AVOIDING THE "LEGAL BERMUDA TRIANGLE": THE MILITARY EXTRATERRITORIAL JURISDICTION ACT'S UNPRECEDENTED EXPANSION OF U.S. CRIMINAL JURISDICTION OVER FOREIGN NATIONALS

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I. INTRODUCTION: CURRENT EVENTS DEMAND A SOLUTION

In early 2000, the United States Army Criminal Investigation Command investigated reports that private contractors at a base near Tuzla, Bosnia were purchasing women from brothels and holding them as sex slaves.[1] The investigations revealed that some of the women were as young as twelve years old.[2] The contractors worked for DynCorp, a Virginia-based firm hired by the

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1. Colum Lynch, *Ex-U.N. Officer Sues U.S. Firm Over Dismissal*, WASH. POST, Jun. 23, 2001, at A20, *available at* http://www.washingtonpost.com/ac2/wp-dyn/A36025-2001Jun22. The contractors worked for DynCorp Aerospace Co., the British subsidiary of U.S.-based DynCorp Inc. *Id.* DynCorp employees who cooperated with the investigation alleged that other DynCorp employees illegally purchased weapons, consorted with organized-crime figures, patronized sex clubs, and engaged in sex trafficking and sexual slavery in Bosnia. *Id.* DynCorp officials also allegedly forged documents for trafficked women to aid their illegal transport into Bosnia. Antony Barnett *&* Solomon Hughes, *Dyncorp's British Subsidiary Sued in the UK*, OBSERVER (London), July 29, 2001, *available at* http://observer.guardian.co.uk/international/story/0,6903,529136,00.html. In fact, between July 2000 and March 2001, Bosnian authorities refused 283 immigration applications, most of which were denied because they were linked to human trafficking. The Protection Project, A Human Rights Report of Trafficking of Persons, Especially Women and Children, Bosnia and Herzegovina 71 (Mar. 2003), *available at* http://www.protectionproject.org/macedonia.doc. In order to confirm the reports, the Army Criminal Investigation Command conducted a sting operation that yielded weapons and a pornographic video featuring a DynCorp supervisor. Lynch, *supra.* Another DynCorp employee admitted to Army investigators that "he had bought a Romanian woman and an Uzi." *Id.* The Army's investigation confirmed many of the allegations and, as a result, DynCorp officials fired eight employees serving in Tuzla, Bosnia between 1999 and 2000. *Id.*; *see also* Robert Capps, *Crime Without Punishment*, SALON, June 27, 2000, http://archive.salon.com/ news/feature/2002/06/27/military/.

2. Kelly Patricia O'Meara, *DynCorp Disgrace*, INSIGHT, Jan. 14, 2002, http://www.insightmag.com/main.cfm/include/detail/storyid/163052.html.

Department of Defense (DoD) to provide maintenance services in Bosnia.[3] Although both the Bosnian authorities and the U.S. Army confirmed the reports, none of the contractors faced criminal prosecution in Bosnia or in the United States.[4] Due to a combination of factors, the contractors did not fall under any jurisdiction with the ability to prosecute.[5] Bosnian authorities could not prosecute the contractors because of the immunity provided to these contractors through international treaties.[6] The U.S. Army could not prosecute because, except in very narrow circumstances, civilians are not subject to prosecution under the Uniform Code of Military Justice (UCMJ).[7] Similarly, U.S. civilian authorities could not prosecute because the crimes were committed outside the territorial jurisdiction of the United States.[8] These circumstances reveal a critical loophole in U.S. criminal law—the "Legal Bermuda Triangle."[9]

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3. *Id.* Founded in 1946 by a group of military pilots, DynCorp's traditional role has been in areas directly supporting DoD in the field. COMPUTER SCIENCE CORPORATION, *CSC and DynCorp Combine to Create Federal IT Powerhouse* (2003), http://www.csc.com/features/2003/7.shtml. DoD contracts represented forty-nine percent of DynCorp's revenue in 2001. *Id.* DynCorp also has significant contracts with the Department of State, the Department of Energy, the Department of Justice, and the U.S. Postal Service. *Id.* Approximately ninety-eight percent of its total revenue comes from the federal government. *Id.* In March 2003, DynCorp merged with Computer Sciences Corporation (CSC), creating a "company that ranks as one of the top information technology and outsourcing services providers to the U.S. federal government." *Id.* Pat Ways, CSC's president of business development, stated, "We now provide support for the warfighter from the day he or she joins the service until they're out in the battlefield actually at work. It's a whole life cycle support of the soldier." *Id.*

4. Lynch, *supra* note 1; *see also* Capps, *supra* note 1.

5. *Id.*

6. Capps, *supra* note 1.

7. Joseph R. Perlak, *The Military Extraterritorial Jurisdiction Act of 2000: Implications for Contractor Personnel*, 169 MIL. L. REV. 92, 97-98 (2001). For a detailed discussion of the Supreme Court decisions eliminating UCMJ jurisdiction over civilians, see Glenn R. Schmitt, *Closing the Gap in Criminal Jurisdiction over Civilians Accompanying the Armed Forces Abroad – A First Person Account of the Creation of the Military Extraterritorial Jurisdiction Act of 2000*, 51 CATH. U. L. REV. 55 (2001). UCMJ jurisdiction over civilians is only permitted in two instances. First, 10 U.S.C. § 802 limits UCMJ jurisdiction to those civilians who are serving with or accompanying the armed forces in the field during times of congressionally-declared war. Second, a civilian contractor may be subject to prosecution under the UCMJ if he is a retired member of a regular component of the armed forces entitled to pay. 10 U.S.C. § 802(a)(4) (2005). Otherwise, DoD employees and contractors are not subject to UCMJ jurisdiction.

8. Lynch, *supra* note 1; *see also* Capps, *supra* note 1. Since most U.S. laws cannot be enforced extraterritorially, there is no jurisdictional authority to prosecute American civilians for crimes committed on foreign soil. *Id*.

9. Nonna Gorilovskaya, *Contracting Justice*, MOTHER JONES, June 11, 2004, http://www.motherjones.com/news/dailymojo/2004/06/06_513.html.

More recently, in April 2004, CBS's *60 Minutes II* broadcast photographs of U.S. military and intelligence personnel subjecting Iraqi detainees to physical, sexual, and psychological abuse at the infamous Abu Ghraib prison in Iraq.[10] DoD's internal investigative report, commonly known as the *Fay Report*,[11] found that several of the perpetrators were civilian contractors.[12] Two private U.S. companies, CACI Incorporated (CACI)[13] and Titan Corporation (Titan), have been implicated in the abuse.[14] Both firms were hired to augment interrogation, analyst,

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10. *Abuse of Iraqi POWs by GIs Probed*, CBS NEWS, Apr. 28, 2004, http://www.cbsnews.com/stories/2004/04/27/60II/main614063.shtml.

11. Major General Fay was initially appointed as the lead investigator by Lieutenant General Sanchez. Press Release, Department of Defense, Results of Investigation of Military Intelligence Activities at Abu Ghraib Prison Facility (Aug. 25, 2004), *available at* http://www.defenselink.mil/transcripts/2004/tr20040825-1224.html. His report resulted in the *Fay Report*. However, Major General Fay later recused himself so that the report could account for his entire chain of command, to include himself. *Id.* Therefore, in June 2004, Lieutenant General Jones, a more senior-ranking officer, was named as the senior investigating officer. *Id.* His investigation resulted in the *Jones Report*. These two reports have been consolidated into one report, known as the *Fay-Jones Report*; however, they remain as two distinct sections within the consolidated report. For the purposes of this Note, the two reports will be cited separately.

12. GEORGE R. FAY, INVESTIGATION OF THE ABU GHRAIB DETENTION FACILITY AND 205TH MILITARY INTELLIGENCE BRIGADE 47-48 (2004) [hereinafter THE FAY REPORT].

13. CACI's original contract for interrogator services started in August 2003. CACI, *CACI in Iraq – Frequently Asked Questions*, http://www.caci.com/iraq_faqs.shtml#employees (last updated Sept. 14, 2004). In August 2004, CACI received a four-month contract extension directly from the U.S. Army to continue providing interrogator services. *Id.* The contract is worth $15.3M and has two optional extensions worth up to $3.8M each, for a total value of $23M. *Id.* CACI interrogators work at the direction of their U.S. military contracting officer's representative (COR) and are assigned to interrogation cases and projects. *Id.* They participate on interrogation teams composed of an interpreter, an analyst, and an interrogator under supervision of an NCO, warrant officer, or commissioned officer. *Id.* The interrogator's role is to propose the plan for interviewing the detainee, the questions to ask, when to ask the questions, and how to support the task of discovering intelligence information that will assist the command in its military mission. Interrogators also review other intelligence data and information available and analyze how the pieces may fit together. *Id.* In addition to interrogator services, CACI also provides logistical and contract administration support. *Id.*

14. THE FAY REPORT, *supra* note 12. Dr. J.P. London, Chairman, President, and Chief Executive Officer of CACI International, Inc., released a statement on behalf of the corporation asserting that CACI was "currently assessing the content of the August 25, 2004 report issued on behalf of U.S. Army Maj. Gen. George R. Fay and Lt. Gen. Anthony R. Jones (the "Fay-Jones Report")." J.P. London, *The Truth Will Out* (Sept. 14, 2004), http://www.caci.com/iraq_news.shtml. He asserted that the corporation was "cooperating fully with government investigators" and that it was also conducting an internal investigation and analysis of its own. *Id.* The corporation also stated, "CACI has never, and will never, condone or tolerate illegal or inappropriate behavior by an employee when engaged in CACI business." *Id.*

and linguist personnel at Abu Ghraib.[15] Reports allege that employees of these firms coached the military personnel at Abu Ghraib in interrogation techniques,[16] which purportedly included how to physically abuse prisoners.[17] Similar to the DynCorp contractors in Bosnia, the contractors at Abu Ghraib cannot be court-martialed by the U.S. military.[18] However, unlike the Bosnian case, it may be

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15. THE FAY REPORT, *supra* note 12; *see also* ANTHONY R. JONES, INVESTIGATING OFFICER, U.S. DEP'T OF DEFENSE, AR 15-6: INVESTIGATION OF THE ABU GHRAIB DETENTION FACILITY AND 205TH MILITARY INTELLIGENCE BRIGADE 11 (2004) [hereinafter THE JONES REPORT]. The need to supplement the Army's capacity for linguists was proposed to the Vice Chief of Staff of the Army in a 1997 "Foreign Language Lay Down." The proposal suggested contracting with the private sector to obtain linguists for contingency and intelligence operations. THE FAY REPORT, *supra* note 12, at 48. As a result of the 1997 proposal, Titan was awarded Contract DASC01-99-D-0001 in March 1999. *Id*. Titan developed a "plan to provide and manage linguists through the world." Since 1999, hundreds of linguists have been employed, with "generally positive results." *Id*. It is important to note that the Titan contract does not mention the contractors actually participating in and conducting interrogations. *Id*. It merely calls for translation services. *Id*. As a result, contractors at the Abu Ghraib prison were not required to review or sign the International Rules of Engagement regarding the humane treatment of prisoners. *Id*. CACI was awarded its contract for "numerous intelligence-related services" in August 2003. THE FAY REPORT, *supra* note 12, at 48. Although it is DoD policy that intelligence activities and related services, including interrogation services, be executed by military or government civilian personnel, the Department also recognizes that "contracts for such services may be required in urgent or emergency situations." *Id*. at 49. The rationale behind the policy is to "avoid many of the problems that eventually developed at Abu Ghraib, e.g., lack of oversight to insure that intelligence operations continued to fall within the law and the authorized chain of command, as well as the government's ability to oversee contract operations." *Id*.

16. ANTONIO M. TAGUBA, U.S. DEP'T OF DEFENSE, ARTICLE 15-6: INVESTIGATION OF THE 800TH MILITARY POLICE BRIGADE 44 (2004) [hereinafter THE TAGUBA REPORT], *available at* http://www.johnmccrory.com/download/taguba_report.pdf. The Taguba Report found that Steven Stephanowicz, a U.S. civilian interrogator employed by CACI and assigned to the 205th Military Intelligence Brigade, "instructed [military police], who were not trained in interrogation techniques, to facilitate interrogations by 'setting conditions' which were neither authorized [nor] in accordance with applicable regulations/policy." *Id. See also* Phillip Carter, *How to Discipline Private Contractors*, SLATE, May 4, 2004, http://slate.msn.com/id/2099954/; Seymour M. Hersh, *Torture at Abu Ghraib*, NEW YORKER, May 10, 2004, http://www.newyorker.com/fact/content/?040510fa_fact.

17. THE TAGUBA REPORT, *supra* note 16. The Report found that Mr. Stephanowicz "clearly knew his instructions equated to physical abuse." *Id.* The Report further found that Mr. Stephanowicz and another CACI contractor, John Israel, "were either directly or indirectly responsible for the abuses at Abu Ghraib." *Id.*; *see also* Carter, *supra* note 16. CACI denies that Mr. Israel is an employee of CACI and asserts that the Taguba Report erroneously listed him as such. CACI, *supra* note 13.

18. For a detailed discussion of court-martial jurisdiction over civilians, see Schmitt, *supra* note 7, at 60.

possible for the contractors at Abu Ghraib to be tried in U.S. federal courts.[19] The gap that existed in U.S. federal criminal jurisdiction at the time of the Bosnian criminal activity has been effectively closed through the enactment of the Military Extraterritorial Jurisdiction Act (MEJA).[20] This time contractors can be tried under the MEJA.[21]

While the contractors implicated in the Abu Ghraib prison scandal were U.S. nationals, this Act does not merely apply U.S. federal law to U.S. citizens, but takes the unprecedented step of applying U.S. federal law to crimes committed in *foreign* countries by *foreign* nationals. This Note will examine the MEJA's significant expansion of American criminal law over crimes committed on foreign soil by foreign nationals employed by DoD. Part II of this Note examines the history of civilians accompanying the military into battle and the factors contributing to the military's increased reliance upon contractor services. Part III describes the various jurisdictional schemes employed to prosecute contractors from the Revolutionary War until the enactment of the MEJA and explains why a jurisdictional gap existed for over thirty years. Part IV describes in detail the MEJA as a solution to this gap. Part V provides the justifications for asserting extraterritorial jurisdiction over foreign nationals pursuant to the Act. Finally, Part VI examines possible alternatives to the Act should U.S. courts find it to be unconstitutional.

II. CIVILIANS GO OFF TO WAR

A. A Historical Perspective

Civilians have served with or accompanied the Armed Forces in battle since the founding of the United States.[22] As early as the Revolutionary War, civilian employees provided support to General George Washington's army.[23]

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19. Gorilovskaya, *supra* note 9.

20. 18 U.S.C. §§ 3261-3267 (2000).

21. Dan Eggen & Walter Pincus, *Ashcroft Says U.S. Can Prosecute Civilian Contractors for Prison Abuse*, WASH. POST, May 7, 2004, at A18, *available at* http://www.washingtonpost.com/ac2/wp-dyn?pagename=article&contentId=A6875-2004May6. There is some concern that since the CACI contract was managed by the Department of the Interior, the MEJA may not apply to the corporation's employees. Renae Merle & Ellen McCarthy, *6 Employees from CACI International, Titan Referred for Prosecution*, WASH. POST, Aug. 26, 2004, at A18. However, most are confident that the MEJA's language will include these contracts. *See* 18 U.S.C. § 3267(1)(A)(ii)(II) (2000).

22. Rebecca Rafferty Vernon, *Battlefield Contractors: Facing the Tough Issues*, 33 PUB. CONT. L.J. 369, 373 (2004).

23. Joe A. Fortner, *Institutionalizing Contractor Support on the Battlefield*, ARMY LOGISTICIAN, July-Aug. 2000, at 12, 12.

They fed the cavalry's horses[24] and transported supplies.[25] However, civilians did not serve in significant numbers until the Civil War.[26] Ever since, civilian support has been commonplace.[27] During World War II, the military relied heavily on civilian employees.[28] Approximately 1200 DoD civilian employees provided construction services on Wake Island when the Japanese attacked on December 8, 1941.[29] Later, during the Vietnam conflict, contractor personnel supported both sides.[30] The North Vietnamese employed civilians to transport supplies and repair lines of communication.[31] The United States employed roughly 9000 civilians to operate electrical plants, perform aircraft maintenance, and support complex equipment, among other things.[32] In Operations Desert Shield and Desert Storm, approximately 4500 DoD civilian employees and over 3000 contractors deployed with 500,000 troops, a ratio of one to sixty-seven.[33] As a result of the increasing number of contingency operations[34] following the Gulf War, even more civilian employees were deployed to countries such as Somalia, Haiti, Kuwait, and

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24. George Cahlink, *Army of Contractors*, GOV'T EXEC. 43, Feb 2002, *available at* http://www.govexec.com/features/0202/ 0202s5.htm.

