

Amending the Military Extraterritorial Jurisdiction Act of 2000: Rushing to Close an Unforeseen Loophole

Major Glenn R. Schmitt¹
U.S. Army Reserve

Introduction

For years, the problem of American civilians committing crimes while accompanying the Armed Forces abroad plagued the U.S. government. In 2000, Congress passed the Military Extraterritorial Jurisdiction Act of 2000 (MEJA) to fix a problem that had gone unsolved for more than forty years. The MEJA extended American federal law to govern criminal acts committed by military dependents and military contractors accompanying the Armed Forces overseas.² But little did the drafters of the bill know at the time—the bill contained a gaping loophole that would become all too evident less than four years later.

The Military Extraterritorial Jurisdiction Act of 2000

America's federal criminal jurisdiction generally ends at the nation's borders. When Americans commit crimes abroad, it is the nations in which the crime occurs that determine whether to prosecute the crime. However, when a host nation declines to prosecute, or when there is no functioning government in the place where the act is committed, crimes can go unpunished.

This jurisdictional problem was particularly vexing to the military, which sends its civilian employees and contractors around the world and also allows family members of many service members stationed abroad to accompany them.³ The military's experience had been that when contractors or dependents committed crimes abroad, the host nation often declined to prosecute the crimes, even if the crimes were serious.⁴ This was especially true if the crime was committed only against another American or American property. In areas where there was no functioning local government for periods of time, such as the Balkans, there was no government to even consider bringing such a prosecution.

To address this problem, Congress passed MEJA, which President Bill Clinton signed into law in November of 2000.⁵ The law created a new federal crime, punishable in federal court, for acts committed outside the United States that would have been a felony under federal law had those acts been committed on federal land in the United States.⁶

The new criminal provision applies only to two groups of people: those "employed by or accompanying the Armed Forces outside of the United States," and those who are members of the armed forces.⁷ The key to the jurisdiction of this

¹ The author previously served as the Chief Counsel of the Subcommittee on Crime of the Committee on the Judiciary of the U.S. House of Representatives and was one of the drafters of the House version of the Military Extraterritorial Jurisdiction Act of 2000, H.R. 3380, 106th Cong. (2000). That bill eventually was enacted into law as S. 768, 108th Cong. (2003).

² See Glenn R. Schmitt, *Closing the Gap in Criminal Jurisdiction Over Civilians Accompanying the Armed Forces Abroad—A First Person Account of the Creation of the Military Extraterritorial Jurisdiction Act of 2000*, 51 CATH. U. L. REV. 55 (2001) (providing a detailed history of the problems that led to the creation of the Act, and the deliberations of Congress during the consideration of the bill in the House and Senate).

³ See, e.g., Richard Roesler, *Civilians in Military World Often Elude Prosecution*, STARS & STRIPES, Apr. 10, 2000, at 3. In his report, Roesler noted incidents of rape, arson, drug trafficking, assaults, and burglaries that went unpunished when the host nation declined to prosecute. *Id.* See also H.R. REP. NO. 106-778, pt.1 (2000).

⁴ A vivid example of this problem is illustrated by the decision in *United States v. Gatlin*, 216 F.3d 207 (2d Cir. 2000). In *Gatlin*, the government charged a civilian defendant with sexually abusing his teenaged step-child, the daughter of his Soldier-wife, while living in military housing in Germany. *Gatlin*, 216 F.3d at 209-10. However, the allegations did not come to light until the defendant, his wife, and step-daughter returned to the United States where the step-daughter revealed that she was pregnant with his child. *Id.* at 210. The defendant moved to dismiss the indictment for lack of jurisdiction. *Id.* The district court ruled that it had jurisdiction to try the defendant, finding that the American military housing area in Germany where the acts occurred was within the "special maritime and territorial jurisdiction of the United States," as defined in § 7 of Title 18, United States Code. *Id.* The Court of Appeals reversed, holding that it was clear from the legislative history that Congress intended § 7(3) to apply exclusively to the territorial United States, and therefore the overseas military housing area was not within the special maritime and territorial jurisdiction and the district court lacked jurisdiction to try the civilian defendant. *Id.* The result in that case helped to prompt Congress to pass MEJA. See Schmitt, *supra* note 2, at 102.

