No. 12-805

In the Supreme Court of the United States

ALAA MOHAMMAD ALI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

Under 10 U.S.C. 802(a)(10), "persons serving with or accompanying an armed force in the field" during a "declared war or a contingency operation" may be tried for violations of the Uniform Code of Military Justice (UCMJ) in a court-martial. Petitioner, a citizen of both Iraq and Canada who served as a civilian interpreter with a U.S. Army unit in Iraq, was charged in a court-martial with three violations of the UCMJ. He pleaded guilty and was sentenced to 115 days of confinement previously served. The questions presented are as follows:

1. Whether Congress lacked the power under Article I of the Constitution to authorize the exercise of court-martial jurisdiction over petitioner.

2. Whether the exercise of court-martial jurisdiction over petitioner violated the Fifth and Sixth Amendments.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Armed Forces (Pet. App. 1a-68a) is reported at 71 M.J. 256. The opinion of the United States Army Court of Criminal Appeals (Pet. App. 69a-87a) is reported at 70 M.J. 514. The order of the military judge denying petitioner's motion to dismiss for lack of jurisdiction (Pet. App. 88a-114a) is unreported.

JURISDICTION

The judgment of the United States Court of Appeals for the Armed Forces was entered on July 18, 2012. A petition for reconsideration was denied on August 31, 2012 (Pet. App. 115a). On November 15, 2012, Chief Justice Roberts extended the time within which to file a petition for a writ of certiorari to and including January 2, 2013, and the petition was filed on December 27, 2012.

The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3).

STATEMENT

Petitioner was charged in a general court-martial in Baghdad, Iraq, with making a false official statement, wrongful appropriation, and wrongfully endeavoring to impede an investigation, in violation of Articles 107, 121, and 134 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 907, 921, 934. Pet. App. 70a-71a. He pleaded guilty and, in accordance with a pretrial agreement, was sentenced to 115 days of confinement that he had already served in pretrial detention. *Ibid.* The United States Army Court of Criminal Appeals (ACCA) affirmed his conviction. *Id.* at 70a n.2, 87a. The United States Court of Appeals for the Armed Forces (CAAF) affirmed. *Id.* at 37a.

1. Since the Nation's founding, successive versions of the Articles of War have authorized the exercise of military jurisdiction over civilians serving alongside the U.S. armed forces in an area of active hostilities. See Pet. App. 12a; *United States* v. *Averette*, 41 C.M.R. 363, 363-364 (C.M.A. 1970). In 1950, Congress codified the Articles of War as the UCMJ. See Act of May 5, 1950, ch. 169, 64 Stat. 107. As originally enacted, the UCMJ subjected to trial by court-martial "[i]n time of war, all persons serving with or accompanying an armed force in the field." Pt. I, Art. 2(10), 64 Stat. 109. In 1970, the former Court of Military Appeals (the predecessor to the CAAF) construed the phrase "in time of war" to mean only "a war formally declared by Congress" and therefore held that civilians "serving with or accompanying an armed force in the field" in the Vietnam War could not be tried by court-martial. See *Averette*, 41 C.M.R. at 365.

Congress amended the UCMJ in 2006 to address that ruling. As modified, it now authorizes court-martial jurisdiction over "persons serving with or accompanying an armed force in the field" "[i]n time of declared war or a contingency operation." 10 U.S.C. 802(a)(10). The term "contingency operation" is defined to include a military operation that "is designated by the Secretary of Defense as an operation in which members of the armed forces are or may become involved in military actions, operations, or hostilities against an enemy of the United States or against an opposing military force." 10 U.S.C. 101(a)(13)(A). Operation Iraqi Freedom, which took place in Iraq between 2003 and 2010, was a contingency operation. See Pet. App. 14a, 78a.

Congress has also authorized civilians accompanying U.S. forces in areas of hostilities to be tried in U.S. courts for offenses committed abroad. The Military Extraterritorial Jurisdiction Act of 2000 (MEJA), Pub. L. No. 106-523, 114 Stat. 2488, provides that "[w]hoever 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 * * * while employed by or accompanying the Armed Forces outside the United States * * * shall be punished as provided for that offense." 18 U.S.C. 3261(a)(1). As relevant here, the term "employed by the Armed Forces outside the United States" is generally defined to refer to "an employee of a contractor * * * of * * * the Department of Defense." 18 U.S.C. 3267(1)(A)(iii)(I). Any "national of * * * the host nation" of the military conflict (*e.g.*, Iraq), however, is excluded from that definition. 18 U.S.C. 3267(1)(C).

The statute makes clear that it does not displace court-martial jurisdiction. 18 U.S.C. 3261(c).

2. a. Petitioner was born in Iraq but fled that country in 1991, settling in Canada. Pet. App. 4a. He ultimately became a Canadian citizen but retained his Iraqi citizenship. *Id.* at 4a-5a.

In December 2007, petitioner entered into an agreement with L3 Communications to provide linguist services in Iraq under L3's contract with the U.S. Army. Pet. App. 5a. The contract stated that petitioner's duties could take place in a combat zone. *Ibid.*

In January 2008, petitioner received brief predeployment training at Fort Benning, Georgia, where, during a class addressing legal subjects, he was informed that as a deployed civilian, he would be subject to the UCMJ (although the instructor added that, in his opinion, civilians would likely be prosecuted for criminal offenses in civilian courts). Pet. App. 73a, 91a. That same month, petitioner was sent to a "Combat Outpost" in Hit, Iraq, and assigned to serve as the interpreter for a U.S. Army squad that had been deployed as part of Operation Iraqi Freedom. *Id.* at 73a, 93a. As an interpreter, petitioner accompanied the squad on its missions and facilitated communications between the squad and the Iraqi police, a function that was essential to the unit's mission. *Id.* at 5a, 94a, 101a.

