IN THE UNITED STATES ARMY
COURT OF CRIMINAL APPEALS

UNITED STATES, Appellee v. Mr. **ALAA MOHAMMAD ALI** United States Army, Appellant	BRIEF ON BEHALF OF APPELLANT Docket No. ARMY 20080559 Tried at Baghdad, Iraq, on 29 May, 11 and 22 June 2008, before a General Court-Martial convened by the Commander, Multi-National Corps-Iraq, Colonel Timothy Grammel, Military Judge, presiding.

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES
ARMY COURT OF CRIMINAL APPEALS

Statement of the Case

On 22 June 2008, a military judge sitting as a General Court-martial tried Mr. Alaa Mohammad Ali [hereinafter appellant]. Pursuant to his pleas, appellant was convicted of making a false official statement, wrongful appropriation, and wrongfully endeavoring to impede an investigation, in violation of Articles 107, 121, and 134, Uniform Code of Military Justice [hereinafter UCMJ]; 10 U.S.C. §§ 907, 921, and 934 (2008). Appellant was sentenced to five months confinement. Pursuant to a pretrial agreement, the convening authority approved only so much confinement (115 days) as appellant had already served as of the date of trial. The Judge Advocate General referred

appellant's case to this Court for review under Article 69(d), UCMJ; 10 U.S.C. § 869(d) (2008).

Statement of the Facts

Mohammad Alaa Ali was a civilian contractor. (R. at Appellate Exhibit (AE) XXXVI.) Until 9 April 2008, Mr. Ali was employed by L3 Communications/L3 Corporation [hereinafter L3 Corporation]. (R. at 101, 105, AEs XXXIII, XXXVI.) He served as an Arabic linguist and interpreter via a contract between himself and L3 Corporation, signed on 20 December 2007. (R. at AE XXXIII.) On 13 December 2007, Headquarters, U.S. Army Intelligence and Security Command issued Mr. Ali a Letter of Identification and Authorization (LOIA) that identified Mr. Ali as an interpreter within Iraq. (R. at AE XXXI.) Mr. Ali received equipment and training at Continental Replacement Center (CRC) at Fort Benning, Georgia before entering the Iraq Theater of Operations on 21 January 2008. (R. at 90-91, AE XXXVI.) Upon arrival, he was assigned to Forward Operating Base Hit, Contingency Out-Post (COP) 4, Camp Rex and Al Asad, located in the Multinational Force-West (MNF-W) Area of Operations (AO). (R. at XXXVI.) There, he was tasked with providing linguistic support to the 170th Military Police Company in its efforts to train their Iraqi police counterparts. (R. at 107, 127, and AE XXXVI.)

Mr. Ali is not a U.S. citizen. (R. at AE XXIII, AE XXXVI.) He is a dual citizen of Canada and Iraq, born in Baghdad in February, 1964. (R. at AE XXXVI, AE XXIII.) In 1992, Mr. Ali moved to Canada, gained Canadian citizenship, and has lived there since with his wife and three children. (R. at AE XXXIII, AE XXXVI.) Under Canadian law, a Canadian immigrant does not lose the citizenship of his country of origin. *Citizenship Act of February 15, 1977*. Further, under the Iraqi Constitution, a person born in Iraq remains a citizen indefinitely unless he takes action to renounce that citizenship. Mr. Ali never renounced his Iraqi citizenship. (R. at AE XXXVI.) He remains subject to Iraqi as well as Canadian law.

Mr. Ali was never advised that he was subject to the UCMJ (R. at 166, 170, 185), nor is there anything in Mr. Ali's LOIA or his L3 Corporation contract indicating that he was subject to the legal authority of any command in the military. (R. at AE XXXI, AE XXXIII.) Mr. Ali's direct supervisor was an L3 Corporation employee who was the site manager for his area. (R. at 92-93.) As a linguist, Mr. Ali had the right to refuse missions. (R. at 95.) His contract with L3 Corporation discussed termination as a remedy for any dispute but did not discuss military jurisdiction over him. (R. at AE XXXIII.) At trial, the former project director for L3 Corporation testified that the military was not allowed to discipline L3 Corporation

employees. (R. at 95, 137.) Additionally, Mr. Ali was never briefed at the CRC or the Iraq in-processing facility that he would be subject to the UCMJ.[1] (R. at 166, 170, 185.)

L3 Corporation terminated Mr. Ali's contract on 9 April 2008 because he could no longer perform as a linguist due to his pretrial confinement. (R. at 101, 105.) Before being placed in pretrial confinement, appellant resided with other interpreters the majority of his time in Iraq unless there was a housing shortage requiring a temporary stay in tents. (R. at 127, 143.) Mr. Ali was not allowed to be armed. (R. at 95.) Mr. Ali did not carry a weapon, even for self-defense, did not engage in any combat-like operations, and his direct supervisor was a fellow contractor. (R. at 94-95, R. at AE XXXIII.)

