IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

U N I T E D S T A T E S, Appellee	) FINAL BRIEF ON BEHALF OF) APPELLEE
v.	)
	) Crim. App. Dkt. No. 20080559
Mister **ALAA MOHAMMAD ALI** Contractor, Appellant	) USCA Dkt. No. 12-0008/AR

JOHN D. RIESENBERG
Captain, U.S. Army
Office of the Judge Advocate General, United States Army
Appellate Government Counsel
U.S. Army Legal Services Agency
9275 Gunston Road
Fort Belvoir, Virginia 22060-5546
(703) 693-0785
john.riesenberg@us.army.mil
Lead Counsel
C.A.A.F. Bar Number 35433

CHAD M. FISHER
Captain, U.S. Army
Branch Chief, Government Appellate Division

AMBER J. ROACH
Major, U.S. Army
Deputy Chief, Government Appellate Division

MICHAEL E. MULLIGAN
Colonel, U.S. Army
Chief, Government Appellate Division

Index to Brief

Table of Cases, Statutes, and Other Authorities

U.S. Constitution

Supreme Court of the United States

Court of Appeals for the Armed Forces

Army Court of Criminal Appeals

United States Circuit Courts

United States District Courts

Statutes

Uniform Code of Military Justice

Manual for Courts-Martial

Articles

Other Authorities

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TO THE HONORABLE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

Summary of Argument

> The good order and efficiency of the service depend largely upon the faithful performance of their duties. If these officers are not in the naval service, it may well be asked who are.[1]

The question before this Court is one of status. More narrowly, the issue is whether appellant was among those "so closely related to what Congress may allowably deem essential for the effective 'Government and Regulation of the land and naval Forces' that they may be subjected to court-martial jurisdiction."[2] Appellant, living and serving with the United States Army in the face of ongoing hostilities, performed a vital function to the success of the mission of the armed

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[1] *Ex Parte Reed*, 100 U.S. 13, 22 (1879) (holding that civilian paymaster clerks are persons "in the naval service of the United States" and subject to court-martial).
[2] *Reid v. Covert*, 354 U.S. 1, 44 (1957) (Frankfurter, J. concurring) (quoting Article I, §8, Clause 14 of the United States Constitution).

forces.[3] Because of his status as defined by the strength of his connection to the Army, appellant's court-martial was no "encroachment," great or slight, on his civil liberties.

Court-martial jurisdiction over appellant was assumed pursuant to the amended Article 2(a)(10) declaring persons serving with or accompanying an armed force in the field in a time of a contingency operation subject to the Uniform Code of Military Justice (UCMJ). Jurisdiction was taken squarely in accordance with Supreme Court precedent and historical practice informing the constitutionality of military trials of civilians when accompanying or serving the armed forces, during a time of actual hostilities, and in a place where hostilities are ongoing.

The circumstances of appellant's case reveal that he was deeply embedded with the armed forces in an area of actual fighting. He wore the same uniform, ate the same food, slept in the same tents, and faced the same constant dangers from the enemy. His status warranted the exercise of congressional power to make rules for not only formally enlisted and commissioned service members, but also for those who are part "of the land and naval forces." The efficiency and well-being of the service

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[3] Joint Appendix (JA) 372-73. The military judge found that appellant "was the only member of the team that was necessary" to the success of the mission.

deployed to a hostile part of the world depended largely on the performance of his duties. If appellant were not part of the land and naval forces for purposes of court-martial jurisdiction, it may well be asked who is.

Statement of Statutory Jurisdiction

On March 31, 2010, The Judge Advocate General of the Army (TJAG) 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 the 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 convicted appellant, pursuant to his pleas,[4] of false official statement, larceny, and obstruction of justice, in violation of Articles 107, 121, and 134, UCMJ.[5] The military judge sentenced appellant to confinement for five months.[6] Pursuant to the terms of a pretrial agreement, appellant's sentence to confinement was limited to time-served in pretrial confinement, a total of 115 days.[7]

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[4] JA 215.
[5] JA 11-15.
[6] JA 218.
[7] JA 219; 380-83, Appellate Exhibits (AE) LV and LVI.

On July 21, 2008, appellant filed a petition for extraordinary relief with the Army Court, seeking a writ of prohibition on the grounds that the court-martial lacked jurisdiction.[8] The Army Court denied the petition on August 29, 2008.[9] Appellant filed a writ-appeal petition with this Court on September 18, 2008.[10] On October 18, 2008, this Court denied appellant's writ-appeal.[11] The convening authority approved the findings and sentence that same day.[12]

On October 28, 2008, appellant's case was forwarded to TJAG for review under Article, 69(a), UCMJ. On March 31, 2010, TJAG forwarded the case to the Army Court for review, pursuant to Article 69(d), UCMJ.[13]

On July 18, 2011, the Army Court issued its opinion in this case.[14] The Army Court affirmed the findings and only so much of the sentence as to include 115 days of confinement and ordered that appellant be credited with 115 days of confinement credit. On November 18, 2011, this Court granted appellant's petition.

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[8] *See Ali v. Austin, et. al.*, Army Misc. 20080678 (Army Ct. Crim. App. 2008).
[9] *Id.*
[10] *See Ali v. Austin*, et. al., Misc. No. 09-8001 (C.A.A.F. 2008).
[11] *Id.*
[12] Action.
[13] *See* Direction for Review, *United States v. Ali*, No. 20080599, dtd 31 March 2010.
[14] *United States v. Ali*, 70 M.J. 514 (A. Ct. Crim. App. 2011); JA 1.

Statement of Facts

On February 23, 2008, the date of his offenses, appellant was employed by L3/Titan Communications as a linguist and assigned as a civilian contractor to the 170th Military Police (MP) Company, stationed in Iraq as part of Operation Iraqi Freedom.[15] Appellant was originally born in Iraq, but moved to Canada in 1992 and was a citizen of both Iraq and Canada at the time of his assignment to the 170th MP Company.[16] On January 16, 2008, prior to his deployment, appellant attended Theater Specific Individual Readiness Training (TSIRT) at Fort Benning, Georgia, where appellant received required training and validation.[17] Appellant was also issued a Common Access Card, identifying him as a U.S. Army Contractor with Geneva Convention Category IV status.[18] Appellant arrived in Iraq on January 22, 2008, and joined the 170th MP Company, which had been deployed to Iraq since May 6, 2007.[19]

While in Iraq, appellant performed duties as an interpreter embedded with the 170th MP Company.[20] Appellant was stationed at

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[15] JA 220, Prosecution Exhibit (PE 6) at 1.
[16] JA 360, Appellate Exhibit (AE) XXXVI; JA 366, AE LI at 1 (paras 2-3).
[17] JA 122-33, 138-48; JA 319-320, AE XXX; JA 360, AE XXXVI; JA 367-68, AE LI at 2-3 (paras 15-20).
[18] JA 140, 301.
[19] JA 368, AE LI at 3 (paras. 21-23).
[20] JA 220, PE 6 at 1.