Although petitioner did not carry a weapon, he wore the same uniform as other members of his squad, including a tape that said "U.S. Army" and the insignia of the brigade to which he was attached. Pet. App. 95a. On missions he also wore Army-issued body armor and a Kevlar helmet. *Ibid.* Petitioner's living conditions were identical to those of the soldiers in his squad, with whom he shared a tent, and he faced the same threats from

enemy fighters as the soldiers with whom he served. *Id.* at 95a-96a, 101a. Interpreters, in fact, were special targets of enemy forces seeking to disrupt the U.S. military's communications capabilities. *Id.* at 96a. Petitioner was supervised for administrative purposes by the L3 Communications site manager, but for operational purposes he answered to his squad leader, Staff Sergeant Clint Butler. *Id.* at 96a.

b. On February 23, 2008, petitioner engaged in a verbal altercation with another interpreter, Mr. Al-Umarryi, who struck petitioner on the back of the head. Pet. App. 6a. The incident was reported to Staff Sergeant Butler. See *ibid.* While Butler searched for Al-Umarryi, petitioner, who was alone in Butler's room, stole a knife from Butler's weapons belt. See *ibid.* He later engaged in another confrontation with Al-Umarryi, which resulted in cuts to Al-Umarryi's chest. See *id.* at 6a, 75a. Following that altercation, petitioner fled the premises, concealed the knife to prevent it from being found by the military police, and, once it was discovered, falsely claimed to have purchased it in Canada. See *id.* at 75a.

Petitioner was then restricted to the local military base, but he violated that restriction by going to Al Asad Air Terminal in an unsuccessful attempt to leave Iraq. Pet. App. 75a. He was apprehended at the airport and placed in pretrial confinement. *Id.* at 75a-76a.

3. Petitioner was charged under the UCMJ with one specification of aggravated assault with a dangerous weapon, and the charge was referred to a general court-martial located in Baghdad, Iraq. Pet. App. 6a, 76a. Because he is "a national of * * * the host nation," 18 U.S.C. 3267(1)(C), by virtue of his Iraqi citizenship, petitioner could not have been tried in a U.S. civilian

court under MEJA. Rather than transferring him to Iraqi authorities for trial in that nation's courts, U.S. officials elected to try him by court-martial in accordance with the extensive procedural protections of the UCMJ.

Before trial, petitioner moved to dismiss the charge, claiming, *inter alia*, that because he was a civilian, the court-martial lacked jurisdiction over him. Pet. App. 6a, 76a. The military judge denied the motion. *Id.* at 88a-114a. The judge first found that Section 802(a)(10) of the UCMJ supplied statutory jurisdiction over petitioner because Operation Iraqi Freedom met the definition of a "contingency operation" and petitioner was both "serving with" and "accompanying" the U.S. Armed Forces "in the field" during the operation. *Id.* at 100a-104a. The judge then held that Congress's constitutional authority "[t]o make Rules for the Government and Regulation of the land and naval Forces," U.S. Const. Art. I, § 8, Cl. 14, permitted Congress to subject petitioner to trial by court-martial because "[u]nder the circumstances, [petitioner] was certainly a person who could be regarded as falling within the 'land forces.'" Pet. App. 107a-110a. Petitioner, the judge explained, "was enmeshed within a military unit both during duty time, when he was a required and integral part of accomplishing the military mission, and during off-duty time, when he lived in close proximity with and relied on the military unit to control the society within which he lived." *Id.* at 112a. The judge found that "[d]enying commanders the tools necessary to maintain discipline," including court-martial proceedings against integral members of a military unit, "would critically impact the success of their mission." *Ibid.*

Following the hearing, petitioner was additionally charged with making a false official statement, wrongful appropriation, and wrongfully endeavoring to impede an investigation, in violation of Articles 107, 121, and 134 of the UCMJ, 10 U.S.C. 907, 921, 934, all in connection with his conduct following the assault. Pet. App. 70a, 76a. Petitioner then entered into a pretrial agreement in which the convening authority agreed to dismiss the assault charge and to limit his sentence of confinement to his time served in pretrial detention. *Id.* at 76a. Petitioner entered pleas of guilty to the three non-assault charges and was formally sentenced to five months of confinement. *Id.* at 70a. In accordance with the agreement, the convening authority approved a sentence of time served. *Id.* at 70a & n.2.

4. Because petitioner was sentenced to less than one year of confinement, he was not entitled to automatic appellate review of his conviction by the ACCA. See 10 U.S.C. 866(b)(1). The Judge Advocate General of the Army, however, directed the ACCA to review petitioner's case, see 10 U.S.C. 869(d)(1), and, in particular, to consider whether the exercise of court-martial jurisdiction over petitioner was proper.

The ACCA affirmed. Pet. App. 69a-87a. The court expressed "no doubt [that] both [petitioner] and his offenses fall squarely within the jurisdictional language of [Section 802(a)(10)]." *Id.* at 80a-81a. On the question whether the application of Section 802(a)(10) to petitioner comported with Article I of the Constitution and the Fifth and Sixth Amendments, the court observed that this Court has long recognized "the historical use of military courts to try civilians in areas of actual fighting," which "coupled with the recognition of the broad authority of military commanders on the battle-

front would seem to authorize, or at least not prohibit, the exercise of military jurisdiction over [petitioner] by the commander of the United States forces in Iraq." *Id.* at 83a-84a (citing *Reid* v. *Covert*, 354 U.S. 1, 33 (1957) (opinion of Black, J.)).