Mr. Ali remained in pretrial confinement from 28 February 2008 until his trial. (R. at Charge Sheet, 361.) On 29 May 2008, appellant was arraigned at Camp Victory, Iraq. (R. at 1, 21.) On 11 June 2008, the military judge heard argument on the Defense's Motion to Dismiss, with prejudice, the charge and

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[1] Appellant disputes the military judge's finding that Mr. Ali was present for this class as the government failed to present any evidence that Mr. Ali was, in fact, present. The Operation Manger, Mr. Santiago, could not say for certain that Mr. Ali attended the UCMJ class as the sign-in sheet was lost. (R. at 185.) Assuming *arguendo* that Mr. Ali was present, the instructor informed the class that civilians would not be prosecuted by the military. (R. at 166, 170.) The slides for the UCMJ class did not say that everyone, including civilians, would be subject to the UCMJ. (R. at 170.)

specification due to jurisdictional and constitutional violations. (R. at 64-250.) On 13 June 2008, the military judge denied the motion, holding that Mr. Ali was subject to military jurisdiction under Article 2(a)(10), UCMJ. (R. at 291, AE LI.) On 17 June 2008, the government preferred additional charges. (R. at Charge Sheet.) On 22 June 2008, appellant was convicted, pursuant to his pleas, of the additional charges: false official statement, wrongful appropriation, and wrongfully endeavoring to impede an investigation in violation of Articles 107, 121, and 134.[2] (R. at 358.)

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

Assignment of Error

> 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

For court-martial jurisdiction to vest, there must be jurisdiction over the offense and personal jurisdiction over the accused. *United States v. Harmon*, 63 M.J. 98, 101 (C.A.A.F. 2006) (citing Rule for Courts-Martial (R.C.M.) 201(b)). Jurisdiction is a legal question which this court reviews de

[2] The initial charge of aggravated assault with a dangerous weapon was dismissed with prejudice. (R. at 392.)

novo. *Id.*; *United States v. Melanson*, 53 M.J. 1, 2 (C.A.A.F. 2000).

Law and Argument

A. Application of Article 2(a)(10), UCMJ to Appellant is Unconstitutional.

Article 2(a)(10), UCMJ, is the authority under which Mr. Ali was tried by General Court-martial. (R. at AE LI.) Article 2(a)(10) was amended by Congress on 17 October 2006 through the passage of §552 of the FY 2007 National Defense Authorization Act. Pub. L. No. 109-364, § 552, 120 Stat. 2217 (codified as amended at 10 U.S.C. § 802(a)(10)(2007)). That Act amended the provision relating to persons subject to the Code under Article 2(a)(10), by adding five words: "In time of declared war or a contingency operation, persons serving with or accompanying an armed force in the field." *Id.* (emphasis added). This provision and its amendment exceed the scope of Congress's legislative authority by subjecting civilians to trial without the Constitutional protections of the 5th and 6th Amendments. Therefore, the military had no jurisdiction to try Mr. Ali by court-martial.

In a series of cases dating back more than fifty years, the U.S. Supreme Court has struck down the military's exercise of jurisdiction over civilians and their trial by courts-martial. *See United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955);

Reid v. Covert, 354 U.S. 1 (1957); *Kinsella v. Singleton*, 361 U.S. 234 (1960); *McElroy v. Guagliardo*, 361 U.S. 281 (1960); *Grisham v. Hagan*, 361 U.S. 278 (1960).

In its seminal case, *Toth v. Quarles*, the Supreme Court held that Congress cannot subject ex-Soldier civilians to trial by courts-martial. *Toth*, 350 U.S. at 23. Specifically, the Court held that Congress' authority "[t]o make rules" to regulate "the land and naval Forces" under Article I, Section 8, clause 14 of the Constitution should be restricted "to those who are actually members or part of the armed forces." *Toth*, 350 U.S. at 15. The Court reasoned that expanding court-martial jurisdiction to civilians "necessarily encroaches on the jurisdiction of the federal courts set up under Article III of the Constitution where persons on trial are surrounded with more constitutional safeguards." *Toth*, 350 U.S. at 15. Those safeguards include: (1) judges appointed for life, subject only to removal by impeachment, (2) indictment by a "grand jury drawn from the body of the people", and (3) the right of trial by jury, which "was considered so important to liberty of the individual that it appears in two parts of the Constitution." *Toth*, 350 U.S. at 16.

The Court found nothing in the history or constitutional treatment of Article I courts which would entitle them to rank alongside Article III courts. *Id.* Even granting that military

personnel possess a "high degree of honesty and sense of justice which nearly all of them undoubtedly have, it still remains true that military tribunals have not been and probably never can be constituted in such way that they can have the same kind of qualifications that the Constitution deemed essential to fair trials of civilians . . . ." *Toth*, 350 U.S. at 17. There is no life tenure for military judges, nor are their salaries constitutionally protected. *Id.* More importantly, trial by jury is greatly different from trial by military members. *Id.* While military personnel may be especially competent to try Soldiers for military infractions, "the premise underlying the constitutional method for determining guilt or innocence in federal courts is that laymen are better than specialists to perform this task." *Toth*, 350 U.S. at 18. Jurors chosen from different walks of life may reach completely different conclusions than specialists in any given field, even military specialists. *Id.* Moreover, the members of courts-martial "do not and cannot have the independence of jurors drawn from the general public." *Reid v. Covert*, 354 U.S. at 36.

