

US DISTRICT COURT  
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**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

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Clerk, U.S. District and  
Bankruptcy Courts

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DAVID CHARLES BREDA JR.  
11604 Cross Spring Drive  
Pearland, Texas 17584  
*currently confined by the United States  
at Al Asad Airfield, Iraq*  
Petitioner,

v.

\_\_\_\_\_  
DR. ROBERT M. GATES  
United States Secretary of Defense  
1000 Defense Pentagon  
Washington, D.C. 20301-1000,  
Respondent.

Case: 1:09-cv-00210  
Assigned To : Huvelle, Ellen S.  
Assign. Date : 2/4/2009  
Description: Habeas Corpus/2255

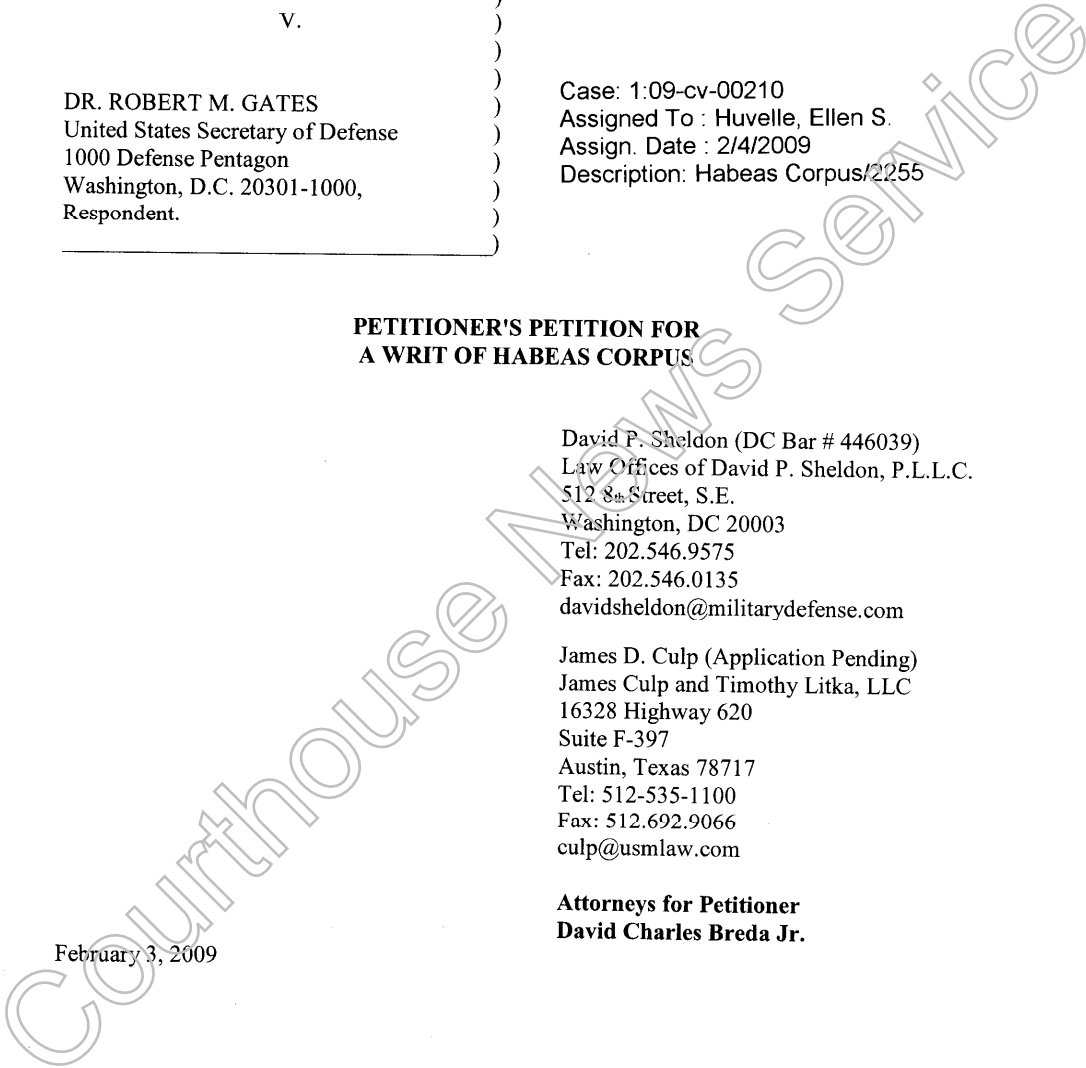
**PETITIONER'S PETITION FOR  
A WRIT OF HABEAS CORPUS**

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**Attorneys for Petitioner  
David Charles Breda Jr.**

February 3, 2009



## 1. INTRODUCTION

Absent intervention by this Court, Petitioner David Charles Breda Jr., a full-fledged U.S. civilian, is poised to be tried by military court-martial, something that has not happened to a U.S. civilian government employee or U.S. contractor in at least thirty-eight years. The United States military has confined Mr. Breda to the Al Asad Air Base in Iraq for more than 60 days beyond the expiration of his civilian contract in preparation for court-martial proceedings despite a series of Supreme Court decisions rejecting on constitutional grounds prior efforts to subject civilians to trial by court-martial. The asserted basis for the military's actions is an ill-considered 2006 amendment to the Uniform Code of Military Justice ("UCMJ"), enacted without hearings or committee consideration, that purports to subject certain civilians to trial by court-martial during "contingency operations". But this statute, if it even applied to Mr. Breda by its terms, cannot overcome the long line of Supreme Court precedent limiting court-martial jurisdiction to accuseds who, unlike Mr. Breda, are actually part of the active armed forces.

This petition requests a writ directing the immediate release of Mr. Breda from military custody. Mr. Breda is currently confined to the Al Asad Air Base in Iraq and is required to report twice daily to the Office of the Provost Marshal, without the benefit of the bail hearing to which a civilian defendant ordinarily would be entitled, while U.S. military authorities complete the procedures necessary to bring Mr. Breda to trial by court-martial. The military is apparently attempting to court-martial Mr. Breda, and deprive him of substantial constitutional rights in that process, when the Supreme Court has struck down the only UCMJ provision that conceivably could apply to a contractor working in Iraq, and when Congress has created a civilian court forum for the prosecution of alleged crimes by civilian contractors supporting the Defense Department mission overseas.

This court should find that the United States lacks the power under the United States' Constitution, and relevant statutory law, to subject a full-fledged U.S. civilian such as Mr. Breda to trial by court-martial. Moreover, the Court should order that Mr. Breda be immediately released from his confinement to the Al Asad Air Base in Iraq. The United States cannot hold Mr. Breda under restrictions tantamount to confinement in Iraq without the bail hearing to which a civilian defendant is ordinarily entitled, in the guise of proceeding with a court-martial that the United States' military has neither the constitutional nor statutory authority to convene.

## **II. JURISDICTION AND VENUE**

This court has jurisdiction pursuant to the All Writs Act, 28 U.S.C. § 1651 as well as 28 U.S.C. § 2241 (c)(1) and 28 U.S.C. § 1331. Venue is appropriate in the District of Columbia because Mr. Breda and his immediate custodian, a U.S. military commander, are both located overseas and the Secretary of Defense exercises exclusive authority to permit Mr. Breda to be court-martialed and has the authority to direct his release. Secretary of Defense Gates is subject to personal jurisdiction in this District and venue is proper in this Court. *See Munaf v. Geren*, 128 S. Ct. 2207, 2216-18 (2008); *Abu Ali v. Ashcroft*, 350 F. Supp. 2d 28, 43-45 (D.D.C. 2004); *Bartman v. Cheney*, 827 F. Supp. 1, 2 (D.D.C. 1993).

## **III. FACTUAL BACKGROUND**

Mr. David Charles Breda Jr. is 35-year-old civilian who was formerly employed by the defense contractor KBR, Incorporated ("KBR"). Mr. Breda was employed by KBR at Al Asad Air Base from August 30, 2007 until November 27, 2008 when his resignation took effect.<sup>1</sup> Although he had been working for KBR in Iraq, and is now confined to Al Asad Air Base in

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<sup>1</sup> See Enclosure 1, Employment Contract of Mr. David Breda

Iraq, Mr. Breda is a resident of Pearland, Texas where his wife and children continue to reside and wait for the release of their father and husband.