5. The CAAF granted review and affirmed. Pet. App. 1a-68a.

a. After concluding that the court-martial had jurisdiction over petitioner under Section 802(a)(10) of the UCMJ, Pet. App. 10a-22a, the CAAF rejected petitioner's argument that the statute, as applied to him, violates the Fifth and Sixth Amendments because it does not provide for indictment by grand jury or trial by a civilian jury, *id.* at 22a-33a.

The CAAF first observed that this Court's decisions holding that certain civilians could not be tried by court-martial each "involved United States citizens tried by court-martial not in a time of war." Pet. App. 24a; see also *id.* at 32a. None of those cases, the court explained, "purported to address the issue before us, which is the constitutionality of military jurisdiction over a noncitizen tried outside of the United States during a contingency operation." *Id.* at 24a.

In addressing that question, the CAAF determined that its resolution turned on the "threshold determination" of whether petitioner, "a foreign national being tried outside the United States for a crime committed outside the United States, enjoys the protections of the Fifth and Sixth Amendments." Pet. App. 25a. The court pointed to a number of this Court's decisions indicating that aliens receive constitutional protections when "they have come within the territory of the United States and developed substantial connections with this country." *Id.* at 26a (quoting *United States* v. *Verdugo-Urquidez*,

494 U.S. 259, 271 (1990)) (emphasis omitted); see also *ibid.* (citing *Johnson* v. *Eisentrager*, 339 U.S. 763, 783 (1950); *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936)). The court further observed that in the "Insular Cases," this Court had not extended the Fifth Amendment's right to indictment by grand jury or the Sixth Amendment's right to trial by jury to foreign nationals residing in the United States' overseas territories. See *id.* at 30a (citing *Balzac* v. *Porto Rico*, 258 U.S. 298 (1922); *Ocampo* v. *United States*, 234 U.S. 91 (1914); *Dorr* v. *United States*, 195 U.S. 138 (1904)).

Given that it could "find no precedent * * * which mandates granting a noncitizen Fifth and Sixth Amendment rights when they have not 'come within the territory of the United States and developed substantial connections with this country,'" the court declined "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. Accordingly, the court held, petitioner's conviction did not violate the Fifth and Sixth Amendments. See *id.* at 33a.

The CAAF also addressed what it described as "the Supreme Court's call for the application of a 'practical and contextual' analysis of constitutional law overseas in *Boumediene* v. *Bush*, 553 U.S. 723 (2008)," and stated that "such an analysis is necessary in this case." Pet. App. 32a n.25. But stressing petitioner's foreign citizenship, the court found that standard satisfied. See *id.* at 28a-33a & n.25.

The CAAF then rejected petitioner's argument that Congress lacks the power, under Article I of the Constitution, "to authorize court-martial jurisdiction over

civilians." Pet. App. 33a-34a. This Court, it explained, has pointed to "Congress's 'war powers' as the constitutional source of authority and justification for federal court decisions which 'upheld military trial of civilians performing services for the armed forces "in the field" during time of war.'" *Ibid.* (quoting *Reid*, 354 U.S. at 33).

Finally, the CAAF rejected an argument raised by amici curiae that the trial of petitioner by court-martial was unconstitutional because "military authorities could have transported [him] back to the United States for trial in an Article III court." Pet. App. 34a. No Article III court had jurisdiction to try petitioner, the court explained, because MEJA "does not extend to citizens of [a] host nation" such as petitioner. *Id.* at 35a (citing 18 U.S.C. 3267(1)(C) and 2(C)).

The CAAF emphasized that its decision set forth "no position" on "a situation involving a United States citizen" and, further, did not "reach the question of the constitutionality of court-martial jurisdiction over a noncitizen who is not also a host-country national" (and so could be tried in an Article III court under MEJA). Pet. App. 33a n.26, 35a n.28.

b. Chief Judge Baker and Judge Effron issued opinions concurring in part and concurring in the result, finding the majority's reasoning "broader than necessary for the resolution of this case." Pet. App. 59a (Effron, J.); see also *id.* at 53a (Baker, C.J.).

Chief Judge Baker believed that the majority should have begun with the question whether Congress has the power under Article I of the Constitution to authorize the trial by court-martial of civilians serving with or accompanying the armed forces, rather than the question whether host-country nationals embedded with U.S.

troops abroad enjoy any rights under the Fifth and Sixth Amendments. See *id.* at 38a. On the question of Congress's Article I power, Chief Judge Baker, relying on "the combination of the Rules and Regulations Clause [U.S. Const. Art. I, § 8, Cl. 14], the war powers, and the Necessary and Proper Clause," determined that Congress was authorized "to legislate court-martial jurisdiction over this contractor, in this context." Pet. App. 51a. Although petitioner "was not a member of the United States Armed Forces," he explained, "the war powers are implicated by the fact that [petitioner] was serving with and accompanying a military unit in combat and was an integral part of the unit and its mission." *Id.* at 51a-52a.

With respect to the Fifth and Sixth Amendments, Chief Judge Baker concluded that "in this case, the only question we need to reach expressly, or by implication, is whether the Government violated [the] Fifth and Sixth Amendments in the manner in which it prosecuted [petitioner]"—not whether petitioner enjoys rights under those amendments at all. Pet. App. 39a. Because petitioner was "an integral member of [the] United States military unit" such that Congress had the Article I power to subject him to court-martial jurisdiction, Chief Judge Baker said, he was entitled to those "rights embedded in the UCMJ to which members of the Armed Forces are entitled, including those rights and rules that are derived from the Fifth and Sixth Amendments." *Id.* at 39a-40a. But petitioner was "not entitled to * * * the rights to a jury trial and indictment by grand jury—rights that extend beyond those to which members of the United States Armed Forces are themselves entitled" under this Court's precedents. *Id.* at 54a.

