

IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES, BRIEF ON BEHALF OF APPELLEE

Appellee Docket No. ARMY 20080559

v.

Mister  
ALAA MOHAMMAD ALI,  
Contractor,  
Appellant

Tried at Camp Victory, Iraq on 29  
May, and 11 and 22 June 2008, by  
a general court-martial,  
appointed 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 convicted appellant, pursuant to his pleas,<sup>1</sup> of false official statement, larceny, and obstruction of justice, in violation of Articles 107, 121, and 134 of the Uniform Code of Military Justice (UCMJ).<sup>2</sup> The military judge sentenced appellant to confinement for five months.<sup>3</sup> 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.<sup>4</sup>

On 21 July 2008, appellant filed a petition for extraordinary relief with this Court, seeking a writ of prohibition on the grounds that the court-martial lacked

<sup>1</sup> R. 303.

<sup>2</sup> R. 358; Charge Sheet II; 10 U.S.C. §§ 907, 921, and 934 (2005).

<sup>3</sup> R. 392.

<sup>4</sup> R. 393; Appellate Exhibits (AE) LV and LVI.

jurisdiction.<sup>5</sup> This Court denied the petition on 29 August 2008.<sup>6</sup> Appellant filed a writ-appeal petition with the U.S. Court of Appeals for the Armed Forces (CAAF) on 18 September 2008.<sup>7</sup> On 18 October 2008, CAAF denied appellant's writ-appeal.<sup>8</sup> The convening authority approved the findings and sentence that same day.<sup>9</sup>

On 28 October 2008, appellant's case was forwarded to The Judge Advocate General of the Army (TJAG) for review under Article, 69(a), UCMJ. On 31 March 2010, TJAG forwarded the case to this Court for review, pursuant to Article 69(d), UCMJ.<sup>10</sup>

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<sup>5</sup> See *Ali v. Austin, et. al.*, Army Misc. 20080678 (Army Ct. Crim. App. 2008). *United States v. Jones*, 64 M.J. 596, 599 (Army Ct. Crim App. 2007) (a court may take judicial notice of its own records) (citing *United States v. Lovett*, 23 C.M.R. 168, 172 (C.M.A. 1957); *United States v. Jackson*, 2 C.M.R. 96, 98 (C.M.A. 1952); *United States v. Moses*, 11 C.M.R. 281, 285 (A.B.R. 1953; and *United States v. Lawrence*, 1 C.M.R. 248, 252 (A.B.R. 1951)).

<sup>6</sup> *Id.*

<sup>7</sup> See *Ali v. Austin, et. al.*, Misc. No. 09-8001 (C.A.A.F. 2008).

<sup>8</sup> *Id.*

<sup>9</sup> Action.

<sup>10</sup> See Direction for Review, *United States v. Ali*, No. 20080599, dtd 31 March 2010.

### Statement of Facts<sup>11</sup>

On 23 February 2008, appellant was employed by L3/Titan Communications as a linguist and assigned as a civilian contractor with the 170<sup>th</sup> Military Police (MP) Company, stationed in Iraq as part of Operation Iraqi Freedom. 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 170<sup>th</sup> MP Company.<sup>12</sup> On 16 January 2008, prior to his deployment, appellant attended Theater Specific Individual Readiness Training (TSIRT) at Fort Benning, Georgia.<sup>13</sup> Appellant received required training and validation, and was issued a Common Access Card, identifying him as a U.S. Army Contractor.<sup>14</sup> Appellant arrived in Iraq on 22 January 2008, and joined the 170<sup>th</sup> MP Company, which had been deployed to Iraq since 6 May 2007.<sup>15</sup>

While in Iraq, appellant performed duties as an interpreter embedded with the 170<sup>th</sup> MP Company.<sup>16</sup> Appellant was stationed at Combat Outpost (COP) 4, near the city of Hit, Iraq. COP 4 was surrounded by wires, tactical barriers, and other obstacles to restrict entry and protect against Vehicleborne Improvised

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<sup>11</sup> Except as otherwise noted, the Statement of Facts comes from Prosecution Exhibit (PE) 6, a stipulation of fact.

<sup>12</sup> AE LI at 1 (paras. 1-4).

<sup>13</sup> AE LI at 3 (para. 16); R. 163-64; 166-70, 178-80; AE XXX.

<sup>14</sup> *Id.*

<sup>15</sup> AE LI at 3 (paras. 21-23).

<sup>16</sup> PE 6.

