

A Military Practitioner's Guide to the Military Extraterritorial Jurisdiction Act in Contingency Operations

Major Aimee M. Bateman*

*This is about our claims to moral leadership in the world. We cannot win a fight for hearts and minds when we outsource critical missions to unaccountable contractors.*¹

—Barack Obama

I. Introduction

Civilians on the battlefield are not a new phenomenon. Contractors have accompanied our troops in the field since the Revolutionary War, helping them fight and win our nation's wars.² What has changed in recent years is the staggering number of civilians, from both the United States and other countries, who support the U.S. Department of Defense (DoD) mission as contract personnel. Historically, contractors made up a small percentage of the deployed force, generally between five and twenty-five percent.³ As of March 31, 2011, contractors made up fifty-two percent of the DoD workforce in Iraq and Afghanistan.⁴

Despite the historical presence and growing number of civilians accompanying U.S. forces overseas, there has not always been a complete jurisdictional net to capture these civilians' crimes. Until 2000, there was a jurisdictional gap allowing some civilians sent overseas as a result of their employment or association with the military to get away with murder—literally, in some cases.⁵

When Congress passed the much-anticipated Military Extraterritorial Jurisdiction Act of 2000⁶ (MEJA), the jurisdictional net expanded vastly with regard to civilians accompanying American troops overseas.⁷ As of February 2, 2012, more than fifty individuals have been prosecuted under MEJA, to include twenty-five contractors.⁸ All twenty-five of the contractor prosecutions have occurred since 2007.⁹ Commanders and their legal advisors need to understand this tool for holding contractors and DoD employees accountable for serious criminal acts. They must be familiar with the process and understand the respective roles of commanders, lawyers, and law enforcement.

This primer addresses the unique challenges of referring a case for prosecution under MEJA from an area of contingency operations. After a brief discussion of the history of MEJA in Part II and of the legislation itself in Part III, Parts IV and V discuss MEJA's relevance and applicability and answer common questions from the

* Judge Advocate, U.S. Army. Presently assigned as Associate Professor, Criminal Law, The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia. LL.M., 2012, The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia; J.D., 2008, Texas Tech School of Law; M.S., 2002, Troy University; B.S., 2000, U.S. Military Academy. Previous assignments include Chief, Military Justice, Regional Command-South, Kandahar Airfield, Afghanistan, 2010–2011; Trial Counsel and Senior Trial Counsel, 10th Mountain Division (LI), Fort Drum, New York, 2009–2010; Company Executive Officer, Battalion Adjutant, and Battalion Rear Detachment Commander, 3d Brigade Combat Team, 3d Infantry Division, Fort Benning, Georgia, 2002–2005; Platoon Leader, Assistant Plans Officer, and Assistant Logistics Officer, 36th Engineer Group, Fort Benning, Georgia, 2000–2002. Member of the bars of Texas and the Northern District of New York. A previous publication by the author is "Defending Those Who Defend America": Avoiding Conflicts of Interest in Order to Provide an Ethical and Effective Defense, ARMY LAW., Aug. 2009, at 42. This article was submitted in partial completion of the Master of Laws requirements of the 60th Judge Advocate Officer Graduate Course, The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia.

¹ Then-Senator Barack Obama, Remarks at Foreign Policy Town Hall Meeting, Iowa City, Iowa (Oct. 3, 2007).

² MOSHE SCHWARTZ & JOYPRADA SWAIN, CONG. RESEARCH SERV., R40764, DEPARTMENT OF DEFENSE CONTRACTORS IN AFGHANISTAN AND IRAQ: BACKGROUND AND ANALYSIS 1 (May 13, 2011) ("During the Revolutionary War, the Continental Army relied on contractors to provide such goods and services as transportation and engineering services, construction, clothing, and weapons. Since then, advances in warfare and technology have expanded the functions and responsibilities of contractors in military operations.") (citations omitted).

³ Colonel Steven J. Zamparelli, *Contractors on the Battlefield: What Have We Signed Up For?*, AIR FORCE J. LOGISTICS, vol. 23, no. 3, Fall 1999, at 11, 12.

⁴ SCHWARTZ & SWAIN, *supra* note 2, at 6 (154,592 contractor personnel in Iraq and Afghanistan, compared to 145,460 uniformed personnel).

⁵ See *Reid v. Covert*, 354 U.S. 1 (1957) (ordering the release of Mrs. Clarice Covert and Mrs. Dorothy Smith, both whom were convicted at court-martial of murdering their servicemember husbands). See discussion *infra* Part II.A.

⁶ 18 U.S.C. §§ 3261–3267 (2011).

⁷ *Id.*

⁸ Interview with Christine Duey, Senior Trial Att'y, Human Rights & Special Prosecutions Section, Crim. Law Div., U.S. Dep't of Justice, in Wash., D.C. (Feb. 2, 2012) [hereinafter Duey Interview].

⁹ *Id.* Prior to 2007, there was only one post-9/11 prosecution of a contractor accompanying troops in contingency operations, *United States v. Passaro*, 577 F.3d 207 (4th Cir. 2009) (conviction for 2003 assault upheld) (assault with a dangerous weapon in Afghanistan). But, this was not a Military Extraterritorial Jurisdiction Act (MEJA) prosecution. Duey Interview, *supra* note 8. Therefore, there are some, even very recent, published reports that MEJA is hardly ever used to prosecute contractors. See, e.g., LAURA A. DICKINSON, OUTSOURCING WAR AND PEACE: PRESERVING PUBLIC VALUES IN A WORLD OF PRIVATIZED FOREIGN AFFAIRS 55 (2011) ("To date, very few contractors have faced criminal proceedings of any kind, despite numerous incidents of reported abuse."). See also discussion *infra*, Part IV.A and text accompanying notes 61–64 (perceptions about "unaccountable" contractors).

perspective of a military practitioner. Part VI analyzes the interplay between MEJA and Article 2(a)(10), Uniform Code of Military Justice (UCMJ),¹⁰ as well as the jurisdictional gap that still exists for civilians working for the U.S. government overseas. The timeline in Appendix A offers a linear perspective of the evolution of the law and policy discussed in this article.

II. Before MEJA¹¹

*If th' assassination
Could trammel up the consequence, and catch
With his surcease success—that but this blow
Might be the be-all and the end-all!*¹²

Getting away with murder is not just a story line of British theater, but was once a reality in overseas military communities. There was no trammel in U.S. law by which to catch and punish civilians who committed crimes while living overseas due to their association with the U.S. military.¹³ Attempts to prosecute such civilians in both military courts and U.S. federal courts developed a clear body of law delineating the limits of military courts and extraterritorial civilian jurisdiction and shaping the legislation that would become MEJA.

A. Civilians in Military Courts

The seminal Supreme Court opinion in this area decided two cases together at a rehearing in 1957.¹⁴ The first case was *Reid v. Covert* in which Mrs. Clarice Covert killed her husband, a sergeant in the Air Force, at an airbase in England.¹⁵ In the second case, *Kinsella v. Kruger*, Mrs. Dorothy Smith killed her husband, an Army officer, at a post

in Japan.¹⁶ Although both convictions were initially upheld,¹⁷ at the rehearing the Court decided that “Mrs. Smith and Mrs. Covert could not constitutionally be tried by military authorities.”¹⁸ The Court stated, “The mere fact that these women had gone overseas with their husbands should not reduce the protection the Constitution gives them.”¹⁹ The Court ordered both women released from custody.²⁰

In *Reid*, the Court also mentions *United States ex rel. Toth v. Quarles*, decided by the Court two years earlier.²¹ Not only were civilian family members overseas during peacetime outside court-martial jurisdiction, but, as *Toth* states, former servicemembers who committed crimes during their terms of service and then left the service were also outside court-martial jurisdiction.²²

Notwithstanding these decisions, Congress retained some authority to subject civilians to prosecution under the UCMJ. Since its inception in 1950,²³ UCMJ jurisdiction has included, “[i]n time of war, all persons serving with or accompanying an armed force in the field.”²⁴ But, in 1970, the Court of Military Appeals (now the Court of Appeals for the Armed Forces) held that for the purpose of exerting UCMJ jurisdiction over civilians, “in time of war” means “a war formally declared by Congress.”²⁵ With this decision, court-martial jurisdiction over civilians was effectively eliminated.

B. Overseas-Civilians in U.S. Federal Courts

1. Extraterritorial Application of the Law

The reach of U.S. law is, in general, limited to the territorial boundaries of the United States.²⁶ But, “Congress has the authority to enforce its laws beyond the territorial

¹⁰ 10 U.S.C. § 802(a)(10) (2011) (amended to extend Uniform Code of Military Justice (UCMJ) jurisdiction to “persons serving with or accompanying an armed force in the field” during “a contingency operations,” not just “in a time of declared war,” resulting in an increased jurisdictional overlap with MEJA).

¹¹ 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 (Fall 2001) (providing a complete and thorough historical look at the legal landscape in the decades leading up to MEJA). Mr. Schmitt had a role in crafting MEJA and provides an in-depth discussion of the jurisdictional gap that preceded its enactment. *Id.* at 56.

¹² WILLIAM SHAKESPEARE, *MACBETH*, act 1, sc. 7.

¹³ While overseas sovereigns may have had jurisdiction, they often declined prosecution. See discussion *infra* Part II.C.

¹⁴ *Reid v. Covert*, 354 U.S. 1, 3–4 (1957).

¹⁵ 351 U.S. 487 (1956).

¹⁶ 351 U.S. 470 (1956).

¹⁷ *Reid*, 354 U.S. at 5.

¹⁸ *Id.*

¹⁹ *Id.* at 33.

²⁰ *Id.* at 40.

²¹ 350 U.S. 11 (1955).

²² *Id.* at 23 (“We hold that Congress cannot subject [ex-servicemen][] to trial by [military] court-martial. They, like other civilians, are entitled to have the benefit of safeguards afforded those tried in the regular courts authorized by Article III of the Constitution.”).

²³ Uniform Code of Military Justice, 64 Stat. 107 (1950) (current version at 10 U.S.C. ch. 47 (2011)).

²⁴ *Id.* at 109.

²⁵ *United States v. Averette*, 41 C.M.R. 363, 365 (C.M.A. 1970).

²⁶ *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 173 (1993).

boundaries of the United States.”²⁷ To overcome the presumption against extraterritoriality, this authority must be asserted explicitly in the law²⁸ or else the congressional intent must be inferable because “limiting the locus of [the] statute to U.S. territory would greatly curtail the scope and usefulness of the statute.”²⁹ When neither of these things is true, personal crimes such as “assaults, murder, burglary, larceny, robbery, arson, embezzlement and frauds of all kinds, which affect the peace and good order of the community, must of course be committed within the territorial jurisdiction of the government” in order to be prosecuted.³⁰

2. Special and Maritime Territorial Jurisdiction

The “territorial jurisdiction of the government” is referred to as “Special Maritime and Territorial Jurisdiction of the United States” (SMTJ) under the Federal Criminal Code.³¹ Included in SMTJ are

[a]ny lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building.³²

In 1999, the U.S. Attorney’s Office in the Eastern District of New York relied on this jurisdictional provision to prosecute James Gatlin, a civilian, who was living on property leased by the U.S. military in Germany.³³ In *United States v. Gatlin*, which served as the final salvo to Congress from the judiciary regarding the prosecution of civilians accompanying the military overseas,³⁴ the Second Circuit

²⁷ *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991).

²⁸ *Id.* (“[L]egislation 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)).

²⁹ *United States v. Villanueva*, 408 F.3d 193, 197–98 (5th Cir. 2005).

³⁰ *United States v. Bowman*, 260 U.S. 94, 98 (1922).

³¹ 18 U.S.C. § 7 (2011).

³² *Id.* § 7(3).

³³ *United States v. Gatlin*, 216 F.3d 207, 209 (2d Cir. 2000).

³⁴ *Id.* at 208 (“With regret . . . we reverse the judgment of conviction and dismiss the indictment. At the same time, because the existence of this jurisdictional gap is an issue that we believe warrants serious congressional consideration, we direct the Clerk of Court to forward a copy of this opinion to the Chairmen of the House and Senate Armed Services and Judiciary Committees.”).

concluded that this provision does not apply extraterritorially.³⁵ Although Mr. Gatlin pled guilty to having sex with his 13-year-old stepdaughter,³⁶ his conviction did not stand. Mr. Gatlin’s crimes were outside the jurisdiction of the U.S. federal courts and, as the court stated, “Our decision today is only the latest consequence of Congress’s failure to close this jurisdictional gap.”³⁷

C. United States Civilians in Foreign Courts

*All that remains is for the dependents of our soldiers to be prosecuted in foreign courts, an unhappy prospect not only for them but for all of us.*³⁸

Even more than an “unhappy prospect,”³⁹ prosecution in foreign courts has proved to be an unlikely one. Even if it were in the sovereign interest of the United States to allow the prosecution of American citizens accompanying troops overseas in foreign courts,⁴⁰ foreign countries are generally not interested in prosecuting Americans when the victims or damaged property are not of the host country.⁴¹ Additionally, some countries in which the United States military and accompanying civilian contractors operate, such as Somalia,

³⁵ *Id.* at 210.

³⁶ *Id.*

³⁷ *Id.* at 223.

³⁸ *Reid v. Covert*, 354 U.S. 1, 90 (1957).