Like Chief Judge Baker, Judge Effron concluded that "the case before us does not provide an appropriate vehicle for resolving the broader issues addressed in the majority opinion." Pet. App. 59a. In particular, he believed that "[t]he portion of the majority opinion that discusses the rights of foreign nationals is not necessary to the disposition of the present case." *Id.* at 63a. He observed that this case "involves a narrow record focusing on a unique statutory niche occupied by * * * a host-country national whose conduct in the theater of operations was excluded from Article III by MEJA." *Id.* at 62a. In light of the significant foreign-policy concerns that led Congress not to extend civilian-court jurisdiction to host-country nationals, Judge Effron concluded that petitioner's trial by court-martial was appropriate. See *ibid.*

ARGUMENT

The CAAF correctly upheld petitioner's conviction by court-martial for offenses that he committed while accompanying a U.S. Army unit during Operation Iraqi Freedom and serving a mission-critical role for that unit. That decision does not conflict with any decision of this Court or a federal circuit court. To the contrary, it is fully consistent with the well-settled understanding that "[f]rom a time prior to the adoption of the Constitution the extraordinary circumstances present in an area of actual fighting have been considered sufficient to permit punishment of some civilians in that area by military courts under military rules." *Reid* v. *Covert*, 354 U.S. 1, 33 (1957) (opinion of Black, J.).

The CAAF's holding, moreover, lacks broad importance. As petitioner acknowledges, court-martial proceedings against civilians accompanying U.S. troops in a war zone are extremely rare—this is the first such

proceeding in over forty years—and petitioner himself was sentenced only to the 115 days that he had already served in pretrial confinement. This case arose from the unusual circumstance in which petitioner's Iraqi citizenship prevented his prosecution in a U.S. civilian court under MEJA's exception for host-country nationals, even though petitioner has long resided in Canada and also has Canadian citizenship. That circumstance is unlikely to recur with any frequency, and the Secretary of Defense has recently issued a directive sharply curtailing military leaders' authority to try civilians by court-martial. Further review is therefore not warranted.

1. Petitioner first argues that Congress lacked the power under Article I of the Constitution to authorize court-martial jurisdiction over him and that the CAAF's contrary conclusion conflicts with decisions of this Court holding that U.S. citizens charged with peacetime offenses could not be tried by court-martial. Pet. 15-33. Those arguments lack merit.

a. The CAAF correctly held that Congress has the constitutional power to authorize court-martial proceedings against foreign nationals who commit offenses while "serving with or accompanying an armed force in the field" during a "contingency operation." 10 U.S.C. 802(a)(10).[1] As the CAAF explained, the war powers

[1] Petitioner suggests that the CAAF did not reach the question of Congress's constitutional power to authorize his trial by court-martial. See Pet. 15. That is incorrect; the CAAF held, in a separately delineated portion of its opinion, that Congress has the constitutional power to authorize petitioner's trial by court-martial, a conclusion also reached by both separately concurring judges. See Pet. App. 33a-34a; *id.* at 51a-52a (Baker, C.J., concurring in part and concurring in the result); *id.* at 62a (Effron, J., concurring in part and concurring in the result). The CAAF presumably devoted more of its

granted by the Constitution to Congress amply support subjecting foreign nationals who serve with or accompany U.S. forces in the field of combat to the same court-martial procedures as American soldiers. See Pet. App. 33a-34a; U.S. Const. Art. I, § 8, Cls. 1, 11-14, 18. When Congress acts pursuant to those war powers, this Court has afforded substantial deference to Congress's judgment in recognition "that civil courts are ill equipped to establish policies regarding matters of military concern." *Solorio* v. *United States*, 483 U.S. 435, 448 (1987) (internal quotation marks and citation omitted); see also, *e.g.*, *Holder* v. *Humanitarian Law Project*, 130 S. Ct. 2705, 2727 (2010) (explaining the "vital" role of judicial deference to the political Branches' factual and policy determinations in cases involving "sensitive and weighty interests of national security and foreign affairs").

In *Reid*, *supra*, a plurality of this Court observed that federal courts have consistently "upheld military trial of civilians performing services for the armed forces 'in the field' during time of war." 354 U.S. at 33 & n.59 (opinion of Black, J.) (emphasis omitted) (collecting cases). Citing the precursor to Section 802(a)(10), the plurality explained that "[f]rom a time prior to the adoption of the Constitution the extraordinary circumstances present in an area of actual fighting have been considered sufficient to permit punishment of some civilians in

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discussion to the question whether subjecting petitioner to court-martial jurisdiction violated the Fifth and Sixth Amendments because that was the constitutional argument that petitioner principally advanced in his brief before that court. See Pet. C.A. Br., 2012 WL 79997, at *3 ("[T]his brief explains why the Court should reject the exercise of military jurisdiction over Mr. Ali because application of Article 2(a)(10) deprived him of the protections afforded by the Fifth and Sixth Amendments to the United States Constitution."); see also *id.* at *9-*24.

that area by military courts under military rules." *Id.* at 33; see also *Duncan* v. *Kahanamoku*, 327 U.S. 304, 313 (1946) (recognizing "the well-established power of the military to exercise jurisdiction over members of the armed forces, [and] those directly connected with such forces").