Explosive Devices (VBIEDS).<sup>17</sup> Appellant lived with the Soldiers in his unit.<sup>18</sup> Appellant wore the Army Combat Uniform (ACUs) with the unit patch, individual body armor (IBA), Kevlar, and glasses; which is exactly what the members of the unit wore.<sup>19</sup> Appellant, along with all of the other interpreters, performed an integral part of the unit's mission in training Iraqi police.<sup>20</sup> When appellant and his unit traveled, they typically did so in up-armored High Mobility Multipurpose Wheeled Vehicles (HMMWV)s.<sup>21</sup> Appellant had a technical chain-of-command within the unit, reporting directly to Staff Sergeant (SSG) Clint Butler.<sup>22</sup> When appellant's unit went on mission they faced IEDs, small arms fire, and indirect fire.<sup>23</sup>

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

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<sup>17</sup> R. 129.

<sup>18</sup> R. 138.

<sup>19</sup> R. 111, 133, 138.

<sup>20</sup> R. 126, 133.

<sup>21</sup> R. 115.

<sup>22</sup> R. 126, 135, 147.

<sup>23</sup> R. 134.

Appellant left SSG Butler's room and went to watch television in the common room to his living quarters. Appellant was watching television with some other interpreters when Mr. Al-Umarryi came into the common room. Appellant and Mr. Al-Umarryi got into another fight. During the fight, appellant cut Mr. Al-Umarryi four times with the stolen knife. After the fight, appellant hid the knife between some floor slots in a shower trailer.

As the Soldiers from the 170<sup>th</sup> MP Company attempted to determine what happened, appellant told them he used a piece of wood to cut Mr. Al-Umarryi and not a knife. After they confronted him about this lie, appellant admitted to using the knife. Appellant later made a sworn written statement to agents from the Criminal Investigation Command (CID).<sup>24</sup> Appellant lied in the sworn statement when he claimed that he bought the knife in Canada two months before deploying to Iraq.<sup>25</sup> Appellant was placed into pretrial confinement on 29 February 2008.

A single charge and specification for assault was preferred against appellant on 27 March 2008.<sup>26</sup> L3/Communications terminated appellant's employment on 9 April 2008.<sup>27</sup> The Article 32 investigation hearing took place on 15 and 16 April 2008.<sup>28</sup>

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<sup>24</sup> AE XLIV.

<sup>25</sup> *Id.*

<sup>26</sup> Charge Sheet I.

<sup>27</sup> R. 101.

<sup>28</sup> AE XLV.

The charge was referred to a general court-martial on 10 May 2008.<sup>29</sup> On 24 May 2008, appellant filed a motion to dismiss with the trial court, alleging that he was not subject to court-martial jurisdiction.<sup>30</sup> The Government filed a response on 28 May 2008.<sup>31</sup> Appellant was arraigned on 29 May 2008.<sup>32</sup> On 11 June 2008, the military judge heard evidence and arguments on appellant's motion to dismiss.<sup>33</sup> On 13 June 2008, the military judge denied appellant's motion and issued written findings of fact and conclusions of law.<sup>34</sup> On 17 June 2008, three additional charges were preferred against appellant.<sup>35</sup> On 21 June 2008, appellant entered into a pretrial agreement with the convening authority.<sup>36</sup> 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.<sup>37</sup>

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

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<sup>29</sup> Charge Sheet I.

<sup>30</sup> AE XXIV.

<sup>31</sup> AE XXV.

<sup>32</sup> R. 22.

<sup>33</sup> R. 75-100, 108-92, 236-50.

<sup>34</sup> AE LI.

<sup>35</sup> Charge Sheet II.

<sup>36</sup> AEs LV and LVI.

<sup>37</sup> *Id.*

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Issues Specified for Review by The Judge Advocate General

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

B. WHETHER THE COURT-MARTIAL HAD SUBJECT-MATTER JURISDICTION OVER THE OFFENSES.<sup>38</sup>

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."<sup>39</sup> An appellate court reviews 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."<sup>40</sup>

Law and Analysis

I. Article 2(a) (10) Properly Extends Court-Martial Jurisdiction Over Civilian Contractors Serving With or Accompanying the Armed Forces in the Field During a Contingency Operation.

A. Article 2(a) (10), UCMJ, is a constitutional exercise of Congress's power and authority under Article I, §8, Clause 14.