Combat Outpost (COP) 4, near the city of Hit, Iraq.[21] COP 4 was surrounded by wires, tactical barriers, and other obstacles to restrict entry and protect against Vehicle-Borne Improvised Explosive Devices (VBIED).[22] Personnel access to COP 4 was highly restricted.[23]

Appellant lived with the Soldiers in his unit.[24] Appellant wore exactly what the members of the unit wore: the Army Combat Uniform (ACU) with the unit patch, individual body armor (IBA), Kevlar helmet, and ballistic eye protection.[25] Appellant, along with all of the other interpreters, performed an integral part of the unit's mission in training Iraqi police.[26] Appellant's mission was to "directly serve alongside the military."[27]

When appellant and his unit traveled, they typically did so in up-armored High Mobility Multipurpose Wheeled Vehicles (HMMWV).[28] Appellant had a technical chain-of-command within the

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[21] *Id.*
[22] JA 92.
[23] *Id.*
[24] JA 101.
[25] JA 74, 96, 101.
[26] JA 89 (testimony of Staff Sergeant William Armstrong: "Without the interpreters we wouldn't be able to do anything. We wouldn't be able to function at all."), JA 96.
[27] JA 51 (testimony of Mr. Jeff Jackson: "I always remind [the linguists] that they are not like anybody else in the world...whatever [the military] mission is there's always a linguist attached to them. So if there are losses in theater, unfortunately, sometimes we suffer them too because our linguists are right there alongside the military."
[28] JA 78.

unit, reporting directly to SSG Clint Butler.[29] When appellant's unit went on mission they faced Improvised Explosive Devices (IEDs), small arms fire, and indirect fire.[30] Over three hundred of appellant's fellow interpreters had been killed during Operation Iraqi Freedom as of the time of appellant's court-martial, many by IED explosion or assassination by local militias.[31]

During the morning of February 23, 2008, appellant got into an argument with Mr. Habeeb Kadhum Al-Umarryi, another interpreter.[32] Mr. Al-Umarryi punched appellant in the back of the head.[33] Appellant reported the incident to Sergeant Joseph Carroll, who in turn reported the fight to SSG Butler.[34] While SSG Butler was looking for Mr. Al-Umarryi in order to investigate the incident, appellant stole a black "Bench Made" knife attached to SSG Butler's weapons belt.[35]

Appellant left SSG Butler's room and went to watch television in the common room to his living quarters.[36] Appellant was watching television with some other interpreters

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[29] JA 89, 98, 110.
[30] JA 97.
[31] JA 60-61.
[32] JA 220, PE 6 at 1.
[33] *Id.*
[34] *Id.*
[35] JA 221, PE 6 at 2.
[36] *Id.*

when Mr. Al-Umarryi came into the common room.[37] Appellant and Mr. Al-Umarryi got into another fight.[38] During the fight, appellant cut Mr. Al-Umarryi four times with the stolen knife.[39] After the fight, appellant hid the knife between some floor slots in a shower trailer.[40]

As the Soldiers from the 170th MP Company attempted to determine what happened, appellant told them he used a piece of wood to cut Mr. Al-Umarryi.[41] After they confronted him about this lie, appellant admitted to using the knife.[42] Appellant later made a sworn written statement to agents from the Criminal Investigation Command.[43] Appellant lied in the sworn statement when he claimed that he bought the knife in Canada two months before deploying to Iraq.[44] Appellant was placed into pretrial confinement on February 29, 2008.[45]

A single charge and specification for assault was preferred against appellant on March 27, 2008.[46] L3/Communications terminated appellant's employment on April 9, 2008.[47] The charge

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[37] *Id.*
[38] *Id.*
[39] *Id.*
[40] *Id.*
[41] *Id.*
[42] *Id.*
[43] JA 361-65, AE XLIV.
[44] *Id.*
[45] JA 11, 242.
[46] JA 11.
[47] JA 64.

was referred to a general court-martial on May 10, 2008.[48] On May 24, 2008, appellant filed a motion to dismiss with the trial court, alleging that he was not subject to court-martial jurisdiction.[49] The Government filed a response on May 28, 2008.[50] Appellant was arraigned on May 29, 2008 at Camp Victory, Iraq.[51] On June 11, 2008, the military judge heard evidence and arguments on appellant's motion to dismiss.[52] On June 13, 2008, the military judge denied appellant's motion and issued written findings of fact and conclusions of law.[53] On June 17, 2008, three additional charges were preferred against appellant.[54] On June 21, 2008, appellant entered into a pretrial agreement with the convening authority.[55] Appellant agreed to plead guilty to the additional charges in exchange for dismissal of the assault charge and a limitation on confinement to time-served.[56]

Any additional facts necessary for the disposition of this case are set forth in argument.

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[48] JA 11-12.
[49] JA 248, AE XXIV.
[50] JA 302, AE XXV.
[51] JA 21-23.
[52] JA 38-213.
[53] JA 214, 366; AE LI.
[54] JA 13-15.
[55] JA 380-83; AEs LV and LVI.
[56] *Id.*

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

Standard of Review

"Jurisdiction is an interlocutory issue, to be decided by the military judge, with the burden placed on the Government to prove jurisdiction by a preponderance of the evidence."[57] Appellate courts review a military judge's ruling on jurisdiction *de novo*, "accepting the military judge's findings of historical facts unless they are clearly erroneous or unsupported in the record."[58] This standard applies to both issues in this case.

Law and Argument

A. Article 2(a)(10), UCMJ, is a constitutional exercise of congressional power and authority under Article I, §8, Clause 14 as applied to appellant.

Article I, §8, Clause 14 of the United States Constitution gives Congress the power "To make Rules for the Government and

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[57] *United States v. Oliver*, 57 M.J. 170, 172 (C.A.A.F. 2002) (citations omitted).

[58] *United States v. Melanson*, 53 M.J. 1, 2 (C.A.A.F. 2000) (citing *United States v. Owens*, 51 M.J. 204, 209 (C.A.A.F. 1999)).

Regulation of the land and naval Forces."[59] The Supreme Court has said that "[o]n its face there is no indication that the grant of power in Clause 14 was any less plenary than the grants of other authority to Congress in the same section."[60] "[J]udicial deference...is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged."[61]

The test for 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.[62] A person who is to be tried by court-martial must be "a person who can be regarded as falling within the term 'land and naval Forces.'"[63] Article 2(a)(10) of the UCMJ states that "[i]n time of declared war or a contingency operation, persons serving with or accompanying an armed force in the field" are subject to the UCMJ.[64]

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[59] Article I, §8, Clause 18 authorizes Congress to "make all laws which shall be necessary and proper" to execute the powers that the Constitution gives to Congress.
[60] *United States v. Solario*, 483 U.S. 435, 441 (1987).
[61] *Id.* at 447 (citations omitted).
[62] *Kinsella v. Singleton*, 361 U.S. 234, 240-41 (1960); *United States v. Phillips*, 58 M.J. 217, 219 (C.A.A.F. 2003) (citing *United States v. Ernest*, 32 M.J. 135, 139 (C.M.A. 1991)).
[63] *Singleton*, 361 U.S. at 240-41.
[64] UCMJ art. 2(a)(10).

The idea of applying the UCMJ to civilians who are part of the land and naval forces is not a new or novel concept. As this Court stated, subjecting persons serving with or accompanying the armed forces to "control by the services and to trial by court-martial" has roots in military authority and "military customs existing from time immemorial."[65] "'[The Supreme] Court has repeatedly laid down the principle that a contemporaneous legislative exposition of the Constitution when the founders of our Government and framers of our Constitution were actively participating in public affairs, long acquiesced in, fixes the construction to be given its provisions.'"[66] Article 63 of the Articles of War, established by the Continental Congress in 1775, provided that "[a]ll retainers to the camp, and all persons serving with the armies of the United States in the field, though not enlisted soldiers, are to be subject to orders, according to the rules and laws of war."[67]

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[65] *United States v. Burney*, 21 C.M.R. 98, 110 (C.M.A. 1956).
[66] *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 412 (1928) (quoting *Myers v. United States*, 272 U.S. 52, 175 (1926)). Military courts have also looked to Congress' "contemporary construction" of a statute and the Constitution. *See United States v. Culp*, 33 C.M.R. 411 (C.M.A. 1963); and *United States v. Howe*, 37 C.M.R. 429, 435-439 (C.M.A. 1967) (abrogated on other grounds).
[67] *Burney*, 21 C.M.R. at 108 (quoting 1775 Articles of War, *reprinted in* William Winthrop, *Military Law and Precedents* 98 (2d ed. 1920 reprint) (hereinafter "Winthrop"). The Supreme Court recognizes Colonel Winthrop as the "Blackstone of Military

The term "serving with" has a long history in the military justice system. As Colonel Winthrop explained, "[I]t is preferred to treat these words as intended to describe civilians in the employment and service of the government. This class...consisted mostly of civilian clerks, teamsters, laborers, and other employees of the different staff departments, hospital officials and attendants, veterinaries, *interpreters*, guides, scouts, and spies...."[68] A virtually identical provision was adopted as Article of War 23 by the Continental Congress the following year.[69]

In August 1789, Secretary of War Henry Knox recognized the potential that "changes to the Government of the United States will require that the articles of war be revised and adapted to the constitution."[70] The following month, the First Congress simply continued the 1776 Articles in force, thereby keeping intact its provisions authorizing the trial by court-martial of civilians serving with the armies in the field.[71] In 1790, Congress reenacted those articles "as far as the same may be

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Law." *Hamdan v. Rumsfeld*, 548 U.S. 557, 597 (2006) (citations omitted).

