

HAVE WE CLOSED THE BARN DOOR YET? A LOOK AT THE CURRENT LOOPHOLES IN THE MILITARY EXTRATERRITORIAL JURISDICTION ACT

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The Military Extraterritorial Jurisdiction Act (MEJA),¹ was passed in 2000 to fill the jurisdictional gap that existed where host nation countries could not or would not prosecute crimes committed by Americans.² This most often occurred when the crime was committed only against an American or American property.³ The Act, its application, and its shortcomings have gained widespread media attention from the prisoner abuse scandal at Abu Ghraib prison and the realization that civilian contractors may be responsible for some of the abuses, yet are immune from any criminal liability.⁴ Discussing whether or not

1. 18 U.S.C.A. §§ 3261–3267 (West Supp. 2004). Since the writing of this article, the Department of Defense has issued Department of Defense Instruction (DODI) 5525.11. See U.S. DEP'T OF DEFENSE, INSTR. 5525.11, CRIMINAL JURISDICTION OVER CIVILIANS EMPLOYED BY OR ACCOMPANYING THE ARMED FORCES OUTSIDE THE UNITED STATES, CERTAIN SERVICE MEMBERS, AND FORMER SERVICE MEMBERS (March 3, 2005). The effectiveness of these implementing regulations in ensuring the legal and political feasibility of prosecuting individuals remains to be seen. This article will analyze MEJA without the benefit of DODI 5525.11, and although the instruction may solve some of the gaps discussed later in the article, a Department of Defense instruction is inadequate to address the vast majority of the deficiencies highlighted in this article.

2. 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, 55–56 (2001).

3. *Id.* at 55.

4. See e.g., David Washburn & Bruce V. Bigelow, *Civilian Contractors Suspected in*

the barn door has finally been shut begs the questions: which horses were escaping from which barn, and why was the door open in the first place?

I. INTRODUCTION

Broadly speaking, the horses are U.S. citizens who commit crimes abroad, and the goal is to keep them within a barn where they may be prosecuted by the United States, if the host nation cannot or will not adequately prosecute the individuals. More realistically though, the horses have been defined narrowly as only two groups of people: those employed by or accompanying the Armed Forces outside the United States and those who are members of the Armed Forces.⁵ This narrowing of applicability will be addressed later in this article, as it contributes to the gaps that still remain.

The U.S. Constitution is the document that builds the walls and roof of this particular barn. Specifically, it is the interplay of Article I courts with Article III courts, the Fifth Amendment, and the Sixth Amendment that truly provides the structure of the barn.⁶ Article I, Section 8, Clause 14 of the Constitution allows Congress “to make rules for the Government and regulation of the land and naval Forces,” as supplemented by the Necessary and Proper Clause of Article I, Section 8, Clause 18.⁷ Article III provides for trial by jury; the Fifth Amendment requires indictment by a grand jury; and the Sixth Amendment guarantees the right to a speedy and public trial.⁸ In essence, the barn is constructed by whichever of these provisions grants Congress the authority to extend jurisdiction to individuals accompanying or employed by U.S. Armed Forces outside the United States.

MEJA begins to close the jurisdictional gap. Part II of this

Abuses in a Legal Gray Area, SAN DIEGO UNION-TRIB., May 29, 2004, at A1; Gail Gibson, *Prosecuting Abuse of Prisoners*, BALT. SUN, May 29, 2004, at 4A; Scott Shane, *Some U.S. Prison Contractors May Avoid Charges*, BALT. SUN, May 24, 2004, at 1A; Jonathan Groner, *Untested Law Key in Iraqi Abuse Scandal*, LEGAL TIMES, May 10, 2004, at 1.

5. Schmitt, *supra* note 2, at 79.

6. See *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234, 240–42 (1960).

7. U.S. CONST. art. I, § 8, cl. 14; *Kinsella*, 361 U.S. 234, 237.

8. U.S. CONST. art. III, § 2, cl. 3; U.S. CONST. amend. V; U.S. CONST. amend. VI.

article addresses the history of military jurisdiction over U.S. civilians and previous attempts to address the issue. Part III discusses the provisions of MEJA and how it has been used to narrow the jurisdictional gap. Finally, Part IV applies MEJA to current situations and analyzes the remaining jurisdictional gaps.

II. THE HISTORY OF RECEDING MILITARY JURISDICTION OVER U.S. CIVILIANS

A. *How Was the Barn Door Opened in the First Place?*

The barn door initially cracked open when the Supreme Court was forced to call into question “the power of Congress to expose civilians to trial by military tribunals, under military regulations and procedures, for offenses against the United States thereby depriving them of trial in civilian courts, under civilian laws and procedures and with all the safeguards of the Bill of Rights.”⁹

The Supreme Court has chiseled away at the power of Article I courts to try civilians in piecemeal fashion. The first modern case to question and limit the power of military courts was *United States ex rel. Toth v. Quarles*,¹⁰ where the military attempted to court-martial a civilian for an offense committed while he was on active duty. The Court determined that the plain meaning of Article I restricted court-martial jurisdiction to individuals who are actually members of the Armed Forces.¹¹ The Court stressed that a narrow reading of court-martial jurisdiction was important to limit encroachment on Article III courts where individuals are surrounded by greater constitutional safeguards.¹²

The next major case was the rehearing of *Reid v. Covert*¹³ and its companion case. Mrs. Covert was accused of murdering

9. *Reid v. Covert*, 354 U.S. 1, 3 (1957).