That acknowledgment that civilians accompanying the armed forces in a military conflict may be subject to trial by court-martial is firmly grounded in the legal traditions of the Nation. The British Articles of War of 1765 provided for jurisdiction over "[a]ll Suttlers and Retainers to a Camp, and *all persons whatsoever* serving with Our Armies in the Field." British Articles of War of 1765, sec. XIV, art. XXIII (*reprinted in* William Winthrop, *Military Law and Precedents* 941 (2d ed. 1920) (Winthrop)) (emphasis added). The Articles of War adopted by the Second Continental Congress in 1775 provided, in almost identical language, that "[a]ll suttlers and retai[n]ers to a camp, and *all persons whatsoever*, serving with the continental army in the field, *though not inlisted soldiers*, are to be subject to the articles, rules, and regulations of the continental army." American Articles of War of 1775, art. XXXII (Winthrop 956) (emphases added); see also American Articles of War of 1776, sec. XIII, art. 23 (Winthrop 967). During the Revolutionary War, civilians providing services to the army were regularly tried by court-martial for a variety of offenses. See Pet. Br. at 103-105, *Wilson* v. *Bohlender*, 361 U.S. 281 (1960) (No. 59-37) (collecting examples).

Following the ratification of the Constitution, the First Congress retained the Articles of War as previously enacted. See Act of Sept. 29, 1789, ch. 25, § 4, 1 Stat. 96. And shortly after ratification of the Bill of Rights,

Congress twice reenacted the 1776 Articles of War without change. See Act of Mar. 3, 1795, ch. 44, § 14, 1 Stat. 432; Act of May 30, 1796, ch. 39, § 20, 1 Stat. 486. When the Ninth Congress undertook a detailed review and revision of the Articles of War in order to "adapt[] [them] to the provisions under the present Government," 15 Annals of Cong. 264 (1805), the provision authorizing the trial by court-martial of "all persons whatsoever, serving with the armies of the United States in the field, though not enlisted soldiers," was left intact. American Articles of War of 1806, sec. 1, art. 60 (Winthrop 981).

Those early statutes are "contemporaneous and weighty evidence of [the] true meaning" of the Constitution. *Marsh* v. *Chambers*, 463 U.S. 783, 790 (1983). They demonstrate that the First Congress and its immediate successors understood that the exercise of court-martial jurisdiction over civilians accompanying U.S. forces in combat areas was both consistent with Congress's constitutional authority and fully compatible with the procedural safeguards of the Bill of Rights. See *Ex parte Quirin*, 317 U.S. 1, 41 (1942) (holding that the 1806 Articles of War "must be regarded as a contemporary construction of both Article III, § 2, and the Amendments"). Petitioner has presented no evidence suggesting that the Constitution was intended to displace the long historical tradition of trying that narrow class of civilians by court-martial.

Here, petitioner, in serving a "mission-critical" role for the U.S. Army unit in which he was embedded, unquestionably was accompanying the armed forces in a combat zone. Pet. App. 74a. He "served side-by-side with [U.S. soldiers] as they performed their daily military missions in support of Operation Iraqi Freedom,"

and "the squad could not [have] accomplish[ed] its mission without him." *Id.* at 79a. He "was virtually indistinguishable from the troops serving in [his] squad," *id.* at 17a, and, in fact, "was the only member of the team that was necessary," *id.* at 101a. He committed his offenses, moreover, "on a combat outpost in an 'area of actual fighting' against enemy insurgent troops." *Id.* at 80a. Given his integral role with a U.S. Army unit in an area of active hostilities, the exercise of court-martial jurisdiction over petitioner falls within the heartland of Congress's war-powers authority.

b. Petitioner mistakenly contends (Pet. 15-21) that the decision below conflicts with decisions of this Court. None of the cited decisions casts doubt on the constitutional authority of Congress to subject a foreign national to a court-martial for offenses committed while accompanying U.S. troops in an active war zone. Nor does the reasoning of the decisions suggest that the exercise of court-martial jurisdiction over petitioner was constitutionally suspect. Rather, each of the cases placed critical emphasis on factors absent here—most notably, the lack of a combat setting.

i. In *United States ex rel. Toth* v. *Quarles*, 350 U.S. 11 (1955) (*Toth*), the Court held that Congress lacked the authority to try ex-service members by court-martial for offenses committed before they were discharged from service. See *id.* at 13, 23. The Court explained that "[i]t has never been intimated by this Court * * * that Article I military jurisdiction could be extended to civilian ex-soldiers who had *severed all relationship* with the military and its institutions," and that "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." *Id.* at 14-15 (emphasis added). The Court reasoned that "[a]rmy discipline will not be improved by court-martialing rather than trying by jury some civilian ex-soldier who has been wholly separated from the service for months, years or perhaps decades." *Id.* at 21-22.

That analysis does not support the view that a foreign national accompanying a U.S. Army unit in a war zone and serving an integral role for that unit cannot be tried by court-martial during the period of such service. Such an individual can certainly be regarded as "part of the armed forces," *Toth*, 350 U.S. at 15, for purposes of Congress's constitutional authority to confer court-martial jurisdiction; as the CAAF determined, petitioner was "virtually indistinguishable from the troops serving in [his] squad." Pet. App. 17a. He "served in the key role of a combat interpreter, was fully integrated into the military mission of his squad, lived with the squad, and wore the same clothing and equipment as members of his squad." *Id.* at 54a (Baker, C.J., concurring in part and concurring in the result).

