

# Comrades in Arms: Using the Uniform Code of Military Justice and the Military Extraterritorial Jurisdiction Act to Prosecute Civilian-Contractor Misconduct

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*ABSTRACT: This Note proposes that a combined litigation team of Department of Justice attorneys, Department of Defense attorneys, and Judge Advocates General can use the Uniform Code of Military Justice and the Military Extraterritorial Jurisdiction Act to prosecute alleged misconduct of civilian employees of private military firms that occurs abroad. The Supreme Court and lower courts have not always been amenable to the exercise of court-martial jurisdiction over civilians, but a recent statutory change in the Uniform Code of Military Justice makes possible such an exercise. This statutory change responds to the same concern that spurred the enactment of the Military Extraterritorial Jurisdiction Act: misconduct of civilian employees of private military firms that occurs abroad. This Note analyzes the two statutes and how their separate grants of jurisdiction interact to provide a basis for the prosecution of civilian contractors abroad.*

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## I. INTRODUCTION

It was Sunday, September 16, 2007, at 11:53 a.m., when a bomb exploded twenty-five yards away from a personal-security detail and a tactical-support team (“TST”) in Baghdad, Iraq.<sup>1</sup> TST 22 reacted to protect an official who was visiting the Izdihar financial compound.<sup>2</sup> The team successfully escorted the official back to the Green Zone<sup>3</sup> “without incident.”<sup>4</sup> Moments later, another unit, TST 23, drove from the Green Zone to assist TST 22 and the personal-security detail,<sup>5</sup> but it instead found itself in a situation that resulted in the deaths of seventeen Iraqis.<sup>6</sup>

TST 23 came under attack from small-arms fire in Nisoor Square and returned fire.<sup>7</sup> Witnesses of the event and others who arrived after the shootings contest the characterization of the event as an ambush.<sup>8</sup> Recalling the incident, a member of TST 23 said that he initially fired in response to a car that had maneuvered too close to the convoy.<sup>9</sup> He then fired a second time in response to small-arms fire that originated from a nearby shack.<sup>10</sup> The TST member also responded to various other threats.<sup>11</sup> TST 23 then moved out of the ambush area and returned to the Green Zone, covering its exit with smoke.<sup>12</sup> TST 22, the team that TST 23 was supposed to help, drove

1. Steve Fainaru & Stephen Raghavan, *Blackwater Faced Bedlam, Embassy Finds*, WASH. POST, Sept. 28, 2007, at A1.

2. *Id.* (quoting a Department of State report).

3. “[T]he 4-sq.-mi. Green Zone (officially called the International Zone) sits in the middle of Baghdad . . . . Since the ouster of Saddam Hussein, the Green Zone has been the seat of U.S. power in Iraq . . . .” Brian Bennett, *Last Call in Iraq*, TIME, May 7, 2007, at 34, 34.

4. Fainaru & Raghavan, *supra* note 1 (quoting a Department of State report).

5. *Id.*

6. Initial reports cited fewer deaths, *see id.* (reporting eleven deaths), but later reports cited seventeen. James Glanz & Alissa J. Rubin, *From Errand to Fatal Shot to Hail of Fire to 17 Deaths*, N.Y. TIMES, Oct. 3, 2007, at A1.

7. Fainaru & Raghavan, *supra* note 1.

8. David Johnston & John M. Broder, *F.B.I. Says Guards Killed 14 Iraqis Without Cause*, N.Y. TIMES, Nov. 14, 2007, at A1 (“Federal agents investigating the Sept. 16 episode . . . have found that at least 14 of the shootings were unjustified and violated deadly-force rules in effect for security contractors in Iraq, according to civilian and military officials briefed on the case.”); Sudarsan Raghavan & Josh White, *Blackwater Guards Fired at Fleeing Cars, Soldiers Say*, WASH. POST, Oct. 12, 2007, at A1 (“[The] soldiers’ report—based upon their observations at the scene, eyewitness interviews and discussions with Iraqi police—concluded that there was ‘no enemy activity involved’ and described the shootings as a ‘criminal event.’”).

9. Sworn Statement by “Paul,” Protective Sec. Specialist, Blackwater Worldwide, to Diplomatic Sec. Serv., U.S. Dep’t of State (Sept. 18, 2007), *available at* [http://abcnews.go.com/images/Blotter/Gunner\\_blackwater\\_abcnews\\_071114.pdf](http://abcnews.go.com/images/Blotter/Gunner_blackwater_abcnews_071114.pdf); *see also* Ginger Thompson, *From Texas to Iraq, and Center of Iraq Case*, N.Y. TIMES, Jan. 19, 2008, at A4 (providing biographical information on “Paul”).

10. Sworn Statement by “Paul,” *supra* note 9.

11. *Id.*

12. Fainaru & Raghavan, *supra* note 1.

back to Nisoor Square to assist.<sup>13</sup> TST 23, the original responders, had departed, but a quick-reaction force of Iraqi Army and Iraqi police prevented TST 22 from leaving.<sup>14</sup> A U.S. Army quick-reaction force (“QRF”) “mediated” TST 22’s release from the scene, and “escorted TST 22 . . . back to the Green Zone.”<sup>15</sup> Seventeen Iraqis lay dead in and around Nisoor Square.<sup>16</sup>

The members of TSTs 22 and 23 worked for Blackwater Worldwide<sup>17</sup> (“Blackwater”), a company that specializes in providing a wide range of military services.<sup>18</sup> Blackwater and other private military firms have been regular fixtures in the news headlines for the past few years. They have been involved in some extremely difficult situations while providing services for their employer, the U.S. government.<sup>19</sup> The recent discussion about these companies centers on a few key questions: Who are they? What services do they provide for the government? What happens when someone alleges criminal misconduct on their part?

The government employs private military firms (“PMFs”) to free up soldiers, sailors, marines, and airmen for active combat roles. The U.S. government relies heavily on contractors to perform myriad tasks on the battlefield.<sup>20</sup> The increased specialization in and technological requirements of maintaining military equipment necessitate the use of the expertise that contractors can provide.<sup>21</sup>

Government use of PMFs can provide another practical benefit by facilitating the application of force in the face of domestic apathy or antipathy. Contracting for certain services can facilitate accomplishment of

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13. *Id.*

14. *Id.*

15. *Id.* (quoting a Department of State report).

16. *See supra* note 6 (discussing the final death count).

17. Fainaru & Raghavan, *supra* note 1.

18. *See* Blackwater Worldwide, <http://www.blackwaterusa.com> (last visited Oct. 11, 2008) (listing various Blackwater services such as “Training” and “Mobility & Logistics”).

19. *See* ROBERT YOUNG PELTON, LICENSED TO KILL: HIRED GUNS IN THE WAR ON TERROR 130–33 (2006) (describing the April 2004 ambush and killing of a Blackwater security detail and the subsequent desecration of the detail members’ corpses); *id.* at 147 (describing how a Blackwater pilot provided medical evacuation for a U.S. soldier wounded during a siege of a Coalition Provisional Authority outpost); Andrew E. Kramer & James Glanz, *U.S. Guards Kill 2 Iraqi Women in New Shooting*, N.Y. TIMES, Oct. 10, 2007, at A1 (describing Blackwater’s Nisoor Square incident and another similar incident involving a different firm).

20. P.W. SINGER, CAN’T WIN WITH ‘EM, CAN’T GO TO WAR WITHOUT ‘EM: PRIVATE MILITARY CONTRACTORS AND COUNTERINSURGENCY 2 (Brookings Inst., Foreign Policy Paper Series No. 4, 2007), available at <http://www.brookings.edu/~media/Files/rc/papers/2007/0927militarycontractors/0927militarycontractors.pdf>.

21. *See* J. Ricou Heaton, *Civilians at War: Reexamining the Status of Civilians Accompanying the Armed Forces*, 57 A.F. L. REV. 155, 190 (2005) (“Examples of weapons in the United States inventory dependent on contractor maintenance include the F-117 Stealth fighter, the M1-A1 tank, the Patriot missile, the B-2 stealth bomber, the Apache helicopter, and many naval surface warfare ships.”).

national objectives when nations wish to use military force without arousing public scrutiny or mobilizing public opinion.<sup>22</sup> Such circumvention can make for splashy headlines and can have a broad, shocking impact when accounts of contractors allegedly committing crimes emerge.

Public outcry and scrutiny logically result. The infamous Abu Ghraib scandal implicated contractors.<sup>23</sup> The Nisoor Square incident recounted above has renewed congressional and media scrutiny of contractors.<sup>24</sup> This renewed scrutiny spurs questions such as: Who or which entity in the U.S. government is responsible for regulating force? For the most part, the White House has not contested the central role of PMFs in fighting the “Global War on Terror,” although Congress is increasing its examination of the issue.<sup>25</sup> The scholarship that deals with this topic seems to consistently invoke the character of Milo Minderbinder from *Catch-22*: “Frankly, I’d like to see the government get out of war altogether and leave the whole field to private industry.”<sup>26</sup> This quotation is instructive in prompting an inquiry into the state’s traditional monopoly on military power.

22. SINGER, *supra* note 20, at 8 (“[P]rivate military contractors have been utilized because they appear to be a convenient way to shift or avoid the direct political costs of an operation.”); The Spy Who Billed Me, NATO to Outsource the Unpopular Afghan War, [http://www.thespywhobilledme.com/the\\_spy\\_who\\_billed\\_me/2007/10/nato-to-outsour.html](http://www.thespywhobilledme.com/the_spy_who_billed_me/2007/10/nato-to-outsour.html) (Oct. 16, 2007) (citing Fidelius Schmid, *Nato Privatisiert Afghanistankrieg*, FIN. TIMES DEUTSCHLAND, Oct. 15, 2007).

23. See Fredrick A. Stein, *Have We Closed the Barn Door Yet? A Look at the Current Loopholes in the Military Extraterritorial Jurisdiction Act*, 27 HOUS. J. INT’L L. 579, 590 (2005). (“[Contractor] offenses included making false statements and possibly instructing untrained military police to facilitate interrogations by ‘setting conditions’ that were not authorized and that were known to equate to physical abuse.”).

24. See Sabrina Tavernise, *U.S. Contractor Banned by Iraq over Shootings*, N.Y. TIMES, Sept. 18, 2007, at A1 (describing the Nisoor Square incident and the outrage that followed it).

25. See generally *Private Security Contracting in Iraq and Afghanistan: Hearing Before the H. Comm. on Oversight and Government Reform*, 110th Cong. 3–9 (2007) (statement of Rep. Henry A. Waxman, Chairman, H. Comm. on Oversight and Government Reform); JENNIFER K. ELSEA ET AL., CONG. RESEARCH SERV., PRIVATE SECURITY CONTRACTORS IN IRAQ: BACKGROUND, LEGAL STATUS, AND OTHER ISSUES 31 (2008), available at <http://www.fas.org/sgp/crs/natsec/RL32419.pdf> (“The use of private contractors in personal security and military operations raises many questions regarding the appropriateness and practicality of entrusting private companies with duties that have been traditionally reserved for military and civilian federal personnel.”); Memorandum from the Majority Staff to the House Comm. on Oversight and Gov’t Reform (Oct. 1, 2007) [hereinafter Majority Staff Memo], available at <http://oversight.house.gov/documents/20071001121609.pdf>. Entities outside of the U.S. government have given extensive consideration to this issue. See PROGRAM IN LAW & PUB. AFFAIRS, PRINCETON UNIV., PRINCETON PROBLEM-SOLVING WORKSHOP SERIES IN LAW AND SECURITY: A NEW LEGAL FRAMEWORK FOR MILITARY CONTRACTORS? 9 (2007) [hereinafter PRINCETON WORKSHOP], available at [http://lapa.princeton.edu/conferences/military07/MilCon\\_Workshop\\_Summary.pdf](http://lapa.princeton.edu/conferences/military07/MilCon_Workshop_Summary.pdf) (“[Some] participants argued that the monopoly on the use of force is at the core of the uniformed military’s responsibilities. . . . Another participant argued that outsourcing security inevitably produces chaos that undermines the efficacy of commanders on the battlefield.”).

26. JOSEPH HELLER, *CATCH-22*, at 269 (Simon & Schuster 1996) (1961) (internal quotation marks omitted). For examples of others who have used this quote, see P.W. SINGER, CORPORATE

By looking at Milo Minderbinder's actions throughout the novel, one can begin an even more probing inquiry into how PMFs subsist: Milo contracts with U.S. forces to transport extravagant European foodstuffs to U.S. Army mess halls; he contracts with the United States to bomb a bridge held by Third Reich forces and with the Third Reich to defend the bridge against the same attack; and then he contracts with Nazi Germany to bomb his own unit for monetary gain after a business deal gone awry.<sup>27</sup> None of these fictional activities were possible without government resources, people, and acquiescence. Likewise, in the world of nonfictional combat zones, PMFs need the government; but does the government need PMFs?<sup>28</sup> Regardless of the answer to that question, PMFs are a creature of the U.S. government, and as such, the government needs to use the tools at its disposal to guide that creation.

The United States does not necessarily have to cede its traditional control over the application of force when it signs a contract with a PMF. In fact, the United States retains a number of tools that can protect U.S. prerogative and punish misapplications of deadly force.<sup>29</sup> Different bodies of law provide bases on which to address alleged acts of wrongdoing; contract law, tort law, and criminal law are options, among others.<sup>30</sup> Two statutory

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WARRIORS: THE RISE OF THE PRIVATIZED MILITARY INDUSTRY 230 (2003); Saad Gul, *The Secretary Will Deny All Knowledge of Your Actions: The Use of Private Military Contractors and the Implications for State and Political Accountability*, 10 LEWIS & CLARK L. REV. 287, 287 (2006); K. Elizabeth Waits, Note, *Avoiding the "Legal Bermuda Triangle": The Military Extraterritorial Jurisdiction Act's Unprecedented Expansion of U.S. Criminal Jurisdiction over Foreign Nationals*, 23 ARIZ. J. INT'L & COMP. L. 493, 541 (2006).

27. HELLER, *supra* note 26, at 261–69. As a conclusion to this part of the novel's narrative, Milo Minderbinder faces virulent opprobrium from an outraged public at home: "Decent people everywhere were affronted, and Milo was all washed up until he opened his books to the public and disclosed the tremendous profit he had made." *Id.* at 269.

28. See SINGER, *supra* note 20, at 13–18 (arguing that the use of PMFs undermines U.S. foreign policy, particularly in Iraq); Jon D. Michaels, *Beyond Accountability: The Constitutional, Democratic, and Strategic Problems with Privatizing War*, 82 WASH. U. L.Q. 1001, 1009–10 (2004) (positing that the use of PMFs violates constitutional law, undermines the performance of the U.S. armed forces, and jeopardizes U.S. foreign policy); Jeffrey S. Thurnher, *Drowning in Blackwater: How Weak Accountability over Private Security Contractors Significantly Undermines Counterinsurgency Efforts*, ARMY LAW., July 2008, at 64, 90 (arguing for reduced governmental reliance on PMFs).