³⁹ *Id.*

⁴⁰ The United States generally retains jurisdiction over its citizens through a Status of Forces Agreement (SOFA) with every nation in which U.S. troops are present. The United States is currently a party to more than 100 agreements that may be considered SOFAs. R. CHUCK MASON, CONG. RESEARCH SERV., RL34531, STATUS OF FORCES AGREEMENT (SOFA): WHAT IS IT, AND HOW HAS IT BEEN UTILIZED? 1 (Jan. 5, 2011). For example, in Afghanistan, jurisdiction over U.S. personnel under NATO authority is dictated by a “Military Technical Agreement,” which states: “The ISAF and supporting personnel, including associated liaison personnel, will under all circumstances and at all times be subject to the exclusive jurisdiction of their respective national elements in respect of any criminal or disciplinary offences which may be committed by them on the territory of Afghanistan.” Military Technical Agreement Between the International Security Assistance Force (ISAF) and the Interim Administration of Afghanistan, Afg.-ISAF, Jan. 4, 2002, 41 I.L.M. 1032.

⁴¹ The General Accounting Office made this clear in a 1979 report to Congress. This report revealed that in 1977, host nations waived their right to prosecute American civilians who were accompanying U.S. Forces overseas in fifty-nine serious cases (to include rape, manslaughter, arson, robbery, and burglary), and in fifty-four less serious cases (involving simple assault, drug abuse, and drunkenness). U.S. GOV’T ACCOUNTABILITY OFFICE, FPCD 79-45, SOME CRIMINAL OFFENSES COMMITTED OVERSEAS BY DoD CIVILIANS ARE NOT BEING PROSECUTED: LEGISLATION IS NEEDED 11 (1979).

have no functioning government.⁴² The same was the case in the Balkans in the late 1990s.⁴³

This issue was highlighted by an incident that occurred in the Balkans in 1999. One of the biggest participants in DoD operations in the region was DynCorp International.⁴⁴ Some DynCorp contractors were buying and trading young women, some as young as twelve years old.⁴⁵ One DynCorp supervisor even videotaped himself raping a woman.⁴⁶ No one was ever prosecuted for these crimes. *Gatlin* and the non-prosecution of DynCorp personnel were soon followed by MEJA, closing a jurisdictional gap that had existed for forty-three years.⁴⁷

III. The Military Extraterritorial Jurisdiction Act of 2000 and Subsequent Amendment

*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.*⁴⁸

Congress finally answered the call to close this jurisdictional gap when it passed MEJA on November 22,

⁴² *Somalia Profile*, BBC NEWS AFRICA, <http://www.bbc.co.uk/news/world-africa-14094503> (last updated Apr. 17, 2013) (“Somalia has been without an effective central government since President Siad Barre was overthrown in 1991.”).

⁴³ John Kifner, *Crisis in the Balkans: Government; Kosovo Rebels Move Into Towns; Violence Is Reported*, N.Y. TIMES, June 19, 1999, <http://www.nytimes.com/1999/06/19/world/crisis-balkans-government-kosovo-rebels-move-into-towns-violence-reported.html> (“Of course we don’t have laws, we don’t have written norms,” [a Kosovo Liberation Army member] said, “but we have enthusiasm for building a new state.”).

⁴⁴ Heather Carney, *Prosecuting the Lawless: Human Rights Abuses and Private Military Firms*, 74 GEO. WASH. L. REV. 317, 326 (2006) (DynCorp employees were in the Balkans on a fifteen-million-dollar-a-year Department of Defense (DoD) contract to assist with peacekeeping).

⁴⁵ K. Elizabeth Waits, *Avoiding the “Legal Bermuda Triangle”: The Military Extraterritorial Jurisdiction Act’s Unprecedented Expansion of U.S. Criminal Jurisdiction over Foreign Nationals*, 23 ARIZ. J. INT’L & COMP. L. 493 (2006).

⁴⁶ P.W. Singer, *Peacekeepers, Inc.*, POL’Y REV., no. 119 (Jun. 1, 2003), available at <http://www.hoover.org/publications/policy-review/article/7437>.

⁴⁷ See *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955); *Reid v. Covert*, 354 U.S. 1 (1957).

⁴⁸ *Hearing on H.R. 3380 Before the H. Subcomm. on Crime*, 106th Cong. 17 (2000) [hereinafter *MEJA Hearing*] (statement of Robert E. Reed, Esq., Assoc. Deputy Gen. Counsel, U.S. Dep’t of Def.).

2000.⁴⁹ Congressional debate on MEJA included the assertion that the act would cover *all* individuals who were overseas because of their connection with the military, and make them accountable for criminal acts committed during that time of association.⁵⁰ After the act was passed, however, it became clear that the trammel was not complete—there were still holes in the jurisdictional net. These became apparent in the aftermath of the Abu Ghraib detainee abuse scandal.⁵¹

After the U.S. Attorney General announced that the Department of Justice (DOJ) was considering prosecuting contractors under MEJA for allegedly abusing detainees at Abu Ghraib,⁵² reports emerged that the Central Intelligence Agency (CIA) and Department of Interior employed the contractors in question.⁵³ Because the contractors were not employees “of a Department of Defense contractor,”⁵⁴ MEJA did not apply.⁵⁵

The fix to this jurisdictional hole came in the Fiscal Year 2005 National Defense Authorization Act (NDAA), in the unambiguously titled section, “Military Extraterritorial Jurisdiction Over Contractors Supporting Defense Missions Overseas.”⁵⁶ President George W. Bush signed the bill into law on October 28, 2004, and MEJA was amended to its current form. This amendment broadened the definition of “employed by the Armed Forces outside the United States” to include contractors who are employees of “any other Federal agency, or any provisional authority, to the extent such employment relates to supporting the mission of the Department of Defense overseas.”⁵⁷

⁴⁹ Pub. L. No.106-523, 114 Stat. 2488 (2000).

⁵⁰ *MEJA Hearing*, *supra* note 48, at 5–6 (statement of Rep. Bill McCollum) (“The bill . . . would amend the Federal criminal code to apply it to persons who commit criminal acts while employed by or otherwise accompanying the U.S. Armed Forces outside of the United States. . . . Many of these civilians are nonmilitary employees of the Defense Department and contractors working on behalf of DOD.”) (emphasis added).

⁵¹ Seymour M. Hersh, *Torture at Abu Ghraib*, NEW YORKER (May 10, 2004), http://www.newyorker.com/archive/2004/05/10/040510fa_fact.

⁵² Dan Eggen & Walter Pincus, *Ashcroft Says U.S. Can Prosecute Civilian Contractors for Prison Abuse*, WASH. POST, May 7, 2004, at A18. Senator Jeff Sessions, who proposed MEJA, also believed that contractors accused of crimes at Abu Ghraib could be prosecuted under MEJA. Mary Orndorff, *Law May Help Prosecute Civilians in Abuse Case*, BIRMINGHAM NEWS, May 5, 2004, available at 2004 WLNR 20550756.

⁵³ Alan F. Williams, *The Case For Overseas Article III Courts: The Blackwater Effect and Criminal Accountability in the Age of Privatization*, 44 U. MICH. J.L. REFORM 45, 61 (2010).

⁵⁴ Pub. L. No. 106-523, § 3267(1)(A), 114 Stat. 2488 (2000).

⁵⁵ 18 U.S.C. § 3261 (2011).

⁵⁶ Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, § 1088, 118 Stat. 1811 (2004).

⁵⁷ 18 U.S.C. § 3267(1)(A)(ii)(II).

With this amendment, federal prosecutors were now equipped with a jurisdictional net more extensive than ever before, one that finally captured *all* persons “employed by,” “otherwise accompanying,” or “working on behalf of DoD.”⁵⁸

IV. MEJA’s Current Relevance and Applicability

A. Contractor Presence Overseas

*[Afghan Minister of Interior Hanif] Atmar said there was a larger issue to consider. He understood that within DynCorp there were many “wonderful” people working hard, and he was keen to see proper action taken to protect them; but, these contractor companies do not have many friends. . . . [I]n Afghanistan, there is increasing public skepticism about contractors.*⁵⁹

As mentioned in Part I, contractors make up a bigger percentage of our forward deployed force than ever before.⁶⁰ Unfortunately, no matter how many “wonderful” contractors there are, the “bad” ones will draw attention of the media and international community, sometimes for years.⁶¹

“Unaccountable” has become a buzzword for commentators⁶² and government officials⁶³ who have been

⁵⁸ See *supra* note 50 and accompanying text.

⁵⁹ *US Embassy Cables: Afghan Government Asks US to Quash “Dancing Boys” Scandal*, GUARDIAN (London), Dec. 2, 2010, <http://www.guardian.co.uk/world/us-embassy-cables-documents/213720>.

⁶⁰ See *supra* text accompanying note 4.

⁶¹ Stephen Lendman, *Unaccountable: Private Military Contractor Abuses*, THEPEOPLESVOICE.ORG (Jan. 18, 2012), <http://www.thepeoplesvoice.org/TPV3/Voices.php/2012/01/18/unaccountable-private-military-contractor> (mentioning the Balkan DynCorp incident from 1999, discussion *supra* Part II.C, and the Abu Ghraib incident from 2003, discussion *supra* Part III).

⁶² See, e.g., DonnaMarie McKinnon, *Federal Civilian Criminal Prosecutions of Private Military Contractors: Inherent Legal Ethics Issues*, 24 GEO. J. LEGAL ETHICS 695, 711 (2011) (“Accountability [of contractors] through the United States criminal justice system, however, has been difficult to obtain.”); Alan F. Williams, *The Case for Overseas Article III Courts: The Blackwater Effect and Criminal Accountability in the Age of Privatization*, 44 U. MICH. J.L. REFORM 45, 47 (2010) (“[W]e can conservatively estimate that nearly 500,000 civilian employees, dependents, and contractors of the U.S. government currently enjoy de facto immunity from meaningful criminal accountability. . . .”); Huma T. Yasin, *Playing Catch-Up: Proposing Status-Based Regulations to Bring Contractors Within the Purview of International and Domestic Law*, 25 EMORY INTL L. REV. 411, 464 (2011) (“[T]o date, no theory comprehensively addresses the legal accountability gap.”).

⁶³ See, e.g., Daniel I. Gordon, Adm’r, Office of Fed. Procurement Policy, Office of Mgmt. & Budget, *Holding Contractors Accountable*, OFFICE OF MGMT. & BUDGET (Nov. 15, 2011, 5:08 PM EDT),

critical of the so-called “outsourcing” of the U.S. mission overseas. In a world where perception is reality,⁶⁴ the only way to combat this perception is through consistent and vigorous enforcement of the law.⁶⁵

B. Isn’t MEJA a “DOJ Thing”? Why Should I or My Commander Care?

While DOJ prosecutes MEJA cases, DoD commanders, attorneys, and law enforcement play an important and prominent role in the process. As the DoD Associate Deputy General Counsel for Military Justice and Personnel Policy testified before the Senate in 2008, “The [DoD] has been instrumental in supporting past legislation and Federal district court prosecution of [DoD] civilian employees, [DoD] contractors, and their dependents who commit felony-level crimes when serving with or accompanying our Armed Forces outside the United States.”⁶⁶ Not only is the involvement of DoD personnel important, it is mandatory. The DoD has a thirty-three-page instruction that serves as regulatory guidance regarding criminal jurisdiction over those individuals who may be prosecuted under MEJA.⁶⁷ Commanders, judge advocates, and DoD law enforcement have mandatory reporting requirements and responsibilities

<http://www.whitehouse.gov/blog/2011/11/15/holding-contractors-accountable>; Obama Quote, *supra* note 1; *Closing Legal Loopholes: Prosecuting Sexual Assaults and Other Violent Crimes Committed Overseas By American Civilians in a Combat Environment: Hearing Before the S. Comm. on Foreign Relations*, 110th Cong. 67 (2008) [hereinafter *Sexual Assault Hearing*] (statement of Rep. Ted Poe) (“While the Federal Government figures out who is responsible and who has jurisdiction, the assailants remain free and unaccountable for their crimes.”).

⁶⁴ Angela Snell, *The Absence of Justice: Private Military Contractors, Sexual Assault, and the U.S. Policy of Indifference*, 2011 U. ILL. L. REV. 1125, 1128 (2011) (“Stationed throughout the world, PMCs [Private Military Contractors] now operate, in effect, with legal immunity while the U.S. government sits idly by.”). Ms. Snell asserts, “The United States has sought to ensure PMC immunity from prosecution under international law, rather than imposing obligations on them.” *Id.* at 1147.

⁶⁵ *Holding Criminals Accountable: Extending Criminal Jurisdiction for Gov’t Contractors and Employees Abroad: Hearing Before the S. Comm. on the Judiciary*, 112th Cong. (2011) [hereinafter *CEJA Hearing*] (statement of Lanny A. Breuer, Esq., Ass’t Att’y Gen., Crim. Div., U.S. Dep’t of Justice) (“[T]he Justice Department has successfully prosecuted numerous MEJA cases involving former [DoD] employees or individuals accompanying them overseas. . . . The Justice Department has also successfully prosecuted Defense Department contractors employed overseas. . . . The Justice Department also successfully and aggressively uses every other tool now available to us to prosecute crimes committed abroad by U.S. Government personnel and U.S. Government contractors (which can include both U.S. citizens and citizens of other countries).”).

⁶⁶ *Sexual Assault Hearing*, *supra* note 63, at 34 (prepared statement of Robert E. Reed, Esq., Assoc. Deputy Gen. Counsel, U.S. Dep’t of Def.).