Article I, § 8, Clause 14 of the United States Constitution gives Congress the power "[t]o make Rules for the Government and Regulation of the land and naval Forces." The Supreme Court has said that "[o]n its face there is no indication that the grant

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<sup>38</sup> *Id.*

<sup>39</sup> *United States v. Oliver*, 57 M.J. 170, 172 (C.A.A.F. 2002) (citations omitted).

<sup>40</sup> *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)).

of power in Clause 14 was any less plenary than the grants of other authority to Congress in the same section."<sup>41</sup>

"[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."<sup>42</sup>

The test of whether Congress's act in subjecting a person to court-martial jurisdiction falls within its power under Article I, §8, Clause 14, and is therefore constitutional, is based on one factor: the status of the accused.<sup>43</sup> A person who is purportedly to be tried by court-martial must be "a person who can be regarded as falling within the term 'land and naval Forces.'"<sup>44</sup> 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.<sup>45</sup>

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 the Court of Military Appeals (now the Court of Appeals for the Armed Forces (CAAF)) stated, subjecting persons serving with or

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<sup>41</sup> *United States v. Solario*, 483 U.S. 435, 441 (1987).

<sup>42</sup> *Id.* at 447.

<sup>43</sup> *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) and *Solorio*, 483 U.S. at 435).

<sup>44</sup> *Singleton*, 361 U.S. at 240-41.

<sup>45</sup> UCMJ art. 2(a)(10).

accompanying the armed forces to "control by the services and to trial by court-martial" has roots in military authority and "military customs existing time immemorial."<sup>46</sup> "[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."<sup>47</sup>

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."<sup>48</sup> Thus, 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

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<sup>46</sup> *United States v. Burney*, 21 C.M.R. 98, 109-110 (C.M.A. 1956).

<sup>47</sup> *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).

<sup>48</sup> *Burney*, 21 C.M.R. at 107 (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 Law." *Hamdan v. Rumsfeld*, 548 U.S. 557, 597 (2006) (citations omitted).

other employees of the different staff departments, hospital officials and attendants, veterinaries, interpreters, guides, scouts, and spies . . . ."<sup>49</sup> A virtually identical provision was adopted as Article of War 23 by the Continental Congress the following year.<sup>50</sup>

In August 1789, Secretary of War Henry Knox recognized that "changes to the Government of the United States will require that the articles of war be revised and adapted to the constitution."<sup>51</sup> 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.<sup>52</sup> In 1790, Congress reenacted those articles "as far as the same may be applicable to the Constitution of the United States."<sup>53</sup> Likewise, shortly after the 15 December 1794 ratification of the Bill of Rights by the states, Congress twice ratified the 1776 Articles without change.<sup>54</sup> Finally, in 1805, the Sixth Congress undertook a more detailed review and revision of those Articles in order to

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<sup>49</sup> Winthrop at 99 (emphasis added).

<sup>50</sup> See American Articles of War of 1776, § XIII, art. 23 (reprinted in Winthrop at 967).

<sup>51</sup> 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)).

<sup>52</sup> *Id.* (citing Act of Sept. 29, 1789, ch. 25 § 4, 1 Stat. 96).

<sup>53</sup> *Id.* (citing Act of April 30, 1790, ch 10, § 13, 1 Stat. 121).

<sup>54</sup> *Id.* (citing Act of March 3, 1795, ch. 44, § 14, 1 Stat. 432; Act of May 30, 1796, ch. 39, § 20, 1 Stat. 486).

"adapt[ ] them to the provisions under the present government."<sup>55</sup>

Congress retained, virtually verbatim, the provision of Article 23 (1776) into 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."<sup>56</sup>

In 1874, this same language was incorporated into Article of War 63, simply omitting the words "settlers" and "whatsoever."<sup>57</sup>

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 immediate successors) perceived certain civilians as an integral part of the "land and naval forces" who 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.<sup>58</sup>

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<sup>55</sup> 15 Annals of Cong. 263 (1805) (<http://memory.loc.gov/cgi-bin/ampage?collId=llac&fileName=015/llac015.db&recNum=0>) (Last visited, 2 March 2011).

<sup>56</sup> American Articles of War of 1806, art. 60 (reprinted in Winthrop at 981).

<sup>57</sup> American Articles of War of 1874, art. 63 (reprinted in Winthrop at 991).

<sup>58</sup> 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.").

