

## NOTES

### MILITARY EXTRATERRITORIAL JURISDICTION ACT: INTERNATIONAL IMPLICATIONS AND PROSECUTORIAL CONSIDERATIONS

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#### I. INTRODUCTION

In 1953, Mrs. Clarice Covert murdered her husband, Master Sergeant Edward Covert, with an ax while he slept at their home on an airbase in England.<sup>1</sup> She admitted to murdering him because he drank to excess, gambled, and caused numerous financial difficulties.<sup>2</sup> Mrs. Covert was released from prison on habeas corpus because the United States did not have authority to prosecute military dependents who committed a crime outside of the territorial U.S.<sup>3</sup>

In 1996, Mr. Milton Gatlin, the husband of Sergeant Gail Taylor, sexually abused his step-daughter while they were living on a military installation in Germany.<sup>4</sup> Soon after returning to the U.S., the 13-year-old step-daughter gave birth to a child, and a subsequent genetic test confirmed that the step-father was responsible.<sup>5</sup> The step-father was immune from prosecution due to the lack of U.S. jurisdiction outside of the territorial U.S.<sup>6</sup>

In 2003, U.S. contractors working on behalf of the Department of the Interior (DOI) assigned as guards at the U.S. Army Abu Ghraib Detention Center

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1. *United States v. Covert*, 16 C.M.R. 465, 471 (1954).

2. *Id.* at 472.

3. *Reid v. Covert*, 354 U.S. 1, 4 (1957) (seminal case where the U.S. Supreme Court held that civilians cannot be court-martialed or subjected to the UCMJ).

4. *United States v. Gatlin*, 216 F.3d 207, 209 (2000) (the court held that civilians outside of the territorial U.S. do not fall into U.S. jurisdiction and subsequently cannot be prosecuted for crimes they commit outside of the U.S.).

5. *Id.* at 210.

6. *Id.* at 223.

physically abused the detainees.<sup>7</sup> The physical abuse included sodomy, electric torture, and in a few cases even death.<sup>8</sup> This physical abuse was proven, in part, through photographs discovered on a CD-ROM by an enlisted soldier.<sup>9</sup> The abusers evaded U.S. prosecution because the U.S. did not have authority allowing jurisdiction to be extended to them.<sup>10</sup>

When the U.S. enters into a foreign state, a Status of Forces Agreement (SOFA) is created with that state.<sup>11</sup> The purpose of a SOFA is to outline rights and responsibilities between the sending state (the U.S.) and the receiving state “on such matters as criminal and civil jurisdiction over sending state personnel.”<sup>12</sup> A SOFA outlines who has the authority to prosecute Department of Defense (DOD) individuals if they commit a crime in that state.<sup>13</sup> Typically, if a military member commits an offense against a U.S. law, the U.S. will take jurisdiction over the case, and will try the individual via a court-martial.<sup>14</sup> If a military member commits an offense prohibited under the receiving state’s laws, but not under U.S. law, then the receiving state will typically take jurisdiction over the individual.<sup>15</sup> If a U.S. civilian commits a crime against a citizen of the receiving state, then the receiving state typically takes jurisdiction, whereas if a U.S. civilian commits a crime against a U.S. citizen in a receiving state, then the U.S. will attempt to extend jurisdiction over the U.S. civilian to prosecute the offender.<sup>16</sup>

When the U.S. sends troops into a receiving state, civilians will usually

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7. James E. Hartney, *A Call for Change: The Military Extraterritorial Jurisdiction Act*, 13 GONZ. J. INT’L L. 2 (2009-2010) (explaining that MEJA has inadequacies that must be addressed by Congress and the Supreme Court to ensure that justice can be achieved).

8. *Iraq Prison Abuse Scandal Fast Facts*, CNN (Mar. 18, 2018), <https://www.cnn.com/2013/10/30/world/meast/iraq-prison-abuse-scandal-fast-facts/index.html> [perma.cc/U45G-WANB] (lists in chronological order the events that took place in uncovering the Abu Ghraib prison scandal).

9. *Id.*

10. Hartney, *supra* note 7.

11. 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, 57 (2001) (outlines the importance of closing the jurisdictional gap that existed prior to Congress passing MEJA in 2000).

12. U.S. DEP’T OF DEF., INSTRUCTION NO. 5525.11, CRIMINAL JURISDICTION OVER CIVILIANS EMPLOYED BY OR ACCOMPANYING THE ARMED FORCES OUTSIDE THE UNITED STATES, CERTAIN SERVICE MEMBERS, AND FORMER SERVICE MEMBERS 31 (Mar. 3, 2005), <https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/552511p.pdf> [https://perma.cc/7KKL-S2M3] (instruction from Deputy Secretary of Defense Paul Wolfowitz explaining 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).

13. Schmitt, *supra* note 11, at 58.

14. *Id.* at 57.

15. *Id.* at 57.

16. *Id.* at 58.

accompany the troops.<sup>17</sup> These civilians can include spouses, children, contractors, and DOD civilians.<sup>18</sup> Prior to 1957, civilians were subject to the court-martial process if they committed an offense in the receiving state.<sup>19</sup> In 1957, however, the U.S. Supreme Court held that the military did not have the jurisdiction to court-martial civilians.<sup>20</sup> After Mrs. Covert murdered her husband, Sergeant Covert, while they lived at an Air Force base in England, she was court-martialed and found guilty.<sup>21</sup> The U.S. Supreme Court held that “military tribunals have not been, and properly never can be, constituted in such way that they can have the same kind of qualifications that the Constitution has deemed essential to fair trial of civilians in federal courts.”<sup>22</sup> The U.S. Supreme Court upheld this standard in *United States ex rel. Toth v. Quarles*.<sup>23</sup> In *Toth*, the defendant was honorably discharged from the Air Force after serving in South Korea.<sup>24</sup> Five months later he was arrested and taken back to South Korea to stand before a court-martial for murder.<sup>25</sup> The Supreme Court held that this was unconstitutional and that “Congress cannot subject [ex-servicemen] to trial by court-martial.”<sup>26</sup> The Court further explained that former servicemen, “like other civilians, are entitled to have the benefit of safeguards afforded to those tried in the regular courts authorized by Article III of the Constitution.”<sup>27</sup> Since the offenses civilians commit in receiving states are typically against U.S. laws, the receiving state will not prosecute the individuals, and since they cannot be court-martialed, they go unpunished for their crimes.<sup>28</sup> The receiving state also typically does not have any interest in prosecuting U.S. citizens who have committed a crime against another U.S. citizen, even if it has occurred in their state. Civilians were literally able to get away with murder. Thus, the creation of the Military Extraterritorial Jurisdiction Act of 2000 (MEJA).<sup>29</sup>

While MEJA was essential, certain individuals and certain crimes are still not covered by statute and therefore individuals can still avoid prosecution. Since the U.S. is known for its fair and equitable justice system for both the defendant and the victim, it should do the utmost to ensure its justice system remains fair and equitable for all parties.

This Note will look at how MEJA functions; the differences between MEJA cases and routine cases prosecuted by U.S. Attorneys in the territorial U.S.; the

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17. *Id.* at 55.

18. *Id.* at 56.

19. *Reid*, 354 U.S. at 6.

20. *Id.* at 40.

21. *Id.* at 3.

22. *Id.* at 39.

23. *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 23 (1955).

24. *Id.* at 13.

25. *Id.*

26. *Id.* at 23.

27. *Id.*

28. Schmitt, *supra* note 11, at 55.

29. Military Extraterritorial Jurisdiction Act, 18 U.S.C. § 3261-3267 (2000).

international impact of MEJA; and recommendations to improve MEJA. Section II examines the history, development, and practical implementation of MEJA. Section III analyzes the differences between prosecuting MEJA cases and routine cases within the U.S., along with the international impact, if any, of MEJA. Section IV offers a recommendation on how the legislative, executive, and judicial branches should move forward in improving MEJA prosecutions. Section V summarizes those recommendations and concludes this Note.

## II. HISTORY/BACKGROUND

### A. Pre-MEJA

Civilians have accompanied the U.S. military in war zones since the Revolutionary War.<sup>30</sup> In the 1700s, dependents lived in camps established by the militia, and civilians employed by the government served with the military directly on the battlefield.<sup>31</sup> These civilians were subject to the same rules as the soldiers.<sup>32</sup> Court-martial jurisdiction, or trial in military court, existed for anyone, either inside or outside of the U.S., accompanying the U.S. military either as a family member or a contractor.<sup>33</sup>

In 2000, the U.S. Court of Appeals for the Second Circuit heard the case of *United States v. Gatlin*.<sup>34</sup> In this case, Mr. Gatlin, Sergeant Taylor's husband, had "sexual intercourse clandestinely" with his step-daughter while they were living in military housing in Germany.<sup>35</sup> At the time, the agreement between the U.S. and Germany was governed by the North Atlantic Treaty Organization (NATO) SOFA.<sup>36</sup> The NATO SOFA outlined that the receiving state, in this case, Germany, would be responsible for prosecuting civilians who committed crimes within their state.<sup>37</sup> Since Mr. Gatlin did not harm a German citizen, Germany did not have an interest in expending resources for his prosecution.<sup>38</sup> After returning to the U.S., Mr. Gatlin was charged in the United States District Court for the Eastern District of New York.<sup>39</sup> The trial court convicted him, and he appealed arguing that a civilian cannot be prosecuted in federal court for conduct on a U.S. military base outside of the territorial U.S.<sup>40</sup> The Second Circuit Court of Appeals overturned the trial court and held that U.S. federal law applies only within the

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30. Schmitt, *supra* note 11, at 60.

31. *Id.* at 60-61.

32. *Id.* at 61.

33. *Id.* at 62.

34. *Gatlin*, 216 F.3d at 208.

35. *Id.* at 210.

36. *Id.* at 221 n.17.

37. *Id.*

38. *Id.* at 220.

39. *Id.* at 210.

40. *Id.* at 209.

territorial U.S.<sup>41</sup> The court called on Congress to close this jurisdictional gap, and even took the liberty of sending a copy of the opinion to the Chairmen of the Senate and House Armed Services and Judiciary committees.<sup>42</sup> A few months later, MEJA was presented before Congress by Representative Chambliss of Georgia.

