[ORAL ARGUMENT SCHEDULED FOR DECEMBER 12, 2012]

No. 12-5038

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

EARLE A. PARTINGTON, Appellant, v. JAMES W. HOUCK, Vice Admiral, JAGC, USN, *et al.*, Appellees.	)

MOTION FOR LEAVE TO SUBMIT POST-ARGUMENT MEMORANDUM

Appellant Earle A. Partington ("Partington") respectfully requests leave to submit a post-argument memorandum regarding the meaning of "other lawyers" in Rules of Court Martial ("R.C.M.") 109(a). As grounds for this request, Partington states as follows. On December 12, 2012, oral argument was held in this matter for which Partington himself presented oral argument on behalf of himself as appellant. During the hearing, there was much discussion regarding the meaning of the words "other lawyers" contained in RCM 109(a). In response, Partington submits that this motion should be granted in order to further explain the appellant's position that the words "other lawyers" do not include civilian

attorneys.

This motion is made pursuant to Circuit Rule 27 and Rule 27 of the Federal Rules of Appellate and is based upon the attached memorandum and the record and file in this appeal.

DATED: December 18, 2012

Respectfully submitted,
EARLE A. PARTINGTON,
Plaintiff-Appellant

By his Attorney,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18th day of December, 2012, the foregoing Appellant's Motion for Leave to Submit Post-Argument Memorandum was served via this Court's Electronic Case Filing System.

/s/ JEFFREY A. DENNER
Jeffrey A. Denner

No. 12-5038

UNITED STATES COURT OF APPEALS
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EARLE A. PARTINGTON, Appellant, v. JAMES W. HOUCK, Vice Admiral, JAGC, USN, *et al.*, Appellees.	)

APPELLANT'S MEMORANDUM REGARDING THE MEANING OF THE WORDS "OTHER LAWYERS" IN R.C.M. 109(a)

At oral argument in this court on December 12, 2012, two members of the panel asked why the words "other lawyers" in Rules of Court Martial ("R.C.M.") 109(a) do not include civilian defense attorneys as seemly clearly encompassed within that term. Apparently Appellant, Earle A. Partington ("Partington") did not make his position clear either in his briefs or argument. Thus, this memorandum.

There is no dispute that there must be an enabling statute for the Navy to exercise disciplinary jurisdiction over civilian defense attorneys. The district court found that source to be Art. 36(a) of the Uniform Code of Military Justice (UCMJ) (10 U.S.C. §836(a)). The Navy defendants have adopted the district court position on appeal.

UCMJ Art. 36(a) provides:

> **Art. 36 President may prescribe rules.**
> (a) Pretrial, trial, and post-trial proceedings, including modes of proof, *for cases arising under this chapter* [the UCMJ] *in courts-martial, military commissions and other military tribunals*, and procedures for courts of inquiry, may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States District Courts, but which may not be contrary to or inconsistent with this chapter [emphasis added].

What is important in UMCJ Art. 36(a) are the limitations *express* and *implied* on the executive's rule making power granted by that statute. The first limitation is the words "for cases arising under this chapter [the UCMJ] in courts-martial, military commissions, and other military tribunals, and procedures for courts of inquiry…." Was the proceeding against Partington a military tribunal as defined in Art. 36(a)? It clearly was not a court-martial, military commission, or a court of inquiry. The term "military tribunal" has no hard and fast definition, but two examples will give the court the idea of what is meant by this term.

First, during the occupation of Japan after World War II, General McArthur set up special military courts for the trial of non-Japanese civilians, including Americans, in Japan who were unaffiliated with the military. *See United States v. Schultz*, 1 U.S.C.M.A. 512, 4 C.M.R. 104 (1952). The court noted that the party claiming jurisdiction over a civilian has the burden of establishing that jurisdiction

was *clearly* conferred by federal statute. 1 U.S.C.M.A. at 516, 4 C.M.R. at 108. Because the civilian in that case did not come within any subsection under UCMJ Art. 2(a), he was not subject to court-martial jurisdiction, but could be tried by a military tribunal under the law of war. 1 U.S.C.M.A. at 530, 4 C.M.R. at 122.

Second, following the Japanese attack on Pearl Harbor in 1941, the military supplanted the civil courts in Hawaii with military tribunals. These tribunals were struck down by the Supreme Court with a comment noting the Founding Fathers' abhorrence of the military rule over civilian rule. *Duncan v. Kahanamoku*, 327 U.S. 304, 320 (1946). Attorney discipline cases do not fit into any of these types of cases. Disciplinary cases are not heard before military tribunals as the term is used. Further, disciplinary cases are *sui generis* quasi-criminal proceedings. *In re Ruffalo*, 390 U.S. 544, 551 (1968). The Navy defendants in the instant case have made no effort to carry their burden to establish jurisdiction.