10. *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 13 (1955).

11. *Id.* at 15.

12. *Id.*

13. 354 U.S. 1 (1957).

her husband, a sergeant in the U.S. Air Force, in England.¹⁴ Despite her claim of insanity, she was found guilty and sentenced to life in prison by a military tribunal.¹⁵ In overturning its decision in the first *Reid v. Covert*¹⁶ case, the Court addressed the exercise of court-martial jurisdiction over dependents accompanying the Armed Forces who commit capital offenses.¹⁷ In concluding that court-martial jurisdiction did not extend to this class of individuals, the Court expressed its concerns with courts-martial: "Courts-martial are typically ad hoc bodies appointed by a military officer from among his subordinates. They have always been subject to varying degrees of 'command influence.' In essence, these tribunals are simply executive tribunals whose personnel are in the executive chain of command."¹⁸ While recognizing that nearly all military personnel have a "high degree of honesty and sense of justice," the Court concluded that members of a court-martial "do not and cannot have the independence of jurors drawn from the general public or of civilian judges."¹⁹ Two Justices in the majority concurred at least partially on the basis that capital offenses are unique.²⁰

A couple years later the Court addressed the issue of dependents who commit non-capital offenses. In *Kinsella v. United States ex rel. Singleton*,²¹ the Court prohibited military jurisdiction over civilian dependents in times of peace, whether or not the crime was a capital offense. Mrs. Dial, the wife of a soldier, lived in government housing in Baumholder, Germany.²² She was accused of involuntary manslaughter stemming from the death of one of the Dials' children.²³ The Court's major focus was determining the lynchpin of power granted to Congress in Article I. They determined that the test for jurisdiction was a ques-

14. *Id.* at 3.

15. *Id.* at 4.

16. *Reid v. Covert*, 351 U.S. 487 (1956).

17. *See Covert*, 354 U.S. at 34–35.

18. *Id.* at 36.

19. *Id.*

20. *See id.* at 45–46, 77 (Frankfurter & Harlan, JJ., concurring).

21. 361 U.S. 234 (1960).

22. *Id.* at 235.

23. *See id.* at 235–36.

tion of status, not a question of the crime committed.²⁴ The question to be answered was “whether the accused in the court-martial proceeding is a person who can be regarded as falling within the term ‘land and naval Forces.’”²⁵ Since the focus of jurisdiction was on status, there was no legally significant distinction between capital and non-capital offenses. Article III of the U.S. Constitution, the Fifth Amendment, and the Sixth Amendment were written in broad terms that cover all criminal prosecutions with no geographical limitations.²⁶

The Court’s analysis focused on the incongruity that would arise by authorizing courts-martial jurisdiction for non-capital cases while denying it for capital cases.²⁷ The Court expressed concern that the government’s position would permit unreviewable military discretion as to which offenses would come within its jurisdiction.²⁸ Offenses could simply be downgraded to give courts-martial jurisdiction to the military.²⁹ In addressing the government’s contention that those accused of a crime would benefit, because capital offenses would be downgraded to non-capital offenses, the Court strongly cautioned against this apparently benevolent position, referring to it as a “garb of mercy.”³⁰ The Court was unwilling to allow the military to choose when to downgrade offenses, thereby removing the procedural safeguards that would allow civilians to fully defend themselves.³¹

In a companion case to *Kinsella*, the Court addressed the next logical step in its steady progress of limiting Article I

24. *Id.* at 240–41.

25. *Id.*

26. *Id.* at 241.

27. *Id.* at 243–44.

28. *Id.* at 244.

29. *Id.*

30. *Id.* at 244–46 (quoting 5 JAMES CHARLES FOX, THE SPEECHES OF THE RIGHT HONOURABLE CHARLES JAMES FOX, IN THE HOUSE OF COMMONS 78 (London 1815)).

31. *See id.* In footnote 10, the Court quoted at length the Right Honourable Charles James Fox’s address to the House of Commons in 1815. *See id.* at 246. Fox derides the “garb of mercy” in treason cases, whereby the government would charge a lesser form of treason taking from the defendant the “shield” of jury challenges, witness lists, advanced notice of the charges, and the assistance of counsel. *Id.*

courts-martial jurisdiction over civilians. *Girsham v. Hagan*³² provided the fact pattern for the Court to address the applicability of courts-martial jurisdiction to capital cases arising against civilian employees of the military overseas. The case arose from a writ of habeas corpus after the petitioner was charged with premeditated murder, found guilty of unpremeditated murder, and sentenced to thirty-five years.³³ The Court made short shrift of the government's detailed differentiation between civilian family members and civilian employees of the Armed Forces.³⁴ The Court found no logical distinction between this case and *Reid* and concluded that the same protections guaranteed by Article III, the Fifth Amendment, and the Sixth Amendment were still controlling.³⁵