Mr. Breda worked for KBR continuously from August 30, 2007 through November 27, 2008 at Al Asad Air Base as a Moral Welfare and Recreation ("MWR") Coordinator. His responsibilities required ensuring the proper operations of the MWR facility at Ala Asad Air Base. MWR Coordinators are responsible for organizing fitness, recreational, and social events. Coordinators also instruct health and fitness classes, and provide health and safety advice to the military members using the MWR facilities. Mr. Breda's one year employment contract expired on August 31, 2008.<sup>2</sup> From August 31, 2008 through November 27, 2008, Mr. Breda worked on a month-to-month basis for KBR at the Al Asad Air Base.<sup>3</sup> On November 19, 2008, Mr. Breda submitted his resignation letter to KBR, and requested that his month-to-month employment status with KBR be terminated on November 27, 2008.<sup>4</sup> Pursuant to his contract for employment, Mr. Breda should have been allowed to depart Iraq and to return home to Pearland, Texas on November 28, 2008.

Before working for KBR, Mr. Breda served in the U.S. Army from August 17, 1994 through March 9, 2001 rising to the level of Sergeant. Mr. Breda was discharged from the Army after six years, six months and 23 days of service for an alleged act of misconduct (for which he received non-judicial punishment) which resulted in a one grade reduction of rank and an administrative discharge whereby his military service was characterized as under other than honorable. Mr. Breda consequently received a re-enlistment code that prevented him from being

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<sup>2</sup> See Enclosure 1

<sup>3</sup> See Enclosure 1

<sup>4</sup> See Enclosure 2, Resignation Letter of Mr. David Charles Breda, Jr.

re-admitted into the U.S. military.<sup>5</sup> Mr. Breda is not, and has not been since March 9, 2001, a member of the United States military by any definition.

**A. Mr. Breda's Confinement and the Proceedings Thus Far**

On November 26, 2008, one day before his resignation of November 19, 2008 was to take effect,<sup>6</sup> Mr. Breda was served a Memorandum titled "Restriction in Lieu of Arrest" by the Commanding General of Al Asad Air Base, Brigadier General ("BG") Randolph Alles.<sup>7</sup> In addition to being the Commander of Al Asad Air Base, BG Alles is also the Commander of the 3<sup>rd</sup> Marine Aircraft Wing, stationed at Al Asad Air Base.

Pursuant to the Memorandum of Restriction in Lieu of Arrest, Mr. Breda was no longer authorized to depart Iraq, he was restricted to the confines of Al Asad Air Base, and he was required to physically report to and sign in with the Provost Marshall (military police station) on Al Asad Air Base twice daily.<sup>8</sup> This restriction and sign-in requirements continue to exist. The Memorandum of Restriction in Lieu of Confinement alleged that some sort of review had taken place whereby a determination had been made that Mr. Breda had committed an offense that was both triable by court-martial as well as U.S. Federal Statute and that subsequently, "restraint upon your liberty, pursuant to Rule for Courts-Martial 304, is required to ensure your continued presence in the Iraq Theater of Operations."<sup>9</sup> In accordance with the Memorandum of Restriction in Lieu of Arrest, Mr. Breda's passport was confiscated and Mr. Breda has been held against his will at Al Asad Air Base since November 26, 2008.

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<sup>5</sup> See Enclosure 3, DD 214 (discharge certificate) of Mr. David Breda

<sup>6</sup> See Enclosure 2

<sup>7</sup> See Enclosure 4, Memorandum of Restriction in Lieu of Arrest

<sup>8</sup> See Enclosure 4

<sup>9</sup> See Enclosure 4

Mr. Breda has never been officially notified of the nature of the pending charges which allegedly confer jurisdiction on the United States' military to hold Mr. Breda against his will at Al Asad Air Base. He has similarly not received any notification of the duration he is to be held against his will in Iraq. Because the Memorandum of Restriction in Lieu of Arrest also forbade Mr. Breda from any contact with Ms. Rachael Wright,<sup>10</sup> a former KBR co-worker and former fellow MWR Coordinator, the military has only intimated that Mr. Breda is being held in Iraq as a result of a complaint made by Ms. Wright on or about November 6, 2008 wherein she alleged that Mr. Breda had inappropriately touched her on or October 4, 2008.

On January 13, 2009, (45 days after he had been held against his will at Al Asad Air Base in Iraq), Mr. Breda forwarded (by e-mail) a request for information from the point of contact that had been listed on his Memorandum of Restriction in Lieu of Arrest, wherein Mr. Breda stated in pertinent part:

My name is David Breda and I am currently at Al Asad Air Base, Iraq. I have been held here for 2 months waiting for someone to tell me whether I can go home or not. It is my understanding that my case may still be held up in Washington. I am also under the impression that it would only take a phone call for someone to find out about my case. Either way I am only looking for an answer because I do believe 2 months is a long time for anyone to have to wait for an answer about what someone plans to do with them. I would really appreciate it if you could find out something and let me know.<sup>11</sup>

In his response to Mr. Breda's request for information, Major Charles T. Kirchmaier, the Chief of Justice for the Multi-National Corps, Iraq (parent unit of the 3<sup>rd</sup> Marine Aircraft Wing) replied on January 13, 2008 that:

As you may be aware, your alleged misconduct is being reviewed by an Assistant U.S. Attorney pursuant to the Military Extra-territorial Jurisdiction Act. As soon as we have a recommendation from the responsible U.S. Attorney office, we will contact you. I

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<sup>10</sup> See Enclosure 4

<sup>11</sup> See Enclosure 5, January 13, 2008 E-mail from Mr. David Breda

appreciate your concerns and assure you this office will remain engaged in this matter to bring about a conclusion as soon as practicable.<sup>12</sup>

Though Major Kirchmaier's response may indicate at first glance that the U.S. military is holding Mr. Breda against his will in Iraq pursuant to the Military Extraterritorial Jurisdiction Act of 2000 ("MEJA"), (codified as amended at 18 U.S. C. § 3261 *et*), it is quite clear from the clear language of MEJA, that federal jurisdiction would apply to Mr. Breda in the United States for actions committed in Iraq if Mr. Breda were allowed to return to the United States. Moreover, there is no provision of MEJA which authorizes the confinement or restriction tantamount to confinement of a U.S. citizen outside the territory of the United States in anticipation of MEJA litigation or jurisdiction.

On the other hand, in order to proceed with a trial by court-martial, the military first must seek permission from the Department of Justice to proceed with the case in a court-martial instead of a federal district court proceeding.<sup>13</sup> Given that the United States' military in Iraq: (1) has no authority pursuant to MEJA to hold, indefinitely or otherwise, Mr. Breda against his will in Iraq; (2) has conferred with the United States' Department of Justice for more than two months while Mr. Breda has been confined to Al Asad Air Base in Iraq against his will with no apparent inclination by the Department of Justice to prosecute the case; and (3) has confined Mr. Breda pursuant to Rule of Court Martial 304, it is apparent that the United States' military intends to proceed with a court-martial of Mr. Breda unless this court intervenes. At this point, Mr. Breda had been confined by the United States' military in Iraq for 68 days.

On information and belief, the Department of Justice has not yet determined whether it will release jurisdiction to the U.S. Marine Corps, while Mr. Breda remains confined to Al Asad

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<sup>12</sup> *Id.*

<sup>13</sup> See Enclosure 6, Secretary of Defense UCMJ Civilian Jurisdiction Memorandum, at ¶ 4.b.(2).

Air Base in Iraq, against his will, with no charges pending, no bail hearing, and no opportunity to return to the United States where his family awaits his return from Iraq.

**B. Potential UCMJ Process if This Court Does Not Grant Habeas Relief**

As of the filing of this brief, no formal charges have been preferred against Mr. Breda, yet he remains indefinitely confined to Al Asad Air Base in Iraq, with no opportunity to post bail. However, if the UCMJ case against Mr. Breda is allowed to go forward, the next step in the military's attempt to court-martial Mr. Breda will be the formal preferral of charges. Preferral is merely a formal step whereby the charges against an accused are sworn to and forwarded to a military commander for disposition. *See* RCM 307, 401. If preferred charges are sent to a special court-martial, no additional investigation or proceedings would be needed prior to the military commander with responsibility for his case (the "convening authority") sending this case to trial. *See* RCM 601(d). The maximum punishment available at a special court-martial for a civilian is confinement at hard labor for one year and a substantial fine. *See* RCM 201(f)(2), 1003.

If the military pursues a general court-martial forum for trial of the allegations against Mr. Breda, the Marines would first have to convene an Article 32 proceedings. *See* RCM 601(d)(2). As discussed below, unlike the grand jury presentment right guaranteed civilians under the Fifth Amendment to the U.S. Constitution, an Article 32 hearing is a one-person investigative hearing that makes a non-binding recommendation to the convening authority regarding: (a) sufficiency of the charges; and (b) whether charges should be referred to a court-martial. *See* RCM 601(d). Referral, the next step in the process, is the formal order of the convening authority sending the charges to a court-martial. *See* RCM 601(a).

