No. _____

IN THE
Supreme Court of the United States

ALAA MOHAMMAD ALI,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Armed Forces

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Congress's decision not to create federal district court jurisdiction for the trial of a class of civilians supporting military forces overseas provides sufficient constitutional justification for subjecting such civilians to trial by court-martial.

2. Whether a citizen of a foreign country serving as a civilian contractor in support of the United States military's mission overseas is entitled to Fifth and Sixth Amendment rights in connection with criminal prosecution by the United States.

PARTIES TO THE PROCEEDINGS

All parties to the proceedings are listed in the caption. Petitioner is an individual.

The following persons and/or entities appeared as *amici curiae* in the United States Court of Appeals for the Armed Forces: John F. O'Connor; Michael J. Navarre; Air Force Appellate Defense Division; Navy-Marine Corps Appellate Defense Division; University of Washington School of Law.

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Alaa Mohammad Ali respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Armed Forces ("the Court of Appeals" or "CAAF").

OPINIONS BELOW

The opinion of the Court of Appeals (Pet.App. 1a) is reported at 71 M.J. 256 (C.A.A.F. 2012). The Court of Appeals entered its order denying Mr. Ali's timely petition for reconsideration (Pet.App. 115a) on August 31, 2012, and the order is reported at 71 M.J. 389 (C.A.A.F. 2012). The opinion of the United States Army Court of Criminal Appeals (Pet.App. 69a) is reported at 70 M.J. 514 (A. Ct. Crim. App. 2011). The military judge's opinion denying Mr. Ali's motion to dismiss for lack of jurisdiction (Pet.App. 88a) is unreported.

JURISDICTION

Mr. Ali seeks review of a final decision of the Court of Appeals entered on July 18, 2012. A timely petition for reconsideration was denied on August 31, 2012. Chief Justice Roberts granted Mr. Ali's application for an extension of time to file this petition to and including January 2, 2013. This Court's jurisdiction rests on 28 U.S.C. § 1259(3).

STATUTORY PROVISIONS INVOLVED

Article 2(a) of the Uniform Code of Military Justice ("UCMJ"), 10 U.S.C. § 802(a) provides:

> The following persons are subject to this chapter
>
> . . . .
>
> (10) In time of declared war or a contingency operation, persons serving with or accompanying an armed force in the field.
>
> . . . .

Section 1 of the Military Extraterritorial Jurisdiction Act of 2000, 18 U.S.C. § 3261, provides:

> (a) Whoever engages in conduct outside the United States that would constitute an offense punishable by imprisonment for more than 1 year if the conduct had been engaged in within the special maritime and territorial jurisdiction of the United States—
>
> (1) while employed by or accompanying the Armed Forces outside the United States;
>
> . . . .
>
> shall be punished as provided for that offense.
>
> (b) No prosecution may be commenced against a person under this section if a foreign government, in accordance with jurisdiction recognized by the United States, has prosecuted or is prosecuting such person for the conduct constituting

> such offense, except upon the approval of the Attorney General or the Deputy Attorney General (or a person acting in either such capacity), which function of approval may not be delegated.
>
> (c) Nothing in this chapter may be construed to deprive a court-martial, military commission, provost court, or other military tribunal of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by a court-martial, military commission, provost court, or other military tribunal.
>
> . . . .

Section 7 of the Military Extraterritorial Jurisdiction Act of 2000, 18 U.S.C. § 3267, provides:

> As used in this chapter:
>
> (1) The term "employed by the Armed Forces outside the United States" means—
>
> (A) employed as—
>
> . . . .
>
> (iii) an employee of a contractor (or subcontractor at any tier) of—
>
> (I) the Department of Defense (including a nonappropriated fund instrumentality of the Department);

. . . .

> (B) present or residing outside the United States in connection with such employment; and
>
> (C) not a national of or ordinarily resident in the host nation.

STATEMENT OF THE CASE

1. Alaa Mohammad Ali is a dual Iraqi-Canadian citizen who fled Iraq in 1991 and has resided in Canada since 1992. Mr. Ali's family joined him in Canada in 1995 and he obtained Canadian citizenship in 1996. Pet.App. 4a-5a.

In December 2007, Mr. Ali accepted a position as a linguist with L-3 Communications, a United States company, in order to provide linguist services to United States military forces in Iraq as a civilian contractor employee. Pet.App. 5a. Mr. Ali traveled to Fort Benning, Georgia in January 2008 in order to receive pre-deployment training and deployed to Iraq in January 2008. Pet.App. 5a, 91a-93a. While in Iraq, Mr. Ali served with a squad of the United States Army's 170th Military Police Company, where Mr. Ali accompanied the military unit on all of its missions. Pet.App. 5a, 94a. Although Mr. Ali wore an Army Combat Uniform while participating in missions, he wore no rank insignia, wore a tape that identified him as an interpreter, and was not permitted to carry a weapon. Pet.App. 5a, 95a. Unlike soldiers, Mr. Ali remained under the

administrative control of L-3 Communications personnel and had the right to refuse a mission assigned him by the Army. Pet.App. 96a. Mr. Ali has never been a member of the United States military.

2. In February 23, 2008, Mr. Ali had a verbal altercation with another civilian contractor and was struck in the head. Pet.App. 6a. Mr. Ali later took a knife from a soldier's room and, during the course of another altercation, the same civilian contractor suffered minor cuts. Pet.App. 6a. As a result of the second altercation, Army officials restricted Mr. Ali to the Victory Base Complex on February 23, 2008. Pet.App. 6a. As a result of Mr. Ali's violation of that restriction and the military's inability to prevent contractor personnel from obtaining transportation out of Iraq, Army officials placed Mr. Ali in pretrial confinement on February 29, 2008, and referred charges against him for trial by general court-martial on May 10, 2008. *Id.*

Mr. Ali moved to dismiss the charges against him on the grounds that, as a full-fledged civilian, the United States had no statutory or constitutional authority to try him by court-martial. Pet.App. 6a, 88a. The military judge assigned to the court-martial denied Mr. Ali's motion, holding that UCMJ Article 2(a)(10), 10 U.S.C. § 802(a)(10),[1] provided a

[1] UCMJ article 2(a)(10), as amended in 2006, purports to authorize courts-martial of persons "serving with or accompanying an armed force in the field" during time of war or during a contingency operation. The Court of Military Appeals, the predecessor to the CAAF, held in 1970 that then-Article 2(10), which allowed court-martial of civilians serving in the (Continued …)

statutory basis for subjecting Mr. Ali to trial by court-martial. Pet.App. 99a-107a. The military judge then turned to the constitutional question and concluded that, even though Mr. Ali was not a member of the armed forces, his trial by court-martial was permitted by Article I, Section 8, Clause 14 of the Constitution ("Clause 14"), which grants Congress the power to "make rules for the government and regulation of the land and naval forces." Pet.App. 110a.[2]

As a result, Mr. Ali was subjected to trial by court-martial, where he was denied procedural protections available to civilians tried by the United States in Article III courts, protections made available to every other civilian contractor in Iraq and Afghanistan subjected to criminal trial by the United States.[3] In particular, Mr. Ali was denied

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field "during time of war" was properly construed as requiring a declared war. *United States v. Averette*, 41 C.M.R. 363, 365 (C.M.A. 1970). This holding effectively ended court-martial of civilians under Article 2(a)(10) of the UCMJ until Congress, without recorded debate, amended the article in 2006 to purport to permit courts-martial during "contingency operations." *See* UCMJ art. 2(a)(10), 10 U.S.C. § 802(a)(10).