In *Reid v. Covert*, the Court recognized the significant improvements in the military justice system following the first two World Wars but still found courts-martial failed to afford an accused the same protections as civil courts, most importantly, "trial by jury before an independent judge after an

indictment by a grand jury." *Reid v. Covert*, 354 U.S. at 37. Moreover, the Court noted that the reforms to the military justice system were "merely statutory," and Congress or the President could reinstate former practices whenever they desired. *Id.* The Court further held the term 'land and naval Forces' under Article I of the Constitution refers to members of the armed forces and not their civilian wives, children and other dependents. *Id.* Thus, dependents of the military could not constitutionally be tried by military authorities for capital offenses committed overseas. *Id.* at 5, 19-20.

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

In 1960, the Court expanded *Covert* to include non-capital offenses committed by civilian dependents of servicemembers. *Kinsella v. Singleton*, 361 U.S. 234 (1960). And in two companion cases decided the same day as *Kinsella*, the Court held there were no constitutional distinction for purposes of court-martial jurisdiction between civilian dependents and civilian employees for capital offenses, *Grisham v. Hagan*, 361 U.S. 278 (1960), or non-capital offenses, *McElroy v. Guagliardo*, 361 U.S. 281 (1960). The common theme linking these cases is the Court's refusal to expand military jurisdiction to include civilians. These opinions would influence the Court of Military Appeals' decision in *United States v. Averette*, 41 C.M.R. 363 (1970).

In *Averette*, the Court of Military Appeals set aside the court-martial conviction of Mr. Averette, a civilian contractor, for lack of jurisdiction. *Averette*, 41 C.M.R. at 363. Mr. Averette, a contractor working for the U.S. Army in Vietnam, had been convicted of conspiracy to commit larceny and attempted larceny of 36,000 United States Government-owned batteries. *Id.* He was convicted under the then-existing language of Article 2(10), which authorized jurisdiction over civilians serving with the force "in time of war." *Id.* In reversing Mr. Averette's conviction, the Court held that the "in time of war" language in Article 2(10) required a congressionally declared war, which the Vietnam conflict was not. *Id.* at 365. This strict and literal

construction was a "result of the most recent guidance in this area from the Supreme Court." *Id.* The Court noted that in a series of cases beginning with *Toth v. Quarles*, the Supreme Court had disapproved the trial by courts-martial of persons not members of the armed forces, and that "a broader construction of Article 2(10) would open the possibility of civilian prosecution by military courts whenever military action on a varying scale of intensity occurs." *Id.*

Notably, each of these cases occurred during a time of peace or, as in *Averette*, where Congress had made no formal declaration of war. The Supreme Court has not yet had the present issue squarely before it: that is, whether the military may exercise Article I court-martial jurisdiction over civilians during a time of declared war or, as in appellant's case, absent a declaration of war but during "contingency operations." Because constitutional protections apply equally in times of war as well as in times of peace, the outcome must be the same as in *Toth v. Quarles*, *Reid v. Covert*, and their progeny. As the Supreme Court stated 150 years ago in *Ex Parte Milligan*, "The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under

all circumstances." *Ex Parte Milligan*, 71 U.S. 2, 120-121 (1866).[3]

In *Milligan*, the Supreme Court held that military authorities were without power to try civilians not in the military or naval service by declaring martial law in an area where the civil administration was not deposed and the courts were open. *Id.* In the Court's view, allowing "[the Constitution's] provisions [to] be suspended during any of the great exigencies of government . . . leads directly to anarchy or despotism." *Id.* at 121. The Supreme Court echoed this concern in *Reid v. Covert*. Rejecting the argument that expansion of military jurisdiction over civilian dependents was "only slight, and that the practical necessity for it is very great," the Court stated, "[s]light encroachments create new boundaries from which legions of power can seek new territory to capture" and "[i]t is the duty of the courts to be watchful for the constitutional rights of the citizen, and against any

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[3] Mr. Ali was not court-martialed as an enemy combatant, or as the result of violating a law of war on behalf of an enemy government, and his case therefore does not present issues governed by other Supreme Court precedent. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 521-22 (2004)(stating *Ex Parte Milligan* did not affect Court's holding that government had authority to seize enemy combatants where the outcome of *Ex Parte Milligan* turned in large part on the fact that Milligan was not a prisoner of war); *Ex Parte Quirin*, 317 U.S. 1 (1942)(holding Constitution authorizes military commissions to try citizens charged with law of war offenses committed on behalf of an enemy government).

stealthy encroachments thereon." *Reid v. Covert*, 354 U.S. at 39-40. Accordingly, it is this Court's duty to be watchful of the constitutional rights of Mr. Ali[4] and other civilians who would be subject to trial by courts-martial. Finding Mr. Ali's court-martial lacked jurisdiction is also consistent with the Supreme Court's desire to limit military jurisdiction to "the least possible power adequate to the end proposed." *Toth v. Quarles*, 350 U.S. at 22-23 (1955).