29. See *infra* note 30 and accompanying text (outlining different legal methods to constrain contractors' conduct).

30. A number of substantive legal approaches could facilitate the regulation of PMFs on the battlefield and perhaps achieve the goal of ensuring that PMFs work in concert with U.S. principles. See Laura A. Dickinson, *Public Law Values in a Privatized World*, 31 YALE J. INT'L L. 383, 403–04 (2006) (arguing that drafting certain norms into the four corners of a contract between a government and a PMF would provide accountability); Marc Lindemann, *Civilian Contractors Under Military Law*, PARAMETERS, Autumn 2007, at 83, 91–92 (positing that the use of the contractual relationship between a contractor and the Department of Defense could provide an effective way of regulating contractor conduct); Christopher H. Lytton, *Blood for Hire: How the War in Iraq Has Reinvented the World's Second Oldest Profession*, 8 OR. REV. INT'L L. 307, 331 (2006)

provisions in particular offer an attractive way to prosecute improper uses of force: the Military Extraterritorial Jurisdiction Act (“MEJA”)<sup>31</sup> and the *Uniform Code of Military Justice* (“UCMJ”).<sup>32</sup>

This Note argues that these two statutes can restrain and effectively punish the wrongful use of force by PMFs.<sup>33</sup> Congress passed the MEJA with the specific intent of prosecuting crimes of civilians who accompany the armed forces overseas, whether the civilian is in a contracting role or is a dependent of a service member.<sup>34</sup> The UCMJ, on the other hand, traditionally has governed only the conduct of service members in the armed forces. However, a recent statutory change to the UCMJ expands its jurisdiction over civilian contractors who accompany the armed forces to the field.<sup>35</sup> The coexistence of two statutes designed to regulate conduct through two distinct authorities—civil and military—gives rise to some important issues. A key question that arises regarding the prosecution

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(describing how the Arms Export Control Act regulates the export of military goods and services); Heather Carney, Note, *Prosecuting the Lawless: Human Rights Abuses and Private Military Firms*, 74 GEO. WASH. L. REV. 317, 336 (2006) (arguing for prosecution of alleged PMF misconduct in the International Criminal Court); Kateryna L. Rakowsky, Note, *Military Contractors and Civil Liability: Use of the Government Contractor Defense to Escape Allegations of Misconduct in Iraq and Afghanistan*, 2 STAN. J. RTS. & CIV. LIBERTIES 365, 366 (2005) (arguing that civil liability and a limited application of sovereign immunity to PMFs can operate to hold PMFs accountable for wrongdoing). Additionally, Iraqi law could provide an avenue of prosecution. *But see Protecting American Employees from Workplace Discrimination: Hearing Before the Subcomm. on Health, Employment, Labor, and Pensions of the H. Comm. on Education and Labor*, 110th Cong. 13 (2008) (statement of Jamie Leigh Jones, former employee, Halliburton/KBR) (“When I decided to pursue a civil suit, I was informed that . . . [an] arbitration clause . . . mandated that I could not get justice from the civil court system. I learned that I had signed away my right to a trial by jury.”); Coalition Provisional Authority Order No. 17 (Revised), Status of the Coalition Provisional Authority, MNF-Iraq, Certain Missions and Personnel in Iraq, § 4(2) (June 27, 2004), available at [http://www.cpa-iraq.org/regulations/20040627\\_CPAORD\\_17\\_Status\\_of\\_Coalition\\_Rev\\_with\\_Annex\\_A.pdf](http://www.cpa-iraq.org/regulations/20040627_CPAORD_17_Status_of_Coalition_Rev_with_Annex_A.pdf) (“Contractors shall be immune from Iraqi legal process with respect to acts performed by them pursuant to the terms and conditions of a Contract or any sub-contract thereto.”); Tyler Cowen, *To Know Contractors, Know Government*, N.Y. TIMES, Oct. 28, 2007, at BU6 (“[W]hatever the possible sins of the Blackwater firm, the overall problem is not private contracting in itself; contractors do not set the tone but rather reflect the sins and virtues of their customers, namely their sponsoring governments.”); Thom Shanker & Steven Lee Myers, *U.S. Asking Iraq for Wide Rights on War*, N.Y. TIMES, Jan. 25, 2008, at A1 (reporting that the United States desires to “guarantee civilian contractors specific legal protections from Iraqi law”). For the most part, examination of the above and other alternatives lies outside the scope of this Note.

31. Military Extraterritorial Jurisdiction Act of 2000, Pub. L. No. 106-523, 114 Stat. 2488 (codified as amended at 18 U.S.C. §§ 3261–3267 (2000 & Supp. IV 2004)).

32. Uniform Code of Military Justice, Pub. L. No. 81-506, 64 Stat. 107 (1950) (codified as amended at 10 U.S.C.A. §§ 801–946 (West 1998 & Supp. 2008)).

33. See *infra* Part IV.B (recommending the formation of a team of attorneys that could use the two statutes together to effectively prosecute contractor crime).

34. See *infra* Part II.C.3 (tracing the development and use of the MEJA).

35. See *infra* Part III.A.1 (examining the new statutory language).

of a crime committed on the battlefield by a contractor is: Who takes jurisdiction, and by which statute?

These two statutes could operate together to create an effective prosecutorial scheme. More clarity, however, is needed about how these two parts of the *United States Code* operate and interact.<sup>36</sup> Although the Secretary of Defense has promulgated regulations regarding the implementation of the MEJA directive<sup>37</sup> and the recent change to the UCMJ,<sup>38</sup> no regulations address the potential intersection of the two statutes. This overlap could develop into a jurisdictional nightmare—where no agency has any idea who has responsibility for what—and perhaps even obstruct an agency legitimately entitled to investigate and prosecute.<sup>39</sup>

One way to ensure that this scenario never materializes is to never prosecute a crime with the new UCMJ language; the other way is to posit a method to use both of the statutes that Congress has provided. If an experienced, well-rehearsed prosecution team can use these two statutes in concert, a synergistic effect might take place, resulting in a greater likelihood of a conviction than would have existed with an uncoordinated prosecution. Some federal crimes not available under the UCMJ could be available for the prosecution team.<sup>40</sup> Some UCMJ offenses not available to the civilian federal system might be available with a dual prosecution.<sup>41</sup>

This Note assumes that the problem at hand involves U.S. civilians employed by a U.S. PMF, under government contract, who have allegedly committed crimes in a combat zone.<sup>42</sup> The Note will first explain critical terms of art.<sup>43</sup> It will then provide critical background on the development

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36. See *infra* Part III.C (exploring the interaction of these two jurisdictional statutes).

37. See *infra* note 216 and accompanying text (discussing the implementation of regulations in accordance with the MEJA).

38. See *infra* notes 245–62 and accompanying text (discussing guidance issued by the Secretary of Defense).

39. To a certain degree, an internecine conflict demonstrates this danger. Different government agencies are complaining about not having proper access to investigate the Nisoor Square incident. Richard A. Opiel, Jr. & Michael R. Gordon, *U.S. Military and Iraqis Say They Are Shut Out of Inquiry*, N.Y. TIMES, Oct. 11, 2007, at A19; see also Karen DeYoung, *Immunity Jeopardizes Iraq Probe*, WASH. POST, Oct. 30, 2007, at A1 (reporting that the Department of State's Bureau of Diplomatic Security granted immunity to Blackwater security guards in its investigation, thereby potentially frustrating a subsequent FBI investigation).

40. See *infra* note 218 and accompanying text (describing how the MEJA allows the prosecution of crimes punishable by imprisonment of more than one year).

41. See *infra* notes 191–97 and accompanying text (describing the types of charges allowed under the UCMJ).

42. Naturally, in order to fulfill their contractual obligations, PMFs do hire non-U.S. citizens for certain positions. Significantly, the first exercise of jurisdiction under the new UCMJ language involved a Canadian contractor. See *infra* notes 171–76 and accompanying text (discussing the prosecution of Alaa “Alex” Mohammad Ali). Situations in which non-U.S. citizens or corporations work under contract with the government presumably would engender issues of constitutional and international law, but such issues are outside the scope of this Note.

43. See *infra* Part II.A (examining the critical terminology associated with this topic).

of UCMJ and MEJA case law as it applies to civilians.<sup>44</sup> It will also explain the new grant of jurisdiction to the UCMJ (“Article 2(a)(10) jurisdiction”)<sup>45</sup> that brings civilian contractors under its ambit.<sup>46</sup> After examining the legal merits and demerits of each statute, the Note will propose that the best way to bring criminals to justice is to assemble a standing cadre of Department of Justice (“DOJ”) and Department of Defense (“DOD”) lawyers who can readily accept any lawyers and support personnel seconded to them, who can establish procedures to decide under which statutes they will prosecute alleged crimes, and who have the resources to successfully conduct investigations and prosecutions in combat zones.<sup>47</sup>

## II. BACKGROUND

### A. THE PLAYERS: DEFINITION OF TERMS

This Note will use several terms throughout its entirety, so it is important to define the following at the outset: civilians, contractors, mercenaries, and private military firms (“PMFs”).

The UCMJ does not explicitly define the status of “civilian,” but it does so implicitly and in the negative by listing those persons subject to its jurisdiction. A civilian is a person who has not received a call to military service (either by being drafted or by being recalled from reserve status) and is not receiving any benefit deriving from military service.<sup>48</sup> Further, as another method of forfeiting civilian status, one can voluntarily submit to military authority by enlisting.<sup>49</sup> The Geneva Conventions negatively define

44. See *infra* Part II.C (examining the development of the UCMJ and the MEJA).

45. The current version of this UCMJ Article, as codified in the *United States Code*, includes the “(a)—i.e., “Article 2(a)(10),” or “10 U.S.C. § 802(a)(10)” —whereas before 1979, the “(a)” was omitted, and this particular provision was known as “Article 2(10)” or “10 U.S.C. § 802(10).” See Department of Defense Authorization Act, 1980, Pub. L. No. 96-107, § 801(a)(1), 93 Stat. 803, 810 (1979) (codified as amended at 10 U.S.C. § 802 (2000)) (inserting the “(a)”); Lawrence J. Schwarz, *The Case for Court-Martial Jurisdiction over Civilians Under Article 2(a)(10) of the Uniform Code of Military Justice*, ARMY LAW., Oct.–Nov. 2002, at 31, 32 (“[T]he first versions of the UCMJ incorporated a more limited application of military jurisdiction to civilians in Article 2(10), now known as Article 2(a)(10).”). Therefore, references in this Note to “Article 2(10)” (or “Article 2(11)”) are simply to predecessors of the current jurisdictional grants contained in Article 2.

46. See *infra* Part III.A.1 (explaining the new grant of jurisdiction under the UCMJ).

47. See *infra* Part IV.B (proposing this solution).

48. See 10 U.S.C. § 802(a) (2000) (listing the persons subject to the jurisdiction of the UCMJ). The UCMJ’s jurisdiction encompasses, among other persons: members of a regular component of the armed forces; other persons lawfully called or ordered into duty in the armed forces; retired members of a regular component of the armed forces who are entitled to a pension; persons in custody of the armed forces serving a sentence imposed by a court-martial; prisoners of war; and persons serving with or accompanying an armed force in the field. See *id.*; see also *infra* Part III.A.1 (analyzing the ramifications of the UCMJ’s new jurisdictional language).

49. 10 U.S.C. § 802(b)–(c).

civilian status in a similar manner.<sup>50</sup> Although dependents (i.e., spouses and children) of service members receive benefits due to their sponsor's status, they are not de facto service members.<sup>51</sup>

Under the *United States Code*, contractors are employers who provide services or goods that various executive officers certify as essential to the national defense.<sup>52</sup> This Note will use the term “contractor” to refer to both employer and employee under contract with the U.S. government.<sup>53</sup> Contractors who accompany an armed force are civilians under the Geneva Conventions.<sup>54</sup> Contractors under this status receive an additional protection that other civilians do not: treatment as a prisoner of war (“POW”) should an enemy force capture them.<sup>55</sup> This status presupposes that contractors will not participate directly in hostilities; the consequence of such an action would be a loss of status.<sup>56</sup> Before identifying the entities for which contractors work, it is important to address the pejorative term that some people use to describe contractors: mercenaries. Mercenaries are individuals who fight, or engage in hostilities, for an employer other than their own government, with financial gain motivating their services.<sup>57</sup> Under the Geneva Conventions, a mercenary's primary motivation is private gain.<sup>58</sup>

50. Heaton, *supra* note 21, at 173–74 (citing Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 50, *adopted* June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I]).

51. Reid v. Covert, 354 U.S. 1, 22–23 (1957) (plurality opinion).

52. 41 U.S.C. § 50 (2000).

53. See August Cole, *Blackwater Assailed on Tax Policy—Firm Calls Iraq Guards Independent Contractors*, WALL ST. J., Dec. 3, 2007, at A14 (describing Blackwater's policy of classifying its workers as “independent contractors” versus “employees,” which redounds significant tax savings to Blackwater).

54. Heaton, *supra* note 21, at 174.

55. *Id.* (citing Geneva Convention Relative to the Treatment of Prisoners of War art. 4(4), Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135).

56. *Id.* at 174, 192. *But see* 73 Fed. Reg. 10,943, 10,945–46 (Feb. 28, 2008) (to be codified at 48 C.F.R. § 52.225-19) (response to public comments on proposed rule) (noting the deletion in a final Federal Acquisition Regulation of a clause stating that “[c]ivilians lose their law of war protection from direct attack if and for such time as they take a direct part in hostilities”); 73 Fed. Reg. 16,764, 16,766 (Mar. 31, 2008) (to be codified at 48 C.F.R. § 252.225-7040) (response to public comments on proposed rule) (discussing the same, except in respect of the Defense Acquisition Regulations).

57. SINGER, *supra* note 20, at 41.

58. Heaton, *supra* note 21, at 174–75 (citing Protocol I, *supra* note 50, art. 47). This article reads:

1. A mercenary shall not have the right to be a combatant or a prisoner of war.

2. A mercenary is any person who:

- (a) Is specially recruited locally or abroad in order to fight in an armed conflict;
- (b) Does, in fact, take a direct part in the hostilities;

This desire drives the mercenary to take direct part in hostilities while not a national or soldier of a nation participating in the conflict.<sup>59</sup>

To some, a private military firm (“PMF”) bears a striking resemblance to a mercenary unit, but that is an inaccurate perception. PMFs are “business organizations that trade in professional services intricately linked to warfare.”<sup>60</sup> They are private businesses that deliver the following military and security services: combat operations, planning, intelligence, risk assessment, operational support, training, and technical skills.<sup>61</sup> PMFs distinguish themselves from mercenaries on several criteria. PMFs are corporate entities that use the open market to advertise their services and recruit employees.<sup>62</sup> In addition, governments recognize their legality.<sup>63</sup> And although PMFs seek financial gain, it is part of the corporate desire for profit, not for individualized private gain.<sup>64</sup>

### B. HISTORY OF CONTRACTORS ON THE BATTLEFIELD

The general conception of warfare is that militaries subordinate to central governments have fought wars since time immemorial; however, this

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(c) Is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party;

(d) Is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict;

(e) Is not a member of the armed forces of a Party to the conflict; and

(f) Has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces.

Protocol I, *supra* note 50, art. 47. The United States has signed this Protocol but has not yet ratified it. George H. Aldrich, *Prospects for United States Ratification of Additional Protocol I to the 1949 Geneva Conventions*, 85 AM. J. INT’L L. 1, 1–2 (1991); Theodor Meron, *The Time Has Come for the United States to Ratify Geneva Protocol I*, 88 AM. J. INT’L L. 678, 678 (1994).

59. Protocol I, *supra* note 50, art. 47.

60. SINGER, *supra* note 20, at 8.

61. *Id.* One can further classify firms that perform these diverse military functions into several broad categories, arranged in increasing proximity to active combat. *Id.*

62. See Kristen Fricchione, Note, *Casualties in Evolving Warfare: Impact of Private Military Firms’ Proliferation on the International Community*, 23 WIS. INT’L L.J. 731, 743 (2005) (citing SINGER, *supra* note 20, at 47).

63. 73 Fed. Reg. 10,943, 10,944 (Feb. 28, 2008) (to be codified at 48 C.F.R. § 52.225-19) (response to public comments on proposed rule) (“The United States Government has the authority to hire security guards worldwide.”); 73 Fed. Reg. 16,764, 16,765 (Mar. 31, 2008) (to be codified at 48 C.F.R. § 252.225-7040) (response to public comments on proposed rule) (discussing the same, except in respect of the Defense Acquisition Regulations); see also SINGER, *supra* note 20, at 48 (“Many PMFs do maintain close ties to their home governments, often because of the business advantages.”).