25. Dan Baum, *Nation Builders for Hire*, N.Y. TIMES, June 22, 2003, at 32.

26. Schmitt, *supra* note 7, at 60.

27. *Id.*

28. Vernon, *supra* note 22, at 374.

29. Michael J. Davidson, *Ruck Up: An Introduction to the Legal Issues Associated with Civilian Contractors on the Battlefield*, 29 PUB. CONT. L.J. 233, 248 (2000).

30. Vernon, *supra* note 22, at 374.

31. W. Hays Parks, *Air War and the Law of War*, 32 A.F. L. REV. 1, 131 (1990).

32. Davidson, *supra* note 29, at 235.

33. OVERSEAS JURISDICTION ADVISORY COMMITTEE, REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL LAW JURISDICTION OVER CIVILIANS ACCOMPANYING THE ARMED FORCES IN TIME OF ARMED CONFLICT 16 (Apr. 18, 1997) [hereinafter OVERSEAS JURISDICTION ADVISORY COMMITTEE REPORT].

34. The term "contingency operation" is defined in 10 U.S.C. § 101(a)(13) (2005):

> The term "contingency operation" means a military operation that—
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> > (A) 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; or
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> > (B) results in the call or order to, or retention on, active duty of members of the uniformed services under section 668, 12301(a), 12302, 12304, 12305, or 12406 of this title, chapter 15 of this title, or any other provision of law during a war or during a national emergency declared by the President or Congress.

Rwanda.[35] In the Balkans, contractor employees outnumbered military personnel, with 12,000 contractors supporting 9000 troops.[36] Today, private contractors provide support for every major U.S. military deployment,[37] performing a wide variety of functions, including communications and equipment maintenance, weapon system modernization, meal preparation, and laundry services.[38]

Perhaps the best example of the increasing involvement of civilian contractors is the most recent war against Iraq. In Operation Iraqi Freedom, civilian employees have managed everything from food preparation and housing to the maintenance of sophisticated weapons systems like the B-2 stealth bomber, the F-117 stealth fighter, the KC-10 refueling aircraft, the U-2 reconnaissance aircraft, and several naval surface warfare ships.[39] In May 2003, there were 8700 civilian contractors in support of Operation Iraqi Freedom.[40] DynCorp, the corporation implicated in sex crime investigations in Bosnia, is paid $30M annually by the Air Force to maintain enough equipment in Qatar, Oman, and Bahrain to supply as many as 26,000 U.S. airmen.[41] Likewise, the Army pays DynCorp $25M annually to maintain stockpiles of support equipment stored on ships in the Indian Ocean.[42] Another private firm, Combat Support Systems, maintains weapons and vehicles, charters exercises, and manages firing ranges at Camp Doha, in Kuwait, under a ten-year $550M contract with that country.[43]

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35. Schmitt, *supra* note 7, at 60.

36. Cahlink, *supra* note 24, at 44.

37. P.W. Singer, *War, Profits, and the Vacuum of Law: Privatized Military Firms and International Law*, 42 COLUM. J. TRANSNAT'L L. 521, 522 (2004). Peter Singer is an expert at the Brookings Institute in Washington, D.C.

38. Schmitt, *supra* note 7, at 60.

39. *See* U.S. DEP'T OF DEFENSE, IMPROVING THE COMBAT EDGE THROUGH OUTSOURCING (Mar. 1996), *available at* http://www.defenselink.mil/speeches/1996/di1130.html. *See also* P.W. SINGER, CORPORATE WARRIORS: THE RISE OF THE PRIVATIZED MILITARY INDUSTRY at 3-17, 79 (2003); Singer, *supra* note 37.

40. *Civil Service and National Security Personnel Improvement Act: Hearing on H.R. 1836 Before the H. Committee on Government Reform*, 108th Cong. 2 (2003) (statement of Rep. Tom Davis), *available at* http://reform.house.gov/uploadedfiles/Chairman%20Opening%20Statement.pdf. Rep. Davis compared the number of private contractors to the number of federal civilian employees in Iraq and found that private contractors represented eighty-three percent of the workforce in Iraq. *Id*.

41. George Cahlink, *Building a Presence*, GOVERNMENT EXECUTIVE, Dec. 15, 2002, *available at* http://www.govexec.com/story_page.cfm?articleid=24526&printerfriendlyVers=1&.

42. *Id.*

43. Juan O. Tamayo, *Pentagon Contractors Playing Vital Military Support Roles*, MIAMI HERALD, Mar. 7, 2003, at A24. The contractor has roughly 550 employees positioned at Camp Doha. *Id.*

In addition to contractors who are U.S. citizens, DoD also outsources contract work to foreign nationals.[44] DoD's most recent report on civilian personnel strength indicates that DoD hired 53,765 foreign nationals, ninety-nine percent of whom are working in countries overseas.[45] The majority of foreign nationals are termed "indirect hire civilians," meaning they are employees of the foreign government involved but have been contracted by the United States to support U.S. forces.[46] However, approximately one-fourth of all foreign nationals hired by DoD are "direct hire civilians," meaning they are hired directly by an agency of DoD.[47] These numbers are significant, as the MEJA applies to foreign nationals as well as U.S. nationals. Since ninety-nine percent of the foreign contractors are working overseas, it is likely that the majority of crimes committed by them will occur on foreign soil.

B. Increased Reliance on Contractor Support

The military's increased reliance on civilian contractors in modern times was launched by former Secretary of Defense William Cohen when he introduced his Defense Reform Initiative in 1997.[48] He stated, "[o]ur infrastructure is still too

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44. DEPARTMENT OF DEFENSE, WORLDWIDE MANPOWER DISTRIBUTION BY GEOGRAPHICAL AREA, Sept. 30, 2003 [hereinafter WORLDWIDE MANPOWER REPORT], *available at* http://web1.whs.osd.mil/mmid/pubs.htm#M05.

45. *Id.* at 17. The number of foreign nationals working overseas is 53,244. *Id.*

46. DEPARTMENT OF DEFENSE, DIRECTORATE FOR INFORMATION OPERATIONS & REPORTS (DIOR), GLOSSARY OF DOD WORK FORCE TERMS [hereinafter DIOR REPORT], *available at* http://www.dior.whs.mil/mmid/netgloss.htm. Of the total 53,244 foreign nationals working for DoD overseas, 38,932 are indirect hire. WORLDWIDE MANPOWER REPORT, *supra* note 44, at 17.

47. DIOR REPORT, *supra* note 46. Of the total 53,244 foreign nationals working for DoD overseas, 14,312 are direct hire. WORLDWIDE MANPOWER REPORT, *supra* note 44, at 17.

48. Arnold L. Punaro, *Options for the New Administration: "Keep the Tooth – Cut the Tail,"* Presentation to the National Defense University "QDR Symposium" (Nov. 8, 2000), http://www.ndu.edu/inss/symposia/jointops00/punaro1_files/frame.htm#slide0009.htm. Secretary Cohen described his Defense Reform Initiative:

> We can sustain the shooters and reduce the supporters–we can keep the tooth, but cut the tail. Right now there is too much fat in the tail. Our infrastructure is still too large for our force structure today . . . . Our logistics system has too many people. We still do too many things in-house that we can do better and cheaper through outsourcing . . . . Across the board, we've got to streamline, downsize and buy more off the shelf . . . . We need to cut the fat from defense not just to save money but also to make the Department every bit as flexible and responsive as the troops we support.

large for our force structure today. We still do too many things in-house that we can do better and cheaper through outsourcing."[49] He justified the outsourcing of tasks originally performed by military personnel by arguing that "we can keep the tooth, but cut the tail."[50] Civilian contractors function as an "effective force multiplier,"[51] meaning they are hired to provide services that will free a "trigger-puller" to fight.[52]

Several trends led to the military's reliance on civilian contractors, including downsizing, outsourcing, and "cradle-to-grave" contracting (long-term support for the duration of the system's lifetime).[53]

1. Post-Cold War Downsizing

During the Cold War, the United States prepared for a protracted and major land war in Europe against a numerically superior foe.[54] However, the dissolution of the Soviet Union and the end of the Cold War altered the role and policies of DoD, leading to reductions in force structure and defense spending.[55] The U.S. military has decreased from over two million people in arms to just over one million, and the budget decreased $143.5B between 1986 and 1997.[56] However, while the military has downsized, the number of peacekeeping and humanitarian missions has steadily increased.[57] And, despite the current war on terrorism, DoD has no plans to increase the size of the military.[58] In the weeks after September 11, 2001 the Air Force requested 7000 more airmen.[59] Defense Secretary Donald Rumsfeld rejected the request and instructed the Air Force to

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Id.

49. *Id.*

50. *Id.* Historically, "the teeth" describes the front line, while "the tail" describes the support behind it. Laurie Goering, *Support Convoys Face Perilous Trek to Front*, CHI. TRIB., Mar. 25, 2003, at 1.

51. Perlak, *supra* note 7, at 108; *see also* JOINT CHIEFS OF STAFF, JOINT PUB. 5-00.2, JOINT TASK FORCE PLANNING GUIDANCE AND PROCEDURES VIII-11 (Jan. 13, 1999).

52. Perlak, *supra* note 7, at 108.

53. Vernon, *supra* note 22, at 374-78.

54. John Withers, *Contracting for Depot Level Maintenance*, ARMY LOGISTICIAN, Jan-Feb 2000, *available at* http://www.almc.army.mil/alog/issues/JanFeb00/MS453.htm.

55. *Id.*

56. *Id.* The defense budget was $403.5B in fiscal year 1986. *Id*. This decreased to $260B in fiscal year 1997 (in constant 1997 dollars). *Id*.

57. Vernon, *supra* note 22, at 375. "During the past decade, the U.S. military participated in humanitarian, peacekeeping, and military operations in the Balkans, Colombia, Panama, Afghanistan, and Iraq." *Id*.

58. George A. Cahlink, *Send in the Contractors*, A.F. MAG., Jan. 2003, at 69, *available at* http://www.afa.org/magaine/Jan2003/0103contract.html.

59. *Id.* After September 11, 2001, all of the military departments made similar requests for increased strength, which were all denied. *Id.*

find the needed personnel within its existing force.[60] He further suggested that the Air Force remove military personnel from tasks that could be outsourced to contractors.[61] In July 2003, Secretary Rumsfeld stated that there are "something in the neighborhood of 300,000 men and women in uniform doing jobs that aren't for men and women in uniform."[62] The military departments soon learned that by using contractors whenever possible, they could devote military personnel to severely undermanned military fields.[63]

The military departments may also employ contractors in foreign venues operating under so-called "force caps" where Congress or the host nation limits the number of U.S. forces in a region.[64] The military is forced to outsource noncombat functions to civilian contractors who arguably do not count against the cap.[65] One such example is the congressionally-mandated cap on the State Department's counter-narcotics program in Colombia.[66] Although Congress limited the number of military personnel to 500, DynCorp provides 355 additional personnel.[67]

2. A New Policy of Government Outsourcing

The federal government continually attempts to make itself smaller by outsourcing inherently nongovernmental functions to the private sector.[68] Since the mid-1950s, federal government policy, codified in OMB Circular A-76,

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60. *Id.*

61. *Id.*

62. Anthony Bianco & Stephanie Anderson Forest, *Outsourcing War*, BUS. WK., Sept. 15, 2003, at 69-70, *available at* http://www.businessweek.com/print/magazine/content/03_37/b3849012.htm?mz.

63. Vernon, *supra* note 22, at 375. This begs the question whether commanders may become so desperate for bodies that they outsource jobs that should be retained by military personnel alone. For a discussion of other problems associated with overly relying on contractor support, see *id.* at 394-95.

64. JOINT CHIEFS OF STAFF, JOINT PUB. 4-0, DOCTRINE FOR LOGISTICS SUPPORT OF JOINT OPERATIONS, at vi (Apr. 6, 2000). "Using civilian contractors is particularly effective when a military ceiling is placed on the size of a deployed force." *Id.*

65. ARMY FIELD MANUAL NO. 3-100.21, CONTRACTORS ON THE BATTLEFIELD ch. 1, §3 (2003). DoD and Army policy encourage contractor use to supplement forces operating under force limits. "When military force caps are imposed on an operation, contractor support can give the commander the flexibility of increasing his combat power by substituting combat units for military support units." *Id.*

66. Tamayo, *supra* note 43.

67. *Id.*

68. *Public-Private Competitions Have Saved DoD $5 Billion Since FY 2000, Official Says*, DEF. DAILY, Mar. 27, 2003, at 2. According to studies by the General Accounting Office and the Center for Naval Analysis, the competitions result in an average of thirty percent savings, regardless of who wins the competition. *Id.*

requires agencies to procure all commercial goods and services from private companies.[69] The Federal Activities Inventory Reform (FAIR) Act, enacted in 1998, requires agencies to comply with OMB A-76.[70] The FAIR Act forces agencies to outsource when utilizing the private sector would be more economical and efficient.[71]

Current DoD policy requires the military departments to utilize non-military commercial support whenever appropriate.[72] Except in a few narrow cases, commercial activities such as aircraft maintenance, base operations, and base supply have all been outsourced.[73]

3. Increasingly Complex Defense Systems

DoD policy encourages "cradle-to-grave" contracting by which the military departments secure long-term support for the duration of a system's lifetime.[74] As a general matter, the more technologically advanced the system, the

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69. William A. Roberts III et al., *A-76 Cost Comparisons: Overcoming the "Undue Built-In Bias Favoring In-House Performance of Services,"* 30 PUB. CONT. L.J. 585, 588 (2001). The policy was codified as OMB Circular A-76. OFFICE OF MGMT. & BUDGET, CIRCULAR NO. A-76 (Revised), PERFORMANCE OF COMMERCIAL ACTIVITIES, 68 Fed. Reg. 32,134 (May 29, 2003), *available at* http://www.whitehouse.gov/omb/circulars/a076/a76_rev2003.pdf. Although inherently governmental functions are not subject to outsourcing, this policy is slowly eroding. The 2003 revision of Circular A-76 narrowed the definition of "inherently governmental," so that fewer military tasks are considered "inherently governmental." *Id.* The National Treasury Employees Union is challenging the validity of the new definition, alleging that it violates the statutory definition of the Federal Activities Inventory Reform (FAIR) Act. Jason Peckenpaugh, *Union Sues Bush Administration over New Job Competition Rules*, GOV'T EXEC., June 19, 2003, *available at* http://www.govexec.com/dailyfed/0603/061903p1.htm.

70. Pub. L. No. 105-270, 112 Stat. 2382, § 2(a) (1998) (codified at 31 U.S.C. § 501 (2003)).

71. Agencies are required to identify all federal employee positions, except those considered "inherently governmental;" agency heads are responsible for determining which positions were "inherently governmental." Federal Activities Inventory Reform (FAIR) Act of 1998, Pub. L. No. 105-270, 112 Stat. 2382 (1998). For a detailed discussion of the FAIR Act's impact on the military departments, see Davidson, *supra* note 29, at 235.

72. DEPARTMENT OF DEFENSE, DIRECTIVE 4100.15, COMMERCIAL ACTIVITIES PROGRAM ¶ 4.4 (Mar. 3, 1989).

73. For a list of OMB A-76 competitions held between 1995 and 1998, see UNITED STATES GENERAL ACCOUNTING OFFICE, REPORT TO THE CHAIRMAN, SUBCOMMITTEE ON READINESS AND MANAGEMENT SUPPORT, COMMITTEE ON ARMED SERVICES, U.S. SENATE, DOD COMPETITIVE SOURCING: RESULTS OF RECENT COMPETITIONS, GAO-99-44, at 26 (Feb. 1999), *available at* http://www.gao.gov/archive/1999/ns99044.pdf.