[68] Winthrop at 99 (emphasis added).

[69] *See* American Articles of War of 1776, §XIII, art. 23 (reprinted in Winthrop at 967).

[70] Frederick Bernays Wiener, *Courts-martial and the Bill of Rights: The Original Practice I*, 72 Harv. L. Rev. 1, 8 (1958) (citing 1 *American State Papers Military Affairs* 6 (Lowrie & Clark ed. 1832)).

[71] *Id.* (citing Act of Sept. 29, 1789, ch. 25 § 4, 1 Stat. 96).

applicable to the Constitution of the United States."[72] Likewise, shortly after the December 15, 1794 ratification of the Bill of Rights by the states, Congress twice ratified the 1776 Articles without change.[73] Finally, in 1805, the Sixth Congress undertook a more detailed review and revision of those Articles in order to "adapt[ ] them to the provisions under the present government."[74] Congress retained, virtually verbatim, the provision of Article 23 (1776) in Article 60 (1806), permitting the trial by court-martial of "all persons whatsoever, serving with the armies of the United States in the field though not enlisted soldiers."[75] In 1874, this same language was incorporated into Article of War 63, simply omitting the words "settlers" and "whatsoever."[76]

The process of enacting, ratifying and reenacting virtually identical provisions governing the court-martial of civilians serving with the Army in the field - contemporaneously with debate upon, adoption, and ratification of the Constitution - presents strong evidence that the First Congress (and its

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[72] *Id.* (citing Act of April 30, 1790, ch 10, §13, 1 Stat. 121).
[73] *Id.* (citing Act of March 3, 1795, ch. 44, §14, 1 Stat. 432; Act of May 30, 1796, ch. 39, §20, 1 Stat. 486).
[74] 15 Annals of Cong. 263 (1805) (http://memory.loc.gov/cgi-bin/ampage?collId=llac&fileName=015/llac015.db&recNum=0) (Last visited, January 20, 2012).
[75] American Articles of War of 1806, art. 60 (reprinted in Winthrop at 981).
[76] American Articles of War of 1874, art. 63 (reprinted in Winthrop at 991).

immediate successors) perceived certain civilians as an integral part of the "land and naval forces" whom it was constitutionally empowered by Clause 14 to make subject to trial by court-martial. Similarly, as that process also straddled the adoption of the Bill of Rights, it is virtually certain that the framers viewed amenability of the covered civilians to trial by court-martial to be compatible with its procedural safeguards.[77]

In 1916, Congress added the term "accompanying" to the statute succeeding Article 63 and preceding Article 2, UCMJ: Article of War 2.[78] At the legislative hearings held for the bill, Major General Crowder, Judge Advocate General, explained the change:

> [The proposed amendment], which corresponds to article 63 of the existing code, introduces the words 'All persons accompanying,' so as to make subject to the article a class of persons who do not fall under the designations, 'retainers to the camp,' and 'persons serving with the armies in the field,' employed in the existing law.... '[P]ersons serving with the armies in the field' [include] civilian clerks, teamsters, laborers, interpreters, guides, contract surgeons officials, and employees of the provost marshal general's department, officers and men employed on transports, etc.... A number of persons who manage to

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[77] *See Ex Parte Quirin*, 317 U.S. 1, 41 (1942) (Supreme Court held that the 1806 articles of war "must be regarded as a contemporary construction of both Article III §2, and the Amendments as not foreclosing trial by military tribunals, without a jury, of offenses against the law of war.").
[78] *In re Di Bartolo*, 50 F. Supp. 929, 932 (S.D.N.Y. 1943).

> accompany the Army, not in the capacity of retainers or of persons serving therewith, are not included. They constitute a class whose subjection to the Articles of War is quite as necessary as in the case of the two classes previously mentioned. Accordingly, the article has been expanded to include also persons accompanying the Army.[79]

Between 1950 and 2006, Article 2(a)(10), and its predecessor Article 2(10), permitted exercise of UCMJ jurisdiction over persons serving with or accompanying an armed force in the field only during a "time of war."[80] In the 1979 decision *United States v. Averette*, this Court construed "time of war" strictly, conditioning statutory jurisdiction on a formal declaration of war.[81] This Court's strict interpretation of "time of war" essentially eliminated all other forms of armed conflict that the United States has engaged in since its last formal declaration of war in 1941.[82] Congress overruled that interpretation in 2006 by amending Article 2(a)(10) to include

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[79] *Id.* (quoting Senate Report No. 130, 64th Congress, First Session).

[80] *See* UCMJ art. 2(10) (1950) ("The following persons are subject to this code:...In time of war, all persons serving with or accompanying an armed force in the field [.]" Subsections b and c were added to Article 2 in 1979, changing Article 2(10) to Article 2(a)(10).

[81] *United States v. Averette*, 41 C.M.R. 363, 365 (C.M.A. 1970) (citations omitted).

[82] Colonel Lawrence J. Schwarz, *The Case for Court-Martial Jurisdiction Over Civilians Under Article 2(a)(10) of the Uniform Code of Military Justice*, 2002 Army Law. 31, 33-34 (2002).

both "declared wars" as well as "contingency operations," as defined in 10 U.S.C. §101(a)(13)(2000).

Congressional extension of UCMJ jurisdiction to contractors during a contingency operation is consistent with the long-standing principle that military jurisdiction extends to civilians who serve with and accompany the armed forces, during military operations, in areas of actual fighting or with a view toward the enemy. In 1957, the Supreme Court stated in *Reid v. Covert*, that "Article 2[a](10) sets forth the maximum historically recognized extent of military jurisdiction over civilians under the concept of 'in the field.'"[83] The term "in the field" is defined as "in an area of actual fighting,"[84] or as "military operations with a view toward an enemy."[85]

The Supreme Court stated that "given its natural meaning, the power granted Congress 'To Make Rules to regulate the land and naval forces' would seem to restrict court-martial jurisdiction to persons who are actually members *or part of* the armed forces."[86] In *Ex Parte Milligan*, the Supreme Court stated that "everyone *connected* with these branches or the public service is amenable to the jurisdiction which Congress has

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[83] *Reid v. Covert*, 354 U.S. 1, 34, n. 61 (1957) (plurality opinion).
[84] *Id.* (citation omitted).
[85] *Burney*, 21 C.M.R. at 109 (citation omitted).
[86] *Toth v. Quarles*, 350 U.S. 11, 15 (1955) (emphasis added).

created for their government, and, while thus serving, surrenders his right to be tried by the civil courts."[87] In *Duncan v. Kahanamaku*, the Supreme Court referred to the "well-established power of the military to exercise jurisdiction over members of the armed forces *and those directly connected with* such forces[.]"[88]

Inclusion of civilians present on the field of battle within military jurisdiction is a constitutionally permissible exercise of congressional power to regulate the land and naval forces, based on fundamental military necessity. "In the face of an actively hostile enemy, military commanders necessarily have broad power over persons on the battlefront. From 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."[89]

In *Covert*, the Supreme Court was not willing to consider dependent spouses residing abroad as being part of the "land and naval forces," and would not extend court-martial jurisdiction

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[87] *Ex Parte Milligan*, 71 U.S. 2, 123 (1866) (emphasis added).
[88] *Duncan v. Kahanomaku*, 327 U.S. 304, 313 (1946) (emphasis added).
[89] *Covert*, 354 U.S. at 33.

simply because they were stationed overseas.[90] However, the Supreme Court was not addressing Article 2(10), UCMJ, which applied to persons accompanying the armed forces "in the field," but instead addressing Article 2(11), UCMJ, which allowed for court-martial jurisdiction over ". . . all persons serving with, employed by, or accompanying the armed forces without the continental limits of the United States."[91] The Supreme Court held that "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 or in Hawaii or Alaska."[92]