If the charges are referred to a court-martial, the case would then proceed through pretrial proceedings and trial, except that many of the protections civilian criminal defendants receive would be unavailable to Mr. Breda, *see infra*. § III.C, including the right to jury trial and the right to a unanimous verdict of guilt. Furthermore, the convening authority would select the members of the panel that would decide guilt or innocence, a panel that (for a general court-martial) need not be composed of more than five servicemembers – only two-thirds of which would need to find the accused guilty to convict him. *See* RCM 501, 901.

### C. Rights Lost if Mr. Breda's Case Proceeds to Court-Martial

Should Mr. Breda's case proceed to general court-martial, Mr. Breda would lose a laundry list of rights to which all civilians are entitled. Mr. Breda would lose these rights solely by virtue of the United States' decision to pursue charges against him in a court-martial rather than through the other available federal district court jurisdictional options. Most notable, a court-martial does not require certain processes which are fundamental rights in federal district court:

- In the military justice system, Mr. Breda has no right to a bail hearing. *See* RCM 305.
- The right to a grand jury does not apply to courts-martial. *See* U.S. Const. amend V (Fifth Amendment provides grand jury right, "except in cases arising in the land or naval forces"); *see also United States v. Coachman*, 752 F.2d 685, 689-90 (D.C. Cir. 1985) (the Fifth Amendment "prescribes that a *non-military felony prosecution* may be instituted only upon a presentment or indictment of a grand jury." (emphasis added)).
- The right to trial by a jury does not apply in the court-martial context. *See United States ex rel. New v. Rumsfeld*, 448 F.3d 403, 408 (D.C. Cir. 2006).
- The right to a randomly-selected jury from a representative cross-section of the community does not apply to courts-martial. *See Sanford v. United States*, 567 F. Supp. 2d 114, 120 (D.D.C. 2008). Rather the "members" of a court-martial panel

are hand-picked by the convening authority with the power to prosecute the accused. *See* Art. 25, UCMJ; RCM 502(a)(1).

- The rights to trial by jury composed of no less than six jurors does not apply to courts-martial. *See Ballew v. Georgia*, 435 U.S. 223, 245 (1978); *see also* Art. 16(1)(A), UCMJ, 10 U.S.C. § 816(1)(A) (requiring only five members for general courts-martial; Art. 16(1)(B), UCMJ, 10 U.S.C. § 816(1)(B) (requiring only three member for special courts-martial).
- Unlike a defendant in federal district court, who has an absolute right of appeal, a court-martial accused has no right to a unanimous verdict of guilt. *See Richardson v. United States*, 536 U.S. 813, 817 (1999) (citing *Johnson v. Louisiana*, 406 U.S. 356, 369-71 (1972)); *see also* Art. 52(a)(2), UCMJ, 10 U.S.C. § 852(a)(2) (requiring two-thirds of the votes to convict in non-capital courts-martial).
- Unlike a defendant in federal district court, who has an absolute right of appeal, a court-martial accused has no right to appeal a court-martial conviction unless the approved sentence includes a punitive discharge or confinement for one year or more. *See* Art. 66(b), UCMJ, 10 U.S.C. § 866(b); RCM 1003(b)(8). Accuseds receiving no punitive discharge from the service, and less than one year of confinement, have no entitlement to direct appeal to a court. Instead, a mere summary record is prepared and that summary record is subject only to review by an office in the Judge Advocate General's office. Art. 69, UCMJ, 10 U.S.C. § 869.

Furthermore, Mr. Breda is not even on equal footing with members of the military as it relates to court-martial rights. First, members of the military are ensured that the jurors (called "members") impaneled to preside over a court-martial are selected from their peer group of fellow servicemembers. Indeed, enlisted accuseds are entitled to demand that at least one-third of the members seated at a court-martial be enlisted members of the military, as opposed to officers. *See* Art. 25(c)(1), UCMJ. By contrast, a government contractor such as Mr. Breda, if he is amenable to trial by court-martial, has no entitlement to have "peers" assigned to the military jury at a court-martial, as the UCMJ does not permit civilian employees or contractors to sit on a court-martial panel.

Second, a civilian contractor such as Mr. Breda is far less likely to have an entitlement to direct appellate review of a court-martial conviction and sentence than a military accused. For the military accused, most serious offenses receive a punitive discharge as part of the sentence, which thereby entitles the accused to a direct appeal of the court-martial through the military appellate courts. Army statistics for fiscal year 2007 demonstrate that a punitive discharge was awarded in nearly 71% (546 out of 772 convictions) of all general courts-martial and almost 58% (358 out of 620 convictions) of all special courts-martial.<sup>14</sup> Because the jurisdictional maximum for special courts-martial is confinement for one year, all but a handful of special courts-martial that annually receive appellate review do so solely due to the accused's receipt of a punitive discharge. By contrast, Mr. Breda, if he is amenable to trial by court-martial, cannot receive a punitive discharge from the service because he is not in the service. Therefore, if he were tried by court-martial, he would have a right of direct appeal only if he was confined at hard labor for one year or more. *See* Art. 66(b), UCMJ; RCM 1003(b)(8). Thus, civilians such as Mr. Breda are *less likely* to have a right of direct appellate review from a court-martial conviction than their military counterparts.<sup>15</sup> Indeed, the military commander convening a court-martial against Mr. Breda can, through his own unreviewable action, effectively eliminate any direct judicial review

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<sup>14</sup> See Report of the Judge Advocate General of the Army, FY2007, at Appendix, available at <http://www.armfor.uscourts.gov/annual/FY07AnnualReport.pdf>.

<sup>15</sup> While the military has not, to Mr. Breda's knowledge, tried a civilian employee or government contractor by court-martial since 1970, the military did court-martial a non-U.S. citizen civilian contractor in 2008 pursuant to the amended Article 2(A)(10). That civilian received a sentence of five months, which effectively evaded all judicial review of the military's exercise of court-martial jurisdiction over a civilian contractor. *See generally* Civilian contractor convicted at a court-martial, Commander, Multi-National Corps-Iraq, Press Release No. 20080612-01 (Jun. 23, 2008), available at [http://www.mmfiraq.com/index.php?option=com\\_content&task=view&id=2067&Itemid=128](http://www.mmfiraq.com/index.php?option=com_content&task=view&id=2067&Itemid=128) (noting that first civilian court-martial under the amended Art. 2(a)(10), UCMJ, resulted in a sentence of five months confinement); *see also Ali v. Austin*, 2008 CAAF LEXIS 1122 (C.A.A.F. Nov. 5, 2008) (summary disposition) (denying writ appeal requesting appellate review).

of Mr. Breda's court-martial by reducing any court-martial sentence to less than one year's confinement.<sup>16</sup>

#### IV. ANALYSIS

##### A. **The United States Lacks the Constitutional and Statutory Power to Subject Mr. Breda, a Full-Fledged Civilian, to Trial By Court-Martial**

##### 1. **The United States Supreme Court Has Repeatedly Rejected, on Constitutional Grounds, Attempts to Subject Civilians to Trial By Court-Martial**

The Supreme Court Has observed that courts-martial "have not been and probably never can be constituted in such a way that they can have the same kind of qualifications that the Constitution has deemed essential to fair trials of civilians in federal courts." *United States ex rel. Toth v. Quales*, 350 U.S. 11, 17 (1955). For the reason, the constitutionally permissible scope of court-martial jurisdiction over civilians has always been exceedingly narrow. Indeed, as discussed below, the Supreme Court has repeatedly rejected on constitutional grounds efforts to subject civilians to trial by court-martial, and established constitutional standards for evaluating courts-martial of civilians that demonstrate the unconstitutionality of the United States' efforts to subject Mr. Breda to trial by court-martial.

The eighteenth and nineteenth century Army Articles of War purported to allow court-martial jurisdiction over certain classes of camp followers, but only in time of war, and that jurisdictional grant was narrowly construed.<sup>17</sup> The purpose of this narrow grant of court-martial jurisdiction over civilians was to create some body of law to govern the conduct of civilians accompanying American forces in the field, as such civilians typically would not be subject to

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<sup>16</sup> See Art. 66(b)(1), UCMJ (the right to appeal hinges on the "approved" sentence, referring to approval of the sentence in Art. 60(c)(2), UCMJ).