64. SINGER, *supra* note 20, at 46.

conception conflicts with the historical record.<sup>65</sup> It was not until recently that state governments assumed the monopoly over violent conflict.<sup>66</sup> In the United States, contractors' assumption of outright combat roles, or roles that support combat operations, keeps with historical practice. Civilians have supported the nation's armed forces in various roles since the time of the Continental Army.<sup>67</sup>

In recent conflicts, the U.S. government, through the DOD, has used contractors to support its various missions. Governmental policy has channeled many functions previously under the DOD's domain to private entities.<sup>68</sup> The DOD uses contractors to provide "goods . . . and minor construction"; "combat support and combat service support"; and equipment and weapons-systems maintenance.<sup>69</sup>

Contractors' presence on the battlefield poses jurisdictional problems, especially when contractors or other civilians allegedly commit crimes. For example, contractors allegedly participated in the abuses of the Abu Ghraib prison scandal.<sup>70</sup> One report concluded that more than a third of improper incidents at Abu Ghraib involved contractors.<sup>71</sup> In the interests of public policy and justice, the U.S. government should seek to prosecute crimes that accompanying civilians commit. Two statutes that grant jurisdiction in prosecuting crime can support that goal.

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65. *See id.* at 19 ("Throughout history the participants in war were often for-profit private entities loyal to no one government.").

66. *See id.* at 19–20 ("Indeed, when one takes a broad view of history, the 'state' itself is a rather new unit of governance, appearing only in the last four hundred years.").

67. *See* Rebecca Rafferty Vernon, *Battlefield Contractors: Facing the Tough Issues*, 33 PUB. CONT. L.J. 369, 373 (2004) ("As early as the Revolutionary War, contract teamsters provided support to General George Washington's army, feeding the cavalry horses, and hauling supplies." (footnotes omitted)).

68. *See id.* at 375 ("Secretary [of Defense] Rumsfeld stated that there are 'something in the neighborhood of 300,000 men and women in uniform doing jobs that aren't for men and women in uniform.'" (quoting Anthony Bianco & Stephanie Anderson Forest, *Outsourcing War*, BUS. WK., Sept. 15, 2003, at 69, 70)).

69. *See id.* at 379–82 (classifying contractor services into three categories—"theater support contractors, external theater support contractors, and system support contractors"—and discussing each category).

70. Steven L. Schooner, *Contractor Atrocities at Abu Ghraib: Compromised Accountability in a Streamlined, Outsourced Government*, 16 STAN. L. & POL'Y REV. 549, 550 (2005).

71. *See id.* at 555 (discussing GEORGE R. FAY, AR 15-6 INVESTIGATION OF THE ABU GHRAIB DETENTION FACILITY AND 205TH MILITARY INTELLIGENCE BRIGADE (2004), available at <http://news.findlaw.com/hdocs/docs/dod/fay82504rpt.pdf>).

C. THE STATUTES' JURISDICTION OVER CIVILIANS: THE UCMJ AND THE MEJA

1. The Purpose of the UCMJ

Military justice helps accomplish the primary purpose of the armed forces: to win the nation's wars.<sup>72</sup> The U.S. Manual for Courts-Martial states that “[t]he purpose of military law is to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States.”<sup>73</sup> Some have frowned upon or derided the concept of an armed force regulating itself through law.<sup>74</sup> Yet justice and even-handedness are vital to let service members—who have volunteered to serve—know that they will receive a fair trial, just as they would as civilians.<sup>75</sup>

The fairness of a trial was on the minds of many U.S. service members who returned home from World War II having experienced the military-justice system at that time.<sup>76</sup> They were concerned with the lack of legal training of presiding officers and the outsized impact that commanders could exercise on proceedings.<sup>77</sup> Congress enacted the UCMJ as a result.<sup>78</sup> Military justice has evolved from its origins in the Articles of War,<sup>79</sup> to the Civil War-era Lieber Code, to its present codified form.<sup>80</sup>

72. U.S. DEP'T OF THE ARMY, FIELD MANUAL 3-0: OPERATIONS, at viii (2008), available at <http://www.army.mil/fm3-0/fm3-0.pdf> (“[T]he Army’s primary purpose is deterrence, and should deterrence fail, decisively winning the Nation’s wars . . .”).

73. MANUAL FOR COURTS-MARTIAL, UNITED STATES pmbl., pt. I, at I-1 (2008).

74. See Reid v. Covert, 354 U.S. 1, 26–27 (1957) (plurality opinion) (“For martial law, which is built upon no settled principles, but is entirely arbitrary in its decisions, is . . . in truth and reality no law, but something indulged rather than allowed as a law.” (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES \*413)).

75. Daniel Zwerdling, *Respected Marine Lawyer Alleges Military Injustices*, NPR, Oct. 30, 2007, <http://www.npr.org/templates/story/story.php?storyId=15783244> (“[I]f troops believed that commanders manipulate the system of justice, ‘it would destroy morale. You want people in an all-volunteer force to serve willingly. If they think the system is unfair, then they’re not going to re-enlist.” (quoting Tom Hemingway, retired Brigadier General and legal advisor to the Pentagon)).

76. Andrew S. Effron, *The Fiftieth Anniversary of the UCMJ: The Legacy of the 1948 Amendments*, in *EVOLVING MILITARY JUSTICE* 169, 169 (Eugene R. Fidell & Dwight H. Sullivan eds., 2002).

77. *Id.*

78. Uniform Code of Military Justice, Pub. L. No. 81-506, 64 Stat. 107 (1950) (codified as amended at 10 U.S.C.A. §§ 801–946 (West 1998 & Supp. 2008)); Fredric I. Lederer & Barbara Hundley Zeliff, *Needed: An Independent Military Judiciary. A Proposal to Amend the Uniform Code of Military Justice*, in *EVOLVING MILITARY JUSTICE*, *supra* note 76, at 27, 32.

79. Lederer & Zeliff, *supra* note 78, at 31.

80. See Diane Marie Amann, *Punish or Surveil*, 16 *TRANSNAT’L L. & CONTEMP. PROBS.* 873, 878–80 (2007) (tracing the development of the UCMJ). Francis Lieber developed for Union general-in-chief Henry Halleck a treatise that became “America’s first code regulating the conduct of its army in warfare.” David Bosco, *Moral Principle Vs. Military Necessity*, *AM. SCHOLAR*, Winter 2008, at 25, 26. President Lincoln approved the proposed code and issued it to his commanders in May 1863. *Id.*

## 2. Development of Military Jurisdiction over Civilians Through Application of the UCMJ and Case Law

Even before the recent expansion of Article 2(a)(10) jurisdiction, Congress envisioned that, at some point, the UCMJ would provide a jurisdictional basis on which to prosecute civilians.<sup>81</sup> Marc Lindemann notes that “the introduction to each punitive article of the UCMJ does state whether that article applies to ‘any person’ or ‘any member of the armed services.’”<sup>82</sup> To illustrate, he continues, the “offense of absence without leave expressly applies to ‘[a]ny member of the armed forces,’ whereas the offense of murder applies to ‘[a]ny person.’”<sup>83</sup>

The case law governing the applicability of military jurisdiction to civilians has developed in correspondence with the United States’ participation in armed conflicts.<sup>84</sup> This case law alternately adheres to or ignores the congressional intent, resulting in a case-by-case analysis to determine whether a civilian falls under military jurisdiction.<sup>85</sup> Since the passage of the UCMJ, the most significant cases regarding application of military jurisdiction to civilians have been *Reid v. Covert*<sup>86</sup> and *United States v. Averette*,<sup>87</sup> although other signal cases have also guided the way.

The Supreme Court jealously guarded the jurisdiction of Article III courts over service members who had returned to civilian status in the case of *United States ex rel. Toth v. Quarles*.<sup>88</sup> Robert Toth had completed his service with the U.S. Air Force when, five months later, military authorities arrested

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81. 10 U.S.C. § 802(a)(10)–(12) (2000), amended by John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364, § 552, 120 Stat. 2083, 2217 (2006); Lindemann, *supra* note 30, at 90 (“[W]hen Congress first enacted the UCMJ in 1950, legislators had anticipated the application of military law to civilians.”); 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, 62 (2001) (“When the UCMJ was enacted in 1950, it contained three provisions that expressly authorized the use of courts-martial to try civilians accompanying the military for acts that violated the UCMJ.”).

82. Lindemann, *supra* note 30, at 90.

83. *Id.* (alterations in original) (quoting Uniform Code of Military Justice arts. 86, 118; 10 U.S.C. §§ 886, 918 (2000)).

84. See generally David A. Melson, *Military Jurisdiction over Civilian Contractors: A Historical Overview*, 52 NAVAL L. REV. 277, 283–93, 302–14 (2005) (tracing the development of case law concerning military jurisdiction over civilians through the past century).

85. 57 C.J.S. *Military Justice* § 22 (2007) (“In identifying those who are civilians and not within constitutional court-martial jurisdiction, the courts have not delineated a bright line rule but have instead proceeded on a case-by-case basis.” (citing *United States v. Cole*, 24 M.J. 18 (C.M.A. 1987))).

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

87. *United States v. Averette*, 19 C.M.A. 363 (1970).

88. See *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 22–23 (1955) (“There are dangers lurking in military trials which were sought to be avoided by the Bill of Rights and Article III of our Constitution.”).

him on charges of murder and conspiracy to commit murder.<sup>89</sup> He allegedly committed the offenses while an airman stationed in Korea.<sup>90</sup> The military transported him to Korea for court-martial.<sup>91</sup> After Toth's sister filed and pursued the petition for habeas corpus,<sup>92</sup> the Court held, notwithstanding Article 3(a) of the UCMJ,<sup>93</sup> "that Congress cannot subject *civilians like Toth* to trial by court-martial,"<sup>94</sup> and that "the constitutional power of Congress to authorize trial by court-martial . . . [must be limited] to '*the least possible power adequate to the end proposed.*'"<sup>95</sup> The Court determined that Congress's power under Article I, Section 8, Clause 14 of the Constitution ("Clause 14")—to regulate "the land and naval Forces"<sup>96</sup>—did not authorize the extension of "court-martial jurisdiction [past] persons who are actually members or part of the armed forces" because "any expansion of court-martial jurisdiction . . . necessarily encroaches on the jurisdiction of federal courts."<sup>97</sup> The dispositive fact in this case was that Toth had been honorably discharged from his service and had severed ties with the U.S. Air Force.<sup>98</sup> A discharge, however, is not always determinative,<sup>99</sup> especially when a service member fraudulently obtains the discharge.<sup>100</sup> *Toth* seemed to clarify when military jurisdiction would apply to a civilian who had formerly served in the military, but it did not explicitly clarify whether a civilian who had never served in the military could face military jurisdiction.

*Reid* helped answer that question. In *Reid*, spouses of U.S. service members were accused of killing their husbands and faced courts-martial

89. *Id.* at 13.

90. *Id.*

91. *Id.*

92. *Id.*

93. Article 3(a) currently provides:

Subject to section 843 of this title (article 43), a person who is in a status in which the person is subject to this chapter and who committed an offense against this chapter while formerly in a status in which the person was subject to this chapter is not relieved from amenability to the jurisdiction of this chapter for that offense by reason of a termination of that person's former status.

10 U.S.C. § 803(a) (2000). For the language of Article 3(a) when *Toth* was decided, which was similar but not identical to the current language, see *Toth*, 350 U.S. at 13 n.2.

94. *Toth*, 350 U.S. at 23 (emphasis added).

95. *Id.* (quoting *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 230–31 (1821)). The Court later referred to this statement as the "*Toth* doctrine." *McElroy v. United States ex rel. Guagliardo*, 361 U.S. 281, 286 (1960). *But see Solorio v. United States*, 483 U.S. 435, 440 n.3 (1987) (characterizing the *Toth* doctrine as "dictum" and further stating that the doctrine may or may not be limited to assertions of military jurisdiction over ex-service members).

96. U.S. CONST. art. I, § 8, cl. 14.

97. *Toth*, 350 U.S. at 15.

98. *United States v. Cole*, 24 M.J. 18, 22 (C.M.A. 1987), *cert. denied*, 484 U.S. 828 (1987).

99. *Id.* (citing *Reid v. Covert*, 354 U.S. 1, 22–23 (1957) (plurality opinion)).

100. *Id.* (citing WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 89 n.46 (2d ed. reprint 1920) (1896)).

under an assertion of jurisdiction pursuant to UCMJ Article 2(11).<sup>101</sup> These killings took place abroad—on an airbase in England and at a post in Japan.<sup>102</sup> After consolidation of the cases and an earlier ruling by the Court that such courts-martial were not “unreasonable or arbitrary when applied to dependents accompanying members of the armed forces overseas,” the Court granted a petition for rehearing.<sup>103</sup>

The Court reached a different conclusion upon rehearing: it ordered that both spouses be released from custody.<sup>104</sup> In delivering the opinion, Justice Black held that foreign treaties do not constrain constitutional guarantees.<sup>105</sup> Further, the Court held that trial of civilian dependents in military courts would impermissibly deny them their constitutional rights.<sup>106</sup> The Court invoked Clause 14—stating that “Clause 14 does not encompass persons who cannot fairly be said to be ‘in’ the military service”—but did not go so far as to hold that civilians could never fall under military jurisdiction: “We recognize that there might be circumstances where a person could be ‘in’ the armed services for purposes of Clause 14 even though he had not formally been inducted into the military or did not wear a uniform.”<sup>107</sup> Justice Harlan concurred in the result and stated that military jurisdiction should not apply to a civilian dependent accused of a capital offense.<sup>108</sup>

Three companion cases subsequently validated Justice Harlan’s reasoning and demonstrated the precedential power of *Reid*.<sup>109</sup> The Court in *Kinsella v. United States ex rel. Singleton* held that civilian dependents could not face court-martial for noncapital offenses.<sup>110</sup> Importantly, the Court found

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101. *Reid*, 354 U.S. at 3 (plurality opinion). Article 2(a)(11) currently provides that the following persons are subject to UCMJ jurisdiction:

Subject to any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, persons serving with, employed by, or accompanying the armed forces outside the United States and outside the Commonwealth of Puerto Rico, Guam, and the Virgin Islands.

10 U.S.C. § 802(a)(11) (2000). For the similar, but not identical, language of Article 2(11) at the time of *Reid*, see *Reid*, 354 U.S. at 3–4. See also *supra* note 45 (explaining the addition of the “(a)” to Article 2(11)).

102. *Reid*, 354 U.S. at 3–4.

103. *Id.* at 5.

104. *Id.* at 41.

105. *Id.* at 17.

106. *Id.* at 30.

107. *Reid*, 354 U.S. at 22–23.

108. *Id.* at 77–78 (Harlan, J., concurring in the result).

109. See *McElroy v. United States ex rel. Guagliardo*, 361 U.S. 281, 283–84 (1960) (relying on *Reid*); *Grisham v. Hagan*, 361 U.S. 278, 280 (1960) (same); *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234, 246 (1960) (same). Further, the jurisdictional basis of the charges in all three cases was Article 2(11) of the UCMJ. *McElroy*, 361 U.S. at 282.

110. See *Kinsella*, 361 U.S. at 248 (“We are therefore constrained to say that since this Court has said that the Necessary and Proper Clause cannot expand Clause 14 so as to include

that the “[uncontradicted] materials . . . show that military jurisdiction has always been based on the ‘status’ of the accused, rather than on the nature of the offense.”<sup>111</sup> *McElroy v. United States ex rel. Guagliardo* further solidified the notion that civilian employees of the armed services could not face court-martial for noncapital offenses.<sup>112</sup> Interestingly, the Court stated that it was relying on *Kinsella*, but it did not explicitly mention the petitioners’ status and, instead, focused on the noncapital nature of their crimes.<sup>113</sup> *Grisham v. Hagan*, a companion case to *Kinsella* and *McElroy*, further restricted military jurisdiction over civilian employees of the armed services.<sup>114</sup> Like civilian dependents, civilian employees who face capital charges can expect a complete jury trial, with the guarantees of Article III courts and the Fifth and Sixth Amendments.<sup>115</sup> Again, like *McElroy*, the Court stated that it was relying on previous cases but did not explicitly mention “status” and, instead, emphasized the importance of the jury trial in light of the “awesomeness of the death penalty.”<sup>116</sup>

The above trio of cases illustrates some important lessons about the application of military jurisdiction to civilians. It seems that these cases presumptively ruled out exercise of military jurisdiction over those with civilian, dependent, or employee status, especially for capital offenses. UCMJ Article 2(11)’s jurisdiction over civilians thus became nonexistent.<sup>117</sup> A determination of non-military status for purposes of Clause 14 could prohibit military jurisdiction altogether if the Court would invoke that status either overtly or as a subtext.<sup>118</sup> A later case in the Court of Military Appeals (now the Court of Appeals for the Armed Forces (“CAAF”)) added an additional gloss upon military jurisdiction over civilians when it dealt with an assertion of military jurisdiction over a civilian employee by relying on a distinguishing fact and a different rationale.<sup>119</sup>

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prosecution of civilian dependents for capital crimes, it cannot expand Clause 14 to include prosecution of them for noncapital offenses.”).