⁶⁷ U.S. DEP’T OF DEF., INSTR. 5525.11, CRIMINAL JURISDICTION OVER CIVILIANS EMPLOYED BY OR ACCOMPANYING THE ARMED FORCES OUTSIDE THE UNITED STATES, CERTAIN SERVICE MEMBERS, AND FORMER SERVICE MEMBERS (3 Mar. 2005) [hereinafter DoDI 5525.11].

with regard to gathering the necessary information for a MEJA prosecution.⁶⁸ If attorneys and investigators are not properly trained on the application of MEJA, the case will never make it to DOJ, the system will fail, and the perception of effective immunity for military contractors will continue to thrive.⁶⁹

C. Relevance Outside of Contingency Operations

The practice points in this article focus on prosecuting contractors who are employed by or supporting the mission of DoD in contingency operation. As noted in Part II, however, jurisdiction over family members is an important part of the history of MEJA. Jurisdiction over former servicemembers may be an important part of the future use of MEJA.

Many servicemembers could, due to normal attrition and the planned contraction of DoD, leave combat zones or overseas duty stations and enter civilian life almost immediately.⁷⁰ Therefore, the potential for former-servicemember prosecution is significant, and judge advocates should be mindful that they may be called upon to assist in such prosecutions by producing investigations, finding witnesses, or otherwise assisting DOJ in gathering information. While the application of MEJA to former servicemembers has been the subject of significant controversy,⁷¹ thus far, this application of MEJA has avoided judicial scrutiny.⁷²

⁶⁸ *Id.* para. 5. See also *infra* Appendix C.

⁶⁹ DoDI 5525.11, *supra* note 67, at 4 (“Effective investigations lead to successful prosecutions and, therefore, these cases warrant close coordination and cooperation between the Department of Defense, the [Department of Justice], and the [Department of State].”).

⁷⁰ Chris Carroll, *Budget Ax falls On Army, Marines: DOD to Cut 100,000 Ground Troops But Protect Military Pay For Now*, STARS & STRIPES, Jan. 26, 2012, at 1, 4 (“Army end strength would fall over the next five years from roughly 562,000 to 490,000 soldiers while the Marine Corps would shrink from just more than 202,000 to 182,000 troops. In the process, the Army would cut at least eight of 45 brigade combat teams.”). Part of this plan is to deactivate two brigades that are currently stationed in Germany. Gen. Raymond Odierno, Army Chief of Staff, Remarks on Budget Impact to Army, Pentagon Press Conf. (Jan. 27, 2012) (transcript available at <http://www.army.mil/article/72688/Jan272012CSAremarksbudgetimpactoArmybriefingatPentagon/>) (“They will come out of the force; they will not be restationed back in the United States.”).

⁷¹ See, e.g., First Lieutenant James E. Hartney, *A Call for Change: The Military Extraterritorial Jurisdiction Act*, 13 GONZ. J. INT’L L. 2 (2009–2010) (“MEJA was never intended to be used [to prosecute former servicemembers].”); Olivia Zimmerman Miller, *Murder or Authorized Combat Action: Who Decides? Why Civilian Court Is the Improper Forum to Prosecute Former Military Service Members Accused of Combat Crimes*, 56 LOY. L. REV. 447 (2010).

⁷² See *United States v. Green*, 654 F.3d 637 (6th Cir. 2011), *cert. denied*, 2012 WL 33631 (U.S. Jan. 9, 2012) (No. 11-7511) (holding that prosecution of defendant in civilian justice system while coconspirators

V. MEJA in Practice

A. Before You Deploy: Read the Law, Understand the Process

Every judge advocate who expects to work overseas in the areas of military justice, trial defense, or contract law, or to supervise those who do, should read the full text of both MEJA⁷³ and DoD Instruction (DoDI) 5525.11.⁷⁴ The most important thing for judge advocates to understand is the referral process.⁷⁵ Appendices D and E of this article contain products and links to resources to assist a deployed legal office in developing internal MEJA case-processing system. Parts V.B and V.C will answer questions about the practical application of MEJA for a military practitioner.

B. The Basics

1. How Does MEJA Work?

No criminal acts are listed in MEJA. The applicable “bad acts” are found in Title 18, U.S. Code, Part I (Crimes).⁷⁶ Military Extraterritorial Jurisdiction Act simply says it is a crime for certain people to commit certain acts while outside the United States, if the act or acts they committed would have been a crime inside the United States.⁷⁷

An excellent explanation of how MEJA works, especially for judge advocates familiar with the Federal Assimilative Crimes Act⁷⁸ as a result of serving as special assistant U.S. attorneys (SAUSAs)⁷⁹ or from charging an

were prosecuted in military justice system did not offend equal protection and prosecution under the MEJA did not violate the Due Process clause).

⁷³ 18 U.S.C. §§ 3261–3267 (2011). See Appendix B (providing the full text of MEJA).

⁷⁴ DoDI 5525.11, *supra* note 67.

⁷⁵ This assertion is based on the author’s recent professional experience as Chief, Military Justice, for a deployed U.S. Army division headquarters [hereinafter Professional Experience].

⁷⁶ 18 U.S.C. pt. I (2011).

⁷⁷ *Id.* § 3261(a).

⁷⁸ *Id.* § 13.

⁷⁹ 28 U.S.C. § 543(a) (2011) (“The Attorney General may appoint attorneys to assist United States attorneys when the public interest so requires . . .”). See also U.S. DEP’T OF ARMY, REG. 27-10, MILITARY JUSTICE para. 23-4.a (3 Oct. 2011) [hereinafter AR 27-10] (“Prosecutions in Federal court are a DOJ responsibility. Staff judge advocates or legal advisors often find it beneficial, however, to have one or more JA or DA civilian attorneys appointed as SAUSA under 28 USC 543 to prosecute crimes in which the Army has an interest.”).

offense under clause 3 of Article 134, UCMJ,⁸⁰ is contained in the House Judiciary Committee report that accompanied MEJA:

In many respects, a prosecution under section 3261 is similar to a prosecution under the Federal Assimilative Crimes Act (18 U.S.C. § 13). That statute makes it a Federal crime to commit an act on lands not within the jurisdiction of a state, commonwealth, territory, possession, or district of the United States that, while not expressly a Federal crime (i.e., made punishable by an act of Congress), would be punishable if committed within the jurisdiction of a state, commonwealth, territory, possession, or district. Persons who commit such acts can be prosecuted under 18 U.S.C. § 13 and, if found guilty in Federal court, are punished under Federal law. While no State law has been violated in such case, the elements of the State offense become part of the elements of the Federal crime charged. Indeed, in nearly all cases, Federal prosecutors reference the State statute in the document that charges the defendant with a violation of section 13. In a prosecution under section 3261, therefore, the elements of the crime that the defendant would have committed had the conduct occurred within the special maritime and territorial jurisdiction of the United States also would be elements of the crime under section 3261.⁸¹

As an example, count 1 of the indictment in *United States v. Brehm*⁸² reads,

On or about November 25, 2010, at Kandahar Airfield, Afghanistan, the defendant, SEAN THEODORE BREHM, did assault "J.O." with a dangerous weapon, that is, a knife, with intent to do bodily harm, and without just cause or excuse. (In violation of Title 18, United States Code, Sections 113(a)(3) and 3261(a).)⁸³

⁸⁰ 10 U.S.C. § 934 (2011) ("crimes and offenses not capital, of which persons subject to this chapter may be guilty").

⁸¹ H.R. REP NO. 106-778, pt. 1, at 15 (2000).

⁸² No. 1:11-CR-11 (E.D. Va. Mar. 30, 2011) (order denying motions to dismiss).

⁸³ Indictment at 2, *Brehm*, No. 1:11-CR-11.

While it is not necessary to charge a violation of the underlying offense (such as Section 113(a)(3), Assault, in the above example) along with Section 3261(a), doing so does "put the defendant on notice of the elements of the crime that the Government will attempt to prove and the maximum punishment that may be imposed for the violation of Section 3261."⁸⁴

2. Proper Person

To prosecute any person under MEJA, the government must establish that the subject is "employed by or accompanying the Armed Forces outside the United States." This is an element of the crime that must be proved beyond a reasonable doubt.⁸⁵ Proving this element is often very fact-intensive, especially if the subject is employed by some "other Federal agency"⁸⁶ and not by the DoD.⁸⁷ Therefore, the investigation should focus not only on proving the underlying criminal act, but also on establishing this vital jurisdictional element.⁸⁸

All contract personnel working overseas in an operational area (whether employed by the DoD or some other Federal agency) will be there pursuant to a Letter of Authorization (LOA).⁸⁹ The LOA, along with every contract within the chain of employment (i.e., between the employee and the subcontractor, the subcontractor and contractor, and the contractor and the DoD) should be obtained.⁹⁰ Obtaining these documents is essential to the prosecution because "[t]he contract is the only legal basis for the relationship between the [DoD] and the contractor."⁹¹

⁸⁴ H.R. REP NO. 106-778, pt. 1, at 15 n.29 (2000), quoted in Schmitt, *supra* note 11, at 4 (the House report noted that it might be "helpful" to refer to the underlying crime in the indictment for this purpose).

⁸⁵ 18 U.S.C. § 3261(a)(1) (2011).

⁸⁶ *Id.* § 3267(1)(A)(ii)(II) and (iii)(II).

⁸⁷ Interview with Micah Pharris, Senior Trial Att'y, Human Rights and Special Prosecutions Sec., Crim. Law Div., Dep't of Justice, in Wash., D.C. (Feb. 2, 2012) [hereinafter Pharris Interview].

⁸⁸ *Id.*

⁸⁹ 32 C.F.R. § 158.3 (2012) ("Letter of authorization (LOA). A document issued by a procuring contracting officer or designee that authorizes contractor personnel to accompany the force to travel to, from, and within an operational area, and outlines Government-furnished support authorizations within the operational area, as agreed to under the terms and conditions of the contract.").

⁹⁰ Pharris Interview, *supra* note 87.

⁹¹ 32 C.F.R. § 158.6(a)(4).

a. Non-U.S. Citizens

The subject need not be a U.S. citizen to fall within MEJA's jurisdictional net. The only non-U.S. citizens who are explicitly excluded from the application of MEJA are persons employed by or supporting the DoD mission who are nationals of or ordinarily live in the country in which the crime occurs.⁹²

Including third-country nationals (TCNs) within the jurisdictional reach of MEJA for crimes committed outside the United States was a huge expansion of the reach of American criminal law. As Glenn R. Schmitt, one of the authors of the legislation remarked:

[T]he act does not require an American person or property be involved at all. For example, if a third-country national accompanying the United States Armed Forces, such as a contract employee, commits a crime against another third-country national, the Act gives United States courts subject matter jurisdiction over the crime even though no American was involved in any way. This portion of the Act will likely be subjected to a court challenge.⁹³

This is precisely what happened following the assault of a citizen of the United Kingdom by a South African national who was a DoD contractor,⁹⁴ resulting in the indictment mentioned in Part V.B.1. The District Court upheld the applicability of MEJA in this case, stating that the defendant,

[V]oluntarily and knowingly entered into a relationship so related to the United States and its military mission in Afghanistan that [he] should have reasonably anticipated being haled into court in the

⁹² 18 U.S.C. § 3267(1)(B), (C). This provision was included for two reasons:

[I]n part out of a belief 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. In addition, this exception was included to address concerns that host nations might resist the presence of American troops in their countries if allowing such presence might subject its own citizens to trial in the United States.

Schmitt, *supra* note 11, at 131.

⁹³ Schmitt, *supra* note 11, at 132.

⁹⁴ *United States v. Brehm*, No. 1:11-CR-11, at 1 (E.D. Va. Mar. 30, 2011) (order denying motions to dismiss).

United States as a result of his alleged conduct, particularly in light of the notices,⁹⁵ privileges and benefits he received because of this employment.⁹⁶

b. Non-DoD Employees

The most fact-intensive personal jurisdiction litigation in a MEJA case occurs when the subject is employed by another federal agency and is supporting DoD missions.⁹⁷ Because the underlying employment contract is with an agency other than DoD, additional information is required to show the nexus with DoD to establish the jurisdictional element beyond a reasonable doubt.⁹⁸ Therefore, investigators must obtain more than an employment paper trail. To show that the subject's "employment relates to supporting the mission of the Department of Defense overseas," the prosecution will need such things as memoranda of understanding or contracts between the subject's employer and the DoD commander with which the subject was working; witness statements that the subject was a part of missions supporting the DoD; and statements explaining exactly what the contractor was doing on these missions, e.g., providing security for DoD personnel.⁹⁹

3. Proper Act

To establish an act as a crime under MEJA, the prosecution must establish that: (1) it is punishable by more than one year of confinement¹⁰⁰ (i.e., is a felony);¹⁰¹ and (2)

⁹⁵ Included in Mr. Brehm's contract was the following notice:

Employee hereby acknowledges that Employee has been informed of, understands and accepts that Employee may be subject to U.S.: i) military criminal jurisdiction under the Uniform Code of Military Justice when, in time of declared war or contingency operation, Employee is serving with or accompanying an armed force in the field; ii) federal civilian criminal jurisdiction under the Military Extraterritorial Jurisdiction Act by accompanying U.S. Armed Forces outside the United States; and iii) federal civilian criminal jurisdiction for war crimes and for crimes committed within the special territorial and maritime jurisdiction of the United States.

Contract Between DynCorp International LLC ("Employer") and Sean Brehm ("Employee"), dated July 25, 2010 (on file with author).

⁹⁶ *Brehm*, No. 1:11-CR-11, at 6.