74. U.S. DEP'T OF DEFENSE, REG. 5000.2-R, MANDATORY PROCEDURES FOR MAJOR DEFENSE ACQUISITION PROGRAMS (MDAPS) AND MAJOR AUTOMATED INFORMATION SYSTEM (MAIS) ACQUISITION PROGRAMS (2002).

more likely "cradle-to-grave" contracting will occur.[75] The military has always depended on the private sector for technology development.[76] However, it is only recently that DoD has come to rely on the private sector for this type of long-term support.[77]

Historically, the commercial sector would research, develop, build, and then surrender the technology to the military.[78] Although the contractor may have been responsible for warranty repairs, his contractual obligations ended when he relinquished the technology to the military.[79] Conversely, most modern defense contracts extend far beyond development.[80] Today, contractors are responsible for maintenance, modernization, and even operation of the technology.[81] Contractors are now involved from research to disposal, hence the term "cradle-to-grave."[82] The number of contractors present on the battlefield to operate and maintain the weapon systems will only increase as DoD's reliance on technology continues to expand.[83] As of 2002, the world of private military firms is a booming industry worth almost $1B a year.[84]

C. Problems Associated with Contractor Support

75. Patience Wait, *Contractors Support Systems on Front Lines; Field Teams*, GOV'T COMP. NEWS, Mar. 24, 2003, at 8. The number of defense systems using "smart-weapons" capabilities increased dramatically after the Gulf War. Smart-weapons capabilities exist on seventy to eighty percent of today's weapons, up from thirty percent during the Gulf War. *Id.*

76. Vernon, *supra* note 22, at 377.

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.* at 377-78.

82. Some contractors are required to be present during the operation of certain weapons, both on and off the battlefield. Many experts believe that the military could not function without the contractors' continual support. Some believe that the military is too reliant upon private contractors for the operation of critical weapons, such as the B-2 stealth bomber, attack helicopters, and drone reconnaissance aircraft. Kenneth Bredemeier, *Thousands of Private Contractors Support U.S. Forces in Persian Gulf*, WASH. POST, Mar. 3, 2002, at E01 (quoting Peter Singer).

83. For the 2003 FY, DoD received $127B for research, development, and procurement. UNITED STATES GENERAL ACCOUNTING OFFICE, REPORT TO CONGRESSIONAL COMMITTEES, DEFENSE ACQUISITIONS: ASSESSMENTS OF MAJOR WEAPONS PROGRAMS, GAO-03-476 (May 2003). Funding is expected to increase. Investment in weapons systems from 2005 through 2009 will exceed $1 trillion. *Id.*

84. Capps, *supra* note 1.

The presence of contractors on the battlefield raises unique issues.[85] First, operational control can be hindered by the lack of direct authority over the contractor and its employees.[86] This lack of authority is due to the fact that contractors are accountable only to their employer.[87] Thus, the military lacks any direct control over their actions.[88]

Second, in addition to adversely affecting military operations, contractors, like all individuals, are capable of committing crimes. As Peter W. Singer, an expert on private military contractors, told *National Public Radio*: "We all know that if we took . . . people from anywhere in the world and dropped them in a place over the course of the year some crime would happen."[89] Such crimes, committed by U.S. government employees, may adversely affect the reputation of the United States worldwide.[90] The sex slave scandal during the Bosnian conflict and the prison abuse scandal at Abu Ghraib are two prominent examples. Furthermore, not only does such criminal activity embarrass the United States within the international community, but it also threatens international relationships.[91]

III. OVER TWO CENTURIES OF PROSECUTING CIVILIANS

A. Early Prosecution of Contractors Under the Articles of War

85. *See generally* Vernon, *supra* note 22.

86. *Id.*

87. Federal government employees are not directly accountable to the military chain of command, but they are subject to the "chain of supervision." In the Air Force, federal employees are subject to disciplinary actions up to and including separation from federal service. *See generally* AIR FORCE INSTR. 36-704, DISCIPLINE AND ADVERSE ACTIONS (July 22, 1994), *available at* http://www.e-publishing.af.mil/pubfiles/af/36/afi36-704/afi36-704.pdf.

88. Vernon, *supra* note 22, at 389. An After-Action Report from peacekeeping efforts in the Balkans stated: "The relationship of [contractor employees] to the disciplinary and administrative apparatus of the force often left commanders scratching their heads." CENTER FOR LAW AND MILITARY OPERATIONS, LAW AND MILITARY OPERATIONS IN HAITI, 1994-1995: LESSONS LEARNED FOR JUDGE ADVOCATES 135, 143 (1995), *available at* http://www.jagcnet.army.mil/JAGNETInternet/Homepages/AC/CLAMO-Public.nfs/0/59e4fca88b99c6785256a1c006f1f03/$FILE/Haiti%20LL.PDF.

89. Gorilovskaya, *supra* note 9.

90. *Military Extraterritorial Jurisdiction Act of 1999: Hearing on H.R. 3380 Before the Subcomm. on Crime of the H. Comm. on the Judiciary*, 106th Cong. 17 (2000) [hereinafter *House MEJA Hearing*] (statement of Robert Reed, Deputy General Counsel, Department of Defense).

91. *Id.*

Since the Revolutionary War, civilians accompanying the military in the field have been subject to trial by court-martial.[92] Before the enactment of the UCMJ in 1950,[93] military jurisdiction over both the military and civilians accompanying the military was well-established under the Articles of War.[94] The 1775 Articles of War provided that "All Sutters and Retainers to a Camp, and all Persons whatsoever Serving with Our Armys in the Field, [though] no Enlisted Soldiers, are to be Subject to Orders, according to the Rules & Discipline of War."[95] The term "Sutters and Retainers to a Camp" referred to civilians who were not employed by the government, but who nevertheless accompanied the soldiers (e.g., privately employed officers' servants and "camp followers," such as newspaper correspondents and telegraph operators).[96] The term "Persons … Serving with [the army] in the Field" referred to civilians who were employed by the government.[97] However, regardless of the classification, jurisdiction depended upon the civilian serving *in the field*.[98] Mere employment relationships or contractual agreements were not sufficient for prosecution.[99]

In 1916, the Articles of War expanded in two areas. First, the military's court-martial jurisdiction extended to all civilians accompanying the military *outside* the territorial jurisdiction of the United States.[100] Second, the court-martial jurisdiction encompassed the mere employment relationship. The requirement that the civilian be "in the Field" no longer applied.[101] The Articles were used to try civilians during both World Wars,[102] but their constitutionality

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92. *See* FREDERICK BERNAYS WIENER, CIVILIANS UNDER MILITARY JUSTICE 22-23 (1967). The United States merely adopted the British practice, which dated from the 1740s. *Id*. at 22 n.80.

93. 10 U.S.C. §§ 801-941 (1994 & Supp. IV 1999).

94. 1920 Articles of War, 41 Stat. 787, art. 2(d) (1920). *See, e.g.*, Hines v. Mikell, 259 F. 28 (4th Cir. 1919); McCune v. Kilpatrick, 53 F. Supp. 80 (E.D. Va. 1943).

95. WIENER, *supra* note 92, at 22. *See also* WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 95 (2d ed. 1920). Again, the United States mimicked the British practice. This provision of the 1775 Articles of War was taken almost verbatim from the British Articles of War. WINTHROP, *supra*, at 98; WIENER, *supra* note 92, at 22.

96. WINTHROP, *supra* note 95, at 98-99.

97. *Id.* at 99.

98. *Ex parte* Henderson, 11 F. Cas. 1067, 1069 (C.C.D. Ky. 1878) (No. 6349).

99. *Id.*

100. WIENER, *supra* note 92, at 227-29.

101. *Id.* At the same time, the Articles continued to provide jurisdiction "in time of war" for all "retainers and persons accompanying or serving with the armies of the United States in the field, both within and without the territorial jurisdiction of the United States." *Id.* at 228.

102. *See, e.g.*, *Ex parte* Gerlach, 247 F. 616, 617 (S.D.N.Y. 1917) (civilian outside the United States); Hines v. Mikell, 259 F. 28, 29 (4th Cir. 1919) (contract employee in the United States); *In re* Berue, 54 F. Supp. 252, 253 (S.D. Ohio 1944) (civilian outside the United States); McCune v. Kilpatrick, 53 F. Supp. 80, 82 (E.D. Va. 1943) (civilian inside the United States).

and scope were not judicially tested, as the cases brought before the courts were limited to offenses committed during wartime and "in the Field."[103]

B. The Advent of the UCMJ

The UCMJ,[104] enacted in 1950, set forth three provisions expressly authorizing the use of courts-martial to try civilians for acts that violated the UCMJ.[105] The provisions authorized court-martial of (1) persons serving with or accompanying the military in the field in time of war; (2) persons serving with, employed by, or accompanying the military outside the United States; and (3) persons within an area leased by or otherwise reserved or acquired for use by the U.S. Government.[106]

These provisions came under almost immediate challenge.[107] In a series of cases beginning with *Reid v. Covert* in 1960, the Supreme Court ruled UCMJ

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103. WIENER, *supra* note 92, at 229.

104. 10 U.S.C. §§ 801-941 (1994 & Supp. IV 1999). The UCMJ regulates the conduct of all persons serving in the U.S. Armed Forces. *Id*. at § 804. Its stated purpose is to "promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States." MANUAL FOR COURTS-MARTIAL, UNITED STATES I-1 (2000 ed.). The UCMJ includes offenses that are unique to the military, as well as offenses punishable under federal or state law. Due to the overlap in jurisdiction, soldiers may be tried by courts-martial, under the UCMJ, or by a civilian court, under federal or state criminal law. Schmitt, *supra* note 7, at 57.

105. 10 U.S.C. §802(a)(10)-(12) (1994). Article 2(a) of the UCMJ provides

> The following persons are subject to [the UCMJ] . . .
> (10) In time of war, persons serving with or accompanying an armed force in the field.
> (11) Subject to any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, persons serving with, employed by, or accompanying the armed forces outside the United States and outside the Commonwealth of Puerto Rico, Guam, and the Virgin Islands.
> (12) Subject to any treaty or agreement . . . or to any accepted rule of international law, persons within an area leased by or otherwise reserved or acquired for the use of the United States which is under the control of the Secretary concerned and which is outside the United States . . . .

Id.

106. *Id*.

107. *See generally* United States *ex rel.* Toth v. Quarles, 350 U.S. 11 (1955) (releasing jailed former servicemen arrested by military authorities five months after they were discharged from the military).

jurisdiction unconstitutional with respect to offenses committed by civilians during peacetime.[108] In *Reid,* the Court reasoned that "the Founders had no intention to permit the trial of civilians in the military courts, where they would be denied jury trials and other constitutional protections. . . ."[109] The *Reid* decision was a capital case involving a military dependent (spouse of a service member).[110] Therefore, to many, the decision stood for the proposition that UCMJ jurisdiction could not be used to try *dependents* for *capital* offenses.[111] In order to clarify its intent, the Court held later that year in a different case that the UCMJ could not be

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108. Reid v. Covert, 354 U.S. 1 (1957). *See* Kinsella v. United States *ex rel*. Singleton, 361 U.S. 234 (1960); Grisham v. Hagan, 361 U.S. 278 (1960); McElroy v. United States *ex rel* Guagliardo, 361 U.S. 281 (1960); *see also* Toth, 350 U.S. 11. It can be inferred from their opinions that the justices who decided *Reid v. Covert* and the later cases understood the implications of their decisions in that they created a "jurisdictional gap" over crimes committed by civilians accompanying the Armed Forces overseas. In *Singleton*, Justice Clark made special note of "the want of legislation providing for trials in capital cases in Article III courts sitting in the United States." 361 U.S. at 245. He further stated "that there had been no effort in Congress to make any provisions for the prosecution of such cases." *Id*. Dissenting in *Reid* three years earlier, Justice Clark had written, "[a]ll that remains is for the dependents of our soldiers to be prosecuted in foreign courts. . . ." 354 U.S. at 90 (Clark, J., dissenting). *See also* Singleton, 361 U.S. at 246 ("[P]rosecution in the United States for the more serious offense when authorized by Congress, might well be the answer to the disciplinary problem."); *id.* at 259 (Harlan, J., dissenting) (predicting that the Court's decisions in *Singleton* and companion cases "may result in our having to relinquish to other nations . . . a substantial part of the jurisdiction now retained over American personnel under the Status of Forces Agreements"); *id.* at 276 (Whittaker, J., concurring) (noting that "jurisdiction of our civil courts does not extend" to "bases in foreign lands"); Reid, 354 U.S. at 48 (Frankfurter, J., concurring in the result) (accepting the government's argument that "only a foreign trial could be had" in the absence of court-martial jurisdiction); *id.* at 76 n.12 (Harlan, J., concurring in the result) (arguing that trying civilian dependents in the United States who commit crimes abroad is one possible alternative "available to Congress," but that "the practical problems in the way of such a choice are obvious and overwhelming"); *id.* at 78 (Clark, J., dissenting) ("The Court today releases two women from prosecution though the evidence shows that they brutally killed their husbands, both American soldiers, while stationed with them in quarters furnished by our armed forces on its military installations in foreign lands."); *id.* (noting that the Court "gives no authoritative guidance as to what, if anything, the Executive or the Congress may do to remedy the distressing situation in which they now find themselves"); *id*. at 88 (arguing that "trial of offenders by an Article III court in this country . . . even if the Congress and the foreign nation involved authorized such a procedure" would be "impracticable as a general solution to the problem" and, therefore, "[t]he only alternative remaining – probably the alternative that the Congress will now be forced to choose – is that Americans committing offenses on foreign soil be tried by the courts of the country in which the offense is committed").

109. 354 U.S. at 30.

110. Reid v. Covert, 351 U.S. 487, 488 (1956) (habeas corpus proceeding).

111. Schmitt, *supra* note 7, at 70.

used to try *dependents* in *non-capital* cases.[112] On the same day, the Court handed down yet another decision in which it considered whether the UCMJ could be applied to civilian *employees* for *capital* cases.[113] Not surprisingly, the Court held that it could not.[114] Later that year the Court issued another decision, which stated that the UCMJ could not be used to try civilian *employees* in *non-capital* cases.[115]

The final blow to court-martial jurisdiction over civilians came, unexpectedly, at the hands of a military court in 1970.[116] It was in that year that the last vestiges of UCMJ jurisdiction over civilians were, for all practical purposes, eliminated.[117] While the UCMJ occasionally retains jurisdiction over civilians, such as during times of congressionally-declared war,[118] there have not been any cases involving court-martial jurisdiction over civilians in nearly thirty years.[119]

C. The Gap

Since *Reid* and its progeny, representatives of the Armed Forces,[120] other executive branch officials,[121] government commissions,[122] members of

112. *Singleton*, 361 U.S. at 248.
113. *Grisham*, 361 U.S. at 279.
114. *Id.* at 280.
115. McElroy v. United States *ex rel* Guagliardo, 361 U.S. 281, 286 (1960).
116. United States v. Avarette, 19 C.M.A. 363 (1970).
117. *Id.*
118. 10 U.S.C. § 802.
119. Perlack, *supra* note 7, at 98.
120. *See, e.g.*, *Extraterritorial Criminal Jurisdiction: Hearing on H.R. 763, H.R. 6148, and H.R.7842 Before the Subcomm. on Immigration, Citizenship, and International Law of the H. Comm. on the Judiciary*, 95th Cong. 42-62 (1977) (hereinafter *Extraterritorial Criminal Jurisdiction Hearing*) (statement of Benjamin Forman, Assistant General Counsel, Department of Defense); Letter from L. Niederlehner, Acting General Counsel for the Department of Defense, to Sen. James O. Eastland, Chairman of the Senate Judiciary Committee (July 24, 1970), *reprinted in Operation of Article VII, NATO Status of Forces Treaty: Hearing Before the Subcomm. of a S. Comm. on Armed Services*, 91st Cong. 4-10 (1970); *id.* at 2 (statement of Ray W. Bronez, Director, Foreign Military Rights Affairs, Department of Defense); DEP'T OF ARMY, PAMPHLET 27-21, ADMINISTRATIVE & CIVIL LAW HANDBOOK, para. 2-19c, at 59 (Mar. 15, 1992).
121. *See, e.g.*, *House MEJA Hearing*, *supra* note 90 (statement of Roger Pauley, Director of Policy and Legislation, Criminal Division, Department of Justice); *Extraterritorial Criminal Jurisdiction Hearing*, *supra* note 120, at 30-33 (statement of Robert L. Keuch, Deputy Assistant Attorney General, Criminal Division, Department of Justice); *id.* at 62-65 (statement of James H. Michel, Assistant Legal Adviser, Department of State). *See also, e.g.*, Letter from David C. Gompert, Deputy Director, Politico-Military Affairs Bureau, Department of State, to J.K. Fasick, Director, International Division, General Accounting Office (June 8, 1979), *reprinted in* COMPTROLLER GENERAL OF THE UNITED STATES, REPORT TO CONGRESS, SOME CRIMINAL OFFENSES COMMITTED OVERSEAS

Congress,[123] and academic commentators[124] have noted the existence of a "jurisdictional gap"—the lack of any congressional authorization to try civilians

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BY DOD CIVILIANS ARE NOT BEING PROSECUTED: LEGISLATION IS NEEDED, 96th Cong. 43-47 (Sept. 11, 1979) [hereinafter GAO REPORT]; Letter from Kevin D. Rooney, Assistant Attorney General for Administration, Department of Justice, to Allen R. Voss, Director, General Government Division, General Accounting Office (renamed General Accountability Office in 2004) (July 5, 1979), *reprinted in* GAO REPORT, *supra*, at 48-51.