In finding the military had jurisdiction to try Mr. Ali, the military judge relied heavily on *United States v. Burney*, 21 C.M.R. 98 (C.M.A. 1956). (R. at AE LI.) However, a close examination of *Burney* reveals that its internal logic and the precedent upon which it relies were both held inapposite in *Reid v. Covert* and its progeny.

Burney, an employee of the Philco Television and Radio Corporation, maintained the Air Force technical equipment at an Air Force Base in Japan in 1954. *Burney*, 21 C.M.R. 98. A game of "Russian Roulette" resulted in his conviction of assault with a dangerous weapon and a sentence to pay a fine of $750.00 and to be confined at hard labor until the fine was paid, but the confinement could not exceed twelve months. The Court

[4] The Court's ruling and the application of military jurisdiction over Mr. Ali is not based on Mr. Ali's citizenship but that he is a civilian serving with the armed forces during a contingency operation. The military judge's ruling allows court-martial of citizens, whether U.S. citizens or non-U.S. citizens.

distinguished its case from *Toth v. Quarles*, which was decided while Burney's petition was pending, by the different Articles of the UCMJ at issue. *Burney*, 21 C.M.R. at 104-105. In *Toth*, the Court had held Article 3(a), 50 U.S.C. § 533, conferring jurisdiction to try former members of the military unconstitutional. Burney, in contrast, was subjected to court-martial jurisdiction under Article 2(11), 50 U.S.C. § 552.[5] Since a different provision was at issue, the *Burney* court found *Toth* inapplicable and held that "jurisdiction is demanded" in light of the "constitutional construction, Congressional amendment, and Supreme Court precedent." *Burney*, 21 C.M.R. at 125.

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

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[5] Article 2(11) provides that "subject to the provisions of any treaty or agreement to which the United States is or may not be a party or to any accepted rule of international law, *all persons serving with, employed by, or accompanying the armed forces* without the continental limits of the United States" shall be subject to the code. 50 U.S.C. § 552 (emphasis added).

Covert. *Reid v. Covert*, 354 U.S. 1 (1957); *see also Kinsella v. Singleton*, 361 U.S. 234 (1960).

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

(J. Frankfurter, concurring); *see also McElroy v. Guagliardo*, 361 U.S. at 285-6 (authorities citing hostilities with the Indian tribes, where so episodic, have little weight).

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

Finally, while the *Burney* court found it "not too much to demand obedience" from civilians, and concluded that they must be subject to the Code, "albeit they are civilians who - when tried by a military court - *are denied a trial by jury,*" *Burney*, 21 C.M.R. at 111 (emphasis added); the Supreme Court in reviewing the identical issue did not consider this encroachment on the Bill of Rights and other safeguards to be so slight. *Reid v. Covert*, 354 U.S. at 39-40. "Military trial of civilians is inconsistent with both the letter and spirit of the Federal Constitution." *Id.* at 25. Thus, the logical underpinnings of *Burney* were obliterated by Supreme Court precedent and the

military judge's heavy reliance on *Burney* to substantiate his ruling was clearly erroneous.

For similar reasons, the federal cases upholding jurisdiction over civilians during the First and Second World Wars are neither dispositive nor authoritative. *See Shilman v. United States*, 73 F.Supp. 648 (S.D.N.Y. 1947); *Perlstein v. United States*, 151 F.2d 167 (3d Cir. 1945); *In re Berue*, 54 F.Supp. 252 (S.D. Ohio 1944); *In re Di Bartolo*, 50 F.Supp. 929 (S.D.N.Y. 1943); *McCune v. Kilpatrick*, 53 F.Supp. 80 (E.D. Va. 1943); *Ex parte Jochen*, 257 F. 200 (S.D. Tex. 1919); *Hines v. Mikell*, 259 F. 28 (4th Cir. 1919); *Ex parte Gerlach*, 247 F. 616 (S.D.N.Y. 1917); *Ex parte Falls*, 251 F. 415 (D.N.J. 1918). These cases pre-date the Supreme Court's decisions in both *Toth* and *Covert*, and either do not conduct a constitutional analysis in light of the 5th and 6th Amendments or rely upon principles and precedent that have been subsequently cast aside.

For instance, the District Court in *Berue*, relied upon the Supreme Court's decision in *In re Ross*, 140 U.S. 453, 11 S.Ct. 897 (1891), which had approved consular power to try Americans abroad. *In re Berue*, 54 F.Supp. 252 (S.D. Ohio 1944). However, the Supreme Court, in overturning their previous decision which had relied on *Ross* heaved *Ross* aside, noting that Congress had buried the consular system of trying Americans: "[w]e are not willing to jeopardize the lives and liberties of Americans by

disinterring it" and "at best, the *Ross* case should be left as a relic from a different era." *Reid v. Covert*, 354 U.S. at 12. Therefore, federal case law predating the *Toth* and *Covert* decisions are not dispositive to the jurisdiction issue in this case.