Before MEJA was passed in 2000, civilians were punished with administrative sanctions as an attempt to close this jurisdictional gap.<sup>43</sup> These administrative sanctions could include being barred from military bases.<sup>44</sup> Other sanctions could be implemented such as privileges being taken away or reduced. This would include revocation of the rights to purchase grocery items from the commissary, use the gym or the pool, and/or, shopping at the exchange. There was nothing else the government could do to punish crimes committed by civilians.<sup>45</sup>

The General Accounting Office (GAO), which is an independent agency within the legislative branch, determined that receiving states waived jurisdiction over individuals who committed serious crimes in their territory 59 times in just 1977.<sup>46</sup> The judiciary and the executive branches were attempting to punish these individuals, and it was clear that it was time for the legislative branch to act. In 2000, they did so by passing MEJA.

#### *B. Development of MEJA*

MEJA was passed in 2000 to close the jurisdictional gap that was created with the Court's ruling in *Gatlin*.<sup>47</sup> MEJA gives the U.S. the authority to prosecute civilians who commit crimes overseas while employed by or accompanying the DOD.<sup>48</sup> In the statute, "employed by" is defined as "a civilian employee of the [DOD] or any other federal agency . . . supporting the mission of the [DOD] overseas"; "a contractor of the [DOD] or any other federal agency . . . supporting the mission of the [DOD] overseas"; or "an employee of a contractor of the [DOD] or any other federal agency . . . supporting the mission of the [DOD] overseas."<sup>49</sup> "Accompanying" is defined as "a dependent of a member of the Armed Forces; a civilian employee of the [DOD]; or a [DOD]

41. *Id.* at 223.

42. *Id.*

43. Schmitt, *supra* note 11, at 55.

44. *Id.*

45. *Id.*

46. *Id.* at 74.

47. Aimee Bateman, *A Military Practitioner's Guide to the Military Extraterritorial Jurisdiction Act in Contingency Operations*, THE ARMY LAWYER, Dec. 2012, at 6 (addresses the challenges military lawyers face when attempting to refer crimes committed by civilians overseas to the DoJ).

48. *Id.* at 4.

49. Military Extraterritorial Jurisdiction Act, 18 U.S.C. § 3267 (2000).

contractor . . . or an employee of the [DOD] contractor.”<sup>50</sup> MEJA originated from recommendations by the GAO, Judge Advocate General of the Army, and the U.S. Supreme Court.<sup>51</sup> At the time MEJA was written, and still today, civilians greatly outnumber the active duty military personnel who are overseas on military installations.<sup>52</sup> The potential impact of allowing U.S. citizens to commit crimes overseas without facing punishment could be so great that Congress knew they had to act.<sup>53</sup> Military members would not have felt safe taking their families with them overseas, and receiving states would have been extremely reluctant, if not in opposition, to the U.S. entering into their state.<sup>54</sup>

Senators Sessions of Alabama and DeWine of Ohio introduced Senate Bill 768 in 1999, and after several revisions, MEJA was passed in 2000.<sup>55</sup> In 2011, the federal judiciary reaffirmed in *United States v. Green* that the creation and implementation of MEJA was constitutional.<sup>56</sup> Mr. Green, who at the time was an active duty infantryman stationed in Iraq, along with three co-conspirators, sexually assaulted and murdered an Iraqi family.<sup>57</sup> Prior to any court-martial, Mr. Green was given separation orders from the Army due to a personality disorder and was thereby discharged.<sup>58</sup> His three co-conspirators remained on active duty and were successfully court-martialed, however the defendant could no longer be court-martialed since he was neither active duty nor a retired veteran.<sup>59</sup> The U.S. Attorney in the Western District of Kentucky charged Mr. Green in federal court under MEJA jurisdiction, and Mr. Green was subsequently found guilty.<sup>60</sup> Mr. Green appealed his conviction and argued that MEJA was unconstitutional because it violated the separation-of-powers principle, the nondelegation doctrine, the equal protection clause, and the due process clause.<sup>61</sup> The Sixth Circuit Court of Appeals rejected Mr. Green’s argument, and reasoned that MEJA is constitutional because Congress has the power to “define federal crimes, fix sentences, and regulate the procedure of federal courts.”<sup>62</sup>

A major concern at the creation of MEJA was that it would deprive the

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50. *Id.*

51. Schmitt, *supra* note 11, at 74.

52. Erik Slavin, *Theft at Base in Japan Highlights Limits of Military Law*, STARS AND STRIPES (Jun. 1, 2015), <https://www.stripes.com/news/theft-at-base-in-japan-highlights-limits-of-military-law-1.349922> [perma.cc/5TVG-US34] (highlights the limitations the military has when handling crimes committed on overseas installations by civilians).

53. Schmitt, *supra* note 11, at 78.

54. *Id.* at 77.

55. *Id.* at 113.

56. *United States v. Green*, 654 F.3d 637, 653 (6th Cir. 2011) (court held that prosecutions under MEJA jurisdiction are constitutional).

57. *Id.* at 642.

58. *Id.* at 640.

59. *Id.* at 643.

60. *Id.* at 644.

61. *Id.* at 641.

62. *Id.* at 649.

receiving state's right to prosecute U.S. citizens who commit a crime in its state, however, that is not the case.<sup>63</sup> The SOFA still determines which state will prosecute an individual who commits a crime in the receiving state.<sup>64</sup> MEJA simply allows for the U.S. to have the jurisdiction to prosecute U.S. civilians who are not prosecuted by the receiving state. For example, the NATO SOFA outlines that the receiving state will determine which state will prosecute the individual who committed the crime.<sup>65</sup> Ultimately, the goal of MEJA is to supplement the SOFA and ensure that a prosecution of an individual who commits a crime can occur.<sup>66</sup>

### *C. Implementation of MEJA*

#### *i. Who, Where, and When MEJA Applies*

For prosecution under MEJA, the government must ensure that the person who committed the crime, and the crime itself, is covered by the statute, and that the U.S. has the proper venue.<sup>67</sup> The first element the government must establish is that the person is included in the statute.<sup>68</sup> An individual can be prosecuted under MEJA if they are:

- (1) employed by the Armed Forces overseas;
- (2) accompanying the Armed Forces overseas;
- (3) a former member of the Armed Forces who is no longer subject to the Uniform Code of Criminal Justice ("UCMJ"); or
- (4) a member of the Armed Forces who commits a crime with other individuals who are not subject to the UCMJ.<sup>69</sup>

These individuals can include civilian employees, contractors, and dependent family members.<sup>70</sup> While most individuals who are not U.S. citizens can be prosecuted under MEJA, individuals who are citizens of the receiving state may not be prosecuted under MEJA jurisdiction for offenses committed in their own state.<sup>71</sup> The arrest, detention, and removal of an offender differs from state to

63. Schmitt, *supra* note 11, at 126.

64. *Id.* at 57-58.

65. Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of their Forces, Jun. 19, 1951, 4 U.S.T. 1792, 199 U.N.T.S. 67.

66. Schmitt, *supra* note 11, at 127.

67. Bateman, *supra* note 47, at 12.

68. *Id.*

69. U.S. DEP'T OF JUSTICE, GUIDE TO EXTRATERRITORIAL APPLICATION OF U.S. LAW SPECIAL MARITIME AND TERRITORIAL JURISDICTION ("SMTJ") AND THE MILITARY EXTRATERRITORIAL JURISDICTION ACT ("MEJA") 4 (Jul. 2016) (guide used by both the DOD and DOJ to determine if jurisdiction exists to prosecute a civilian who committed a crime overseas).

70. *Id.*

71. *Id.*

state, due in part to the different SOFAs that are put in place in each receiving state.<sup>72</sup>

As mentioned, MEJA can also be applied to individuals who are not U.S. citizens, but are working with the U.S. overseas.<sup>73</sup> For example, in 2012 the Fourth Circuit Court of Appeals upheld a MEJA conviction against a citizen of South Africa.<sup>74</sup> Mr. Brehm, a South African citizen, was working for a U.S. contracting company in Afghanistan when he stabbed a British citizen who was working for a U.K. contracting company in Afghanistan.<sup>75</sup> Mr. Brehm claimed he could not be prosecuted in the U.S., but the court held that he could under MEJA jurisdiction due to his employment status under a U.S.-based contractor constituting a reasonable understanding that he would be subject to U.S. jurisdiction, despite his citizenship claims.<sup>76</sup> The Department of Justice (DOJ) outlined an exception to MEJA stating that “[it] does not cover offenses committed by individuals who are members of the foreign country where the offense occurred, or individuals who ordinarily reside in the foreign country where the offense occurred.”<sup>77</sup> Nonetheless, the defendant did not fit into this exception since the crime took place in Afghanistan, and he is a “member of” or “ordinarily reside[s]” in South Africa.<sup>78</sup> This exception to MEJA includes any individuals who are employed by or supporting the DOD mission who are “nationals of or ordinarily live in the country in which the crime occurs.”<sup>79</sup> This poses an issue for states such as Somalia where no functioning government exists, and thus no way for that individual to be prosecuted.<sup>80</sup>

Second, the government must establish that the crime is one that falls under MEJA jurisdiction.<sup>81</sup> MEJA covers only crimes that are “punishable by imprisonment for more than 1 year.”<sup>82</sup> The “bad acts” that are applicable to MEJA are listed in Title 18, U.S. Code, Part I (Crimes).<sup>83</sup> These include “assault, theft, murder, manslaughter, attempt to commit murder or manslaughter, conspiracy to commit murder, robbery and burglary, aggravated sexual abuse, sexual abuse, sexual abuse of a minor, certain activities relating to material constituting or containing child pornography.”<sup>84</sup> “Bad acts” are not necessarily listed in MEJA,

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72. *Id.*

73. *See* *United States v. Brehm*, 691 F.3d. 547, 550 (4th Cir. 2012) (court held that MEJA jurisdiction can be used to prosecute individuals who are not U.S. citizens but who are working for a U.S. contracting company overseas).

74. *Id.* at 554.

75. *Id.* at 549.

76. *Id.* at 554.

77. Human Rights and Special Prosecutions, *supra* note 69, at 4.

78. *Brehm*, 691 F.3d. at 549-52.

79. Bateman, *supra* note 47, at 11.

80. *Id.* at 6-7.