⁵ The Military Extraterritorial Jurisdiction Act of 2000, Pub. L. No. 106-523, 114 Stat. 2488 (codified at 18 U.S.C. ch. 212, §§ 3261-67 (2000)).

⁶ 18 U.S.C. § 3261. See generally Schmitt, *supra* note 2, at 113-17.

⁷ While the main concern of the drafters of the bill was accountability for criminal acts by civilians, they drafted the bill to apply also to acts by service members. See Schmitt, *supra* note 2, at 114-15. Prior to the enactment of the MEJA, the military was powerless to prosecute properly-discharged service members for criminal acts they committed outside of the United States but which were not discovered before they were discharged, as they may not be

statute is the definition of the first phrase. The act defines the phrase persons “employed by . . . the Armed Forces,” to mean a Department of Defense (DOD) civilian employee, including a nonappropriated fund instrumentality employee, a DOD contractor or subcontractor of any level, or an employee of such contractor or subcontractor. Persons “accompanying the Armed Forces outside the United States” is defined to mean those people who are dependents of and reside with military members, DOD civilian employees or NAF employees, or DOD contractors and subcontractors or their employees outside the United States. In both cases, the definitions use the term “DoD contractors and subcontractors.” Consequently, persons or organizations under contract to other parts of the U.S. government were not covered by this Act.⁸

Abu Ghraib

This seemingly reasonable distinction would take on a great deal of consequence in 2004 when reports began to appear in the news media that American military personnel had abused Iraqi prisoners at Abu Ghraib, a prison in Iraq in which Coalition Forces held Iraqi detainees and which had been notorious under the Saddam Hussein regime.⁹ As the story began to unfold, the media reported that civilian contractors working to support the American military also may have been involved in these abuses.¹⁰ In early May of 2004, then-U.S. Attorney General John Ashcroft announced that the Department of Justice was considering using MEJA to prosecute these persons.¹¹ Eventually, however, the media reported that some of these contractors worked under contract for the Central Intelligence Agency (CIA) and other contractors, although directly working to support the military operations in Iraq, were employed under a contract with the Department of the Interior.¹² As press attention began to turn to MEJA, it became clear that the law would not apply to acts by these persons because of the act’s limitation to only DOD employees and contractors. As a result, these people could not be prosecuted in American courts for their crimes.¹³

While two bills were introduced before the House Representatives to address this problem no action was taken, perhaps because members of the minority party had sponsored them.¹⁴ Of course, the bills could not have provided a basis for

recalled to active duty. See *id.* at *Toth v. Quarles*, 350 U.S. 11 (1955). See also Schmitt, *supra* note 2, at 61-72. The MEJA cured this jurisdictional limitation of the Uniform Code of Military Justice. In doing so it also gave the government another means to prosecute persons who commit a crime while in federal service as a member of a reserve component but who then return to civilian life and are no longer subject to the UCMJ. H.R. REP. NO. 106-778, at 12 n.23. See also Schmitt, *supra* note 2, at n.293 and accompanying text. Although the act technically applies to all active duty service members, it makes clear that the military retains exclusive jurisdiction to prosecute active duty service members under the UCMJ, unless the service member is charged as a codefendant of one or more civilians. See 18 U.S.C. § 3261(d); H.R. REP. NO. 106-778, at 12 n.23.

⁸ The act has been used only sparingly. In 2002, a defendant prosecuted in federal court in Washington state pleaded guilty to a violation of the act. The first use of the extradition procedures under the act did not occur until 2003. See Jessica Iñigo, *In First Use of Jurisdiction Act, USAF Spouse to Be Tried in Husband's Death*, STARS & STRIPES (European ed.), June 5, 2003. The conviction in that case, the first in a contested case under the act, did not occur until late 2004. See Associated Press, *Military Base Death Called Manslaughter*, SAN DIEGO UNION-TRIBUNE, Oct. 16, 2004, available at www.signonsandiego.com/uniontrib/20041016/news_1n16region.html; NBC4.TV News, *Woman Convicted in Husband's Death on Military Base; Jury Convicts Woman on Voluntary Manslaughter Charge*, at www.nbc4.tv/news/3825936/detail.html (last modified Oct. 15, 2004); Barbara Miller, *Wife Convicted of Manslaughter*, PATRIOT-NEWS (Pa.), Oct. 16, 2004 (on file with author). The defendant was not sentenced until February 2005. *Woman Gets 8 Years for Stabbing Air Force Husband to Death*, NORTH COUNTY TIMES (Cal.), Feb. 16, 2005, available at www.nctimes.com/articles/2005/02/17/military/21_23_232_16_05.txt. In neither case were the jurisdictional aspects of the law challenged.