In 1916, Congress added the term "accompanying" to the statute succeeding Article 63 and preceding Article 2, UCMJ: Article of War 2.<sup>59</sup> 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 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.<sup>60</sup>

Between 1950 and 2006, Article 2(a)(10) permitted exercise of UCMJ jurisdiction over persons serving with or accompanying an armed force in the field only during a "time of war."<sup>61</sup> In

<sup>59</sup> *In re Di Bartolo*, 50 F. Supp. 929, 932 (S.D.N.Y. 1943).

<sup>60</sup> *Id.* (quoting Senate Report No. 130, 64<sup>th</sup> Congress, First Session).

<sup>61</sup> 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).

the 1979 decision *United States v. Averette*, CAAF construed "time of war" strictly, requiring a formal declaration of war.<sup>62</sup> CAAF'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.<sup>63</sup> Congress rectified this problem in 2006 by amending Article 2(a)(10) to include both "declared wars" as well as "contingency operations," as defined in 10 U.S.C. § 101(a)(13)(2000).

Congress extending 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, that are in areas of actual fighting or are 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.'"<sup>64</sup> The term "in the field" is defined as "in an area of actual fighting,"<sup>65</sup> or as "military operations with a view toward an enemy."<sup>66</sup>

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<sup>62</sup> 41 C.M.R. 363, 365 (C.M.A. 1970) (citations omitted).

<sup>63</sup> 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).

<sup>64</sup> *Reid v. Covert*, 354 U.S. 1, 34, n. 61 (1957) (plurality opinion).

<sup>65</sup> *Id.* (citation omitted).

<sup>66</sup> *Burney*, 21 C.M.R. at 109 (citation omitted).

Interpreting the Constitution itself, 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.'"<sup>67</sup> In *Ex Parte Milligan*, the Supreme Court stated that "every one connected with these branches or the public service is amendable to the jurisdiction which Congress has created for their government, and, while thus serving, surrenders his right to be tried by the civil courts."<sup>68</sup> In *Duncan v. Kahanomaku*, 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[.]"<sup>69</sup>

Inclusion of civilians present on the field of battle within military jurisdiction is a constitutionally permissible exercise of Congress's 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 battlefield. From a time prior to the adoption of the Constitution the extraordinary circumstances present in an area of actual fighting have been

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<sup>67</sup> *Toth v. Quarles*, 350 U.S. 11, 15 (1955) (emphasis added).

<sup>68</sup> 71 U.S. 2, 123 (1866) (emphasis added).

<sup>69</sup> 327 U.S. 304, 313 (1946) (emphasis added).

considered sufficient to permit punishment of some civilians in that area by military courts under military rules."<sup>70</sup>

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 simply because they were stationed overseas. However, the Supreme Court was not addressing Article 2(a)(10), UCMJ, which applied to persons accompanying the armed forces "in the field," but instead addressed the Government's reliance on Article 2(a)(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."<sup>71</sup> The Supreme Court noted 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."<sup>72</sup> 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 field' during time of

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<sup>70</sup> *Covert*, 354 U.S. at 33.

<sup>71</sup> *Id.* at 3 (quoting UCMJ art. 2(11) (1950) (50 U.S.C. § 552(11) (1950), 10 U.S.C. 802(a)(11) (1979)).

<sup>72</sup> *Covert*, 354 U.S. at 33-34.

war[,]” noting that in *Covert* the women at issue were in countries where there was no active hostilities.<sup>73</sup>

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.”<sup>74</sup> Appellant’s case represents such a circumstance. Appellant cannot be placed in the same category as a spouse or family member, accompanying the force only by virtue of their relationship to a servicemember and the fact that they live overseas. Appellant’s service to the armed forces was not incidental. Appellant was serving a unit that was actively participating in the field of military operations.

Thus, the test for military status under Article 2(a)(10), UCMJ, is not one of title or technical oath. Rather, it is whether the person is a part of the “land and naval forces,” such that they support the mission in the field. 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

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<sup>73</sup> *Covert*, 354 U.S. 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).

<sup>74</sup> *Covert*, 354 U.S. at 22-23 (plurality opinion); see also *Id.* at 45 (Frankfurter, J., concurring).

the contractor are members of the "land and naval forces" - the form of their connection differs, but the status is the same. 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 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 civilian contractors.

**B. Subjecting appellant to court-martial jurisdiction does not violate his right to substantive or procedural Due Process.**

Appellant claims that subjecting him to court-martial jurisdiction denies him his right to indictment by grand-jury and trial by jury, pursuant to the Fifth and Sixth Amendments to the United States Constitution.<sup>75</sup> 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.*"<sup>76</sup> This language contains an express exception for cases which are tried under

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<sup>75</sup> AB at 20-23.