81. *Id.* at 11-12.

82. 18 U.S.C. § 3261(a).

83. Bateman, *supra* note 47, at 9.

84. *Id.* at 34.

but rather it states that it is a “crime for certain people to commit certain acts while outside of the U.S., if the act or acts they committed would have been a crime inside the U.S.”<sup>85</sup> The DOJ has explained in its guide to prosecuting MEJA cases that “MEJA punishes conduct that would qualify as a felony [in the United States].”<sup>86</sup>

Third, the government must establish proper venue.<sup>87</sup> For MEJA to be implemented, the crime must occur “outside of the territorial boundaries of the United States.”<sup>88</sup> This is not a difficult element to meet, because if the crime occurred within the territorial U.S. then the federal government or applicable U.S. state would take jurisdiction over the defendant.

Prior to the enactment of MEJA in 2000, Congress established Special Maritime and Territorial Jurisdiction (SMTJ) in 1948. The SMTJ was created to prosecute individuals who could not be court-martialed, but who committed crimes outside of the territorial U.S.<sup>89</sup> SMTJ essentially extends U.S. jurisdiction outside of the territorial U.S. to very specific places or situations where the U.S. has an interest. The places include: crimes that occur on the high seas or other waterways that belong to the U.S.; on vessels that belong to the U.S.; on aircrafts that belong to the U.S.; and on space vehicles that belong to the U.S.<sup>90</sup> If the crime is committed by or against a U.S. citizen and in one of the designated places or situations, then the DOJ does not have to apply MEJA jurisdiction since jurisdiction already exists under SMTJ. Crimes that can be prosecuted under SMTJ are: assault, maiming, theft, homicide, kidnapping, damage to property and, sexual abuse.<sup>91</sup> Also, either the perpetrator or victim must be a U.S. citizen.<sup>92</sup> Due to the extremely limited scope of SMTJ, Congress, along with the other branches of government, knew it had to do more, and that is why it passed MEJA. Most often the U.S. Attorney will need to use MEJA to prosecute crimes outside of the U.S. since SMTJ can rarely be used.

The DOJ is the entity that prosecutes individuals under MEJA. It is the DOD Judge Advocate Generals (JAGs), or military lawyers, however, who play the key role in moving the case forward and ensuring that it has the potential to be prosecuted.<sup>93</sup> The JAG must refer the case for prosecution to the DOJ Office of Human Rights and Special Prosecutions (HRSP).<sup>94</sup> Therefore, the JAG must exercise discretion on whether to refer an individual to be prosecuted by the DOJ. Once the JAG decides to refer the case to the DOJ, and the DOJ decides to charge

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85. *Id.* at 9.

86. Human Rights and Special Prosecutions, *supra* note 69, at 4.

87. Bateman, *supra* note 47, at 12.

88. *Id.* at 16.

89. Special Maritime and Territorial Jurisdiction of the United States, 18 U.S.C. § 7 (1948).

90. Human Rights and Special Prosecutions, *supra* note 69, at 3.

91. *Id.*

92. *Id.*

93. Bateman, *supra* note 47, at 8-9.

94. *Id.* at 12-13.

the individual, then the defendant must have an initial hearing.<sup>95</sup> Since the civilian defendant will still be in the custody of the military overseas, it will be up to a JAG to provide defense counsel for the defendant for any hearings that are held prior to his transfer back to the U.S.<sup>96</sup>

Once the prosecuting JAG and U.S. Attorney determine probable cause is present and the case can move forward with prosecution, the attorneys must determine the individual's last known residence in the U.S. so they can decide in which federal district the defendant will be prosecuted.<sup>97</sup> Once the civilian is transferred, the JAG continues to play a key role in investigating the crime.<sup>98</sup>

In June 2016, the DOJ released a "Guide to . . . MEJA" in order to "provide the investigator and prosecutor in the field with a basic overview of various statutes that apply extraterritorially, and some issues with extraterritorial jurisdiction."<sup>99</sup> The guide states that all U.S. Attorneys are required to inform the DOJ of any potential MEJA charges, or if the military has referred a MEJA charge, since the DOJ is the primary point of contact for all MEJA prosecutions.<sup>100</sup>

#### *ii. Shortcomings and Amendments to MEJA*

MEJA has several shortcomings, and therefore individuals are still able to avoid prosecution for crimes they commit. In certain situations, the legislative, executive, and judicial branches have attempted, sometimes successfully, to address these problems. At the time of its creation, MEJA extended jurisdiction only to individuals who were associated with the DOD.<sup>101</sup> The consequence is that other civilians, such as contractors who are overseas on behalf of the CIA, avoid prosecution for abusing detainees.<sup>102</sup> In 2004, Congress and President Bush amended MEJA to extend jurisdiction over "contractors supporting defense missions overseas."<sup>103</sup> This means that any U.S. contractor who is supporting a DOD overseas mission can be subject to MEJA prosecution.

While the amendment was a major step towards ensuring all individuals overseas who work with or on behalf of the U.S. fall under U.S. jurisdiction, the amendment did not fix all of the MEJA loopholes. For example, if an employee of or a contractor on behalf of the Department of State (DOS), who is working to advance a DOS mission, were to commit a crime outside of the territorial jurisdiction of the U.S., then he could not be prosecuted under MEJA or under

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95. Schmitt, *supra* note 11, at 129.

96. *Id.* at 130.

97. U.S. DEP'T OF DEF., *supra* note 12, at 13.

98. *Id.*

99. Human Rights and Special Prosecutions, *supra* note 69, at 1.

100. *Id.* at 4.

101. Bateman, *supra* note 47, at 7.

102. *Id.*

103. *Id.*

any other statute.<sup>104</sup> In order to remedy this, Congress would have to amend MEJA to apply to all civilians who are accompanying or working for the U.S. government overseas.<sup>105</sup> Senator Leahy of Vermont proposed a bill called the Civilian Extraterritorial Jurisdiction Act (CEJA) which would remedy this problem. However the proposed bill died in committee.<sup>106</sup> Many individuals are very concerned about this particular issue and its potential impact.<sup>107</sup> Drones, for example, are already a controversial issue, and today more contractors are involved in drone operations than U.S. military personnel.<sup>108</sup> This causes further concern for the usage of drones, because it would be difficult to establish jurisdiction to prosecute contractors who are operating those drones for the Central Intelligence Agency (CIA) or the DOS, to further a CIA or DOS mission, if they were to misuse the drone.<sup>109</sup>

Another example is when the U.S. contractors working on behalf of the Department of Interior (DOI) abused the detainees at the Abu Ghraib Detention Center in Iraq in 2003.<sup>110</sup> The detainees of the U.S. Army prison were physically abused, humiliated, and tortured by both military servicemembers and contractors.<sup>111</sup> Secretary Rumsfeld described the acts as “blatantly sadistic, cruel, and inhuman.”<sup>112</sup> Twelve servicemembers were indicted via court-martial, yet the two civilian contractors who played a significant role in the abuse avoided prosecution because MEJA did not extend jurisdiction to them since they were working on behalf of the DOI and not the DOD.<sup>113</sup> They were thus able to avoid criminal prosecution.<sup>114</sup> President Bush’s 2004 amendment to MEJA, which extends MEJA jurisdiction to contractors furthering a DOD mission, would have allowed the U.S. to prosecute these DOI contractors.

According to a report by the Congressional Research Service, U.S. departments and agencies are increasingly relying on private firms to perform jobs overseas.<sup>115</sup> In 2005, Senator Leahy and Representative Price of North

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104. *Id.* at 16.

105. *Id.*

106. Civilian Extraterritorial Jurisdiction Act of 2015, S.1377, 114th Cong. (2015) [hereinafter Civilian Extraterritorial Jurisdiction Act].

107. See Laura Dickinson, *Drone Contractors: An Oversight and Accountability Gap*, JUST SECURITY (Jul. 21, 2015), <https://www.justsecurity.org/24795/drone-contractors-oversight-accountability-gap/> [<https://perma.cc/6M3U-55UQ>] (addresses the U.S. government’s lack of authority to hold non-DOD contractors accountable for their actions, especially during a time when the majority of drones are operated by contractors under agencies such as the CIA).

108. *Id.*

109. *Id.*

110. Hartney, *supra* note 7.

111. *Iraq Prison Abuse Scandal Fast Facts*, *supra* note 8.

112. *Id.*

113. Hartney, *supra* note 7.

114. *Id.*

115. Jennifer Elsea, *Private Security Contractors in Iraq and Afghanistan: Legal Issues*, CONGRESSIONAL RESEARCH SERVICE 1 (Jan. 7, 2010), <https://fas.org/sgp/crs/natsec/R40991.pdf>

Carolina proposed CEJA to extend MEJA jurisdiction over all these contractors.<sup>116</sup> In addition, the bill would achieve three other goals:

- (1) Direct the Justice Department to create new investigative units to investigate, arrest and prosecute contractors and employees who commit serious crimes.
- (2) Allow the Attorney General to authorize federal agents to arrest alleged offenders outside of the United States, if there is probable cause that an employee or contractor has committed a crime.
- (3) Require the Attorney General to report annually to Congress the number of offenses received, investigated and prosecuted under the statute; the number, location, and deployments of the newly created investigative units; and any changes needed in the law to make it more effective.<sup>117</sup>

This would put more pressure on the DOJ to prosecute the civilians overseas and narrow the discretion of the DOD. CEJA died in committee.<sup>118</sup>

Another shortcoming is a loophole that is created when the DOD does not refer a prosecution to the DOJ.<sup>119</sup> In 2007, when Congress passed the Defense Authorization Act it added a clause to Article 2 of the UCMJ expanding jurisdiction of the UCMJ to “contractors ‘[i]n time of *declared war or a contingency operation* (emphasis added).”<sup>120</sup> The purpose of this was to close that gap and allow JAGs the responsibility of prosecuting the case via court-martial.<sup>121</sup> In addition, the new UCMJ Article 2 clause does not restrict prosecution to only DOD contractors, but rather includes all contractors who are overseas.<sup>122</sup> The key to prosecution via this method, though, is that the contractor

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[<https://perma.cc/66T7-GC4J>] (discusses jurisdiction in federal court over private security contractors who are overseas in Iraq and Afghanistan and potential means of prosecuting those contractors who violate U.S. law).