⁹ The Coalition Provisional Authority announced in March, 2004 that it had concluded, but would not yet release publicly, an investigation into allegations that American military personnel abused detainees at the prison. Transcript, Coalition Provisional Authority Briefing, Mar. 20, 2004, available at http://www.iraqcoalition.org/transcripts/20040320_Mar20_KimmitSenor.html (statement of Brigadier General Mark Kimmitt, U.S. Army, Deputy Director for Coalition Operations). However, it was not until CBS News broadcast photos of the abuse and *The New Yorker* magazine published an in-depth piece on the story did the news media begin to report extensively on the allegations. See, e.g., Seymour M. Hersh, *Torture at Abu Ghraib, American Soldiers Brutalized Iraqis. How Far up Does the Responsibility Go?*, NEW YORKER, May 10, 2004, available at http://www.newyorker.com/fact/content?040510fa_fact; Associated Press, *U.S. Soldiers Face Investigation of POW Abuse*, COLUMBIA DAILY TRIBUNE (Mo.), Apr. 30, 2004, available at www.showmenews.com/2004/Apr/20040430News017.asp; David Folkenflik, *Iraq Prison Story Tough to Hold Off on, CBS Says*, BALTIMORE SUN, May 5, 2004, available at <http://www.baltimoresun.com/news/nationworld/bal-to.media05may05.0.296863.column?coll=bal-nationworld-headlines>; Phillip Kennicott, *A Wretched New Picture of America*, WASH. POST, May 5, 2004, at C01; Christian Davenport, *New Prison Images Emerge, Graphic Photos May Be More Evidence of Abuse*, WASH. POST, May 6, 2004, at A01; Charles Babington & Helen Dewar, *Lawmakers Demand Answers on Abuses in Military-Run Jails*, WASH. POST, May 6, 2004, at A12; The New York Times Editorial Board, *A System of Abuse*, WASH. POST, May 5, 2004 at A28.

¹⁰ Renae Merle, *Prison-Abuse Reports Adds to Titan's Trouble, Lockheed Plan to Buy Firm Already Stalled*, WASH. POST, May 7, 2004, at E03; Ariana Eunjung & Renae Merle, *Line Increasingly Blurred Between Soldiers and Civilian Contractors*, WASH. POST, May 13, 2004, at A01.

¹¹ Dan Eggen & Walter Pincus, *Ashcroft Says U.S. Can Prosecute Civilian Contractors for Prison Abuse*, WASH. POST, May 7, 2004, at A18.

¹² Renae Merle & Ellen McCarthy, *6 Employees from CACI International, Titan Referred for Prosecution*, WASH. POST, Aug. 26, 2004, at A18.

¹³ Scott Shane, *Some US Prison Contractors May Avoid Charges; Interior Department Hired Abu Ghraib Interrogators; Loophole Tangles Prosecution; Army Chain of Command Blurred in Civilian Abuses*, BALTIMORE SUN, May 24, 2004, at 1A; Ellen McCarthy & Renae Merle, *Contractors and the Law; Prison Abuse Cases Renew Debate*, WASH. POST, Aug. 27, 2004, at E01.

¹⁴ The Contractor Accountability Act, H.R. 4387, 108th Cong. (2004) (introduced by Rep. Martin Meehan (D – Mass.) on 18 May 2004); The MEJA Clarification Act, H.R. 4390, 108th Cong. (2004) (introduced by Rep. David Price (D – N.C.) on 19 May 2004).

prosecuting the acts that had already come to light,¹⁵ but they would have applied to any future crimes committed by contractors or other government employees.¹⁶ Although Congress did not act on the two introduced bills,¹⁷ both houses of Congress held numerous hearings into the problems at the Abu Ghraib prison.¹⁸ Also, the Senate included a provision similar to that contained in the House bills in the Senate version of the FY 2005 DOD authorization act.¹⁹

Finally, as the 2004 legislative session came to a close, conferees from the House and Senate met to work out the differences between the House and Senate versions of the DOD authorization bills. At this conference, the Senate's MEJA provision was left in the conference report on the bill²⁰ and enacted into law.²¹ President George W. Bush signed the bill, with the MEJA amendments, into law on 28 October 2004.