<sup>76</sup> U.S. Const. amend V (emphasis added).

Congress's power to regulate the armed forces.<sup>77</sup> Likewise, the right to trial by jury, found in the Sixth Amendment and Article III of the Constitution, does not apply to those cases tried by court-martial.<sup>78</sup> 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."<sup>79</sup> Consequently, neither the Fifth nor Sixth Amendments to the U.S. Constitution restrict trials by courts-martial.

Appellant confuses the analysis by making the rights to indictment by grand jury and trial by jury part of the jurisdictional analysis. However, the correct analysis is not to first ask whether the accused can be afforded a right to indictment by grand jury and trial by jury and then, having answered in the negative, conclude that court-martial jurisdiction over contractors is unconstitutional. The right to indictment or jury trial is not a jurisdictional prerequisite. If a person is properly subjected to court-martial jurisdiction, then he is not entitled to indictment or a jury trial. This is consistent with Congress's act of repeatedly extending court-martial jurisdiction over civilians serving in the field

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<sup>77</sup> *Covert*, 354 U.S. at 22.

<sup>78</sup> *Ex Parte Quirin*, 317 U.S. at 40-41 (citing *Ex Parte Milligan*, 71 U.S. at 123).

<sup>79</sup> *Ex Parte Milligan*, 71 U.S. at 123.

contemporaneously with the drafting and ratification of Clause 14 and the Bill of Rights.<sup>80</sup>

In this case, appellant was a member of the land and naval forces of the United States, and was properly subject to court-martial jurisdiction, so the rights to indictment by grand jury and trial by jury do not apply, just as they do not apply to the thousands of citizen-Soldiers in the armed forces. "Every one connected with these branches of the public service is amenable to the jurisdiction which Congress has created for their government, and, while thus serving, surrenders his right to be tried by the civil courts."<sup>81</sup>

**C. The availability of alternatives to courts-martial does not change Congress's authority.**

Appellant's arguments regarding the potential applicability (or inapplicability) of the Military Extraterritorial Jurisdiction Act (MEJA) of 2000, and its impact on jurisdiction under the UCMJ, were properly rejected by the military judge.<sup>82</sup> While the jurisdictional reaches of Article III Courts and courts-martial can potentially overlap, they are independently based.<sup>83</sup> Congress properly defined the jurisdictional parameters

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<sup>80</sup> See *Supra* at 11.

<sup>81</sup> *Ex Parte Milligan*, 71 U.S. at 123.

<sup>82</sup> AE LI at 13; 18 U.S.C. §§ 3261-3267 (2000).

<sup>83</sup> 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

for federal courts in the MEJA statute and properly defines 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.<sup>84</sup> 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.<sup>85</sup>

Appellant cites *McElroy v. U.S. ex rel. Guagliardo*,<sup>86</sup> as support for his argument.<sup>87</sup> However, *Guagliardo* simply involved a series of companion cases to *Kinsella v. Singleton*.<sup>88</sup> The Court did not hold that alternatives to courts-martial divest Congress of the constitutional authority to extend court-martial jurisdiction over civilian's accompanying the armed forces in the field, but merely "pointed out" possible alternatives after the Court had ruled Article 2(11), UCMJ, unconstitutional.<sup>89</sup> In fact, the *Guagliardo* Court echoed 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

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law of war may be tried by a court-martial, military commission, provost court, or other military tribunal." 18 U.S.C. § 3261(c).

<sup>84</sup> 18 U.S.C. § 3261(d).

<sup>85</sup> It would also appear that MEJA could not apply to appellant because he was a citizen of Iraq. The MEJA expressly excepts out nationals of the host nation from its jurisdiction. 18 U.S.C. § 3266(c)(1)(C).

<sup>86</sup> 361 U.S. 281 (1960).

<sup>87</sup> AB at 20.

<sup>88</sup> *Guagliardo*, 361 U.S. at 282; See *Supra* at n.43.

<sup>89</sup> *Guagliardo*, 361 U.S. at 286-87.

formally been inducted into the military . . . ."<sup>90</sup>

Furthermore, the *Guagliardo* Court noted that none of the defendants at issue in those cases were considered to be "in the field," as they did not arise during any active hostilities.<sup>91</sup>

Servicemembers subject to the Code are often alternatively subject to Article III court jurisdiction. For example, an active-duty servicemember 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. § 1111(b).<sup>92</sup> By appellant's logic, Congress would not be permitted to subject a citizen-Soldier to court-martial jurisdiction in such a situation because an alternative exists that grants that citizen-Soldier greater Constitutional protections. However, the true analysis is that if Congress is properly exercising its power under Article I, § 8, Clause 14 of the U.S. Constitution, than the availability of alternative jurisdiction in Article III courts is irrelevant.