116. David Isenberg, *Contractors and the Civilian Extraterritorial Jurisdiction Act*, THE HUFFINGTON POST (Apr. 4, 2010), [https://www.huffingtonpost.com/david-isenberg/contractors-and-the-civil\\_b\\_446298.html](https://www.huffingtonpost.com/david-isenberg/contractors-and-the-civil_b_446298.html) [<https://perma.cc/M2TN-JCJQ>] (outlines the benefits of CEJA and the importance of passing the legislation to hold contractors who are overseas working for agencies other than the DOD accountable for their actions).

117. *Id.*

118. Civilian Extraterritorial Jurisdiction Act, *supra* note 106.

119. Marc Lindemann, *Civilian Contractors Under Military Law*, US ARMY WAR COLLEGE 83, 87 (2007), <https://ssi.armywarcollege.edu/pubs/parameters/articles/07autumn/lindeman.pdf> [<https://perma.cc/3RKF-H5P7>] (states that at the end of 2006 approximately 100,000 contractors were operating in Iraq, and approximately 30,000 of those contractors provided armed military services such as personal and site security; further explains the need to regulate those contractors under some sort of jurisdiction).

120. *Id.* at 88.

121. *Id.*

122. *Id.* at 89.

must have committed a crime during a “war or a contingency operation”.<sup>123</sup> This therefore excludes crimes that are committed outside of those parameters, such as a contractor raping or murdering a citizen of the receiving state, or another U.S. citizen, while overseas but not currently on an operation. This added clause is distinguishable to the case of *Reid v. Covert*, where the U.S. Supreme Court declared it unconstitutional to court-martial civilians, because it is effective only during a time of war and/or when the defendant is actively engaged in conflict, rather than simply a dependent residing overseas. MEJA’s intention is to provide a jurisdiction to prosecute those crimes that are not covered by the UCMJ and give the JAGs the responsibility to refer those crimes for prosecution to the DOJ.

Another flaw in MEJA is the type of crimes that it covers.<sup>124</sup> MEJA allows for prosecution of crimes that are only punishable for one-year of imprisonment or more.<sup>125</sup> Thus crimes such as sexual criminal misconduct or driving under the influence are unlikely to be prosecuted.<sup>126</sup> This can have an enormous international impact as other states will see that the U.S. does not take responsibility for its citizens working for government agencies outside of the military in those receiving states.<sup>127</sup>

MEJA still is not always used when it can be applied.<sup>128</sup> As of 2012, the U.S. had prosecuted only a few more than 50 individuals under MEJA.<sup>129</sup> That is an average of 4-5 prosecutions per year since its creation. Individuals should not be avoiding prosecution solely because they are in a receiving state and that receiving state decides to waive jurisdiction over them, or because the U.S. military does not want to take the time to refer them for prosecution to the DOJ. It is necessary to find a solution, not just to hold these individuals who are committing the crimes accountable, but because it can strain U.S. international relationships.

### III. ANALYSIS

#### *A. Factors JAGs Consider When Referring MEJA Cases*

At the creation of MEJA it was not clear how significant a role the JAGs and military investigators would play throughout the entire prosecution of defendants.<sup>130</sup> It was clear that it is up to the discretion of the JAGs to determine whether an individual should be referred for prosecution since it is their duty to decide whether to inform the DOJ that a crime has occurred.<sup>131</sup>

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123. *Id.* at 88.

124. Slavin, *supra* note 52.

125. 18 U.S.C. § 3261(a).

126. Slavin, *supra* note 52.

127. *Id.*

128. Bateman, *supra* note 47, at 13.

129. *Id.* at 4.

130. Schmitt, *supra* note 11, at 125.

131. U.S. DEP’T OF DEF., *supra* note 12, at 4.

In 2005, the DOD issued DOD Instruction 5525.11, *Criminal Jurisdiction Over Civilians Employed By or Accompanying the Armed Forces Outside the United States, Certain Service Members, and Former Service Members* which establishes regulations for JAGs when using MEJA.<sup>132</sup> In those instructions, Deputy Secretary of Defense Paul Wolfowitz explains that the Military Criminal Investigative Organization should submit an Investigative Report to the Office of the Staff Judge Advocate (SJA) of the Designated Commanding Officer.<sup>133</sup> He states that it is the responsibility of the SJA to submit that report to the DOJ if the SJA believes that the defendant should be prosecuted.<sup>134</sup> Further, he explains that the DOD Inspector General (IG) has the responsibility to inform the Attorney General (AG) whenever he or she has a suspicion that a crime has been committed, and the DOD IG has the responsibility to implement investigative policies.<sup>135</sup> The discretion of whether to report the crime to the DOJ is left solely up to the DOD.<sup>136</sup>

In 2007, 32 Code of Federal Regulations (CFR) Part 153 was written and put into place by Congress.<sup>137</sup> The purpose of this regulation is to assign responsibility of MEJA prosecutions.<sup>138</sup> It outlines what was already known about MEJA, that the DOD and the DOJ must communicate with each other and coordinate the prosecution of any individual who is subject to MEJA jurisdiction.<sup>139</sup>

The DOD Associate Deputy General Counsel for Military Justice and Personnel Policy testified before the Senate in 2008 that the DOD is instrumental in the “prosecution of DOD civilian employees, DOD contractors, and their dependents who commit felony-level crimes when serving with or accompanying our Armed Forces outside of the United States.”<sup>140</sup> Therefore, the role of the DOD is imperative to the successful prosecution of these civilians.

In March 2008, the DOD released a statement explaining the MEJA process and the responsibilities of JAGs.<sup>141</sup> The Secretary of Defense stated that the

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132. Elsea, *supra* note 115, at 23.

133. U.S. DEP'T OF DEF., *supra* note 12, at 12, 14.

134. *Id.* at 4

135. Elsea, *supra* note 115, at 24.

136. *Id.*

137. 32 C.F.R. pt. 153 (2007).

138. *Id.*

139. *Id.*

140. Bateman, *supra* note 47, at 8.

141. MEMORANDUM FROM THE SECRETARY OF DEFENSE REGARDING 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 1 (Mar. 10 2008), <https://www.justice.gov/sites/default/files/criminal-hrsp/legacy/2011/02/04/03-10-08DOD-ucmj.pdf> [<http://perma.cc/Y8BU-AWHB>] [hereinafter Memo regarding UCMJ Jurisdiction Over DoD Civilian Employees, DoD Contractor Personnel, and Other Persons] (outlines the military's authority to prosecute civilians who are working with the DOD during times of war or contingency operations under the UCMJ; further states that these

commanders “have the authority to cause an inquiry or investigation to be conducted of any crime allegedly committed by persons subject to” MEJA jurisdiction.<sup>142</sup> It further explains that the military has the authority to arrest and detain the civilian and begin conducting an investigation into the alleged offense.<sup>143</sup> The military commander can then notify the DOJ of a possible prosecution, and the DOJ has 14 days to respond with whether they would like to move forward with the prosecution.<sup>144</sup> After the DOJ’s notification, the military authorities will continue to investigate in order to assist the DOJ with the prosecution of the defendant.<sup>145</sup> Almost every military installation in the U.S. has a JAG who is appointed as a Special Assistant U.S. Attorney (SAUSA).<sup>146</sup> The appointed SAUSA is the individual on the military installation who acts with the DOJ to investigate and prosecute the defendant.<sup>147</sup>

Further, in 2012, a U.S. Army JAG and Associate Professor at The Judge Advocate General’s School in Charlottesville, Virginia wrote in *A Military Practitioner’s Guide on MEJA* that involvement of DOD personnel in the prosecution of individuals under MEJA is not just important but is mandatory.<sup>148</sup>

Since the DOD refers cases to the DOJ, the DOJ will make the ultimate decision on whether to prosecute the civilian.<sup>149</sup> The DOJ will also make the decision on whether to prosecute the case themselves, or forward the case to an Assistant U.S. Attorney in the district where the defendant will be tried.<sup>150</sup> If forwarded, the defendant will be tried in the federal district where the defendant last resided.<sup>151</sup> Once a specific U.S. Attorney within the DOJ has control of the case, the prosecution of MEJA cases do not proceed much differently than any other case.<sup>152</sup> The prosecutor needs to ensure sufficient evidence is present to prove that the defendant committed the crime beyond a reasonable doubt.<sup>153</sup> The largest difference between MEJA cases and routine prosecutions is that the special jurisdiction requirements must be met when bringing a MEJA case, such as proving that the defendant is either a contractor, dependent, or employee with

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guidelines also apply to the U.S. Coast Guard when it is not operating as a service in the Navy).

142. *Id.* at attachment 1.

143. *Id.*

144. *Id.* at attachment 3.

145. *Id.* at 2.

146. Email Interview with LTC Rodney R. Lemay, Branch Chief of International Law, U.S. Army (Oct. 16, 2017).

147. *Id.*

148. Bateman, *supra* note 47, at 8.

149. Memo regarding UCMJ Jurisdiction Over DoD Civilian Employees, DoD Contractor Personnel, and Other Persons, *supra* note 141, at attachment 3.

150. Bateman, *supra* note 47, at 13-14.

151. U.S. DEP’T OF DEF., *supra* note 12, at 13.

152. Telephone Interview with DOJ Official, Human Rights and Special Prosecutions Section of the Department of Justice (Oct. 19, 2017) [hereinafter Telephone Interview].

153. Memo regarding UCMJ Jurisdiction Over DoD Civilian Employees, DoD Contractor Personnel, and Other Persons, *supra* note 141, at attachment 1.

or in furtherance of the DOD and that the crime occurred overseas.<sup>154</sup>

The funding for MEJA cases comes from the Human Rights and Special Prosecutions (HRSP) section of the DOJ.<sup>155</sup> Therefore, office resources are not a factor the military has to consider when deciding whether to refer a case to the DOJ. Expenses incurred when trying a MEJA case would include paying for the witnesses and/or victims to travel to the U.S. to testify in a case.<sup>156</sup> This specific expense is one that a U.S. Attorney would not ordinarily have to take into consideration when prosecuting a non-MEJA case as they typically do not have to fly in witnesses or victims from overseas.<sup>157</sup> Often, the DOJ will look at how many resources would be required to bring a case and charge the underlying crime.<sup>158</sup> For example, if a dependent is accused of stealing \$1,000 from an exchange on a U.S. base in Germany, but prosecuting the case would cost the government \$50,000, then the U.S. would most likely not prosecute that crime.