The Supreme Court's decision in *Covert* was based on its exclusion of "wives, children and other dependents of servicemen" from the definition of those "in the land and naval forces." The Supreme Court distinguished those cases in lower courts in which court-martial jurisdiction was upheld over civilians "performing services for the armed forces 'in the

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[90] *But see Madsen v. Kinsella*, 343 U.S. 341 (1952) (upholding jurisdiction of a military commission over a dependent spouse in occupied Germany).
[91] *Covert*, 354 U.S. at 3-4. (quoting UCMJ art. 2(11) (1950) (50 U.S.C. § 552(11) (1950)).
[92] *Covert*, 354 U.S. at 20.

field' during time of war[,]" noting that in *Covert* the women at issue were in countries where there were active hostilities.[93]

The Supreme Court specifically recognized that "there might be circumstances where a person could be 'in' the armed services for purposes of Clause 14 even though he had not formally been inducted into the military or did not wear a uniform."[94] Appellant's case represents such a circumstance. Appellant is not in the same category as a spouse or family member, who accompanies the force only by virtue of a domestic relationship and the fact that they live overseas. Similarly, he is not in the same category as a civilian working for the Army overseas in a time of peace and far from the battlefield.[95]

Appellant's service to the armed forces was not incidental, nor was it removed from the place of ongoing hostilities.

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[93] *Id.*, at 33-34 (citing *Perlstein v. United States*, 151 F.2d 167, *cert. granted*, 327 U.S. 777, *dismissed as moot*, 328 U.S. 822 (1946); *Hines v. Mikell*, 259 F. 28 (4th Cir. 1919); *Ex parte Jochen*, 257 F. 200 (D.Tex. 1919); *Ex parte Falls*, 251 F. 415 (D.N.J. 1918); *Ex parte Gerlach*, 247 F. 616 (D.N.Y. 1917); *Shilman v. United States*, 73 F.Supp. 648 (D.N.Y. 1947), *reversed in part*, 164 F.2d 649 (2nd Cir. 1947), *cert. denied*, 333 U.S. 837 (1948); *In re Berue*, 54 F.Supp. 252 (D.Ohio 1944); *McCune v. Kilpatrick*, 53 F.Supp. 80 (D.Va. 1943); and *In re Di Bartolo*, 50 F.Supp. 929 (S.D.N.Y 1943)).

[94] *Covert*, 354 U.S. at 22-23; *see also id.* at 45 (Frankfurter, J., concurring).

[95] *McElroy v. U.S. ex rel Guagliardo*, 361 U.S. 281 (1960) (civilian working for the military in 1954 Morocco in time of peace not subject to court-martial jurisdiction).

Appellant wore the same uniform,[96] went on the same missions,[97] suffered the same living conditions, reported to the same supervisors, and received the same type of logistical support that the Soldiers next to him did.[98] Appellant's service was so directly connected to the armed forces that appellant's unit could not accomplish the mission without him.[99] Without question, appellant was serving a unit that was actively participating in the field of military operations in the face of a hostile enemy.

The constitutional test for status is not one of title or technical oath. It is the service to the force and the connection to the mission that is important, not the form of the contract. Both the Soldier and the appellant are members of the "land and naval forces" - the form of their connection differs, but the status is the same.[100] Congress appropriately decided that those who live, work, face the enemy, and in some cases die together, should all be subject to the same Code, designed to

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[96] Appellant actually wore ACUs with the US Army tape attached. JA 101.
[97] Testimony of SSG Butler: "if we worked an 18 hour day, [the linguists] worked an 18 hour day. If we only worked 2 hours then they only worked 2 hours." JA 107.
[98] JA 53, 56, 60, 73-75, 86-89, 96-98, 101-02, 110.
[99] JA 372-73.
[100] If appellant had been captured during operations, his status entitled him to the same prisoner of war treatment as an enlisted Soldier or commissioned officer under the Geneva Convention. Third Geneva Convention, art. 4, 6 U.S.T. 3316.

ensure good order and discipline among the force, and thereby preserve the success of the mission. As such, Article 2(a)(10) is a constitutionally permissible application of court-martial jurisdiction over appellant.

B. The application of Article 2(a)(10) to appellant did not deprive appellant of substantive or procedural Due Process.

Appellant claims that his court-martial deprived him of his Fifth and Sixth Amendment rights to indictment, trial by jury of his peers, and a life-tenured, salary-protected judge.[101] Certainly, the Supreme Court has emphasized that the importance of Fifth and Sixth Amendment protections for criminal defendants informs the propriety of a narrow construction of status, of those persons who are "in the land and naval forces."[102] But the

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[101] Appellant's Brief (AB) 9-14. Appellant devotes an entire subsection to the proposition that the Fifth and Sixth Amendments apply to him despite his lack of United States citizenship citing *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990). *Verdugo-Urquidez* only held that the Fourth Amendment rights are inapplicable to aliens outside the borders of the United States and did not have occasion to address the contours of procedural rights that attach to an alien in an extraterritorial prosecution by United States authorities. Moreover, that question has no bearing on this case because appellant is a member of the "land and naval forces" and therefore subject to trial by court-martial to which the Fifth and Sixth Amendment rights to indictment and trial by jury do not extend.

[102] *Toth*, 350 U.S. at 22-23 (stating in dicta that court-martial jurisdiction must be limited to the least possible power adequate to the end proposed); *Cf. Solorio*, 483 U.S. at 440 n.3 (commenting on this language in *Toth* by stating "the Court in *Toth v. Quarles* was addressing only the question whether an ex-serviceman may be tried by court-martial for crimes committed

importance of such rights does not dictate appellant's status or the jurisdictional consequences that flow from that status.

In enacting and reenacting without change the 1776 Articles of War, which made amenable to court-martial jurisdiction certain civilians serving with the armed forces in the field, the framers fully appreciated the fact that such individuals would not possess the rights to indictment and trial by jury. Nonetheless, they did not view that deprivation as incompatible with the Constitution and its contemporaneously enacted amendments.[103]

If a person is properly subjected to court-martial jurisdiction, then he is not entitled to indictment or a jury trial. The right to indictment by grand jury is guaranteed in the Fifth Amendment to the Constitution, which provides that "no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, *except in cases arising in the land or naval forces*, or in the Militia, when in actual service in time of War or public danger."[104] This language contains an express exception for

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while serving in the Air Force. Thus [this] dictum may be also interpreted as limited to that context.").

[103] *See Ex Parte Quirin*, 317 U.S. at 41.

[104] U.S. Const. amend V (emphasis added).

cases that are tried under congressional power to regulate the armed forces.[105]

Likewise, the right to trial by jury, under the Sixth Amendment and Article III of the Constitution, does not apply to those cases tried by court-martial.[106] The Supreme Court long ago determined that "the framers of the Constitution, doubtless, meant to limit the right of trial by jury, in the Sixth Amendment, to those persons who were subject to indictment or presentment in the Fifth."[107] Consequently, neither the Fifth nor Sixth Amendments to the U.S. Constitution restricts trials by courts-martial.[108] Therefore it follows that because appellant was properly subject to court-martial jurisdiction, the Fifth and Sixth Amendment rights to which he lays claim do not apply to him, just as they do not apply to the thousands of citizen-Soldiers who are members of the armed forces.[109]

C. Neither the availability of alternative forums, nor logistical considerations, alters Congress's constitutional authority.

Both appellant and *amici* desire to construe the test for jurisdiction to be that if, in a particular case, there is "some

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[105] *Covert*, 354 U.S. at 22.
[106] *Ex Parte Quirin*, 317 U.S. at 40-41 (citing *Ex Parte Milligan*, 71 U.S. at 123).
[107] *Ex Parte Milligan*, 71 U.S. at 123.
[108] *Id.*
[109] Furthermore, because appellant was subject to court-martial jurisdiction, he was not entitled to an Article III judge. *United States v. Weiss*, 510 U.S. 163, 181 (1994).

way" to avoid court-martial jurisdiction for civilian defendants, then the Constitution demands that the alternative forum be used.[110] *Amici* desire to frame the constitutional question as one of "logistics": if it is possible for Congress to create an alternative forum, or if it is logistically possible to transfer a particular appellant to an existing civilian court, the Constitution requires that it be done in lieu of court-martial.[111] These arguments are unpersuasive.