111. *Id.* at 243.

112. *McElroy*, 361 U.S. at 282–87.

113. *Id.* at 283–84.

114. *See Grisham*, 361 U.S. at 280 (holding that civilian employees who face capital charges are not subject to military jurisdiction).

115. *See id.* (providing those civilian employees who are not subject to military jurisdiction with the privileges that accompany litigants in Article III courts).

116. *Id.*

117. Schmitt, *supra* note 81, at 70.

118. *See* Anthony E. Giardino, Note, *Using Extraterritorial Jurisdiction to Prosecute Violations of the Law of War: Looking Beyond the War Crimes Act*, 48 B.C. L. REV. 699, 718–19 (2007) (citing *Solorio v. United States*, 483 U.S. 435, 436, 439, 450–51 (1987)). “In an unbroken line of decisions from 1866 to 1960, this Court interpreted the Constitution as conditioning the proper exercise of court-martial jurisdiction over an offense on one factor: the military status of the accused.” *Solorio*, 483 U.S. at 439.

119. *United States v. Averette*, 19 C.M.A. 363 (1970).

This case, *United States v. Averette*, further restricted application of military jurisdiction over civilian employees, based on a strict statutory interpretation of UCMJ Article 2(10).<sup>120</sup> The case concerned a contractor who had worked in the Republic of Vietnam.<sup>121</sup> Raymond Averette allegedly had committed the crimes of conspiracy to commit larceny and attempted larceny of thousands of government batteries.<sup>122</sup> After examining the above Supreme Court cases,<sup>123</sup> the Court of Military Appeals seemed loath to announce a bold principle that would be at odds with existing case law.<sup>124</sup> The court distinguished the previous Supreme Court case law by noting that it “covered offenses in periods other than a time of declared war.”<sup>125</sup> The court then strictly interpreted UCMJ Article 2(10) to extend jurisdiction over civilians accompanying the force only “in time of war,” meaning that Congress would have had to formally declare war—an action that it declined to take in regard to the Vietnam conflict.<sup>126</sup> The court did acknowledge “that the fighting in Vietnam qualifies as a war as that word is generally used and understood,” but it looked to “guidance in this area from the Supreme Court” and the “sensitiv[ity] . . . of subjecting civilians to military jurisdiction” to further buttress its interpretation of the UCMJ and its holding that the facts did not warrant the extension of military jurisdiction over Averette.<sup>127</sup>

The distinction between capital and noncapital offenses might not be controlling in light of the trio of 1960 Supreme Court cases. The only distinguishing factor that *Averette* examined was whether the alleged offense took place in a “time of a declared war.” The CAAF has distinguished previous Supreme Court decisions by looking at the state of armed conflict and the statutory language of the UCMJ. Based on the CAAF’s ruling and the absence of a Supreme Court decision explicitly on point, it seems that a court-martial could try a civilian employee during a declared war. The court in *Averette* did not reach the question of whether a declared war permits military jurisdiction for capital as well as noncapital offenses. These caveats are important ones, and this Note will explain how the new UCMJ statutory language modifies *Averette* and how it circumvents the above case law. Numerous complicated problems exist in asserting military jurisdiction over

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120. *Id.* at 365; *see also supra* note 45 (addressing the change from Article 2(10) to Article 2(a)(10)).

121. *Averette*, 19 C.M.A. at 363.

122. *Id.*

123. *McElroy v. United States ex rel. Guagliardo*, 361 U.S. 281 (1960); *Grisham v. Hagan*, 361 U.S. 278 (1960); *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234 (1960); *Reid v. Covert*, 354 U.S. 1 (1957); *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955).

124. *Averette*, 19 C.M.A. at 365 (“Here the constitutionally delicate question of military jurisdiction over civilians recurs.”).

125. *Id.* at 364.

126. *Id.* at 365.

127. *Id.* at 365–66.

civilians. Fortunately, there is a statute that avoids the complications of military jurisdiction over civilians—the MEJA.

### 3. Passage, Significance, and Development Through Case Law of the MEJA

Congress enacted the Military Extraterritorial Jurisdiction Act of 2000 in order to extend the criminal jurisdiction of Article III courts to personnel accompanying the military abroad.<sup>128</sup> Historically, many crimes that DOD civilian employees or contractors committed were beyond U.S. jurisdiction; furthermore, host nations were often uninterested in prosecuting these crimes.<sup>129</sup> Under the MEJA, Article III courts have jurisdiction over those persons who accompany the armed forces and commit an offense punishable by more than one year of imprisonment.<sup>130</sup> Further, the MEJA provides for jurisdiction over civilian employees of the DOD, or “any other Federal agency, or any provisional authority, to the extent such employment relates to supporting the mission of the [DOD] overseas.”<sup>131</sup> The language seems to expand jurisdiction even to U.S. government employees who have only a tangential relationship to any particular DOD missions abroad.

Territorially, the jurisdiction of the MEJA is broad and extends to offenses committed anywhere outside of the United States, so long as the offense would have merited more than one year of imprisonment if committed in the special maritime and territorial jurisdiction (“SMTJ”).<sup>132</sup> The SMTJ, in turn, includes areas such as the high seas, certain aircraft, and “[a]ny place outside the jurisdiction of any nation with respect to an offense by or against a national of the United States.”<sup>133</sup>

The MEJA provides for significant interactions with foreign authorities who potentially would be interested in prosecuting the crimes of civilians accompanying the armed forces in SMTJ areas. First, if a foreign nation prosecutes an alleged wrongdoer, the United States may not initiate a prosecution without approval from the Attorney General or the Deputy

128. See 146 CONG. REC. 16,200 (2000) (statement of Rep. Chambliss) (“[The MEJA] will create a new Federal law that would apply Federal criminal statutes to crimes which are committed overseas by employees or dependents of members of the Armed Forces, persons employed by the Department of Defense, or contractors or subcontractors of the Armed Forces.”); Joseph R. Perlak, *The Military Extraterritorial Jurisdiction Act of 2000: Implications for Contractor Personnel*, 169 MIL. L. REV. 92, 93–94 (2001) (noting that the purpose of this “much-anticipated” statute is to fill the jurisdictional gap that prevented civilians from being prosecuted for crimes committed while accompanying military forces overseas).

129. 146 CONG. REC. 16,200 (2000) (statement of Rep. Chambliss).

130. 18 U.S.C. § 3261(a) (2000).

131. *Id.* § 3267(1)(A) (2000 & Supp. IV 2004).

132. *Id.* § 3261(a) (2000).

133. *Id.* § 7 (defining the SMTJ); see also Giardino, *supra* note 118, at 715–16 (explaining that the areas to which SMTJ pertains include, among others: vessels on the high seas, aircraft in flight, certain areas of land, and areas in a foreign nation that the United States utilizes). Giardino further describes a successful prosecution of a contractor in Afghanistan under this statute. *Id.* at 699–700.

Attorney General.<sup>134</sup> It is also important to note that the United States might yield jurisdiction to a foreign nation if a Status of Forces Agreement (“SOFA”) is in place.<sup>135</sup> Secretary of State Condoleezza Rice and Secretary of Defense Robert Gates noted that “[w]henver American troops are stationed or temporarily present on foreign soil,” a SOFA helps resolve “a number of legal questions . . . ranging from the overall scope of [the troops’] mission to the minutiae of day-to-day life—from authority to fight to rules for delivering mail.”<sup>136</sup> SOFAs address, among other issues, criminal jurisdiction in the event that a U.S. service member or dependent of a service member commits a crime while stationed in a foreign nation, e.g., England, Germany, or the Republic of Korea.<sup>137</sup> The United States negotiates an individualized SOFA with a concerned nation to meet the particular concerns of that country.<sup>138</sup>

The laws of foreign nations are not the only statutory consideration in exercising jurisdiction under the MEJA. Prosecutions under the MEJA do not deprive a court-martial of concurrent jurisdiction.<sup>139</sup> Further, the MEJA does not extend jurisdiction over a person subject to the UCMJ unless that person committed the crime with someone *not* subject to the UCMJ or that person leaves the armed forces and hence the UCMJ’s jurisdiction.<sup>140</sup>

Prosecutors are beginning to use the MEJA with varying degrees of success. The MEJA has formed the jurisdictional basis for the prosecutions in *United States v. Arnt* and the pending case of *United States v. Green*.

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134. 18 U.S.C. § 3261(b) (2000) (outlining the interactions of foreign and U.S. criminal prosecutions).

135. See Schmitt, *supra* note 81, at 57 (“[SOFAs] are designed to strike a balance between the rights and obligations of the two nations involved in the deployment of troops, the ‘sending state’ and the ‘receiving state,’ and to resolve as many issues as possible before that deployment occurs.”).

136. Condoleezza Rice & Robert Gates, Editorial, *What We Need Next in Iraq*, WASH. POST, Feb. 13, 2008, at A19 (advocating the implementation of a United States–Iraq SOFA). Discussions between the United States and Iraq about the legal framework governing U.S. troops in Iraq continue. Karen DeYoung & Sudarsan Raghavan, *U.S., Iraqi Negotiators Agree on 2011 Withdrawal*, WASH. POST, Aug. 22, 2008, at A1 (“With talks at a stalemate and time growing short, the two sides scaled back hopes of reaching a full status-of-forces agreement of the type that outlines the rights and responsibilities of U.S. forces in more than 80 countries around the world.”).

137. See Agreement Under Article IV of the Mutual Defense Treaty Between the United States of America and the Republic of Korea, Regarding Facilities and Areas and the Status of United States Armed Forces in the Republic of Korea, U.S.–S. Korea, arts. VII, IX, XII, XIV, XX, XXII, July 9, 1966, 17 U.S.T. 1677 (addressing such issues as respect for local law, customs and duties, air-traffic control, taxation, military post offices, and criminal jurisdiction).

138. See Rice & Gates, *supra* note 136 (“In more than 115 nations, [the United States] ha[s] individually tailored status-of-forces agreements.”).

139. 18 U.S.C. § 3261(c) (2000).

140. *Id.* § 3261(d); see also *infra* note 141 (outlining the use of the MEJA in the ongoing prosecution of a former service member).

The court in *Green* will begin a jury trial in April 2009.<sup>141</sup> In *Arnt*, the Ninth Circuit upheld the jurisdictional basis of the MEJA that allowed the prosecutor to bring voluntary-manslaughter charges against the defendant.<sup>142</sup>

### III. THE UCMJ AND THE MEJA EXAMINED AND COMPARED

#### A. THE UCMJ EXAMINED

##### 1. The New Language

In 2006, Congress passed an amendment to the UCMJ under the John Warner National Defense Authorization Act.<sup>143</sup> The relevant section extended the jurisdiction of Article 2(a)(10) to include, it appears, civilian contractors.<sup>144</sup> The Court has stated that Article 2(a)(10) provides the “maximum historically recognized extent of military jurisdiction over civilians.”<sup>145</sup> Previously, as the court in *Averette* held, Article 2(a)(10) jurisdiction applied to those persons who served with or accompanied an armed force in the field during a “time of [declared] war.”<sup>146</sup> This latest amendment directly addresses the holding in *Averette* by changing the “time of war” language to read “declared war or a contingency operation.”<sup>147</sup> Thus, this particular grant of jurisdiction now reads: “The following persons

141. *United States v. Green*, No. 5:06CR-19-R (W.D. Ky. Dec. 18, 2007) (order setting trial schedule), available at <http://www.kywd.uscourts.gov/3-06-00230/pdf/entry87.pdf>; see also Giardino, *supra* note 118, at 727–29 (tracing the case’s pre-trial developments). On March 12, 2006, in Iraq, Steven Green, a former U.S. Army soldier, allegedly killed the family of a fourteen-year-old girl whom he subsequently raped and killed. Giardino, *supra* note 118, at 728. The MEJA is the jurisdictional foundation for the charges of rape and murder. Indictment at 4, *United States v. Green*, No. 5:06CR-19-R (W.D. Ky. Nov. 2, 2006), available at <http://www.kywd.uscourts.gov/3-06-00230/pdf/entry36.pdf> (alleging “violation[s] of Title 18, United States Code, Section 3261(a)(2)”); Giardino, *supra* note 118, at 728.

142. *United States v. Arnt*, 474 F.3d 1159, 1160–61 (9th Cir. 2007). Unrelated to the MEJA, the court found reversible error in the failure of the district court to issue a jury instruction on a lesser charge. *Id.* at 1161.

143. John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364, § 552, 120 Stat. 2083, 2217 (2006) (codified at 10 U.S.C.A. § 802(a)(10) (West Supp. 2008)); see also Griff White, *New Law Could Subject Civilians to Military Trial*, WASH. POST, Jan. 15, 2007, at A1 (describing the amendment).

144. See Lindemann, *supra* note 30, at 90 (“On its face, the 2007 defense authorization act applies the whole of the UCMJ to contractors.”).

145. See Reid v. Covert, 354 U.S. 1, 34 n.61 (1957) (plurality opinion) (discussing Article 2(10)); *supra* note 45 (addressing the change from Article 2(10) to Article 2(a)(10)).

146. See 10 U.S.C. § 802(a)(10) (2000) (applying jurisdiction “[i]n time of war”); *supra* notes 120–27 and accompanying text (discussing *Averette*’s interpretation of Article 2(10) as requiring a formal declaration of war); *supra* note 45 (addressing the change from Article 2(10) to Article 2(a)(10)).

147. John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364, § 552, 120 Stat. 2083, 2217 (2006) (codified at 10 U.S.C.A. § 802(a)(10) (West Supp. 2008)).

are subject to this chapter: . . . [i]n time of declared war or contingency operation, persons serving with or accompanying an armed force in the field.”<sup>148</sup> The holding of *Averette* already defined “time of declared war,”<sup>149</sup> so this Note will proceed with an analysis of the remaining language.

The phrases “contingency operation” and “serving with or accompanying an armed force in the field” have specific implications. The statutory definition of “contingency operation” is broad and encompasses any military operation that the Secretary of Defense may so designate.<sup>150</sup> Further, a “contingency operation” can also be a military operation in which other current or retired service members are called to duty, either pursuant to statutory provisions or pursuant to presidential or congressional designation of a national emergency.<sup>151</sup> For example, President Bush’s Executive Order 13,223 called members of the reserve to active duty, thereby designating Operation Enduring Freedom a “contingency operation.”<sup>152</sup> If a “contingency operation” is defined by the state of affairs,

148. 10 U.S.C.A § 802(a)(10) (West Supp. 2008).

149. See *supra* notes 120–27 and accompanying text (discussing *Averette*).

150. 10 U.S.C. § 101(a)(13)(A) (2000) (“[C]ontingency operation’ means a military operation that . . . is designated by the Secretary of Defense as an operation in which members of the armed forces are or may become involved in military actions, operations, or hostilities against an enemy of the United States or against an opposing military force . . .”).

151. See *id.* § 101(a)(13)(B). The statute provides:

The term “contingency operation” [also] means a military operation that . . . results in the call or order to, or retention on, active duty of members of the uniformed services under section 688 [retired service members], 12301(a) [service members part of a reserve component], 12302 [members of the Ready Reserve], 12304 [members of the Selected Reserve and certain members of the Individual Ready Reserve], 12305 [authorizing the President to suspend any laws in force relating to promotion, retirement, or separation of service members], or 12406 [authorizing the President to call into federal service members of the National Guard if active military units cannot respond to an invasion or other crisis] of this title, chapter 15 of this title, or any other provision of law during a war or during a national emergency declared by the President or Congress.