While international relations is something the DOD takes into consideration with nearly every decision it makes, it should not take international relations into consideration when deciding whether to refer a case for prosecution to the DOJ. Discretion should be solely with the DOJ. The DOJ can and will prosecute wrongdoers in the U.S. Depending on the receiving state, the U.S. may not want a U.S. citizen to be a defendant in that state's judicial system. When the DOJ prosecutes wrongdoers, those receiving states will see that the U.S. holds its citizens accountable for crimes even committed outside of the U.S.<sup>159</sup>

In a case where the victim is not a U.S. citizen, the receiving state may bring the case themselves and try the defendant. If the receiving state declines to prosecute, however, then the U.S. can still prosecute them under MEJA in the U.S.<sup>160</sup> Consequently, the nationality of the victim is not something that the military should take into consideration.

It is also important to note that it is possible for non-DOD personnel to be prosecuted under MEJA.<sup>161</sup> The prosecutor must prove that the defendant was supporting a DOD mission.<sup>162</sup> An example is the Nisour Square case.<sup>163</sup> In 2007, U.S. contractors working on behalf of the Department of State (DOS) approached

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154. *MEJA. Military Extraterritorial Jurisdiction Act of 2000, 18 U.S.C. § 3261, Pub. L. No. 106-523*, GONZALEZ & WADDINGTON ATTORNEYS AT LAW (<https://www.ucmjdefense.com/resources/military-extraterritorial-jurisdiction-act-meja/jurisdiction-over-the-reserve-component/meja-military-extraterritorial-jurisdiction-act-of-2000-18-u-s-c-%C2%A7-3261-pub-l-no-106-523.html>) [<https://perma.cc/RXX2-82J3>].

155. Bateman, *supra* note 47, at 12-14.

156. Telephone Interview, *supra* note 152.

157. *Id.*

158. *Id.*

159. *See* Elsea, *supra* note 115, at 1

160. *See Brehm*, 691 F.3d. at 549-52.

161. Bateman, *supra* note 47, at 7.

162. *Id.*

163. Elsea, *supra* note 115, at 1.

Nisour Square in Iraq to respond to a nearby bombing.<sup>164</sup> In a chaotic series of events, one of the contractors believed they were being ambushed and shot an innocent Iraqi in the head.<sup>165</sup> Unsure of where the bullet came from at the time, the other contractors fired their guns and weapons which resulted in the death of 17 men, women, and children, and wounded 24.<sup>166</sup> These contractors were charged via the “supporting the mission of the [DOD]” amendment to MEJA.<sup>167</sup> If not for that amendment, however, those contractors would have avoided prosecution. If Congress were to pass a bill such as the proposed Civilian Extraterritorial Jurisdiction Act, then civilians who are overseas supporting an agency other than the DOD could be prosecuted.<sup>168</sup> The military would not have to consider whether, and how, a specific individual who committed a crime overseas is furthering a DOD mission, but rather they could refer all overseas crimes to the DOJ.

The DOJ encourages the military to refer all potential prosecutions so that they can determine whether to move forward with the prosecution.<sup>169</sup> Since MEJA is so narrow in scope, that does not always happen. The military focuses on referring those cases to the DOJ that would fit within MEJA. Crimes committed by non-DOD civilians, and crimes that are not serious enough may not even get referred. They go unprosecuted and the criminals go unpunished for their actions.

*B. Factors U.S. Attorneys Consider When Deciding to Prosecute MEJA Cases versus Routine Cases*

U.S. Attorneys must take several factors into consideration when deciding whether to prosecute a case.<sup>170</sup> The attorney must be able to prove beyond a reasonable doubt that the defendant committed the crime.<sup>171</sup> This is determined by looking at the quality of the evidence, ability for the jury to understand the crime (even if it is complex), any potential problems with witnesses or victims, and any potential problems with the investigators or agents.<sup>172</sup> Other factors to consider are if the crime is one that warrants prosecution versus immunity,

164. James Glanz & Alissa Rubin, *From Errand to Fatal Shot to Hail of Fire to 17 Deaths*, N.Y. TIMES (Oct. 3, 2007), [http://www.nytimes.com/2007/10/03/world/middleeast/03firefight.html?\\_r=3&oref=slogin&oref=slogin&oref=slogin](http://www.nytimes.com/2007/10/03/world/middleeast/03firefight.html?_r=3&oref=slogin&oref=slogin&oref=slogin) [<http://perma.cc/Y8BU-AWHB>] (provides a timeline for the September 2007 Nisour Square incident).

165. *Id.*

166. *Id.*

167. Lauren Carasik, *Blackwater Verdict Long Overdue*, AL JAZEERA AMERICA (Oct. 22, 2014), <http://america.aljazeera.com/opinions/2014/10/blackwater-guiltyverdictforiraqsnisoursquareshootings.html> [<https://perma.cc/KV22-EAPT>].

168. Civilian Extraterritorial Jurisdiction Act, *supra* note 106.

169. Telephone Interview, *supra* note 152.

170. Donna Eide, *How Prosecutors Make Charging Decisions* (Sep. 10, 2013) (on file with author).

171. *Id.*

172. *Id.*

pretrial diversion or civil penalty, if the defendant has a criminal history, and if the office has the resources to try the case.<sup>173</sup> Further, a message will be sent to the public through every prosecution, and it is important to consider that public message, whether it be the crime the U.S. Attorney is charging the defendant with or who the defendant is.<sup>174</sup>

While U.S. Attorneys have broad discretion in whether to prosecute a defendant, the prosecutors also have sentencing discretion.<sup>175</sup> The prosecutor should aim to follow sentencing guidelines and protocols set up at his office. The ultimate decision, however, is made by the individual U.S. Attorney.<sup>176</sup> The discretion that the U.S. Attorney uses in sentencing will send a message to the public that the U.S. does not allow people to get away with committing crimes.

Further, the DOJ has prosecutorial guidelines in place to help the U.S. Attorney decide whether or not to move forward with the prosecution of an individual defendant.<sup>177</sup> In addition, each U.S. Attorney's office also has its own office guidelines to help the attorneys in deciding which cases to move forward in prosecuting.<sup>178</sup>

The DOJ has published the U.S. Attorneys' Manual on their Justice website.<sup>179</sup> In the Manual, the DOJ lists the Principles of Federal Prosecution, and includes Grounds for Commencing or Declining Prosecution located in Section 9-27.220, Initiating and Declining Charges – Substantial Federal Interest located in Section 9-27.230, and Initiating and Declining Charges – Prosecution in Another Jurisdiction located in Section 9.27-240.<sup>180</sup>

The manual lists three grounds for commencing or declining prosecution of an offense: 1) the U.S. Attorney must “believe that the person’s conduct constitutes a federal offense” 2) “that the admissible evidence will probably be sufficient to obtain and sustain a conviction” and 3) “that a substantial federal interest would be served by the prosecution.”<sup>181</sup> The manual then lists two reasons for not prosecuting an individual: 1) if “the person is subject to effective prosecution in another jurisdiction” or 2) “there exists an adequate non-criminal alternative to prosecution.”<sup>182</sup>

The manual then lists eight different potential interests that could be considered “substantial federal interests,” and they are as follows:

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173. *Id.*

174. *Id.*

175. Eide, *supra* note 170.

176. *Id.*

177. Interview with Donna Eide, Former U.S. Attorney for the Southern District of Indiana, Indianapolis (Oct. 18, 2017) (former U.S. Attorney and adjunct professor at Indiana University Robert H. McKinney School of Law teaching Criminal Procedure) [hereinafter Interview].

178. *Id.*

179. U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS' MANUAL, <https://www.justice.gov/usam/usam-9-27000-principles-federal-prosecution> [<http://perma.cc/ZUM2-KRWL>].

180. *Id.* §§ 9-27.220, 9-27.230, 9-27.240.

181. *Id.* §§ 9-27.220.

182. *Id.*

- (1) Federal law enforcement priorities, including any federal law enforcement initiatives or operations aimed at accomplishing those priorities;
- (2) The nature and seriousness of the offense;
- (3) The deterrent effect of prosecution;
- (4) The person's culpability in connection with the offense;
- (5) The person's history with respect to criminal activity;
- (6) The person's willingness to cooperate in the investigation or prosecution of others;
- (7) The interests of any victims; and
- (8) The probable sentence or other consequences if the person is convicted.<sup>183</sup>

If the prosecution of the individual does not serve one of these substantial federal interests, then the manual explains that the attorney should not proceed with prosecution of the individual.<sup>184</sup>

U.S. Attorneys should consider these three factors when determining which jurisdiction the individual should be prosecuted in:

- (1) The strength of the other jurisdiction's interest in prosecution
- (2) The other jurisdiction's ability and willingness to prosecute effectively; and
- (3) The probable sentence or other consequences if the person is convicted in the other jurisdiction.<sup>185</sup>

It is important that the U.S. Attorney look at these factors in MEJA cases, because sometimes the defendants can be charged in multiple jurisdictions and it will be up to the U.S. Attorney to decide that jurisdiction.

As with routine federal prosecutions, these factors should also be considered in deciding whether or not to prosecute a MEJA case. It is especially important that U.S. Attorneys ensure that they will have enough admissible evidence to move forward with successfully prosecuting the defendant. The evidence will be collected overseas by military personnel, and the U.S. Attorneys do not have as much control over that evidence or with that investigation.

Similar to the JAGs in MEJA cases, the U.S. Attorneys will make prosecution decisions based on office resources and the severity of the crime. While office resources are not the ultimate determining factor on deciding whether to prosecute a specific case, it is very possible they can be a determining factor.<sup>186</sup> For example, New York is more likely to prosecute a complex corporate fraud case than is Indiana since they have the offices and resources dedicated to those

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183. *Id.* §§ 9-27.230.

184. U.S. DEP'T OF JUSTICE, *supra* note 179, §§ 9-27.230.

185. *Id.* §§ 9-27.240.