The Constitution does not define congressional power to regulate the "land and naval forces" in terms of exigencies or logistics or alternate forums. Moreover, from *Toth* to *Guagliardo*, the Supreme Court has never framed the jurisdictional analysis in such terms. The Supreme Court certainly did express that it was unconvinced by Government arguments in those cases where the Government was seeking to expand jurisdiction over discharged Soldiers, civilian

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[110] AB 24-26; *Amici Curiae* Brief (AC) 9 ("The Supreme Court squarely held in *Toth* and *Singleton* that if Congress reasonably *could* provide an Article III forum for the trial of civilians accompanying the military overseas, a court-martial is unconstitutional.").

[111] AC 9-10, 14: *Amici* argue that advances in transportation have "greatly improved" since *Toth* and *Singleton*. Although the world has seen many technological advances since *Toth* (1955) and *Singleton* (1959) were decided, it is questionable whether there have been any dramatic technological advances in *transportation* that would have been relevant. Transcontinental and transoceanic flights certainly existed in the middle of the twentieth century and *could* have moved a defendant around the world.

dependants, and civilian employees overseas in times of peace, that "if [jurisdiction] is not sustained [defendants] may escape punishment altogether."[112]

What the Supreme Court clearly meant in rejecting such arguments by the Government was that jurisdiction is not conferred, nor the congressional powers in Article I bolstered, by a ***lack*** of alternative forums. But the converse was never expressly or implicitly held by the Supreme Court to be the law: that the ***existence*** of alternative forums defeats court-martial jurisdiction or alters the status of a defendant. If the Supreme Court intended an "alternative forum" or "logistics" based test of the sort appellant and *amici* propose, surely it knew how to articulate such a test.

Most crimes committed by uniformed service members *could* be dealt with in a state or federal civilian court. This fact should not, and does not, have any meaning with regard to their status or amenability to court-martial. For example, an active-duty service member committing a murder on a military installation that is within the special maritime and territorial jurisdiction of the United States could be subject to court-martial jurisdiction under Article 118, UCMJ, or be subject to the jurisdiction of a federal civilian court under 18 U.S.C.

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[112] *Toth*, 350 U.S. at 20.

§1111(b).[113] Under appellant's and *amici*'s argument, Congress would not be permitted to subject a citizen-Soldier to court-martial jurisdiction in such a situation because an alternative forum exists that grants that citizen-Soldier different constitutional protections.

The question is not one of alternative forums, or the practical availability of those forums. As repeatedly expressed by the Supreme Court in the *Toth* to *Guagliardo* line of cases, and more recently reaffirmed by the Supreme Court in *Solario*,[114] the question is solely one of status.[115] 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."[116] If Congress is properly exercising its power under Article I, §8, Clause 14 of the U.S. Constitution, then the availability of alternative forums is irrelevant.

Furthermore, appellant's arguments regarding the potential applicability (or inapplicability) of the Military

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[113] *See* 18 U.S.C. §7 (defining special maritime and territorial jurisdiction); *United States v. McDonald*, 435 U.S. 850, 852, n.3 (1978).
[114] *Solario*, 483 U.S. at 439 (quoting *Singleton* 361 U.S. at 240-241) ("without contradiction, the materials...show that military jurisdiction has always been based on the 'status' of the accused").
[115] *Singleton*, 361 U.S. at 243.
[116] *Id.* at 241 (quoting *Covert*, 354 U.S at 46-47, Frankfurter, J. concurring).

Extraterritorial Jurisdiction Act (MEJA) of 2000, and its impact on jurisdiction under the UCMJ, were properly rejected by the military judge.[117] While the jurisdictional reaches of Article III Courts and courts-martial can potentially overlap, they are independently based.[118] Congress properly defined the jurisdictional parameters for federal courts in the MEJA statute and properly defined the jurisdictional parameters of courts-martial in Article 2, UCMJ. Furthermore, the statute itself only permits prosecution under MEJA of individuals who are not subject to the Code or who committed their offense in concert with someone not subject to the Code.[119] So long as appellant was a member of the land and naval forces and subject to the Code, jurisdiction under MEJA did not extend to appellant.[120]

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[117] JA 378, AE LI at 13; 18 U.S.C. §§3261-3267 (2000).

[118] Congress foresaw such a potential overlap, and ensured within the statute that MEJA would not be used to undermine jurisdiction under the UCMJ. "Nothing in this chapter may be construed to deprive a court-martial, military commission, provost court, or other military tribunal of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by a court-martial, military commission, provost court, or other military tribunal." 18 U.S.C. §3261(c).

[119] 18 U.S.C. §3261(d).

[120] It would also appear that the Army Court was correct in noting that MEJA could not apply to appellant because, as a citizen of Iraq, MEJA expressly excepts nationals of the host nation from its jurisdiction. JA 4. 18 U.S.C. §3266(1)(C).

Appellant cites *Guagliardo* to support his argument regarding alternative forums.[121] The *Guagliardo* Court did not hold that alternatives to courts-martial divested Congress of the constitutional authority to extend court-martial jurisdiction over civilians accompanying the armed forces in the field. Rather, the Court merely "pointed out" possible alternatives after the Court had ruled Article 2(11), UCMJ, unconstitutional.[122] In fact, the *Guagliardo* Court affirmed its statement in *Covert* that "'there might be circumstances where a person could be 'in' the armed services for purposes of Clause 14 even though he had not formally been inducted into the military....'"[123] Furthermore, the *Guagliardo* Court noted that none of the defendants at issue in those cases was considered to

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[121] AB 26.

[122] *Guagliardo*, 361 U.S. at 286-87. Notably, appellant does not mention the primary suggestion in *Guagliardo* of an "alternative" to court-martial jurisdiction over civilians accompanying the armed forces overseas: the drafting of civilians into the armed forced by "compulsory induction." *See* Robinson O. Everett, *Military Jurisdiction Over Civilians*, 1960 Duke L.J. 366, 409 (1960) ("Thus, the culmination of a series of cases which express a desire to protect American citizens from the alleged abuses of courts-martial is the suggestion that more American citizens be drafted into the armed services, where they will be subject not only to courts-martial, but also to all other liabilities and responsibilities of a serviceman.").

[123] *Guagliardo*, 361 U.S. at 286-87 (quoting *Covert*, 354 U.S. at 23).

be "in the field," as their cases did not arise during any active hostilities.[124]

D. *Averette* does not control the constitutional analysis in appellant's case.

Appellant and *amici* point to *Averette* for the proposition that court-martial jurisdiction over appellant is unconstitutional because: (1) *Averette* "might" require a declaration of war as part of the constitutional jurisdictional analysis[125] and (2) the language in *Averette* suggests that the terms of the amended Article 2(a)(10) are too broad to pass constitutional muster.[126]

1. No declaration of war is necessary.

First, *Averette* was expressly decided on statutory, not constitutional grounds.[127] Second, the courts have repeatedly, for purposes of constitutional interpretation, articulated that "a time of war" is defined not in terms of formal congressional declaration, but in terms of the realities of actual fighting.[128]

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[124] *Id.* at 285-86.
[125] AC 15-16.
[126] AB 27-31.
[127] *Averette*, 41 C.M.R. at 365 ("We do not presume to express an opinion on whether Congress may constitutionally provide for court-martial jurisdiction over civilians in a time of declared war when these civilians are accompanying the armed forces in the field.").
[128] *Bas v. Tingy*, 4 Dallas 37 (U.S. 1800); *Covert*, 354 U.S. at 33-34; *Burney*, 21 C.M.R. at 109 (C.M.A. 1956) ("the phrase "in a time of war" must be construed to refer to the actualities of the situation, rather than the presence of a formal declaration

Third, the line of Supreme Court cases from *Toth* to *Guagliardo* never held that the constitutional analysis turned on the formality of a congressional declaration of war. Instead, the 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."[129]

2. The terms of Article 2(a)(10) are sufficiently narrow to pass constitutional review.

Appellant turns to the language in *Averette*[130] to urge that the terms of the amended Article 2(a)(10) are too broad to stand constitutional review.[131] Again, *Averette* was a statutory decision, and this language applied merely to motivate this

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to that effect by Congress."); *See also*, Wm.C.Peters, *On Law, Wars, and Mercenaries: The Case for Courts-Martial Jurisdiction over Civilian Contractor Misconduct in Iraq*, 2006 BYU L. Rev. 367, 403 (2006); Winthrop at 101 ("A period of hostilities with Indians is, equally with a period of warfare against a foreign power, 'a time of war.'").