*Id.*

152. Exec. Order No. 13,223, 3 C.F.R. 785 (2002). This executive order reads in relevant part:

I hereby order as follows . . . [t]o provide additional authority to the Department of Defense . . . to respond to the continuing and immediate threat of further attacks on the United States, the authority under title 10, United States Code, to order any unit, and any member of the Ready Reserve not assigned to a unit organized to serve as a unit, in the Ready Reserve to active duty for not more than 24 consecutive months, is invoked and made available, according to its terms, to the Secretary concerned . . .

*Id.* This language comports with 10 U.S.C. §§ 101(a)(13)(B), 12302. See also *Civilians Accompanying Forces in the Field Now Subject to U.S. Military Justice*, GOV’T CONT. ADVISORY (McKenna Long & Aldridge LLP, Wash., D.C.), Jan. 29, 2007, at 1 [hereinafter *Civilians Accompanying Forces*], available at <http://www.mckennalong.com/attachment/499/GC%20Advisory%201-29-07%20UCMJ%20Jurisdiction.pdf> (describing the order).

then it is necessary to determine whether a person—a civilian contractor—is “serving with or accompanying an armed force in the field.”<sup>153</sup>

*United States v. Rubenstein*<sup>154</sup> gives some insight into when a civilian contractor would be “serving with or accompanying an armed force.”<sup>155</sup> If the contractor’s presence were “not merely incidental to, but directly connected with or dependent upon, the activities of the armed forces or their personnel,”<sup>156</sup> then a contractor might be “serving with or accompanying.” Although *Rubenstein* was a pre-*Reid* case and relied on Article 2(11)<sup>157</sup> (as did the Court in *Reid* and the following companion cases<sup>158</sup>), its dictum concerning Rubenstein’s continued use of and reliance on military facilities after termination of his employment is useful.<sup>159</sup> It seems reasonable to view certain PMFs as “connected with or dependent upon” the military either in Iraq or Afghanistan. The activities of combat-service providers or other support activities are certainly “connected with” military activities. Further, the physical proximity and interrelated nature of DOD and Department of State (“DOS”) contractors could militate toward a potential finding of “connect[ion]” or “dependen[cy].”<sup>160</sup> If a contractor is participating in a “contingency operation” and is “serving with or accompanying an armed force,” then the next inquiry is whether that contractor is also “in the field.”

*Reid* again proves instructive by defining “in the field.” A contractor is “in the field” when that person is working “in an area of actual fighting”<sup>161</sup> at or near the “battlefront”<sup>162</sup> where “actual hostilities are under way.”<sup>163</sup> Physical proximity is not the only factor in determining whether a contractor

153. 10 U.S.C.A. § 802(a)(10) (West Supp. 2008).

154. *United States v. Rubenstein*, 22 C.M.R. 313 (C.M.A. 1957).

155. *Civilians Accompanying Forces*, *supra* note 152, at 2 (quoting *United States v. Rubenstein*, 22 C.M.R. 313, 317 (C.M.A. 1957)).

156. *Rubenstein*, 22 C.M.R. at 317.

157. *See supra* note 101 (quoting the current Article 2(a)(11) language and citing to the prior Article 2(11) language).

158. *See supra* notes 101–18 and accompanying text (examining the holdings of *Reid* and the companion cases of *McEvroy*, *Grisham*, and *Kinsella*).

159. *Rubenstein*, 22 C.M.R. at 318.

160. *Civilians Accompanying Forces*, *supra* note 152, at 2. These practitioners state:

Many contractors in contingency operation areas today work side-by-side with [DOD] personnel, but may not be [DOD] contractors, and may not be performing a [DOD] mission, such as firms contracted by the State Department with Iraq Relief and Reconstruction Fund money to perform reconstruction work. Therefore, the determination of whether the person’s presence is “directly connected with or dependent upon the activities of the armed forces” will depend on the specific facts, including the government policies, of that project.

*Id.*

161. *Id.* (quoting *Reid v. Covert*, 354 U.S. 1, 34 n.61 (1957) (plurality opinion)).

162. *Id.* (quoting *Reid*, 354 U.S. at 35).

163. *Id.* (quoting *Reid*, 354 U.S. at 35).

is “in the field”; the person’s activities are also a factor. The Court of Military Appeals, in an earlier decision, stated that “the activity in which [a person] may be engag[ing] at any particular time, not the locality,” determines whether a contractor is “in the field.”<sup>164</sup> Qualifying activities would be those that relate, either directly or indirectly, to active combat with an enemy.<sup>165</sup> Such an analysis seems correct because of the decentralized nature of modern warfare. An unmanned, armed aerial drone may patrol skies in southwest Asia, yet a pilot near Las Vegas, Nevada, could be the one actually controlling that drone.<sup>166</sup> Extreme geographical distance probably should not be determinative of whether a civilian contractor is “in the field.” Thus, Article 2(a)(10) seems like it could survive the Court’s scrutiny.

The DOD’s initial guidance on the exercise of this updated UCMJ jurisdiction was: proceed cautiously.<sup>167</sup> The DOD’s interim approach to the new statutory language was to “[w]ithhold and [o]versee,”<sup>168</sup> meaning that the DOD would carefully grant military jurisdiction and then closely supervise the exercise of that jurisdiction. The interim assessment emphasized the Rules for Courts-Martial, which mandate that the appropriate authority should dispose of alleged offenses at the lowest level of disposition before progressing to court-martial charges.<sup>169</sup> In any given prosecution, it is also possible that the President, Secretary of Defense, or subordinate commanders could dismiss charges that “would probably be inimical to the prosecution of a war or harmful to national security,”<sup>170</sup> which seems to grant wide discretion to these officials. It should be remembered, however, that despite this seemingly large grant of power, the statute and the case law provide a jurisdictional foundation for a court-martial over a civilian contractor only when the contractor meets important prerequisites. First, the contractor must be working under the conditions of a “declared war” or a “contingency operation.” That contractor must also be “in the field” and “serving with” or “accompanying” a military force. The

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164. *Id.* (quoting *United States v. Burney*, 21 C.M.R. 98, 109 (C.M.A. 1956)).

165. *Burney*, 21 C.M.R. at 109.

166. *Civilians Accompanying Forces*, *supra* note 152, at 2.

167. See Robert E. Reed, Dep’t of Def., Contingency Rules: The Application of the UCMJ to Contractors 4–5, 14–24 (July 26, 2007), [http://www.ncmahq.org/files/presentations/Reed\\_Contingency\\_Rules.ppt](http://www.ncmahq.org/files/presentations/Reed_Contingency_Rules.ppt) [hereinafter Reed, Contingency Rules]; Kara M. Sacilotto, *Update Regarding Application of the UCMJ to Contractors*, GOV’T CONT. ISSUES UPDATE (Wiley Rein LLP, Wash., D.C.), Aug. 2007, at 4, 4, available at [http://www.wileyrein.com/docs/newsletter\\_issues/520.pdf](http://www.wileyrein.com/docs/newsletter_issues/520.pdf) (discussing recommendations made by Robert E. Reed, DOD Associate Deputy General Counsel, at a June 8, 2007 ABA meeting); Posting of No Man to CAAFlog, Blogging from the CAAF Conference: Art. 2(a)(10), UCMJ, <http://caaflog.blogspot.com/2007/05/blogging-from-caaf-conference-art-2a10.html> (May 17, 2007, 08:19 EST) (discussing a presentation by Robert E. Reed at a CAAF Conference).

168. Reed, Contingency Rules, *supra* note 167, at 3.

169. *Id.* (quoting MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. II, R. 306(b)–(c), at II-25 to II-26 (2008)).

170. MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. II, R. 407(b), at II-41 (2008).

DOD's initial guidance has graduated to formal guidance from Secretary Gates.

Military prosecutors have successfully used Article 2(a)(10) jurisdiction under the Secretary's guidance. For example, a court-martial recently exercised the new jurisdiction to try a civilian contractor. The court-martial convicted Alaa "Alex" Mohammad Ali, a civilian contractor working under supervision of the U.S. Army.<sup>171</sup> The charge sheet against Ali alleged that he had stabbed a civilian colleague in the chest.<sup>172</sup> Ali has both Iraqi and Canadian citizenship.<sup>173</sup> Ali pleaded guilty to wrongful appropriation of a knife, obstruction of justice for wrongfully disposing of the knife after the altercation, and making a false official statement to military investigators.<sup>174</sup> After Ali pleaded guilty to these charges, the prosecutor dropped a charge of aggravated assault.<sup>175</sup> Ali has recently filed an appeal.<sup>176</sup> As the recent court-martial of Alaa "Alex" Mohammed Ali shows, a court-martial of a civilian offers certain advantages to both the prosecutor and the defendant.

## 2. Advantages of Prosecution of Civilian Contractors Solely Under the UCMJ

As stated above, some in the legal community regard courts-martial as little better—or perhaps worse—than a kangaroo court,<sup>177</sup> yet courts-martial do serve the ideal of justice, and so offer the baseline guarantee of a fair

171. Alexandra Zavis, *Army Interpreter Sentenced at Court-Martial*, L.A. TIMES, June 24, 2008, at A3.

172. Charge Sheet (Mar. 27, 2008), <http://www.caaflog.com-a.googlepages.com/RedactedContractorChargeSheet.pdf>; Posting of No Man to CAAFlog, BREAKING NEWS: Contractor Charged Under UCMJ, <http://caaflog.blogspot.com/2008/04/breaking-news-contractor-charged-under.html> (Apr. 2, 2008, 09:27 EST) (linking to the charge sheet).

173. Michael R. Gordon, *U.S. Charges Contractor at Iraq Post in Stabbing*, N.Y. TIMES, Apr. 5, 2008, at A6.

174. Press Release, Multi-Nat'l Corps—Iraq, Civilian Contractor Convicted at a Court-Martial (June 23, 2008), available at [http://www.mnf-iraq.com/index.php?option=com\\_content&task=view&id=20671&Itemid=128](http://www.mnf-iraq.com/index.php?option=com_content&task=view&id=20671&Itemid=128); Posting of Phillip Carter to Intel Dump, Military Justice for a Civilian, [http://voices.washingtonpost.com/inteldump/2008/06/first\\_contractor\\_prosecution\\_i.html](http://voices.washingtonpost.com/inteldump/2008/06/first_contractor_prosecution_i.html) (June 24, 2008, 11:00 EST).

175. Ernesto Lodoño, *Two U.S. Soldiers Killed as Iraqi Council Member Opens Fire After Meeting*, WASH. POST, June 24, 2008, at A8; Press Release, Multi-Nat'l Corps—Iraq, *supra* note 174; Posting of Phillip Carter to Intel Dump, *supra* note 174.

176. United States Court of Appeals for the Armed Forces, Daily Journal No. 09-013 (Sept. 18, 2008), <http://www.armfor.uscourts.gov/journal/2008Jrnl/2008Sep.htm>; Posting of No Man to CAAFlog, BREAKING NEWS: Writ from First Ever Amended Art. 2, UCMJ Civilian Court-Martial, <http://caaflog.blogspot.com/2008/09/breaking-news-writ-from-first-ever.html> (Sept. 22, 2008, 21:00 EST).

177. See *Reid v. Covert*, 354 U.S. 1, 26–27 (1957) (plurality opinion) (discussing historical perceptions of military jurisdiction). But see Phillip Carter, *The Seven Basic Myths About Military Justice: Why It's Much Fairer to Defendants Than You May Have Been Led to Think*, FINDLAW'S WRIT, Dec. 18, 2002, [http://writ.news.findlaw.com/student/20021218\\_carter.html](http://writ.news.findlaw.com/student/20021218_carter.html) (addressing common misconceptions about military justice, such as disproportionate and unjust command influence and lack of constitutional safeguards).

trial, while offering the prosecutor wide latitude. Rendering justice in an even-handed manner helps to accomplish the armed forces', and hence the nation's, purposes.<sup>178</sup> Regardless of some perceptions, the Judge Advocate General's Corps of the armed forces dedicates itself to the ideal of fairness.<sup>179</sup>

This ideal of fairness is in line with the constitutional guarantees that the populace of the United States expects and that the UCMJ, to a large degree, honors. The rules governing discovery offer one significant concession to the defense.<sup>180</sup> The trial counsel must allow the defense to inspect any evidence that would be material to the preparation of a defense or that the trial counsel intends to use in the case-in-chief.<sup>181</sup> Such evidence includes books, papers, documents, photographs, or other tangible objects.<sup>182</sup> Other items subject to discovery are results of examinations and scientific tests.<sup>183</sup> These disclosure provisions are virtually identical to those for civilian defendants in Article III courts.<sup>184</sup> And as in a civilian criminal procedure, an authority cannot compel an accused to engage in self-incrimination.<sup>185</sup>

Prosecution of a civilian contractor under the UCMJ would also promote the ideal of fairness by allowing all those who fulfill similar functions on the battlefield to see that one standard—one system—applies. A large chasm already exists between the standard of treatment of a soldier and that of a PMF contractor. PMFs are executing missions that are similar to those the military would complete, such as providing security to ground

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178. See Zwerdling, *supra* note 75 (“[I]f troops believed that commanders manipulate the system of justice, ‘it would destroy morale. You want people in an all-volunteer force to serve willingly. If they think the system is unfair, then they’re not going to re-enlist.” (quoting Tom Hemingway, retired Brigadier General and legal advisor at the Pentagon)).

179. See *id.* (“We are an American military . . . We’re here to support American values, and one of the things that we have in our disciplinary system, as a requirement, is that the trial system be fair.” (quoting Tom Hemingway, retired Brigadier General and legal advisor at the Pentagon)).

180. See DAVID A. SCHLUETER, *MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE* § 10-4 (6th ed. 2004) (“[T]he military criminal justice system is generous in providing the defense with discoverable information.”).

181. *MANUAL FOR COURTS-MARTIAL, UNITED STATES* pt. II, R. 701(a)(2), at II-56 (2008).

182. *Id.* pt. II, R. 701(a)(2)(A), at II-56.

183. *Id.* pt. II, R. 701(a)(2)(B), at II-56.

184. *FED. R. CRIM. P.* 16(a)(1)(E)–(F).

185. Compare U.S. CONST. amend. V (“No person . . . shall be compelled in any criminal case to be a witness against himself . . .”), with 10 U.S.C. § 831(a) (2000) (“No person subject to this chapter may compel any person to incriminate himself or to answer any question the answer to which may tend to incriminate him.”), 10 U.S.C. § 831(b) (prohibiting interrogation of an accused without a *Miranda*-type warning), and 10 U.S.C. § 831(c)–(d) (specifying further protections). Congress enacted these UCMJ provisions sixteen years prior to the *Miranda* decision. Uniform Code of Military Justice, Pub. L. No. 81-506, art. 31, 64 Stat. 107, 118 (1950) (codified at 10 U.S.C. § 831 (2000)); *Miranda v. Arizona*, 384 U.S. 436, 444–45 (1966); James B. Smith, *Is Military Justice Just?*, N.J. LAW. MAG., June 2007, at 55, 57 n.4.

convoys, but while earning a much greater salary than would a service member.<sup>186</sup> Yet contractors rarely face discipline, formal or informal, for alleged misconduct.<sup>187</sup> Uniform treatment of prosecutable offenses can fulfill the goal of maintaining morale within a military unit.<sup>188</sup> Maintaining current standards of conduct for contractors, which are relatively lax, can potentially have a deleterious effect on a military unit's morale.<sup>189</sup>

Fairness in the military-justice system is crucial, but using the UCMJ to prosecute civilian contractors would give prosecutors significant advantages as well. The UCMJ's jurisdictional reach is worldwide;<sup>190</sup> therefore, a prosecutor would be able to reach any misconduct during any "time of declared war" or "contingency operation," so long as the alleged wrongdoer were serving "in the field." The flexibility and broadness of the UCMJ's jurisdiction means that wherever the United States might deploy a military force, a system of justice will follow.