A third companion case, *McElroy v. Guagliardo*,³⁶ decided the last permutation of this puzzle: namely, the legitimacy of court-martial jurisdiction over civilian employees of the Armed Forces, stationed overseas, who commit non-capital crimes in times of peace. Here, an Air Force employee stationed near Casablanca, Morocco, stood accused of larceny and conspiracy to commit larceny.³⁷ The Court took a detour to discuss the option open to the government of drafting specialty employees, as occurred in the formation of the Seabees for World War II,³⁸ but quickly went on to conclude that this case was no different than the preceding cases. Court-martial jurisdiction did not cover civilian employees overseas accused of non-capital crimes.³⁹

Interestingly enough, the final push to completely open the barn door came from the military itself. All of the preceding Supreme Court cases determined jurisdiction for offenses that occurred in periods other than a time of declared war.⁴⁰ *United States v. Averette* arose from misconduct during the Vietnam

32. 361 U.S. 278, 278-79 (1960).

33. *Id.* at 279.

34. *See id.* at 280.

35. *Id.*

36. 361 U.S. 281 (1960).

37. *Id.* at 282.

38. *Id.* at 287.

39. *Id.*

40. *United States v. Averette*, 41 C.M.R. 363, 364 (1970).

Conflict. A general court-martial sitting in Vietnam convicted Averette of conspiracy to commit larceny and attempted larceny of 36,000 U.S. government-owned batteries.⁴¹ The highest court of the military wrestled with the meaning of “in time of war” as it was used in Article 2(10) of the Uniform Code of Military Justice.⁴² Taking guidance from the Supreme Court, they concluded that phrase to mean “a war formally declared by Congress.”⁴³ The focus of their concern was that a broader construction would open the possibility that civilians could be prosecuted in military courts when there was military action of any scale and intensity.⁴⁴ This would have created no meaningful standard and, in practical terms, may have left *Covert* jurisprudence an empty shell with no real effect.

B. What Is the Significance of the Evolution in Courts-Martial Jurisdiction?

There are two ways to consider the breadth of the problem left by any gap in jurisdiction. The first is to assess, at least in broad terms, the overall exposure this jurisdictional gap leaves in its wake. While the raw numbers concerning civilians connected to the military overseas ebb and flow with the current state of the world, at any given time there are significant numbers of dependents and employees accompanying U.S. Armed Forces around the globe. In 1977, the General Accounting Office (GAO) reported that 343,000 civilians accompanied the Armed Forces abroad.⁴⁵ That number included dependents of service members, civilian employees of the Armed Forces, and the dependents of those employees.⁴⁶ “During the first Gulf War, one of every 100 Americans in that region worked for a [private mili-

41. *Id.* at 363.

42. 10 U.S.C. §802.

43. *Id.* at 365. Earlier in its opinion, the Court provided a breakdown of the *Covert* line of cases. *See id.* at 364. The Court interpreted those cases to mean that a strict and literal construction of “in time of war” should apply. *Id.* at 365.

44. *Id.*

45. Captain Gregory A. McClelland, *The Problem of Jurisdiction over Civilians Accompanying the Forces Overseas—Still With Us*, 117 MIL. L. REV 153, 175 (1987).

46. *Id.*

tary firm].”⁴⁷ During Operation Desert Storm, 950 civilian contract personnel and 750 Department of the Army Civilians eventually deployed to the Persian Gulf.⁴⁸ “Thirty-four of the contract personnel even crossed the Iraqi border during the ground offensive.”⁴⁹ When the military returned to the Persian Gulf in the fall of 1994, 160 Department of the Army Civilians accompanied them.⁵⁰ “In 1999, there were more than 49,560 civilian employees of the Department of Defense working overseas.”⁵¹ There were also “more than 193,000 dependent family members living with military members overseas” in 1999.⁵² In 2000, Department of Defense officials told a House Judiciary Subcommittee that “more than 2,000 civilian employees and contractors were deployed to combat areas.”⁵³ Currently, more than 20,000 federal contractors are working in Iraq.⁵⁴

The potential cases slipping through the jurisdictional gap is magnified because Iraqi courts probably do not have jurisdiction over U.S. government contractors as a result of our Status-of-Forces Agreement (SOFA) with Iraq.⁵⁵ This is not a new phenomenon. When the U.S. military went into Somalia and Haiti, there were no functioning governments in existence to prosecute crimes.⁵⁶ The Dayton Accords⁵⁷ controlled jurisdiction between the United States and the Balkan countries, and “specifically provided that the United States had exclusive jurisdiction over

47. *PMFs New Element in War*, CHARLESTON GAZETTE (West Virginia), Sep. 3, 2003.

48. Major Susan S. Gibson, *Lack of Extraterritorial Jurisdiction Over Civilians: A New Look at an Old Problem*, 148 MIL. L. REV. 114, 148 (1995).

49. *Id.*

50. *Id.* at 148–49.

51. Schmitt, *supra* note 2, at 60.

52. *Id.* at 61.