⁹⁷ Pharris Interview, *supra* note 87.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ 18 U.S.C. § 3261(a) (2011).

it is a crime under U.S. Code if committed within the SMTJ of the United States.¹⁰² Therefore, although MEJA has the word “extraterritorial” in its name, the only crimes prosecuted under MEJA are “territorial” crimes, that is, crimes that the U.S. government normally cannot prosecute unless committed on American soil, such as rape, murder, and assault.¹⁰³

Some crimes under Title 18 are explicitly extraterritorial, for example, torture.¹⁰⁴ In such cases, MEJA is *not* applicable. The individual should be charged only with the extraterritorial crime, and not under Section 3261. However, initial notifications, discussed in Part C.1 and Appendix E below, are the same. The Human Rights and Special Prosecutions Section (HRSP) of DOJ handles both MEJA cases and other extraterritorial crime prosecutions.¹⁰⁵

4. Proper Place

As long as the status of the person and crime comply with MEJA, anywhere outside of the territorial boundaries of the United States is a proper “place” under the Act. Therefore, a civilian spouse living in Germany and a civilian contractor deployed in Afghanistan supporting combat operations both are in locations where MEJA applies. If the location is within the United States, MEJA is neither applicable nor necessary. MEJA does not create any new crimes under Title 18.¹⁰⁶ It simply provides a net to capture the criminal acts of those outside the territorial jurisdiction of the United States.

However, following *Gatlin*,¹⁰⁷ Congress expanded SMTJ¹⁰⁸ to include,

(A) the premises of United States diplomatic, consular, military or other United States Government missions or entities in foreign States, including the buildings, parts of buildings, and land appurtenant or ancillary thereto or used for purposes of those missions or entities, irrespective of ownership; and (B) residences in foreign States and the land appurtenant or ancillary thereto, irrespective of ownership, used for purposes of those missions or entities or used by United States personnel assigned to those missions or entities.¹⁰⁹

Therefore, there may be situations overseas where a crime actually occurs within the territorial jurisdiction of the United States, even when the military and accompanying civilians are on “borrowed” land.

The practice point for reporting is the same—the DOJ HRSP prosecutes SMTJ crimes also.¹¹⁰ There is one limitation to this definition of SMTJ: only “offenses committed by or against a national of the United States” are crimes under that definition of SMTJ.¹¹¹

C. Processing a MEJA Referral to DOJ

1. Initial Notifications

The MEJA referral process and checklist contained in Appendix E provide the necessary guidance for properly referring a case through DoD channels to DOJ for a MEJA prosecution.¹¹² The first step is to notify the DoD’s General Counsel designee for MEJA cases immediately,¹¹³ along with the attorneys at the DOJ HRSP.¹¹⁴ The HRSP is “the

¹⁰¹ *Id.* § 3559(a)(1)–(5) (every crime that is classified as having an authorized punishment of a term of imprisonment of more than one year is classified as a felony).

¹⁰² *Id.* § 3261(a).

¹⁰³ See *infra* Appendix D (providing common offense that could be charged under MEJA).

¹⁰⁴ 18 U.S.C. § 2340A.

¹⁰⁵ Human Rights & Special Prosecution Section (HRSP), *About the Section*, U.S. DEP’T OF JUSTICE, <http://www.justice.gov/criminal/hrsp/about> (last visited Mar. 4, 2012) [hereinafter *About the HRSP*] (“Where U.S. federal jurisdiction exists, HRSP seeks to prosecute human rights violators under the federal criminal statutes proscribing torture, war crimes, genocide, and recruitment or use of child soldiers. . . . In addition, HRSP prosecutes certain other cases of crimes of violence committed abroad, particularly crimes that fall under MEJA.”).

¹⁰⁶ See discussion *supra* Part V.B.1.

¹⁰⁷ *United States v. Gatlin*, 216 F.3d 207 (2d Cir. 2000); see discussion *supra* Part II.B.2.

¹⁰⁸ See discussion *supra* Part II.B.2.

¹⁰⁹ 18 U.S.C. § 7(9).

¹¹⁰ *About the HRSP*, *supra* note 105 (“Similarly, HRSP investigates and prosecutes cases involving violent crimes that fall under the special maritime and territorial jurisdiction of the United States.”).

¹¹¹ 18 U.S.C. § 7(9).

¹¹² See *infra* Appendix E.

¹¹³ DoDI 5525.11, *supra* note 67, para. 5.3.1. See *infra* Appendix E (providing DoD GC contact information).

¹¹⁴ Duey Interview, *supra* note 8; Pharris Interview, *supra* note 87; see *infra* Appendix E (providing HRSP section contact information).

primary point of contact for [DoD] personnel regarding all investigations that may lead to criminal prosecutions and all associated pretrial matters”¹¹⁵ Additionally, a MEJA referral memo should be sent to the Department of State (DOS) through the local embassy.¹¹⁶ The involvement of DOS is especially important when the subject is a TCN.¹¹⁷ Diplomatic communications with the nation of which the TCN is a citizen should begin immediately when the subject is arrested or investigation begins.¹¹⁸

In areas of contingency operations, there is now another legal mechanism at play that could result in concurrent jurisdiction over an offense. As a part of the 2007 NDAA, Article 2(a)(10) of the UCMJ was amended to expand court-martial jurisdiction over civilians.¹¹⁹ In 2008, the DoD published guidance regarding such prosecutions,¹²⁰ and in 2011 the Army published regulatory guidance to include initial reporting procedures.¹²¹ Therefore, Army practitioners must also use the flowchart in Chapter 27 of Army Regulation 27-10 (Appendix G to this article), during the “initial notification” process.¹²²

If there is uncertainty as to whether the crime or the location of the crime falls under the jurisdiction of MEJA, UCMJ Article 2(a)(10), or both, without delay, the incident should be reported in accordance with Article 2(a)(10) processing (as described in Appendix G of this article) and to the DOJ HRSP.¹²³ While it is helpful to include any information about the crime from the initial report, an in-depth legal analysis of the jurisdiction is not required and

could be counterproductive in establishing jurisdiction. Correspondences of this sort would likely have an impact on any subsequent prosecution as they would have to be turned over to attorneys for the defendant as *Brady* material.¹²⁴ Any analysis stating MEJA does not apply, possibly based on incomplete information at the beginning of the investigation, could then be used by the defense to challenge jurisdiction.¹²⁵

2. How Likely Is It That DOJ Will Accept the Case?

Even if an incident meets all the jurisdictional requirements of MEJA, DOJ will not automatically accept every case referred from DoD. The implementing guidance for MEJA states only “serious misconduct” will be prosecuted under MEJA.¹²⁶ This does not mean DOJ is biased against taking cases,¹²⁷ only that they have the discretion in whether to do so, and there are things DoD attorneys and investigators can do to increase the likelihood that a case will be accepted for prosecution.

Among the most important things DoD attorneys can do is immediately notify the DOJ, through the HRSP that a crime under their jurisdiction has occurred.¹²⁸ While immediate reporting is imperative, it is better to report to the HRSP than to the U.S. Attorney’s office where a prosecution might occur.¹²⁹ While it may take some time to route the referral through the HRSP, this section is responsible for tracking all MEJA cases, has a better understanding of MEJA and its applicability, and has a vested interest in

¹¹⁵ DoDI 5525.11, *supra* note 67, para. 5.4.4.

¹¹⁶ See *infra* Appendix E (providing DOS contact information).

¹¹⁷ DoDI 5525.11, *supra* note 67, para. 6.1.9.

¹¹⁸ *Id.* The Department of State may also send a diplomatic note to the host nation government notifying them of the incident, even if the applicable MTA or SOFA preclude host-nation jurisdiction in the case. Professional Experience, *supra* note 75.

¹¹⁹ John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109–164, § 552, 119 Stat. 3136 (2006).

¹²⁰ Memorandum from Sec’y of Def., to Secretaries of the Mil. Dep’ts et al., subject: UCMJ Jurisdiction Over DoD Civilian Employees, DoD Contractor Personnel, and Other Persons Serving with or Accompanying the Armed Forces Overseas During Declared War and in Contingency Operations (10 Mar. 2008). See also Memorandum from Gen. Counsel of the Dep’t of Def., to Secretaries of the Mil. Dep’ts et al., subject: Policies and Procedures Applicable to DoD and United States Coast Guard (USCG) Civilian Personnel Subject to Uniform Code of Military Justice (UCMJ) Jurisdiction in Time of Declared War or a Contingency Operations (20 Jan. 2012).

¹²¹ AR 27-10, *supra* note 79, ch. 27. See also Appendix G (Article 2(a)(10) notification flow chart).

¹²² See Part VI.A (providing further discussion on the interplay between MEJA and Article 2(a)(10) jurisdiction and the future of UCMJ jurisdiction over civilians).

¹²³ Duey Interview, *supra* note 8; Pharris Interview, *supra* note 87.

¹²⁴ *Brady v. Maryland*, 373 U.S. 83 (1963) (evidence in the hands of the government that is material to either guilt or punishment must be provided to the defendant).

¹²⁵ Duey Interview, *supra* note 8; Pharris Interview, *supra* note 87.

¹²⁶ 32 C.F.R. pt. 153 (2012).

¹²⁷ *CEJA Hearing*, *supra* note 65 (“We have had great success in bringing cases under MEJA and are committed to continuing to enforce MEJA vigorously.”) (Statement of Lanny A. Breuer, Esq., Ass’t Att’y Gen., Criminal Div., U.S. Dep’t of Justice).

¹²⁸ Duey Interview, *supra* note 8.

¹²⁹ The proper venue for a criminal case in U.S. federal court when the crime does not happen in a U.S. territory is governed by 18 U.S.C. Section 3238:

The trial of all offenses begun or committed upon the high seas, or elsewhere out of the jurisdiction of any particular State or district, shall be in the district in which the offender, or any one of two or more joint offenders, is arrested or is first brought; but if such offender or offenders are not so arrested or brought into any district, an indictment or information may be filed in the district of the last known residence of the offender or of any one of two or more joint offenders, or if no such residence is known the indictment or information may be filed in the District of Columbia.

ensuring cases of serious criminal misconduct are tried under MEJA if the law applies.¹³⁰ It is also important to build a continuity file on the case to be kept in the local staff judge advocate's (SJA) office overseas and to be retained upon redeployment. Some cases may take months or years from initiation to indictment and the judge advocates and DoD investigators who worked on the case may have moved on in the interim.¹³¹

Finally, judge advocates who work with contract personnel overseas should be mindful of their interactions with these individuals, both before and after a criminal act by a civilian occurs. Judge advocates and DoD law enforcement should not be facilitating or commenting on any internal company investigations that may occur following an incident.¹³² As with correspondences about jurisdiction, correspondences of this sort might also qualify as *Brady* material and would likely be required to be disclosed to the contractor's defense counsel.¹³³

3. Can the Suspect be Arrested or Detained? If So, Where and for How Long?

When a person has committed an offense under MEJA, DoD law enforcement personnel are authorized to arrest a person outside the United States.¹³⁴ The decision to detain should be made on a case-by-case basis, and ordered by the combatant commander only when "a serious risk is believed to exist that the person shall flee and not appear, as required, for any pretrial investigation, pretrial hearing, or trial proceeding, or the person may engage in serious criminal misconduct"¹³⁵

4. What Is the Initial or Preliminary Hearing?

These hearings only occur when a person has been arrested or temporarily detained by U.S. military authorities overseas.¹³⁶ In this situation, an initial hearing must happen "without unnecessary delay."¹³⁷ This can occur by phone or

by video teleconference.¹³⁸ The purpose of the hearing is for a federal magistrate judge to make a determination as to whether or not there is probable cause to believe that the detained subject committed a crime in violation of MEJA, and can therefore be detained.¹³⁹

5. Does the Subject Have the Right to a Military Lawyer?

In the very limited situation described above, in which a subject has been detained and is awaiting an initial proceeding, he is entitled to "qualified military counsel" to represent him at such a hearing.¹⁴⁰ This representation is limited solely to the initial legal proceeding.¹⁴¹ Since these hearings happen very quickly after arrest, deployed Trial Defense Service (TDS) offices must be prepared to respond quickly to a request for "qualified military counsel" for a person who has been arrested or charged under MEJA¹⁴² and understand the limitations of such representation.

VI. An Evolving Area of the Law—The Future of Criminal Prosecutions for Civilians Overseas¹⁴³

A. Article 2(a)(10), UCMJ

*Then, like a bolt out of the blue in October
2006, the UCMJ was amended to resurrect
military-criminal jurisdiction of these
civilian augmentees.*¹⁴⁴

¹³⁰ Duey Interview, *supra* note 8; Pharris Interview, *supra* note 87.

¹³¹ Duey Interview, *supra* note 8; ; Pharris Interview, *supra* note 87.

¹³² Duey Interview, *supra* note 8; Pharris Interview, *supra* note 87.

¹³³ Duey Interview, *supra* note 8; Pharris Interview, *supra* note 87.

¹³⁴ DoDI 5525.11, *supra* note 67, paras. 6.2.4.4, 6.2.4.5 (law enforcement personnel include Defense Criminal Investigative Service, U.S. Army Criminal Investigation Command, Air Force Office of Special Investigations, Naval Criminal Investigative Service, security forces, military police, and shore patrol).

¹³⁵ *Id.* para 6.2.5.2.1.

¹³⁶ *Id.* para 6.4.

¹³⁷ *Id.* para. 6.4.3.

¹³⁸ *Id.* para. 6.4.4.

¹³⁹ *Id.* para. 6.4.5.

¹⁴⁰ *Id.* para. 6.3.2.3.

¹⁴¹ *Id.* at enclosure 4.

¹⁴² See AR 27-10, *supra* note 79, para. 26-2.b ("Any judge advocate assigned to [U.S. Army Trial Defense Service] USATDS and certified under UCMJ, Art. 27(b), may be considered qualified military counsel under DoDI 5525.11.").

¹⁴³ For a frequently updated repository of press releases, trial documents, congressional hearings, and other news-worthy items on the topics of the Civilian Extraterritorial Jurisdiction Act (CEJA), MEJA, and Article 2(a)(10), see CAAFlog, a web log that reports on these topics. CAAFlog Category: MEJA, <http://www.caaflog.com/category/meja/> (last visited Jan. 29, 2012) (which also contains CEJA commentary); CAAFlog Category: Art. 2(a)(10), <http://www.caaflog.com/category/art-2a10/> (last visited Jan. 29, 2012).