186. Interview, *supra* note 177.

types of crimes.<sup>187</sup> Both the U.S. Attorney's office and the JAGs will move forward in prosecuting a case if the office has the resources to do so because they believe the crime committed has a serious enough of an implication to move forward with using those office resources.

One factor the U.S. Attorneys usually do not take into consideration when deciding whether to move a case forward with prosecution is the international impact the case will have. While it is possible that routine prosecutions by U.S. Attorneys can have an international impact, it is unlikely.<sup>188</sup> Although on June 23, 2017, the U.S. Attorney for the Southern District of Florida charged the National Director of Anti-Corruption in Columbia and an attorney practicing in Columbia with conspiracy to launder money in order to promote foreign bribery.<sup>189</sup> The U.S. Attorneys did not consider the international impact of prosecution until assets were already seized, but it would have been beneficial for the U.S. Attorney to consider the impact beforehand.<sup>190</sup> This factor—international impact—is the main difference between prosecuting MEJA cases and routine cases because every single MEJA case will have some sort of international impact since the crime took place in a receiving state.

The most important factor a U.S. Attorney should consider when moving forward with a case is if he has enough evidence to prove that the defendant committed the crime beyond a reasonable doubt.<sup>191</sup> This is also the most important factor a U.S. Attorney considers when deciding whether he wants to proceed in prosecuting a MEJA case.

Overall, U.S. Attorneys have a significant amount of discretion on whether to prosecute a defendant. Ordinarily, the attorneys use that discretion at the very beginning of a case. The prosecution of MEJA cases are slightly different because first the JAG must decide if he wants to refer the case to the DOJ, and then the U.S. Attorney must decide if he does in fact want to prosecute the defendant. Regardless, if a U.S. Attorney decides to move forward with prosecuting a case, it is important that he follows through with the prosecution and is prepared to go to trial.<sup>192</sup>

### *C. MEJA's Impact on International Relations*

The international implications of MEJA is significant, especially in receiving

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187. *Id.*

188. *Id.*

189. Press Release, Department of Justice, National Director of Anti-Corruption in Columbia Charged with Conspiracy to Launder Money in Order to Promote Foreign Bribery, (Jun. 27, 2017), <https://www.justice.gov/usao-sdfl/pr/national-director-anti-corruption-columbia-charged-conspiracy-launder-money-order-0> [<https://perma.cc/9VAU-5MBW>] (the U.S. Attorney for the Southern District of Florida charged individuals in Columbia for crimes they committed in Miami, Florida, which resulted in having an unexpected international implication).

190. Interview, *supra* note 177.

191. *Id.*

192. *Id.*

states where tensions historically exist with the U.S., such as Japan and Iraq. U.S. and Japanese tensions have been periodically high and continue to rise.<sup>193</sup> Following WWII, the Japanese and U.S. made an agreement that Japan would not form an offensive military, and the U.S. would move into Japan in order to defend them if necessary.<sup>194</sup> Around 54,000 U.S. military personnel are stationed in Japan today.<sup>195</sup> As with any large population, crime is also present on the U.S. bases.<sup>196</sup> These crimes are committed by both active duty servicemembers as well as U.S. civilians such as dependents, contractors, and DOD employees.<sup>197</sup> Some of these crimes are against other Americans and some are against the local Japanese.<sup>198</sup> Until 2000, when MEJA was enacted, the U.S. had no jurisdiction to prosecute the U.S. civilians who committed crimes in Japan, and even today, the U.S. is still unable to prosecute the civilians who are with a department other than the DOD.<sup>199</sup> This jurisdictional gap adds to the natural tension that was created with the Japanese as a result of WWII.<sup>200</sup>

The SOFA Japan signed with the U.S. in 1960 states that the U.S. can require the Japanese to surrender a U.S. citizen who is believed to have committed a crime to U.S. jurisdiction.<sup>201</sup> In 2016, the governor of Okinawa demanded that the legal protections granted to U.S. contractors (that the U.S. can demand custody if they are believed to have committed a crime) must be terminated so that Japan could have jurisdiction to prosecute the cases.<sup>202</sup> Furthermore, Japan and its leaders continued to protest U.S. presence on the island.<sup>203</sup> Okinawa citizens complained that the U.S. continues to commit violent crimes on their island.<sup>204</sup> In

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193. Hannah Beech, *The Tense Relationship Between Japan and the U.S. Military*, TIME (Jun. 8, 2016), <http://time.com/4360940/us-military-navy-japan-okinawa-alcohol-bases/> [perma.cc/5BAX-LGAA] (explains the historical significance of the tense relationship between the U.S. and Japan).

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.*; Slavin, *supra* note 52.

199. Schmitt, *supra* note 11, at 56.

200. *See* Beech, *supra* note 193.

201. Jonathon Soble, *U.S. Moves to Limit Protections for Its Civilian Military Workers in Japan*, N.Y. TIMES (Jul. 5, 2016), <https://www.nytimes.com/2016/07/06/world/asia/japan-us-military-bases.html> [perma.cc/RU2G-GLZ7] (outlines the change in the SOFA between the U.S. and Japan and why it changed).

202. *Id.*

203. Rob McBride, *Japan's Okinawa Rallies Against US Military Base*, AL JAZEERA (Jun. 19, 2016), <http://www.aljazeera.com/news/2016/06/japan-okinawa-island-protest-160619050825296.html> [perma.cc/Q9Y7-BH4C] (elaborates on the tense relationship between Japan and the U.S. and how Japan retaliates against U.S. presence in their state).

204. *Ex-US Marine Charged with Rape, Murder of Okinawa Woman*, AL JAZEERA (Jun. 30, 2016), <http://www.aljazeera.com/news/2016/06/marine-charged-rape-murder-okinawa-woman-160630080538403.html> [perma.cc/Y5CY-4JYU] (explains the process of a U.S. citizen being

July 2016, under authority of President Obama, the U.S. and Japan amended their SOFA to say that the U.S. can no longer demand that a U.S. contractor accused of committing a crime in Japan be turned over to the U.S., and instead, Japan will always have authority to prosecute U.S. contractors if it wishes.<sup>205</sup> This was perhaps not a prudent decision on behalf of the U.S., as it took away U.S. authority to prosecute its own citizens, and especially citizens who are working for the U.S. government overseas in Japan. It allows other receiving states to see that the U.S. willingly surrendered authority over its citizens. While the action was intended to relieve some discontent that Okinawans have with Americans assigned to Okinawa, other receiving states saw that the U.S. does not take responsibility for prosecuting the individuals the U.S. is responsible for. It did not relieve any of the anti-American sentiments that Okinawans feel, but rather allowed a U.S. citizen who was working on behalf of the U.S. government to endure an unfair trial.<sup>206</sup>

The Japanese prosecution of U.S. contractor Kenneth Shinzato, who was working at Kadena Air Base and which prompted the change in the SOFA, does not meet U.S. standards of a fair and equitable trial. He was charged in 2016 in Okinawa for the murder and stabbing a 20-year-old local Okinawan woman.<sup>207</sup> President Obama agreed to allow the Okinawan court to prosecute him, and stated that he “promised to ‘cooperate fully with the investigation to ensure that justice is done under the Japanese legal system.’”<sup>208</sup> The murder and stabbing allowed the Okinawan governor to express further outrage at the U.S.<sup>209</sup> Mr. Shinzato claimed that he could not have a fair trial in Okinawa due to the significant anti-American sentiment, and that Okinawa refused to take his mental conditions into consideration.<sup>210</sup> Mr. Shinzato was found guilty and is currently serving life in prison in Japan.<sup>211</sup> Two key aspects of the American judicial system, a fair trial

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charged by Japanese prosecutors despite the original U.S. - Japan SOFA that stated the U.S. will take responsibility for crimes committed in Japan by U.S. citizens).

205. Tomoko Otake, *Shinzato Denies Rape, Says Prejudging by Public Denies Him ‘Fair Trial’ in Okinawa*, THE JAPAN TIMES (Jul. 6, 2016), <https://www.japantimes.co.jp/news/2016/07/06/national/crime-legal/shinzato-denies-rape-says-prejudging-public-denies-fair-trial-okinawa/#.WfJ969CnHb0> [perma.cc/LBR8-27QM] (the U.S. defendant in Japan states that his trial in Japan will be unfair because the Japanese already dislike Americans and they will not consider his mental health as a potential defense).

206. Arata Yamamoto, *U.S. Contractor Kenneth Shinzato Charged In Okinawa Murder*, NBC NEWS (Jun. 30, 2016), <https://www.nbcnews.com/news/military/u-s-contractor-kenneth-shinzato-charged-okinawa-murder-n601581> [perma.cc/FUC9-WRYR] (the murder of a local Okinawan by an American sparked outrage by the locals against the U.S. and the presence of the U.S. on their island).

207. *Id.*

208. *Id.*

209. *Id.*

210. Otake, *supra* note 205.

211. Motoko Rich, *Former U.S. Marine Gets Life in Prison for Okinawa Rape and Murder*, THE NEW YORK TIMES (Dec. 1, 2017), <https://www.nytimes.com/2017/12/01/world/asia/us-marine->

and the opportunity to present a defense, were taken away from Mr. Shinzato despite the U.S. government sending him there to work. The U.S. made a mistake in allowing Mr. Shinzato to be prosecuted by the Okinawans, instead of taking responsibility for his alleged actions and prosecuting him in a fair and equitable trial in U.S. federal court.

In Okinawa, where U.S. military-Japanese tensions are at its highest, a large sum of cash was stolen from a slot machine on a Navy base in 2015.<sup>212</sup> The thief avoided arrest by the U.S. for 2 years, but was eventually found in Kansas in January 2017.<sup>213</sup> The DOJ decided to prosecute the defendant under MEJA jurisdiction in the Western District of Missouri.<sup>214</sup> This is one of the most recent MEJA cases brought by the DOJ. The defendant pleaded guilty on August 28, 2017 and was sentenced in January 2018.<sup>215</sup> The Okinawans are aware that crimes are committed in their state, and that without MEJA, offenders are going unpunished.<sup>216</sup> This would give good cause for the Okinawans to want the U.S. military presence to leave their island. However, under MEJA jurisdiction, the U.S. can take responsibility and prosecute individuals who commit crimes in receiving states.