[2] Mr. Ali filed an interlocutory petition for extraordinary relief with the United States Army Court of Criminal Appeals ("Army Court"), challenging the military judge's ruling. That petition was denied without prejudice to Mr. Ali's right to pursue the issue in the ordinary course of appellate review. Pet.App. 3a. The CAAF similarly denied Mr. Ali's writ-appeal petition seeking review of the Army Court's ruling. *Id.*

[3] Every other civilian contractor subjected to criminal trial by the United States for conduct occurring in Iraq or Afghanistan has been tried in federal district court. U.S. Dep't of Def., *MEJA Statistics as of June 30, 2010*,

(Continued …)

any right of grand jury presentment,[4] or a right to a jury of his peers,[5] or a right to a jury of at least six members,[6] or a right to a unanimous verdict on guilt,[7] or a right to a judge serving a fixed term of office.[8] Mr. Ali ultimately pleaded guilty to wrongful appropriation, making a false official statement, and wrongfully endeavoring to impede an investigation in return for an agreement that limited his confinement to time served. Pet.App. 2a-3a.

3. Because Mr. Ali's approved sentence extended to only 115 days of confinement, he had no right of judicial review of his court-martial.[9] The Judge Advocate General of the Army, however, exercised his plenary power to refer Mr. Ali's case for review by

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http://www.dod.gov/dodgc/images/meja_statistics.pdf (fifteen civilian contractors charged in federal district court, one tried by court-martial).

[4] *See* UCMJ art. 32, 33, 10 U.S.C. §§ 832, 833.

[5] *See Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 123 (1866); UCMJ art. 25, 10 U.S.C. § 825 (court-martial members hand-picked by the military officer convening the court-martial).

[6] *Compare Ballew v. Georgia*, 435 U.S. 223, 245 (1978), *with* UCMJ art. 16, 10 U.S.C. § 816.

[7] *Compare Richardson v. United States*, 526 U.S. 813, 817 (1999) *and* Fed. R. Crim. P. 31(a) (requiring unanimous jury verdict on guilt) *with* UCMJ art. 52, 10 U.S.C. § 852 (vote of two-thirds of members sufficient to find accused guilty).

[8] *Compare* U.S. Const. art. III, § 1 (Article III judges "shall hold their Offices during good Behaviour") *with Weiss v. United States*, 510 U.S. 163, 179 (1994) (no right to judge serving fixed term of office at court-martial).

[9] UCMJ art. 66(b), 10 U.S.C. § 866(b) (no right of judicial review of courts-martial where approved sentence does not include a sentence of death, confinement for one year or more, or a punitive discharge from the service).

the Army Court pursuant to Article 69 of the UCMJ. Pet.App. 9a. The Army Court concluded that Mr. Ali fell within the statutory purview of UCMJ Article 2(a)(10). Pet.App. 77a-81a. As for Mr. Ali's constitutional challenge, the Army Court concluded that it was required to apply UCMJ provisions as enacted "unless we are convinced that they are fundamentally hostile to military due process, or that they have been specifically condemned by the Supreme Court." Pet.App. 86a. Finding neither condition satisfied, the Army Court affirmed the exercise of court-martial jurisdiction over Mr. Ali.

4. The CAAF granted Mr. Ali's petition for review of the Army Court's decision. Pet.App. 4a. The CAAF concluded that Mr. Ali fell within the statutory grant of jurisdiction in UCMJ Article 2(a)(10), and therefore was triable by court-martial unless such a trial was barred by the United States Constitution. Pet.App. 22a.

In addressing the constitutional question, however, the three-judge CAAF majority did not begin by considering whether Article I of the Constitution empowers Congress to subject full-fledged civilians such as Mr. Ali to trial by court-martial. Instead, the majority began by considering whether Mr. Ali, as a Canadian-Iraqi citizen, is entitled to any constitutional rights. Pet.App. 22a-33a. While recognizing that Mr. Ali had been employed by an American contractor, had traveled to the United States for pre-deployment training, and had deployed to Iraq for the purpose of supporting the United States military's mission in Iraq, Pet.App. 5a, the majority nevertheless concluded that Mr. Ali

had not "developed substantial connections with this country" that would entitle him to Fifth and Sixth Amendment rights. Pet.App. 30a (quoting *United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990)).

Having determined that Mr. Ali was not entitled to any Fifth or Sixth Amendment rights, the CAAF majority next considered the source of Congress's power to subject civilians such as Mr. Ali to trial by court-martial. The majority rejected the position, espoused by the United States and adopted by the military judge, that Congress's power under Clause 14 to regulate the land and naval forces, or the Necessary and Proper Clause, included the power to court-martial a civilian such as Mr. Ali. Pet.App. 33a. The majority held, however, that the constitutional power to try civilians by court-martial flowed from the amalgam of "war powers" contained in Article I of the Constitution. Pet.App. 33a-34a.

The CAAF majority then addressed this Court's admonition that court-martial jurisdiction must be limited to the "least possible power adequate to the end proposed." Pet.App. 34a-35a (citing *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 23 (1955)). The majority acknowledged that, unlike when this Court decided *Toth*, Congress had enacted legislation that would create federal district court jurisdiction for criminal offenses committed by civilians serving with the United States armed forces overseas. Pet.App. 35a (citing Military Extraterritorial Jurisdiction Act of 2000 ("MEJA"), 18 U.S.C. § 3261(a)).

However, the majority noted that Congress, in enacting MEJA, had not created federal court jurisdiction over civilians who are nationals of the host nation. Accordingly, the majority held that the absence of an available federal court forum under MEJA provided constitutional justification for trying Mr. Ali by court-martial. Pet.App. 35a ("Thus, there is no available alternative forum here, and Congress used the 'least possible power adequate' to try Mr. Ali in this case.") (quoting *Toth*, 350 U.S. at 23). The CAAF majority did not rely on any other fact or factor, besides Congress's decision not to create federal district court jurisdiction, as showing a necessity that Mr. Ali be tried by court-martial as opposed to in an Article III court.