<sup>17</sup> See William Winthrop, *Military Law and Precedents* 99-100 (2d ed. 1920).

the reach of the federal courts or to the laws of an invaded or occupied territory.<sup>18</sup> Before the enactment of the UCMJ in 1950, there were no 20<sup>th</sup> century Courts-martial of civilians other than during wars declared by Congress.<sup>19</sup> In addition, the federal courts regularly rejected efforts to subject civilian United States citizens to military tribunals when the federal or local civilian courts were available for a. *See, e.g., Ex parte Milligan, 71 U.S. 2, 121 (1866)* (U.S. citizen could not be subjected to trial by military commission “where the courts are open and their process unobstructed”); *Duncan v. Kahanamoku, 327 U.S. 304, 312, 324 (1946)* (Hawaiians not subject to military court during World War II where the civilian courts “had always been able to function”).

Against this backdrop of hostility toward trial of American civilians by military courts, Congress enacted the UCMJ in 1950 and sought to extend court-martial jurisdiction over civilians in the following relevant respects:

- Article 2(11) of the UCMJ purported to create court-martial jurisdiction over government employees serving within the armed forces overseas and civilian dependents accompanying their military sponsors overseas. *See Kinsella v. United States ex rel. Singleton, 361 U.S. 234, 235 n.2 (1960)* (quoting original version of Article 2(11)).
- Article 2(10) of the UCMJ purported to subject to trial by court martial, “{i}n time of war, persons serving with or accompanying an armed force in the field”. *See Robb v. United States, 456 F. 2d. 768,770 (Ct. Cl. 1972)* (quoting original version of Article 2(10)).
- Article 3(a) of the UCMJ purported to subject to trial by court-martial discharged servicemembers for felony offenses committed in their prior military service if no state or federal court had jurisdiction over the alleged offenses. *United States ex rel. Toth v. Quarles, 350 U.S. 11,13 n.2 (1955)* (quoting original version of Article 3(a)).

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<sup>18</sup> See Op Att’y Gen. 177 (1814) (civilians embarked on Navy ship on high seas likely not subject to jurisdiction of U.S. civilian courts); *Colemen v. Tennessee, 97 U.S. 50, 517 (1878)* (invading force not subject to laws of invaded territory).

<sup>19</sup> See Enclosure 7, Report of Overseas Jurisdiction Advisory Committee 13 (Apr. 18, 1997).

As the Supreme Court considered these provisions of the UCMJ, it repeatedly struck them down as outside Congress's constitutional power to regulate the armed forces. As the Court explained, court-martial jurisdiction is based on the status of the accused, and the persons subject to the jurisdiction of courts-martial are those actually in the military. The class of civilians who are amenable to trial by court-martial is either non-existent or so narrow as to be functionally non-existent. Either way, the Supreme Court's case law makes it clear that court-martial jurisdiction may not be asserted constitutionally against a civilian, such as Mr. Breda, where the federal courts have jurisdiction over him and where there has been no congressional declaration of war.

The first Supreme Court decision striking down Congress's attempt to create court-martial jurisdiction over civilians concerned Article 3(a) of the UCMJ, which purported to render discharged servicemenbers amenable to trial by court-martial or offenses committed prior to their discharge. In *Toth*, the United States concluded after Toth's discharge that he had committed murder and conspiracy to commit murder while on active duty in Korea. *Toth*, 350 U.S. at 13. Because Congress had not given federal courts jurisdiction over such offenses committed overseas, no United States court would have jurisdiction over Toth's offenses if he were not amenable to trial by court-martial.

The Court began by acknowledging the importance of the forum question because court-martial jurisdiction "necessarily encroaches on the jurisdiction of federal courts set up under Article III of the Constitution where persons on trial are surrounded with more constitutional safeguards than in military tribunals" *Id.* At 22. & n.20. From that premise, the Court identified the constitutional limit on Congress's power to create court-martial jurisdiction:

Determining 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.** We hold that Congress cannot subject civilians like Toth to trial by court-martial. They, 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.* (emphasis added) (footnote and internal quotations omitted).

Importantly, the United States argued that this exercise of court-martial jurisdiction over Toth was necessary because his alleged offenses –murder and conspiracy to murder in Korea- were not triable in United States’ civilian courts. The Court rejected this argument, holding that the exercise of court-martial jurisdiction over a civilian was not necessary because Congress *could have* vested the federal courts with jurisdiction over such offenses:

It is conceded that it was wholly within the constitutional power of Congress to follow this suggestion {from the Judge Advocate General of the Army} and provide for federal district court trials of discharged soldiers accused of offenses committed while in the armed services. This concession is justified. 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.* at 21 (citations omitted).

Building on *Toth*, the Supreme Court next invalidated Article 2(11) of the UCMJ, which purported to create court-martial jurisdiction over dependents accompanying their military sponsors overseas and over government employees and contractors serving with the armed forces overseas. In *Reid v. Covert*, 354 U.S.1, 30 (1957), the Court struck down Article 2(11) of the UCMJ to the extent it purported to allow court-martial jurisdiction over capital offenses committed by civilian dependents overseas. As the *Covert* plurality explained, “there is no indication that the Founders contemplated setting up a rival system of military courts to compete with civilian courts or jurisdiction over civilians who might have some contact or relationship with the armed forces.” *Id.* (plurality opinion); *see also id.* at 21. (Under the grand design of the

Constitution civilian courts are the normal repository of power to try persons charged with crimes against the United States.”)

Thereafter, in a trio of decisions issued on the same day in 1960, the Supreme Court invalidated the remainder of Article 2(11), holding that government employees and dependents were not amenable to court-martial jurisdiction for capital or non-capital offenses. *Grisham v. Hagan*, 361 U.S. 278, 280 (1960) (court-martial of government employee for capital offense); *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234, 249 (1960) (court-martial of civilian dependent for non-capital offense); *McElroy v. United States ex rel. Guagliardo*, 361 U.S. 281, 283-84 (1960) (court-martial of government employee for non-capital offense). In none of these cases was the fact that the federal civilian courts had *no* jurisdiction over the alleged offenses sufficient to justify a trial by court-martial for civilian defendants.

Of greatest import for present purposes is *McElroy* 361 U.S. at 284-85, where the Court rejected court-martial jurisdiction over government employees for non-capital offenses. In *McElroy*, the United States asserted that the employees were subject to court-martial jurisdiction because they were located overseas<sup>20</sup> and, therefore, “in the field,” language used in Article 2(10) of the UCMJ to purportedly create court-martial jurisdiction over government employees “in the field” with an armed force in the time of war. The United States argued that case law supported the constitutionality of courts-martial of civilians who were “in the field” with the military even if civilians ordinarily could not be subjected to trial by court-martial. *Id.* (citing *Ex parte Reed*, 100 U.S. 13 (1879), and *Johnson v. Sayre*, 158 U.S. 109 (1895)). The Court found

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<sup>20</sup> The Employees had been serving with the military in Morocco and occupied Berlin, respectively. *McElroy*, 361 U.S. At 282-83.

these cases inapposite, holding that they were based on the unique nature of naval service and, in particular, the unique status of paymasters in the Navy:

But it is contended that *Ex parte Reed*, 100 U.S. 13 (1877), is controlling because the forces covered by Article 2(11) are overseas and therefore “in the field.” Examination of that case, as well as *Johnson v. Sayre*, 158 U.S. 109 (1895), however, shows them to be entirely inapposite. Those cases permitted trial by courts-martial of paymasters’ clerks in the navy. The Court found that such a position was “an important one in the machinery of the navy,” the appointment being made only upon the approval of the commander of the ship and for a permanent tenure “until discharged.” Also the paymaster’s clerk was required to agree in writing “to submit to the laws and regulations for the government and discipline of the navy.” Moreover, from time immemorial the law of the sea has placed the power of disciplinary action in the commander of the ship when at sea or in a foreign port. None of these considerations are present here. *Id.* At 285 (parallel citations omitted).