¹⁴⁴ Geoffrey S. Corn, *Bringing Discipline to the Civilianization of the Battlefield: A Proposal for a More Legitimate Approach To Resurrecting Military Criminal Jurisdiction over Civilian Augmentees*, 62 U. MIAMI L. REV. 491 (2008).

As discussed in Part V.C.1, the “new” Article 2(a)(10)¹⁴⁵ changed the legal landscape with regard to prosecution of civilians in areas of contingency operations. However, as the above quote implies, and in contrast to the expansive discussion on the congressional floor about MEJA,¹⁴⁶ there was no debate or congressional hearing regarding whether or not to expand the very limited¹⁴⁷ UCMJ jurisdiction over civilians.¹⁴⁸ The military was apparently not on notice of or prepared for this development because while the new law went into effect on October 17, 2006,¹⁴⁹ the DoD’s implementing instructions were not published until March 10, 2008.¹⁵⁰ On June 22, 2008, in Baghdad, Iraq, the first and only case under this expanded jurisdiction was tried.¹⁵¹ The constitutionality of Article 2(a)(10) as applied in this case remains an open question.¹⁵²

B. The Resurgent Importance of MEJA

Even if the expanded UCMJ jurisdiction survives judicial scrutiny, very few civilians in the near future may be caught in this jurisdictional net. Combat operations in Iraq have ended,¹⁵³ and a drawdown in Afghanistan is set to follow.¹⁵⁴ While Article 2(a)(10) jurisdiction over civilians

¹⁴⁵ 10 U.S.C. § 802(a)(10) (2011).

¹⁴⁶ *MEJA Hearing*, *supra* note 48.

¹⁴⁷ *See* discussion *supra* Part II.A.

¹⁴⁸ Had there been input solicited from DoD, it may not have been favorable based on previous testimony on the topic. At the MEJA hearing on March 30, 2000, Mr. Reed said, “For several reasons, the Department of Defense then [referring to the Defense Department’s Overseas Jurisdiction Advisory Committee] then and now supports only the extension of title 18 jurisdiction. The expansion of UCMJ jurisdiction presents unique constitutional questions.” *MEJA Hearing*, *supra* note 48, at 12.

¹⁴⁹ Pub. L. No. 109-364, 120 Stat. 2083 (2006).

¹⁵⁰ Memorandum from the Sec’y of Def., for Sec’y of the Military Dep’ts et al., subject: UCMJ Jurisdiction Over DoD Civilian Employees, DoD Contractor Personnel, and Other Persons Serving with or Accompanying the Armed Forces Overseas During Declared War and in Contingency Operations (10 Mar. 2008).

¹⁵¹ *United States v. Ali*, 70 M.J. 514 (A. Ct. Crim. App. 2011) (holding a court-martial held during Operation Iraqi Freedom had both personal and subject matter jurisdiction over the civilian accused who was serving with and accompanying combat units “in the field” at time of the offenses, and the exercise of court-martial jurisdiction over the accused did not violate the Fifth or Sixth Amendment).

¹⁵² The Court of Appeals for the Armed Forces upheld the application of the statute on constitutional grounds in July 2012. *United States v. Ali*, 71 M.J. 256 (C.A.A.F. 2012), *petition for cert. filed*, 2012 WL 6759750 (U.S. Dec. 27, 2012) (No. 12-805). Whether the U.S. Supreme Court will grant certiorari and hold the same is not yet known.

¹⁵³ *Foreign Policy*, WHITE HOUSE, <http://www.whitehouse.gov/issues/foreign-policy> (last visited Apr. 24, 2013) (“In December of 2011, the final U.S. troops left Iraq, ending America’s war there.”).

¹⁵⁴ President Barack Obama, State of the Union Address, in Wash., D.C. (Feb. 12, 2013), *available at* <http://www.whitehouse.gov/the-press->

was expanded to include “contingency operations,” the force these civilians are accompanying must still be “in the field.”¹⁵⁵ For a force to be “in the field,” it must be conducting operations in areas of “actual fighting.”¹⁵⁶ In the recent contingency operation in Iraq, factors supporting a finding of “in the field” for the purpose of UCMJ jurisdiction included: the country was specifically designated as a combat zone in which Soldiers were authorized hazardous duty pay; the offenses in question occurred on a combat outpost where there was “actual fighting” against enemy insurgent groups; and “the accused and the troops he supported were under a constant threat of attack by small arms fire, indirect fire, improvised explosive devices, and vehicle-borne explosive devices.”¹⁵⁷

While the U.S. military will still have a forward-projected force worldwide, these forces will most likely no longer be operating in conditions with a defined and declared enemy.¹⁵⁸ Therefore, Article 2(a)(10) will go back to being a dormant jurisdictional provision.

On the other hand, MEJA “applies during periods of armed conflict, contingency operations, and in times of peace.”¹⁵⁹ MEJA will again become the essential piece of legislation for filling the jurisdictional gap and holding civilians who accompany the force overseas accountable.¹⁶⁰

C. Still A Gap?

*As much as we have been able to accomplish under existing law, however, MEJA leaves significant gaps in our enforcement capability.*¹⁶¹

[office/2013/02/12/remarks-president-state-union-address](http://www.whitehouse.gov/the-press-office/2013/02/12/remarks-president-state-union-address) (“Tonight, I can announce that over the next year, another 34,000 American troops will come home from Afghanistan. This drawdown will continue and by the end of next year [2014], our war in Afghanistan will be over.”).

¹⁵⁵ 10 U.S.C. § 802(a)(10) (2011).

¹⁵⁶ *Ali*, 71 M.J. at 264 (citing *Reid v. Covert*, 354 U.S. 1, 34 n.61 (1957)), *petition for cert. filed*, 2012 WL 6759750 (U.S. Dec. 27, 2012) (No. 12-805).

¹⁵⁷ *United States v. Ali*, 70 M.J. 514, 518 (A. Ct. Crim. App. 2011), *aff’d*, 71 M.J. 256 (C.A.A.F. 2012).

¹⁵⁸ *See, e.g.*, Craig Whitlock, *Philippines May Allow Greater U.S. Military Presence in Reaction to China’s Rise*, WASH. POST, Jan. 25, 2012, http://www.washingtonpost.com/world/national-security/philippines-may-allow-greater-us-presence-in-latest-reaction-to-chinas-rise/2012/01/24/gIQAhFfyQQ_story.html.

¹⁵⁹ *MEJA Hearing*, *supra* note 48, at 12.

¹⁶⁰ 10 U.S.C. § 802(a)(10).

¹⁶¹ *CEJA Hearing*, *supra* note 65 (statement of Lanny A. Breuer, Esq., Ass’t Att’y Gen., Criminal Div., U.S. Dep’t of Justice).

Despite the 2004 amendment to MEJA and the 2006 amendment to the UCMJ, there is still a jurisdictional gap over civilians who are overseas working on behalf of the U.S. government. For example, if a DoD employee were to murder his colleague today in Iraq, he could be prosecuted under MEJA; a DOS employee who commits the same crime will likely not be covered by MEJA.¹⁶² The gap is becoming more pronounced for the same reasons Article 2(a)(10) jurisdiction no longer applies—there is no longer a DoD mission in Iraq.¹⁶³ Therefore, employees or contractors of “other Federal agencies” cannot possibly be “supporting the mission” of DoD there, and MEJA does not apply.¹⁶⁴

The proposed fix is for Congress to again use its authority to extend the reach of U.S. laws extraterritorially¹⁶⁵ and create a jurisdictional net for all U.S. civilians working for the government who commit felonies overseas by passing the Civilian Extraterritorial Jurisdiction Act (CEJA).¹⁶⁶ Along with allowing for more accountability under U.S. law for civilian contractors, no matter what their mission overseas,

[F]illing in the gaps in existing law is in the interests of the United States and our personnel and contractors abroad. The absence of U.S. jurisdiction to prosecute serious crimes creates legal uncertainty and can expose American civilians to prosecution by nations whose laws and judicial systems are less transparent and offer fewer legal protections than our own.¹⁶⁷

VII. Conclusion

[T]oday we find our very preservation as a nation inexorably intertwined with the maintenance of large overseas contingents, composed of both military and civilian personnel. These groups are so closely related, in all aspects of the venture, that discipline and success will be affected adversely if one segment of the

*force is free to operate outside the law and the other is restricted to obedience. And this has always been true of armed forces being trained for or held in readiness for combat.*¹⁶⁸

Jurisdiction over civilians serving with or accompanying U.S. troops abroad has been a contentious and evolving area of the law for more than fifty years. While the law and the operational landscape continue to change, one thing is likely to stay the same: civilian employees and contractors will continue to serve alongside U.S. servicemembers overseas. It is important for commanders to understand that civilian misconduct, especially if mishandled, can have a palpable impact on their mission, and for judge advocates to understand every tool at their disposal for dealing with such misconduct. While it is difficult to prepare for every contingency a military practitioner might face in a deployed environment, being prepared to deal with civilian misconduct is both possible and essential to the mission.

¹⁶² *Id.*

¹⁶³ See *supra* text accompanying note 153.

¹⁶⁴ 18 U.S.C. § 3267(1) (2011).

¹⁶⁵ *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991).

¹⁶⁶ S. 1145, 112th Cong (2011).

¹⁶⁷ Letter from Ronald Weich, Ass't Att'y Gen., to Hon. Patrick J. Leahy and Hon. Dianne Feinstein (Oct. 7, 2011), available at <http://www.justice.gov/ola/views-letters/112/100711-ltr-re-s1145-civilian-extraterritorial-jurisdiction-act.pdf>.

¹⁶⁸ *United States v. Burney*, 21 C.M.R. 98, 120 (C.M.A. 1956).

Appendix A

U.S. Criminal Jurisdiction Over Civilians Overseas

1950 – UCMJ Enacted – Civilians accompanying the force, in the field, may be prosecuted by military court-martial during a time of war

Holes in the jurisdictional net revealed

1955 – *United States ex rel Toth v. Quarles*: former servicemembers are not subject to UCMJ jurisdiction

1957 – *Reid v. Covert*: Military dependents overseas with the military are not subject to UCMJ jurisdiction

1970 – *United States v. Avarette*: Civilians serving overseas “in the field” with the military are not subject to UCMJ jurisdiction absent a congressional declaration of war

1999 – *United States v. Gatlin*: Federal criminal jurisdiction does not extend to land overseas where military dependents are living with servicemembers

2000 – **Congress passes MEJA** – former servicemembers, DoD employees/contractors, and DoD dependents are subject to federal criminal prosecution for crimes committed overseas

Fixing the net

2003-2004 – Abu Ghraib – CIA and Dep’t of Interior employees who committed crimes at the Iraqi prison are not subject to MEJA jurisdiction

New holes revealed

2004 – **MEJA Amended** – Civilians who are not employed by DoD, but are acting in direct support of the DoD mission are also subject to MEJA jurisdiction

New legislation

2006 – **UCMJ Amended** – Now also during “contingency operations,” civilians accompanying the force, in the field, are subject to UCMJ

2008 – *United States v. Ali* – Civilian (Iraqi-Canadian citizen) prosecuted at a trial by court-martial, in Baghdad, Iraq

2011 – Combat operations end in Iraq
-DoD mission ends in Iraq
-**CEJA proposed**

Testing UCMJ jurisdiction; The changing face of DoD operations; The need for more legislation

2012 – *United States v. Ali* – The legality of UCMJ jurisdiction over civilians is again being reviewed in the appellate courts

Appendix B

The Military Extraterritorial Jurisdiction Act of 2000

(current as of April 29, 2013)¹⁶⁹

§ 3261. Criminal offenses committed by certain members of the Armed Forces and by persons employed by or accompanying the Armed Forces outside the United States

(a) Whoever engages in conduct outside the United States that would constitute an offense punishable by imprisonment for more than 1 year if the conduct had been engaged in within the special maritime and territorial jurisdiction of the United States—

(1) while employed by or accompanying the Armed Forces outside the United States; or

(2) while a member of the Armed Forces subject to chapter 47 of title 10 (the Uniform Code of Military Justice), shall be punished as provided for that offense.

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

(c) Nothing in this chapter may be construed to deprive a court-martial, military commission, provost court, or other military tribunal of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by a court-martial, military commission, provost court, or other military tribunal.

(d) No prosecution may be commenced against a member of the Armed Forces subject to chapter 47 of title 10 (the Uniform Code of Military Justice) under this section unless—

(1) such member ceases to be subject to such chapter; or

(2) an indictment or information charges that the member committed the offense with one or more other defendants, at least one of whom is not subject to such chapter.

§ 3262. Arrest and commitment

(a) The Secretary of Defense may designate and authorize any person serving in a law enforcement position in the Department of Defense to arrest, in accordance with applicable international agreements, outside the United States any person described in section 3261(a) if there is probable cause to believe that such person violated section 3261(a).

(b) Except as provided in sections 3263 and 3264, a person arrested under subsection (a) shall be delivered as soon as practicable to the custody of civilian law enforcement authorities of the United States for removal to the United States for judicial proceedings in relation to conduct referred to in such subsection unless such person has had charges brought against him or her under chapter 47 of title 10 for such conduct.

¹⁶⁹ 18 U.S.C.A. §§ 3261–3267 (West 2013).