The Legislative Fix

In section 1088 of the Fiscal Year 2005 DOD Authorization Act Congress amended MEJA to extend its jurisdictional coverage to employees and contractors of other federal agencies.²² The 2005 DOD Authorization Act also amended MEJA to apply to employees and contractors of "any provisional authority."²³ In each case, however, the act limits this coverage

¹⁵ See U.S. CONST. art. I, sec. 9, cl. 3 (prohibiting Congress from passing any "ex post facto Law.").

¹⁶ After the Abu Ghraib abuses gained widespread attention, there were reports of similar abuses at other prison facilities operated by the U.S. military. Tom Bowman & Julie Hirschfeld Davis, *Army Reveals Wider Abuse Investigation; At Least 20 Cases in Iraq, Afghanistan Scrutinized; Prisoner Death Ruled Homicide; Members of Congress Question Top Army Brass*, BALTIMORE SUN, May 5, 2004, available at www.baltimoresun.com/news/printededition/bal-te.congress05may05.0.6989726.story; R. Jeffrey Smith, *General Cites Problems at U.S. Jails in Afghanistan*, WASH. POST, Dec. 3, 2004, at A01.

¹⁷ See generally Thomas, Legislative Information on the Internet, at <http://thomas.loc.gov> (providing a summary and status of bills introduced to Congress) (last visited Apr. 7, 2005).

¹⁸ See, e.g., H.R. REP. NO. 108-807, Report of the Activities of the Committee on Armed Services for the One Hundred Eighth Congress (2005). In it, the Committee states that it held

three public hearings specifically on detainee treatment and three hearings on operations in Iraq, during which detainee issues were discussed at length, . . . four member briefings, fourteen staff briefings, and hosted several opportunities for members to review photographic evidence and specific reports by the International Committee of the Red Cross. Additionally, several members and staff made separate trips to review detainee operations at Guantanamo Bay, Cuba. The committee also sought and received over 15,000 pages of classified internal documents from the Department of Defense, provided every member of the committee with an opportunity to review the classified material, and reported out two bills concerning detainee matters.

Id. at 39. The Senate Armed Services Committee also held hearings on the issue and hosted briefings for its members and staff, however a report of its activities during the 108th Congress has yet to be filed. *But see, e.g., Rumsfeld Testifies Before Senate Armed Services Committee*, WASH. POST, May 7, 2004, available at <http://www.washingtonpost.com/wp-dyn/articles/A8575-2004May7.html> (printing a transcript of a hearing before the Committee on Armed Services of the United States Senate); Helen Dewar & Spencer S. Hsu, *Warner Bucks GOP Right on Probe of Prison Abuse*, WASH. POST, May 28, 2004 at A01; Josh White, *Top Army Officers Are Cleared in Abuse Cases*, WASH. POST, Apr. 23, 2005 at A01. Some persons debated whether these hearings had any effect. See, e.g., Jackson Diehl, *Refusing to Whitewash Abu Ghraib*, WASH. POST, Sept. 13, 2004, at A21; The New York Times Editorial Board, *No Accountability on Abu Ghraib*, N.Y. TIMES, Sept. 10, 2004, available at http://www.cfba.info/iraq/nyt_torture_accountability_2.html.

¹⁹ National Defense Authorization Act for Fiscal Year 2005, S. 2400, 108th Cong. § 1081 (2004). Not included in the bill when it was originally introduced, Senator Jeff Sessions of Alabama offered it as an amendment when the Senate debated the bill on the floor. See 150 CONG. REC. S6535 (2004).

²⁰ The Conference Report is the vehicle that enacts the compromise bill

²¹ National Defense Authorization Act for Fiscal Year 2005, H.R. 4200, 108th Cong. (2004) (enacted, Pub. L. No. 108-375, 118 Stat. 1811).