[129] *Covert*, 354 U.S. at 35.

[130] 41 C.M.R. at 365 (expressing concern that based on "recent guidance" from the Supreme Court, defining "time of war" broadly would "open the possibility of civilian prosecutions by military courts whenever military action on a varying scale of intensity occurs").

[131] AB 27-31. Appellant's concern seems to be that Article 2(a)(10) reaches so broadly as to include jurisdiction over civilians within the United States engaged in functions such as air cover support for the Super Bowl. The Government believes that such civilians are far from "in the field." So are all CONUS civilians serving with or accompanying the armed forces, absent ongoing hostilities occurring within the borders of the United States.

Court to narrowly construe the terms of Article 2(10).[132] Moreover, the statutory language of Article 2(a)(10) is specifically designed to meet the restrictive test examining status required by the Supreme Court to "meet the maximum historically recognized extent of military jurisdiction over civilians under the concept of 'in the field.'"[133]

The terms of Article 2(a)(10) requiring a defendant to be "serving with or accompanying an armed force," "in the field," and in a time of "declared war or contingency operation" pose no danger of military prosecutions of civilians whenever some level of military operations occur around the world. Only those persons like appellant, who are performing duties directly connected to military operations, in an area of actual fighting, fit into that narrow and historically recognized category of persons in the "land or naval forces."

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[132] To the extent that the *Averette* Court was influenced in 1970 in its statutory interpretation by the Supreme Court's "recent guidance" in *O'Callahan v. Parker*, 395 U.S. 258 (1969), and the *O'Callahan* Court's dim view of military justice, such concern is no longer valid twenty-five years after *O'Callahan's* overruling by *Solario*.

[133] *Covert*, 354 U.S. at 34 n.61.

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

A court-martial has subject-matter jurisdiction over violations of the UCMJ that are committed by persons who are subject to the UCMJ at the time of the offense.[134] A court-martial has personal jurisdiction over a person who is subject to the UCMJ at the time of trial.[135] In this case, appellant's court-martial had both subject-matter and personal jurisdiction because appellant was subject to the UCMJ at both the time of offense and the time of trial.[136] At the time of the offenses and the time of trial, appellant was "a person serving with or accompanying an armed force in the field" during a "contingency operation," pursuant to Article 2(a)(10), UCMJ.

A. At both the time of the offense and the time of trial, Operation Iraqi Freedom was a "Contingency Operation."

> The term "contingency operation" means a military operation that -

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[134] *Solario*, 483 U.S. at 450-51.
[135] *United States v. Howard*, 20 M.J. 353, 354 (C.M.A. 1985).
[136] All three offenses appellant pled guilty to required that he be "subject to this chapter," i.e. Chapter 47 of Title 10. UCMJ arts. 107, 121, and 134. Article 2, UCMJ, defines those individuals subject to Chapter 47 of Title 10. Some offenses require a more specific status. *See generally* UCMJ arts. 85, 86, 88, 91, 99, 113, and 133.

> (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
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> (B) results in the call or order to, or retention on, active duty of members of the uniformed services under section 688 [call up of retired service members], 12301(a) [call up of reserves], 12302 [call up of ready reserve], 12304 [call up of selected reserve or individual ready reserve], 12305 [suspension of retirement], or 12406 [call up of national guard], of this title, chapter 15 of this title or any other provision of law during a war or during a national emergency declared by the President or Congress.[137]

On 14 September 2001, the President issued Proclamation 7463, invoking the provisions of Title 10 to call up the ready reserve.[138] On 12 September 2007, the President continued for an additional year the national emergency declared in Proclamation 7463.[139] Consequently, Operation Iraqi Freedom was a "contingency operation." The accused was embedded with the 170th MP Company, a unit serving in Iraq, in support of Operation Iraqi Freedom. As a result, his offense and trial occurred during a contingency operation.

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[137] 10 U.S.C. §101(a)(13)(2000).
[138] Proclamation No. 7463, 66 Fed. Reg. 48199 (Sept. 14, 2001); Exec. Order No. 13,233, 66 Fed. Reg. 48,201 (Sept. 14, 2001).
[139] 72 Fed. Reg. 52465 (Sept. 12, 2007).

B. Subject-Matter Jurisdiction

1. At the time of the offense, appellant was "serving with" and "accompanying" the 170th Military Police Company "in the field."

While the terms "serving with" and "accompanying" an armed force "in the field" are not specifically defined in the UCMJ, they have been judicially construed.[140] In *Burney*, six years after Congress enacted the UCMJ, CAAF discussed the meaning of these terms in relation to Article 2 of the UCMJ.[141] Although appellant contends that "[*Covert*] obliterates the reasoning in *Burney*,"[142] he misconstrues the *Covert* holding. *Covert* did not disagree in any way with the discussion in *Burney* pertaining to the jurisdiction provisional in Article 2(10) for civilians serving with the Armed Forced in the field. When Justice Frankfurter referred in his *Covert* concurrence to the historical materials that were "too episodic, too meager, to form a solid basis in history," he was specifically referring to examples of court-martial jurisdiction over civilian dependents in a time of peace, not to the *Burney* Court's historical examples of court-martial jurisdiction over civilians serving with or accompanying the armed forces in the field.

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[140] *See* R.C.M. 202(a) analysis, at A21-11.
[141] *Burney*, 21 C.M.R. at 109-10.
[142] AB 21.

The *Burney* Court stated that "[t]he test is whether [the accused] has moved with a military operation and whether his presence with the armed force was not merely incidental, but directly connected with, or dependent upon, the activities of the armed force or its personnel."[143] Thus, "an accused may be regarded as 'accompanying' or 'serving with' an armed force, even though he is not directly employed by such a force or the Government, but, instead, works for a contractor engaged on a military project."[144]

The term "in the field" is crucial to the constitutionality of the statute, and distinguishes Article 2(a)(10) from Article 2(11), which the Supreme Court found unconstitutional in *Covert*.[145] The definition of the phrase has been historically afforded a broad scope. Colonel Winthrop construed the phrase to mean "the period and pendency of war and to acts committed in the theater of war."[146] The courts have defined "in the field" as "in an area of actual fighting,"[147] or as "military operations with a view to an enemy."[148]

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[143] *Burney*, 21 C.M.R. at 109-10.
[144] *Id.*
[145] *Covert*, 354 U.S. at 34-35.
[146] Winthrop, at 101; *See also*, 14 Op. Att'y Gen. 22, at 24 (1872) (the words 'in the field' "imply military operations with a view to the enemy," i.e. "when an army is engaged in offensive or defensive operations").
[147] *Burney*, 21 C.M.R. at 109-10.
[148] *Id.* (citation omitted).