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<sup>90</sup> *Id.* (quoting *Covert*, 354 U.S. at 23).

<sup>91</sup> *Id.* at 285-86.

<sup>92</sup> See 18 U.S.C. § 7 (defining special maritime and territorial jurisdiction); *United States v. McDonald*, 435 U.S. 850, 852, n3 (1978).

D. The service-connection test.

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 jurisdiction.<sup>93</sup> Appellant argues that reliance on the "service connection test" announced in *O'Callahan v. Parker*,<sup>94</sup> despite the fact that it was expressly overruled by *Solorio*,<sup>95</sup> is "instructive."<sup>96</sup> However, appellant's attempt to resurrect this extinct legal concept is based on a misconception of the "service connection" test. The twelve factors cited by appellant<sup>97</sup> 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.<sup>98</sup> Court-martial jurisdiction is based on appellant's status as a member of the land and naval forces.<sup>99</sup> 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.

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<sup>93</sup> *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.").

<sup>94</sup> 395 U.S. 258 (1969).

<sup>95</sup> *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*[.]").

<sup>96</sup> AB at 27.

<sup>97</sup> AB at 27, n. 8.

<sup>98</sup> *O'Callahan*, 395 U.S. at 267, 272.

<sup>99</sup> "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.

III. The Court-Martial Had Both Subject-Matter and Personal Jurisdiction Over Appellant Under Article 2(a)(10), UCMJ. Appellant Fell Squarely Within the Parameters of Article 2(a)(10) as a Person Serving With or Accompanying an Armed Force in the Field During a Contingency Operation.

As stated above, jurisdiction within the military justice system is a question of status. A court-martial has subject-matter jurisdiction over "those violations of the Code which are committed by persons who are subject to the Code at the time of the offense."<sup>100</sup> A court-martial has personal jurisdiction over a person who is subject to the UCMJ at the time of trial.<sup>101</sup> In this case the 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.<sup>102</sup> Both 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. Operation Iraqi Freedom Was a "contingency operation."

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

(A) is designated by the Secretary of Defense as an operation in which members of the armed forces are or may become involved

<sup>100</sup> *United States v. Chodara*, 29 M.J. 943, 944 (A.C.M.R. 1990).

<sup>101</sup> *Id.*

<sup>102</sup> 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.

in military actions, operations, or hostilities against an enemy of the United States or against an opposing military force; or

(B) results in the call or order to, or retention on, active duty of members of the uniformed services under section 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.<sup>103</sup>

On 14 September 2001, the President issued Proclamation 7463, invoking the provisions of Title 10 to call up the ready reserve.<sup>104</sup> On 12 September 2007, the President continued for an additional year the national emergency declared in Proclamation 7463.<sup>105</sup> Consequently, Operation Iraqi Freedom was a "contingency operation." The accused was embedded with the 170<sup>th</sup> 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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<sup>103</sup> 10 U.S.C. § 101(a)(13) (2000).

<sup>104</sup> Proclamation No. 7463, 66 Fed. Reg. 48,199 (Sept. 14, 2001); Exec. Order No. 13,233, 66 Fed. Reg. 48,201 (Sept. 14, 2001).

<sup>105</sup> 72 Fed. Reg. 52,465 (Sept. 12, 2007)

B. The court-martial had subject matter jurisdiction because, at the time of the offense, appellant was a person "serving with [and] accompanying an armed force in the field," during a contingency operation.

1. At the time of the offense, appellant was "serving with" and "accompanying" the 170<sup>th</sup> 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.<sup>106</sup> Six years after Congress enacted the UCMJ, CAAF discussed the meaning of these terms in relation to Article 2 of the UCMJ.<sup>107</sup> The Court stated that "[t]he test is whether he 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."<sup>108</sup> 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."<sup>109</sup>

As noted above, the term "in the field" is crucial to the constitutionality of the statute, and distinguishes Article 2(a)(10) from Article 2(a)(11), which the Supreme Court found unconstitutional in *Covert*.<sup>110</sup> The term "in the field" is

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<sup>106</sup> See R.C.M. 202(a) analysis, at A21-11.