²² The text of section 3267(1)(A) of title 18, as amended by the bill now defines "employed by the Armed Forces outside the United States" as:

- (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.

18 U.S.C. § 3267(1)(A) (LEXIS 2005).

²³ *Id.*

only “to the extent such employment relates to supporting the mission of the Department of Defense.”²⁴ Unfortunately, the lack of precision in each of these new terms may cause the courts problems in applying this portion of the act in the future.²⁵

Most problematic, Congress failed to define the phrase “supporting the mission of the Department of Defense” supplied in the bill, leaving unanswered the question of just how broadly the terms “supporting” and “mission” are to be interpreted. In light of world events ongoing when Congress drafted this language, “mission” would seem to mean, at the least, the wartime or occupational activities of the military. This conclusion is born out by the limited discussion of this new language on the Senate floor by the bill’s sponsors who focused solely on the military’s activities in Iraq,²⁶ and principally on the physical abuses at Abu Ghraib.²⁷ But given that, the question arises: does the word “mission” mean all DOD activities, including its regular day-to-day administrative operations, or does “mission” only include identifiable missions—and perhaps only those that are so well-defined as to be given a specific name, such as “Operation Iraqi Freedom?”

Similarly, the question exists of whether any amount of support provided falls within the meaning of the term “supporting” in the bill. That is, is there some threshold level of support that must be provided to the military before MEJA, as amended, will apply to the criminal acts of the persons providing that support? For example, are all CIA agents covered by the bill if some or all of the intelligence that they gather is eventually shared with the Defense Department? Certainly, the DOD uses that intelligence in carrying out its mission, but is the CIA “supporting” the DOD’s mission in that circumstance or its own mission?

There is no formal legislative history to be consulted on this provision, but given the floor debate, in which only federal government contractors were discussed, it is unlikely that the drafters intended to bring CIA agents within the scope of this bill.²⁸ The amendment language, however, applies to both employees and contractors, and so CIA employees do fall within the scope of the amendment. As another example, if contractors working on a State Department mission also provide incidental support (*e.g.*, food, shelter, housekeeping services) to military personnel providing security, training, or logistical support, do they then fall under the jurisdiction of the act? As the bill is drafted, it would seem that they would.

It would have been helpful had Congress used more specific terminology in the amendment. At the very least, the Senate should have provided examples in a legislative history on this portion of its version of the DOD Authorization Act as to the types of support it intended would fall within or outside this new provision. Without such guidance from the legislative branch, it will be left to the courts to parse the meaning of these phrases. A reasonable interpretation of this

²⁴ *Id.*

²⁵ There were no hearings on this portion of the mammoth authorization bill, and only a passing reference to this provision in the conference report on the compromise between the differing House and Senate authorization bills. The conference report contains only the following language about MEJA amendment:

The Senate amendment contained a provision (sec. 1081) that would amend the definitional section of the Military Extraterritorial Jurisdiction Act of 2000, section 3267 of title 18, United States Code (Public Law 106-523), to expand jurisdiction over civilian employees and contractor personnel of the United States to include personnel not employed by or contracting with the Department of Defense whose employment relates to supporting the mission of the Department of Defense overseas. The House bill contained no similar provision. The House recesses.

H. R. REP. NO. 108-767, National Defense Authorization Act for Fiscal Year 2005 (2004).

²⁶ Senator Jeff Sessions stated

This act will deal with what our previous act dealt with—those who were directly related to the Department of Defense, either contractors or civilian employees. But the abuses in Abu Ghraib involved private contractors who may not have in every instance been directly associated with the Department of Defense, and as such, perhaps those people—or some of them at least—might not be prosecutable under this statute. So it highlighted our need to clarify and expand the coverage of the act.

150 CONG. REC. S6863 (daily ed. June 16, 2004) (statement of Sen. Sessions).

²⁷ While first discussing Abu Ghraib, Senator Sessions also made a passing reference to using this provision to prosecute contractor fraud against the United States. As he summarized at the end of his remarks,

This amendment clarifies existing precedent and leaves no doubt whether wrongdoers can be brought to justice. This includes physical acts against personnel by contractors. It also includes frauds that could be committed against the Department of Defense such as overcharging. Fraudulent activities of any kind could be prosecuted under this act.