Chief Judge Baker concurred in part and in the result. In Chief Judge Baker's view, the starting point for the constitutional analysis was not whether Mr. Ali had any individual constitutional rights, but whether Congress has "an enumerated and positive authority to act, even if its actions would not otherwise run afoul of the Bill of Rights." Pet.App. 38a. Chief Judge Baker agreed with the majority that the military judge had erred in concluding that Clause 14 provided a constitutional basis for trying Mr. Ali by court-martial, but concluded that the power to court-martial civilians could be derived from the war powers granted Congress and the President. Pet.App. 43a, 52a.

Chief Judge Baker rejected the majority's conclusion that Mr. Ali lacked sufficient voluntary connection to the United States to entitle him to Fifth and Sixth Amendment rights. Pet.App. 56a

("In my view, service with the Armed Forces of the United States in the uniform of the United States in sustained combat is a rather substantial connection to the United States."). Nevertheless, Chief Judge Baker concluded that while Mr. Ali had Fifth and Sixth Amendment rights, those rights were no greater than those enjoyed by active duty servicemembers, who are not entitled to the full panoply of constitutional rights at a court-martial as they or civilians would enjoy in an Article III court. Pet.App. 58a.

Judge Effron also concurred in part and in the result. In Judge Effron's view, the majority overreached in deciding whether foreign nationals generally have constitutional rights, and instead should have upheld the exercise of court-martial jurisdiction based solely on Congress's decision not to create Article III jurisdiction under MEJA. Pet.App. 63a. Judge Effron opined that "[a] very different constitutional question – an open question – would arise under the 'least possible power adequate to the end proposed' test if the conduct at issue involved a DoD civilian or DoD contractor employee who, as [a] third-count[r]y national, would be subject to Article III coverage under MEJA." Pet.App. 63a.

5. Mr. Ali timely petitioned the CAAF for reconsideration, and the CAAF denied the petition on August 31, 2012. Pet.App. 115a. On November 15, 2012, Chief Justice Roberts granted Mr. Ali's application for an extension of his deadline for seeking a writ of certiorari to and including January 2, 2013.

REASONS THE WRIT SHOULD BE GRANTED

This case presents important questions concerning allocation of the judicial power of the United States, between Article III courts and Article I courts-martial, to try civilians for criminal offenses. Mr. Ali is the first, and only, full-fledged civilian to be subjected to trial by court-martial by the United States since at least 1970. Review by this Court is appropriate for three reasons.

First, the decision below upholding court-martial jurisdiction over Mr. Ali represents a substantial departure from this Court's precedent, which holds that court-martial jurisdiction must be confined to "the least possible power adequate to the end proposed," that end being "mainten[ance of] discipline among troops in active service." *Toth*, 350 U.S. at 21-22 & n.20. In applying this test, the Court has squarely held that Congress's decision not to create Article III jurisdiction for offenses committed by a class of civilians *does not* create a sufficient necessity to justify trial of such civilians by court-martial.

Nevertheless, the decision below concludes that it is a necessity to exercise court-martial jurisdiction over civilians such as Mr. Ali, as opposed to leaving their cases to an Article III court, based solely on Congress's failure to create applicable federal district court jurisdiction. Mr. Ali's petition should be granted in order to resolve whether the Court of Appeals is correct in concluding that Congress may expand the jurisdictional reach of courts-martial over civilians by limiting the reach of Article III

jurisdiction over such civilians and their alleged offenses.

Second, the Court of Appeals' conclusion that Mr. Ali has no cognizable Fifth and Sixth Amendment rights is contrary to this Court's precedent and in conflict with decisions by the Fourth and Ninth Circuits. The Court of Appeals' decision failed to apply the flexible, practical test required by *Boumediene v. Bush*, 553 U.S. 723 (2008), for considering the extraterritorial reach of constitutional rights. In particular, the decision below ignored that Mr. Ali was in Iraq specifically because he was supporting the United States military's mission in that country and that there were no obstacles preventing the transport of civilians such as Mr. Ali to the United States for a civilian trial in an Article III court.

The Court of Appeals' decision that Mr. Ali lacks constitutional rights in connection with a criminal prosecution by the United States also conflicts with the approach taken by other courts of appeals. In *United States v. Brehm*, 691 F.3d 547 (4th Cir. 2012), the Fourth Circuit not only held that the trial of the alien defendant in that case had to comport with Fifth Amendment due process standards, but also concluded that his trial in an Article III court complied with the requirement of due process *because* the defendant's support of the United States military's mission in Afghanistan constituted a substantial connection with the United States. Similarly, the Ninth Circuit has held that an alien with a temporary student visa has Fifth Amendment due process rights even when out of the country,

Ibrahim v. Dep't of Homeland Security, 669 F.3d 983, 997 (9th Cir. 2012), premising constitutional rights on a connection with the United States of far less significance than voluntary deployment in support of the U.S. military's mission overseas.

Third, the Court should grant Mr. Ali's petition because of the far-reaching nature of the Court of Appeals' decision. The United States' use of civilian contractors to support military operations overseas has grown exponentially in the last twenty years, including the United States' reliance on civilian contractors who are not United States citizens. The Court of Appeals' holdings that a lack of Article III jurisdiction supports an expansion of Article I court-martial jurisdiction, and that foreigners working for United States contractors and supporting the United States military mission overseas have no Fifth and Sixth Amendment rights, are issues of considerable importance and bind every court-martial convened by the U.S. military. Moreover, the limited appellate rights afforded to those convicted by court-martial may limit the availability of another appropriate case in which to decide the issues raised in Mr. Ali's petition even as other civilians are tried by court-martial.