In addition relying upon the defunct *Burney* decision, the military judge also found military jurisdiction of civilians was necessary to maintain the good order and discipline of the force. However, the existence of available alternatives which guarantee the necessary constitutional protections demonstrates that such jurisdiction is unnecessary and that subjecting civilians to court-martial jurisdiction is not the exercise of the least possible power adequate to the end proposed. *See Toth v. Quarles*, 350 U.S. at 22-23 (1955). The Military Extraterritorial Jurisdiction Act [hereinafter MEJA] was signed into law on 22 November 2000. 18 U.S.C. §§3261-3266. It provides for federal jurisdiction over certain prescribed persons who engage in any conduct outside the United States that would have constituted an offense punishable by imprisonment for more than one year if that conduct had occurred within the special and territorial jurisdiction of the United States. *Id.* Offenses that meet this definition include, but are not limited to, certain aggravated assaults, arson, theft of a value in excess of a $1000, homicide, kidnapping, selling obscene

material, robbery, and certain sexual assault/abuse offenses or offenses related to the exploitation of minors. *See generally Report of the Advisory Committee on Criminal Law Jurisdiction over Civilians Accompanying the Armed Forces in Time of Armed Conflict (April 18, 1997)* [hereafter *Report of Advisory Committee*].[6]

One category of persons covered by the reach of MEJA include "civilians employed by or accompanying the armed forces" outside the United States. 18 U.S.C. §3261(a) (2000). The MEJA would constitute the most suitable venue for a prosecution of a case of this nature; in Federal District Court, Mr. Ali's rights under the Constitution are observed, as a defendant in a prosecution by the United States. Moreover, since MEJA was intended to forego the need to resort to military jurisdiction over civilians, Mr. Ali's case falls squarely within the jurisdictional gap that Congress contemplated and intended to fill. Employing MEJA would negate concerns regarding the deprivation of fundamental rights inherent in trying civilians in military courts, while simultaneously addressing Due Process concerns implicated by the lack of clear, comprehensive implementing procedures for Article 2(a)(10).

[6] Available at www.fas.org/irp/doddir/dod/ojac.pdf (last visited 28 January 2011).

There are other options as well. As an alternative, the military could follow *Ex Parte Reed* which permitted trial by courts-martial of civilian paymasters' clerks who were required to agree in writing to submit to the laws and regulations of the government and discipline of the navy. *Melroy v. Guagliardo*, 361 U.S. at 284-6 (discussing *Ex parte Reed*, 100 U.S. 13 (1879). Alternatively, the military could replace civilian employees with military personnel if disciplinary problems require military control. *Melroy v. Guagliardo*, 361 U.S. at 287. The increased cost to maintain these employees in a military status is the price the Government must pay in order to comply with constitutional requirements. *Melroy v. Guagliardo*, 361 U.S. at 287. As the Court stated in *Toth*, "the business of soldiers is to fight and prepare to fight wars, not to try civilians for their alleged crimes." *Toth*, 350 U.S. at 36.

The application of Article 2(a)(10) to uphold court-martial jurisdiction over Mr. Ali as one who is accompanying the force will deprive him of "fundamental" constitutional rights, including the right to a jury. The "general grant of jury trial for serious offenses is a fundamental right, essential for preventing miscarriages of justice and for assuring that fair trials are provided for all defendants." *Duncan v. Louisiana*, 391 U.S. 145, 157-58 (1968)(holding that "the Fourteenth Amendment guarantees a right of jury trial in all criminal cases

which - were they to be tried in a federal court - would come within the Sixth Amendment's guarantee.")

Mr. Ali was also denied the right to a jury of more than five members. Under the UCMJ, the minimum number of military members needed to constitute the necessary quorum for a military panel is five. Article 29(b), UCMJ. However, in *Ballew v. Georgia*, 435 U.S. 223 (1978), the Supreme Court held that a criminal trial to a jury of less than six persons substantially threatens Sixth Amendment guarantees. *Ballew* at 243. In *Ballew*, the defendant was charged with a misdemeanor, for which the Georgia Constitution sanctioned a five person jury. *Id.* The defendant challenged this provision of the state's constitution as a violation of the U.S. Constitution's Sixth and Fourteenth Amendments. *Id.* The Court agreed with Ballew, holding that he "established that his trial on criminal charges before a five-member jury deprived him of the right to trial by jury guaranteed by the Sixth and Fourteenth Amendments." *Id.* at 245. The core judgment by the Court that only five jurors violated the Sixth Amendment was unanimous.

Contrary to *Ballew*, none of the members of the military panel were non-military personnel, like Mr. Ali. Only servicemembers are allowed to serve on military panels. Article 25, UCMJ. Mr. Ali's fellow contractors, civilians, foreign nationals, and Iraqi citizens cannot serve as court members.

Id. Under the UCMJ, a civilian is not guaranteed six members to sit in judgment of him, the benefit of a unanimous verdict, or the "judgment of his peers". *Ballew* at 241 (quoting *Apodaca v. Oregon*, 406 U.S. 404, 411 (1972)).