53. Groner, *supra* note 4.

54. Shane, *supra* note 4; Washburn & Bigelow, *supra* note 4.

55. Washburn & Bigelow, *supra* note 4; Groner, *supra* note 4.

56. Schmitt, *supra* note 2, at 73.

57. Republic of Bosnia and Herzegovina-Federation of Bosnia and Herzegovina: Dayton Agreement on Implementing the Federation of Bosnia and Herzegovina, with Attached agreed Principles for the Interim Statute for the City of Mostar, Nov. 10, 1995, 35 I.L.M. 170 (1996) available at <http://www.state.gov/www/regions/eur/bosnia/bosagree.html>.

criminal offenses committed by [members of the U.S. Armed Forces and U.S. civilians].⁵⁸ The Korean – U.S. SOFA⁵⁹ automatically reserved jurisdiction over U.S. civilians attached to the Armed Forces of the United States anytime the Korean government declared martial law.⁶⁰ The Korean government has done so several times since the Korean War, and the state of martial law has lasted over one year on some occasions.⁶¹

The second means for examining the import of any jurisdictional gap is to consider the number of actual cases that fell through the gaps and to review some of the fact patterns to determine if they involved meaningful issues. The 1977 GAO audit determined that host countries released jurisdiction over crimes committed by civilians to the United States in fifty-nine serious cases and in fifty-four less serious cases.⁶² Serious cases included murder, rape, manslaughter, negligent homicide, arson, robbery and related offenses, forgery and related offenses, and aggravated assault.⁶³ In 1984, there were fifty-three serious cases released to the United States out of 415 serious cases committed by civilians overseas.⁶⁴ That equals 12.7 percent of the serious cases.⁶⁵ Due to a lack of jurisdiction, the United States was unable to prosecute some of these released cases, including civilians charged with murder, rape, manslaughter, robbery, and aggravated assault.⁶⁶ Other articles have touched on the serious nature of cases slipping through the cracks. “[I]ncidents of rape, arson, drug trafficking, assaults, and burglaries went unpunished [because] the host nation declined to prosecute.”⁶⁷

58. Schmitt, *supra* note 2, at 73 n.133.

59. 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, July 6, 1966, 17 U.S.T. 1677, 674 UNTS 163.

60. McClelland, *supra* note 45, at 180.

61. *Id.*

62. *Id.* at 175.

63. *Id.*

64. *Id.* at 180.

65. *Id.*

66. *Id.* at 176, 181.

67. Schmitt, *supra* note 2, at n.1 (citing Richard Roesler, *Civilians in Military World Often Evade Prosecution*, STARS AND STRIPES, Apr. 10, 2000, at 3).

Atrocious scenarios where civilians have gone unpunished are plentiful. Sometime between 1999 and 2000, U.S. civilians working for DynCorp in the Balkans were involved in prostitution and human trafficking.⁶⁸ They apparently purchased young girls as sex slaves and even videotaped a rape.⁶⁹ The contractors were merely sent home and fired.⁷⁰ Perpetrators have even been sophisticated enough to research the law and jurisdictional gaps, plotting so that their actions fall within those gaps. This is precisely what happened in Berlin, where a member of the Armed Forces plotted with his wife to murder a fellow American, researching the likelihood that the spouse would not be prosecuted.⁷¹

Fact patterns where civilians could potentially slip out the barn door continue in the new millennium. In 2001, the Civilian Deputy Chief of the U.S. 8th Army Mortuary was accused of ordering the dumping of toxic chemicals at a Yongsan military compound.⁷² Although Korea intended to prosecute the civilian, the U.S. military issued a certificate stating that the conduct took place in an official duty capacity.⁷³ By the terms of Article 22 of the U.S. – Korea SOFA, such a certificate properly issued is sufficient evidence to determine primary jurisdiction rests with the state that issued the certificate.⁷⁴ Although there are means for Korea to request jurisdiction from the United States,⁷⁵ if the United States does not release jurisdiction back to Korea, without MEJA, this would be another case where U.S. civilian crime would go unprosecuted.

The abuses at Abu Ghraib provide a stark illustration of the importance of MEJA with the development of the modern Army. In that battlefield environment, the critical role of interrogation

68. Gibson, *supra* note 4.

69. *Id.*

70. *Id.*

71. McClelland, *supra* note 45, at 178.

72. Hankook Ilbo, *Korea to Retain Jurisdiction over USFK Toxic Waste Dumping*, KOREA TIMES, May 17, 2001.

73. *Id.*

74. *Id.*

75. *See id.*

is not the exclusive domain of the military.⁷⁶ Multiple high-level investigations into the abuses in Iraq have specifically found civilians to be responsible for the abuses.⁷⁷ The investigation conducted by Major General Antonio M. Taguba determined that civilian contractors, Messrs. Steven Stephanowicz and John Israel, were either directly or indirectly responsible for abuses at Abu Ghraib.⁷⁸ Their 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.⁷⁹

The abuse was not limited to civilians. There were “numerous incidents of sadistic, blatant, and wanton criminal abuses” intentionally committed by several members of the military police guard force against detainees.⁸⁰ Soldiers videotaped and photographed naked male and female detainees; they arranged them in sexually explicit positions for photographing; they kept them naked for days at a time; they forced male prisoners to masturbate; they simulated electric torture; they performed a host of sadistic acts on the detainees; a male guard had sex with a female detainee; and they used military dogs to threaten and attack detainees.⁸¹ The holding in *Toth*⁸² is crystal clear; had these abuses come to light when the perpetrators were no longer in the Army, there would be no jurisdiction to try them without MEJA.⁸³

76. See Shane, *supra* note 4.

77. ANTONIO M. TAGUBA, ARTICLE 15-6 INVESTIGATION OF THE 800TH MILITARY POLICE BRIGADE, 48 (2004) (detailing the Taguba investigation into the abuses and recommending that punitive action be taken against civilian interrogators), available at <http://www.npr.org/iraq/2004/prison%5Fabuse%5Freport.pdf> (last visited on Apr. 2, 2005); Bill Gertz, 27 *Tied to Iraq Prisoner Abuses*, WASH. TIMES, Aug. 26, 2004, at A01.