<sup>107</sup> *Burney*, 21 C.M.R. at 109-10.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> See *Supra* at 15-16.

defined as "in an area of actual fighting,"<sup>111</sup> or as "military operations with a view toward an enemy."<sup>112</sup>

Appellant argues that this Court should use the definitions of "accompanying the armed forces outside the United States" from MEJA,<sup>113</sup> which applies only to (1) "dependents" of members of the armed forces, DOD civilians, DOD contractors; (2) who are residing with their dependent; and (3) who are not nationals or residents of the host nation.<sup>114</sup> Appellant also points to the North Atlantic Treaty Association's Status of Forces Agreement (NATO SOFA), which excludes host nation members from the definition of "civilian personnel accompanying a force."<sup>115</sup> 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" found in Article 2(a)(10), UCMJ.<sup>116</sup>

Appellant fails to cite any support for his cross-referencing of these definitions. First, "where there is an

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<sup>111</sup> *Burney*, 21 C.M.R. at 109-10.

<sup>112</sup> *Id.* (citation omitted).

<sup>113</sup> AB at 31.

<sup>114</sup> 18 U.S.C. § 3267(2).

<sup>115</sup> AB at 32; 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).

<sup>116</sup> AB at 34.

'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.'<sup>117</sup> 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 on defining "accompanying the Armed Forces outside the United States."<sup>118</sup>

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*."<sup>119</sup> MEJA speaks to dependents "residing with [the dependee] *outside the United States*."<sup>120</sup> 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.<sup>121</sup> The definition used in MEJA does not reach those persons that are with a unit in the field, and as such, is not applicable to Article 2(a)(10), UCMJ.<sup>122</sup>

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<sup>117</sup> *In re Princo Corp.*, 486 F.3d 1365 (Fed. Cir. 2007) (quoting *United States v. Reorganized CF&I Fabricators of Utah, Inc.*, 518 U.S. 213, 220 (1996)).

<sup>118</sup> 18 U.S.C. § 3267(3-4).

<sup>119</sup> UCMJ art. 2(a)(10) (emphasis added).

<sup>120</sup> 18 U.S.C. § 3267(2)(B) (emphasis added).

<sup>121</sup> *Supra* at 15-16.

<sup>122</sup> 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 at 33, n9). However, appellant's claims that "the criminal courts of Iraq are operational" are not supported by any

At the time of the offenses appellant was an interpreter embedded in the 170<sup>th</sup> MP Company, stationed at COP 4 in Iraq.<sup>123</sup> COP 4 was surrounded by wires, tactical barriers, and other obstacles to restrict entry and protect against VBIEDS.<sup>124</sup> Appellant lived with the Soldiers in his unit.<sup>125</sup> Appellant wore ACUs with the unit patch, IBA, Kevlar, and glasses; the same uniform as members of the unit.<sup>126</sup> When appellant and his unit traveled, they typically did so in up-armored HMMWVs.<sup>127</sup> Appellant had a technical chain-of-command within the unit, reporting directly to SSG Butler.<sup>128</sup> When appellant's unit went on mission they faced IEDs, small arms fire, and indirect fire.<sup>129</sup>

Appellant, along with all of the other interpreters, performed an integral part of the unit's mission in training Iraqi police.<sup>130</sup> 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 evidence of appellant being fully embedded with the 170<sup>th</sup> MP

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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.

<sup>123</sup> PE 6.

<sup>124</sup> R. 129.

<sup>125</sup> R. 138.

<sup>126</sup> R. 111, 133, 138.

<sup>127</sup> R. 115.

<sup>128</sup> R. 126, 135, 147.

<sup>129</sup> R. 134.

<sup>130</sup> R. 126, 133.

Company, the military judge properly found that appellant both accompanied and served with the armed forces in the field.<sup>131</sup>

**C. The court-martial had personal jurisdiction over appellant because, at the time of trial, appellant was a person "accompanying an armed force in the field" during a contingency operation.**

Appellant's argument is that his termination from L3/Titan Communications after preferral of charges, but before his trial, severed court-martial jurisdiction.<sup>132</sup> However, this argument ignores the plain language of Article 2(a)(10), UCMJ. It is not appellant's employment which is the critical factor, but his 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 23 February 2008. On 29 February 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. 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

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<sup>131</sup> AE LI at 7-9.

<sup>132</sup> AB at 24-26.