As one possible solution to the military’s asserted need to punish conduct by government employees serving with the military overseas, the *McElroy* court suggested that Congress might use the “alternative types of procedures available to the Government in the prosecution of civilian defendants” essentially vesting jurisdiction in the federal district courts for offenses committed overseas. *Id.* At 286 (referring to *Kinsella*, 361 U.S. at 245-46, for a description of such available alternative procedures). Regardless, however, the Court rejected the notion that the constitutionally-permissible solution could involve trial by court-martial and expressed grave doubt that court-martial jurisdiction for civilians “in the field” could extend beyond the unique status of navy paymasters and the long tradition of ship captains’ expansive disciplinary power at sea. *Id.*

Within a decade of these decisions, further judicial decisions eliminated as a practical matter whatever court-martial jurisdiction theoretically might exist over civilians “in the field” with an armed force. In *United States v. Averette*, 41 C.M.R. 363 (C.M.A. 1970), the United

States Court of Military Appeals – the Article 1 court at the apex of the military justice system – held that the “time of war” requirement in Article 2(10) for exercise of court-martial jurisdiction over civilians “in the field” required “a war formally declared by Congress.” *Id.* at 365. Therefore, the court did not need to determine whether Averette had been “in the field” with the armed forces; because there had been no formal declaration of war against North Vietnam, no court-martial jurisdiction could exist over civilians. *Id.* The court was careful to note that it expressed no opinion whether the exercise of court-martial jurisdiction would have been constitutional had there been a formal declaration of war. *Id.* at 365-66. The court merely held that “at least in the sensitive area of subjecting civilians to military jurisdiction, there can be no such jurisdiction when Congress has not formally declared war.” *Id.* The United States Court of Claims reached the same result in *Robb v. United States*, 456 F.2d 768, 771 (Ct. Cl. 1972). Because Congress has not formally declared war since World War II, there were no courts-martial of civilians under Article 2(10) – now Article 2(a)(10) – from 1970 to 2008.

In 2000, Congress enacted the Military Extraterritorial Jurisdiction Act of 2000 (“MEJA”), Pub. L. No. 106-513, 114 Stat. 2488 (codified as amended at 18 U.S. C. § 3261 *et seq.*). MEJA adopted the “alternative procedure” suggested by the Supreme Court in the jurisdiction cases of the 1950s and 1960s and conferred jurisdiction on the federal district courts for certain offenses committed by government employees, contractors, and dependents stationed with the military overseas. This statute ensures that civilians tried for offenses committed overseas retain their Fifth and Sixth Amendment jury and presentment rights, as well as the other constitutional and statutory protections afforded civilians in federal criminal proceedings.

Despite having filled this “jurisdictional gap” through federal civilian court jurisdiction, Congress, without any recorded debate, amended Article 2(a)(10) of the UCMJ in 2006,

purporting to create court-martial jurisdiction over civilians “in the field” with an armed force not only in time of declared war but also during any “contingency operation.” *See* Fiscal year 2007 Military Authorization Act, Pub. L. No. 109-364, § 552, 120 Stat. 2083, 2217 (2006) (codified at 10 U.S.C. § 802 (a)(10)). Thus, although the United States has jurisdiction over Mr. Breda in federal court, where the constitutional and statutory protections afforded civilian criminal defendants are fully available, the United States, through its own forum selection, has apparently declined prosecution in federal court and is attempting to subject Mr. Breda, a full-fledged civilian, to trial by court-martial under Article 2(a)(10). This the United States Constitution does not permit.

**2. Mr. Breda Is Not Subject To Trial By Court-Martial Under Article 2(a)(10) Because Article 2(a)(10) of the UCMJ Confers Jurisdiction Only Where Civilian Courts Have No Jurisdiction, and U.S. Federal Courts Have Jurisdiction Over Mr. Breda Pursuant to 18 U.S. C. § 3261 (MEJA).**

The United States is seeking to sidestep *McElroy* and the other Supreme Court cases invalidating court-martial jurisdiction over government employees or dependents located overseas by invoking Article 2(a)(10) of the UCMJ, which purports to create court-martial jurisdiction over civilian contractors serving in the field with an armed force during a declared war or contingency operation. But even if that statute were constitutional, it does not reach Mr. Breda, who was not serving with an armed force “in the field.” The term “in the field” is not defined in the UCMJ. The relevant authorities, however, demonstrate that a person is “in the field” with an armed force only when in an area of actual hostilities “where the civilian courts have no jurisdiction.” As explained in this brief, the United States does have jurisdiction over civilian contractors in Iraq through MEJA, and therefore the United States cannot not rely on

Article 2(a)(10) of the UCMJ to court-martial Mr. Breda as a matter of statutory construction, even if Article 2(a)(10) were otherwise constitutional.

In *Covert*, the plurality recognized that the “[m]ilitary trial of civilians ‘in the field’ is an extraordinary jurisdiction and it should not be expended at the expense of the Bill of Rights.” *Covert*, 354 U.S. at 35 (plurality opinion). The plurality noted with approval that “[e]xperts on military law, the Judge Advocate General and the Attorney General have repeatedly taken the position that ‘in the field’ means in an area of actual fighting.” *Id.* at 34 n.61. In *Kinsella*, the dissent, while urging a more expansive exercise of court-martial jurisdiction, nevertheless acknowledged that “[h]istorically, the term [“in the field”] has been thought to include armed forces located at points where the civil power of the Government did not extend or where its civil court did not exist.” *Kinsella*, 361 U.S. at 274 (Whittaker, J., concurring in part and dissenting in part). Indeed, Justice Whittaker’s opinion quoted an 1866 opinion of the Judge Advocate General of the Army to the effect that “a detachment of troops is an army ‘in the field’ when on the march, or at a post remote from civil jurisdiction.” *Id.* at 274 n.26.

Two Attorney General opinions similarly compel the conclusion that the phrase “in the field” requires that the armed force be in an area of active military hostilities *and* at a location outside the jurisdiction of civilian federal courts. In 1814 Attorney General Rush advised that courts-martial had jurisdiction over civilians only when outside the jurisdictional reach of the United States. “[B]ut for all such offenses as may take place on board [ship] while they are within the jurisdictional limits of the United States, or their territories, the ordinary courts of law of the country are competent to afford redress. The jurisdiction of the military tribunals is not to

be stretched by implication.”<sup>21</sup> Similarly, in 1872, Attorney General Williams concluded that a civilian employee of the Army was subject to trial by court-martial during offensive and defensive operations against Indians. After explaining that the phrase “in the field” implies “military operations with a view toward an enemy,” Attorney General Williams further identified the concept that “in the field” connoted the inapplicability of civilian court jurisdiction:

Possibly the fact that troops are found in a region of the country chiefly inhabited by Indians, and remote from the exercise of civil authority, may enter in to a description of “any army in the field.” 14 Op. Att’y Gen. 22 (1872)

As a matter of pure statutory construction, and without considering its constitutionality, Article 2(a)(10) would confer jurisdiction only when the civilian is located in a place of actual fighting and in a place where *the United States civilian courts have no jurisdiction*. This is clearly not the case here. Mr. Breda has been employed, and continues to be confined at Al Asad Air Base where the United States civilian courts are not without jurisdiction over offenses committed there, as MEJA plainly applies. Nor is there any logistical issue that makes it impossible to transport persons such as Mr. Breda to the United States where the federal courts are fully operational and clearly have jurisdiction. Thus, the military cannot satisfy the requirement for a finding that Mr. Breda was serving “in the field,” as the United States civilian courts plainly have jurisdiction over offenses committed by Department of Defense contractors in Iraq.

Moreover, to the extent that there is any doubt about whether the term “in the field” can be construed to reach Mr. Breda, the Court must construe Article 2(a)(10) *against* the exercise of jurisdiction. *United States v. Rodriguez*, 128 S. Ct. 1783, 1800 (2008) (rule of lenity requires criminal statute to be construed in favor of accused once the court has “seiz[ed] every thing from

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<sup>21</sup> See 1 Op. Att’y Gen. 177 (1814).

which aid can be derived, but [is] left with an ambiguous statute." (internal quotations omitted); *Moskal v. United States*, 498 U.S. 103, 108 (1990) ("[W]e have always reserved lenity for those situations in which a reasonable doubt persists about a statute's intended scope even after resort to the language and structure, legislative history, and motivating policies of the statute."); *United States v. Villanueva-Sotelo*, 515 F.3d 1234, 1246 (D.C. Cir. 2008).

Indeed, the D.C. Circuit, in granting a habeas corpus petition filed by a civilian government employee, has held that the Constitution's hostility to trial of civilians by court-martial precluded an "expansive" construction of the "in the field" requirement of Article 2(10). *Latney v. Ignatius*, 416 F.2d 821, 823 (D.C. Cir. 1969). Given the undefined nature of "in the field," and the historical materials defining that term to require unavailability of civilian court jurisdiction, Article 2(a)(10) cannot be unambiguously construed to confer court-martial jurisdiction over Mr. Breda even if that statute were constitutional. Moreover, even if Mr. Breda somehow fell within the statutory reach of Article 2(a)(10), Supreme Court precedent would require this Court to strike down Article 2(a)(10) as applied to Mr. Breda for the reasons set forth below.