78. TAGUBA, *supra* note 77, at 48.

79. *Id.* at 48.

80. *Id.* at 16.

81. *Id.* at 16–17.

82. United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 14–15, 23 (1955).

83. See *id.*

C. *Did This Jurisdictional Gap Somehow Go Undetected Until 2000?*

No. In fact, in the forty-plus years since the *Covert* decision, twenty-seven bills have been introduced in Congress to fill the void.⁸⁴ For various reasons, none of them ever became law.⁸⁵ The issue was raised in congressional oversight hearings, and reports explaining the problem were issued by executive and legislative branch agencies.⁸⁶ Even the Judge Advocate General of the Army raised the issue in 1982 through a “Wartime Legislation Team” established to assess the application of military law during combat operations.⁸⁷

Suggestions that Congress take action have also come through the judicial branch. The *Covert* case itself is peppered with reminders that the issue at hand is whether or not civilians can be tried at courts-martial versus in federally-established Article III courts.⁸⁸ In *Singleton*, decided just two and a half years after the second *Covert* case, the Supreme Court tacitly suggested that Congress could act to fill the void.⁸⁹ Apparently, during oral argument the government representative used the lack of congressional action as one of the arrows in its quiver to persuade the Court to allow court-martial jurisdiction.⁹⁰ The Court was not persuaded by that reasoning. However, in its opinion, noting the government’s concern, the Court seemed to take it for granted that Congress certainly could extend the jurisdictional reach over civilians as long as it kept civilians in peacetime within Article III courts.⁹¹

Apparently, the courts decided that Congress simply was not receiving the message clearly. In *United States v. Gatlin*⁹² the accused was a male civilian who had married a female sergeant

84. Schmitt, *supra* note 2, at 73–74 n.135.

85. *Id.*

86. *Id.* at 74.

87. *Id.*

88. *See Covert*, 354 U.S. at 19, 36, 37, and 42 (Frankfurter, J., concurring).

89. *See Singleton*, 361 U.S. 234, 245 (1960) (“The situation will be aggravated by the want of legislation.”).

90. *See id.*

91. *See id.*

92. 216 F.3d 207, 209 (2d Cir. 2000).

in the U.S. Army who had two daughters from a previous marriage. From February 1994 to August 1997, they lived in government housing on a U.S. Army base in Darmstadt, Germany.⁹³ In 1996, Gatlin secretly began having sexual intercourse with his thirteen-year-old stepdaughter, Claudia.⁹⁴ This continued until a few months before they returned to the United States.⁹⁵ In September of 1997, Claudia gave birth and soon afterwards she disclosed the prior intercourse with Gatlin.⁹⁶ A paternity test concluded that Gatlin was the father of the child.⁹⁷ Gatlin pled guilty to a magistrate judge, but prior to the acceptance of his plea by the judge, he moved to dismiss the indictment for lack of jurisdiction.⁹⁸

In overturning Gatlin's conviction and dismissing the indictment, the court declared that, "with regret," it must agree there is no jurisdiction.⁹⁹ The court thought the issue so serious that it took the extraordinary step of directing the Clerk of the Court to forward a copy of the opinion to the Chairmen of the Armed Services and Judiciary Committees.¹⁰⁰ In its opinion the court emphasized the fact that "neither party disputes the *authority* of Congress to regulate the conduct of its citizens and nationals outside the territorial boundaries of the United States."¹⁰¹ The case is not an issue of congressional power: Can jurisdiction extend to people in Gatlin's status? But rather one of statutory construction: Has jurisdiction been extended?¹⁰² The court concluded that unfortunately Congress had not yet properly extended jurisdiction.¹⁰³ In closing, the court again clearly laid out the boundaries of its holding: "Finally, it clearly is within Congress's power to change the effect of this ruling by

93. *Id.*

94. *Id.* at 210.

95. *See id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.* at 209.

100. *Id.*

101. *Id.* at 211.