Id.

²⁸ The only floor statement on this point was made by Sen. Sessions, “This amendment would give the Justice Department authority to prosecute civilian contractors employed not only by the Department of Defense but by any Federal agency that is supporting the American military mission overseas.” *Id.*

phrase, in light of the floor debate and the world events that prompted this amendment, would be to apply this new part of MEJA only when a person's activities have, *as their principal purpose*, the intent to assist the mission of the DOD.

Another, and possibly more vexing, problem with MEJA, as amended, is that it now applies to employees of "any provisional authority" and to contractors and their employees of "any provisional authority."²⁹ Given the focus of the drafters of this provision on the Abu Ghraib abuses, it seems certain that they had the Coalition Provisional Authority (CPA) in Iraq in mind when using this language.³⁰ But making this new term a part of MEJA calls into question the legal status of a provisional authority. The Government's view of just what the CPA was is muddled. The U.S. Congress, in an act to supply funding to the CPA, referred to it alternately as a U.S. Government entity and a creation of the U.N.³¹ Similarly, the former general counsel of the CPA has described it as both an organization of the U.S. government and an international entity.³² However, the Office of Management and Budget and other agencies of the Executive Branch have stated that the U.N. created the CPA.³³ And the U.S. Army Legal Services Agency has gone so far as to assert that the CPA is not a Federal agency, instead referring to it as "multi-national coalition"³⁴ Despite these references to the U.N.'s role, a close reading of the United Nations Security Council resolutions to which these agencies point as having created the CPA does not lend much support for that position. In those resolutions, the Security Council speaks about the CPA as if it already existed and does not use any language which might be interpreted as creating it.³⁵

Even in early 2005, after sovereignty had been "restored" to Iraq, and the CPA no longer existed and had turned its the role over to the U.S Mission in Iraq,³⁶ the official position of the Executive Branch on what the CPA had been remained uncertain. In a lawsuit brought by whistle-blowers under the False Claim Act³⁷ against an American company that had

²⁹ See *supra* note 24.

³⁰ See *supra* note 28.

³¹ See Emergency Supplemental Appropriations Act for Defense and for the Reconstruction of Iraq and Afghanistan, Pub. L. No. 108-106, 117 Stat. 1209 (2004). That act provides that

funds appropriated under this heading shall be apportioned only to the Coalition Provisional Authority in Iraq (in its capacity as an entity of the United States Government *Id.* at 117 Stat. 1225. But in another part of that same act it appropriates money to the CPA "For necessary expenses of the Coalition Provisional Authority in Iraq, established pursuant to United Nations Security Council resolutions including Resolution 1483,

Id. 117 Stat. at 1226. It would seem strange that an entity of the United States Government could have been created by the United Nations and not by Congress. Finally, at section 2208 of that act, Congress defines the term "Coalition Provisional Authority" "to include any successor United States government entity with the same or substantially the same authorities and responsibilities as the Coalition Provisional Authority in Iraq." *Id.* 117 Stat. at 1231. In section 3001, Congress creates the Office of Inspector General of the CPA. *Id.* 117 Stat. at 1234. If the CPA was not part of the U.S. Government, how could Congress have created new offices within it?

³² E-mail from E. Scott Castle, Esq., Deputy General Counsel (Fiscal), Office of DOD General Counsel, to author (15 Dec. 2004) (on file with author) ("The CPA had a dual status, and was simultaneously a U.S. Government entity . . . and a discrete entity under international law The CPA administered the occupation on behalf of the occupying powers (US and UK)"; E-mail from E. Scott Castle, Esq. to author (7 June 2005) (on file with author) ("international entity" . . . and 'organization of the U.S. Government' . . . more correctly describes our position."). Mr. Castle served as General Counsel of the Coalition Provisional Authority.

³³ See U.S. Office of Management and Budget, *Budget of the United States Government—FY 2005*, app., at 958-959 (2004) ("For necessary expenses of the Coalition Provisional Authority in Iraq, established pursuant to United Nations Security Council resolutions including Resolution 1483,). The Pentagon Renovation Office also took this position. See L. Elaine Halchin, *The Coalition Provisional Authority (CPA): Origin, Characteristics, and Institutional Authorities*, CONG. RESEARCH SERVICE 9 (June 6, 2005), available at <http://www.fas.org/sgp/crs/mideast/RL32370.pdf#search=halchin%20june%2006> (citing Pentagon Renovation Office, solicitation W914NS-04_R-0001, Jan. 6, 2004, p.2).