I. THE DECISION BELOW AS TO THE SCOPE OF CONGRESS'S POWER TO SUBJECT CIVILIANS TO TRIAL BY COURT-MARTIAL IS CONTRARY TO SETTLED PRECEDENT FROM THIS COURT

A. This Court Has Rejected the Court of Appeals' Premise That Congress's Failure to Create Article III Jurisdiction Over a Class of Civilians Provides a Constitutionally-Sufficient Justification for Trying Such Civilians By Court-Martial

The decision below concluded that, based on his foreign citizenship, Mr. Ali was not entitled to any individual constitutional rights, and that he was entitled only to the statutory rights Congress provided for courts-martial. Pet.App. 31a-32a. That conclusion, even if it were correct, does not resolve the separate, prefatory question whether Congress has the power under Article I of the Constitution to create court-martial jurisdiction over civilians such as Mr. Ali.[10]

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[10] *See* Pet.App. 38a (Baker, C.J., concurring) ("I believe the essential and threshold question in this case is whether Congress possesses the authority to amend the Uniform Code of Military Justice (UCMJ) to include within its jurisdiction civilian contractors serving with or accompanying the United States Armed Forces."). Indeed, although the Court of Appeals characterized this Court's precedent rejecting court-martial jurisdiction over civilians as involving only vindication of individual rights under the Bill of Rights, this Court expressly held that its decisions also involved vindication of the

(Continued …)

The decision below acknowledged this Court's "repeated refusals to extend court-martial jurisdiction over civilians" as well as this Court's "repeated caution against the application of military jurisdiction over anyone other than forces serving in active duty." Pet.App. 31a. The decision below also acknowledged this Court's holding that the United States Constitution limits Congress's power to create court-martial jurisdiction to the "least possible power adequate." Pet.App. 35a (quoting *Toth*, 350 U.S. at 23).

Nevertheless, the Court of Appeals concluded that the exercise of court-martial jurisdiction over Mr. Ali was the "least possible power adequate" because Congress had elected to except host country nationals[11] from the Article III jurisdiction created by MEJA. The Court of Appeals concluded that the absence of federal district court jurisdiction under MEJA supplied sufficient necessity to allow subjection of Mr. Ali to trial by court-martial. Pet.App. 35a. The decision below relied on no other military necessity or exigency as providing a constitutional basis for trying Mr. Ali by court-martial. *Id.*

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separation of powers associated with Article III of the Constitution. *Toth*, 350 U.S. at 23; *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234, 249 (1960) ("We therefore hold that Mrs. Dial is protected by the specific provisions of Article III and the Fifth and Sixth Amendments and that her prosecution and conviction by court-martial are not constitutionally permissible.").

[11] Although he resides in Canada, Mr. Ali has dual Canadian-Iraqi citizenship. Pet.App. 4a.

The Court of Appeals' holding in this regard is directly contrary to this Court's precedent. Article III of the Constitution provides that "[t]he judicial Power shall extend to all Cases, in Law and Equity, arising under . . . the Laws of the United States . . . ." U.S. Const. art. III, § 2. Although the Constitution implicitly excepts "cases arising in the land and naval forces" from Article III's command, *see* U.S. Const. amend. V, this Court has repeatedly rejected efforts by Congress to extend court-martial jurisdiction to civilians. Indeed, "[i]n an unbroken line of decisions from 1866 to 1960, this Court interpreted the Constitution as conditioning the proper exercise of court-martial jurisdiction over an offense on one factor: the military status of the accused." *Solorio v. United States*, 483 U.S. 435, 439 (1987) (citing cases). That unbroken line of cases, in which this Court has rejected court-martial jurisdiction over full-fledged civilians such as Mr. Ali, continues to this day.

In a series of cases decided between 1955 and 1960, this Court struck down as unconstitutional UCMJ provisions purporting to create court-martial jurisdiction over discharged servicemembers, civilian dependents accompanying their military sponsors overseas, and civilians employed by the armed forces overseas. *See Toth*, 350 U.S. at 23; *Reid v. Covert*, 354 U.S. 1, 35-36 (1957) (plurality opinion); *Kinsella*, 361 U.S. at 249; *Grisham v. Hagan*, 361 U.S. 278, 280 (1960); *McElroy v. United States ex rel. Guagliardo*, 361 U.S. 281, 284 (1960). These cases are particularly instructive in that they consider, and reject, the very premise on which the Court of

Appeals relied in finding Article I power to subject Mr. Ali to trial by court-martial.

In *Toth*, the Court struck down UCMJ Article 3(a), which purported to confer jurisdiction on courts-martial to try ex-servicemembers, for offenses committed while on active duty overseas, if the offense was not triable in a United States civilian court. *Toth*, 350 U.S. at 13 n.2. This Court reviewed the historical and constitutional preference for civilian trials for civilian defendants, and noted the inferior procedural protections available in a trial by court-martial. *Id.* at 15-23. Based on that analysis, the Court held that "the scope of the constitutional power of Congress to authorize trial by court-martial presents another instance calling for limitation to '*the least possible power adequate to the end proposed*,'" the end proposed being the "mainten[ance of] discipline among troops in active service." *Id.* at 22-23; *see also McElroy*, 361 U.S. at 286 ("'[W]e believe that the *Toth* doctrine, that we must limit the coverage of Clause 14 to 'the least possible power adequate to the end proposed,' to be controlling." (internal citation omitted)).

In applying this test, the Court in *Toth* framed the issue not as whether it was necessary to punish offenders such as Toth, who was charged with murder, but whether there was an overriding need to try such civilians *by court-martial* when it was conceded that Congress instead could have created federal district court jurisdiction. *Toth*, 350 U.S. at 21. This Court then held that because Congress *could have* created Article III jurisdiction over Toth's offense, Congress's failure to do so could not supply

the military necessity required to expand the constitutional reach of courts-martial to civilians such as Toth:

> There can be no valid argument, therefore, that civilian ex-servicemen must be tried by court-martial or not tried at all. If that is so it is only because Congress has not seen fit to subject them to trial in federal district courts.

Id. Because there was no cognizable military necessity for trying ex-servicemembers by court-martial, as opposed to trial in an Article III court, this Court held in *Toth* that discharged servicemembers, "like other civilians, are entitled to have the benefit of safeguards afforded those tried in the regular courts authorized by Article III of the Constitution." *Id.* at 23.

Five years later, the Court returned to this theme in *Kinsella*, holding that the Government's available recourse for misconduct by civilian dependents located overseas was creation of an Article III forum, and that the absence of federal district court jurisdiction could not justify trying such civilians by court-martial. *Kinsella*, 361 U.S. at 246; *see also McElroy*, 361 U.S. at 286-87 (solution for lack of jurisdiction over civilian employees stationed overseas was to create Article III jurisdiction in a federal district court or to induct such employees into the uniformed services).

The Court of Appeals' decision here, however, concluded that the exercise of court-martial

jurisdiction over Mr. Ali was the "least possible power adequate"[12] based solely on the argument expressly rejected by this Court – that Congress's failure to create federal district court jurisdiction provides the military necessity required to expand court-martial jurisdiction to reach a full-fledged civilian such as Mr. Ali.[13] This Court has squarely rejected this premise as a basis for constitutional adjudication, holding that the absence of Article III jurisdiction over the offenses committed by the civilians in *Toth*, *Reid*, *Kinsella*, *Grisham*, and *McElroy* did not support the exercise of court-martial jurisdiction. Rather, an absence of Article III jurisdiction simply meant that these civilians were not subject to prosecution by the United States for their alleged misconduct, which ranged from murder[14] to larceny.[15]

Moreover, even if the Court of Appeals' reliance on the absence of Article III jurisdiction had not been repudiated in *Toth*, 350 U.S. at 21, the decision below also conflicts with this Court's decision in *Solorio*, 483 U.S. at 439, where the Court held that amenability to trial by court-martial is solely a question of status and is not dependent on the

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[12] Pet.App. 35a (quoting *Toth*, 350 U.S. at 23).