**3. The Exercise of Court-Martial Jurisdiction Over Mr. Breda Does Not Satisfy the Constitutional Requirements That Court-Martial Jurisdiction Be "The Least Power Adequate to the End Proposed" and "Essential to Maintain Discipline Amongst the Troops."**

The United States Supreme Court essentially decided Mr. Breda's petition forty-nine years ago when it struck down Article 2(11) of the UCMJ. See *McElroy*, 361 U.S. at 283-85. At the time the Court decided *McElroy*, Article 2(11) of the UCMJ purported to create court-martial jurisdiction over "persons serving with, employed by, or accompanying the armed forces outside the United States." *Id.* at 282 n.1. The Court held that the Constitution did not permit the United

States to try the habeas petitioners, who had been civilian employees serving with the armed forces in Morocco and occupied West Berlin, respectively, by court-martial for non-capital offenses. *Id.* at 282.

In reaching this result, the Court applied the rule announced in *Toth*, that the court-martial jurisdiction authorized by the Constitution must be “the least possible power adequate to the end proposed.” *Id.* (quoting *Toth*, 350 U.S. at 23). As the Court explained, court-martial jurisdiction over civilian government employees was not “the least power adequate to the end proposed” because the United States *could have* either created federal court jurisdiction for offenses committed by government contractors overseas, *id.* at 286, or *could have* enlisted these government employees as specialists in the armed forces (such as the Navy’s Construction Battalions) so that the petitioners were actual members of the armed forces, *id.* at 286-87. What the military could not do, however, was make the decision to leave a government employee in a civilian status and then seek to court-martial that civilian for offenses committed overseas. *Id.* at 287 (“The increased cost to maintain these employees in a military status is the price the Government must pay in order to comply with constitutional requirements.”) Therefore, *McElroy* is directly on point with respect to the attempted court-martial of a civilian, such as Mr. Breda, who is a contractor working in a country where MEJA jurisdiction applies.

In *Kinsella*, the Court held “that military tribunals must be restricted ‘to the narrowest jurisdiction deemed absolutely essential to maintaining discipline among troops in active service.’” *Kinsella*, 361 U.S. at 239-40 (quoting *Toth*, 350 U.S. at 22).

By its plain terms, this standard requires that, for civilians to be subject to the court-martial jurisdiction, the exercise of such jurisdiction must be “absolutely essential” to maintaining discipline among active duty troops *and*, because such court-martial jurisdiction

must be as narrow as possible, that there is no other acceptable forum for prosecuting offenses allegedly committed by civilians. *Id.* Neither of these constitutional requirements is even arguably present here. Mr. Breda is not a soldier and has no military status. *See McElroy*, 361 U.S. at 287 ("The increased cost to maintain these employees in a military status is the price the Government must pay in order to comply with constitutional requirements."). Mr. Breda was a civilian contractor and is subject to the jurisdiction of the federal civilian courts under MEJA. There is no constitutional basis for the extraordinary exercise of court-martial jurisdiction over a civilian such as Mr. Breda. He may not be subjected to a deprivation of his constitutional rights through the charging decisions of the United States government.

*First*, and perhaps foremost, the exercise of court-martial jurisdiction over Mr. Breda is not "the least power adequate to the end proposed," *Toth*, 350 U.S. at 23, because there is an available civilian forum before which this civilian may be tried. In *Toth*, the Court held that there was no court-martial jurisdiction where Congress *could have* created federal court jurisdiction that would have safeguarded the defendant's constitutional rights. That is, the exercise of court-martial jurisdiction was not the least power adequate to the end proposed because Congress could have created a civilian forum for *Toth's* alleged crimes.

Here, Congress *has* created a federal civilian court forum to try cases involving alleged misconduct overseas by Defense Department contractors. Trial of a civilian by court-martial, with its deprivation of the constitutional rights ordinarily available in civilian courts, cannot be "absolutely essential to maintaining discipline among troops in active service," *Kinsella*, 361 U.S. at 239-40, or "the least power adequate to the end proposed," *Toth*, 350 U.S. at 23, when Congress has created an alternative forum for prosecuting offenses allegedly committed by civilians serving with the military overseas. If a civilian forum is unavailable, it is solely

because the United States has declined to prosecute Mr. Breda in a civilian forum under MEJA. The Constitution does not permit the United States to manufacture a court-martial forum for civilians through its charging decisions. *Kinsella*, 361 U.S. at 244 (rejecting court-martial jurisdiction over non-capital offenses because "it would place in the hands of the military an unreviewable discretion to exercise jurisdiction over civilian dependents simply by downgrading the offense, thus stripping the accused of his constitutional rights and protections"). As the Supreme Court has repeatedly explained, the Constitution requires that civilians be tried in civilian courts, perhaps always and at a minimum when a civilian trial is possible. The Constitution therefore cannot be twisted to permit a military trial when a civilian forum is unquestionably available.

*Second*, the history of jurisdiction over civilians accompanying the military overseas demonstrates that trying civilians, such as Mr. Breda, in a military court-martial, is not essential to the maintenance of good order and discipline of the active duty military force. Prior to 1950, there was not a single twentieth century court-martial of a civilian other than in time of declared war. Moreover, by 1960 the Supreme Court had rejected the exercise of court-martial jurisdiction over civilian contractors and dependents stationed overseas. *Covert*, 354 U.S. at 30; *Grisham*, 361 U.S. at 280; *Kinsella*, 361 U.S. at 249 (1960); *McElroy*, 361 U.S. at 283-84. As a result of the United States Court of Military Appeals construction of Article 2(10) of the UCMJ in *Averette*, 41 C.M.R. at 365, there has been no court-martial jurisdiction since 1970 over any U.S. civilians who theoretically might be viewed as "in the field." Thus, for the thirty-six years between *Averette* and the amendment of Article 2(a)(10), the United States military had no power to court-martial civilian contractors whatsoever, and the Republic survived.

Indeed, from 1970 until MEJA's enactment in 2000, a time that included the first Gulf War and U.S. involvement in military conflicts in Vietnam, Somalia, and the former Yugoslavia, the United States had no power whatsoever to try civilian contractors in any forum for offenses committed overseas, with the exception of those few criminal statutes with extraterritorial effect. When the constitutional test is that court-martial jurisdiction must be no broader than that absolutely essential for military readiness, such jurisdiction cannot exist where the military flourished for thirty years with no ability to prosecute overseas civilian contractors in any forum and where, today, there exists an available federal civilian forum with jurisdiction over offenses allegedly committed by contractors overseas. *See Toth*, 350 U.S. at 22 ("It is impossible to think that the discipline of the Army is going to be disrupted, its morale impaired, or its orderly processes disturbed, by giving ex-servicemen the benefit of a civilian court trial when they are actually civilians.").<sup>22</sup>

*Third*, Mr. Breda does not fit within the exceedingly narrow category of civilians where the *McElroy* Court suggested court-martial jurisdiction *might* constitutionally lie. As the *McElroy* Court explained, the cases where it had permitted the court-martial of civilians were limited to the unique circumstance of navy paymaster clerks, who were essentially a hybrid between citizen and soldier. A navy paymaster clerk was hired directly by the navy, upon appointment by the ship's commander, and the service was "until discharged." *McElroy*, 361 U.S. at 284-85. More to

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<sup>22</sup> Furthermore, the term "contingency operations," as defined elsewhere in the U.S. Code, is far broader than that which is possibly needed to maintain good order and discipline in the military. Contingency operations in the past thirty years have included not only the first Gulf War, but such low intensity events as typhoon relief—which can be considered contingency operation without any formal declaration defining them as a contingency operation. *See* 10 U.S.C. § 101(a)(13)(2) (defining contingency operations as any military operation that "results in the call or order to, or retention on, active duty of members of the uniformed services under other provision of law during a war or during a national emergency declared by the president or Congress.") . The current war in Iraq was exactly such a conflict, *see* Proclamation No. 7463, 66 Fed. Reg. 48, 199 (Sept. 18, 2001) (declaring a national emergency after Sep. 11, 2001), and will likely remain such a contingency operation as a result of the President's declaration of a state of emergency and retention of troops on active duty in support of that emergency. *See* Notice On Continuation Of The National Emergency with Respect To Certain Terrorist Attacks, 73 Fed. Reg. 51,211 (Sept. 2, 2008) (extending the national emergency until Sep. 14, 2009).

the point, this jurisdiction was justified by the unique characteristics of service at sea, where ship captains exercised near-dictatorial disciplinary powers and where navy ships essentially were an island in the sea without ready ability to transfer crew members to American civilian authorities. *Id.* By contrast, Mr. Breda was/is not employed not by the United States, but by a civilian contractor. He was an at-will employee. He is not embarked on a ship; he was employed at a military base in Iraq. As with the government employees in *McElroy*, Mr. Breda has none of the characteristics of the narrow class of navy paymasters against whom court-martial jurisdiction *might* have been constitutionally permissible.