At the time of the offenses, appellant was an interpreter embedded in the 170th MP Company, stationed at COP 4 in Iraq.[149] COP 4 was surrounded by wires, tactical barriers, and other obstacles to restrict entry and protect against VBIEDS.[150] Appellant lived with the Soldiers in his unit.[151] Appellant wore ACUs with the unit patch, IBA, Kevlar, and ballistic eye protection; the same uniform as members of the unit.[152] When appellant and his unit traveled, they typically did so in up-armored HMMWVs.[153] Appellant had a technical chain-of-command within the unit, reporting directly to SSG Butler.[154] When appellant's unit went on mission they faced IEDs, small arms fire, and indirect fire.[155]

Appellant, along with all of the other interpreters, performed an integral part of the unit's mission in training Iraqi police.[156] Appellant was with a military unit, in a foreign country, participating in military operations where the enemy was shooting at his unit. Based on this overwhelming

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[149] JA 220, PE 6 at 1.
[150] JA 92.
[151] JA 101.
[152] JA 74, 96, 101.
[153] JA 78.
[154] JA 89, 98, 110.
[155] JA 134.
[156] JA 89, 96.

evidence, the military judge properly found that appellant both accompanied and served with the armed forces in the field.[157]

2. Historical evidence supports the interpretation that appellant was "in the field."

Amici misconstrue the historical evidence (and the Supreme Court's interpretation of that evidence) related to the meaning of the phrase "in the field." *Amici's* argument that the military trials of civilians at the time of the Revolutionary War "generally appear to have occurred in an area of active hostilities where civilian courts of the struggling colonies were not effectively functioning"[158] overstates the conclusions that can be drawn from early American history.[159] The *Covert* Court stated:

> We have examined all the cases of military trials of civilians by the British or American Armies prior to and contemporaneous with the Constitution that the Government has advanced or that we were able to find by independent research. Without exception these cases appear to have involved trials during wartime in the area of battle- 'in the field' - or in occupied enemy territory.[160]

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[157] JA 366, AE LI at 7-9.
[158] AC 22.
[159] *Amici* cite the briefs for both Petitioners and Respondents in *Guagliardo*, but fail to address that the facts as articulated by those briefs show that of 40 court-martial cases of civilians identified by the Respondent's brief in the 1790s, only 17 occurred in areas where "the civil courts did not function." Reply Brief for Petitioners (Government), 1959 WL 101597 at 12.
[160] *Covert*, 354 U.S. at 34 n.60.

No mention is made of whether these armies had the logistical capacity to transport those civilians to areas where civilian courts would or could be functioning.

Certainly, Revolutionary War era courts-martial of civilians were common, and there is little or no evidence to say that jurisdiction was taken *only* where transport of the civilians to a civilian court was deemed completely impracticable.[161] During the antebellum period, among the six courts-martial that *amici* cite between 1800 and 1860, *amici* admit that two were conducted in areas with no hostilities and where local courts were running.[162] Apparently, the other four were "on the frontier,"[163] but there is no evidence about the "logistical" or "practical" difficulty of moving those accused from the "frontier" to a civilian court. *Amici's* dramatic conclusion drawn from a sample pool of six courts-martial, of which one-third of the sample fails to support the conclusion drawn, is precisely the sort of evidence that Justice Frankfurter referred to in his *Covert* concurrence as "too meager" from which to draw historical inferences.

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[161] *Guagliardo* Reply Brief for Petitioners (Government), 1959 WL 101597 at 4-13 ("[civilians] were included under military jurisdiction where the circumstances called for it---during hostilities, with the army on the march in the field *or* where civil jurisdiction was lacking")(emphasis added).
[162] AC 22 n.47.
[163] AC 22.

By the time of the Civil War, military commissions regularly conducted trials of camp followers and other civilians connected with the Army.[164] Civil War era authorities did not limit jurisdiction to the zone of immediate operations, but instead believed "that the entire army as mobilized in the Civil War might well be considered as in the field."[165]

The *Guagliardo* Court specifically noted the 1872 opinion of the Attorney General stating that the words "in the field" implied military operations with a view to the enemy.[166] *Guagliardo* emphasized that the jurisdictional key was that the courts-martial occurred "in time of 'hostilities' with Indian tribes."[167] The Court did not mention logistical concerns, or the availability of alternate forums, as urged by the Government in *Guagliardo*,[168] or the *amici* in this case.

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[164] Wm.C.Peters, 2006 BYU L. Rev. at 400 (citing Winthrop at 838).

[165] Edmund Morgan, *Court-Martial Jurisdiction Over Non-Military Persons Under The Articles of War*, 4 Minn. L. Rev. 79, 92 (1920).

[166] *Guagliardo*, 361 U.S. at 285.

[167] *Id.*, 361 U.S. at 285-86.

[168] *Guagliardo*, Reply Brief for Petitioners (Government), 1959 WL 101597 at 17. The Government in *Guagliardo*, attempting to assert a basis for jurisdiction over a civilian contractor in Morocco in a time of peace, argued that "in the field" focused on remoteness from civilian authority as opposed to a location of actual hostilities. That the Supreme Court was not convinced by the Government's argument should provide no comfort to appellant in this case.

By the twentieth century, it is clear that the courts applied no "logistics" or "alternative forums" test for the term "in the field." The World War I and II cases cited by *amici* all stand for the proposition that defendants were in the field, despite the twentieth century ability to move defendants around the world.[169] For example, the defendant in *Perlstein* committed his misconduct in Eritrea in Italian East Africa and left Eritrea by ship for Egypt where he was caught and tried by court-martial.[170] There was no evidence that the Government was unable to move him by ship or plane to the United States where an Article III court would be located. Nor did the *Perlstein* Court attempt to define or frame the phrase "in the field" through that prism.

Throughout our national history, "in the field" has taken on the meaning as generally understood at the founding of our country, and as articulated by the Supreme Court, and this Court, in the cases from the 1950s and 1960s: in a location of actual hostilities. The logistical and practical availability

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[169] AC at 23. Several of the cases cited by appellant involve defendants who committed misconduct on ships, the exact sort of logistical transports that could have easily moved appellant to the location of an Article III court. *Ex Parte Gerlach* actually involved a defendant on the return leg of a voyage, headed for New York at the time of misconduct. The Government fails to see how such cases show historical evidence consistent with *amici*'s proffered "logistics" test.

[170] *Perlstein*, 151 F.2d at 168.

of alternative forums does not impact the jurisdictional analysis.

3. The definitions in MEJA are irrelevant to the jurisdictional analysis.

Appellant argues that this Court should use the definitions of "accompanying the armed forces outside the United States" from MEJA,[171] which applies only to (1) "dependents" of members of the armed forces, DOD civilians, DOD contractors; (2) who are residing with their dependee; and (3) who are not nationals or residents of the host nation.[172] Appellant also points to the North Atlantic Treaty Organization's Status of Forces Agreement (NATO SOFA), which excludes host nation members from the definition of "civilian personnel accompanying a force."[173] Appellant then argues that because he does not meet the definition of "accompanying the Armed Forces outside the United States" (because he is both an Iraqi national and not a dependent) under MEJA or "accompanying the force" under the NATO SOFA, then Congress intended to exclude him from the class of people defined as those "serving with or accompanying the armed forces" under Article 2(a)(10), UCMJ.[174]

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[171] AB 40-41.
[172] 18 U.S.C. §3267(2).
[173] AB 41-42; Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Forces (NATO SOFA), Art. I, para. 1.(b); 4 U.S.T. 1 (1951).
[174] AB at 43.

Appellant fails to cite any support for his cross-referencing of these definitions. First, "where there is an 'absence of any explicit connector between' the two statutes, the Supreme Court has declined to read a definition from one statute into another, finding the absence of a cross-reference to be 'revealing.'"[175] Congress specifically cross-referenced the definitions of "Armed Forces," "Judge Advocate General" and "judge advocate" from the MEJA to Title 10, but made no such cross-reference regarding "accompanying the Armed Forces outside the United States."[176]

Second, appellant is not comparing the same terms. Article 2(a)(10), UCMJ, uses the term "persons serving with or accompanying an armed force *in the field*."[177] MEJA refers to dependents "residing with [the dependee] *outside the United States*."[178] The term used by MEJA is more akin to the one used in the version of Article 2(11) that the Supreme Court would not allow as a basis for asserting court-martial jurisdiction over civilian dependents. The definition used in MEJA does not reach

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[175] *In re Princo Corp.*, 486 F.3d 1365, 1368 (Fed. Cir. 2007) (quoting *United States v. Reorganized CF&I Fabricators of Utah, Inc.*, 518 U.S. 213, 220 (1996)).
[176] 18 U.S.C. §3267(3-4).
[177] UCMJ art. 2(a)(10) (emphasis added).
[178] 18 U.S.C. §3267(2)(B) (emphasis added).