102. *See id.*

103. *Id.* at 209, 223.

passing legislation to close the jurisdictional gap.”¹⁰⁴

III. MEJA: A STEP TO LATCH THE BARN DOOR SHUT

A. *The Provisions of MEJA*

In the year 2000, Congress passed and President Clinton signed what has come to be known as the Military Extraterritorial Jurisdiction Act.¹⁰⁵ MEJA is contained in Sections 3261-3267 of Title 18 of the United States Code. The provisions remained unchanged through the year 2004. Section 3261 provides the heavy lifting, and is basically an assimilative crime statute.¹⁰⁶ It criminalizes offenses by members of the Armed Forces and by persons employed by or accompanying the Armed Forces outside the United States.¹⁰⁷ Specifically, paragraph (a) sets the parameters by including conduct engaged in outside the United States that would constitute an offense punishable by imprisonment for more than one year, a felony, if it had occurred within the special maritime and territorial jurisdiction of the United States.¹⁰⁸ It encompasses civilians who are employed by the Armed Forces or who accompany the Armed Forces, outside the United States.¹⁰⁹

Paragraph (b) of Section 3261 excludes from prosecution those individuals already tried, or in the process of being tried by a foreign government, unless the Attorney General or Deputy Attorney General specifically approves the prosecution.¹¹⁰ Paragraph (c) clarifies that MEJA does not remove courts-martial jurisdiction in any case where both MEJA and the military may have jurisdiction.¹¹¹ Paragraph (d) limits the trial of members of the Armed Forces to situations where the military no longer has jurisdiction over them¹¹² or where the service member committed

104. *Id.* at 223.

105. Schmitt, *supra* note 2, at 78.

106. *Id.* at 114.

107. 18 U.S.C.A. § 3261 (West Supp. 2004).

108. *Id.* § 3261(a).

109. *Id.*

110. *Id.* § 3261(b).

111. *Id.* § 3261(c).

112. Paragraph (d) addresses the very circumstances involved in *Toth*. See United

the offense with one or more persons not subject to court-martial jurisdiction.¹¹³

Sections 3262 to 3266 of Title 18 of the United States Code broadly lay out the procedures to be used in applying Section 3261. Section 3262 empowers the Secretary of Defense to use Department of Defense law enforcement personnel to arrest the individuals described in Section 3261(a).¹¹⁴ It also establishes the basic preference for the transfer of those individuals to civilian authorities in the United States as soon as possible.¹¹⁵ As the bill was being drafted, representatives of Department of Defense teachers voiced their concern.¹¹⁶ They were worried that a mere accusation would land them in custody, back in the United States with little or no investigation beforehand, removed from their employment, family, and friends.¹¹⁷ They even raised the concern that once their name was cleared, they would personally have to bear the expense of returning overseas.¹¹⁸

These concerns were addressed in Section 3264: Limitation on removal. This Section requires that prior to removal, one of five things must first occur: 1) a federal magistrate judge orders the person to be removed to the United States to be present at a detention hearing; 2) a federal magistrate judge orders detention of the person prior to trial; 3) the person is entitled to and does not waive a preliminary examination under the Federal Rules of Criminal Procedure; 4) a federal magistrate judge otherwise orders the person to be removed to the United States; or, 5) the Secretary of Defense determines that military necessity

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

113. 18 U.S.C.A. § 3261(d) (West Supp. 2004).

114. *Id.* § 3262(a).

115. *See id.* § 3262(b).

116. *See* Schmitt, *supra* note 2, at 96–98. Schmitt has unique insight into how MEJA came into existence. Schmitt previously served as the Chief Counsel to the Subcommittee on Crime of the House Committee on the Judiciary. National Institute of Justice, *Biography: Glenn R. Schmitt, Deputy Director, National Institute of Justice*, at http://www.ojp.usdoj.gov/nij/bio_glenn.html (last visited on Mar. 27, 2005). He was on the Judiciary Committee staff from 1994 to 2001. *Id.* He was one of the drafters of MEJA and played a key role during the amendment process of the bill. *See id.* He also drafted the House Judiciary Committee's report on MEJA.

117. *See* Schmitt, *supra* note 2, at 96–98.

118. *Id.* at 97.

requires the individual to be removed.¹¹⁹

Section 3263 of Title 18 of the United States Code provides the authority to deliver individuals who violate MEJA to the foreign country where the violation allegedly occurred.¹²⁰ This can only be done if the country requests delivery and if delivery is authorized by a treaty or international agreement to which the United States is a party. This authority is subject to the limitation of removal set forth in Section 3264.¹²¹

Section 3265 of Title 18 of the United States Code delineates the procedure for initial proceedings under MEJA.¹²² It requires that any person arrested or charged and not delivered to another country shall have an initial appearance as contemplated by the Federal Rules of Criminal Procedure.¹²³ The appearance shall be conducted by a federal magistrate judge and can be done by teleconference so long as all the parties can hear each other.¹²⁴ The magistrate judge shall determine whether there is probable cause to believe that an offense as contemplated by Section 3261(a) was committed by the person accused.¹²⁵ If a motion is made requesting the detention of the individual before trial, the magistrate judge shall hold that hearing as well, which may also take place via teleconference if the accused so desires.¹²⁶

Paragraph (c)(1) of Section 3265 provides for the right to counsel at these preliminary hearings.¹²⁷ Further, it authorizes the magistrate judge to appoint qualified military counsel for purposes of the hearings.¹²⁸ This was initially a significant bone of contention within the Department of Defense.¹²⁹ However, the Department of Defense was satisfied as long as a military law-

119. 18 U.S.C.A. § 3264(b)(1)–(5) (West Supp. 2004).

120. *Id.* § 3263(a).