³⁴ See Halchin, *supra* note 33, at 10 (citing a letter from a USALSA representative to the U.S. General Accounting Office in October 2003 in which USALSA asserted that the GAO did not have jurisdiction over a bid protest filed by a company to a contract issued by the CPA because the CPA was not a federal agency).

³⁵ In that resolution, the Security Council only "calls upon" the authority to do certain things. S.C. Res. 1438, 57th Sess., 4624th mtg., U.N. Doc. S/Res/1438 (2002). But see S.C. Res. 1511, U.N. SCOR, 4844th mtg., U.N. Doc. S/Res/1511 (2003) (seeming to state something different by noting that the "specific responsibilities, authorities, and obligations under international law" of the United States and the United Kingdom as occupying powers under a unified command, defined as the Coalition Provisional Authority, were "set forth" in United Nations Security Council Resolution 1483 and were to end when an "internationally recognized, representative government of the people of Iraq . . . assumes the responsibilities of the Authority . . .").

³⁶ See Embassy of the United States: Iraq-Baghdad, *Negroponte Pledges "True Partnership" with Iraq Government: Says U.S. committed to helping government achieve "lasting stability,"* June 3, 2004, at http://iraq.usembassy.gov/iraq/amb_20040603.html (statement by Ambassador John D. Negroponte, U.S. Representative to the United Nations, on the Situation in Iraq). See generally Embassy of the United States: Iraq-Baghdad, *Negroponte Sworn In as Ambassador to Iraq: Powell, Negroponte speak hopefully of Iraq's future,* June 23, 2003, at http://iraq.usembassy.gov/iraq/amb_20040623.html (remarks of Secretary of State Colin L. Powell at the Swearing-In of John D. Negroponte, U.S. Ambassador to Iraq).

³⁷ 31 U.S.C. §§ 3729-33 (2000). In general, the act provides for a civil penalty to the United States if a person knowingly presents a false or fraudulent claim for payment to the U.S. Government, conspires to defraud the Government by getting a false or fraudulent claim allowed or paid, or has possession, custody, or control of property or money to be used by the Government and conceals the property or delivers less property than the amount for which the person payment. *Id.* § 3729. The act allows private citizens to bring action for violation of the law in the name of the Federal government. *Id.* § 3730.

received millions in dollars from the CPA, the issue arose as to whether the act applied to funds paid by the CPA under contracts it had entered into.³⁸ As the case progressed, the judge specifically ordered the lawyers for the Federal government to state the government's position on whether the CPA was a U.S. Government entity.³⁹ In its brief to the court answering that question,⁴⁰ the government took the position, apparently for the first time, that "the CPA was created by the Commander of the Coalition Forces in Iraq, General Tommy Franks."⁴¹ The Government's lawyers went on to explain that "General Franks established the CPA under the laws of war to perform civil government functions in liberated Iraq during the brief occupation."⁴² Perhaps to explain the role of the UN in all of this, they noted that the "establishment of the CPA by the Coalition was formally recognized by" the United Nations in Security Council Resolution 1483.⁴³

Thus, these conflicting views of the CPA's status makes interpreting MEJA amendment even more troublesome, and creates a risk that courts may conclude that it is unconstitutional. If the CPA, and any similar authorities created in the future, is deemed to be an agency of the U.S. government, it is unnecessary to include the term "any provisional authority" in the bill. After all, the term "any other Federal agency" as used in MEJA amendment is broad enough to cover the authority's employees and contractors. Conversely, if the CPA or some later authority is, instead, an interim government of the nation in which it is operating or an international entity, then including the employees and contractors of that organization within the reach of MEJA raises an important constitutional question: on what basis is the U.S. government seeking to regulate the employees and contractors of another country's government or of an international entity?