The UCMJ offers prosecutors broad reach over alleged misconduct by covering offenses that the MEJA does not cover, standard federal offenses under the *United States Code*, and offenses unique to the UCMJ. First, the

186. The following comparison of pay differential, while simplistic, is instructive. In 2004, a U.S. Army sergeant at the E-5 pay grade (the first level of noncommissioned officer pay), with five years of service, serving in Iraq, would make \$66.37 per day tax-free, excluding any enlistment bonus, hazardous-duty pay, family-separation pay, and any other entitlements. See Def. Finance & Accounting Servs., Military Pay Tables (effective Jan. 1, 2004), <http://www.dfas.mil/militarypay/2006militarypaytables/militarypaypriorrates/2004paytable.pdf> (\$1991.10 divided by 30 days). One particular employee of Blackwater signed a contract for pay of \$600 per day to provide security for convoys. Joseph Neff & Jay Price, *Contractors in Iraq Make Costs Balloon*, NEWS & OBSERVER (Raleigh, N.C.), Oct. 24, 2004, at A1, available at [http://www.newsobserver.com/nation\\_world/bridge/v-print/story/241329.html](http://www.newsobserver.com/nation_world/bridge/v-print/story/241329.html). But see PELTON, *supra* note 19, at 121 ("The biggest benefit for the U.S. military is that using contractors adds no long-term liability in insurance, retirement, training, benefits, or medical costs. . . . Contractors are the ultimate use-once, throwaway soldiers—an expensive but disposable source of muscle and steel when problems occur.").

187. HUMAN RIGHTS FIRST, PRIVATE SECURITY CONTRACTORS AT WAR: ENDING THE CULTURE OF IMPUNITY 3 (2008), available at <http://www.humanrightsfirst.info/pdf/08115-usls-psc-final.pdf>.

188. See T. Christian Miller, *U.S. Marines Detained 19 Contractors in Iraq*, L.A. TIMES, June 8, 2005, at A10 (reporting that Marines, after detaining a team of contractors working for the Army Corps of Engineers, allegedly taunted and abused the contractors, jeering, "How does it feel to be a big, rich contractor now?"); White, *supra* note 143 ("[Senator] Graham, an Air Force Reserve lawyer, said the [statutory change to the UCMJ] will help morale in the field. 'If the troops see someone getting away with something that hurts the overall mission, that is a morale buster,' he said.").

189. See PRINCETON WORKSHOP, *supra* note 25, at 3 ("[T]he co-mingling of contractors and uniform personnel, and the existence of different rules for each group, creates confusion and the potential for problems. For example, contractors may have greater access to drugs and alcohol, and can fraternize, which may corrupt military discipline."); *id.* at 10 ("Several participants argued that subjecting contractors to the UCMJ could have the positive effect of bringing everyone within the same system, bridging the culture gap between contractors and military personnel, and clarifying the applicable legal standards.").

190. See 10 U.S.C. § 805 (2000) ("This chapter applies in all places.").

UCMJ allows for the prosecution of federal offenses that merit less than one year of imprisonment, in contrast to the provisions of the MEJA.<sup>191</sup> Second, the UCMJ addresses offenses that are substantially similar to many of those addressed by Title 18 of the *United States Code*.<sup>192</sup> Third, Article 134 would be of great use, as that Article is a “general” one, meaning that any conduct that “bring[s] discredit upon the armed forces” or is prejudicial to “good order and discipline” would be an offense.<sup>193</sup> Moreover, Article 133 would give a prosecutor great latitude in bringing charges for “[c]onduct unbecoming an officer and gentleman.”<sup>194</sup> Violation of this Article would seem to depend mainly on the norms of the military unit.<sup>195</sup> However, application of these norms to a contractor would result in some serious, perhaps implacable, difficulties.<sup>196</sup> Nevertheless, from a prosecutor’s and military commander’s standpoint, the UCMJ offers stronger and more binding ways to regulate contractor conduct beyond the mandates of the four corners of the contract.<sup>197</sup>

The UCMJ suits itself well to the ideal of a fair trial and to providing a prosecutor the ability to complete his job. The fairness implicit in the UCMJ serves the purpose of ensuring national security by letting the troops know that they operate under a fair disciplinary system. This system substantially mirrors the safeguards of a civilian criminal system and follows the military

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191. 18 U.S.C. § 3261(a) (2000).

192. Compare 10 U.S.C. §§ 918–920 (2000) (providing for the prosecution of murder, manslaughter, and rape), with 18 U.S.C. §§ 1111–1112, 2241–2242 (2000) (providing for the prosecution of murder, manslaughter, “aggravated sexual abuse,” and “sexual abuse”).

193. 10 U.S.C. § 934 (2000). This statute provides:

Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court.

*Id.* Robert E. Reed, DOD Associate Deputy General Counsel, apparently views “gambling with subordinates” and “fraternization” as non-prosecutable offenses for civilians under the new language of the UCMJ. Posting of No Man to CAAFlog, *supra* note 167.

194. 10 U.S.C. § 933 (2000) (“Any commissioned officer, cadet, or midshipman who is convicted of conduct unbecoming an officer and a gentleman shall be punished as a court-martial may direct.”).

195. See MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, para. 59, at IV-111 (2008) (“There are certain moral attributes common to the ideal officer and the perfect gentleman, a lack of which is indicated by acts of dishonesty, unfair dealing, indecency, indecorum, lawlessness, injustice, or cruelty.”).

196. See *infra* notes 207–10 and accompanying text (discussing the practical difficulties of applying military norms to civilian contractors).

197. See PRINCETON WORKSHOP, *supra* note 25, at 10 (“Without the possibility of sanction under the UCMJ system, contractors are subject only to the terms of the contract, which only bureaucratic contracting personnel can modify.”).

force on each of its deployments. Yet the fairness of the UCMJ will not hamstring prosecutors. The prosecutor has many options in bringing an alleged wrongdoer to justice. To this point, the UCMJ appears to offer a robust means of prosecution under the Constitution. However, difficulties and disadvantages do exist, and the next subsection will address them.

### 3. Disadvantages of Prosecution of Civilian Contractors Solely Under the UCMJ

This Note has assumed that the UCMJ's new statutory language would withstand constitutional scrutiny should a prosecution of a civilian contractor result from any alleged wrongdoing; yet it is plausible that such a prosecution would fail under a facial challenge. Based on previous case law regarding court-martial jurisdiction over civilians, the new language in Article 2(a)(10) might not survive Supreme Court scrutiny.<sup>198</sup> Under some analyses, any expansion of military jurisdiction results in an impermissible usurpation of proper civilian jurisdictional authority.<sup>199</sup> Recent unrelated Supreme Court decisions, however, have treated the military-justice system favorably in dicta.<sup>200</sup>

Despite this recent favorable treatment, constitutional concerns remain.<sup>201</sup> There are three types of courts-martial: general,<sup>202</sup> special,<sup>203</sup> and

198. See *supra* Part II.C.2 (tracing the development of UCMJ case law).

199. *Reid v. Covert*, 354 U.S. 1, 21 (1957) (plurality opinion) ("Every extension of military jurisdiction is an encroachment on the jurisdiction of the civil courts, and, more important, acts as a deprivation of the right to jury trial and of other treasured constitutional protections.")

200. See *Amann*, *supra* note 80, at 911 ("The Court [in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006),] wrote favorably of the enactment of the UCMJ . . . ."); Susan S. Gibson, *Lack of Extraterritorial Jurisdiction over Civilians: A New Look at an Old Problem*, 148 MIL. L. REV. 114, 178 (1995) ("In the past ten years . . . the Supreme Court has shown its increasing approval of court-martial procedures.")

201. See *Stein*, *supra* note 23, at 581 (likening the constitutional and statutory constructs to a "barn" that keeps U.S. citizens who commit crimes abroad—the "horses"—subject to jurisdiction); *supra* Part II.C (explaining the statutory and case-law development of the UCMJ and the MEJA). Although this Note does not evaluate explicitly the constitutionality of Article 2(a)(10) jurisdiction, one such analysis concludes that this new jurisdictional grant is constitutional. Cara-Ann M. Hamaguchi, Recent Development, *Between War and Peace: Exploring the Constitutionality of Subjecting Private Civilian Contractors to the Uniform Code of Military Justice During "Contingency Operations"*, 86 N.C. L. REV. 1047, 1065 (2008).

202. 10 U.S.C.A. § 816(1) (West 1998 & Supp. 2008). This section describes general courts-martial as follows:

[G]eneral courts-martial[] consist[] of—

(A) a military judge and not less than five members or, in a case in which the accused may be sentenced to a penalty of death, the number of members determined under section 825a of this title (article 25a); or

(B) only a military judge, if before the court is assembled the accused, knowing the identity of the military judge and after consultation with defense counsel, requests orally on the record or in writing a court composed only of a military judge and the military judge approves . . . .

summary.<sup>204</sup> Under this scheme, the only instance in which twelve people sitting in judgment would hear a defendant's case would be during a capital case.<sup>205</sup> A further concern in a capital case would be the origin of the rules that govern a court-martial. The President in his constitutional role as Commander-in-Chief defines the rules of trial procedure and sets maximum sentence limits.<sup>206</sup> Although it would presumably be unwise for him to do so, he could set these rules without any advice from the legislature or judiciary.

Along with constitutional concerns, service-culture concerns emerge.<sup>207</sup> While a criminal code proscribes certain acts, it ordinarily does not address day-to-day manners or patterns of behavior—yet that is what the UCMJ does.<sup>208</sup> A number of provisions in the UCMJ have the potential to befuddle any citizen who has no experience serving in a military organization; conversely, these provisions could baffle a commander trying to apply military norms to a civilian.<sup>209</sup> For example, a military offense that would immediately raise a constitutional concern is “provoking speeches or gestures.”<sup>210</sup> There may be large room for confusion between a civilian contractor who is used to speaking freely and a military officer who expects a certain level of respect and decorum.

Contract law also poses a difficulty for the imposition of military jurisdiction. PMFs work under the specified terms of the contracts they sign with the U.S. government. In turn, a PMF's subcontractors sign contracts with the PMF. If a military commander decides to tell a contractor to take a

*Id.*

203. 10 U.S.C. § 816(2) (2000) (“[S]pecial courts-martial consist[] of . . . not less than three members; or . . . a military judge and not less than three members; or . . . only a military judge, if one has been detailed to the court, and the accused under the same conditions as those prescribed in clause (1)(B) so requests . . .”).

204. *Id.* § 816(3) (“[S]ummary courts-martial[] consist[] of one commissioned officer.”).

205. 10 U.S.C.A. § 825a (West Supp. 2008) (providing that twelve members comprise a court-martial in a capital case, unless exigent circumstances dictate that twelve members are “not reasonably available”).

206. *Id.* § 836 (trial procedure); 10 U.S.C. § 856 (2000) (maximum sentence limits).

207. Lindemann, *supra* note 30, at 90. Lindemann notes:

[T]he UCMJ articulates a code of behavior as much as it does a system of justice. The military ethics enshrined in the UCMJ do not necessarily or neatly translate into what contractors may expect from the civilian legal system. In the day-to-day affairs of the civilian world, disrespect toward a senior fellow employee does not result in judicial punishment.

*Id.*

208. *Id.*

209. *Id.* at 90–91 (“Upon closer reading of the UCMJ, however, there are a number of ‘any-person’ offenses that might be problematic when applied to civilian contractors, including . . . misconduct as a prisoner [10 U.S.C. § 905], and provoking speeches or gestures [10 U.S.C. § 917].”). See generally, e.g., 10 U.S.C. §§ 887, 889–890, 892–895, 898, 900–903, 905, 906a, 914–917, 925 (applying to “[a]ny person subject to this chapter”).

210. 10 U.S.C. § 917 (2000).

course of action that would violate the terms of the signed contract, what should the contractor do? The contractor would find himself in an untenable situation, with UCMJ prosecution on one hand and breach of contract on the other. The commander also might find himself in an untenable situation if he does not have the authority under the contract to constructively modify the contract's terms.<sup>211</sup> An order that a military commander issues to a contractor could have significant monetary ramifications for the U.S. government if that order triggers overtime-pay conditions or another contractual clause.<sup>212</sup> To alleviate such problems, a commander must have not only the authority to issue commands to contractors but also the authority to fund those commands.<sup>213</sup>

The interstitial areas that the new UCMJ language creates pose significant problems for holding potential wrongdoers accountable for misconduct. The ability of the President to modify rules of trial procedure threatens the ability of a civilian contractor to obtain a fair trial, especially during a capital case. Even in cases where the charges are noncapital, those particular charges may be of a substantially military character. Lastly, an order from a commander might significantly alter a contract, with resulting breach-of-contract ramifications. These difficulties, while significant, are not insuperable because the MEJA, as it currently stands, can provide for jurisdiction over civilians with fewer problematic areas.

#### B. THE MEJA EXAMINED

The MEJA in its current form provides the jurisdictional basis for prosecuting crimes associated with DOD missions.<sup>214</sup> Application of the MEJA might change in the future, as representatives and senators have developed bills that would alter its implementation.<sup>215</sup> For the meantime, the DOD has recently promulgated regulations that give guidance to the military departments on the implementation of the MEJA.<sup>216</sup> Both the

211. See *Civilians Accompanying Forces*, *supra* note 152, at 3 (“[A] commander may not unilaterally direct a contractor to perform some action if that action is outside the scope of the contract requirements. Instead, the commander must direct the contracting officer to modify the contract, and, if necessary, obtain additional funds to implement the change.”).

212. PRINCETON WORKSHOP, *supra* note 25, at 11.

213. See *id.* (“[M]ost commanders . . . effectively don’t have a checkbook they can use to buy additional services . . . [T]he UCMJ would have to be implemented in a way that resulted in an appropriate allocation of authority within the government.”).

214. 18 U.S.C. § 3267 (2000 & Supp. IV 2004).

215. See *infra* note 225 and accompanying text (noting congressional bills that would alter the jurisdiction of the MEJA).

216. Criminal Jurisdiction over Civilians Employed by or Accompanying the Armed Forces Outside the United States, Certain Service Members, and Former Service Members, 32 C.F.R. pt. 153 (2007); see also U.S. DEP’T OF THE ARMY, ARMY REGULATION 27-10: MILITARY JUSTICE ch. 26, at 115 (2005), available at [http://www.army.mil/usapa/epubs/pdf/r27\\_10.pdf](http://www.army.mil/usapa/epubs/pdf/r27_10.pdf).

regulations and the statute itself afford their own set of advantages and disadvantages. This Note will examine both in the following subsections.

### 1. Advantages of Prosecution of Civilian Contractors Solely Under the MEJA

The main advantage of the MEJA is that it allows a prosecutor to bring charges against alleged offenders worldwide.<sup>217</sup> Violations of the *United States Code* that are punishable by imprisonment of more than one year are amenable to prosecution.<sup>218</sup> The MEJA also seems to address the *Reid* line of cases by allowing prosecution of a discharged service member who committed a crime while overseas.<sup>219</sup>

The key caveat to MEJA jurisdiction is that a civilian must be working in a capacity related to the DOD's activities. Congress recently amended the MEJA to apply its provisions to those contractors who work under a contract associated with DOD activities,<sup>220</sup> which seems to broaden the MEJA's jurisdiction. The MEJA now applies to those civilian contractors (and their employees) of any federal agency or provisional authority, as long as their employment "relates to supporting the mission of the [DOD] overseas."<sup>221</sup> This language lends itself to broad interpretation. Since the mission of the DOD is to provide for national security by winning the United States' wars, there would seem to be a miniscule class of federal activities that would not fall into the ambit of this statute.

The MEJA also has significant provisions that can serve to safeguard an accused. For example, if the United States decides not to deliver the accused to foreign authorities, a federal magistrate judge must conduct the initial hearing and also determine the validity of probable cause for the arrest.<sup>222</sup> Furthermore, a federal magistrate would be available to conduct a detention hearing.<sup>223</sup>

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217. See *supra* Part II.C.3 (examining the legislative history of the MEJA and its statutory language).