122. *See, e.g.*, OVERSEAS JURISDICTION ADVISORY COMMITTEE REPORT, *supra* note 35; GAO REPORT, *supra* note 121.

123. *See, e.g.*, *Extraterritorial Criminal Jurisdiction Hearing*, *supra* note 120. For at least eighteen years a Subcommittee of the Senate Armed Services Committee conducted annual hearings on the operation of Article VII of the NATO Status of Forces Treaty. *See, e.g.*, *Operation of Article VII, NATO Status of Forces Treaty: Hearing Before the S. Comm. on Armed Services*, 92d Cong. (1972). In almost every one of these hearings, the Subcommittee discussed the jurisdictional gap. *See, e.g.*, *id.* at 2 (statement of Benjamin Forman, Assistant General Counsel, Directorate for Defense). Before the passage of the Military Extraterritorial Jurisdiction Act of 2000, which finally closed the gap, Congress entertained more than thirty bills over four decades. *See, e.g.*, S. 768 & S. 899, 106th Cong. (1999); H.R. 3380, 106th Cong. (1999); S. 2484, 105th Cong. (1998); H.R. 4651, 105th Cong. (1998); S. 3 & S. 172, 105th Cong. (1997); S. 2083, 104th Cong. (1996); S. 3, S. 74 & S. 816, 104th Cong. (1995); H.R. 808, 104th Cong. (1995); H.R. 4531, 103d Cong. (1994); S. 129, 103d Cong. (1993); H.R. 5808, 102d Cong. (1992); S. 182, 102d Cong. (1991); S. 147, 101st Cong. (1989); H.R. 255, 99th Cong. (1985); S. 1437, 95th Cong. (1978); H.R. 763, 95th Cong. (1977); S. 1, 94th Cong. (1975); H.R. 3907, 94th Cong. (1975); S. 1745, 92d Cong. (1971); H.R. 18548 & H.R. 18857, 91st Cong. (1970); S. 2007, 90th Cong. (1967); H.R. 226, 90th Cong. (1967); S. 762, 89th Cong. (1965). *See generally* OVERSEAS JURISDICTION ADVISORY COMMITTEE REPORT, *supra* note 33, at 9-11; GAO REPORT, *supra* note 121, at 16-18.

124. *See, e.g.*, Thomas G. Becker, *Justice on the Far Side of the World: The Continuing Problem of Misconduct by Civilians Accompanying the Armed Forces in Foreign Countries*, 18 HASTINGS INT'L & COMP. L. REV. 277 (1995); Peter D. Ehrenhaft, *Policing Civilians Accompanying the United States Armed Forces Overseas: Can United States Commissioners Fill the Jurisdictional Gap?*, 36 GEO. WASH. L. REV. 273, 276-80, 295-96 (1967); Robinson O. Everett & Laurent R. Hourcle, *Crime Without Punishment – Ex-Servicemen, Civilian Employees and Dependents*, 13 U.S.A.F. JAG L. REV. 184 (1971); Robert Girard, *The Constitution and Court-Martial of Civilians Accompanying the Armed Forces – A Preliminary Analysis*, 13 STAN. L. REV. 461, 507-08 & n.217 (1961); Gregory A. McClelland, *The Problem of Jurisdiction over Civilians Accompanying the Forces Overseas – Still With Us*, 117 MIL. L. REV. 153 (1987); Jordan J. Paust, *Non-Extraterritoriality of "Special Territorial Jurisdiction" of the United States: Forgotten History and the Errors of* Erdos, 24 YALE J. INT'L L. 305 (1999); Lisa M. Schenck, *Child Neglect in the Military Community: Are We Neglecting the Child?*, 148 MIL. L. REV. 1, 22-23 (1995); Geoffrey R. Watson *Offenders Abroad: The Case for Nationality-Based Criminal Jurisdiction*, 17 YALE J. INT'L L. 41 (1992); Stephen B. Swigert, Note, *Extraterritorial Jurisdiction – Criminal Law*, 13 HARV. INT'L L. J. 346, 353-55 (1972); Note, *Criminal Jurisdiction over Civilians Accompanying American Armed Forces Overseas*, 71 HARV. L. REV. 712, 715-18 (1958). *See also, e.g.*, DONALD N. ZILLMAN ET

who commit crimes while accompanying the military overseas.[125] This gap is due in part to the elimination of court-martial jurisdiction and also to the inability to prosecute civilians in U.S. federal courts, as many federal criminal laws do not reach beyond the territorial borders of the United States.[126] As a result, prior to the enactment of the MEJA in 2000, crimes committed by civilians accompanying the military usually went unpunished by U.S. authorities.[127]

Additionally, host nations are often unable or unwilling to exercise criminal jurisdiction.[128] Consequently, many crimes continue to go unpunished by foreign authorities, as well.[129] Each year, numerous incidents of rape, sexual abuse, aggravated assault, arson, robbery, drug distribution, and a variety of fraud and property crimes committed by American civilians overseas go unpunished due to the host nation's waiver of jurisdiction over these crimes.[130] Surprisingly, most host nations do not wish to assert their jurisdiction to try American civilians in their countries.[131] Often, the host nation has little interest in devoting precious judicial resources to prosecute crimes that involve only U.S. citizens or U.S. property.[132] On occasion, the host nation is unwilling to prosecute because the contractors are somehow carrying out the state's dirty work.[133] Other times, the host nation may be unable to prosecute, as was the case in the failed state of Bosnia, where the legal system had simply crumbled.[134] In addition, the host nation may have no control over the contractors because they are fighting against the host government.[135] Whatever the motivation, the result is "an environment where civilians are untouchable despite commission of what would be serious crimes within the United States . . . . A contractor, there to support the U.S.

AL., THE MILITARY IN AMERICAN SOCIETY 3.17-18 (1978) (discussing the "jurisdiction gap"); Robinson O. Everett, *Military Jurisdiction over Civilians*, 1960 DUKE L.J. 366, 392, 396-97; Susan S. Gibson, *Lack of Extraterritorial Jurisdiction over Civilians: A New Look at an Old Problem*, 148 MIL. L. REV. 114 (1995); Stephen J. Lepper, *A Primer on Foreign Criminal Jurisdiction*, 37 A.F. L. REV. 169, 179-81 (1994).

125. United States v. Gatlin, 216 F.3d 207, 222 n.17-20 (2d Cir. 2000).

126. H.R. REP. NO. 106-778, pt. 1, at 5 (2000) [hereinafter HOUSE REPORT]. Sexual assault, arson, robbery, larceny, embezzlement, and fraud currently are not punishable extraterritorially. *Id.*

127. *See id.*

128. *Id.* at 7.

129. *Id.*

130. OFFICE OF THE INSPECTOR GENERAL, DEP'T OF DEFENSE, EVALUATION OF MILITARY CRIMINAL INVESTIGATIVE ORGANIZATIONS' INVESTIGATIVE EFFECTIVENESS REGARDING U.S. FORCES CIVILIANS STATIONED OVERSEAS, REP. NO. 99500009I, 7-10 (Sept. 7, 1999) [hereinafter OIG REPORT], *available at* http://www.dodig.mil/inspections/ipo/evalreports.htm.

131. HOUSE REPORT, *supra* note 126, at 7.

132. *Id.* at 5.

133. Singer, *supra* note 37, at 537.

134. *Id.*

135. *Id.*

national interest, could murder, rape, pillage and plunder with complete, legal unaccountability."[136] This is precisely what occurred in Bosnia and Kosovo, where several DynCorp employees were reported to have committed statutory rape, abetted prostitution, and accepted bribes.[137] No employees were ever prosecuted.[138] Instead, DynCorp has recently been awarded a defense contract to help run the new police force in Iraq, demonstrating that market and reputational forces do not ensure justice.[139]

Five months before the enactment of the MEJA, the Second Circuit issued a decision[140] in which the court, appalled at the lack of legislation in this area, took the extraordinary step "of directing the Clerk of the Court to forward a copy of this opinion to the Chairmen of the Senate and House Armed Services and Judiciary Committees."[141] *United States v. Gatlin*, decided in June of 2000, emphasized that in the years since the Supreme Court eliminated court-martial jurisdiction, the civilian criminal code still had not filled the overseas jurisdictional gap.[142] Gatlin, a military spouse stationed in Germany, pled guilty to repeatedly sexually abusing a minor, his thirteen-year-old stepdaughter.[143] When the child became pregnant, DNA testing proved Gatlin to be the father.[144] Gatlin was charged with engaging in sexual acts with a minor.[145] Although Gatlin pled guilty, he moved to dismiss the indictment for lack of jurisdiction.[146] The District Court judge ruled that the court had jurisdiction, finding that the American military housing in Germany, where the abuse occurred, was within the "special maritime and territorial jurisdiction of the United States."[147] The Court of Appeals reversed the decision, holding that the statute the defendant violated

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136. Gordon Campbell, *Contractors on the Battlefield: The Ethics of Paying Civilians to Enter Harm's Way and Requiring Soldiers to Depend Upon Them*, Presentation to the Joint Services Conference on Professional Ethics 2000 (Jan. 27-28, 2000), *available at* http://www.usafa.af.mil/jscope/JSCOPE00/Campbell00.html.

137. Singer, *supra* note 37, at 538.

138. *Id.*

139. *Id.*

140. United States v. Gatlin, 216 F.3d 207 (2d Cir. 2000). *Gatlin* was decided in the summer of 2000 while the MEJA was still under consideration in various congressional committees. *See generally* Schmitt, *supra* note 7.

141. *Gatlin*, 216 F.3d at 223.

142. *Id.*

143. *Id.* at 210.

144. *Id.*

145. 18 U.S.C. § 2243(a) (1994). The court of appeals held that § 2243(a) did not apply to Gatlin's offense. *Gatlin*, 216 F.3d at 220.

146. *Gatlin*, 216 F.3d at 210.

147. *Id.* This is the jurisdictional requirement for many federal crimes. *Id*. The court of appeals held that Gatlin was not within the special maritime and territorial jurisdiction of the United States under 18 U.S.C. § 2243(a). *Id*. at 220.

applied exclusively to the territorial United States.[148] Therefore, because of the jurisdictional gap, Gatlin's conviction was reversed.[149]

Circuit Judge Jose Cabranes' opinion in *Gatlin* cited the development of case law that led to the gap and noted that commentators had "urged Congress for over four decades to close the jurisdictional gap by extending the jurisdiction of Article III courts to cover offenses committed on military installations abroad and elsewhere by civilians accompanying the armed forces."[150] He argued that Congress's failure to act cannot be "blamed on a lack of awareness of the gap."[151] He also argued that the court's decision to reverse the defendant's conviction was "only the latest consequence of Congress's failure to close this jurisdiction gap."[152] Furthermore, Judge Cabranes forwarded his opinion to the Chairmen of the Senate and House Armed Services and Judiciary Committees.[153]

D. Negative Impact of the Gap

The most serious consequence of the jurisdictional gap is that criminal activity goes unpunished.[154] Persons accompanying the U.S. Armed Forces overseas are able to commit often-violent crimes without retribution.[155] These crimes have included grave offenses such as murder, sexual assault, sexual abuse, arson, and drug trafficking.[156] The U.S. Government, it would seem, has a moral obligation to punish criminals.[157] Additionally, prosecuting these crimes may

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148. *Id.*

149. *But see* United States v. Corey, 232 F.3d 1166, 1172-65 (9th Cir. 2000) (reviewing the *Gatlin* decision but reaching a completely opposite conclusion on similar facts); s*ee generally* Paust, *supra* note 126.

150. United States v. Gatlin, 216 F.3d 207, 221-22 (2d Cir. 2000) (citing Becker, *supra* note 124, at 280; McClelland, *supra* note 124; Everett & Hourcle, *supra* note 124; Ehrenhaft, *supra* note 124).

151. *Gatlin*, 216 F.3d at 222-23.

152. *Id.*

153. *Id.* at 223. Judge Cabranes stated,

> [I]n doing so, we should not be understood to express a view on the justice o[r] wisdom of any potential legislation. In our system of government "[t]he responsibility for the justice or wisdom of legislation rests with Congress, and it is the province of the courts to enforce, not to make, the laws."

Id. (citing United States v. First Nat'l Bank of Detroit, 234 U.S. 245 (1914)).

154. Schmitt, *supra* note 7, at 76.

155. *Id.* at 76 & n.137.

156. GAO REPORT, *supra* note 121, at 79-45.

157. Schmitt, *supra* note 7, at 77.

deter others from committing crimes while accompanying the Armed Forces overseas.[158]

At the House hearing on the MEJA, held by the Subcommittee on Crime, Robert E. Reed, DoD Associate Deputy General Counsel, testified that the gap has undermined good order and discipline in the military.[159] Mr. Reed testified as such:

> The inability of the United States to appropriately pursue the interests of justice and hold its citizens criminally accountable for offenses committed overseas has undermined deterrence, lowered morale, and threatened good order and discipline in our military communities overseas. In addition, the inability of U.S. authorities to adequately respond to serious misconduct within the civilian component of the U.S. Armed Forces, presents the strong potential for embarrassment in the international community, increases the possibility of hostility in the host nation's local community where our forces are assigned, and threatens relationships with our allies.[160]

Logically, if servicemen and -women realize that the U.S. Government is unable to punish criminals who harm their families when they are stationed overseas, they will be less willing to accept overseas assignments.[161] As one judge advocate general noted: "Word quickly gets around the military housing areas of a foreign post or base once a serious crime has occurred and the government proves unable to take action against the perpetrator."[162] Additionally, a servicewoman, preoccupied with the safety of her family, might be distracted from her duties.[163] This is especially true if she is deployed from her overseas assignment to an even more remote location where her family is unable to follow, such as Bosnia or Kosovo.[164] Further undermining good order and discipline is the fact that some

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158. *Id.*

159. *House MEJA Hearing*, *supra* note 90, at 17 (statement of Reed). Mr. Reed was also a member of the Overseas Jurisdiction Advisory Committee. Schmitt, *supra* note 7, at 77. DoD and the Department of Justice (DoJ) established the Advisory Committee at the request of Congress in 1995. National Defense Authorization Act for Fiscal Year 1996, Pub L. No. 104-106, § 1151, 110 Stat. 186, 467 (1996). Congress directed that they establish a committee to "review and make recommendations concerning the appropriate forum for criminal jurisdiction over civilians accompanying the Armed Forces in the field outside the United States in time of armed conflict." *Id*.

160. *House MEJA Hearing*, *supra* note 90, at 17 (statement of Reed).

161. Glenn Schmitt argues that military members may even leave the service to avoid overseas assignments. Schmitt, *supra* note 7, at 77.

162. *Id.*

163. *Id.*

164. *Id.*

servicemen and -women may resort to vigilantism when they learn that the government is powerless to prosecute criminals who have harmed their families.[165] Morale within the military is also impacted by the inequality that can result from the jurisdictional gap.[166] If a soldier and a civilian contractor were to commit a crime together, the soldier could be prosecuted under the UCMJ,[167] while the contractor would be immune from prosecution, assuming the host nation did not prosecute.[168]

The gap also affects U.S. relations with foreign nations and the ability of the U.S. Government to ensure due process to all citizens.[169] As Brigadier General Joseph Barnes, former Assistant Judge Advocate General of the Army, testified at the hearing before the House Subcommittee on Crime, closing the gap would permit the United States to more "successfully negotiate the right to exercise exclusive jurisdiction over civilians" in future status of forces agreement (SOFA) negotiations.[170] SOFAs govern the specific aspects of the deployment of American forces in foreign countries.[171] Clearly, if a host nation knows that American law does not permit the prosecution of crimes committed in its country, the host nation will be hard-pressed to negotiate away its right to bring those civilians to justice under its own law.[172] Glenn Schmitt, a judge advocate general and one of the drafters of the MEJA, explains in the following terms:

> As a result, Americans suspected of crimes in a foreign country would be judged by legal systems that may not offer the same protections to the falsely accused as the United States provides. Closing the jurisdictional gap addresses this problem by giving American negotiators of future SOFAs the ability to more credibly seek agreement from the host nation that Americans accused of crimes be brought to justice under the laws and procedures of American courts.[173]

IV. CLOSING THE GAP: THE MILITARY EXTRATERRITORIAL JURISDICTION ACT

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165. *Id.*
166. *Id.* at 78.
167. Schmitt, *supra* note 7, at 78.
168. HOUSE REPORT, *supra* note 126, at 5.
169. Schmitt, *supra* note 7, at 77-78.
170. *House MEJA Hearing*, *supra* note 90, at 20 (statement of Joseph Barnes, Assistant Judge Advocate General of the Army).
171. Schmitt, *supra* note 7, at 57.
172. *Id.* at 78.
173. *Id.*

In 2000, Congress enacted the MEJA,[174] which amended federal law to extend criminal jurisdiction to civilians, both U.S. citizens and foreign nationals, who commit criminal acts while employed by or accompanying the Armed Forces outside the United States.[175] As a result, DoD employees and contractors, including foreign nationals, are now subject to criminal prosecution in U.S. federal courts.[176]

A. The MEJA: A Brief Overview

The MEJA authorizes punishment of specified persons who commit acts outside the United States, which would constitute a felony-level offense if the acts were committed within the territorial jurisdiction of the United States.[177] The offender receives the same punishment as he would if the acts were committed in the United States.[178] The MEJA also provides guidelines for certain pre-trial procedures, such as arrest and removal of the accused to the United States.[179] And, while the MEJA provides for prosecution of civilians in U.S. federal courts, it does not deprive the host nation of jurisdiction.[180]

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174. Military Extraterritorial Jurisdiction Act of 2000, 18 U.S.C. §§ 3261-3267 (2000), *available at* http://uscode.house.gov/download/pls/18C212.txt.