121. *Id.* §§ 3263(a), 3264.

122. *See id.* § 3265.

123. *Id.* § 3265(a)(1).

124. *Id.*

125. *Id.* § 3265(a)(2).

126. *Id.* § 3265(b).

127. *Id.* § 3265(c)(1).

128. *Id.*

129. Schmitt, *supra* note 2, at 103.

yer could only be appointed from a list designated by the Secretary of Defense.¹³⁰ That would provide the military with some control over who was appointed and hopefully ensure that only judge advocates with training or experience in the federal system would be appointed.¹³¹ To that end, paragraph (c)(2) limits the appointment to judge advocates made available by the Secretary of Defense.¹³²

Given the lack of specific procedural details in the MEJA statutes, Section 3266(a) of Title 18 of the United States Code requires the Secretary of Defense to prescribe regulations¹³³ governing the apprehension, detention, and removal of persons under MEJA.¹³⁴ It further requires that the regulations be uniform throughout all the services.¹³⁵ The Act itself does not indicate who can arrest and detain these civilians, but requires the Secretary of Defense to make that determination.¹³⁶ The Act does not address the extent of the military's role after a defendant is arrested. Although it was written with a preference that civilian authorities take over a case as soon as practical, it does not address who will continue to investigate the case.¹³⁷ The Act also fails to address what role the military will have in determining when and where a case will be presented to an assistant U.S. attorney.¹³⁸ Although the United States will ordinarily not prosecute the case if the host nation chooses to, there is no provision prescribing how long the United States must wait for the host nation to act before proceeding on its own.¹³⁹ Although the Secretary of Defense compiles the list of judge advocates who may be appointed as defense counsel by the magistrate judge, there is no language describing the training or other accreditation that

130. *Id.* at 103.

131. *Id.* at 103–04.

132. 18 U.S.C.A. § 3265(c)(2) (West Supp. 2004).

133. *See* explanation *supra* note 1 (referring to the recently passed DODI 5525.11 and how this article analyzes MEJA without the benefit of the instruction).

134. 18 U.S.C.A. § 3266(a).

135. *Id.*

136. *Id.* § 3262(a).

137. Schmitt, *supra* note 2, at 125.

138. *Id.* at 126.

139. *Id.*

must be given to those judge advocates before they are included on that list.¹⁴⁰

Section 3266(b) of Title 18 of the United States Code contains notice provisions. Specifically, the Secretary of Defense is required, to the maximum extent practicable, to provide notice to any non-U.S. citizen employed by or accompanying the Armed Forces outside the United States that they may be subject to the criminal jurisdiction of the United States.¹⁴¹ Part two of the paragraph provides the caveat that failure to provide such notice is not fatal to the prosecution of an individual and is not a defense.¹⁴²

Finally, Section 3267 of Title 18 of the United States Code provides the definitions of terms used throughout the MEJA statutes. Through the 2004 version of the Act, the term “employed by” was defined as “employed as a civilian employee of the Department of Defense (including a nonappropriated fund instrumentality of the Department), as a Department of Defense contractor (including a subcontractor at any tier).”¹⁴³ It excludes from the definition individuals who are nationals of, or ordinarily resident in, the host nation. The statute defines “accompanying the Armed Forces” to include dependents of members of either the Armed Forces, employees of the Department of Defense or Department of Defense contractors.¹⁴⁴ The dependent must be residing with a member of the Armed Forces, employee, or contractor, and again, cannot be a national of or ordinarily resident in the host nation.¹⁴⁵

B. Is MEJA an Improvement?

Absolutely. However, in the four years that the Act has been in place, only one individual has been tried under MEJA, and there have not been any prosecutions of contractors.¹⁴⁶ On Octo-

140. *See id.* at 130.

141. 18 U.S.C.A. § 3266(b)(1) (West Supp. 2004).

142. *Id.* § 3266(b)(2).

143. *Id.* § 3267(1)(A).

144. *Id.* § 3267(2)(A).

145. *Id.* § 3267(2)(B)–(C).

146. *See* Gibson, *supra* note 4 (describing the “single existing prosecution” under MEJA of Latasha Arnt, the wife of an Air Force member).

ber 15, 2004, Latasha Arnt was acquitted of second-degree murder and found guilty of voluntary manslaughter.¹⁴⁷ Arnt was convicted in a Los Angeles federal court for stabbing her Air Force husband to death while they were stationed in Turkey.¹⁴⁸ With no regulations in place governing the specific procedures of detention and removal to the United States, Arnt was accompanied from Turkey by U.S. marshals, and then held by federal authorities without bail.¹⁴⁹ Without MEJA, the United States could not have tried this case. If Turkey had declined to prosecute the case, Arnt would have gone unpunished. This case shows that MEJA can indeed be a useful tool for extending jurisdiction abroad.