MEJA increases favorable foreign relations with Japan and other receiving states. In 2014, an 18 year-old high school dependent of an enlisted soldier raped a 17-year-old high school dependent of another enlisted soldier on Kadena Air Base in Japan.<sup>217</sup> Sherwood, the defendant, was charged with sexual abuse, production of child pornography, and possession of child pornography in Minnesota District Court.<sup>218</sup> MEJA was the only available jurisdiction to charge Sherwood.<sup>219</sup> The receiving state, in this case Japan, was able to see that U.S. criminals are being held responsible for the crimes that they commit in receiving states.

The Nisour Square incident in Iraq provides another good example of a foreign affairs implication of MEJA. In 2007, U.S. contractors hired by the

okinawa-rape.html [<https://perma.cc/38ZG-6SR9?type=image>].

212. Slavin, *supra* note 52.

213. Press Release, U.S. Attorney's Office for the Western District of Missouri, Former Cashier for U.S. Navy Morale Welfare and Recreation Center in Japan Pleads Guilty to Theft of Nearly \$100,000 (Aug. 22, 2017), <https://www.justice.gov/usao-wdmo/pr/former-cashier-us-navy-morale-welfare-and-recreation-center-japan-pleads-guilty-theft> [perma.cc/YZ7S-8LWG] (one of the most recent MEJA prosecutions ended up in a plea deal in the Western District of Missouri).

214. *Id.*

215. *Id.*

216. *See* Slavin, *supra* note 52.

217. Matthew Burke, *Kadena Student Charged With Raping Fellow Student*, STARS AND STRIPES (May 13, 2014), <https://www.stripes.com/news/kadena-student-charged-with-raping-fellow-student-videotaping-incident-1.282815#.WduTHGhSzb0> [perma.cc/YL9A-GC2N] (MEJA jurisdiction was extended to a high school student who is a dependent of a U.S. Marine stationed in South Korea).

218. *Id.*

219. *Id.*

Department of State (DOS) opened fire in a crowded traffic circle at Nisour Square in Iraq.<sup>220</sup> The contractors were responding to a nearby bombing, and one of the contractors mistakenly thought that they were about to be ambushed and fired a shot towards a vehicle.<sup>221</sup> Unsure of where the original shot came from, the other contractors opened fire in the traffic circle.<sup>222</sup> This resulted in the death of 17 civilians.<sup>223</sup> Four of the contractors working on behalf of the DOS were originally convicted for their crimes under MEJA since they were supporting a DOD mission.<sup>224</sup> However, in August 2017, a federal appeals court reversed the conviction of one of the contractors and ordered the resentencing of the other three.<sup>225</sup> The three-judge panel held that the trial court abused its discretion in not allowing one of the co-defendants to be tried separately and the sentences (30-year term of imprisonment) of the other three defendants violated the cruel and unusual punishment clause of the 8<sup>th</sup> Amendment.<sup>226</sup> The contractor whose case was overturned was retried in September 2018, but the jurors could not agree on a verdict.<sup>227</sup> He was tried again for a third time in December 2018 and convicted of first-degree murder.<sup>228</sup> All four security guards are still awaiting sentencing.<sup>229</sup>

Iraq wanted the opportunity to try the four contractors for killing and injuring innocent Iraqis without justification, but the U.S. denied Iraq that opportunity.<sup>230</sup> This further increased tensions between the two states.<sup>231</sup> Iraq said “the outcome

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220. Elsea, *supra* note 115, at 1.

221. Glanz and Rubin, *supra* note 164.

222. *Id.*

223. *Id.*

224. Spencer Hsu, *Murder Conviction in Blackwater Case Thrown Out, Others Sentences Overturned*, WASH. POST (Aug. 4, 2017), [https://www.washingtonpost.com/local/public-safety/murder-conviction-in-blackwater-case-thrown-out-other-sentences-overturned/2017/08/04/a14f275c-792e-11e7-9eac-d56bd5568db8\\_story.html?utm\\_term=.a50861c5f764](https://www.washingtonpost.com/local/public-safety/murder-conviction-in-blackwater-case-thrown-out-other-sentences-overturned/2017/08/04/a14f275c-792e-11e7-9eac-d56bd5568db8_story.html?utm_term=.a50861c5f764) [perma.cc/CKQ8-UWW3] (explains what happened to the Blackwater defendants after initially being prosecuted by the U.S.).

225. *Id.*

226. *Id.*

227. Paul Duggan, *Blackwater Security Guard Will Face Third Murder Trial in 2007 Iraqi Civilian Massacre*, WASH. POST (Sep. 14, 2018), [https://www.washingtonpost.com/local/public-safety/blackwater-security-guard-will-face-third-murder-trial-in-2007-iraqi-civilian-massacre/2018/09/14/5ec42ac6-b7a4-11e8-94eb-3bd52dfe917b\\_story.html?utm\\_term=.a8c1c2cedc36](https://www.washingtonpost.com/local/public-safety/blackwater-security-guard-will-face-third-murder-trial-in-2007-iraqi-civilian-massacre/2018/09/14/5ec42ac6-b7a4-11e8-94eb-3bd52dfe917b_story.html?utm_term=.a8c1c2cedc36) [https://perma.cc/38A3-B2RT].

228. Tom Jackman and Spencer S. Hsu, *Blackwater Security Guard Convicted in 2007 Iraqi Civilian Massacre at Third U.S. Trial*, WASH. POST (Dec. 19, 2018), [https://www.washingtonpost.com/local/legal-issues/blackwater-security-guard-convicted-in-2007-iraqi-civilian-massacre-at-third-us-trial/2018/12/19/e8b3d8ac-fd5f-11e8-ad40-cdfd0e0dd65a\\_story.html?utm\\_term=.9ffe60ceaffe](https://www.washingtonpost.com/local/legal-issues/blackwater-security-guard-convicted-in-2007-iraqi-civilian-massacre-at-third-us-trial/2018/12/19/e8b3d8ac-fd5f-11e8-ad40-cdfd0e0dd65a_story.html?utm_term=.9ffe60ceaffe) [https://perma.cc/95NC-VHJH].

229. *Id.*

230. Elsea, *supra* note 115, at 1.

231. *Id.* at 2.

[was] ‘unacceptable’ and vow[ed] to seek redress.”<sup>232</sup> Further, the United Nations called on the U.S. and Iraq “to cooperate . . . to ensure that the Nisour Square incident [was] fully remedied . . . .”<sup>233</sup> Despite the tensions, Iraq should have confidence in the fact that the U.S. has taken responsibility for the contractors, and is affording them a fair and equitable trial in the U.S. Even though one of the contractors had to be retried, and the other three must be resentenced, the U.S. is still taking responsibility for the actions of the contractors they sent into Iraq.

#### IV. RECOMMENDATION

Improving MEJA is a three-fold process. First, MEJA should be amended to include all U.S. crimes, and not just crimes that result in a year or more of imprisonment. Second, MEJA should be amended to include all U.S. citizens as well as individuals who are not U.S. citizens, but who are overseas working with the U.S. in some governmental capacity. Third, there should be a standard operating procedure put in place for the JAGs to promptly notify a specific attorney in the DOJ upon notice of a crime. All three of these recommendations will eliminate a potential negative international impact with the receiving state.

##### *A. Amending MEJA to Include all U.S. Crimes*

By amending MEJA to include all U.S. crimes, the world would see that the U.S. is serious about taking responsibility for its citizens, especially individuals the government employs to do work on its behalf. This does not automatically mean that every crime must be prosecuted, as that discretion is still left up to the U.S. Attorney prosecuting the case. Rather, it provides an avenue for a prosecution to take place if necessary.

For example, the first or second driving under the influence offense is currently not considered a crime that can be prosecuted under MEJA because the typical punishment in most states involves a maximum sentence of less than a year in prison.<sup>234</sup> Driving under the influence is a very serious crime, as it can put many people at risk. Currently, alcohol abuse has risen significantly, especially when military personnel and their accompanying civilians are stationed overseas.<sup>235</sup> Alcohol abuse is prominent among military members and civilians who are stationed in Iraq and Afghanistan.<sup>236</sup> The alcohol is readily available in

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232. *Id.*

233. *Id.*

234. *DUI or DWI Punishments and Practices*, NOLO, <https://www.nolo.com/legal-encyclopedia/dui-or-dwi-punishments-penalties-30321.html> [perma.cc/L67G-DVJW] (in most states in the U.S. the maximum punishment for a DUI or a DWI is less than one year of imprisonment in jail, which would not be punishable under MEJA jurisdiction).

235. *Alcohol Abuse and Military Personnel*, THE CABIN (Sept. 3, 2012), <https://www.thecabin Chiangmai.com/alcohol-abuse-and-military-personnel/> [perma.cc/Z2FL-MP3H] (points out that the term “military personnel” is used to refer both to active duty servicemembers as well as civilians who are accompanying those servicemembers overseas).

236. *Id.*

those states and cheaper than in the U.S., as it is sold both on base and by the locals.<sup>237</sup> With such an obvious problem within the DOD, and especially within the DOD overseas, the federal government should want to do more to remedy the abuse. One way to accomplish this is to ensure the civilians overseas know that their crimes will not go unpunished. Even if the individual crime does not go all the way to the prosecution phase, the individual should be aware that prosecution and subsequent punishment is possible. In addition, it is important that Iraq and Afghanistan know that the U.S. has control over the individuals it sends to those states.

Another example of a crime that is not punishable under MEJA is criminal sexual misconduct because, again, it is not punishable for up to a year of imprisonment since it is considered a misdemeanor in most states.<sup>238</sup> Sexual misconduct is defined as “harassment, unwanted touching . . .”<sup>239</sup> It is well known that sexual crimes are an issue among military members and on military installations.<sup>240</sup> But when a civilian overseas on a military installation commits a sexual crime that cannot be punished for more than a year in prison, that civilian cannot be prosecuted. If Congress were to amend MEJA to include all crimes, then that problem is easily solved. Again, not every crime has to be fully prosecuted. However, it provides an avenue in the instance that a crime does need to be prosecuted, such as if a contractor commits sexual misconduct against a citizen of the receiving state. The fact that the U.S. could prosecute that individual will help improve international relations with that receiving state. It will allow the receiving state to know that the U.S. does take responsibility for the individuals that the U.S. sends to their state.