175. HOUSE REPORT, *supra* note 126. The MEJA also extends federal criminal jurisdiction to include persons who commit crimes while they are members of the Armed Forces but who are not court-martialed by military authorities and later are no longer subject to military control. *Id.*

176. 18 U.S.C. §§ 3261-3267 (2000).

177. 18 U.S.C. § 3261(a) (2000).

178. *Id.*

179. 18 U.S.C. §§ 3262-3265. These guidelines are to be further elaborated upon in regulations to be issued by the Secretary of Defense, in consultation with the Secretary of State and the Attorney General. § 3266.

180. 18 U.S.C. § 3261(b). This section provides,

> No prosecution may be commenced against a person under this section if a foreign government, in accordance with jurisdiction recognized by the United States, has prosecuted or is prosecuting such person for the conduct constituting such offense, except upon the approval of the Attorney General or the Deputy Attorney General (or a person acting in either such capacity), which function of approval may not be delegated.

Id. The purpose of this provision appears to be twofold. First, Congress proposes to limit application of the MEJA to situations that are not already addressed by an existing scheme of criminal law. HOUSE REPORT, *supra* note 126, at 16. The Act is carefully devised not to disrupt "existing jurisdictional schemes, including those provided by international agreements." Perlack, *supra* note 7, at 103. Instead, the import of § 3261(b) is to fill perceptible jurisdictional gaps and nothing more. *Id*. at 103. It is not intended to "undo or supplant any part of the existing international law scheme." *Id*. For example, where

1. Covered Offenses

The MEJA appears to be constructed for straightforward application to the offenses in Title 18 of the United States Code that are punishable by more than one year imprisonment if committed within the United States.[181] Such offenses include: arson, certain aggravated assaults, theft (over $1000 in value), homicide, kidnapping, damage to real or personal property, selling obscene material, robbery, and certain sexual abuse or exploitation of minors offenses.[182]

2. Covered Persons

Once it is established that the offense is covered by the MEJA (i.e., is a felony-level offense), it still must be established that the overseas offender is also covered.[183] The MEJA applies to two categories of persons: (1) certain persons subject to the UCMJ at the time of the offense and (2) certain civilians employed

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international agreements recognized by the United States already allow for foreign criminal jurisdiction, and where that jurisdiction is being exercised, Congress is satisfied to permit the existing scheme of law—the foreign law—to be applied. HOUSE REPORT, *supra* note 126, at 16. For instance, in a recent case, German law was applied to convict the dependant teenagers of U.S. service members for a deadly stone-throwing on a German motorway. *See generally* Eric. B. Pilgrim, *Three U.S. Teens Convicted in German Rock-Throwing Deaths*, STARS AND STRIPES, December 23, 2000 (detailing the cases prosecuted under German law as attempted murder and endangering traffic), *available at* http://www.pstripes.com/dec00/ed122300a.html. While offenses such as these would also fall under the MEJA, Congress allows the foreign government to prosecute these cases if the foreign government wishes. However, were the foreign government to decline to prosecute, the United States could do so under the MEJA.

The second purpose of § 3261(b) is to minimize situations where concurrent prosecutions by the United States and a foreign government occur. "Although the American legal doctrine of 'double jeopardy' does not apply where there are two separate sovereigns (for example the United States and Germany), Congress wants to avoid redundancy." Perlack, *supra* note 7, at 102-03. By vesting in the Attorney General and the Deputy Attorney General the discretionary authority to prosecute, Congress intends for the United States not to pursue concurrent or parallel prosecutions except in the most extraordinary of circumstances and with the highest level of authorization. 18 U.S.C. § 3261(b); *see also* HOUSE REPORT, *supra* note 126, at 16.

181. Title 18 applies to offenses within the "special maritime and territorial jurisdiction of the United States." This term is defined in 18 U.S.C. § 7 (2000).

182. *See* OVERSEAS JURISDICTION ADVISORY COMMITTEE REPORT, *supra* note 33, at n.140 (providing a complete list of the then current offenses applicable in the "special maritime and territorial jurisdiction of the United States").

183. Andrew D. Fallon & Theresa A. Keene, *Closing the Legal Loophole? Practical Implications of the Military Extraterritorial Jurisdiction Act of 2000*, 51 A.F. L. REV. 271, 273 (2001).

by or accompanying the Armed Forces.[184] The former category includes servicemen and -women who commit crimes while subject to the UCMJ but whose criminal offenses are not discovered until after they have left the service.[185] In addition, active-duty military personnel may be prosecuted under the MEJA if they are co-defendants with a civilian.[186]

However, this Note's main concern is with the latter category. It consists of certain civilians employed by or accompanying the Armed Forces.[187] The terms "employed by" and "accompanying" are specifically defined by the MEJA.[188] Those "employed by" the Armed Forces include civilian employees of DoD, DoD contractors or subcontractors, and employees of either contractors or subcontractors.[189] Those "accompanying" the Armed Forces include the dependents (e.g., spouses and children) of those "employed by" the Armed Forces.[190]

The MEJA also applies to foreign nationals. According to one of the drafters of the Act, Glenn Schmitt, the MEJA "represents a significant expansion of the reach of American criminal law over non-citizens who commit acts outside of the United States."[191] In fact, congressional staffers who aided in the drafting of the MEJA indicate that "there was very little discussion during the drafting, the public hearings, or the floor debate" concerning the breadth of the Act's applicability to foreign nationals.[192]

The MEJA applies to the criminal acts of *all* persons who are employed by or accompanying the U.S. Armed Forces overseas, regardless of nationality.[193] The only exception is where the offender is a national of the host nation (the nation in which the crime occurs) or ordinarily lives there.[194] It was presumed that the host nation would have a significant interest in the criminal activities of its

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184. 18 U.S.C. § 3261(a). The MEJA also instructs the Secretary of Defense to provide notice to such persons that they are potentially subject to prosecution in the United States under the MEJA. 18 U.S.C. § 3266(b)(1).

185. 18 U.S.C. § 3261(a)(2), (d)(1).

186. *Id.* at § 3261(d)(2).

187. *Id.* at § 3261(a)(1).

188. *Id.* at § 3267(1)-(2).

189. *Id.* at § 3267(1).

190. *Id.* at § 3267(2).

191. Schmitt, *supra* note 7, at 131.

192. *Id.*

193. HOUSE REPORT, *supra* note 126, at 14-15, n.27, & 21-22.

194. 18 U.S.C. § 3267(1)(C), (2)(C). The exemption for host nation nationals was included because the drafters of the MEJA believed "that host nations would likely take an interest in punishing the criminal acts of their own citizens, even if they were committed only against Americans or American-owned property." Schmitt, *supra* note 7, at 131. Furthermore, the drafters anticipated opposition from host nations if the exemption were not included. *Id.* It was presumed that a host nation "might resist the presence of American troops" in its country if that presence subjected its own citizens to trial in American courts. *Id.*; *see also*, Fallon & Keene, *supra* note 183, at 275.

own nationals.[195] This means that, with the exception of citizens of the host nation, *all* foreign nationals who are employed by or accompanying the U.S. Armed Forces overseas are subject to prosecution in U.S. federal courts for felony-level offenses.[196]

Before enactment of the MEJA, some federal criminal statutes applied to acts committed by foreign persons outside the territorial boundaries of the United States.[197] However, these statutes required (1) injury to an American national or property or (2) that some consequence of the act occur in the United States.[198] In contrast, the MEJA does not require that any American person or property be involved for the United States to assert jurisdiction over a foreign national.[199] Consequently, if a third-country foreign national (i.e., not a host nation national) employed by the U.S. Armed Forces, such as a contractor employee, were to murder another third-country foreign national while in a foreign country, the United States could assert jurisdiction over the entire crime, although no American person or property was involved in any way.[200] This portion of the MEJA will likely be subject to a court challenge[201] and is precisely the issue of U.S. criminal jurisdiction over foreign nationals that this Note will examine in more detail.

V. CAN THE MEJA WITHSTAND JUDICIAL SCRUTINY?

In examining the question of whether the extraterritorial application of U.S. federal law over foreign nationals is constitutional, it is natural to look to U.S. legal precedent. However, several U.S. courts have found principles of international law to be particularly instructive when making determinations of extraterritoriality.[202] Therefore, this section will examine the MEJA under both U.S. law (Section A) and principles of international law (Section B).

A. Is the MEJA Lawful Under U.S. Law?

195. Fallon & Keene, *supra* note 183, at 275.
196. Schmitt, *supra* note 7, at 131.
197. *Id.*
198. *See, e.g.*, 18 U.S.C. §§ 2332 (1994).
199. Schmitt, *supra* note 7, at 132.
200. *Id.*
201. *Id.*
202. United States v. Davis, 905 F.2d 245, 249 n.2 (9th Cir. 1990), *cert. denied*, 498 U.S. 1047 (1991); United States v. Peterson, 812 F.2d 486, 493-94 (9th Cir. 1987) (citing United States v. Pizzarusso, 388 F.2d 8, 10-11 (2d Cir. 1968)); United States v. Bin Laden, 92 F. Supp. 2d 189, 195 (S.D.N.Y. 2000).

It is well-established that Congress has the power to regulate conduct outside the United States and that there is no general constitutional bar to the extraterritorial application of U.S. penal laws.[203] If it so chooses, Congress is permitted, under U.S. law, to enforce its laws beyond the territorial boundaries of the United States.[204] Thus, the issue is not one of congressional power or authority but of congressional intent.[205]

1. Presumption Against Extraterritoriality

While it is well-established that Congress has the authority to regulate extraterritorial conduct, it is equally well-established that the courts are to presume that Congress has *not* exercised this power.[206] Absent statutory language or an express statement by Congress to the contrary, congressional legislation is intended to apply only within the territorial boundaries of the United States.[207] The Supreme Court has invoked this territorial presumption in numerous cases

203. EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991) ("Congress has the authority to enforce its laws beyond the territorial boundaries of the United States."); *Bin Laden*, 92 F. Supp. 2d at 193; United States v. Vasquez-Velasco, 15 F.3d 833, 839 (9th Cir. 1994); United States v. Felix-Gutierrez, 940 F.2d 1200, 1204 (9th Cir. 1991); Chua Han Mow v. United States, 730 F.2d 1308, 1311 (9th Cir. 1984); *cf.* Research in Int'l. Law of the Harvard Law School, *Jurisdiction with Respect to Crime*, 29 AM. J. INT'L L. SUPP. 435, 519 (1935) ("The competence of the State to prosecute and punish its nationals on the sole basis of their nationality is universally conceded.").

204. United States v. Corey, 232 F.3d 1166, 1170 (9th Cir. 2000); *Vasquez-Velasco*, 15 F.3d at 839; *Arabian Am. Oil Co.*, 499 U.S. at 248.

205. United States v. Gatlin, 216 F.3d 207, 210 (2000); *Corey*, 232 F.3d at 1170; *Vasquez-Velasco*, 15 F.3d at 839; *Felix-Gutierrez*, 940 F.2d at 1204; *Chua Han Mow*, 730 F.2d at 1311; United States v. Bowman, 260 U.S. 94, 98 (1922).

206. Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155, 188 (1993) ("Acts of Congress normally do not have extraterritorial application unless such an intent is clearly manifested."); *Arabian Am. Oil Co.*, 499 U.S. at 248 ("It is a longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'") (quoting Foley Bros. v. Filardo, 336 U.S. 281, 285 (1949)); *see also* Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 440 (1989) ("When it desires to do so, Congress knows how to place the high seas within the jurisdictional reach of a statute.").

207. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 cmt. a (1987) [hereinafter RESTATEMENT]; *Vasquez-Velasco*, 15 F.3d at 839 n.4; *Sale*, 509 U.S. at 188; *Arabian Am. Oil Co.*, 499 U.S. at 248; Foley Bros. v. Filardo, 336 U.S. 281, 285 (1949).

involving the scope of broad regulatory statutes.[208] In all of these cases, the Court ruled that Congress anticipated its regulations would cease at national borders.[209]

The rationale for this presumption is rooted in a number of considerations.[210] First, the presumption recognizes that Congress usually "legislates with domestic affairs in mind."[211] Since most legislation is domestic in nature, it makes perfect sense that there exists a presumption against extraterritoriality.[212] The presumption allows courts to infer territorial jurisdiction from congressional silence.[213] Second, one of the central purposes of the presumption is to ensure that the United States does not precipitate "unintended clashes between our laws and those of other nations which could result in international discord."[214] Thus, regarding domestic matters, the presumption against extraterritoriality is based on the common-sense inference that where Congress does not indicate otherwise, legislation is not meant to extend beyond the nation's borders.[215] But the presumption does not necessarily apply where legislation implicates matters that are not inherently domestic.[216] The U.S. Supreme Court extensively discussed this exception in *United States v. Bowman*.[217]

2. The *Bowman* Exception

While the territorial presumption applies to most criminal statutes, it does not apply to one category of criminal statutes.[218] The Supreme Court has held that statutes prohibiting crimes against the U.S. government may be applied extraterritorially even in the absence of "clear evidence" that Congress so intended.[219] This exception to the territorial presumption is known as the "*Bowman* exception," named after a case in which the defendant committed fraud

208. *See, e.g.*, *Sale*, 509 U.S. at 173 (Immigration and Nationality Act); *Arabian Am. Oil Co.*, 499 U.S. at 248 (Title VII); *Foley Bros.*, 336 U.S. at 285 (federal overtime law); Am. Banana Co. v. United Fruit Co., 213 U.S. 347, 357 (1909) (Sherman Act).

209. *See, e.g.*, *Sale*, 509 U.S. at 173; *Arabian Am. Oil Co.*, 499 U.S. at 248; *Foley Bros.*, 336 U.S. at 285; *Am. Banana Co.*, 213 U.S. at 357.

210. Smith v. United States, 507 U.S. 197, 204 n.5 (1993).

211. *Id.*; *Foley Bros.*, 336 U.S. at 285.

212. United States v. Corey, 232 F.3d 1166, 1170 (9th Cir. 2000).

213. *Id.*

214. *Arabian Am. Oil Co.*, 499 U.S. at 248; *see also* United States v. Gatlin, 216 F.3d 207, 216 n. 11 (2000).

215. *Corey*, 232 F.3d at 1170.

216. *Id.*; United States v. Vasquez-Velasco, 15 F.3d 833, 839 n.4 (9th Cir. 1994).

217. 260 U.S. 94 (1922).

218. *Id.* at 98.

219. *Id.*

on a U.S. vessel outside the territorial waters of the United States.[220] Regardless of the fact that the statute in *Bowman* did not contain an extraterritoriality provision, the Court concluded that it applied extraterritorially.[221] The Supreme Court held:

> The same rule of interpretation should not be applied to criminal statutes which are, as a class, not logically dependent on their locality for the Government's jurisdiction, but are enacted because of the *right of the Government to defend itself against obstruction, or fraud wherever perpetrated, especially if committed by its own citizens, officers or agents*.[222]

Regarding such statutes, the Supreme Court has reasoned, Congress's intent to regulate conduct overseas may "be inferred from the nature of the offense."[223] Thus, the courts refrain from applying the territorial presumption where it is not a reliable guide to congressional intent.[224]

In the specific case of the MEJA, it is doubtful whether the courts would have to resort to the *Bowman* exception in order to assert extraterritorial

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220. *See id.* at 94.