[13] Pet.App. 35a ("[T]he problem this argument presents is that no Article III alternative exists under the facts of this case" because Congress had not created Article III jurisdiction under MEJA).

[14] *Toth*, 350 U.S. at 13; *Reid*, 354 U.S. at 3; *Kinsella*, 361 U.S. at 235-36; *Grisham*, 361 U.S. at 279.

[15] *McElroy*, 361 U.S. at 282.

nature of the offense charged.[16] The decision below would create a jurisdictional hodgepodge whereby a civilian such as Mr. Ali is amenable to trial by court-martial for offenses for which no Article III jurisdiction exists, but not amenable to trial by court-martial with respect to conduct subject to extraterritorial federal criminal statutes, or if Mr. Ali's conduct occurred on an overseas military base falling within the special maritime and territorial jurisdiction of the United States.[17] Thus, the decision below not only relies on an analysis of constitutional necessity that was specifically precluded by *Toth*, but also requires a piecemeal approach to court-martial jurisdiction rejected by this Court in *Solorio*.

B. This Case is an Excellent Vehicle for Considering the First Question Presented

In the present case, the question whether Congress's failure to create Article III jurisdiction can serve as a jurisdictional basis for court-martialing civilians is isolated and involves no alternative theories of military necessity. This

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[16] *Solorio*, 483 U.S. at 439; *see also Kinsella*, 361 U.S. at 240-41 ("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.'").

[17] *See* 18 U.S.C. § 7; *see also United States v. Passaro*, 577 F.3d 207, 214-15 (4th Cir. 2009) (misconduct occurring in 25-acre fortress in Afghanistan, surrounded by a mud wall, occurred within the special maritime and territorial jurisdiction of the United States).

makes the present case an exceptional vehicle for resolving this question.

Cases involving the court-martial of civilians deployed overseas with American military forces could, in some circumstances, involve a dispute as to whether it was feasible from an operational and logistical standpoint to return the civilian to the United States for prosecution in an Article III court. In cases involving a contention that transport of the civilian to the United States would have been difficult from an operational standpoint, this Court might find itself ill-equipped to assess the impact on the military mission of requiring an Article III trial. *See, e.g.*, *Winter v. Nat'l Resources Def. Council, Inc.*, 555 U.S. 7, 24, 2008); *Rostker v. Goldberg*, 453 U.S. 57, 65-66 (1981); *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973).

In the present case, however, the Court of Appeals rested its conclusion that allowing court-martial jurisdiction over Mr. Ali was the "least possible power adequate to the end proposed"[18] solely on the grounds that Congress had elected to except Mr. Ali from the reach of MEJA. Pet.App. 35a. The decision below does not base its holding on any operational or logistical difficulties in returning Mr. Ali to the United States for an Article III trial, and the United States made no argument to this effect. *Id.* As a result, this case does not involve the potentially more difficult question whether court-martial jurisdiction over civilians is permissible when operational exigencies would have made it

[18] *McElroy*, 361 U.S. at 286; *Toth*, 350 U.S. at 23.

difficult or impossible to bring the civilian to the United States for trial in an Article III court.

The United States' decision not to argue operational necessity was compelled by the facts of Mr. Ali's case. Mr. Ali was placed in pretrial confinement on February 29, 2008 at Victory Base Camp, a cluster of camps (including Camp Victory and Camp Liberty) surrounding Baghdad International Airport, and was tried by court-martial on June 22, 2008. Pet.App. 75a-76a. During the four months Mr. Ali was in pretrial confinement awaiting trial, the United States investigated and arrested another civilian contractor at Camp Liberty for possession of child pornography (April 2008), transported him to Kuwait where he was then flown by commercial flight to Virginia (April 30, 2008), charged him in federal district court (May 7, 2008), and proceeded with an initial federal district court appearance (May 29, 2008).[19]

Similarly, three months after Mr. Ali's court-martial, the Government apprehended three civilian contractors for offenses taking place in or around Al-Asad Air Base in Iraq. *United States v. Broussard*, No. 08-cr-0367, 2010 WL 582778, at *1 (W.D. La. Feb. 17, 2010). Like Mr. Ali, these contractors were brought to Victory Base Camp and placed in pretrial confinement. *Id.* Unlike Mr. Ali, however, these defendants were transported a few weeks later to the United States where they were tried under MEJA in an Article III court where they had all of the

[19] Statement of Facts at 1-3, *United States v. Waltrip*, No. 1:08-CR-283, Dkt. 19 (E.D. Va. July 22, 2008).

procedural rights afforded civilian defendants in civilian court. *Id.* at *1-2.

Indeed, according to Defense Department statistics, as of June 30, 2010, the United States had prosecuted or charged sixteen civilian contractors (and two discharged servicemembers) for offenses occurring while deployed in Iraq or Afghanistan.[20] Other than Mr. Ali, every one of those civilians was charged and/or prosecuted in federal district court, where they enjoyed all the procedural protections associated with an Article III criminal proceeding.[21]

Thus, the United States has regularly resorted to Article III courts for prosecution of misconduct in Iraq and Afghanistan by civilians, both American citizens and foreigners,[22] and transported civilians from Victory Base Camp, Iraq, to the United States for Article III trials at the same time Mr. Ali was being tried by court-martial at that same location. Therefore, this case does not involve any consideration of issues of military necessity or the effect on military operations associated with transporting Mr. Ali to the United States for trial. Consequently, the first question presented is a pure, isolated, and dispositive question of law as to whether the necessity required by this Court's

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[20] U.S. Dep't of Def., *MEJA Statistics as of June 30, 2010*, http://www.dod.gov/dodgc/images/meja_statistics.pdf.

[21] *Id.*

[22] *See United States v. Brehm*, 691 F.3d 547, 549 (4th Cir. 2012) (civilian contractor who was citizen of South Africa transported by United States from Afghanistan to Virginia for trial in federal district court under MEJA).

precedents for the trial of civilians by court-martial is satisfied by Congress's decision not to provide an Article III court with jurisdiction.