§ 3263. Delivery to authorities of foreign countries

(a) Any person designated and authorized under section 3262(a) may deliver a person described in section 3261(a) to the appropriate authorities of a foreign country in which such person is alleged to have violated section 3261(a) if—

(1) appropriate authorities of that country request the delivery of the person to such country for trial for such conduct as an offense under the laws of that country; and

(2) the delivery of such person to that country is authorized by a treaty or other international agreement to which the United States is a party.

(b) The Secretary of Defense, in consultation with the Secretary of State, shall determine which officials of a foreign country constitute appropriate authorities for purposes of this section.

§ 3264. Limitation on removal

(a) Except as provided in subsection (b), and except for a person delivered to authorities of a foreign country under section 3263, a person arrested for or charged with a violation of section 3261(a) shall not be removed—

(1) to the United States; or

(2) to any foreign country other than a country in which such person is believed to have violated section 3261(a).

(b) The limitation in subsection (a) does not apply if—

(1) a Federal magistrate judge orders the person to be removed to the United States to be present at a detention hearing held pursuant to section 3142(f);

(2) a Federal magistrate judge orders the detention of the person before trial pursuant to section 3142(e), in which case the person shall be promptly removed to the United States for purposes of such detention;

(3) the person is entitled to, and does not waive, a preliminary examination under the Federal Rules of Criminal Procedure, in which case the person shall be removed to the United States in time for such examination;

(4) a Federal magistrate judge otherwise orders the person to be removed to the United States; or

(5) the Secretary of Defense determines that military necessity requires that the limitations in subsection (a) be waived, in which case the person shall be removed to the nearest United States military installation outside the United States adequate to detain the person and to facilitate the initial appearance described in section 3265(a).

§ 3265. Initial proceedings

(a)(1) In the case of any person arrested for or charged with a violation of section 3261(a) who is not delivered to authorities of a foreign country under section 3263, the initial appearance of that person under the Federal Rules of Criminal Procedure—

(A) shall be conducted by a Federal magistrate judge; and

(B) may be carried out by telephony or such other means that enables voice communication among the participants, including any counsel representing the person.

(2) In conducting the initial appearance, the Federal magistrate judge shall also determine whether there is probable cause to believe that an offense under section 3261(a) was committed and that the person committed it.

(3) If the Federal magistrate judge determines that probable cause exists that the person committed an offense under section 3261(a), and if no motion is made seeking the person's detention before trial, the Federal magistrate judge shall also determine at the initial appearance the conditions of the person's release before trial under chapter 207 of this title.

(b) In the case of any person described in subsection (a), any detention hearing of that person under section 3142(f)—

(1) shall be conducted by a Federal magistrate judge; and

(2) at the request of the person, may be carried out by telephony or such other means that enables voice communication among the participants, including any counsel representing the person.

(c)(1) If any initial proceeding under this section with respect to any such person is conducted while the person is outside the United States, and the person is entitled to have counsel appointed for purposes of such proceeding, the Federal magistrate judge may appoint as such counsel for purposes of such hearing a qualified military counsel.

(2) For purposes of this subsection, the term "qualified military counsel" means a judge advocate made available by the Secretary of Defense for purposes of such proceedings, who—

(A) is a graduate of an accredited law school or is a member of the bar of a Federal court or of the highest court of a State; and

(B) is certified as competent to perform such duties by the Judge Advocate General of the armed force of which he is a member.

§ 3266. Regulations

(a) The Secretary of Defense, after consultation with the Secretary of State and the Attorney General, shall prescribe regulations governing the apprehension, detention, delivery, and removal of persons under this chapter and the facilitation of proceedings under section 3265. Such regulations shall be uniform throughout the Department of Defense.

(b)(1) The Secretary of Defense, after consultation with the Secretary of State and the Attorney General, shall prescribe regulations requiring that, to the maximum extent practicable, notice shall be provided to any person employed by or accompanying the Armed Forces outside the United States who is not a national of the United States that such person is potentially subject to the criminal jurisdiction of the United States under this chapter.

(2) A failure to provide notice in accordance with the regulations prescribed under paragraph (1) shall not defeat the jurisdiction of a court of the United States or provide a defense in any judicial proceeding arising under this chapter.

(c) The regulations prescribed under this section, and any amendments to those regulations, shall not take effect before the date that is 90 days after the date on which the Secretary of Defense submits a report containing those regulations or amendments (as the case may be) to the Committee on the Judiciary of the House of Representatives and the Committee on the Judiciary of the Senate.

§ 3267. Definitions

As used in this chapter:

- (1) The term “employed by the Armed Forces outside the United States” means—
 - (A) employed as—
 - (i) a civilian employee of—
 - (I) the Department of Defense (including a nonappropriated fund instrumentality of the Department); or
 - (II) any other Federal agency, or any provisional authority, to the extent such employment relates to supporting the mission of the Department of Defense overseas;
 - (ii) a contractor (including a subcontractor at any tier) of—
 - (I) the Department of Defense (including a nonappropriated fund instrumentality of the Department); or
 - (II) any other Federal agency, or any provisional authority, to the extent such employment relates to supporting the mission of the Department of Defense overseas; or
 - (iii) an employee of a contractor (or subcontractor at any tier) of—
 - (I) the Department of Defense (including a nonappropriated fund instrumentality of the Department); or
 - (II) any other Federal agency, or any provisional authority, to the extent such employment relates to supporting the mission of the Department of Defense overseas;
 - (B) present or residing outside the United States in connection with such employment; and
 - (C) not a national of or ordinarily resident in the host nation.

- (2) The term “accompanying the Armed Forces outside the United States” means—
 - (A) A dependent of—
 - (i) a member of the Armed Forces;
 - (ii) a civilian employee of the Department of Defense (including a nonappropriated fund instrumentality of the Department); or
 - (iii) a Department of Defense contractor (including a subcontractor at any tier) or an employee of a Department of Defense contractor (including a subcontractor at any tier);
 - (B) residing with such member, civilian employee, contractor, or contractor employee outside the United States; and
 - (C) not a national of or ordinarily resident in the host nation.

- (3) The term “Armed Forces” has the meaning given the term “armed forces” in section 101(a)(4) of title 10.

- (4) The terms “Judge Advocate General” and “judge advocate” have the meanings given such terms in section 801 of title 10.

Appendix C

DoDI 5525.11 (March 3, 2005) – Selected Sections Referencing DoD Responsibilities

5.3 (page 4): The Heads of the Military Law Enforcement Organizations and the Defense Criminal Investigative Organizations, or their Designees, shall:

5.3.1. Advise the applicable Commander of the Combatant Command and Staff Judge Advocate (or Legal Advisor), or designees, of an investigation of an alleged violation of the Act that may lead to arrest or criminal prosecution under the Act. Such notice shall be provided as soon as practicable. In turn, the [General Counsel (GC)], DoD, or designee, shall be advised to ensure notification of and consultation with the DOJ and the DoS regarding information about the potential case, including the host nation's position regarding the case. At the discretion of the GC, DoD, other agencies and organizations (such as the Legal Counsel to the Chairman of the Joint Chiefs of Staff and Secretary of the Military Department that sponsored the person into the foreign country) shall be informed, as appropriate. Effective investigations lead to successful prosecutions and, therefore, these cases warrant close coordination and cooperation between the Department of Defense, the DOJ, and the DoS.

5.5 (page 5-6): The Commanders of the Combatant Commands, through the Chairman of the Joint Chiefs of Staff, shall:

5.5.1. Assist the [Domestic Security Section of the Criminal Division, Department of Justice (DSS/DOJ)] on specific cases occurring within the Commander of the Combatant Command's area of responsibility that may lead to arrest or criminal prosecution under the Act. These responsibilities include providing available information and other support essential to an appropriate and successful prosecution under the Act with the assistance of the Commanders' respective Staff Judge Advocates (or Legal Advisors), or their designees, to the maximum extent allowed and practicable.

5.5.2. Ensure command representatives are made available, as necessary, to participate in briefings of appropriate host nation authorities concerning the operation of this Act and the implementing provisions of this Instruction.

5.5.3. Determine when military necessity in the overseas theater requires a waiver of the limitations on removal in Section 3264(a) of the Act and when the person arrested or charged with a violation of the Act shall be moved to the nearest U.S. military installation outside the United States that is able to adequately detain the person and facilitate the initial proceedings prescribed in Section 3265(a) of the Act and this Instruction. Among the factors to be considered are the nature and scope of military operations in the area, the nature of any hostilities or presence of hostile forces; and the limitations of logistical support, available resources, appropriate personnel, or the communications infrastructure necessary to comply with the requirements of Section 3265 of the Act governing initial proceedings.

Appendix D

MEJA Toolkit

1. Department of Defense Policy and Consolidated Resources. As of April 26, 2013, the following resources can be found at the DoD's Joint Service Committee on Military Justice online repository at http://www.dod.mil/dodgc/jsc_business.html. The hyperlinks below are the direct links to each individual document.

a. Military Extraterritorial Jurisdiction Act (MEJA) of 2000, Pub. L. No. 106-523, 114 Stat. 2488 (2000) (codified as amended at 8 U.S.C. §§ 3261–3267 (2012)), *available at* http://www.dod.mil/dodgc/images/meja_3261.pdf

b. 18 U.S.C.S. §7 (LexisNexis 2010), *amended by* Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001. Pub. L. No. 107-56, § 804, 115 Stat. 272 (adding § 7(9) to the definition of Special Maritime and Territorial Jurisdiction of the United States), *available at* http://www.dod.mil/dodgc/images/meja_patriot_act.pdf

c. Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. 108-375, § 1088, 118 Stat. 1811, 2066 (2004), *available at* http://www.dod.mil/dodgc/images/2004_section1088.pdf (expanding MEJA jurisdiction to include non-DoD federal employees and contractors supporting DoD missions abroad).

d. 150 Cong. Rec. S6863–01 (daily ed. June 16, 2004) (statements of Sen. Jeff Sessions, Sen. Charles E. Schumer, and Sen. Carl Levin), *available at* http://www.dod.mil/dodgc/images/leg_history.pdf (explaining the congressional intent behind the 2004 amendment to expand the MEJA jurisdiction).

e. U.S. DEP'T OF DEF., INSTR. 5525.11, CRIMINAL JURISDICTION OVER CIVILIANS EMPLOYED BY OR ACCOMPANYING THE ARMED FORCES OUTSIDE THE UNITED STATES, CERTAIN SERVICE MEMBERS, AND FORMER SERVICE MEMBERS (3 Mar. 05), *available at* <http://www.dod.mil/dodgc/images/dodi552511.pdf>.¹⁷⁰

f. Criminal Jurisdiction Over Civilians Employed by or Accompanying the Armed Forces Outside the United States, Service Members, and Former Service Members, 71 Fed. Reg. 8946 (Mar. 3, 2005) (codified at 32 C.F.R. pt. 153 (2012)), *available at* <http://www.dod.mil/dodgc/images/part153title32.pdf>.

g. Memorandum from the Deputy Sec'y of Def., to Sec'ys of Military Dep'ts et al., subject: Management of DoD Contractors and Contractor Personnel Accompanying U.S. Armed Forces in Contingency Operations Outside the United States (25 Sept. 2007), *available at* http://www.dod.mil/dodgc/images/management_of_contractors.pdf.

h. Memorandum from the Sec'y of Def., to Sec'ys of Military Dep'ts et al., subject: UCMJ Jurisdiction Over DoD Civilian Employees, DoD Contractor Personnel, and Other Persons Serving With or Accompanying the Armed Forces Overseas During Declared War and in Contingency Operations (10 Mar. 2008) (C1, 23 Sept. 2010), *available at* http://www.dod.mil/dodgc/images/ucmj_art2.pdf.

i. Memorandum from the Sec'y of Def., to Sec'ys of Military Dep'ts et al., subject: Responsibility for Response to Reports of Alleged Criminal Activity Involving Contractors and Civilians Serving with or Accompanying the Armed Forces Overseas (10 Sept. 2008), *available at* http://www.dod.mil/dodgc/images/meja911_criminal.pdf.

¹⁷⁰ This regulation is in the process of being revised and updated, and will be posted to the main resource site when published. E-mail from Mr. Robert Reed, Office of Gen. Counsel., U.S. Dep't of Def., to author (Jan. 27, 2012, 15:30 EST) (on file with author).

j. Memorandum from Shay D. Assad, Dir., Def. Procurement & Acquisition Policy, to Commander, U.S. Special Operations Command, et al., subject: Class Deviation, Additional Contractor Requirements and Responsibilities Relating to Alleged Crimes By or Against Contractor Personnel in Iraq and Afghanistan (14 Dec. 2009), *available at* http://www.dod.mil/dodgc/images/contractor_meja_ucmj.pdf.

k. Memorandum from Gen. Counsel, U.S. Dep't of Def., Sec'ys of Military Dep'ts et al., subject: Policy and Procedures Applicable to DoD and United States Coast Guard (USCG) Civilian Personnel Subject to Uniform Code of Military Justice (UCMJ) Jurisdiction in Time of Declared War or a Contingency Operation (20 Jan. 2012), *available at* http://www.dod.mil/dodgc/images/ucmj_art2_jurisdiction.pdf.

l. Data spreadsheet from U.S. Dep't of Def. on MEJA (18 U.S.C. §§ 3261–3267), Federal Prosecutions, and Alternative Article 2, UCMJ Dispositions (30 June 2010), *available at* http://www.dod.mil/dodgc/images/meja_statistics.pdf.

2. Department of Justice Resources:

a. U.S. ATTORNEYS' MANUAL para. 9-20.116 (2010), *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/20mcrim.htm#9-20.116 (guiding U.S. DOJ attorneys on DOJ policies and procedures for prosecution under MEJA).

b. *Military Extra Territorial [sic] Jurisdiction Act*, U.S. DEP'T OF JUST., <http://www.justice.gov/criminal/hrsp/statutes/meja.html> (last visited Apr. 30, 2013) (providing HRSP resources for MEJA as well as HRSP's contact information).