221. *Id.* at 99; *see also Vasquez-Velasco*, 15 F.3d at 839 n.4 (applying *Bowman* to violent crimes associated with international drug trafficking); United States v. Felix-Gutierrez, 940 F.2d 1200, 1205 n.3 (9th Cir. 1991) (applying *Bowman* to accessory after the fact in the murder of a DEA agent in Mexico).

222. *Bowman*, 260 U.S. at 98 (emphasis added); *see also Felix-Gutierrez*, 940 F.2d at 1205 n.3 (citing Brulay v. United States, 383 F.2d 345, 350 (9th Cir. 1967)) (limiting the jurisdiction of drug smuggling statutes to activities that occur within the United States would severely undermine their scope and effective operation because "drug 'smuggling by its very nature involves foreign countries, and . . . the accomplishment of the crime always requires some action in a foreign country.'").

223. *Bowman*, 260 U.S. at 98; *see also* Skiriotes v. Florida, 313 U.S. 69, 73-74 (1941).

224. In *United States v. Bin Laden*, the Southern District Court of New York stated that legislative history is not irrelevant under the *Bowman* exception. 92 F. Supp. 2d 189, 193 n.3 (S.D.N.Y. 2000). The Court reasoned that the *Bowman* exception is ultimately concerned with congressional intent. *Id.* Therefore, if the legislative history demonstrates that the statute was intended to apply solely to territorial conduct, then "it would be inconsistent with *Bowman* to ignore this evidence, and conclude – in reliance on *Bowman* – that Congress intended the statute to apply extraterritorially." *Id.* It is also important to note that the *Bowman* Court explicitly stated that the exception does not apply to "[c]rimes against private individuals or their property, like assaults, murder, burglary, larceny, robbery, arson, embezzlement and frauds of all kinds." *Bowman*, 260 U.S. at 98; *see also* United States v. Gatlin, 216 F.3d 207, 211 n.5 (2000); Kollias v. D & G Marine Maint., 29 F.3d 67, 71 (2nd Cir. 1994) (holding that "*Bowman* should be read narrowly" such that "only criminal statutes, and perhaps only those relating to the government's power to prosecute wrongs committed against it, are exempt from the presumption [against extraterritoriality].").

jurisdiction pursuant to the Act. As the section below explains, this is because Congress has "clearly manifested" its intent that the Act apply extraterritorially.

3. Statutory Interpretation and the "Clear Manifestation" Requirement

While the courts presume that "Congress legislates against the backdrop of the presumption against extraterritoriality,"[225] clearly manifested evidence to the contrary will allow for the extraterritorial application of a statute.[226] In determining Congress's intent, the court is not limited to the text of the statute.[227] Rather, it is permitted to consider "all available evidence" about the meaning of the statute, including its text, structure, and legislative history.[228] Using all available evidence, the courts have found many statues to apply extraterritorially.[229]

In the particular case of the MEJA, Congress "clearly manifested" its intent for the statute to apply extraterritorially.[230] The statute's title alone explicitly states Congress's intent.[231] Furthermore, the opening sentence of the House Judiciary Committee's report on the MEJA states that the bill "establish[es] Federal jurisdiction over offenses committed outside the United

225. EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991).

226. Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155, 188 (1993) ("Acts of Congress normally do not have extraterritorial application unless such an intent is clearly manifested.").

227. *Gatlin*, 216 F.3d at 211.

228. *Sale*, 509 U.S. at 177; *see also* Smith v. United States, 507 U.S. 197, 204 (1993) (examining text, structure, and legislative history); *see also Kollias*, 29 F.3d at 73 ("[T]he Supreme Court has made clear . . . that reference to nontextual sources is permissible.").

229. United States v. Larsen, 952 F.2d 1099, 1101 (9th Cir. 1991) (21 U.S.C. § 841(a)(1) – possession of narcotics with intent to distribute); United States v. Wright-Barker, 784 F.2d 161, 167 (3d Cir. 1986) (21 U.S.C. § 841(a)(1) – possession of narcotics with intent to distribute); United States v. Orozco-Prada, 732 F.2d 1076, 1088 (2d Cir. 1984) (21 U.S.C. § 841(a)(1) – possession of narcotics with intent to distribute); United States v. Benitez, 741 F.2d 1312 (11th Cir. 1984) (holding that 18 U.S.C. § 1114 applies to the extraterritorial conduct of foreign nationals); United States v. Erdos, 474 F.2d 157 (4th Cir.) (concluding that 18 U.S.C. §§ 114 and 1111 apply extraterritorially to the conduct of U.S. citizens); United States v. Pizzarusso, 388 F.2d 8, 9 (2d Cir. 1968) (18 U.S.C. § 1546 – making false statements with respect to travel documents); United States v. Yousef, 927 F. Supp. 673 (S.D.N.Y. 1996) (holding that 18 U.S.C. § 924(c) applies to the extraterritorial conduct of foreign nationals); United States v. Zehe, 601 F. Supp. 196, 200 (D. Mass. 1985) (18 U.S.C. §§ 792-799 – espionage).

230. HOUSE REPORT, *supra* note 126, at 1.

231. In choosing the title "The Military *Extraterritorial Jurisdiction* Act" (emphasis added), it can be argued that Congress has explicitly intended for the Act to apply extraterritorially.

States by persons employed by or accompanying the Armed Forces . . . ."[232] Additionally, it is clear that Congress intended the statute to apply to the extraterritorial conduct of U.S. nationals *and* foreign nationals.[233] The House Judiciary Committee's report states that federal law is amended "to extend the application of its criminal jurisdiction to persons, *both United States citizens and foreign nationals*."[234] In order to understand the truly extraordinary nature of the MEJA's jurisdiction over foreign nationals, it is instructive to examine such jurisdiction pre-MEJA.

4. Extraterritorial Jurisdiction over Foreign Nationals

In *United States v. Bin Laden*,[235] the District Court for the Southern District of New York dealt solely with the question of extraterritorial jurisdiction over foreign nationals.[236] Fifteen defendants were charged with conspiracy to murder U.S. nationals, to use weapons of mass destruction against U.S. nationals, to destroy U.S. buildings and property, and to destroy U.S. defense utilities.[237] The indictment also charged several defendants with crimes in connection with the August 1998 bombings of the U.S. Embassies in Nairobi, Kenya, and Dar es Salaam, Tanzania, including 223 counts of murder.[238] At the trial, only six of the defendants were in U.S. custody, not including, of course, Usama Bin Laden.[239]

One defendant, Mohamed Sadeek Odeh, argued that several of the counts should be dismissed because "they are based on statutes that are inapplicable to the acts he is alleged to have performed."[240] He asserted that his alleged offenses were committed outside U.S. territory and were based on statutes that were not intended by Congress to regulate extraterritorial conduct.[241] More specifically, Odeh argued that the statutes constituting the basis for the indictment "fail clearly and unequivocally to regulate the conduct of foreign nationals for conduct outside the territorial boundaries of the United States."[242]

In considering the issue of extraterritorial jurisdiction over foreign nationals, the district court in *Bin Laden* recognized Congress's ability to regulate

232. HOUSE REPORT, *supra* note 126, at 1.
233. *Id.* at 5.
234. *Id.* (emphasis added).
235. 92 F. Supp. 2d 189 (S.D.N.Y. 2000).
236. *Id.* at 192 n.1.
237. *Id.* at 192.
238. *Id.*
239. *Id.*
240. *Id.*
241. *Bin Laden*, 92 Supp. 2d at 192.
242. *Id.* Odeh listed the following Title 18 statutes as being subject to the presumption of territoriality: § 930; § 844; § 1111; § 2155; § 1114; [§ 924(c)]; and § 114. *Id.* (citing Odeh's Memo. at 7).

conduct outside the United States.[243] It also acknowledged the territorial presumption, stating that "[s]tatutes apply only to acts performed within the United States territory – unless Congress manifests an intent to reach acts performed outside United States territory."[244] However, the court found that the *Bowman* exception applied in that case.[245]

Odeh argued that *Bowman* was not controlling precedent because it "involved the application of penal statutes to United States citizens" and not to foreign nationals such as himself.[246] The court held that while the facts of *Bowman* were limited to prosecutions of U.S. citizens, the "underlying rationale is not dependent on the nationality of the offender."[247] The court held that *Bowman* was based on two factors: (1) the right of the United States to protect itself from harmful conduct (regardless of the locality of the conduct) and (2) the presumption that Congress would not enact a statute designed to serve this protective function, and at the same time, undermine this protective function by limiting the statute's application to the United States.[248] The court reasoned that since foreign nationals are equally capable as U.S. nationals of performing extraterritorial conduct, "it would make little sense to restrict such statutes to United States nationals,"[249] and that it would "greatly curtail the scope and usefulness of the statute."[250] Furthermore, at the time of the *Bin Laden* decision, no court had refused to apply the *Bowman* exception because the defendant was a foreign national.[251] In fact, the Eleventh Circuit had held that one of the statutes challenged by Odeh, viz. 18 U.S.C. § 1114 (penalizing murder and attempted murder of officers and employees of the United States) applied to conduct by foreign nationals on foreign soil.[252]

Not only did the *Bin Laden* court have to engage in extensive and tedious statutory analysis in order to apply U.S. statutes to conduct by foreign nationals on foreign soil, but it was also necessary to establish a link between the criminal activity and the right of the United States to protect itself from harmful conduct.[253] The MEJA did away with such analysis. In essence, it created a new

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243. *Id.* at 193 (citing EEOC v. Arabian Am Oil Co., 499 U.S. 244, 248 (1991)).
244. *Id.* (referencing Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155, 188 (1993)).
245. *Id.* at 194.
246. *Bin Laden*, 92 Supp. 2d at 194 (citing Odeh's Memo. at 17).
247. *Id.* at 194.
248. *Id.*
249. *Id.*
250. *Id.* (citing United States v. Bowman, 260 U.S. 94, 98 (1922)).
251. *Id.* at 195 n.6. Odeh cited *United States v. Mitchell*, as a case in which the court refused to apply the *Bowman* exception. United States v. Mitchell, 553 F.2d 996 (5th Cir. 1977). However, the defendant in that case was a U.S. citizen. *Bin Laden*, 92 Supp. 2d at 194.
252. United States v. Benitez, 741 F.2d 1312, 1317 (11th Cir. 1984).
253. *Bin Laden*, 92 F. Supp. 2d at 194.

federal crime by applying all of Title 18 to the extraterritorial conduct of foreign nationals employed by and accompanying the Armed Forces.[254]

5. Fifth Amendment Due Process Concerns

In addition to issues of congressional intent discussed above and elaborated upon in the *Bin Laden* decision, the extraterritorial aspects of the MEJA may also face a due process challenge under U.S. constitutional jurisprudence.[255] This issue was raised by the Department of Justice at the congressional hearings on the MEJA.[256] The Department of Justice was concerned that the MEJA might violate the Fifth Amendment's Due Process Clause; and therefore, it concluded that implementing regulations should be drafted so as to satisfy due process concerns.[257] Pre-MEJA case law, including *Bin Laden*, is very instructive on this point.[258]

In *Bin Laden*, Odeh argued that the extraterritorial application of several of the statutes relied upon in the indictment violated his rights under the Due Process Clause of the Fifth Amendment.[259] He claimed that "there are several, related norms of due process" which would be violated, namely: (1) the rule of lenity, (2) the right to fair warning, and (3) the requirement of a sufficient nexus between the alleged conduct and the United States.[260]

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254. HOUSE REPORT, *supra* note 126, at 10.

255. Fallon & Keene, *supra* note 183, at 282.

256. HOUSE REPORT, *supra* note 126, at n.26 and accompanying text (stating that one of the individuals providing testimony was Mr. Roger Pauley, Department of Justice). Mr. Pauley's written statement included the following: "There may be instances in which the federal interest in offenses committed by such persons is so tenuous that the assertion of federal jurisdiction could raise constitutional due process concerns." *House MEJA Hearing*, *supra* note 90, at n.6 (written statement of Mr. Roger Pauley, Department of Justice). *See, e.g.*, United States v. Davis, 905 F.2d 245, 248-49 (9th Cir. 1990), *cert. denied*, 498 U.S. 1047 (1991). *But cf.* United States v. White, 51 F. Supp. 2d 1008, 1011 (E.D. Cal. 1997).

257. *House MEJA Hearing*, *supra* note 90, at n.6 (written statement of Mr. Roger Pauley, Department of Justice).

258. Fallon & Keene, *supra* note 183, at 282.

259. United States v. Bin Laden, 92 F. Supp. 2d 189, 216 (S.D.N.Y. 2000). *See also* United States v. Larsen, 952 F.2d 1099, 1100 (9th Cir. 1991) ("Congress is empowered to attach extraterritorial effect to its penal statutes so long as the statute does not violate the due process clause of the Fifth Amendment.").

260. *Bin Laden*, 92 F. Supp. 2d at 216 (citing Odeh's Memo. at 18). There are, of course, other due process concerns associated with the MEJA that do not pertain to the assertion of jurisdiction. *See House MEJA Hearing*, *supra* note 90, at 17; Schmitt, *supra* note 7, at 93, 95-101.

a. The Rule of Lenity

Odeh first argued that the counts against him were based on statutes that "fail to clearly proscribe the conduct of a foreign national on foreign soil."[261] They are "ambiguous with regard to enforcement vis-à-vis foreign nationals," and therefore, Odeh argued that the rule of lenity required the court to dismiss them.[262] Under the rule of lenity, an ambiguous statute is to be strictly construed against the government.[263] The rule is applied when "after seizing everything from which aid can be derived, [a court] can make no more than a guess as to what Congress intended."[264] In *Bin Laden*, the court ultimately held that the statutes in question, viewed through the lens of *Bowman*, were not "the least bit ambiguous."[265] However, this might not be true in other situations in which the U.S. Government is arguing for extraterritorial jurisdiction, and the rule of lenity must be taken into account when the court is making such a determination.[266]

In the case of the MEJA, it would be difficult for a defendant to assert that the statute is "ambiguous with regard to enforcement vis-à-vis foreign nationals" since the Judiciary Committee's report explicitly indicates that the statute is meant to apply to the extraterritorial conduct of foreign nationals.[267] A court would not be forced to "guess" as to what Congress intended. Therefore, it is unlikely that foreign nationals will be successful arguing against the constitutionality of the MEJA based on the rule of lenity.

b. The Right to Fair Warning

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261. *Bin Laden*, 92 F. Supp. 2d at 216 (citing Odeh's Memo. at 22-23).

262. *Id.* (citing Odeh's Memo. at 24).

263. United States v. Lanier, 520 U.S. 259, 266 (1997); United States v. Bass, 404 U.S. 336, 347 (1971):

> In various ways over the years, we have stated that when a choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite.

264. Holloway v. United States, 526 U.S. 1 (1999) (citations and internal quotations omitted).

265. *Bin Laden*, 92 F. Supp. 2d at 216 (with regard to 18 U.S.C. §§ 844, 924, 930, 1114, and 2155); *id*. at 217 (with regard to 18 U.S.C. § 1116); *id*. at 218 (with regard to 18 U.S.C. § 2332).

266. *Lanier*, 520 U.S. at 266; *Bass*, 404 U.S. at 347.

267. HOUSE REPORT, *supra* note 126, at 5.

Odeh also argued that the application of certain statutes to his extraterritorial conduct would violate his due process right to a fair warning.[268] The Supreme Court has held that an accused has a right to a "fair warning . . . in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible, the line should be clear."[269]

Odeh asserted that "no reasonable foreign citizen would have known he risked a death sentence" for engaging in proscribed conduct while on foreign soil.[270] The government countered that "while Odeh may not have known [the] breadth of the statutory framework that would serve as the basis for the charges against him – few defendants do – there is no room for him to suggest that he has suddenly learned that mass murder was illegal in the United States or anywhere else."[271] In the end, the court found the government's argument persuasive and held that the extraterritorial application of the statutes in question did not violate Odeh's right to a fair warning.[272]

A constitutional challenge asserting a lack of fair warning could be successful against the MEJA. While defendants have fair warning that mass murder is illegal, other federal crimes might not be as self-evident, such as certain aspects of money structuring or money laundering. It might be necessary for DoD to include a notice provision in future employment contracts that employees at any level may be tried in U.S. federal courts under the MEJA.

c. The Sufficient Nexus Requirement

In his brief, Odeh also contended that the nexus between himself and the United States was insufficient for a conviction.[273] Since he is Jordanian and all the acts alleged in the indictment took place on foreign soil, he argued that the connection between himself and the United States was weak.[274] As the court pointed out, few cases have addressed the requirement of sufficient nexus.[275] One case that does discuss the requirement in some detail is *United States v. Davis*.[276]

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268. *Bin Laden*, 92 F. Supp. 2d at 218 (citing Odeh's Memo. at 26).