II. THE COURT OF APPEALS' DECISION THAT MR. ALI HAD NO FIFTH AND SIXTH AMENDMENT RIGHTS IS CONTRARY TO THIS COURT'S PRECEDENT AND CREATES A CIRCUIT CONFLICT

The Court of Appeals rested its decision that Mr. Ali, as a full-fledged civilian, was triable by court-martial largely on its conclusion that Mr. Ali had no Fifth and Sixth Amendment rights to assert in connection with a prosecution by the United States:

> Neither Ali's brief pre-deployment training at Fort Benning, Georgia, nor his employment with a United States corporation outside the United States constitutes a "substantial connection" with the United States as envisioned in *Verdugo-Urquidez*. Ultimately, we are unwilling to extend constitutional protections granted by the Fifth and Sixth Amendments to a noncitizen who is neither present within the sovereign territory of the United States nor has established any substantial connections to the United States.

Pet.App. 30a-31a.

As noted with respect to the first question presented, Congress's decision not to create federal

court jurisdiction over Mr. Ali's offense would not provide constitutional justification for trying Mr. Ali by court-martial *even if* Mr. Ali had no Fifth and Sixth Amendment rights. That said, the trial of Mr. Ali by court-martial was unconstitutional for the additional reason that under this Court's precedent Mr. Ali *does* have Fifth and Sixth Amendment rights that preclude trial by court-martial. The decision below's conclusion to the contrary also conflicts with recent Fourth Circuit precedent recognizing that a foreigner serving as a civilian contractor in support of United States military forces abroad is entitled to Fifth Amendment Due Process rights in connection with a prosecution by the United States.

A. The Court of Appeals Ignored the *Boumediene* Factors in Its Decision

The majority decision below ignored the test for extraterritorial application of constitutional rights set forth in *Boumediene v. Bush*, 553 U.S. 723 (2008). Instead, the majority applied a formalistic test to hold that Mr. Ali lacked any constitutional rights to assert with respect to his trial by court-martial. The majority's decision was based on Mr. Ali's foreign citizenship and the majority's questionable conclusion that Mr. Ali, who deployed to Iraq to support the United States military's mission in that country, lacked a substantial connection with the United States. Pet.App. 30a-31a (citing *United States v. Verdugo-Urquidez*, 494 U.S. 259, 271

(1990)). The decision below cannot be squared with the practical test required by *Boumediene*.[23]

As this Court articulated in *Boumediene*, the application of constitutional rights abroad is not an inflexible concept. Rather, it is a flexible standard driven by "practical considerations," rather than strict concepts of citizenship and sovereignty. *Boumediene*, 553 U.S. at 761-63. Much like this Court's criticism of the government's position in *Boumediene*, the decision below overlooks the common thread of the Court's extra-territorial rights jurisprudence, that "questions of extraterritoriality turn on objective factors and practical concerns, not formalism." *Boumediene*, 553 U.S. at 764.

This Court's decision in *Boumediene* was substantially informed by the Court's prior decision in *Reid*, where the Court held that dependents of military personnel stationed overseas were entitled to constitutional rights that were not vindicated in a trial by court-martial. *Reid*, 354 U.S. at 39 (plurality

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[23] In addition, as Chief Judge Baker noted in his concurrence below, *Verdugo-Urquidez* is not dispositive of this case because that case considered extraterritorial application of the Fourth Amendment, not the Fifth and Sixth Amendment rights at issue here. *See* Pet.App. 55a-56a (Baker, C.J. concurring); *see also Verdugo-Urquidez*, 494 U.S. at 264-66, 271. As this Court recognized in *Verdugo-Urquidez* and *Reid v. Covert*, this distinction is relevant because the text of the Fifth and Sixth Amendments commands a broader application of the rights set out therein as compared to the narrower application commanded by the text of the Fourth Amendment. *See Verdugo-Urquidez*, 494 U.S. at 264; *Reid*, 354 U.S. at 7-9; *see also Duncan v. Louisiana*, 391 U.S. 145, 155 (1968) (noting fundamental character of right to trial by jury).

opinion); *id.* at 74-75 (Harlan, J., concurring). In *Boumediene*, this Court noted that the plurality and concurring opinions in *Reid v. Covert* found the rights to presentment and indictment applied to the petitioners in *Reid v. Covert* "not [solely] on the basis of the citizenship of the petitioners, but [also] on practical considerations" that made application of the Fifth and Sixth Amendment guarantees feasible. *Boumediene*, 553 U.S. at 761-762 (citing *Reid*, 354 U.S. at 10-12 (plurality opinion); *id.* at 64 (Frankfurter, J., concurring); *id.* at 75 (Harlan, J., concurring)).[24]

Indeed, this Court in *Boumediene* described Justice Harlan's concurring opinion in *Reid* as establishing that "whether a constitutional provision has extraterritorial effect depends upon the 'particular circumstances, the practical necessities, and the possible alternatives which Congress had before it' and, in particular, whether judicial enforcement of the provision would be 'impracticable and anomalous.'" *Boumediene*, 553 U.S. at 759-60 (quoting *Reid*, 354 U.S. at 74-75 (Harlan, J., concurring)).[25]

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[24] *See also Boumediene*, 553 U.S. at 759-60 (noting that Justice Kennedy's decisive opinion in *Verdugo-Urquidez* applied a similar "impracticable and anomalous" extraterritoriality test, even in the Fourth Amendment context).

[25] *See also id.*, 553 U.S. at 760 (reiterating that "practical considerations, related not to the petitioners' citizenship but to the place of their confinement and trial, were relevant to each Member of the *Reid* majority. And to Justices Harlan and Frankfurter (whose votes were necessary to the Court's

(Continued …)

Based on its survey of Court precedent, and in particular relying on *Reid* and *Johnson v. Eisentrager*, 339 U.S. 763 (1950), this Court in *Boumediene* identified a non-exhaustive list of factors to determine the extent of the extraterritorial reach of constitutional rights. *See Boumediene*, 553 U.S. at 766.[26] The three factors the Court considered in *Boumediene* were "(1) the citizenship and status of the detainee and the adequacy of the process through which that status determination was made; (2) the nature of the sites where apprehension and then detention took place; and (3) the practical obstacles inherent in resolving the prisoner's entitlement to the writ." *Id.* at 766-69.[27]

The majority opinion below touches on only one of the factors identified in *Boumediene* – Mr. Ali's foreign citizenship. Taken together, however, the *Boumediene* factors preclude the Court of Appeals' conclusion that Mr. Ali had no constitutional rights to assert at his court-martial.

First, the decision below essentially began and ended its inquiry of Mr. Ali's citizenship and status

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disposition) these considerations were the decisive factors in the case.")