Petitioner relies on *Toth*'s statement that a trial by court-martial is permissible only if it represents "the least possible power adequate to the end proposed." Pet. 18 (quoting *Toth*, 350 U.S. at 22-23) (emphasis omitted). He draws from that statement a supposed requirement that Congress identify a "cognizable military necessity" before authorizing trial by court-martial and argues that the CAAF failed to find such a necessity here. Pet. 19-21. In *Solorio*, however, this Court concluded that *Toth*'s "suggest[ion]" was "dictum" and that although it could be read broadly, it "may be * * * interpreted as limited to th[e] context" of ex-service members. 483 U.S. at 440 n.3.

The CAAF, therefore, was not required, as petitioner contends (Pet. 16), to identify a "military necessity or exigency" to establish the constitutionality of his court-martial. Rather, as a general rule, for courts-martial established pursuant to Article I of the Constitution, "[t]he test for jurisdiction . . . 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.'" *Solorio*, 483 U.S. at 439 (quoting *Kinsella* v. *United States ex rel. Singleton*, 361 U.S. 234, 240-241 (1960)). Under that test, Congress must be afforded substantial deference in determining whether to authorize court-martial jurisdiction. See *id.* at 439-440, 447-450. Petitioner briefly contends (Pet. 20-21) that the decision below also conflicts with *Solorio*'s status test, but neither *Solorio* nor any other decision of this Court had the occasion to consider whether a civilian accompanying the armed forces who serves an integral role in a war zone meets the status test for purposes of Congress's constitutional authority to confer court-martial jurisdiction. See *Reid*, 354 U.S. at 22-23 (opinion of Black, J.) ("We recognize that there might be circumstances where a person could be 'in' the armed services for purposes of [the Constitution] even though he had not formally been inducted into the military or did not wear a uniform."); *id.* at 43 (Frankfurter, J., concurring in the result) ("The cases cannot be decided simply by saying that, since these women were not in uniform, they were not 'in the land and naval Forces.'").

ii. The other cases cited by petitioner similarly relied on factors that are not present with respect to a foreign national accompanying U.S. troops during hostilities. *Reid* held that civilian dependents of U.S. service members charged with capital offenses while stationed in

peacetime Great Britain and Japan could not be tried by court-martial. See 354 U.S. at 3-5 (opinion of Black, J.). Relying on *Toth*, the plurality placed critical emphasis on the fact that the defendants in both cases "were American citizens." *Id.* at 32. It further explained that the dependents had a more attenuated connection to military service than the ex-serviceman in *Toth* in that they "had never served in the army in any capacity." *Ibid.* And, most pertinently, the *Reid* plurality expressly distinguished "civilians performing services for the armed forces 'in the field' during time of war." *Id.* at 33 (emphasis omitted). Because "neither Japan nor Great Britain could properly be said to be an area where active hostilities were under way" at the time the dependents committed their offenses, the plurality said, that traditional basis for court-martial jurisdiction was not present. See *id.* at 33-35; see also *id.* at 49 (Frankfurter, J., concurring in the result) ("I * * * conclude that, in capital cases, the exercise of court-martial jurisdiction over civilian dependents in time of peace cannot be justified by Article I, considered in connection with the specific protections of Article III and the Fifth and Sixth Amendments."); *id.* at 65 (Harlan, J., concurring in the result) (similar).

Petitioner also cites a number of cases that extended *Reid* to other contexts, but those decisions also placed significant reliance on factors not present here—in particular, the peacetime setting. See *Kinsella*, *supra* (non-capital offenses committed by civilian dependents in peacetime); *Grisham* v. *Hagan*, 361 U.S. 278 (1960) (capital offenses by civilian employees in peacetime); *McElroy* v. *United States ex rel. Guagliardo*, 361 U.S. 281 (1960) (offenses committed by civilian employees during peacetime). *McElroy*, for example, distinguished

the founding-era practice of exercising court-martial jurisdiction over civilians accompanying the army on the ground that such trials "were all during a period of war, and hence are inapplicable here." 361 U.S. at 284. None of those decisions addressed the circumstance presented in this case: a foreign national accompanying a U.S. Army unit in an area of active hostilities serving an essential function for that unit. Accordingly, neither their holdings nor their reasoning conflicts with the decision below.

2. Petitioner also contends (Pet. 25-36) that the court below erred in holding that the exercise of court-martial jurisdiction over him did not violate the Fifth and Sixth Amendments. He argues that the court's holding conflicts with this Court's decision in *Boumediene* v. *Bush*, 553 U.S. 723 (2008), as well as decisions of the Fourth and Ninth Circuits.

There is no conflict. Neither *Boumediene* nor the cited circuit decisions had occasion to consider the scope and applicability of the Fifth and Sixth Amendments in the particular context at issue here. As both concurring judges below observed, this case "does not provide an appropriate vehicle for resolving * * * broader issues" about the applicability of the Fifth and Sixth Amendments to foreign nationals abroad, Pet. App. 59a (Effron, J., concurring in part and concurring in the result), because petitioner received precisely "those rights embedded in the UCMJ to which members of the Armed Forces are entitled," including safeguards for U.S. service members parallel to the Fifth and Sixth Amendments, *id.* at 40a (Baker, C.J., concurring in part and concurring in the result). See also *id.* at 53a ("I conclude that [petitioner's] Fifth and Sixth Amend-

ment rights were not violated by his court-martial, but through a distinct and narrower analysis.").