218. 18 U.S.C. § 3261(a) (2000).

219. *Id.* § 3261(d)(1) ("No prosecution may be commenced against a member of the Armed Forces subject to chapter 47 of title 10 (the Uniform Code of Military Justice) under this section unless . . . such member ceases to be subject to such chapter . . .").

220. *Id.* § 3267(1) (Supp. IV 2004).

221. *Id.* § 3267(1)(A)(ii)-(iii) (Supp. IV 2004).

222. *Id.* § 3265(a)(1)-(2) (2000).

223. 18 U.S.C. § 3265(b) (2000). Also, a military regulation contemplates the assignment of military counsel to an accused in this situation, although a federal magistrate has the discretion to make that decision. See *id.* § 3265(c)(1) ("[T]he Federal magistrate judge may appoint as such counsel for purposes of such hearing a qualified military counsel."); U.S. DEP'T OF THE ARMY, *supra* note 216, para. 26-2(b), at 115 ("The Federal Magistrate will appoint qualified military counsel, as necessary, to represent an individual for initial proceedings under the MEJA.").

## 2. Disadvantages of Prosecution of Civilian Contractors Solely Under the MEJA

The MEJA can confuse as well as clarify. Scholars have written extensively on the glaring flaw of the MEJA: it only provides jurisdiction over crimes committed abroad that merit punishment of imprisonment for more than one year.<sup>224</sup> Moreover, the MEJA, in its current form, applies only to DOD-related activities, although pending bills would expand that to personnel working under contract with any government agency.<sup>225</sup> Furthermore, a prosecutor could use the MEJA to prosecute alleged misconduct of a group of contractors and service members, but not the service members alone.<sup>226</sup>

### C. INTERACTION OF THESE TWO STATUTES: SOURCE OF POSSIBLE JURISDICTIONAL CONFLICT?

The UCMJ and the MEJA provide for jurisdiction to prosecute crimes committed abroad, yet interstitial material does not exist to instruct a prosecuting authority, much less determine *which* prosecuting authority, on how to proceed with a case. Which federal agency takes the case? What is the practical operation of “concurrent jurisdiction”?<sup>227</sup> Would a prosecutor decide to prosecute a crime of possible international ramifications?<sup>228</sup> Unless there is some sort of coordination, a turf battle could erupt between federal agencies over which prosecutor of which agency will prosecute a crime under which circumstances.<sup>229</sup> The next Part will make recommendations about how to address the above questions in a manner that will result in a successful prosecution.

224. 18 U.S.C. § 3261(a) (2000); see Giardino, *supra* note 118, at 731–33 (positing a situation where a violation of the law of war—slapping a detainee—would rise only to the level of a misdemeanor, hence escaping the MEJA’s jurisdiction).

225. Security Contractor Accountability Act of 2007, S. 2147, 110th Cong. § 2(a) (as introduced in Senate, Oct. 4, 2007); MEJA Expansion and Enforcement Act of 2007, H.R. 2740, 110th Cong. § 2(a) (as passed by House, Oct. 4, 2007).

226. 18 U.S.C. § 3261(d) (2000).

227. *Id.* § 3261(c).

228. See 153 CONG. REC. H11,263 (daily ed. Oct. 4, 2007) (statement of Rep. Price) (“My legislation does not compel prosecution and it does not interfere with the prosecutor’s discretion. If a prosecutor ever has concerns that prosecution of a contractor under MEJA would . . . undermine our security interests, the prosecutor has the discretion not to prosecute the case.”). Relying on prosecutorial discretion for bringing high-profile alleged misconduct to trial could be problematic in the fulfillment of justice. See Yue Ma, *A Comparative View of Judicial Supervision of Prosecutorial Discretion*, 44 CRIM. L. BULL. 31, 33 (2008) (“[T]he discretionary power to be lenient is an impossibility without a concomitant discretionary power not to be lenient, and injustice from the discretionary power not to be lenient is especially frequent; the power to be lenient is the power to discriminate.” (quoting KENNETH CULP DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* 170 (1969))).

229. Further conflict could result if a foreign nation were to decide to exert jurisdiction over a U.S. contractor. However, such a consideration is outside the scope of this Note.

## IV. RECOMMENDATIONS

## A. PRESENT AND FUTURE DIRECTIONS OF THE MAJOR PLAYERS

## 1. The Executive Branch

Currently, the DOD and DOS are trying to provide their officers with some guidelines and create new protocols and relationships between themselves and also with PMFs. In October 2007, the DOS released a report produced by an independent panel.<sup>230</sup> Also, the DOD and DOS have signed a Memorandum of Agreement (“MOA”) that provides guidelines on their agencies’ and PMFs’ operations.<sup>231</sup> Further, representatives from the DOD and DOS have met with certain PMFs to discuss future actions.<sup>232</sup>

After the Nisoor Square incident, the DOS and DOD tried to find their own solutions to preventing a similar event,<sup>233</sup> especially since they had not coordinated their previous movements with each other.<sup>234</sup> The DOS began implementing several new procedures in early October 2007;<sup>235</sup> however, the DOD and DOS recently came to an accord that may or may not leave these new procedures in place.<sup>236</sup>

The two executive agencies signed an MOA that should increase coordination of DOD actions and DOS movements with their attendant security details.<sup>237</sup> The purpose of the MOA is “to improve coordination and accountability of [the DOD’s and DOS’s] respective private security contractor operations in Iraq.”<sup>238</sup> Now, DOS personnel and their security details must inform a central tracking center of their movements through the military’s assigned areas.<sup>239</sup> Previously, providing information to military

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230. See *infra* note 233 (describing the report of the panel).

231. See *infra* notes 237–41 and accompanying text (describing the MOA).

232. See *infra* notes 242–44 and accompanying text (describing this meeting between the DOD, DOS, and certain PMFs).

233. The DOS-appointed fact-finding body made certain recommendations in the aftermath of the Nisoor Square incident. ERIC J. BOSWELL ET AL., REPORT OF THE SECRETARY OF STATE’S PANEL ON PERSONAL PROTECTIVE SERVICES IN IRAQ 8–12 (2007), available at <http://www.state.gov/documents/organization/94122.pdf>.

234. August Cole, *Pentagon to Have More Say over Armed Contractors*, WALL ST. J., Dec. 6, 2007, at A11.

235. Press Release, U.S. Dep’t of State, Implementation of Recommendations from the Secretary of State’s Report on Personal Protective Service Details (Oct. 23, 2007), available at <http://www.state.gov/r/pa/prs/ps/2007/oct/94013.htm>.

236. Karen DeYoung, *State Dept. Contractors in Iraq Are Reined In*, WASH. POST, Dec. 6, 2007, at A24.

237. Memorandum of Agreement (MOA) Between the Department of Defense and the Department of State on USG Private Security Contractors (Dec. 5, 2007), available at <http://www.nimj.org/documents/DoS-DoD%20Agreement%20on%20PSCs.pdf>.

238. *Id.* annex A, at 1.

239. *Id.* annex A, at 5–6.

commanders was more of an aspiration, but now it is imperative.<sup>240</sup> This new, extensive coordination will not, however, give the DOD power to “hire” or “fire” DOS contractors.<sup>241</sup>

In addition to the MOA, the DOD is trying to institute new protocols with respect to PMFs. The DOD has recently met with representatives from some PMFs.<sup>242</sup> As a result, the DOD will now have a greater role in supervising Blackwater Worldwide and other PMFs.<sup>243</sup> Besides Blackwater representation, senior representatives from DynCorp International, Triple Canopy, and Aegis Defence attended the meeting.<sup>244</sup>

The implementing regulations for the new UCMJ language are promising. Secretary Gates has recently issued guidelines for the DOD that apply when it appears probable that a military officer will exercise military jurisdiction over a contractor.<sup>245</sup> First, the memorandum describes this type of jurisdiction as “unique” and specifies the circumstances in which UCMJ jurisdiction over civilians should apply.<sup>246</sup> These circumstances are “[w]hen U.S. federal criminal jurisdiction otherwise does not apply or federal prosecution is not pursued, and/or [w]hen the person’s conduct is adverse to a significant military interest of the United States.”<sup>247</sup> As an example of “adverse” conduct, the memorandum provides “alleged misconduct that may jeopardize good order and discipline or discredit the armed forces.”<sup>248</sup>

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240. See DeYoung, *supra* note 236 (reporting on the results of a DOD and DOS meeting). Deputy Secretary of State John Negroponte noted previous difficulties in coordinating DOS and DOD activities through the same area:

Although diplomatic movement information was shared with the military in the past, “it was harder to get and it wasn’t as well distributed as it is now. We were sending over plans of these movements to the [military] headquarters . . . but it wasn’t getting to the different elements” in the field, he said.

*Id.*

241. *Id.*

242. *Iraq Security Contractors Getting New Rules*, USA TODAY, Jan. 30, 2008, [http://www.usatoday.com/news/washington/2008-01-30-iraq-contractors\\_N.htm](http://www.usatoday.com/news/washington/2008-01-30-iraq-contractors_N.htm).

243. See *id.* (describing the intent and certain agenda items of the meeting).

244. *Id.*

245. Memorandum from Robert M. Gates, Sec’y of Def., U.S. Dep’t of Def., to Sec’ys of the Military Dep’ts, Chairman of the Joint Chiefs of Staff, Under Sec’ys of Def., and Commanders of the Combatant Commands 2 (Mar. 10, 2008) [hereinafter UCMJ Memorandum], available at <http://www.caaflag.com-a.googlepages.com/2a10.pdf>; see also Posting of No Man to CAAFlag, SecDef Art. 2(a)(10) Withholding Memo, <http://caaflag.blogspot.com/2008/03/secdef-art-2a10-withholding-memo.html> (Mar. 12, 2008, 14:50 EST) (discussing the memo).

246. UCMJ Memorandum, *supra* note 245, attachment 3.

247. *Id.*

248. *Id.*

Secretary Gates nevertheless emphasized that military commanders retain extensive authority to control their areas of command.<sup>249</sup>

Second, DOD personnel will notify DOJ personnel of the alleged violation of federal criminal laws, and the DOD will continue investigating.<sup>250</sup> If the DOJ declines to pursue a prosecution, the DOD may assume responsibility for the investigation and potential prosecution.<sup>251</sup>

When the DOD assumes responsibility, the Secretary of Defense retains the authority to exercise jurisdiction over persons subject to Article 2(a)(10) when those persons committed the alleged offense within the United States.<sup>252</sup> When the contractor subject to Article 2(a)(10) is outside the United States and allegedly commits an offense, the commander of a geographic command may exercise Article 2(a)(10) jurisdiction.<sup>253</sup> Additionally, within that area, a commander with the authority to convene a general court-martial may exercise Article 2(a)(10) jurisdiction.<sup>254</sup> Any subordinate commander must forward any request for Article 2(a)(10) jurisdiction to the general-court-martial authority.<sup>255</sup> Before any of the commanders with general-court-martial authority can exercise such authority, however, they must permit the DOJ notification process to go forward as DOD preliminary investigations continue.<sup>256</sup> The DOJ then has fourteen days to decide whether to take the case.<sup>257</sup> If the DOJ decides to assume responsibility for the prosecution, the commander cannot exercise Article 2(a)(10) jurisdiction unless the DOJ's prosecution terminates.<sup>258</sup> The memorandum envisions DOD and DOJ cooperation in the investigation, even if the DOJ takes the case.<sup>259</sup>

Based on the successful prosecution of Alaa "Alex" Mohammad Ali,<sup>260</sup> it seems that the above procedures work: The DOD complied with the

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249. *See id.* at 1–2 (“Commanders possess significant authority to act whenever criminal activity may relate to or affect the commander’s responsibilities, including situations in which the alleged offender’s precise identity or actual affiliation is to that point undetermined.”).

250. *Id.* at 2 (“When . . . civilians [allegedly] violate U.S. federal criminal laws, the [DOD] shall notify . . . [the DOJ], and afford [the DOJ] the opportunity to pursue its prosecution of the case . . . . While the [DOJ] notification and decision process is pending, commanders and military criminal investigators should continue to address the alleged crime.”).

251. *See* UCMJ Memorandum, *supra* note 245, at 2 (“Commanders should be prepared to act . . . should possible U.S. federal criminal jurisdiction prove to be unavailable . . .”).

252. *Id.* attachment 2.

253. *Id.*

254. *Id.*

255. *Id.* attachment 3.

256. UCMJ Memorandum, *supra* note 245, attachment 2.

257. *Id.* attachment 3.

258. *Id.* attachment 2.

259. *See id.* attachment 3 (“Even where [the DOJ] intends to pursue prosecution, continued DOD investigative assistance may be necessary. Thus, criminal investigative activity by DOD should continue in coordination with [the DOJ] . . .”).

260. *See supra* notes 171–76 and accompanying text (describing the Ali prosecution).

procedures that Secretary Gates issued, and after the DOJ declined to prosecute Ali under the MEJA, the Army assumed responsibility for the prosecution.<sup>261</sup> However, one of the weak parts of Secretary Gates's guidance is that the fourteen-day grace period for the DOJ has the possibility of leaving an investigation in limbo, in contrast to the potential robustness of the combined investigative–prosecutorial team proposed by this Note.<sup>262</sup>

While the promulgation of regulations regarding Article 2(a)(10) jurisdiction is extremely important, military commanders still need to know how to properly supervise a civilian within a chain of command.<sup>263</sup> Without instructions about how and where to place a contractor in the chain of command—if at all—a commander would constantly have to explore and determine the limits of his command authority.<sup>264</sup> This sort of activity is not the best use of time for a commander fighting battles and implementing counterinsurgency programs. Furthermore, in addition to clarifying the issue of chain of command, the executive branch also needs to provide its military commanders more robust training on how to use contractors in a combat setting.<sup>265</sup>

## 2. The Legislative Branch

Congress should continue pursuing its current legislative path in expanding jurisdiction over U.S. citizens deployed abroad.<sup>266</sup> It should also

261. Emma Schwartz, *First Contractor Charged Under Military Justice System: The Case Against a Canadian-Iraqi Translator Could Raise Key Constitutional Issues*, USNEWS.COM, Apr. 5, 2008, <http://www.usnews.com/articles/news/iraq/2008/04/05/first-contractor-charged-under-military-justice-system.html>.

262. See *infra* Part IV.B (discussing the proposed team).

263. See Lindemann, *supra* note 30, at 91 (“The chain of command’s influence . . . has previously stopped at the four corners of a civilian’s contract.”); *id.* (“The question of whether contractors would have to obey orders from military personnel still remains. Although there may not be an obvious civilian equivalent, a combat environment raises particular concerns about deference to on-the-ground military authority.”).

264. PRINCETON WORKSHOP, *supra* note 25, at 2.

265. See *id.* at 5. The workshop attendees discussed the difficult situations in which they had found themselves:

[O]ne participant noted that before his 2005–06 deployment to Iraq, he received zero training in working with contractors, even though he led a hybrid team of contractors and military personnel. Another participant noted that his one formal class on contracting was conducted *post* deployment. . . . [T]he same [military officer] who led a hybrid team in Iraq emphasized that, officers spend their entire career learning how to manage and lead soldiers, but only receive a few hours (at most) on how to manage contractors, a difficult situation when contractors provide as much of the force’s capability as they do today.

*Id.*

266. The National Defense Authorization Act for Fiscal Year 2008, enacted January 28, 2008, provides more oversight. National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 862, 2008 U.S.C.C.A.N. (122 Stat.) 3, 254–58. Further, on March 1, 2009, a “Commission on Wartime Contracting” will issue an interim report that will address, *inter alia*,

consider how the many federal agencies interact with each other when involved in combat zones or imminent-danger zones. Namely, if the executive does not act to provide clarification to its attorneys, Congress should continue to enact requirements for executive agencies.<sup>267</sup> The congressionally mandated steps are a good start but are not as comprehensive or effective as the recommended steps below would be.