[26] *See also id.*, 553 U.S. at 766 (noting that the Court in *Eisentrager* found that "the alien, to whom the United States has been traditionally hospitable, has been accorded a generous and ascending scale of rights as he increases his identity with our society" (citing *Eisentrager*, 339 U.S. at 770)).

[27] *Boumediene* does not require all the considerations to weigh in favor of extraterritorial application. *See Boumediene*, 553 U.S. at 734 (noting that each petitioner had been found to be an alien enemy combatant).

by noting that Mr. Ali was neither a citizen nor a resident of the United States. However, Mr. Ali's status as an alien who is not only friendly to the United States but who was actively assisting the United States' military's mission, distinguishes Mr. Ali sufficiently from the petitioners in *Eisentrager*, *Boumediene* and all of the other detainee cases to come before the Court in the last decade. As the Court stated in *Eisentrager*, "the alien, to whom the United States has been traditionally hospitable, has been accorded a generous and ascending scale of rights as he increases his identity with our society." *Eisentrager*, 339 U.S. at 770, 94 L. Ed. 1255, 70 S. Ct. 936 (1950); *see also Boumediene*, 553 U.S. at 766-67. To quote Chief Judge Baker's concurrence below, "service with the Armed Forces of the United States in the uniform of the United States in sustained combat is a rather substantial connection to the United States." Pet.App. 56a.

Indeed, Mr. Ali's connection with the United States and its interests hardly could have been more distinct. The record below reflects that Mr. Ali put his personal safety at risk by accompanying United States military personnel on their missions, and as a linguist was a particularly high-value target for enemies of the United States. Pet.App. 17a-18a ("Ali and the soldiers of 1st Squad faced daily threats from enemy insurgents . . . . The squad was routinely attacked with improvised explosive devices, vehicle-borne explosive devices, small arms fire, precision small arms fire, and indirect fire. As an interpreter, Ali would have been specifically targeted by the enemy in an attempt to inhibit United States Army communications capabilities."); *see also* Pet.App. 48a

(Baker, C.J., concurring) ("As the military judge noted, Appellant's duties were crucial to the success of the United States mission. Appellant was 'the direct link between the squad and the Iraqi Police officers being trained. Without an interpreter, the squad could not function and could not accomplish its mission.'").

Second, the other two factors identified in *Boumediene* – the place of apprehension and detention and practical obstacles to making constitutional rights available – pay heed to the reality that, in some circumstances, there are practical and/or logistical obstacles to applying constitutional rights extraterritorially.[28] If anything, these factors favor according Mr. Ali with Fifth and Sixth Amendment rights in connection with a prosecution by the United States.

Consideration of the practical barrier to extraterritorial application of constitutional rights focuses on the place of detention, which for Mr. Ali was the Victory Base Complex, Iraq. *See Boumediene*, 553 U.S. at 768 (assessing whether there were practical obstacles to allowing writ of

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[28] Here, the United States was an occupying power in June 2008 with control of the Victory Base Complex, the location where Mr. Ali was detained and tried. *See* United Nations Security Council, Resolution 1483 (2003), S/RES/1483(2003), May 22, 2003, p. 2, available at http://www.un.org/Docs/sc/unsc_resolutions.html; *cf. United States ex rel. Krueger v. Kinsella*, 137 F. Supp. 806, 807 (S.D. W. Va. 1956) (noting that the petitioner in *Reid v. Covert*, Mrs. Smith, was tried in Tokyo, Japan on Jan. 10, 1953, after the occupation of Japan ended), *rev'd*, 354 U.S. 1 (1957).

habeas corpus at Guantanamo Bay, Cuba).[29] As Mr. Ali has noted in connection with the first question presented, the United States has not asserted that there were any practical barriers to transporting Mr. Ali to the United States for a trial. Indeed, at the very same time that Mr. Ali was being held and tried at Victory Base Camp, the United States transported civilian contractor employees from the same cluster of camps to the United States so that they could be charged and tried under MEJA in a federal district court, where they would enjoy all of the constitutional and statutory protections associated with an Article III trial. *See supra* notes 19-22 and accompanying text.

Thus, the United States' demonstrated conduct shows that there is no practical obstacle to affording a civilian such as Mr. Ali the constitutional and statutory protections ordinarily afforded civilians prosecuted by the United States. The only obstacle to bringing Mr. Ali to the United States for an Article III trial was that Congress elected to exclude persons such as Mr. Ali from the thousands of civilian contractors covered by MEJA, and this Court has squarely held that such policy decisions by Congress cannot expand the constitutional reach of court-martial jurisdiction. *Toth*, 350 U.S. at 22-23.

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[29] Lakhdar Boumediene was arrested in Bosnia, *Boumediene v. Bush*, 579 F. Supp. 2d 191, 193 (D.D.C. 2008), *rev'd sub nom. Bensayah v. Obama*, 610 F.3d 718 (D.C. Cir. 2010), yet the Court's analysis focused solely on practical obstacles to allowing habeas corpus rights at Guantanamo Bay, Cuba.

When the United States military exercised criminal jurisdiction over a full-fledged civilian working alongside United States military forces in Iraq, and held and tried him at a United States military base in Iraq from which travel to the United States was not only possible but commonplace, the Constitution was, as in *Boumediene*, in "full effect."[30] Mr. Ali was entitled to the same Fifth and Sixth Amendment rights as any other civilian subjected to trial in a United States criminal proceeding. Review by this Court is appropriate because the lower court failed to apply the *Boumediene* considerations, improperly denying Mr. Ali his Fifth and Sixth Amendment rights to presentment, indictment, and trial by jury.

B. The Court of Appeals' Rejection of Constitutional Rights Creates a Circuit Split Appropriate for Resolution by this Court

The Court of Appeals' holding that Mr. Ali is not entitled to Fifth and Sixth Amendment rights in connection with a criminal prosecution by the United States conflicts with a recent decision by the Fourth Circuit in which that court recognized and considered a Fifth Amendment due process challenge brought by a foreign civilian contractor supporting the United States military's mission in Afghanistan. *See United States v. Brehm*, 691 F.3d 547 (4th Cir. 2012). The decision below is also inconsistent with the Fourth Circuit's analysis in *Brehm* as to whether

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[30] *See Boumediene*, 553 U.S. at 770 (holding that the constitution has "full effect at Guantanamo Bay.")

a civilian contractor supporting the United States military overseas has a substantial connection with the United States.