those persons that are with a unit in the field, and as such, is not applicable to Article 2(a)(10), UCMJ.[179]

4. The service connection test has no impact on the subject matter jurisdiction analysis.

The Supreme Court in *Solorio* made clear that jurisdiction under the UCMJ is based on an accused's status, and discarded "service connection" of the crime as a basis for subject-matter jurisdiction.[180] Appellant argues that reliance on the "service connection test" announced in *O'Callahan*, despite the fact that it was expressly overruled by *Solario*,[181] is "instructive."[182] However, appellant's attempt to resurrect this extinct legal

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[179] Similarly, there is nothing in the NATO SOFA that restricts a member nation from subjecting civilian personnel accompanying their armed forces to military jurisdiction. Appellant claims that because appellant is a dual Iraqi-Canadian citizen, subjecting him to court-martial jurisdiction may interfere with Iraqi sovereignty (AB 42). However, appellant's claims that "the criminal courts of Iraq are operational" are not supported by any evidence in the record. Furthermore, such a question does not concern the jurisdictional reach of the UCMJ, but involves political considerations properly left to the policymaking branches of Government. Finally, there is no evidence that either Canada or Iraq sought jurisdiction over appellant or objected to the United States asserting its jurisdiction.

[180] *Solorio*, 483 U.S. at 439-41, 450-51. *See also Singleton*, 361 U.S. at 243 ("military jurisdiction has always been based on the 'status' of the accused, rather than on the nature of the offense.").

[181] *Solorio*, 483 U.S. at 436 ("This case presents the question whether the jurisdiction of a court-martial convened pursuant to the Uniform Code of Military Justice (U.C.M.J.) to try a member of the Armed Forces depends on the 'service connection' of the offense charged. We hold that it does not, and overrule our earlier decision in *O'Callahan v. Parker*[.]").

[182] AB at 38.

concept is based on a misconception of the "service connection" test. The twelve factors cited by appellant[183] were designed to determine if the *criminal offense* had a service connection, not whether the accused was connected to the service for purposes of jurisdiction.[184] Court-martial jurisdiction is solely based on appellant's status as a member of the land and naval forces.[185] If he is a member of the land and naval forces, whether as a Soldier or a contractor, then the Constitution permits application of courts-martial jurisdiction.

C. Personal Jurisdiction

Appellant's arraignment and trial occurred at Camp Victory and Camp Liberty, Iraq.[186] The personal jurisdiction question is whether the accused's status continued to meet the Article 2(a)(10) definition through the "time of trial."

Appellant's argument is that his termination from L3/Titan Communications after preferral of charges, but before his trial, severed court-martial jurisdiction.[187] However, this argument ignores the plain language of Article 2(a)(10), UCMJ. It is not appellant's employment that is the critical factor, but his

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[183] AB at 39, n. 14.
[184] *O'Callahan*, 395 U.S. at 267, 272.
[185] "The test for jurisdiction, it follows, is one of status, namely, whether the accused in the court-martial proceeding is a person who can be regarded as falling within the term 'land and naval Forces.'" *Singleton*, 361 U.S. at 240-41.
[186] JA 25, 27, 93, 121.
[187] AB at 32-34.

status under the statute. At the time of the assault, appellant was employed as an interpreter embedded within an MP company and was serving with and accompanying the force, as described above. The crimes occurred on February 23, 2008. On February 29, 2008, he was placed into pretrial confinement on Camp Victory, Iraq, a United States military compound, in the custody of military personnel while still in a combat zone.[188] He remained in this status even after his employment with L3/Communications was terminated on 9 April 2008.

The employment decision of a private contractor after a crime has occurred cannot operate to deprive the United States of jurisdiction over an accused that still serves with the force. Even if the argument can be stretched to say an accused who once "served with" an armed force is no longer in that status, jurisdiction does not end where the accused is still present and "accompanying" the armed force in the field.[189] As the *Perlstein* Court stated:

> The argument [that termination of employment severs court-martial jurisdiction over a civilian] is without merit. Assuming that by analogy, military jurisdiction would expire when the 'accompaniment' ceased, it by no means follows that jurisdiction failed

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[188] JA 11, 176-77, 242.

[189] Appellant cites no authority for the proposition that the involuntary nature of confinement means that appellant could not be "accompanying" the armed forces. AB 33. This argument ignores the plain meaning of the word "accompanying."

> when the employment terminated. The primary issue is whether the appellant accompanied the Armies of the United States.[190]

In *Perlstein*, *In re Di Bartolo*, and *Ex parte Gerlach*, the accuseds' employment ended before the offenses had occurred, yet the courts in those cases found that they continued to "accompany" the armed forces.[191] In this case, appellant's employment did not terminate until thirteen days after charges were preferred, and forty-six days after the crime occurred. Even if the termination of his employment ended his status of "serving with" the armed forces, his accompaniment certainly continued. As the analysis to the Manual for Courts-Martial correctly explains:

> Although a person "accompanying an armed force" may be "serving with" it as well, the distinction is important because even though a civilian's contract with the Government ended before the commission of an offense, and hence the person is no longer "serving with" an armed force, jurisdiction may remain on the ground that the person is "accompanying an armed force" because of continued connection with the military.[192]

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[190] *Perlstein*, 151 F.2d at 169-70 (citing *In re Di Bartolo*, 50 F.Supp. at 929-31 and *Ex parte Gerlach* 247 F. at 617.).
[191] *Id.* Appellant claims these cases are inapplicable because they pre-date the Supreme Court's decision in *Covert* (AB at 23). However, appellant fails to note that the Supreme Court addressed these cases in *Covert*, and distinguished them on the grounds that they involved cases with contractors under Article 2(10), UCMJ, as opposed to family members tried under Article 2(11), UCMJ. *Covert*, 354 U.S. at 33-34, n.59.
[192] R.C.M. 202(a) analysis, at A21-11-12.

Moreover, appellant was still "in the field" during the term of his pretrial confinement and trial. At the time of his trial, Iraq was a designated combat zone authorizing combat pay to all Soldiers therein.[193] All personnel, like appellant, received TSIRT as a requirement directed by the CENTCOM commander before entering the Iraq theatre of operations.[194] Blocks of instruction for both military and civilian personnel included training on "improvised explosive devices, unexploded ordinances, [] first aid, evaluat[ing] casualt[ies], control[ing] bleeding...9 line MEDEVAC [procedures], open head wound[s]," and other training necessary to survive deployment to Iraq.[195]

Every individual going into theatre received the same training, regardless of ultimate destination within the country.[196] Moreover, appellant's Letter of Identification and Authorization stated that when in transit to the Iraq theatre of operations, appellant was considered deployed and therefore authorized logistical support from the Government.[197]

The evidence presented regarding appellant's status at the time of the offense and the time of trial clearly demonstrated

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[193] Exec. Order No. 12,744, 56 Fed.Reg. 2663 (Jan 21, 1991).
[194] JA 138-39.
[195] *Id.*
[196] JA 139.
[197] JA 334-335.

that appellant was serving with or accompanying the armed forces in the field during a contingency operation. Therefore, he was subject to jurisdiction under the UCMJ.

Conclusion

Appellant chose to serve with the armed forces of the United States as an interpreter in a combat zone. That appellant was a contractor made him no less a part of the land and naval forces at the time of his offense and trial. Congress properly exercised its authority under the U.S. Constitution to extend courts-martial jurisdiction over appellant, and there was both personal and subject-matter jurisdiction in this case. This Court should affirm the findings and sentence.

JOHN D. RIESENBERG
Captain, U.S. Army
Office of the Judge Advocate General, United States Army
Appellate Government Counsel
U.S. Army Legal Services Agency

CHAD M. FISHER
Captain, U.S. Army
Branch Chief, Government Appellate Division

AMBER J. ROACH
Major, U.S. Army
Deputy Chief, Government Appellate Division

MICHAEL E. MULLIGAN
Colonel, U.S. Army
Chief, Government Appellate Division

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JOHN D. RIESENBERG
Captain, U.S. Army
Government Appellate Counsel
U.S.C.A.A.F. Bar No: 35433