the position that "in the field" means in an area of actual fighting). The Court does not state in its

opinion, however, that other factors are not also part of the analysis. *See* AB at 44, AC at 16. The government argues, "the [*Reid*] Court recognized that the maximum reach of court-martial jurisdiction depended on whether the civilian-military relationship occurred 'in an area where actual hostilities are under way.'"[4] GB at 31. The government, once again, attempts to oversimplify the jurisdictional analysis by omitting critical factors including the broad statutory definition of "contingency operation," the availability of civilian courts, and the ability to implement alternatives that are "adequate to the end proposed." *See Toth*, 350 U.S. at 22; *Milligan*, 71 U.S. at 121 (explaining that "where the courts are open and their process unobstructed," citizens cannot be subjected to military jurisdiction).

By oversimplifying the analysis, the government asks this Court to rely on the "unreviewable discretion" of the executive to decide when and where to apply court-martial jurisdiction to a civilian. *See Kinsella*, 361 U.S. at 244-45; *see also* AC at 14. The statutory definition of "contingency operation" allows for court-martial jurisdiction over civilians whenever a military

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[4] The full and correct quote has a different meaning than that argued by the government: "While we recognize that the 'war powers' of the Congress and the Executive are broad, we reject the government's argument that present threats to peace permit military trial of civilians accompanying the armed forces overseas in an area where ***no*** actual hostilities are under way." *Reid*, 354 U.S. at 34-35 (emphasis added).

operation "results in the call or order to, or retention on, active duty of members of the uniformed services . . . during a national emergency declared by the President or Congress." 10 U.S.C. § 101(a)(13)(B). That broad statutory definition allows for court-martial jurisdiction over civilians in the United States as well as overseas and "open[s] the possibility of civilian prosecutions by military courts whenever military action on a varying scale of intensity occurs." *Averette*, 41 C.M.R. at 365.

Conclusion

In order to accept the government's argument, this Court would first have to reject *Toth*, *Reid*, *Kinsella*, *Grisham*, and *Gugliardo*.[5] The government's argument is inconsistent with the requirement to limit court-martial jurisdiction to "the least possible power adequate . . . ." *Toth*, 350 U.S. at 23. The *Toth* framework controls how the courts analyze Congressional efforts to expand court-martial jurisdiction over civilians such as Mr. Ali. *See Kinsella,* 361 U.S. at 239; *United States v. Averette*, 41 C.M.R. 363, 364-65 (1970). This Court should apply that framework in this case and reject court-martial jurisdiction over Mr. Ali.

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[5] The Court could avoid the constitutional issue by interpreting "in the field" to require unavailability of civilian courts or other options to address civilian misconduct in operational areas. AC at 16-29; AB at 44-47.

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 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 February 16, 2012.

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