a. The CAAF correctly held that the exercise of court-martial jurisdiction over petitioner did not violate the Fifth and Sixth Amendments. As discussed above, since the Nation's founding, civilians accompanying U.S. troops in areas of active hostilities have been subject to trial by court-martial. See pp. 15-16, *supra*. Given that historical tradition, such individuals are afforded the same rights as U.S. service members in such proceedings, which include "[m]ost of the significant constitutional rights available to the defendant in a civil proceeding." *Lawrence* v. *McCarthy*, 344 F.3d 467, 473 (5th Cir. 2003). For example, the UCMJ "prohibits coerced confessions (art. 31, 10 U.S.C. § 831), double jeopardy (art. 44, 10 U.S.C. § 844), and cruel or unusual punishments (art. 55, 10 U.S.C. § 855)," and "gives the accused the right to be apprised of the charges against him (art. 30(b), 10 U.S.C. § 830(b)), to be represented by counsel of his choice (art. 38, 10 U.S.C. § 838), and to compulsory process to obtain witnesses (art. 46, 10 U.S.C. § 846)." *Wickham* v. *Hall*, 706 F.2d 713, 717 n.5 (5th Cir. 1983). Petitioner does not claim that he was deprived of any of those rights.

It is true that in certain respects—most notably, the rights to a grand-jury indictment and a jury trial—a court-martial differs from a criminal trial in civilian courts.[2] A court-martial panel comprises members of the military, two-thirds of whom must agree that the defendant is guilty beyond a reasonable doubt before he may be convicted (with a unanimous verdict required for capital offenses). See 10 U.S.C. 825, 851, 852. The de-

[2] Most of the rights that petitioner identifies (Pet. 6-7) are components of the right to a jury trial.

fendant has "a right to members who are fair and impartial"—a guarantee that "is the cornerstone of the military justice system"—but not to a body with all of the constitutional characteristics of a civil jury. *United States* v. *Dowty*, 60 M.J. 163, 169 (C.A.A.F. 2004) (citations omitted), cert. denied, 543 U.S. 1188 (2005).

That difference arises because the Fifth and Sixth Amendments have not been interpreted to require juries in properly constituted courts-martial. "Presentment by a grand jury and trial by a jury of the vicinage where the crime was committed were at the time of the adoption of the Constitution familiar parts of the machinery for criminal trials in the civil courts," but "they were procedures unknown to military tribunals." *Quirin*, 317 U.S. at 39. For that reason, the Fifth Amendment expressly excludes "cases arising in the land or naval forces" from the grand-jury requirement, and, as with petty offenses, this Court has interpreted the Sixth Amendment not to require a jury trial in a court-martial proceeding. See *Reid*, 354 U.S. at 37 n.68 (opinion of Black, J.) ("The exception in the Fifth Amendment * * * provides that grand jury indictment is not required in cases subject to military trial and this exception has been read over into the Sixth Amendment so that the requirements of jury trial are inapplicable."); see also *Quirin*, 317 U.S. at 39-40.

Thus, even assuming that petitioner enjoyed the full protections of the Fifth and Sixth Amendments, he suffered no deprivation of those rights so long as Congress had the authority to exercise court-martial jurisdiction over him. For the reasons set forth above, that exercise of jurisdiction was well within Congress's power.

b. Petitioner incorrectly contends that the decision below conflicts with this Court's decision in *Boume-*

diene. See Pet. 26-33. According to petitioner, *Boumediene* requires that he receive "the same Fifth and Sixth Amendment rights as any other civilian subjected to trial in a United States criminal proceeding," including the "rights to presentment, indictment, and trial by jury." Pet. 33. But *Boumediene* held that aliens then designated as enemy combatants and detained at the military facility at Guantanamo Bay, Cuba, could petition for habeas corpus to challenge the legality of their detention. See 553 U.S. at 732-733, 771; see also *id.* at 766 (identifying factors "relevant in determining the reach of the Suspension Clause"). It did not address what rights those detainees might enjoy in criminal proceedings, much less whether a foreign national accompanying U.S. troops in a foreign war zone is entitled to procedural protections beyond what U.S. service members enjoy. Indeed, *Boumediene* placed critical emphasis on the "unique status of Guantanamo Bay," over which the United States "maintains *de facto* sovereignty," and distinguished a "detention facility * * * located in an active theater of war." *Id.* at 752, 755, 770.

Petitioner believes that the reasoning in the majority opinion below makes this case an appropriate vehicle to resolve questions about whether and to what extent rights set forth in the Fifth and Sixth Amendments apply to foreign nationals residing abroad. But this case would be a poor vehicle to address those issues given that petitioner was afforded all of the procedural protections that U.S. service members receive in court-martial proceedings, including protections paralleling the Fifth and Sixth Amendment rights. See Pet. App. 40a, 54a (Baker, C.J., concurring in part and concurring in the result); see also *id.* at 48a-50a, 56a-58a (characterizing *Boumediene* as requiring a multi-factored approach to

extraterritoriality but nevertheless rejecting petitioners' arguments). Given that petitioner's arguments are readily rejected on the historical grounds discussed above and that the CAAF's ruling is unlikely to have significant practical importance, see pp. 26-29, *infra*, this case does not present a suitable opportunity for the Court to delineate the extraterritorial scope of the Fifth and Sixth Amendments as applied to foreign nationals.

c. Finally, petitioner is mistaken in contending (Pet. 33-36) that the decision below conflicts with *United States* v. *Brehm*, 691 F.3d 547 (4th Cir.), cert. denied, 133 S. Ct. 808 (2012), and *Ibrahim* v. *Department of Homeland Security*, 669 F.3d 983 (9th Cir. 2012), neither of which addressed court-martial proceedings at all.