Other crimes could potentially have a negative international impact that currently are not able to be prosecuted under MEJA simply because they are not considered serious enough by the authors of MEJA. The result of Congress amending MEJA to include all crimes would be positive, as the international community would see that the U.S. has the ability to take accountability for all crimes committed by the individuals the U.S. sends to these receiving states.

*B. Amending MEJA to Include All Individuals Working Overseas for or on Behalf of the U.S. Government*

Including all U.S. citizens and individuals who are not U.S. citizens, but who

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237. *Id.*

238. *Sexual Misconduct*, JUSTIA, <https://www.justia.com/criminal/offenses/sex-crimes/sexual-misconduct/> [perma.cc/QPK7-9CZG] (defines sexual misconduct and that the maximum punishment for the crime is generally less than one year of imprisonment).

239. *Id.*

240. Reuters Staff, *Pentagon Discloses Data on Sexual Assault Reports on Military Bases*, REUTERS (Nov. 17, 2017), <https://www.reuters.com/article/us-usa-military-sexualassault/pentagon-discloses-data-on-sexual-assault-reports-on-military-bases-idUSKBN1DH2TT> [perma.cc/HM3R-9RPM] (lists instances of sexual assault at certain military installations including an overseas base in South Korea).

are overseas working for the U.S. in some governmental capacity, allows the government to have a possible venue for it to prosecute. This eliminates the possibility of someone avoiding prosecution because of the department they are working for or on behalf of. Again, every case need not be prosecuted, but it will allow the U.S. Attorney to use discretion in considering every case.

Congress has attempted this change a few different times. In 2007, Congress first tried to expand the scope of MEJA to include all private contractors working in combat zones.<sup>241</sup> The amendment was passed overwhelmingly in the House with a 389 to 30 vote.<sup>242</sup> However, the White House objected to expanding the scope to include all contractors working under all U.S. agencies overseas, arguing that the amendment was vague about the proximity to the conflict.<sup>243</sup>

In 2014, Senator Leahy and Representative Price introduced the Civilian Extraterritorial Jurisdiction Act (CEJA) which would hold all U.S. government employees and contractors working overseas accountable to U.S. law.<sup>244</sup> Senator Leahy originally worked to pass MEJA in 2000, and its amendment in 2004.<sup>245</sup> Senator Leahy cited incidents such as the Nisour Square incident where civilians had been injured or killed due to misconduct of U.S. employees and contractors as the need behind CEJA.<sup>246</sup> He explained that “our allies, including those countries most essential to our counterterrorism and national security efforts, work best with us when we hold our own accountable.”<sup>247</sup> Senator Leahy also cited an incident where a 20-year-old U.S. citizen was hired by a U.S. government contracting business overseas in Iraq. In her first week there she was drugged and gang-raped by coworkers.<sup>248</sup> Her attackers, he explains, would have been able to be prosecuted under CEJA.<sup>249</sup> Unfortunately, CEJA was not passed in Congress.

CEJA, or a similar bill, should be passed in Congress. This would expand

241. Jonathon Weisman, *House Acts in Wake of Blackwater Incident*, WASH. POST (Oct. 5, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/10/04/AR2007100400282.html> [perma.cc/9GWK-LC42] (explains how Congress responded to the Blackwater incident and the inability to prosecute some of the contractors who were responsible for the scandal).

242. *Id.*

243. *Id.*

244. Press Release, U.S. Senator Patrick Leahy of Vermont, Leahy, Price Introduce Legislation To Hold American Contractors Overseas Accountable Under U.S. Law (Jul. 14, 2014), <https://www.leahy.senate.gov/press/leahy-price-introduce-legislation-to-hold-american-contractors-overseas-accountable-under-us-law> [perma.cc/ED8Y-CFYW] (explains the Senator’s rationale behind proposing the CEJA legislation and the importance of passing the legislation through both the Senate and the House).

245. *Id.*

246. *Id.*

247. *Id.*

248. *Id.*

249. Leahy, Price Introduce Legislation To Hold American Contractors Overseas Accountable Under U.S. Law, *supra* note 244.

U.S. jurisdiction and allow the U.S. government to hold all its employees and contractors accountable to U.S. law. Even if the DOJ decides not to move forward with prosecuting a government employee or contractor overseas who commits a crime, at least the DOJ would have the ability to prosecute them in the U.S. Otherwise, the only venue the U.S. citizen can be prosecuted in is the receiving state. The U.S. should not leave the prosecution of its own citizens with another state, because the U.S. cannot ensure the same fair and equitable trial that the citizen would receive in the U.S. In addition, the reason that individual is in that state is because the U.S. sent him there. Therefore, that individual should be afforded U.S. constitutional protections.

*C. Implementing a Procedure for the JAGs to Refer MEJA Cases*

Implementing a procedure will ensure the discretion to prosecute is solely with the DOJ. In addition, it will be the U.S. Attorney's responsibility to consider the international impact the prosecution of a case may have. No special intent existed at the creation of MEJA when it came to the role that the military would play in prosecuting under this new jurisdiction.<sup>250</sup>

It is important to note that the JAGs will continue to have authority over those who fall under Uniform Code of Military Justice (UCMJ) jurisdiction. These include any individuals listed in Article 2 of the UCMJ: members of the armed forces, retired members of the armed forces, and contractors working with the DOD in times of declared war or a contingency operation.<sup>251</sup> The fact that retired members of the armed forces can still be subject to prosecution under the UCMJ is significant because many contractors working overseas are retired servicemembers. It is possible that many times, the DOJ will begin investigating a case, and will later discover that the individual they are investigating is a retiree.<sup>252</sup> In that case, the DOJ will then usually hand the case back over to the JAGs.<sup>253</sup>

The procedure should be simple. It is important that recommendations A and B are implemented. When a crime is committed on an overseas military installation, the military should immediately begin investigating the crime. The military investigators should notify the designated JAG that a crime may have occurred. The JAG should take note of the crime that occurred and who is

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250. Schmitt, *supra* note 11, at 124.

251. 10 U.S.C. § 802 (2016) (lists individuals who are subject to prosecution under the UCMJ).

252. See *\$100k Security Contracting Jobs for Veterans*, G.I. JOBS, <https://www.gijobs.com/contracting-jobs-for-veterans-overseas/> [<https://perma.cc/PTL4-R5RY>].

253. See Memo regarding UCMJ Jurisdiction Over DoD Civilian Employees, DoD Contractor Personnel, and Other Persons, *supra* note 141 at attachment 2 (“[C]ommanders of geographic combatant commands, and only those commanders assigned or attached to the combatant command who possess general court-martial convening authority, may exercise court-martial convening authority and impose nonjudicial punishment over persons subject to Article 2(a)(10), UCMJ, jurisdiction with respect to offenses committed outside the ‘United States . . .’”).

suspected of committing the crime. If the suspect may be subjected to the UCMJ, the military should take full custody of the case and the DOJ will not have to be involved. A significant number of U.S. employees and contractors who are sent overseas are subject to the UCMJ since they are former servicemembers.<sup>254</sup> If the individual is not subjected to the UCMJ, the case should be referred to the designated attorney in the Human Rights and Special Prosecutions (HRSP) section of the DOJ. The JAG should ensure that the designated attorney is informed of which government agency the individual works for and the crime that was committed. It will then be solely the DOJ's decision whether to file charges against the individual. This eliminates a gap that is created when both the military and the DOJ use discretion on whether to prosecute a case. The DOJ attorney needs to ensure that both the individual and the crime fall under MEJA jurisdiction. If one or the other does not, then the U.S. Attorney will not be able to prosecute the case. Under the above recommendations, the U.S. Attorney will be able to prosecute any individual who is working for, on behalf of, or accompanying the U.S. who committed a crime under U.S. law. The discretion on whether to prosecute should be left solely up to the attorney in the DOJ.

If the DOJ does decide to prosecute the individual, it should work directly with the designated JAG to ensure that the crime is investigated properly and that the individual is properly detained and provided with counsel. The DOJ and the DOD should work together to ensure that JAGs have training on how to adequately defend civilians because it will be necessary for the DOD to provide a JAG to represent the defendant once charges are filed and until the defendant is transferred to the U.S.

It is important that the discretion on determining international impact is left solely with the DOJ. The JAGs have other duties and responsibilities to fulfill, and it should not be their responsibility to also decide whether the international implications are worth prosecuting a civilian. The JAGs do not have any experience in prosecuting civilians, and those decisions should be left to the DOJ.

## V. CONCLUSION

The passage and implementation of MEJA was vital to maintain the U.S.'s successful international relations as well as uphold the principles this great nation was founded on by ensuring that criminals are adequately prosecuted. A significant amount of work still needs to be done by Congress, the DOD, and the DOJ. A U.S. citizen should never be able to avoid prosecution, much less for a violent crime such as murder, rape, or torture. The U.S. is a leader in human rights, and is known globally for its fair and equitable justice system for both the victims and the defendants. Other states model their criminal justice system after the U.S., because they have seen how successful and equitable it is. The U.S. should be doing the utmost work to ensure that it maintains amicable international relations with its global neighbors, especially the other states in which the U.S. has a presence.

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254. *\$100k Security Contracting Jobs for Veterans*, supra note 252.

In U.S. history, the legislative, judicial, and executive branches all recognized that a jurisdictional gap existed, and they sought to close that gap by passing MEJA and its subsequent amendments. The legislative, judicial, and executive branches must now come together again, almost twenty years later, to close the jurisdictional gap that still exists and is causing problems today. If the U.S. is going to rely on contractors to do the work of its military, then it must hold them accountable for their actions.

It is imperative that Congress act to ensure that jurisdiction and a courtroom are available for all U.S. citizens. Congress must take steps to expand MEJA to include all U.S. crimes and all U.S. citizens, whatever agency or department they may be working under, for, or in conjunction with. The DOD needs to establish a procedure that focuses on referring all crimes to the DOJ so as to leave sole discretion of prosecution with the U.S. Attorneys.

The fate of U.S. international relations should not be left in flux solely because the U.S. cannot prosecute crimes its own citizens commit. The U.S. must take these additional steps to maintain the ideals and principles, and the fair and equitable criminal justice system, upon which the country was founded.