These fundamental rights apply to Mr. Ali. Mr. Ali has been subjected to the judicial power of the United States of America. When that happens, the accused is entitled to fundamental Due Process rights, a point made emphatically by Chief Justice Rehnquist in *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990). There the issue was whether a Mexican citizen could claim protection under the Fourth Amendment for a search conducted by U.S. agents in Mexico. Although the Court held that he could not, *Verdugo-Urquidez,* 494 U.S. at 278, it also empahsized that while the defendant's lack of connection with the United States meant he could not claim the protection of the *Fourth* Amendment, he was entitled to fundamental due process rights as he was being subjected to trial by the United States. *Id.* As the Chief Justice wrote:

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

> contrasts with the words "persons" and "accused" used in the Fifth and Sixth Amendments regulating *procedure* in criminal cases.

Id. at 265 (emphasis added). The Chief Justice drew a sharp distinction between Fourth Amendment rights, on one hand, and the Fifth Amendment and the Sixth Amendment rights on the other. Justice Kennedy, concurring in the judgment, echoed this distinction of ensuring fundamental rights for an accused: "The United States is prosecuting a foreign national in a court established under Article III . . . . All would agree, for instance, that the dictates of the Due Process Clause of the Fifth Amendment protect the defendant." *Id.* at 278.

Mr. Ali is entitled to fundamental trial rights under the Fifth and Sixth Amendments despite his lack of U.S. citizenship. Mr. Ali's eligibility for these fundamental rights does not hinge on his status as a non-resident alien, but on *who* is prosecuting the case: the United States. Seen in this light, the expansion of Article 2(a)(10) clearly violates Mr. Ali's fundamental rights and contravenes the Equal Protection Doctrine.[7] Indeed, it would allow the U.S. Government to subject

[7] The absence of implementing instructions under Article 36, UCMJ further illustrates the feckless nature of the government's assertion of jurisdiction in this case. In the four years since the passage of §552 of the FY 2007 NDAA, the President has not promulgated comprehensive instructions, regulations, policies, or procedures implementing this legislature. Not only is the Manual for Courts-Martial silent on this issue, but a review of current DoD and service directives, regulations, field manuals,

any resident alien or U.S. citizen to military jurisdiction, so long as they were employed as a contractor accompanying the force, thereby depriving them of the fundamental rights required in any prosecution by the United States.

B. The Court-Martial Lacked Personal and Subject Matter Jurisdiction over Mr. Ali.

(1) The Court Lacked Personal Jurisdiction

A court-martial must have personal jurisdiction over the accused *at the time of his trial*. *United States v. Chodara*, 29 M.J. 943, 944 (1990)(emphasis added); Rules for Court Martial (R.C.M.) 201(b)(4); *see also*, UCMJ Article (3)(a). Mr. Ali was fired on 9 April 2008 (R. at 101, 105), and was not arraigned on the charges until 29 May 2008. (R. at 21.) Assuming personal jurisdiction did attach at one time, once Mr. Ali was no longer employed by L3 CORPORATION or otherwise accompanying or serving with the force, the military lacked personal jurisdiction to try Mr. Ali.

Mr. Ali's case is analogous to the facts in *Toth v. Quarles*. Mr. Toth had been honorably discharged from the

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and other memorandum of instruction (MOI) similarly reveals no implementing instructions or guidance. The SecDef MOI discusses command authority and various preferral notification requirements but provides no guidance for how courts-martial will be implemented on the ground (i.e., trial procedures). Consequently, the military lacks the necessary legal infrastructure to support the court-martial of civilians. Trying Mr. Ali, a civilian contractor, by court-marital in the absence of clear implementing instructions violates Mr. Ali's Constitutional right to Procedural Due Process.

service when the government brought charges against Mr. Toth and brought him back to Korea to be court-martialed. By the time of his arrest, Mr. Toth had no relationship with the military. The Supreme Court held, "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." *Toth,* 350 U.S. at 15.

Applying the Supreme Court's reasoning in *Toth* to Mr. Ali's case, military jurisdiction cannot be exercised over him. At the time of his trial, Mr. Ali had been fired from L3 CORPORATION and no longer had any connection to the U.S. military. He was no longer working as a translator, nor did he have any other ties to the military or United States government. At trial, Mr. Ali's only "association" with the military was his pretrial confinement, which - being involuntary - cannot create an "association" with the U.S. military where none existed before.

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

court found no jurisdiction over a reservist who was not flagged and whose term of service was allowed to expire. *Smith v. Vanderbush,* 47 M.J. 56 (C.A.A.F. 1997). The court looked at "whether court-martial jurisdiction, once initiated, continues despite an otherwise valid administrative discharge issued prior to adjudication of findings and sentence." *Id.* at 59. The court answered in the negative, finding that "[a]rraignment alone . . . is not sufficient as a matter of law to mandate continuation of court-martial jurisdiction throughout trial." *Id.* at 60. The issue looked at by courts when deciding jurisdiction for reservists is whether they are subject to the UCMJ not only at the time of the offense *but also at the time of trial. United States v. Schuering,* 36 C.M.R. 480, 483 (C.M.A. 1966). Thus, even if this court finds that Mr. Ali was subject to the Code at the time of the offense, he was no longer subject to the code at the time of trial because, like the petitioner in *Vanderbush*, there is no mechanism for extending jurisdiction here.