269. McBoyle v. United States, 283 U.S. 25, 27 (1931); *see also Lanier*, 520 U.S. at 265 ("[N]o man shall be held criminally responsible for conduct which he could not reasonably [have] understood to be proscribed.") (citations and internal quotations omitted).

270. *Bin Laden*, 92 F. Supp. 2d at 218 (citing Odeh's Memo. at 26-27).

271. *Id.* (citing Gov't Memo. at 34).

272. *Id.* at 219.

273. *Id.* (referring to Odeh's Reply Memo. at 18-19).

274. *Id.*

275. *Id*. at 219; *see* Lea Brilmayer & Charles Norchi, *Federal Extraterritoriality and Fifth Amendment Due Process*, 105 HARV. L. REV. 1217, 1219 n.12 (1992) (stating that "[f]ew cases seriously discuss the constitutional question [of whether the Due Process

In *Davis*, the Ninth Circuit stated: "In order to apply extraterritorially a federal criminal statute to a defendant consistently with due process, there must be a sufficient nexus between the defendant and the United States, so that such application would not be arbitrary or fundamentally unfair."[277] According to the Ninth Circuit in another case,[278] the nexus requirement serves the same purpose as the "minimum contacts" test for personal jurisdiction.[279] The "minimum contacts" test analyzes the quality and quantity of the potential defendant's contacts within the forum.[280] Continuous and systematic contacts with the forum constitute sufficient contacts to subject the defendant to the general jurisdiction of that state's courts.[281] In order to reach a determination of sufficient nexus, the *Davis* court focused on the effects of the crime in the United States. It observed that "[w]here an attempted transaction is aimed at causing criminal acts within the United States there is a sufficient basis for the United States to exercise jurisdiction."[282] In another opinion, involving drug trafficking, the Ninth Circuit held that a sufficient nexus also exists pursuant to "the protective principle of jurisdiction without any showing of an actual effect on the United States."[283] As a result of these arguments, the *Bin Laden* court held that Odeh possessed a sufficient nexus with the United States.[284]

This type of constitutional argument could be successful in some MEJA cases. If the civilian contractor is a U.S. national, the requirement of sufficient

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Clause limits the extraterritorial application of federal statutes], and none invalidate application of federal law on these grounds").

276. 905 F.2d 245 (9th Cir. 1990).

277. *Id.* at 248-49; *see also* United States v. Klimavicius-Viloria, 144 F.3d 1249, 1257 (9th Cir. 1998) (quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980)) ("The nexus requirement serves the same purpose as the 'minimum contacts' test in personal jurisdiction. It ensures that a United States court will assert jurisdiction only over a defendant who 'should reasonably anticipate being hailed into court' in this country."); United States v. Caicedo, 47 F.3d 370, 372 (9th Cir. 1995):

> [P]unishing a crime committed on foreign soil . . . is an intrusion into the sovereign territory of another nation. As a matter of comity and fairness, such an intrusion should not be undertaken absent proof that there is a connection between the criminal conduct and the United States sufficient to justify the United States' pursuit of its interests.

278. *Klimavicius-Viloria*, 144 F.3d at 1257.

279. 444 U.S. at 297.

280. Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

281. *Id.*

282. *Davis*, 905 F.2d at 249 (citations and quotations omitted).

283. United States v. Peterson, 812 F.2d 486, 493-94 (9th Cir. 1987) (citing United States v. Pizzarusso, 388 F.2d 8, 10-11 (2d Cir. 1968)). The protective principle of jurisdiction is discussed in great detail below.

284. United States v. Bin Laden, 92 F. Supp. 2d 189, 220 (S.D.N.Y. 2000).

nexus poses no additional problem because the Ninth Circuit has held that U.S. citizenship itself constitutes a sufficient nexus for extraterritorial jurisdiction.[285] However, concerning civilian contractors who are foreign nationals, facts will have to be established at trial to provide the "nexus" between the foreign offender and the United States.[286] It is unclear whether the employment relationship alone is sufficient to establish this nexus, especially where the foreign national may be an "indirect hire civilian" (i.e., technically employed by a foreign government but has been contracted to the United States to support U.S. forces).

In summation, in order for the MEJA to be held constitutional under U.S. law, it is necessary to show that (1) Congress intended the statute to apply extraterritorially and that (2) the MEJA does not violate due process norms. It seems clear that Congress did, in fact, intend the MEJA to apply extraterritorially, and, although considerations of due process are factually-dependent, it appears that, in most cases, the MEJA does not violate due process.

B. Is the MEJA Lawful Under International Law?

As noted above, several U.S. courts have found principles of international law to be useful when making a determination of extraterritoriality.[287] The *Davis* court, in particular, held that "[i]nternational law principles [of extraterritorial jurisdiction] may be useful as a rough guide . . . ."[288] The *Bin Laden* court also devoted a large portion of its opinion to examining the relationship between the *Bowman* exception and principles of international law.[289]

Under international law, extraterritoriality is governed by the "subjective territorial principle," [290] which is similar to the territorial presumption under U.S. law.[291] This principle asserts that "a state has jurisdiction to prescribe law with

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285. United States v. Corey, 232 F.3d 1166 (9th Cir. 2000) ("There is no doubt that the United States may exercise jurisdiction over American Nationals living abroad, regardless of where the crime is committed.").

286. Fallon & Keene, *supra* note 183, at 283.

287. *Davis*, 905 F.2d at 249 n.2; *see, e.g.*, *Peterson*, 812 F.2d at 493-94 (citing *Pizzarusso*, 388 F.2d at 10-11); *Bin Laden*, 92 F. Supp. 2d at 195.

288. *Davis*, 905 F.2d at 249 n.2.

289. *Bin Laden*, 92 F. Supp. 2d at 195. The court recognized that the question of whether Congress intended for a statute to apply extraterritorially is distinct from the question of whether the extraterritorial application accords with international law. *Id*. at 195 n.7. However, the court believed it necessary to explain why the lower federal courts have viewed the extension of the *Bowman* exception to foreign nationals as "unproblematic." *Id*.

290. *Id.* at 195; *see* RESTATEMENT, *supra* note 207, at § 402(1)(a); *see also* Christopher L. Blakesley, *Extraterritorial Jurisdiction*, *in* INTERNATIONAL CRIMINAL LAW 47-50 (M. Cherif Bassiouni ed., 1999).

291. *Bin Laden*, 92 F. Supp. 2d at 195; RESTATEMENT, *supra* note 207, at § 402(1)(a); *see also* Blakesley, *supra* note 290.

respect to . . . conduct that, wholly or in substantial part, takes place within its territory."[292] However, international law also recognizes five other principles of jurisdiction by which a state may reach conduct *outside* its territory: (1) the objective territorial principle, (2) the protective principle, (3) the nationality principle, (4) the passive personality principle, and (5) the universality principle.[293] This Section examines each of these principles in relation to the MEJA.

1. Objective Territorial Principle

The objective territorial principle permits a state to prescribe law with respect to "conduct outside its territory that has or is intended to have a *substantial effect within its territory*."[294] Therefore, if the wrongdoing of the foreign national has or is intended to have a substantial effect within U.S. territory, application of the MEJA to that conduct would be consistent with the objective territorial principle, and thus, consistent with principles of international law.[295] It stands to reason, however, that not all conduct would fall within this category. For instance, if a foreign national perpetrates a crime upon another foreign national without involving either U.S. nationals or U.S. property, it would be difficult to justify an application of the MEJA under this principle. One could argue that, as an employee of the U.S. Government, the conduct of the foreign national adversely affects the reputation of the United States in the international community. However, merely affecting the reputation of the United States at large might not be adequate for a finding of "substantial effect."

2. Protective Principle

The protective principle provides that a state may prescribe law with respect to "certain conduct outside its territory *by persons not its nationals* that is directed against the security of the state or against a limited class of other state interests."[296] This principle provides the strongest argument for application of the MEJA to foreign nationals. Under this principle, the United States could argue that it is justified in applying the MEJA to foreign nationals if the wrongdoing is directed against U.S. security interests or qualifies as one of the other state interests. The "limited class of other state interests" generally refers to offenses

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292. RESTATEMENT, *supra* note 207, at § 402(1)(a); *see also* Blakesley, *supra* note 290.

293. Blakesley, *supra* note 290, at 50-81.

294. RESTATEMENT, *supra* note 207, at § 402(1)(c) (emphasis added).

295. *Id.*

296. *Id.* at § 402(3) (emphasis added).

threatening the integrity of governmental functions and that are generally recognized as crimes by developed legal systems (e.g., espionage, counterfeiting of the state's seal or currency, falsification of official documents, as well as perjury before consular officials, and conspiracy to violate immigration or customs laws).[297] While the protective principle provides the strongest argument for the application of the MEJA to foreign nationals, it may not provide justification for such application in all cases. In some circumstances, it may be hard to argue that theft, rape, or even murder, constitute conduct "directed against the security of the state."

3. Nationality Principle

The nationality principle allows a state to prohibit conduct with respect to "the activities, interests, status or relations of *its nationals* outside as well as within its territory."[298] Limited application of the MEJA over foreign nationals would be justified under this principle, but only if the offense affects the activities, interest, status, or relations of U.S. nationals.

4. Passive Personality Principle

The passive personality principle states that "a state may apply law – particularly criminal law – to an act committed outside its territory by a person not its national where the *victim of the act was its national*."[299] While the passive personality principle permits jurisdiction over crimes committed by foreign nationals outside the United States, it requires that the victim of the act be a U.S. national.[300] Therefore, the U.S. Government could rely on this principle to justify use of the MEJA only in limited cases in which the victim is a U.S. national.

5. Universality Principle

Lastly, the universality principle holds that "[a] state has jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nationals as *of universal concern*, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism," regardless of the location of their occurrence.[301] This principle

297. *Id*. at § 402 cmt. f.
298. *Id.* at § 402(2) (emphasis added).
299. *Id.* at § 402 cmt. g.
300. RESTATEMENT, *supra* note 207, at § 402 cmt. G.
301. *Id.* at § 404 (emphasis added).

could be employed to justify the application of the MEJA over foreign nationals depending on the nature of the offense. In the case of the Abu Ghraib scandal, if the conduct by the civilian contractors amounts to torture, the MEJA could arguably be applied, as torture is an offense of universal concern.[302] However, most offenders will be prosecuted under the MEJA for crimes that do not amount to offenses of universal concern.

In conclusion, it is well-established under U.S. law that Congress has the power to override international law if it desires.[303] Therefore, none of these five principles places ultimate limits on Congress's power to reach extraterritorial conduct.[304] However, consistent with the territorial presumption, courts should be hesitant to give criminal statutes extraterritorial effect absent a clear congressional directive.[305] Courts should presume that Congress does not intend to violate principles of international law.[306] Additionally, the courts should not blind themselves to potential violations of international law where congressional intent is ambiguous.[307] Hence, courts have typically paused in their decisions to note that their finding of extraterritoriality is consistent with one or more of the five principles under international law.[308] Therefore, in determining whether the MEJA should be upheld to prosecute foreign nationals, a U.S. court would

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302. Philip Carter, *Do the Right Thing*, SLATE, May 7, 2004, http://slate.msn.com/id/2100194.

303. United States v. Yunis, 924 F.2d 1086, 1091 (D.C. Cir. 1991). *See, e.g.*, Comm. of U.S. Citizens Living in Nicaragua v. Reagan, 859 F.2d 929, 938 (D.C. Cir. 1988) ("Statutes inconsistent with principles of customary international law may well lead to international law violations. But within the domestic legal realm, that inconsistent statute simply modifies or supersedes customary international law to the extent of the inconsistency."); Fed. Trade Comm'n v. Compagnie de Saint-Gobain-Pont-a-Mousson, 636 F.2d 1300, 1323 (D.C. Cir. 1980) (U.S. courts "obligated to give effect to an unambiguous exercise by Congress of its jurisdiction to prescribe even if such an exercise would exceed the limitations imposed by international law"); United States v. Aluminum Co. of Am., 148 F.2d 416, 443 (2d Cir. 1945); RESTATEMENT, *supra* note 207, at § 402 cmt. i.

304. *Yunis*, 924 F.2d at 1091; *Aluminum Co.*, 148 F.2d at 443; RESTATEMENT, *supra* note 207, at § 402 cmt. i.

305. See discussion *supra* Section V(A)(1) of this Note. Foley Bros. v. Filardo, 336 U.S. 281, 285 (1949); United States v. Bowman, 260 U.S. 94, 98 (1922).

306. United States v. Vasquez-Velasco, 15 F.3d 833, 839 (9th Cir. 1994) (citing McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10, 21-22 (1963)).

307. Murray v. The Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804) ("[A]n act of congress ought never to be construed to violate the law of nations, if any other possible construction remains . . .").

308. *See, e.g.*, United States v. MacAllister, 160 F.3d 1304, 1308 (11th Cir. 1998) (objective territorial principle); *Vasquez-Velasco*, 15 F.3d at 841 (objective territoriality principle, protective principle, and universality principle); United States v. Felix-Gutierrez, 940 F.2d 1200, 1205-06 (9th Cir. 1991) (objective territoriality principle, protective principle, and passive personality principle); United States v. Benitez, 741 F.2d 1312, 1316 (11th Cir. 1984) (protective principle and passive personality principle); United States v. Pizzarusso, 388 F.2d 8, 11 (2d Cir. 1968) (protective principle).

typically proceed first through an analysis under U.S. law, examining Congressional intent.[309] After determining that Congress intended for the MEJA to apply to the extraterritorial conduct of foreign nationals employed by DoD,[310] the court would examine the statute in light of constitutional principles, such as the requirement of sufficient nexus.[311] If the court determines that application of the MEJA would not violate the defendant's due process rights, it is likely that the court would then engage in a discussion of the MEJA under international principles.[312]

C. Policy and Morality Considerations

Glenn R. Schmitt, one of the authors of the MEJA, argues that there is "ample reason for the United States to prosecute [foreign] perpetrators."[313] He astutely points out that the presence of third-country nationals (i.e., foreign nationals not of the host nation) in the host nation may be due entirely to their relationship with the U.S. military.[314] If the host nation declines to assert its jurisdiction and prosecute an offending third-country national, all the potential harms of the jurisdictional gap discussed previously would threaten the military once more.[315] Although no U.S. citizen may be involved, the U.S. Government still has a moral obligation to punish criminals,[316] especially those it employs. Prosecution may also deter other third-country nationals from committing crimes while accompanying the U.S. Armed Forces overseas.[317] Furthermore, the inability of the United States to adequately respond to misconduct by third-country nationals could potentially damage the United States' reputation within the international community and injure international relationships.[318] As Schmitt maintains, there is, therefore, a "sufficient interest to justify the U.S. Government's desire to assert its jurisdiction over third-country nationals."[319]

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309. Although the *Bin Laden* decision preceded the enactment of the MEJA, it is an example of the manner in which the courts typically analyze the extraterritoriality of a statute. United States v. Bin Laden, 92 F. Supp. 2d 189 (S.D.N.Y. 2000). The *Bin Laden* court began with an analysis of congressional intent and proceeded to discuss constitutional and international concerns. *Id*.

310. See discussion *supra* Section V(A)(3) of this note.

311. See discussion *supra* Section V(A)(5).

312. *Bin Laden*, 92 F. Supp. 2d 189.

313. Schmitt, *supra* note 7, at 132.

314. *Id.*

315. *Id.*

316. *Id.* (making reference to Schmitt's discussion in Section II, B of his article).

317. *Id.*

318. *Id.*

319. Schmitt, *supra* note 7, at 132.

VI. ALTERNATIVES TO THE MEJA

Although there may be "ample reason" for the United States to assert its jurisdiction over foreign nationals employed by DoD, the MEJA's applicability to foreign nationals for acts committed on foreign soil will likely be subject to a court challenge.[320] While a successful challenge is not likely, it is worthwhile to examine alternatives to the MEJA were the court to find such application unconstitutional or contrary to principles of international law.