3. Additional Resources, by Service Departments:

a. U.S. Department of Army:

(1) U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE (3 Oct. 2011), *available at* http://www.apd.army.mil/jw2/xmldemo/r27_10/head.asp.

(a) Chapter 26 (Prosecution of Criminal Offenses under the Military Extraterritorial Jurisdiction Act of 2000)

(b) Chapter 27 (Procedures Related to Civilians Subject to Uniform Code of Military Justice Jurisdiction under Article 2(a)(10))

(2) All Army Activities (ALARACT) Message, 096/05, 131953Z MAY 05, subject: Foreign Nationals Employed by or Accompanying Army Forces OCONUS May Be Subject To U.S. Criminal Jurisdiction, *available at* <https://www.us.army.mil> (requires AKO login; search for "ALARACT"; then follow "Army ALARACT's Home" hyperlink; then follow "2005 ALARACTS" folder; then follow "ALARACT_096_2005" hyperlink) (on file with author).

(3) Information Paper, Criminal Law Div., Office of The Judge Advocate Gen., U.S. Army, subject: Military Extraterritorial Judicial [sic] Act (MEJA) (24 May 2005), *available at* [https://www.jagcnet.army.mil/Portals/USArmyTJ.nsf/\(JAGCNetDocID\)/65482092EFCDB157852579B500587996/\\$FILE/MEJA%20INFORMATION%20PAPER.doc](https://www.jagcnet.army.mil/Portals/USArmyTJ.nsf/(JAGCNetDocID)/65482092EFCDB157852579B500587996/$FILE/MEJA%20INFORMATION%20PAPER.doc).

b. U.S. Department of Navy:

(1) All Navy Message 059/05, 081949Z AUG 05, subject: Interim Policy and Training Requirements For Criminal Jurisdiction Over Certain Current and Former Members of the U.S. Army Forces, and Over Civilians Employed By or Accompanying the U.S. Armed Forces Outside the United States, *available at* <http://www.public.navy.mil/bupers-npc/reference/messages/Documents/ALNAVS/ALN2005/ALN05059.txt>.

(2) Information Paper, U.S. Marine Corps, subject: Military Extraterritorial Judicial [sic] Act (MEJA) (22 Aug. 2005), *available at* <http://www.hqmc.marines.mil/Portals/135/MEJAinfopaper-web-22Aug05.doc>.

c. U.S. Department of Air Force:

(1) U.S. DEP'T OF AIR FORCE INSTR. 51-1001, DELIVERY OF PERSONNEL TO UNITED STATES CIVILIAN AUTHORITIES FOR TRIAL sec. B (20 Oct. 2006) (C2, 17 Dec. 2012), *available at* http://static.e-publishing.af.mil/production/1/af_a3_5/publication/afi51-1001/afi51-1001.pdf.

(2) U.S. DEP'T OF AIR FORCE INSTR. 51-201, ADMINISTRATION OF MILITARY JUSTICE secs. 2.7.3, 2.12.2, 13.24, 13.27.3 (21 Dec. 2007) (C2, 3 Feb. 2010), *available at* http://static.e-publishing.af.mil/production/1/af_a3_5/publication/afi51-201/afi51-201.pdf.

Appendix E

MEJA Referral Procedures, Checklist, and Templates¹⁷¹

Referral Procedures for Military Extraterritorial Jurisdiction Act and Other Crimes

Upon receiving a report of potential criminal misconduct by a contractor or U.S. government (USG) civilian employee, the appropriate military and/or civilian law enforcement agency should IMMEDIATELY be notified and requested to investigate.

Military commander's authority to investigate is not limited to military personnel. For example, military investigators may investigate any crime allegedly committed by persons subject to MEJA (DoDI 5525.11; DoDI 5525.07¹⁷²; Rules for Court Martial 303¹⁷³).

Federal civilian law enforcement officials also have independent authority to investigate crimes and apprehend persons to the extent their authority is permitted by applicable statutes or other legal authority.

The law enforcement agency should examine whether federal jurisdiction exist under MEJA (18 U.S.C. § 3261(a)) or under statutes applicable to the Special Maritime & Territorial Jurisdiction (SMTJ) (18 U.S.C. § 7(9)) or under other extraterritorial statutes.

The Department of Justice can provide assistance in determining whether federal jurisdiction may exist. **IF THERE IS A QUESTION REGARDING WHETHER FEDERAL JURISDICTION EXISTS, PARTICULARLY IN VIOLENT CRIME MATTERS OR MEJA MATTERS, CONTACT THE HUMAN RIGHTS AND SPECIAL PROSECUTIONS SECTION (HRSP).** HRSP POCs include the following:

Micah Pharris, Trial Attorney: 202-353-3639; micah.pharris@usdoj.gov
Jay Bauer, Trial Attorney: 202-353-0228; jay.bauer@usdoj.gov

The HRSP general number is 202-616-2492 and the DOJ Command Center, which has 24 hour capability to locate persons, is 202-514-5000.

MEJA

Jurisdiction under MEJA exists when the person is:

- 1) a civilian directly employed by DoD; or
- 2) a civilian contractor (or subcontractor) of DoD; or

¹⁷¹ Current as of Mar. 2, 2012. E-mail from Micah Pharris, Trial Attorney, Human Rights & Special Prosecutions Section, Criminal Law Div., U.S. Dep't of Justice, to author (Mar. 2, 2012, 10:17 EST) (on file with author).

¹⁷² U.S. DEP'T OF DEF., INSTR. 5525.07, IMPLEMENTATION OF THE MEMORANDUM OF UNDERSTANDING (MOU) BETWEEN THE DEPARTMENTS OF JUSTICE (DOJ) AND DEFENSE RELATING TO THE INVESTIGATION AND PROSECUTION OF CERTAIN CRIMES (18 June 2007) [hereinafter DoDI 5525.07].

¹⁷³ MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 303 (2012).

- 3) a civilian contractor of another U.S. agency (DOS, CIA, etc.) or a civilian employed by another U.S. agency whose employment relates to supporting the mission of DoD; or
- 4) a family member or dependent who is accompanying a member of the armed forces, a civilian employee of DoD, or a DoD contractor; or
- 5) a member of the Armed Forces. (18 U.S.C. § 3267(1) and (2))

MEJA applies no matter what the nationality of the person is, unless the person is a citizen or “ordinarily resident” of the country where the offense occurred.

MEJA has very specific arrest, detention, and removal requirements that must be followed. Various international agreements, including applicable Status of Forces Agreement (SOFAs) and USG law and policies, may apply and limit when and how MEJA may be used. Investigators should attempt to determine whether the host nation government has prosecuted or is prosecuting the case, as this may impact MEJA application.

SMTJ and Other Statutes

The SMTJ of the United States can include U.S. military bases, embassy property, residences of USG personnel, property controlled by the USG, and surrounding property (18 U.S.C. § 7(3) and § 7(9)). A number of federal statutes, including those dealing with homicide, rape, assault, child pornography, and drug offenses, apply to conduct that occurred in the special maritime and territorial jurisdiction of the United States.

There are also a number of federal statutes that have extraterritorial application independent of MEJA and SMTJ. As just one example, 18 U.S.C. § 1119 prohibits the extraterritorial murder of a U.S. national by another U.S. national no matter where it occurs outside the United States. A case of this nature can be prosecuted by the Department of Justice even if there is no MEJA or SMTJ jurisdiction.

Referrals

MEJA referrals must be made formally. Before making a formal MEJA referral to DoD headquarters, the appropriate military legal or law enforcement agency should confer with the Human Rights and Special Prosecutions Section (HRSP), which can provide a MEJA referral checklist, information on preparing draft affidavits to support the referral, etc.

Formal MEJA referrals are made from DoD headquarters to HRSP. A draft affidavit and MEJA referral memorandum should be sent to Mr. Robert Reed, the Associate Deputy General Counsel for Military Justice and Personnel Affairs for the Department of Defense, at (703) 695-1055/reedr@dodgc.osd.mil.

Referrals of non-MEJA cases may be made directly to HRSP. (If the matter is not a HRSP matter, HRSP may provide assistance in locating the appropriate prosecuting office.) In addition to basic information about the crime, referrals should include information about the last known residence of the subject, since that may determine where in the United States the case will be prosecuted.

Template for Affidavit to be Completed by DoD Law Enforcement

AFFIDAVIT in the matter of (SUBJECT NAME HERE)

I. Purpose of this Affidavit

1. This affidavit is provided to support a referral of law enforcement information to the United States Department of Justice (DOJ) and the United States Department of Defense (DoD) for prosecutorial action under the Military Extraterritorial Jurisdiction Act (18 U.S.C. § 3261, et al.) and/or the Uniform Code of Military Justice (10 U.S.C. § 801, et al.). The subject of this referral is (SUBJECT NAME HERE).

II. Affiant

2. I, _____(AGENT NAME HERE)_____, the affiant, am a Special Agent with the United States Army Criminal Investigation Division (CID) and during my tenure as a Special Agent, I have conducted and participated in numerous investigations of criminal activity, including, but not limited to, the investigation of illegal controlled substances, larceny, fraud, and sexual assaults. During the investigation of these cases, your affiant has executed, or participated in the execution of, numerous search warrants, and seized evidence of these violations. In addition, I have received formal training from both the U.S. Army and other law enforcement agencies in the area of sexual assault investigations. I graduated as the honor graduate of the Apprentice Special Agent Course, a U.S. Army criminal investigation course, on 3 June 2008. I have attended the U.S. Army Military Police School, One Station Unit Training, in Fort Leonard Wood, MO, in March of 2000. I am currently assigned to _____ CID Office in _____, Iraq. I am the lead investigator in this investigation.

3. The facts and information contained in this affidavit are based upon my personal observations and knowledge of this investigation to include the taking and reviewing of witness statements and the observations of other officers and agents involved in this investigation as related to me in their official capacity.

4. This affidavit contains information necessary to support a referral of this case to [DOJ and/or DoD]. It is not intended to include each and every fact and matter observed by me or known to CID.

III. Background

5. Mr. _____(SUBJECT NAME HERE) is an American Citizen, born in [city, state], United States, on or about _____. His residence is located at _____, _____, [state, zip code].

6. Mr. _____(SUBJECT NAME HERE) is a contract employee of _____(Contractor Name) as a _____ assigned to the _____ via contract number _____, issued by CDR, HQ-U.S. Army Material Command Logistic Support Element. He was working under a Letter of Authorization (LOA) issued on ___ (date), by _____(Contractor Name).

7. Mr. _____(SUBJECT NAME HERE) entered the Iraq Theater of Operations on or around __, (date) by traveling, upon information and belief, from the United States to Kuwait and into Iraq. Mr. _____ was assigned to the _____ in the _____ Area of Operations (AO) and began working at the _____ located on the _____.

IV. Nature of the Offense

8. On _____(Date), Mr. John Q. Public, a friend of Mr. _____(SUBJECT NAME HERE), reported to CID Agents that Mr. _____(SUBJECT) confided in him that he was with a female (victim) on _____ and said they “took advantage of her.” Mr. _____(SUBJECT) stated the victim said she did not think this was a good idea and Mr. _____(SUBJECT), stated, “_____” and then (facts of sexual assault here). Additionally, Mr. _____(SUBJECT) stated he attempted to rape another female in New York City, but the “logistics did not work out.” Mr. Public did not know the name of the female Soldier that Mr. _____(SUBJECT) was referring to, but said he remembered she worked at the _____ and was an Army officer with the rank of _____.

9. On _____, CID Agents interviewed the victim, who stated she was with Mr. _____(SUBJECT) only one time around the middle to end of _____ at their containerized housing unit (CHU) on _____. Another male, Mr. John Q. Friend, was present for most of the night and they all talked and listened to music.

10. On _____, CID Agents interviewed the victim, under a testimonial immunity memorandum, who rendered a sworn statement, wherein she detailed she was intoxicated and sexually assaulted by Mr. _____(SUBJECT). She stated she remembered Mr. _____(SUBJECT) saying _____. She remembers Mr. _____(SUBJECT) putting his penis in her without her consent. The victim stated she blacked out shortly afterwards, unable to remember further details of the incident. The victim provided buccal swabs for identification of a DNA profile for later comparison.

11. On _____, CID Agents executed a search authorization for the room of Mr. _____(SUBJECT) and collected, as evidence, bedding from the room of Mr. _____(SUBJECT) and buccal swabs from Mr. _____(SUBJECT) for identification of a DNA profile for later comparison.

12. On _____, CID Agents interviewed Mr. _____(SUBJECT), who initially agreed to speak with CID, but subsequently requested legal counsel after being asked if he knew the victim.

13. The bedding collected as evidence is currently pending examination by the United States Army Criminal Investigation Laboratory (USACIL). Anticipated completion date is _____, 2009.

14. The computer systems seized as evidence is currently pending examination by the _____, Camp _____, Iraq. Anticipated completion date is _____, 2009.