**4. Civilian Contractors May Not Be Subjected To Court-Martial Jurisdiction Absent a Formal Declaration of War**

As originally enacted, Article 2(10) of the UCMJ purported to allow court-martial jurisdiction over civilians serving in the field with an armed force "in time of war." *See Robb*, 456 F.2d at 770 (quoting original version of Article 2(10)). As held by the United States Court of Military Appeals and the United States Court of Claims, this jurisdictional grant extended only to civilians serving during a time of a formal congressional declaration of war. *Averette*, 41 C.M.R. at 365; *Robb*, 456 F.2d at 770-71. In *Reid v. Covert*, the controlling plurality explained that, to the extent that the trial by court-martial of civilians was ever constitutionally permissible, the outer reaches of that power were set forth in the existing version of Article 2(10). *Covert*, 354 U.S. at 36 n.61 ("We believe that Art. 2(10) sets forth the maximum historically recognized extent of military jurisdiction over civilians under the concept of 'in the field'"). Here, the United States is relying on a 2006 broadening of the scope of Article 2(a)(10), when the *Covert* plurality correctly observed that the then-existing version of Article 2(a)(10) — which was limited to declared wars — was the maximum jurisdiction over civilians that might satisfy the Constitution. Therefore,

allowing court-martial jurisdiction over civilians in the absence of a congressionally-declared war would require a rejection of the constitutional standard identified by the plurality in *Covert*.

That Congress's power to confer such court-martial jurisdiction is limited to congressionally-declared wars does not flow solely from the plurality's analysis in *Covert*; it is also compelled from the constitutional source of Congress's power. The source of Congress's power to subject servicemembers to trial by court-martial is Article I, Section 8, clause 14 of the Constitution, which grants Congress the admittedly broad power to "make rules for the government and regulation of the land and naval forces." U.S. Const. Art. I, § 8, cl. 14 ("Clause 14"). However, in the jurisdiction cases of the 1950s and 1960s, the United States attempted to justify court-martial jurisdiction over civilians as based on Clause 14 or the Necessary and Proper Clause,<sup>23</sup> and the Supreme Court squarely rejected this theory. *Toth*, 350 U.S. at 14 ("For 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."); *Kinsella*, 361 U.S. at 240 ("It was said [in *Toth*] that the Clause 14 provision itself does not empower Congress to deprive people of trials under Bill of Rights safeguards . . . ." (internal quotations omitted)); *id.* ("We were therefore not willing to hold that power to circumvent those safeguards [afforded civilians in civilian trials] should be inferred through the Necessary and Proper Clause").

Thus, if whatever power Congress might have to subject civilians to trial by court-martial does not flow from Clause 14 or the Necessary and Proper Clause, it must be justified as a necessary component of Congress's Article I power to declare war. *See* U.S. Const. Art. I, § 8, cl. 11. As a result, the *Covert* plurality's observation makes perfect sense that Congress's power to subject civilians in the field to court-martial jurisdiction must be limited to time of declared war

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<sup>23</sup> U.S. Const. art. I, § 8, cl. 18.

because Congress's constitutional power in this area is justifiable solely as an adjunct to its constitutional power to declare war. Because Congress has not declared war, there is no constitutional source for a congressional power to subject civilians to trial by court-martial.

**B. Mr. Breda Is Not Required to Seek Relief From the Military Courts That Have No Jurisdiction Over Him**

Mr. Breda's petition argues that Congress had no constitutional power to subject him to the jurisdiction of military courts due to his status as a civilian. Under the well-established precedent of the D.C. Circuit and the United States Supreme Court, Mr. Breda, because of his status as a civilian, need not exhaust his remedies within the military justice appellate system before seeking a writ releasing him from continued military justice proceedings. *See Schlesinger v. Councilman*, 420 U.S. 738, 758-59 (1975); *Hamdan v. Rumsfeld*, 548 U.S. 557, 589 n.20 (2006); *New v. Cohen*, 129 F.3d 639, 643-44 (D.C. Cir. 1997); *Hamdan v. Rumsfeld*, 415 F.3d 33, 36-37 (D.C. Cir. 2005), *rev'd on other grounds*, 548 U.S. 557 (2006); *see also Khadr v. Bush*, No. 04-1136 (JDB), 2008 U.S. Dist. LEXIS 95473, at \*15-\*16 (D.D.C. Nov. 24, 2008).

Typically, servicemembers seeking a writ in Article III courts to intervene in military justice proceedings must demonstrate that they have exhausted their remedies within the military justice system. *See New*, 129 F.3d at 642-43. This requirement is grounded in two principal considerations of comity:

First, the military justice system must remain free from undue interference, because the military is a specialized society separate from civilian society with laws and traditions of its own developed during its long history. . . . Second, Congress sought to balance the competing interests in military preparedness and fairness to service members charged with military offenses, by creating an integrated system of military courts and review procedures.

*Id.* at 643 (internal quotations and citations omitted). Mr. Breda, of course, is not part of the "specialized society" that is the armed forces. He is a civilian, and the United States military

ected to employ him in Iraq without changing his status to that of a member of the armed forces. *McElroy*, 361 U.S. at 287 ("The increased cost to maintain these employees in a military status is the price the Government must pay in order to comply with constitutional requirements."). Therefore, the general rule of abstention would not apply to Mr. Breda, a full-fledged civilian, even if, as discussed below, Mr. Breda's petition did not fall into a clearly recognized exception to the general rule of abstention.

As the D.C. Circuit held in *Hamdan*, "even within the framework of *Councilman* and *New*, there is an exception to abstention: 'a person need not exhaust remedies in a military tribunal if the military court has no jurisdiction over him.'" *Hamdan*, 415 F.3d at 36 (quoting *New*, 129 F.3d at 644). As the Supreme Court explained, this exception is based on the realization that "the disruption caused to petitioners' civilian lives and the accompanying deprivation of liberty made it 'especially unfair to require exhaustion . . . when the complainants raised substantial arguments denying the right of the military to try them at all.'" *Councilman*, 420 U.S. at 759 (quoting *Noyd v. Bond*, 395 U.S. 683, 696 n.8 (1969)).

Mr. Breda's petition presents a factual situation identical to the facts discussed in *Councilman*, the cases cited by the Supreme Court in *Councilman*, and the D.C. Circuit's requirements for the exception in *New* and *Hamdan*. See *Councilman*, 420 U.S. at 759 (citing *Toth v. Quarles*, 350 U.S. 11(1955); *Covert*, 354 U.S. at 1, and *McElroy*, 361 U.S. at 281)); *Hamdan*, 415 F.3d at 36; *New*, 129 F.3d at 644. Mr. Breda is not a military member contending the military courts lack jurisdiction over him. Rather, he has been a civilian contractor working with the military in Iraq, and is seeking a writ releasing him from military custody in Iraq by finding that the military courts lack jurisdiction to try him by court-martial.

Mr. Breda's restriction tantamount to confinement in Iraq, against his will and beyond the expiration of his civilian contract for employment in Iraq, without the benefit of the bail hearing to which civilians are ordinarily entitled, is based entirely on the military's implied intention to try him by court-martial if the U.S. Department of Justice declines prosecution. Mr. Breda is therefore entitled to challenge court-martial jurisdiction over him without first submitting to the unconstitutional jurisdiction of a court-martial over civilians, just as the petitioners in *Toth v. Quarles*, *Reid v. Covert*, and *Noyd v. Bond* were permitted to do.

**C. This Court Has Jurisdiction To Issue the Requested Writ of Habeas Corpus**

This Court can and should act now to determine that the military lacks jurisdiction over Mr. Breda pursuant to the UCMJ because the military has already exerted its UCMJ authority over Mr. Breda by indefinitely confining him to the geographical limitations of Al Asad Air Base in Iraq. This fact alone is sufficient to meet the habeas corpus "custody" requirement.

The so-called "custody" requirement to issue a writ of habeas corpus is met when a civilian is challenging court-martial jurisdiction prior to the convening of a court-martial against him. See 22 U.S.C. § 2241(c)(1); *Councilman*, 420 U.S. at 751-752 (noting that habeas corpus was available to petitioner in his suit to stop court martial proceedings prior to trial). Even if Mr. Breda were not a civilian, the requirement to show custody before seeking habeas corpus would be met where there are pending court-martial proceedings with significant constitutional issues at stake. See *Kauffman v. Sec'y of Air Force*, 415 F.2d 991, 996 (D.C. Cir. 1969); see also *Watada v. Head*, 530 F. Supp. 2d 1136, 1147 (W.D. Wash. 2007) (noting that where significant constitutional issues were at stake that could not be remedied by the military justice appellate process, "being required to appear for trial is sufficient to show custody over an individual for

habeas purposes" (citing *Justices of Boston Municipal Court v. Lydon*, 466 U.S. 294, 300-301 (1984))).