(2) The Court Lacks Subject Matter Jurisdiction

The Supreme Court in *O'Callahan v. Parker*, 395 U.S. 258 (1969), held a 'service connection' was required in order to exercise courts-martial jurisdiction over servicemembers and set out a twelve-factor test. While this test was later abandoned by the Court in *Solorio v. United States,* 43 U.S. 435 (1987),

the *O'Callahan* factors are still instructive and useful in determining where the status of the non-military individual is unclear. Moreover, *Solorio* never addressed how military jurisdiction, assuming it is constitutionally valid, is applied to civilians tried by military courts. Therefore, where there is no clear status evidenced by an enlistment contract or commission, the *O'Callahan* twelve factor test is instructive to determine whether a civilian and his or her offenses are sufficiently connected to the military to subject him or her to court-martial jurisdiction.[8]

Applying the factors in their totality to Mr. Ali's case compels the conclusion that no service connection exists. Several of the factors do not apply at all. Mr. Ali's alleged crime occurred on a military installation, Al Asad Air Base.

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[8] The twelve factors as articulated by the Supreme Court are: (1) the serviceman's proper absence from the base, (2) the crime's commission away from the base; (3) its commission at a place not under military control; (4) its commission within our territorial limits and not in an occupied zone of a foreign country; (5) its commission in peacetime and its being unrelated to authority stemming from the war power; (6) the absence of any connection between the defendant's military duties and the crime; (7) the victim's not being engaged in the performance of any duty relating to the military; (8) the presence and availability of a civilian court in which the case can be prosecuted; (9) the absence of any flouting of military authority; (10) the absence of any threat to a military post; (11) the absence of any violation of military property; and (12) the offense's being among those traditionally prosecuted in civilian courts. *Relford v. Commandant, U.S. Disciplinary Barracks, Ft. Leavenworth*, 401 U.S. 355 (1971).

The U.S. military presence in Iraq as an occupying force ended on June 2004; thereafter, the interim Iraqi government requested the U.S. to stay in Iraq. The offenses did not occur during a time of war; they occurred during stability operations, led by the State Department. Though Mr. Ali worked as an interpreter for a military police unit, the acts charged were not connected to his duties as an interpreter.

Regardless, Mr. Ali does not have a military status. An unbroken line of decisions from 1866 to 1960 interprets the Constitution as conditioning the proper exercise of court-martial jurisdiction over an offense on the military status of the accused. *Gosa* v. *Mayden*, 413 U.S. 665, 673 (1973) (plurality opinion); *see Kinsella* v. *United States ex rel. Singleton*, 361 U.S. 234, 240-241, 243 (1960); *Grafton* v. *United States*, 206 U.S. 333, 348 (1907); *Johnson* v. *Sayre*, 158 U.S. 109, 114 (1895); *Smith* v. *Whitney*, 116 U.S. 167, 183-185 (1886); *Coleman* v. *Tennessee*, 97 U.S. 509, 513-514 (1879); *Ex parte Milligan*, 4 Wall. 2, 123 (1866); *cf. United States ex rel. Toth* v. *Quarles*, 350 U.S. 11, 15 (1955); *Kahn* v. *Anderson*, 255 U.S. 1, 6-9 (1921); *Givens* v. *Zerbst*, 255 U.S. 11, 20-21 (1921). Mr. Ali has never possessed any "military status." He is a Canadian-Iraqi citizen who has no direct connection to the Department of Defense (DoD). Neither his contract nor his LOIA subject him to the UCMJ. Assuming, *arguendo*, that Mr. Ali's

service connection could trigger jurisdiction, even when he lacked status, the result is the same: jurisdiction fails because Mr. Ali's alleged crime lacked service connection.

There are other avenues upon which it would be more appropriate for Mr. Ali to be prosecuted. He is a dual citizen of Iraq and Canada and could have been turned over to the Iraqi Government for prosecution. Canada could also assert jurisdiction over Mr. Ali. The offenses charged against Mr. Ali were not military-specific crimes; they could easily have been prosecuted by civilian courts. Taken together, these factors fail to support any "service connection" in this case. This analysis highlights, once again, Mr. Ali's lack of status as a member of the armed forces, as well as the total absence of any compelling rationale for trying him in a court-martial.