Agent Name
Special Agent, Seq # 0000
U.S. Army CID
Camp _____ CID, _____, Iraq

Subscribed and Sworn Before Me, A Person Authorized By Law to Administer Oaths,

This ____ Day of _____, 2009, at: _____

Signature of Person Administering Date Name of Person Administering

Authority to Administer Oath: 10 U.S.C. § 936

Template for Memorandum to be Completed by Judge Advocate

MEMORANDUM

TO: COL _____, _____, Staff Judge Advocate, UNIT
LTC _____, _____ Staff Judge Advocate, UNIT
Ms. _____, Department of State, Baghdad
Mr. Robert Reed, Department of Defense, Office of General Counsel
Mr. Micah Pharris, Department of Justice
Mr. Jay Bauer, Department of Justice

CC: CPT _____, _____, Chief of Justice, UNIT
Mr. _____, Justice Attaché, AG's Office
SA _____, Camp _____ CID Office

FROM: CPT _____, _____, Senior Trial Counsel
(UNIT NAME HERE) OSJA POC

DATE: _____ 2009

RE: Mr. SUBJECT NAME HERE, Case No. 1234-56
CIVILIAN MISCONDUCT Iraq Theater of Operations

RECOMMENDATION: MEJA REFERRAL

ALCON:

(1) SHORT STATEMENT OF FACTS

Provide statement of facts consistent with affidavit.

(2) REQUESTS FOR ACTION/NOTIFICATION

UNIT NAME HERE Military Justice is requesting U.S. Department of Justice action under MEJA.

(a) UNIT NAME HERE: OSJA is making notification to UNIT NAME HERE and requesting a MEJA referral.

(b) CENTCOM: UNIT NAME HERE, OSJA is making notification to CENTCOM and requesting a MEJA referral.

(c) DoD: UNIT NAME HERE, OSJA is making notification to DoD and requesting a MEJA referral.

(d) DOJ: UNIT NAME HERE, OSJA is requesting acceptance or declination of this case as a MEJA referral.

(3) IDENTIFICATION OF SUBJECTS

Mr. SUBJECT NAME HERE. D.O.B., Address, Citizen of United States, employed by (Contractor), Inc. as an _____, as part of contract _____, no task order. He was a _____ case manager embedded with a military unit, _____, _____. His employer point of contact was Ms. _____, phone: DSN 123-456-7890. Mr. SUBJECT resigned his position following his implication in this matter.

IDENTIFICATION OF VICTIM: Identity Withheld

(4) LOCATION OF SUBJECTS, BASIS FOR HOLDING

Mr. SUBJECT currently resides at _____, Camp _____, Iraq. Subject resigned his position at Contractor, Inc. and is currently unemployed. He has been restricted by the _____ Base Garrison Commander to the _____ Base Complex due to this investigation.

(5) VIOLATION OF US CODE

18 U.S.C. § 2242: Sexual Abuse. Zero to life.

(6) VENUE/NEXUS INFORMATION

Mr. SUBJECT is a citizen of the United States. Mr. SUBJECT was employed by (Contractor), Inc., a company that performs various services for the United States as contractors, as an _____ under government contract number _____. Mr. SUBJECT was a case manager for a team that did _____. Mr. SUBJECT's address in the United States is _____, _____, NY 12345. He is subject to MEJA jurisdiction pursuant to 18 U.S.C. § 3261(a)(1). Pursuant to 18 U.S.C. § 3238 venue for the subject under MEJA may be the federal district court of the district of Mr. SUBJECT's residence in _____, NY.

(7) SHORT LEGAL ANALYSIS

Mr. SUBJECT was employed as a civilian contractor accompanying the force and embedded with a military unit. Mr. SUBJECT's statement to his friend that he intended to rape and did rape the victim in this case is the strongest evidence of the crime. Mr. SUBJECT's friend is willing to testify despite his close relationship to Mr. SUBJECT. The victim's testimony of her level of intoxication is the next best evidence. The defense will attempt to establish that her motive for the rape allegation is to deflect attention from her General Order No. 1 violation. In person, the victim has a good presence and comes across well. After CID interviewed Mr. SUBJECT, he told a co-worker, Mr. Bystander, that he had a threesome with the victim that got taken out of context before a supervisor instructed them not to ask about the issue. The victim is sure of sexual penetration despite her level of intoxication. This is a difficult case, as are most cases involving possibly incapacitated victims. MEJA jurisdiction applies to Mr. SUBJECT.

(8) LAW ENFORCEMENT MATERIALS:

- (a) Agent's supporting affidavit for SUBJECT
- (b) CID report to date
- (c) Offer letter for SUBJECT
- (d) LOA for SUBJECT
- (e) Statements of victim, Mr. Public, Mr. Friend, and Mr. Bystander

Military Extraterritorial Jurisdiction Act Jurisdiction Determination Checklist¹⁷⁴

Military Extraterritorial Jurisdiction Act Jurisdiction Determination Checklist

Please provide the following information to assist the Department of Justice in making a determination regarding MEJA jurisdiction
All MEJA referrals from DoD to DoJ must comply with DoDI 5525.11

DoJ: Domestic Security Section - Phone: (202) 616-5731, E-Mail: MEJA@usdoj.gov

DoD: General Counsel's Office (Mr. Robert Reed) - Phone: (703) 695-1055, E-Mail: reedr@dodgc.osd.mil

DoS: Diplomatic Security Service (Special Agent Scott Banker) - Phone: (571) 345-2270, E-Mail: bankers@state.gov

Part I - Investigator's Information

Due to frequent duty station transfers of overseas investigators, please provide complete information. Military investigators may be required to draft and swear to affidavits in front of U.S. based magistrate judges and testify at grand jury proceedings. Due to the overseas location of primary agents in MEJA cases, a U.S. based law enforcement agent should be assigned to assist federal prosecutors in the district with appropriate venue.

| | | | |
|-------------------|-------|-----------------|-------|
| Case Agent: | _____ | Agency: | _____ |
| Phone Number: | _____ | E-Mail Address: | _____ |
| Alternate P.O.C.: | _____ | Agency: | _____ |
| Phone Number: | _____ | E-Mail Address: | _____ |
| JAG P.O.C.: | _____ | Command: | _____ |
| Phone Number: | _____ | E-Mail Address: | _____ |

Part II - Subject's Information

Venue is established pursuant to 18 USC § 3238. Generally, appropriate venue is the in the U.S. district of the subject's last known residence. However, in some instances, venue is perfected in the venue where the subject is "first brought" under law enforcement custody. Prior coordination with DoJ is required to determine venue in each MEJA referral.

Name: _____ Status: (at time of offense)

Date of Birth: _____ SSN: _____ Citizenship: _____

Last Known U.S. Residence: _____

How was last known address obtained? (provide a copy of source document) _____

If Active Duty Military:

Branch: _____ Command/Unit: _____

Rank/Rate: _____ Command/Unit Phone Number: _____

If Contractor or U.S. Government Civilian Employee: (provide copy of employment contract and termination paperwork, if applicable)

Employer: _____ Position: _____

Dates of Employment: _____ Supervisor's Name: _____ Supervisor's Phone: _____

If Dependent:

Sponsor's Name: _____ Sponsor's Unit/P.O.C.: _____

Part III - Host Nation Information

Status of host nation investigation/prosecution:

¹⁷⁴ This document was created in August 2008, prior to the creation of the Human Rights and Special Prosecutions (HRSP). Office of Pub. Affairs, U.S. Dep't of Justice, Assistant Attorney General Lanny A. Breuer Announces New Human Rights and Special Prosecutions Section in Criminal Division (Mar. 30, 2010), <http://www.justice.gov/opa/pr/2010/March/10-crm-347.html>. The contact information in the "Referral Procedures," *supra* Appendix E, or at the HRSP website, *supra* Appendix D, should be used rather than the contact information listed for "DSS" in this form.

Military Extraterritorial Jurisdiction Act Jurisdiction Determination Checklist

Name of U.S. official coordinating with host nation: _____ Phone: _____

Name of host nation official involved in coordination: _____ Phone: _____

Part IV - MEJA / UCMJ Matters Matters subject to both federal statute and UCMJ Art. 2 must be processed pursuant to DOD Memorandum (March 2008)

If the offense is subject to MEJA and UCMJ Article 2(a), does the appropriate command seek alternative UCMJ authority?

Describe the subject's current arrest/detention/restriction status or current location: _____

Location of Arrest: _____ Date of Arrest: _____

If the subject is being removed from the foreign country to the U.S. for prosecution pursuant to MEJA removal procedures (18 USC §§ 3142, 3264-3265), has the subject been medically cleared to travel? (If yes, attach copy of clearance)

Provide subject's travel itinerary: (if applicable) _____

Part V - Documents Enclosed Department of Defense Instruction 5525.11 provides guidance on the investigative material required to be provided to DoJ during the MEJA referral process. Required documents and investigative materials can be submitted via email.

- All documents requested in Parts I-IV (as applicable)
- Preliminary reports of investigation (including a copy of any military police blotter)
- Witness statements (including biographical and current CONUS and OCONUS contact information for each witness)
- Statement(s) of the accused and rights advisal form(s) (if available)
- Photographs taken of injuries/crime scene
- Crime scene sketch/evaluations
- Description of physical evidence obtained, current location of all evidence, and contact information for laboratory/storage facilities where evidence was submitted
- Itemized chain of custody documentation regarding all physical evidence
- Medical records (with appropriate release documentation for the medical records)
- Addendum listing all law enforcement personnel involved and current CONUS and OCONUS contact information
- DRAFT, UNSIGNED affidavit or declaration, prepared by the investigating agent, setting forth the probable cause basis for believing that a violation of MEJA occurred and that the person identified has committed the violation (per DoDI 5525.11, paragraph 6.2.2)

Upon completion of this form:

- E-mail this form and all applicable documents to: MEJA@usdoj.gov, or
- Print and mail this form and all documents to: U.S. Department of Justice, Criminal Division - Domestic Security Section, Attn: MEJA Coordinator, 950 Pennsylvania Ave. NW, Washington, DC 20530

Note: Unless a civilian law enforcement agency formally assumes sole investigative authority regarding an overseas investigation, military investigative agencies are required to continue to investigate and assist DoJ prosecutors with the investigation and prosecution of MEJA referrals.

Signature: _____ Date: _____

Appendix F

Selected Felony Offenses Under Title 18, U.S. Code¹⁷⁵

Section 113 – Assaults

- (a)(1) – With intent to commit murder
 - (a)(2) – With intent to commit any felony, except murder
 - (a)(3) – With a dangerous weapon, with intent to do bodily harm, and without just cause or excuse
 - (a)(6) – Resulting in serious bodily injury
 - (a)(7) – Resulting in substantial bodily injury to an individual who has not attained the age of 16 years
- **Assault by striking, beating, or wounding (a)(4) and simple assault (a)(5) are not felonies.**

Section 661 – Theft

- Felony if the property value exceeds \$1,000 or is taken from another person

Section 1111 – Murder

Section 1112 – Manslaughter

- The unlawful killing of a human being without malice
- Voluntary and involuntary

Section 1113 – Attempt to Commit Murder or Manslaughter

Section 1117 – Conspiracy to Commit Murder

Section 2111 – Robbery and Burglary

- by force and violence, or by intimidation, takes or attempts to take from the person or presence of another anything of value

Section 2241 – Aggravated Sexual Abuse (by force, or threatening or placing in fear of death, serious bodily injury, or kidnapping; includes attempts)

Section 2242 – Sexual Abuse (threats made (other than above) or victim unable to consent)

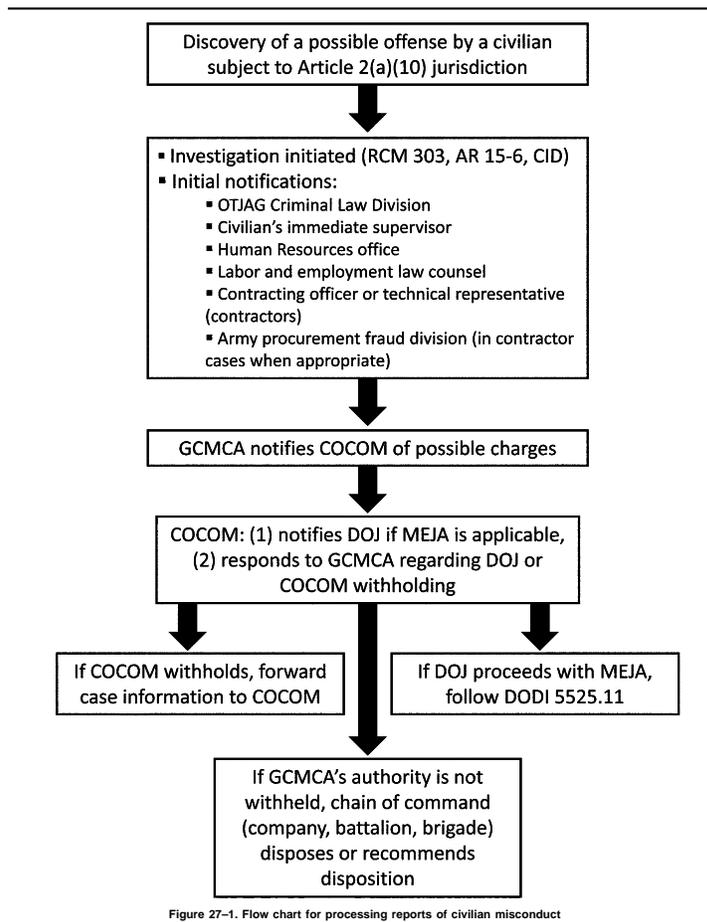
Section 2243 – Sexual Abuse of a minor or ward

Section 2252A – Certain Activities Relating to Material Constituting or Containing Child Pornography

¹⁷⁵ A complete list of all Title 18 offenses can be found at Title 18, U.S. Code, Part I. 18 U.S.C. pt. I (2011), available at <http://www.gpo.gov/fdsys/pkg/USCODE-2011-title18/pdf/USCODE-2011-title18-partI.pdf>.

Appendix G

Article 2(a)(10) Chart¹⁷⁶



¹⁷⁶ AR 27-10, *supra* note 79, fig.27-1, at 130.