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. As the U.S. Court of Appeals for the Third Circuit noted in *Perlstein v. United States*:

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 when the employment terminated. The primary issue is whether the appellant accompanied the Armies of the United States.<sup>133</sup>

In *Perlstein*, *In Re DiBartolo*, 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.<sup>134</sup> In this case, the accused'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:

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<sup>133</sup> 151 F.2d at 169-70 (citing *In re DiBartolo*, 50 F.Supp. at 929-31) and *Ex parte Gerlach* 247 F. at 617.).

<sup>134</sup> *Id.* Appellant claims these cases are inapplicable because they pre-date the Supreme Court's decision in *Covert* (AB at 17). 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.

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.<sup>135</sup>

Thus, the accused was at all times relevant to this case serving with or accompanying the armed forces in the field, and therefore, subject to jurisdiction under the UCMJ.

**D. Notice.**

Appellant argues that he cannot be subject to court-martial jurisdiction because he was not told about potential court-martial jurisdiction prior to his deployment.<sup>136</sup> There is no constitutional or statutory requirement for personal notice of potential court-martial jurisdiction for a civilian, just as there is no constitutional or statutory requirement for personal notice of potential court-martial jurisdiction for officers. Article 137, UCMJ, requires that certain articles of the UCMJ "shall be carefully explained to each *enlisted* member."<sup>137</sup> Congress has chosen not to extend this requirement to officers or civilians subject to the UCMJ. Moreover, there is nothing in Article 137, UCMJ, that makes the notification requirement a jurisdictional threshold.

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<sup>135</sup> R.C.M. 202(a) analysis, at MCM, A21-11-12.

<sup>136</sup> AB at 29-31.

<sup>137</sup> Article 137, UCMJ.

Appellant cites to *United States v. Abernathy*,<sup>138</sup> for the proposition that "notice be given before subjecting anyone to the UCMJ."<sup>139</sup> However, that is not what the Coast Guard Court of Military review stated. *Abernathy* dealt with the application of Article 2(3), UCMJ, which in 1972 required reservists called to active duty to "voluntarily accept[]" their orders before becoming subject to the Code.<sup>140</sup> The Coast Guard Court determined that under the plain language of Article 2(3), UCMJ, there must be evidence that a reservist accepted their orders before court-martial jurisdiction applied.<sup>141</sup> Nowhere did the Coast Guard Court, or any court, indicate that "acceptance of orders" was required for everyone being subject to the Code, other than those falling under Article 2(3), UCMJ. Furthermore, this provision was eliminated by Congress when Article 2(a)(3), UCMJ, was amended in 1986.<sup>142</sup>

Appellant also cites to MEJA again, noting the statute's requirement that the Secretary of Defense provide notice to those individuals "employed by or accompanying the Armed Forces outside the United States" of potential jurisdiction under MEJA.<sup>143</sup> Leaving aside that MEJA is a separate statute from the UCMJ, appellant omits the next paragraph of the statute which

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<sup>138</sup> 48 C.M.R. 205 (C.G.C.M.R. 1974).

<sup>139</sup> AB at 30 (emphasis in original).

<sup>140</sup> *Abernathy*, 48 C.M.R. at 206; 10 U.S.C. 802(3) (1966).

<sup>141</sup> *Id.* at 206-08.

<sup>142</sup> See 10 U.S.C. 802(a)(3) (1986).

<sup>143</sup> AB at 30 (citing 18 U.S.C. § 3266(b)(1)).

specifically states that a failure to provide such notice does not defeat jurisdiction.<sup>144</sup>

Finally, the military judge made a specific finding of fact that petitioner was, in fact, briefed on being subjected to UCMJ authority during training on 16 January 2008,<sup>145</sup> and appellant fails to address this finding other than the unsupported statement that "Mr. Ali was never told he could possibly be subject to military jurisdiction."<sup>146</sup> The military judge's finding of historical fact is supported by evidence in the record and is not clearly erroneous.<sup>147</sup> Therefore, petitioner's "notice" argument is legally and factually without merit.

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<sup>144</sup> 18 U.S.C. § 3266(b)(2). As the military judge noted, while notice to contractors may be a "good idea," it is not required for jurisdiction. AE LI at 10.

<sup>145</sup> AE LI at 3 (para. 16); R. 163-64, 166-70, 178-80; AE XXX.

<sup>146</sup> AB at 31.

<sup>147</sup> "When an accused contests personal jurisdiction on appeal, we review that question of law de novo, accepting the military judge's findings of historical facts unless they are clearly erroneous or unsupported in the record." *Melanson*, 53 M.J. at 2 (citation omitted).

( ) ( )

**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.