(3) Lack of Notice

Until charges were preferred in this case, Mr. Ali was not on notice that he could be subject to military jurisdiction. Mr. Ali's contract with L3 CORPORATION does not refer or even allude to the possibility that he could be subject to military jurisdiction. The orders Mr. Ali received do not discuss the possibility of being subject to military jurisdiction. Article 137 (a)(1), UCMJ, states that "[t]he sections of this title (Article of the Uniform Code of Military Jurisdiction) specified in paragraph (3) shall be carefully explained to each enlisted

member at the time of (or within fourteen days after) the member's initial entrance on active duty." *Id.* An enlisted Soldier - like a contractor - is presumed to come into the military with no familiarity of military law. *See United States v. Abernathy*, 48 C.M.R. 205 (1974)(finding a lack of jurisdiction where the accused was not put on proper notice in his activation orders that he would be subject to the UCMJ; this case established for the U.S. Coast Guard the requirement that notice be given before subjecting *anyone* to the UCMJ). Congress' recognition of and concern over this lack of notice is further reinforced in 18 U.S.C. §3266(b)(1). This statutory provision mandates that the Secretary of Defense provide to the fullest extent practicable notice for those "employed by" or "accompanying" the Armed Forces that they are potentially subject to criminal jurisdiction of the United States. The Report of the Advisory Committee echoes this need to inform non-service members of the U.S. military's jurisdictional reach: "Contractor employees, who accompany the U.S. forces in the field on Secretarially designated contingency operations, be notified of possible court-martial jurisdiction before deployment and receive training on the UCMJ similar to that given military personnel." *Report of Advisory Committee* at 58. It is vital that designated civilians are informed that military jurisdiction could apply to them and that they might lose very

vital rights under this system. However, Mr. Ali was never told he could possibly be subject to military jurisdiction.

C. Mr. Ali was Not Serving with or Accompanying an Armed Force under the UCMJ.

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

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

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

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

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

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

NATO SOFA, art. I.1.(b)(1951) (emphasis added). The NATO SOFA not only parallels the "exclusionary language" of MEJA pertaining to the exercise of criminal jurisdiction by another nation over nationals of the host nation, but is also in concert with the intent of the "exclusionary language" in Coalition Provisional Authority Order No. 17, discussed below.

This exclusionary language reflects a policy of deference to international agreements, existing foreign jurisdiction, and respect for host nation sovereignty. Presumably, nationals of the host nation are subject to the host nation's criminal jurisdiction. At first glance, CPA Order No. 17 stands for the proposition that coalition forces (to include civilian contractor and other "augmentees") are immune from Iraqi legal process for their conduct during the period in which the CPA is in effect. *Id.* However, much like the language excluding persons that are nationals of the host nation from the reach of MEJA, the CPA also includes similar language excluding from the category of persons immune from the Iraqi legal process under CPA Order No. 17 those persons that are nationals of the host-nation, namely Iraqi citizens. This further signifies the importance of host-nation sovereignty (where applicable).[9] MEJA,

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[9] The right to prosecute an offense committed by a civilian serving with or accompanying the force is normally governed by a status of forces agreement (SOFA) between states (i.e., the US and the host nation). In cases involving offenses punishable by

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

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

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the laws of both states resulting in concurrent jurisdiction, the NATO SOFA grants the sending state primary jurisdiction over offenses committed against the security, person, or property of the sending state. Otherwise, the primary right rests with the host nation. *See NATO SOFA, art. VII §§ 2 & 3 (1951).* Mr. Ali is of dual citizenship (Canadian and Iraqi); hence, this situation is one in which the US would have neither primary nor exclusive jurisdiction. Though there is no established SOFA between the US and Iraq, the criminal courts of Iraq are operational, and Iraq has the ability to extend its criminal jurisdiction to this matter.

[10] The Overseas Jurisdiction Advisory Committee was appointed by the SECDEF and the Attorney General in 1997 to review and develop recommendations with regard to the issue of the jurisdictional "gap" that seemingly existed with respect to civilians accompanying the armed forces overseas. In contemplation of its recommendations (i.e. enactment of MEJA and the extension of UCMJ authority to civilians through the proposed Article 2(13), UCMJ), the committee's intent was clearly to exclude host-country nationals from the definition of

Neither the Iraqi government, nor the Canadian government has been offered the opportunity to accept or decline prosecution of Mr. Ali. Both are viable options for the prosecution of Mr. Ali's case in lieu of court-martial. In further consideration of host nation sovereignty, MEJA also provides that no person can be prosecuted under its provisions if the foreign government is prosecuting the person for the same conduct, unless the Attorney General or Deputy Attorney General approves the U.S. prosecution. 18 U.S.C. § 3261(b).

In light of the foregoing, Mr. Ali's trial for false official statement, wrongful appropriation, and obstruction of justice is not the type envisioned by the courts to be so essential to the military mission as to subject Mr. Ali to the UCMJ. Jurisdiction fails because Mr. Ali was not a member or even a *de facto* member of the armed forces. *Covert,* 354 U.S. at 22-23. Moreover, there is no compelling reason to try Mr. Ali in a court-martial.

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persons "serving with," "accompanying" and/or "employed by" the armed forces overseas. *Id.*

Conclusion

By attempting to subject civilians to military court-martial jurisdiction, Congress exceeded the scope of its authority under Article I, Section 8, Clause 14 of the United States Constitution. As such, this Court should not allow Mr. Ali's conviction to stand. Appellant respectfully requests this Honorable Court set aside the findings and sentence.