*B. A PROPOSAL FOR AN INVESTIGATIVE AND PROSECUTORIAL ORGANIZATION  
TO ADDRESS FUTURE INCIDENTS*

Secretary Gates's directive and the successful prosecution of a civilian contractor under Article 2(a)(10) seem to indicate that no room for improvement remains. That, however, is not the case. The fourteen-day window for the DOJ to accept or decline responsibility for an investigation and prosecution seems to encourage comity between executive-branch agencies. Yet Secretary Gates's directive does not provide for explicit resolution of a disagreement between the DOD and DOJ should both wish to take responsibility for the case.<sup>268</sup> An example of a potential jurisdictional squabble is the aftermath of the Nisoor Square shooting incident. The Federal Bureau of Investigation ("FBI") is currently leading the investigation,<sup>269</sup> but initially, the DOS was in charge.<sup>270</sup> During those initial stages of the investigation, the DOD and the U.S. military, parties intensely interested in the incident and the prosecution's outcome, said that the DOS denied them access to the individuals and the vehicle involved.<sup>271</sup> The uncertainty over the prosecution hobbled the investigation,<sup>272</sup> although the DOJ seems to be preparing to charge individuals involved in the shooting in Nisoor Square.<sup>273</sup> Another example—although it might simply be a case of prosecutorial discretion—is the alleged killer of an Iraqi official's bodyguard who seemingly has not faced legal action.<sup>274</sup> The latest incident that has

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"misuse of force," and "the extent of potential violations of the laws of war [and] Federal law." *Id.* § 841.

267. Within 120 days of the enactment of the National Defense Authorization Act for Fiscal Year 2008, "the Secretary of Defense, in coordination with the Secretary of State, shall prescribe regulations on the selection, training, equipping, and conduct of personnel performing private security functions under a covered contract in an area of combat operations." *Id.* § 862(a)(1). The Federal Acquisition Regulations will then reflect the agreed-upon regulations by requiring insertion of a contract clause addressing "selection, training, equipping, and conduct of personnel." *Id.* § 862(b)(1).

268. See UCMJ Memorandum, *supra* note 245, attachment 3.

269. Johnston & Broder, *supra* note 8.

270. Oppel & Gordon, *supra* note 39.

271. See *id.* (describing an interagency conflict).

272. James Risen & David Johnston, *Justice Dept. Cites Obstacles in Blackwater Case*, N.Y. TIMES, Jan. 16, 2008, at A12.

273. Del Quentin Wilber & Karen DeYoung, *Justice Dept. Moves Toward Charges Against Contractors in Iraq Shooting*, WASH. POST, Aug. 17, 2008, at A1.

274. Majority Staff Memo, *supra* note 25, at 9–12.

come to light was the rapidly concluded investigation of a Blackwater contractor's use of lethal force.<sup>275</sup> A Blackwater employee emplaced in a sniper position atop the Iraqi Justice Ministry killed three Iraqis with rifle fire.<sup>276</sup> A dispute still lingers over whether the appropriate officials investigated this last incident thoroughly.<sup>277</sup>

As stated above, one way to ensure that a conflict between the UCMJ and the MEJA never materializes is to never prosecute a crime with the new UCMJ language; but there is another way to conduct business. Given the impact of criminal misconduct on the DOD's and the DOS's missions and, hence, on national policy, the better way is to use the prosecutorial tools that Congress has provided. A combined jurisdictional prosecution would address some previous concerns.<sup>278</sup> As shown above, the advantages of one statute can ameliorate the drawbacks of a sole prosecution under the other statute.<sup>279</sup>

If an experienced, well-rehearsed prosecution team can use these two statutes in concert, a synergistic effect might take place, resulting in a greater likelihood of a conviction than would have existed with an

275. See Steve Fainaru, *How Blackwater Sniper Fire Felled 3 Iraqi Guards*, WASH. POST, Nov. 8, 2007, at A1 ("The incident shows how American officials responsible for overseeing the security company conducted only a cursory investigation when Blackwater guards opened fire."). *But see id.* ("The embassy conducted a review of the circumstances surrounding the . . . shooting incident and . . . concluded that the actions of the security team fell within the approved rules,' [a U.S.] official said.").

276. *Id.* Although this Note is primarily concerned with addressing alleged wrongdoing of contractors who apply lethal force, the UCMJ and the MEJA could provide the jurisdictional foundations for the prosecution of other contractor crimes as well. See *Enforcement of Federal Criminal Law to Protecting Americans Working for U.S. Contractors in Iraq: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 110th Cong. (2007) (statement of Jamie Leigh Jones, former employee, KBR, Inc.) (describing her graphic, horrific ordeal, travails, and persistent trauma after being drugged and brutally raped on July 29, 2005, in Iraq); James Risen, *Limbo for U.S. Women Reporting Iraq Assaults*, N.Y. TIMES, Feb. 13, 2008, at A1 (reporting that female contractors have not found suitable recourse after being sexually assaulted).

277. Fainaru, *supra* note 275.

278. See Giardino, *supra* note 118, at 731–32 (pointing out that the MEJA's jurisdiction applies only to crimes punishable for one year or more, thus permitting possible law-of-war infractions to go unpunished); Wm. C. Peters, *On Law, Wars, and Mercenaries: The Case for Courts-Martial Jurisdiction over Civilian Contractor Misconduct in Iraq*, 2006 BYU L. REV. 367, 373 (advocating for expansion of UCMJ jurisdiction over civilian contractors).

279. See *supra* Part III (analyzing the contours of the statutes' grants of jurisdiction). *But see* Giardino, *supra* note 118, at 734 (arguing that the new statutory language in the UCMJ is not in accord with the Constitution). Giardino states:

[R]epealing the authority for civilian courts-martial [would] preserve the rights of citizens to a trial in a civilian court . . . [and] ensure that the burden of prosecuting instances of overseas civilian misconduct is handled by the Department of Justice and not a military justice system designed for those with a military status.

*Id.*

uncoordinated prosecution. The confluence of these two statutes could provide a robust prosecution scheme for contractors who commit crimes abroad under DOD supervision.

As implied in the MEJA, all contractors could sign a contract with the DOD, even if another department—e.g., State, Treasury, or Justice—is the end-user agency.<sup>280</sup> Such a procedure would alleviate the potential problem caused by the MEJA's requirement that a contractor's employment relate to a DOD mission. Secretary of Defense Gates has already suggested such a procedure.<sup>281</sup>

A combined investigative–prosecutorial team (“CIT”)—one that would combine attorneys from the DOJ, the DOD, and the armed forces' Judge Advocate General's (“JAG”) Corps and that could rapidly receive seconded judges, attorneys, and paralegals—would maximize the opportunities to investigate and prosecute alleged contractor misconduct. To a degree, the DOD and the DOJ have already agreed in principle to a way of investigating and prosecuting crimes for which both entities share jurisdiction.<sup>282</sup> Congress is working on legislation that would institute a similar concept in creating Theater Investigative Units (“TIUs”) under the control of the FBI.<sup>283</sup> The TIUs are supposed to refer any concerns to the Attorney

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280. See 18 U.S.C. § 3267(1)(A)(ii)–(iii) (Supp. IV 2004) (extending MEJA jurisdiction to contractors (and their employees) under contract with *any* agency “to the extent such employment relates to supporting” DOD missions); see also MEJA Expansion and Enforcement Act of 2007, H.R. 2740 § 2(a) (as passed by House, Oct. 4, 2007).

281. Eric Schmitt & Thom Shanker, *Pentagon Sees One Authority over Contractors*, N.Y. TIMES, Oct. 17, 2007, at A1.

282. Memorandum of Understanding Between the Departments of Justice and Defense Relating to the Investigation and Prosecution of Certain Crimes (1984), reprinted in MANUAL FOR COURTS-MARTIAL, UNITED STATES app. 3, at A3-2 (2008) (“It is neither feasible nor desirable to establish inflexible rules regarding the responsibilities of the Department[s] . . . as to each matter over which they may have concurrent interest. Informal arrangements and agreements within the spirit of this MOU are permissible with respect to specific crimes or investigations.”). But see MANUAL FOR COURTS-MARTIAL, UNITED STATES pmb1, pt. I, at I-1 (2008) (“These [memoranda of understanding] do not constitute the official views of the [DOD], the Department of Homeland Security, the [DOJ], the military departments, the [CAAF], or any other authority of the Government of the United States, and they do not constitute rules.”).

283. Giardino, *supra* note 118, at 734 & n.266 (“Legislation is pending that would create a federal investigative unit focused on overseas misconduct and redefine the class of personnel covered by the MEJA to cover more broadly those Americans involved in supporting any contingency operation.”). The current legislation under consideration would establish a TIU under the control of the FBI. Transparency and Accountability in Military and Security Contracting Act of 2007, S. 674, 110th Cong. § 8(a) (as introduced in Senate, Feb. 16, 2007). This unit would be “responsible for investigating allegations of criminal misconduct under” the MEJA. *Id.* The FBI is to ensure that the TIU “has adequate resources and personnel to carry out its responsibilities.” *Id.* § 8(c)(1). Further, other agencies must “cooperate with and support the activities of the [TIU]” and will “coordinate[] with [TIU] activities . . . as appropriate.” *Id.* § 8(d). The House has passed its own version of the bill. MEJA Expansion and Enforcement Act of 2007, H.R. 2740, 110th Cong. (as passed by House, Oct. 4, 2007). The House bill bears significant resemblance to the Senate bill. See generally *id.* As with the Senate bill, the House bill

General. This new piece of legislation does not fully address the problem, however, because many practical concerns still exist: logistical concerns, agency-cooperation concerns, etc.

The CIT would address and resolve these practical concerns as follows. A standing relationship between the DOJ and the DOD would alleviate many logistical concerns, namely transporting personnel to conduct investigations or trials, or transporting witnesses and evidence back to a federal district court.<sup>284</sup> A CIT would alleviate any need to transfer an in-progress investigation to an arriving agency,<sup>285</sup> and it would avoid possible double-jeopardy considerations. Further, a CIT would be able to offer a unified vision of the investigation and prosecution. A chief attorney of the CIT could properly exercise prosecutorial discretion. Moreover, a unified entity would help prevent missteps like offering immunity to concerned parties too soon<sup>286</sup> or allowing the alteration of material evidence.<sup>287</sup>

The civil–military nature of the CIT would maximize the advantages of each federal entity. DOJ attorneys could provide their expertise in prosecuting crimes across the *United States Code*. DOD and JAG attorneys would be able to use their knowledge of the UCMJ and their experience in the theater, as well as their expertise on any specific contractual issues. This proposed CIT would have to be resourced appropriately. As a standing entity, the CIT would be a cadre of sorts that could adjust staffing as appropriate. It would have to have enough support staff to receive incoming

calls for the FBI to establish a TIU and resource it appropriately. *Id.* § 3(a)–(c). The House bill calls specifically for TIU cooperation with the DOD, as opposed to an unspecified government agency, should the TIU need security assistance. *Id.* § 3(c)(3). The Attorney General would have to request from other federal agencies any additional resources that a TIU might need. *Id.* § 3(d).

284. See PRINCETON WORKSHOP, *supra* note 25, at 10. (“A few participants noted that troops can be disciplined easily within the UCMJ system, but the civilian justice system is too cumbersome to invoke to discipline contractors both because flying civilian lawyers overseas is very expensive and because civilian investigation and prosecution overseas is simply not feasible.”).

285. UCMJ Memorandum, *supra* note 245, attachment 3. A panel that the DOS created to investigate the circumstances of the Nisoor Square incident recommended the formation of a team that can rapidly respond to similar incidents in a way that would preserve any pertinent evidence. BOSWELL ET AL., *supra* note 233, at 9.

286. DeYoung, *supra* note 39. *But see* John M. Broder & David Johnston, *U.S. Military to Supervise Iraq Security Convoys*, N.Y. TIMES, Oct. 31, 2007, at A1 (“[A]ny suggestion that the Blackwater employees in question have been given immunity from federal criminal prosecution is inaccurate.” (quoting Dean Boyd, a DOJ spokesman)).

287. Lara Jakes Jordan & Matt Apuzzo, *FBI Finds Blackwater Trucks Patched*, USA TODAY, Jan. 13, 2008, [http://www.usatoday.com/news/washington/2008-01-12-3036624540\\_x.htm](http://www.usatoday.com/news/washington/2008-01-12-3036624540_x.htm). (“Blackwater Worldwide repaired and repainted its trucks immediately after a deadly September shooting in Baghdad, making it difficult to determine whether enemy gunfire provoked the attack, according to people familiar with the government’s investigation of the incident. . . . The repairs essentially destroyed evidence that Justice Department investigators hoped to examine . . .”).

additional litigators, investigators, and paralegals. In addition, its closely linked association with the DOD would facilitate the provision of security in a combat zone.<sup>288</sup>

An example of a multi-agency effort to eradicate and prosecute crime is the federal government's creation of a program to combat human trafficking. A National Security Presidential Directive "directs federal agencies to 'strengthen their collective efforts, capabilities, and coordination to support the policy to combat trafficking in persons.'"<sup>289</sup> Congress passed the Trafficking Victims Protection Act of 2000—a division of the Victims of Trafficking and Violence Protection Act of 2000—to provide a single legal basis for prosecuting human trafficking (whereas before, prosecutors had to rely on discrete sections of the *United States Code*).<sup>290</sup> The DOJ and the Department of Labor ("DOL") cooperated even before the passage of the Act by establishing a task force co-chaired by the assistant attorney general for civil rights and the DOL's solicitor.<sup>291</sup> This task force "maintains a multi-lingual, national, complaint line for trafficking victims" and works with the Department of Health and Human Services, which in turn "certifies" victims as bona fide human-trafficking victims.<sup>292</sup> With the assistance of the victim, and with the promise of a T-visa, the DOJ prosecutes the trafficker.<sup>293</sup> This example is not completely analogous to the proposed CIT, namely because the DOJ retains the sole responsibility to prosecute the human traffickers. The example is instructive, however, in showing that a broad, interbranch, interagency approach to a seemingly intractable problem can succeed in creating a functioning program.

It would seem that the largest problem in creating a CIT would be interagency rivalries and conflicts over joint prosecuting authority. Notwithstanding the professionalism of individual DOJ, DOD, and JAG attorneys, their agencies would have to agree to let their lawyers serve another agency for an unspecified amount of time. Agencies would have to play nice, cooperate, and remain impartial when one of their own members, or contractors, is implicated in a crime. It is simply too easy, as it currently

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288. A possible ramification of resourcing security for the CIT would be to siphon active-duty service members away from other tasks, a situation that could result in the DOD hiring more contractors from PMFs.

289. John R. Miller, *The United States' Effort to Combat Trafficking in Persons*, GLOBAL ISSUES, June 2003, at 6, 6, <http://usinfo.state.gov/journals/itgic/0603/ijge/ijge0603.pdf> (quoting National Security Presidential Directive No. 22 (Dec. 16, 2002)).

290. See Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 102(b)(14), 114 Stat. 1464, 1467 (codified at 22 U.S.C. § 7101(b)(14) (2000)) ("Existing legislation and law enforcement in the United States . . . are inadequate to deter trafficking and bring traffickers to justice . . . . No comprehensive law exists in the United States that penalizes the range of offenses involved in the trafficking scheme.").

291. Miller, *supra* note 289, at 7.

292. *Id.*

293. *Id.*

stands, for one agency to restrict another from conducting a parallel investigation.<sup>294</sup>

#### V. CONCLUSION

The current situations in Iraq and Afghanistan highlight the government's increasing dependence on PMFs to accomplish its national policy goals and its corresponding need to apply the rule of law to alleged criminals. Two statutes potentially offer a government prosecutor great power in pursuing alleged misconduct. The latest change in the UCMJ's jurisdiction and the ever-evolving MEJA offer a powerful means of holding wrongdoers accountable.

The constitutionality of these statutes has not yet faced a serious challenge, and while they could eventually fail constitutional scrutiny, they are currently the law of the land. The government should take advantage of these statutes. In creating a unified prosecutorial entity, the CIT, the U.S. government could facilitate the fruition of its national policy by enforcing the rule of law and American values.

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294. Opiel & Gordon, *supra* note 39.