The second limitation is the restriction in UCMJ Art. 2(a) (10 U.S.C. §802(a)) as to the persons who are subject to the UCMJ. Art. 2(a) restricts application of the UCMJ to twelve very limited classes of persons,[1] not one of

[1] UCMJ Art. 2(a) provides:

> (a) The following persons are subject to this chapter:
>
> (1) Members of a regular component of the armed forces, including those awaiting discharge after expiration of their terms of enlistment; volunteers from the time of their muster or acceptance into the armed forces; inductees from the time of

their actual induction into the armed forces; and other persons lawfully called or ordered into, or to duty in or for training in the armed forces, from the dates when they are required by the terms of the call or order to obey it.
(2) Cadets, aviation cadets, and midshipman.
(3) Members of a reserve component while on inactive-duty training, but in the case of members of the Army National Guard of the United States or the Air National Guard of the United States only when in Federal Service.
(4) Retired members of a regular component of the armed forces who are entitled to pay.
(5) Retired members of a reserve component who are receiving hospitalization from an armed force.
(6) Members of the Fleet Reserve and Fleet Marine Corps Reserve.
(7) Persons in custody of the armed forces serving a sentence imposed by a court-martial.
(8) Members of the National Oceanic and Atmospheric Administration, Public Health Service, and other organizations, when assigned to and serving with the armed forces.
(9) Prisoners of war in custody of the armed forces.
(10) In time of war, persons serving with or accompanying an armed force in the field.
(11) Subject to any treaty or agreement which the United States is or may be a party to any accepted rule of international law, persons serving with, employed by, or accompanying the armed forces outside the United States, the Commonwealth of Puerto Rico, Guam, and the Virgin Islands.
(12) Subject to any treaty or agreement to which the United States is or may be a party to any accepted rule of international law, persons within an area leased by or otherwise reserved or acquired for use of the United States which is under the control of the Secretary concerned and which is outside the United States, the Commonwealth of Puerto Rico, Guam, and the Virgin Islands.

which includes, by any construction, civilian defense attorneys who appear in naval service or other courts-martial within the United States. *See United States v. Schultz, supra*.

Then, where is the statutory source for the disciplinary authority claimed by the Navy defendants? The truth is that such statutory authority just does *not* exist because neither Art. 36(a) nor any other statute grants it.

Perhaps the most important point to be made here is that R.C.M. 109(a) is *not* an enabling statute, but a rule adopted by the executive to implement the rule making power granted by Art. 36(a). *No rule can exceed the express and implied limitations of the power granted in Art. 36(a),* but that is, in effect, what the Navy defendants are impliedly arguing. The Navy defendants have offered no real argument to support their position.

Thus, in interpreting as narrowly as possible in favor of Partington as attorney disciplinary proceedings are quasi-criminal,[2] R.C.M. 109(a) must be interpreted to limit the meaning of "other lawyers" to persons subject to the UCMJ in proceedings under the UCMJ as expressly stated, in Arts. 2(a) & 36(a). Clearly, a rule may not "be accorded precedence" over a statute that expressly limits the scope of the rule. *See United States v. Seay*, 1 M.J. 201, 202 (C.M.A.1975).

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[2] Penal statutes and regulations are strictly construed in favor of an accused. *United States v. Baker*, 18 U.S.C.M.A. 504, 507, 40 C.M.R. 216, 219 (1969).

Under this reasonable and limited interpretation, the term "other lawyers" must be limited to persons subject to the UCMJ other than designated judge advocates under UCMJ Art. 27 (10 U.S.C. §827). The only category of persons left within the classes forth in Art. 2(a) are lawyers in the armed forces who are not judge advocates. Civilian defense attorneys cannot possibly be included because the limitations within Arts. 2(a) & 36(a) prevent it. Any other definition gives the Navy unlimited and clearly unintended power over civilians, something the Founding Fathers would have found repugnant to the principle of civilian control over the military. Such a construction is also a recipe for abuse of the type that is so clear in the instant case.

CONCLUSION

For the foregoing reasons, Partington respectfully requests this court find that the words "other lawyers" referenced in RCM 109(a) do not include civilian defense attorneys and therefore civilian defense counsel are not subject to discipline by the Navy.

DATED: December 18, 2012

Respectfully submitted,
EARLE A. PARTINGTON,
Plaintiff-Appellant

By his Attorney,

/s/ JEFFREY A. DENNER
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18th day of December, 2012, the foregoing Appellant's Memorandum Regarding the Meaning of the Words "Other Lawyers" in R.C.M. 109(a) was served via this Court's Electronic Case Filing System.

/s/ JEFFREY A. DENNER
Jeffrey A. Denner