Furthermore, in a criminal context, where the government has placed significant restrictions on an individual's liberty, including the refusal to allow a U.S. citizen to travel back to the United States on his own recognizance, pending trial, and thereby forcing the person to remain in a hostile and dangerous location of contingency operations (where U.S. servicemen and servicewomen are being killed every day), the habeas corpus "custody" requirement is satisfied. See *Banks v. Gonzales*, 496 F. Supp. 2d 146, 149 (D.D.C. 2007) ("The custody requirement may be met where a petitioner is not imprisoned, so long as there were 'significant restrictions' placed on the petitioner's liberty." (quoting *Hensley v. Municipal Court*, 411 U.S. 345, 349 (1973))); see also *Kumarasamy v. Att'y Gen. of the United States*, 453 F.3d 169, 172 (3d Cir. 2006) (citing *Jones v. Cunningham*, 371 U.S. 236 (1963)). Finally, the custody requirement is also met in cases where American citizens are being held by military authorities overseas. See *Itlunaf*; 128 S. Ct. at 2216-18 (permitting habeas petitions by U.S. citizens alleged to be insurgents held by U.S. forces that were part of the Multinational Force-Iraq for trial in Iraqi courts); *Omar v. Harvey*, 416 F. Supp. 2d 19, 26 (D.D.C. 2006), *rev 'd on other grounds*, 128 S. Ct. 2207 (2008) (noting that the requirements for habeas are not subject to technical notions of jurisdiction).

Mr. Breda is currently being confined to Al. Asad Air Base in Iraq pending the military's attempt to court-martial him. This confinement necessarily prevents Mr. Breda from returning to the United States, as he wishes to do. Thus, sufficient restrictions have been placed on Mr. Breda's liberty to rise above the non-technical standards for the habeas corpus custody requirement. In fact, Mr. Breda's pretrial confinement to a military base in hostile overseas territory, which essentially jails him until trial, is far more onerous than typical personal

recognizance bonds, which have been found sufficient to satisfy the "custody" requirement of habeas corpus jurisdiction, *see Justices of Boston Municipal Court*, 466 U.S. at 301, including those issued in federal district courts. *See* Administrative Office of the U.S. Courts, Order Setting Conditions of Release, Form A0199A, *available at* <http://www.uscourts.gov/forms/ao199a.pdf> (merely requiring for release on personal recognizance that, "[t]he defendant promises to appear in court as required and surrender to serve any sentence imposed").

**D. Venue is Proper in This Court**

Venue is proper in the District of Columbia because the proper party to be named in this case is the Secretary of Defense as the ultimate custodian of Mr. Breda and the sole authority to authorize his court-martial to go forward. The proper party to be named in a habeas corpus petition is typically the person immediately responsible for the petitioner's "custody," the "immediate custodian;" in the case of military servicemembers that person is typically the Commanding Officer or Commandant of the military brig where an accused is held. *See Rurnsfeld v. Padilla*, 542 U.S. 426, 436 (2004) (citing *Monk v. Secretary of the Navy*, 793 F.2d 364, 369 (D.C. Cir. 1986) (holding that the proper respondent in a habeas action brought by a military prisoner is the commandant of the military detention facility, not the Secretary of the Navy), and 10 U.S.C. § 951(c)). Venue normally lies in the district where the respondent is holding the petitioner. *See id.*

However, the Supreme Court in *Padilla* also acknowledged that while the traditional party named in a habeas corpus action is the "immediate custodian" of the petitioner, a long recognized exception exists "to the immediate custodian rule in the military context where an American citizen is detained outside the territorial jurisdiction of any district court." *Padilla*,

542 U.S. at 435 n.9 (citing *Braden v. 30th Judicial Circuit Court*, 410 U.S. 484, 498 (1973)); *see also Eisentrager v. Forrestal*, 174 F.2d 961, 967 (D.C. Cir. 1949) ("We think, upon the basis of the foregoing conclusions, that when a person is deprived of his liberty by the act of an official of the United States outside the territorial jurisdiction of any District Court of the United States, that person's petition for a writ of habeas corpus will lie in the District Court which has territorial jurisdiction over the officials who have directive power over the immediate jailer."), *rev 'd on other grounds, Johnson v. Eisentrager*. 339 U.S. 750, 783 (1950).

As Judge Bates's analysis in *Abu Ali v. Ashcroft* demonstrates, the Supreme Court has on at least three separate occasions acknowledged the existence of an exception to the "immediate custodian" rule where the petitioner and immediate custodian are both overseas. *See Abu Ali v. Ashcroft*, 350 F. Supp. 2d 28, 43-45 (D.D.C. 2004) (analyzing the decisions in *Rumsfeld v. Padilla*, *Braden*, and *Rasul v. Bush*, 542 U.S. 466 (2004)); *see also Gharebi v. Bush*, 338 F. Supp. 2d 91, 95 (D.D.C. 2004) (citing *Padilla* and *Rasul* for the same conclusion). Moreover, as Judge Bates wrote, in cases where there is no physical custody, venue is proper where the "respondent was responsible for significant restraints on the petitioner's liberty." *Abu Ali*, 350 F. Supp. 2d at 48.

Thus, venue clearly lies in the District of Columbia based on the exception to the "immediate custodian" rule articulated by the Supreme Court in *Padilla* and *Rasul*. *See Abu Ali*, 350 F. Supp. 2d at 43-45. Mr. Breda is confined by the United States military at a base in Iraq at the direction of military authorities based solely on the military's exercise of authority to exercise UCMJ jurisdiction over civilians. Neither Mr. Breda, nor the military commander at Al Asad Air Base, Iraq, falls within the territorial jurisdiction of any U.S. District Court and, therefore, jurisdiction is appropriate in the District of Columbia where ultimate military authorities may be served with process. *See Toth*, 350 U.S. at 13 & n.3 (habeas case brought in District of Columbia

by military detainee in Korea against Secretary of the Air Force); *Padilla*, 542 U.S. at 436 n.9 (noting that an exception to the "immediate custodian" rule authorizes venue in the United States District Court of the District of Columbia for people detained abroad); *see also Ghorebi*, 338 F. Supp. 2d at 96.<sup>24</sup>

Moreover, venue lies in the District of Columbia because the Secretary of Defense holds direct review and approval authority over Mr. Breda's impending court-martial proceedings, proceedings that are the asserted basis for the current restrictions on Mr. Breda's liberty. Under the Secretary of Defense's March 10, 2008 memorandum, Mr. Breda's case must be forwarded to the Secretary for review and approval prior to going forward.<sup>25</sup> Thus, the Secretary of Defense is ultimately responsible for whether military officials can detain Mr. Breda in Iraq and convene UCMJ proceedings against him. Analogously, the Supreme Court has held that venue is appropriate in the District of Columbia by virtue of the Secretary's ultimate responsibility for the acts of commanders in Iraq. *See generally Ghorebi*, 338 F. Supp. 2d at 95-96 & n 2, and cases cited therein. Where, as here, the respondent is the Secretary of Defense, the District of Columbia is an appropriate venue by virtue of the Secretary performing a "significant amount" of his official duties in the District. *See Bartman*, 827 F. Supp. at 2 (citing *Doe v. Casey*, 601 F. Supp. 581, 584 (D.D.C. 1985), *rev'd on other grounds*, 796 F.2d 1508 (D.C. Cir. 1986)).

## V. CONCLUSION

For the foregoing reasons, the Court should issue a writ of habeas corpus that directs Respondent to release Mr. Breda from military custody, and should prohibit Respondent from

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<sup>24</sup> *See generally Rasul v. Bush*, 542 U.S. 466, 497-99 (2004) (Scalia, J., dissenting) (explaining that Braden and other authorities unquestionably stand for the proposition that a citizen detained abroad had a right to seek habeas corpus in the District of Columbia regardless of the text of the habeas corpus statute).

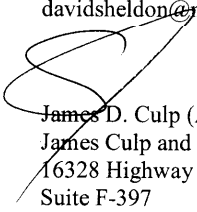
<sup>25</sup> *See* Enclosure 6, Secretary of Defense UCMJ Civilian Jurisdiction Memo, at paragraph 4.b.(2)). Only after that review and approval can the court-martial proceed. *See id.*

permitting court-martial proceedings against Mr. Breda. In the alternative, the Court may effect the same relief through issuance of a writ of mandamus or a writ of prohibition.

Respectfully submitted,



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