A. Prosecution in the Host Nation

As previously discussed, the host nation has the jurisdiction to prosecute crimes perpetrated within its borders.[321] However, this solution is inadequate for several reasons. First, as previously noted, the host nation may be unable or unwilling to exercise criminal jurisdiction.[322] This inevitably invites a reoccurrence of the crimes committed by contractors in Bosnia, where the failed state of Bosnia was unable to prosecute because its legal system had crumbled.[323] Peter W. Singer, an expert on privatized military firms, states:

> The real risk of gross misbehavior of [private military firms] is not during their operation in sound states like the United States, but rather the contracts they have in weak or failing states. The inherent problem is that local authorities in such areas often have neither the power nor the wherewithal to challenge these firms. For example, the weak central government of Sierra Leone could not control its own capital, let alone monitor and punish the actions of an outside military firm. Thus, any true legal enforcement will usually have to be extraterritorial.[324]

Before the MEJA, numerous incidents of rape, aggravated assault, and drug distribution committed by civilians overseas went unpunished due to the host nation's waiver of jurisdiction over these crimes.[325] A return to this state of affairs is not a viable option.

B. Law of the Marketplace

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320. *Id.*
321. HOUSE REPORT, *supra* note 126, at 7.
322. *Id.*
323. Singer, *supra* note 37, at 537.
324. *Id.* at 535-36.
325. OIG REPORT, *supra* note 130.

It is argued that, in the absence of a criminal statute such as the MEJA, market and reputational forces will compel contractors to comply with U.S. and international law.[326] Obviously, firms with a reputation of frequent criminal activity pose a risk for DoD. Because it is in DoD's interest to hire law-abiding firms, market and reputational forces could cause DoD to look to other firms to provide the same services. There are several non-judicial, economic tools that DoD can use to discipline firms.[327]

First, firms can have their government contracts terminated at the discretion of the agency that issued the original contract.[328] This can result in a loss of thousands (or millions) of dollars.[329] Under Part 49 of the Federal Acquisition Regulations, the government may terminate contracts in the event of a material breach or other "default" on the contractor's part.[330] A breach may involve a simple failure to perform under the terms of the contract or more serious conduct, such as criminal activity by employees or by the corporation itself.[331] If an agency were to terminate a contract, the firm could appeal this decision to the courts.[332]

Second, firms that commit breaches of their governmental contracts may also be barred from bidding for future contracts.[333] Part 9 of the Federal Acquisition Regulations instructs procurement officials to award contracts only to "responsible" companies.[334] The Regulations state that "contracts shall be awarded to responsible prospective contractors only."[335] The Regulations further state that "[i]n the absence of information clearly indicating that the prospective contractor is responsible, the contracting officer shall make a determination of nonresponsibility."[336] This means that, for instance, the alleged prisoner abuse at Abu Ghraib by CACI and Titan contractors could lead procurement officials to designate those firms as "not responsible."[337]

A third and more serious way to discipline contracting firms is through "suspension" or "debarment" proceedings.[338] This entails a decision by procurement officials to bar a firm from future contracts for a certain period of time.[339] For example, in July 2003, the Air Force suspended three divisions of

326. Singer, *supra* note 37, at 543; *see also* Carter, *supra* note 16.
327. *Id*.
328. Federal Acquisition Regulations System, 48 C.F.R. § 49.100(a)(1) (2006).
329. Carter, *supra* note 16.
330. Federal Acquisition Regulations System, 48 C.F.R. § 49.4 (2006).
331. Carter, *supra* note 16.
332. *Id.*
333. Federal Acquisition Regulations System, 48 C.F.R. § 49.405 (2006).
334. *Id*. § 49.103(a).
335. *Id.*
336. *Id.* § 49.103(b).
337. Carter, *supra* note 16.
338. *Id.*
339. *Id.*

Boeing and three former employees of Boeing from eligibility for new contracts in response to serious violations of federal law.[340] It should be noted, however, that if the grounds for debarment relate to the wrongdoing of an individual employee, the wrongdoing could only be attributed to the corporation by presenting evidence of corporate "negligence in failing to investigate, train, or supervise its employees."[341]

While it is evident that the easiest way to discipline a firm is to terminate its contract, some argue that market forces are insufficient to discipline contractors.[342] Peter Singer, who has examined in great detail the emerging global industry of private firms that sell military services, stated that such firms "have the ability to transform in order to circumvent legislation or escape prosecution."[343] Often the firms recreate or relocate themselves.[344] For instance, if a government begins to target the firm for wrongdoing, the firm can shift its base of operation to a more amenable area.[345] One glaring example of this technique is Executive Outcomes, a mercenary firm, which participated in the fighting in Angola, Sierra Leone, and the Democratic Republic of Congo.[346] In the late 1990s, the firm was based in South Africa.[347] As South African legislation began to target the firm, Eben Barlow, the founder, stated that he was not concerned: "Three other African countries have offered us a home and a big European group has even proposed buying us out."[348] Executive Outcomes eventually closed in South Africa.[349]

Another commonly used tactic is for firms to simply adopt a new corporate structure whenever the local government becomes inhospitable.[350] The firm Lifeguard, operating in Sierra Leone, is considered by many to be a "spin-off" of Executive Outcomes.[351] Lifeguard is made up of many of Executive

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340. Press Release, Air Force, AF Announces Boeing Inquiry Results, (July 25, 2003), *available at* http://www.af.mil/news/story.asp?storyID=123005322. The suspension resulted from the 1998 evolved expendable launch vehicle source selection. *Id*.

341. Carter, *supra* note 16.

342. Singer, *supra* note 37, at 538; Capps, *supra* note 1.

343. SINGER, *supra* note 39, at chs. 14-15.

344. Singer, *supra* note 37, at 535.

345. *Id.*

346. SINGER, *supra* note 39, at ch. 7 (2003). *See also* FOREIGN AND COMMONWEALTH OFFICE, PRIVATE MILITARY COMPANIES: OPTIONS FOR REGULATION, 2002-11 HC 577 [hereinafter GREEN REPORT], *available at* http://www.fco.gov.uk/Files/kfile/mercenaries,0.pdf.

347. Singer, *supra* note 37, at 535.

348. Juan Carlos Zarate, *The Emergence of a New Dog of War: Private International Security Companies, International Law, and the New World Disorder*, 34 STAN. J. INT'L L. 75, 157 n.491 (1998).

349. Singer, *supra* note 37, at 535.

350. *Id.*

351. *Id.*

Outcome's former employees, has retained much of that company's corporate ties, and operates in the same contract zones.[352]

Singer also argued that current events have shown that economic sanctions are not effective in controlling private contracting firms.[353] He cited the example of DynCorp.[354] DynCorp has carried out operations in Colombia, Kosovo, Afghanistan, and, most recently, Iraq.[355] Singer reports that "in at least two past DynCorp operations, several of its employees were accused of 'engaging in perverse, illegal and inhumane behavior [and] purchasing illegal weapons, women, forged passports and [committing] other immoral acts."[356] Such inhumane behavior included a videotaped account of the firm's Bosnia site supervisor raping two young women.[357] This same firm has now been awarded a U.S. contract worth $250M to train the new Iraqi police.[358] Singer scoffs at the idea that market and reputational forces act to punish transgressing firms.[359]

C. Prosecution by the International Criminal Court

In the absence of an effective method to discipline contractors, it might be possible for the International Criminal Court (ICC) to try such offenders. The ICC Statute, which entered into force on July 1, 2002, establishes the "duty of every State to exercise its criminal jurisdiction over those responsible for international crimes."[360] The ICC may exercise jurisdiction over an individual as

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352. *Id.* For a more detailed discussion of Executive Outcomes, see GREEN REPORT, *supra* note 346, at 10, 16.

353. *See generally* Singer, *supra* note 37.

354. *Id.* at 524.

355. *Id.* at 524-25; *DynCorp's Assignment: Protect Afghan Leader*, WASH. POST, Dec. 2, 2002, at E01.

356. Singer, *supra* note 37, at 525 (citing John Crewdson, *Sex Scandal Still Haunts DynCorp*, CHI. TRIB., Apr. 19, 2003, at C3). *See also* Kelly Patricia O'Meara, *Broken Wings*, INSIGHT, Apr. 29, 2002, at 12, *available at* http://www.insightmag.com/main.cfm/main.cfm/main.cfm/include/detail/storyid/229690.html.

357. Singer, *supra* note 37, at 525; Susan J. Brison, *Torture, or 'Good Old American Pornography'?*, CHRONICLE REVIEW, June 4, 2004, *available at* http://chronicle.com/free/v50/i39/39b01001.htm.

358. David Isenberg, *There's No Business Like the Security Business*, ASIA TIMES ONLINE, Apr. 30, 2003, http://www.atimes.com/atimes/Middle_East/ED30Ak03.html; *see also* John Crewdson, *Sex Scandal Still Haunts DynCorp*, CHI. TRIB., Apr. 19, 2003, at C3. However, the Defense Department has suspended orders for new "interrogator support" and a $21.8M contract for "human intelligence support." Gorilovskaya, *supra* note 9.

359. Singer, *supra* note 37, at 538.

360. Rome Statute of the International Criminal Court, pmbl., *opened for signature* July 17, 1998, 2187 U.N.T.S. 90, *reprinted in* 37 I.L.M. 1002 [hereinafter ICC Statute].

long as he or she is a national of a country that has ratified the treaty.[361] ICC jurisdiction may also be exercised if the crime was committed within the territory of a State Party.[362]

It is unclear, however, whether the ICC could hear the Abu Ghraib cases, even if the United States were a signatory to the Rome Treaty.[363] Two main conditions are required for ICC jurisdiction. First, the jurisdiction of the ICC is "limited to the most serious crimes of concern to the international community"[364] – crimes such as "torture or inhuman treatment" and "committing outrages upon personal dignity, in particular humiliating and degrading treatment."[365] ICC prosecutors must also establish that the acts were committed as part of a plan or policy or as part of a large-scale commission of such crimes.[366] It has yet to be determined whether the latter was the case at Abu Ghraib.[367] The second requirement is that ICC prosecutors may only act when a nation with jurisdiction fails to prosecute.[368] The Court's jurisdiction is "complementary to national criminal jurisdictions."[369] Consequently, a case is inadmissible before the ICC if it is being effectively investigated and/or prosecuted by a State that has jurisdiction over it.[370]

DoD contractors who are *U.S. citizens* would not be subject to ICC jurisdiction, as the United States is not a State Party and systematically opposes ICC jurisdiction over its citizens.[371] The American Servicemembers Protection Act of 2002 authorizes the use of military force to liberate any U.S. citizen who is being held by the ICC.[372] The United States has also negotiated several bilateral non-surrender agreements with ICC State Parties prohibiting the transfer or

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361. *Id.* art. 12(2)(b).

362. *Id*. Bosnia and Herzegovina is a party to the ICC Statute. *Ratification Status of the Rome Statute*, http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty10.asp (last visited Feb. 20, 2005).

363. Carter, *supra* note 302.

364. ICC Statute, *supra* note 360, art. 5(1).

365. Carter, *supra* note 302.

366. ICC Statute, *supra* note 360, art. 7 (1). The ICC Statute defines "[a]ttack directed against any civilian population" as "a course of conduct involving the multiple commission of acts . . . pursuant to or in furtherance of a State or organizational policy to commit such attack." *Id*. art. 7(2)(a); *see also* Carter, *supra* note 302.

367. Carter, *supra* note 302.

368. ICC Statute, *supra* note 360, art. 1.

369. *Id.*

370. *Id.* art. 17(1)(a).

371. Jennifer Murray, Note, *Who Will Police the Peace-Builders? The Failure to Establish Accountability for the Participation of United Nations Civilian Police in the Trafficking of Women in Post-Conflict Bosnia and Herzegovina*, 34 COLUM. HUM. RTS. L. REV. 475, 513 (2003).

372. American Servicemembers Protection Act of 2002, § 2008, Pub. L. No. 107-206, 116 Stat. 820 (2002).

surrender of U.S. citizens to the jurisdiction of the Court.[373] As of May 3, 2005, the U.S. Government has reported that it has succeeded in concluding one hundred bilateral agreements.[374]

Additionally, several problems arise if the ICC is permitted to prosecute *foreign nationals* hired by DoD. First, it could create a double standard. Hypothetically, if a U.S. citizen and a third-country national, hired by the same firm, commit a crime together, the U.S. citizen would be tried in U.S. courts, while the third-country national could face prosecution by the ICC. Second, if the MEJA were found to be unconstitutional in part or in whole, the United States would lose its jurisdiction over foreign nationals hired by DoD. Since the ICC does not have the jurisdiction to hear all types of cases, it is possible that certain offenses would continue to go unpunished (e.g., crimes that do not qualify as serious enough to merit international attention).[375] Third, if the ICC assumes jurisdiction, the United States would effectively be transferring its ability to prosecute offenses, which affects its interests.

D. Return to an All-Military Force

If there is no law under which to prosecute contractors, some argue for a ban on funding for contracting firms.[376] When Aviation Development Corporation, a firm on contract with the CIA, was implicated in the accidental downing of a missionary plane in Peru,[377] U.S. Representative Jan Schakowsky (D-Ill.) introduced a bill that would have prevented the government from funding private military companies in the Andean region.[378] Such a ban would have forced the military to rely on military personnel only to conduct its mission in that region. No action was taken on the bill.

Ed Soyster, spokesman for the major American military contractor MPRI, asserts that such critics are mistaken.[379] As the U.S. military shrinks its forces, he says, private companies will be essential to filling the gap.[380] He argues

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373. *See* INTERNATIONAL CRIMINAL COURT, PROPOSED TEXT OF ARTICLE 98 AGREEMENTS WITH THE UNITED STATES, http://www.amicc.org/docs/98template.pdf (July 2002). In response to these agreements, also known as "Article 98 Agreements," the European Council has declared that, as presently drafted, it would be illegal for ICC State Parties to sign them. *See American Non-Governmental Organization to the International Criminal Court* 3, *available at* http://www.amicc.org/docs/UStimeline.pdf (2002).

374. Press Release, Dep't of State, U.S. Signs 100th Article 98 Agreement (May 3, 2005), http://www.state.gov/r/pa/prs/ps/2005/45573.htm.

375. Carter, *supra* note 302.

376. Capps, *supra* note 1.

377. *Id.*

378. Andean Region Contractor Accountability Act, H.R. 1591, 107th Cong. (2001).

379. Capps, *supra* note 1.

380. *Id.*

that the problem in holding contractors accountable lies with the government; "[a]fter all . . . a company doesn't have the power to arrest people, try them or send them to jail."[381]

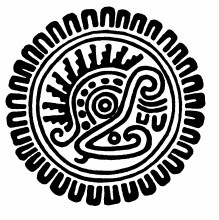
The possibility of a return to an all-military force is improbable, especially in areas in which contractors are responsible for maintenance, operation, and modernization.[382] Many experts believe that the military cannot function without these contractors.[383] As Major Milo Minderbinder, a character in Joseph Heller's novel *Catch-22*, stated, "Frankly, I'd like to see the government get out of war altogether and leave the whole feud to private industry."[384] Whether the course of war proceeds to the extent Minderbinder desires remains to be seen. However, it is becoming clear that as the military continues to increase its reliance on technology, its reliance on contractor support on the battlefield can only continue to expand as well.[385]

VII. CONCLUSION

The Military Extraterritorial Jurisdiction Act of 2000 was intended to fill a gap in U.S. federal criminal law by applying the U.S. penal code to civilians serving in U.S. military operations on foreign soil. However, even after its enactment, gaps still remain. As many are quick to point out, the MEJA applies only to civilian contractors working directly for DoD, not to contractors working for other U.S. agencies, such as the Central Intelligence Agency or the Department of State.[386] Many other issues are not addressed in the Act, including, but not limited to, the military's role after a defendant is arrested, host nation involvement, the assignment of a case to a U.S. Attorney, and the liability of military defense counsel for malpractice.[387] As Major Joseph Perlak, a Judge Advocate with the U.S. Marine Corps, wrote, "[T]here is a dearth of doctrine, procedure, and policy on just how this new criminal statute will affect the way the military does business with contractors."[388] At present, no one is quite sure how or when to apply it.[389] Despite the issues that remain to be considered and uncertainty concerning certain provisions, such as the extraterritorial application

381. *Id.* (paraphrasing Ed Soyster).
382. *See* Vernon, *supra* note 22, at 377-78.
383. Bredemeier, *supra* note 82 (quoting Peter Singer).
384. JOSEPH HELLER, CATCH-22 254 (1955).
385. *See* Vernon, *supra* note 22, at 378.
386. Schmitt, *supra* note 7, at 133-34; Singer, *supra* note 37, at 537.
387. For a more comprehensive discussion, see Schmitt, *supra* note 7, at 124-34; *see also* Fallon & Keene, *supra* note 183, at 280-91.
388. Perlak, *supra* note 7, at 95.
389. Singer, *supra* note 37, at 537.

over foreign nationals, the MEJA is a significant development in U.S. federal criminal law.[390]



390. Schmitt, *supra* note 7, at 134.