As the legislative history of MEJA makes clear, its principal constitutional basis is Congress' power to regulate the Armed Forces.⁴⁴ When MEJA applies to DOD employees, contractors, or even the dependents of service members who live abroad solely because their loved ones are stationed there, Congress is clearly acting to regulate the conduct of the Armed Forces.⁴⁵ Regulating the conduct of employees of and contractors to another government's agencies or an international agency does not fall into this category.

The other constitutional provision commonly used to justify federal criminal law, the Commerce Clause,⁴⁶ is an even more tenuous basis upon which to base a statute that regulates the conduct of another government's nationals or those employed by or under contract to an international organization. Given that the conduct MEJA regulates occurs outside the United States, it would seem quite a stretch to argue that it substantially affects interstate commerce in the United States or with foreign Nations.⁴⁷ By making this new provision so broad as to apply to almost everyone in an area where the military is involved in contingent operations, Congress might have made the amendment unconstitutionally overbroad. If so, then Congress' imprecise drafting might threaten the enforceability of the new language or even the statute as a whole.

³⁸ See Griff Witte, *Lawmakers Told About Contract Abuse in Iraq*, WASH. POST, Feb. 15, 2005, at A03.

³⁹ See Griff Witte, *Justice Dept. Weighs Status of Interim Authority in Iraq Case*, WASH. POST, Feb. 18, 2005, at E01.

⁴⁰ Apparently, the Government did not have a position at the beginning of the case. See *id.* at E1. The reporter noted that the Justice Department had yet to file a brief outlining the government's position as to the status of the CPA. *Id.*

⁴¹ See Halchin, *supra* note 33, at 12-13 (citing Supplemental Brief of the United States 6-7, *United States ex re. DRC, Inc. and Robert Isakson v. Custer Battles, LLC et al.*, Case No. CV-04-199a)(E.D. Va. 2004)).

⁴² *Id.*

⁴³ *Id.*

⁴⁴ See H.R. REP. NO. 106-778, pt.1, at 14 (2000) (citing as authority for the bill art. I, sec. 8, cls. 10, 14, 16, and 18 of the Constitution.). The sponsors of the Senate version of the bill adopted the House Report as the authoritative statement on the act. See 146 CONG. REC. S11181, S11183 (daily ed. Oct. 26, 2000) (statement of Sen. Sessions, commenting that the House report "reflects the intentions of the Senate," and statement of Sen. Leahy, "I agree with Senator Sessions with respect to the report.").

⁴⁵ While MEJA applies to the criminal conduct of third country nationals who are contractors or subcontractors of the DOD, this aspect of the law is still designed to control the conduct of persons who would not be in a country but for the activities of the U.S. military there. See Schmitt, *supra* note 2, at 131-32. This provision exempts from the reach of MEJA persons who are nationals of or ordinarily resident in the country where the crime is believed to have been committed. See 18 U.S.C. § 3267(1)(c).

⁴⁶ U.S. CONST. art. I, sec. 8, cl. 3. Congress has the power "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." *Id.*

⁴⁷ See, e.g., *United States v. Lopez*, 514 U.S. 549 (1995). In *Lopez*, the Court struck down a federal criminal statute making it illegal to possess a firearm within 1,000 feet of a school. The Court held that Congress's power to regulate interstate commerce did not authorize it to regulate gun possession near schools, because "[t]he possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce." *Id.* at 567. Given this, perhaps only the "Necessary and Proper Clause" of the Constitution (U.S. Const., art. I, sec. 8) is left as support for this part of the MEJA amendment.

Conclusion

MEJA was a significant development in American criminal law, and closed a gap in the law that existed for over forty years. But, as recent events have proven, loopholes exist even in bills that seemed comprehensive when they were drafted. Congress acted promptly to close the loophole in MEJA once the events surrounding the Abu Ghraib prison abuse were brought to light. However, the imprecise language it used in doing so, coupled with a lack any real legislative history to explain this language, may confuse the courts as to the meaning of these new provisions.

Given that the statute has been used only a few times since it was enacted, Congress' decision to add provisions to MEJA that might prove difficult to enforce could undermine the entire statute. In retrospect, it would have been better had Congress had spent a little more time publicly debating and then drafting the solution to the problem of non-DOD contractors committing crimes abroad, and included interpretive information in a congressional report to explain it, before enacting the solution into law.