In *Brehm*, the Fourth Circuit held that the trial of a foreign national in an Article III court under MEJA for an offense committed in Afghanistan did not violate due process. See 691 F.3d at 552-554. The court found that "a sufficient nexus between the defendant and the United States" existed such that application of U.S. criminal laws to him "would not be arbitrary or fundamentally unfair." *Id.* at 552 (citation omitted). Petitioner does not argue that he lacks a sufficient connection to the United States to be subject to its criminal laws. Rather, he claims that the reasoning of *Brehm* conflicts with the decision below because "the Fourth Circuit did not reject Brehm's constitutional challenge on the ground[] that Brehm had no Fifth Amendment rights." Pet. 34. But the defendant in *Brehm*, unlike petitioner, was tried on U.S. soil in an ordinary civilian court, so it is little wonder that the Fourth Circuit did not hold that the defendant could not invoke the Fifth Amendment. See 691 F.3d at 549. Moreover, in its appellate arguments, the government had "[a]ssum[ed], * * * for purposes

of this appeal, that the due process clause does indeed require the existence of a nexus as a precondition to the exercise of personal jurisdiction" over the defendant and had argued only that the standard was satisfied on the facts of the case. Gov't C.A. Br. at *38, *42, 2012 WL 508566 (11-4755).

Ibrahim is even further afield from this case. That decision addressed a claim by a student-visa holder who had resided in the United States for four years that she had been mistakenly placed on the federal No-Fly List and barred from returning to the United States after traveling abroad. See 669 F.3d at 986-988. The court held that the plaintiff had "the right to assert claims under the First and Fifth Amendments" because she had a "'significant voluntary connection' with the United States" as a consequence of "her four years at Stanford University while she pursued her Ph.D" and her wish to return to complete her academic program. *Id.* at 997 (citation omitted). The court relied on what it regarded as the particular strength of the plaintiff's links with the United States, making clear that its decision did not encompass "tourists, business visitors," or even "all student visa holders." *Ibid.* Although petitioner claims that his "participating in the defense of this country overseas" also represents a substantial connection to the United States, Pet. 35, *Ibrahim* plainly does not address whether a foreign national serving with a U.S. military unit in an area of hostilities must receive greater procedural rights than a member of that unit would receive.

3. This case does not present an issue of such importance as to justify further review in the absence of a conflict among lower courts. Even after pleading guilty to offenses committed in a combat zone, petitioner was sentenced only to 115 days of confinement that he had

already served. Thus, while his challenge to his conviction is not moot, see *Sibron* v. *New York*, 392 U.S. 40, 50-52 (1968), he has already served his sentence and faces no further criminal punishment.

As petitioner acknowledges, moreover, he "is the first, and only, full-fledged civilian to be subjected to trial by court-martial by the United States since at least 1970," and "[e]very 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." Pet. 6 n.3, 12. He is therefore wrong that the petition presents issues of "national importance given the increased reliance on civilian contractors by deployed military forces." Pet. 36. In the six-and-one-half years since Section 802(a)(10) was amended to include "contingency operation[s]," U.S. military authorities have invoked it to prosecute a civilian only once (this case), despite the "approximately 154,000 civilian contractor personnel supporting Defense Department operations in Iraq and Afghanistan." Pet. 36; see Pet. App. 61a (Effron, J., concurring in part and concurring in the result) (observing that "[a]lthough the armed forces and military contractors have employed a large number of civilians in Iraq and Afghanistan * * * , the UCMJ has not been a significant factor in the prosecution of misconduct by civilians," with petitioner being the only civilian subjected to a court-martial).

Although petitioner is correct that numerous host-nation civilian employees support Department of Defense operations in Afghanistan and Iraq, in no other instance has such an individual ineligible for prosecution in the United States been prosecuted by court-martial. That is because ordinarily the host nation itself prosecutes its citizens for offenses committed in connection

with U.S. military operations. See Pet. App. 62a (Effron, J., concurring in part and concurring in the result) ("Although the legislative history of the MEJA exclusion for host-country nationals is not extensive, it reflects congressional sensitivity to the interests of a host country in prosecuting its own citizens."); Overseas Jurisdiction Advisory Comm., DoD, *Report of the Advisory Committee on Criminal Law Jurisdiction over Civilians Accompanying the Armed Forces in Time of Armed Conflict* 61 (Apr. 18, 1997), http://www.fas.org/irp/doddir/dod/ojac.pdf (noting that host-country nationals are not likely to escape punishment by their own criminal-justice authorities and warning that an effort by United States authorities to assert extraterritorial criminal jurisdiction over their actions within their own country could well cause unnecessary conflicts of jurisdiction and other difficulties). Petitioner is unusual in that he holds Canadian citizenship in addition to Iraqi citizenship and has resided in Canada for over three decades. That highly anomalous circumstance is unlikely to recur with any frequency.

Moreover, shortly after petitioner was charged, the Secretary of Defense issued a directive that now substantially limits the authority of military commanders to assert court-martial jurisdiction over civilian contractors under Section 802(a)(10). See *Memorandum for Secretaries of the Military Departments, Subject: UCMJ Jurisdiction Over DoD Civilian Employees, DoD Contractor Personnel, and Other Persons Serving With or Accompanying the Armed Forces Overseas During Declared War and in Contingency Operations* (Mar. 10, 2008), http://www.dod.gov/dodgc/images/ucmj_civ08.pdf. Among other things, the directive reserves exclusively to the Secretary of Defense the au-

thority to convene the court-martial of a civilian under Section 802(a)(10); precludes the exercise of such jurisdiction until after the Department of Justice determines that it does not intend to exercise jurisdiction over a case; and requires that the charged conduct result in a potential adverse effect on military operations. That new and substantial restriction on the use of court-martial proceedings against civilians further indicates that the decision below is unlikely to have broad prospective importance.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 2013