In *Brehm*, the defendant, a South African national employed by a United States defense contractor in Afghanistan, raised due process challenges to the United States' authority to try him in federal district court under MEJA for misconduct occurring in Afghanistan. *Brehm*, 691 F.3d at 550-51. While the CAAF held that Mr. Ali's status as a foreigner supporting the United States military in Iraq did not entitle him to any constitutional rights (Pet.App. 30a-31a), the Fourth Circuit did not reject Brehm's constitutional challenge on the grounds that Brehm had no Fifth Amendment rights. Instead, and contrary to the Court of Appeals' approach in the present case, the Fourth Circuit conducted a full due process analysis in reaching its ultimate conclusion that a trial of Brehm in federal district court comported with the due process guarantees of the Fifth Amendment. *Brehm*, 691 F.3d at 552-53. Thus, while the Fourth Circuit afforded Fifth Amendment rights to a foreign civilian contractor who supported the United States military mission overseas, the decision below categorically held that Mr. Ali had no such rights to assert.

The manner in which the Fourth Circuit considered Brehm's constitutional challenge punctuates the analytical conflict between *Brehm* and the decision below. Brehm asserted that it violated his due process rights under the Fifth Amendment for the United States to try him in federal district court when Brehm was a foreigner,

the victim of Brehm's assault was a foreigner, and the conduct occurred in a foreign country. *Id.* at 549. The Fourth Circuit rejected Brehm's due process challenge specifically because of the substantial connection he had to the United States by virtue of his employment by a United States contractor in support of the United States military's mission in Afghanistan. *Id.* at 52-53. By contrast, the CAAF rejected the notion that Mr. Ali had any Fifth or Sixth Amendment rights to assert based on its conclusion that a foreigner employed by a United States contractor to support the United States military's mission overseas lacks any substantial connection to the United States. Pet.App. 30a-31a.

Similarly, the Ninth Circuit held that an alien possessing a temporary student visa had Fifth Amendment due process rights, even when she was voluntarily outside the country, because temporary status as a student was a substantial connection with the United States. *Ibrahim*, 669 F.3d at 997. The Ninth Circuit's recognition of Ibrahim's connection with the United States, for purposes of acquiring constitutional rights, stands in stark contrast to the CAAF's conclusion that participating in the defense of this country overseas is an insubstantial connection to the United States and less worthy of constitutional protections. Pet.App. 30a. Indeed, as Chief Judge Baker noted in his concurrence below, the majority's approach logically would deny constitutional rights to the thousands of foreign nationals who have enlisted in the U.S. armed forces and been deployed overseas, leaving them subject to court-martial but disentitled from

any right that their court-martial comply with constitutional requirements. Pet.App. 57a.

III. REVIEW IS NECESSARY BECAUSE THIS CASE PRESENTS QUESTIONS OF NATIONAL IMPORTANCE

The extent to which the United States may subject civilian contractors to trial by court-martial, and need not provide them any constitutional protections at that trial, is an issue of national importance given the increased reliance on civilian contractors by deployed military forces. While a mere 9,200 civilian contractor personnel supported U.S. military operations in Iraq during the 1991 Gulf War, by 2006 the United States Army alone was using nearly 60,000 civilian contractor employees to support its operations in Southwest Asia.[31] As of March 2011, there were approximately 154,000 civilian contractor personnel supporting Defense Department operations in Iraq and Afghanistan, and about 55,000 of those civilian contractors were local nationals not covered by MEJA.[32]

Since the founding of this country, the armed forces typically have addressed misconduct by

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[31] U.S. Gov't Accountability Office, GAO-07-145, *Report to Congressional Committees, High-Level DOD Action Needed to Address Longstanding Problems with Management and Oversight of Contractors Supporting Deployed Forces* 1 (2006), http://www.gao.gov/products/GAO-07-145.

[32] Moshe Schwartz & Joyprada Swain, Cong. Research Serv., *Department of Defense Contractors in Afghanistan and Iraq: Background and Analysis* 11, 17 (May 13, 2011).

civilians in their ranks by non-punitive measures such as expulsion from the base camp or directing that the civilian cease working under government contracts,[33] or by turning misbehaving civilian personnel over to local authorities for prosecution. The decision below, however, would subject the tens of thousands of host nation civilian contractors serving in Iraq and Afghanistan (but not the tens of thousands of civilian contractors who are U.S. citizens or citizens of third-party countries) to the jurisdiction of courts-martial, simply because Congress has elected not to include these civilians within MEJA's reach. Indeed, because CAAF's jurisdiction is not limited to a geographic boundary, the decision below is binding on all courts-martial conducted by U.S. forces worldwide.

The limited availability of appellate review of courts-martial also favors deciding the questions presented by this petition now, in this case. Unlike defendants in an Article III proceeding, a person convicted by court-martial is not entitled to appellate review by a court unless the approved sentence includes a punitive discharge from the service or confinement for one year or more.[34] Because civilian

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[33] *See* Def. Fed. Acquisition Regs. § 252.225-7040(h)(1) (June 2006); 1 William Winthrop, *Military Law and Precedents* 98-99 (reprint 2000); Dig. Op. Judge Advocates General of the Army 151 (1912) ("*Held* that retainers to the camp, such as officers' servants and the like, as well as camp followers generally, have rarely been subjected to trial by court-martial in our service, but they have generally been dismissed from employment for breaches of discipline by them.").

[34] 10 U.S.C. § 866(b).

contractors are not *in* the service, they cannot be punitively discharged, and therefore are entitled to appellate review by a court only if sentenced to confinement for one year or more. Moreover, for court-martial accuseds sentenced at trial to confinement for one year or more, the military officer convening the court-martial may thwart appellate review by approving a quantum of confinement that is less than one year.[35]

Mr. Ali, having been sentenced to confinement for five months, and released from confinement on the date of his trial, had no right to appellate review by a court. Mr. Ali obtained judicial review only as a matter of Executive grace, as the Judge Advocate General of the Army took the extraordinary step of specially referring Mr. Ali's case for review by the military courts so that the jurisdictional issues implicated by this case could be resolved.[36] With the Court of Appeals having ruled that civilians serving in the field may be tried by court-martial if they are not subject to MEJA and, when so tried, have no constitutional rights, the likelihood of future certification by a service Judge Advocate General seems remote. As a result, the decision below opens the door to the court-martial of the tens of thousands of host-nation civilian contractors supporting military forces in the field without the protection of

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[35] *Id.*; *cf. Kinsella*, 361 U.S. at 244-45 & n.10 (noting that premising court-martial jurisdiction on the seriousness of the offense charged created the risk that Article III rights would be subverted in the guise of mercy).

[36] *See* 10 U.S.C. § 869; *see also* Pet.App. 9a (noting referral of case to military appellate court by Judge Advocate General).

the Bill of Rights, but the opportunity for review by this Court going forward may be limited by restrictions on judicial review of courts-martial.

CONCLUSION

For all these reasons, this Court should grant the Petition on the questions presented.

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