C. The Latch has Already Been Tightened Once

The abuses at Abu Ghraib focused attention on a glaring problem with MEJA. The definition section required the employer of the civilians included within the scope of the act to be the Department of Defense or a contractor with the Department of Defense.¹⁵⁰ Major General Taguba named two contracting firms in a report on the abuses at Abu Ghraib. CACI, Inc. of Arlington, Virginia provided interrogators at the prison, and Titan Corp of San Diego, California provided translators.¹⁵¹ Steven Stefanowicz was a contract interrogator with CACI, and as previously discussed, has been accused of giving military police instructions that he knew equated to physical abuse.¹⁵² Unfortunately, the interrogators worked for CACI, and this firm has no contract with the Department of Defense. CACI's contract is with the Interior Department's National Business Center, which has run the contracting office at Fort Huachuca, Arizona for the past four years.¹⁵³ Since CACI's contract is not with the Department of Defense, it is doubtful that the jurisdictional arm of

147. David Rosenzweig, *Air Force Wife Guilty in Spouse's Fatal Stabbing*, L.A. TIMES, Oct. 16, 2004, at B3.

148. *Id.*

149. *Wife Arrested in Sergeant's Death*, A.F. TIMES, June 16, 2003, at 5.

150. 18 U.S.C.A. § 3267(1)(A) (West Supp. 2004).

151. Gibson, *supra* note 4.

152. *Id.*

153. Shane, *supra* note 4.

MEJA will reach Mr. Stefanowicz.¹⁵⁴ As Representative David E. Price described it, “Pentagon contractors working in Iraq are operating in a legal fog, where they are not accountable to Iraqi laws, U.S. laws or military laws governing our troops.”¹⁵⁵ As succinctly stated by Peter W. Singer of the Brookings Institution, the task of military interrogation is being supervised by Smokey the Bear.¹⁵⁶ In response to this glaring gap in coverage, Representatives Price and Christopher Shays introduced a bill that extends coverage to contractors with any federal agency as long as they are supporting the mission of the Department of Defense outside the United States.¹⁵⁷ Although not yet codified within MEJA, the proposal has been passed by both Houses and signed into law by President Bush.¹⁵⁸

IV. IS THE BARN DOOR TRULY SHUT?: TIGHTENING THE LATCH

The barn door is not yet firmly shut. There remain at least five areas where the United States may foreseeably want to prosecute civilians overseas but will have no jurisdiction to do so. This is not to suggest that MEJA should be extended to cover all of the following gaps. Instead, careful consideration should be given to the lapses in coverage and an informed decision made as to whether or not the jurisdictional reach of MEJA should be broadened.

A. *MEJA Only Applies to Members of the Military and Civilians Supporting the Department of Defense Mission*

By its terms, MEJA only applies to civilians supporting the mission of the Department of Defense overseas.¹⁵⁹ Shortly after MEJA was enacted, representatives of the State Department proposed that the Act be extended to cover State Department officials and their family members living outside the United

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. See *Military Extraterritorial Jurisdiction Over Contractors Supporting Defense Missions Overseas*, 108 Pub. L. No. 108-375, Sec. 1088, § 3267(1)(A), 118 Stat. 1811, 2066–67 (2004) (to be codified as amended at 18 U.S.C. § 3267(1)(A)).

159. *Id.*

States.¹⁶⁰ They have thousands of employees and family members stationed around the world. Any crimes they might commit would fall through the same jurisdictional gap that existed for Department of Defense personnel prior to MEJA.¹⁶¹ Considering that diplomatic immunity may prohibit prosecution of these individuals by the host nation, the gap may be more significant than it was with Department of Defense personnel.¹⁶² Other federal agencies also fall outside the Act's coverage, such as the Federal Bureau of Investigation, Drug Enforcement Administration, and Department of Homeland Security.¹⁶³ No matter which part of the alphabet soup personnel belong to, their conduct overseas raises precisely the same concerns that led to the passage of MEJA in the first place.

Abuse scandals in Iraq demonstrate the significance of this gap. A report by retired Colonel Stuart Herrington recently surfaced detailing that even before the events at Abu Ghraib, the military knew of detainee abuses.¹⁶⁴ The Herrington Report found that members of Task Force 121 and its predecessor, Task Force 20, were in Iraq searching for weapons of mass destruction and "high value targets including Saddam Hussein."¹⁶⁵ The Herrington Report found that Task Force members "had been abusing detainees" while in Iraq.¹⁶⁶ The Report concluded that the detainees' injuries suggested that they were beaten and that the members of the task force need to be reined in with respect to their treatment of detainees.¹⁶⁷ The Report also noted that agents from other government agencies regularly kept ghost detainees by not logging their arrests.¹⁶⁸ Major General Taguba's report noted precisely the same misconduct among agents of

160. Schmitt, *supra* note 2, at 133.

161. *Id.*

162. *Id.* at 133-34.

163. *See id.* at 134.

164. Josh White, *U.S. Generals in Iraq Were Told of Abuse Early, Inquiry Finds*, WASH. POST, Dec. 1, 2004, at A1.

165. *Id.*

166. *See id.*

167. *Id.*

168. *Id.*

other governmental agencies.¹⁶⁹ These “ghost detainees” were moved around within the facility to hide them from the International Committee of the Red Cross survey team.¹⁷⁰ This violates army doctrine and international law.¹⁷¹

As MEJA is currently written, personnel from the CIA and other government agencies fall outside of its jurisdictional reach. These individuals are in the same legal void as were civilians employed by, or accompanying, the Armed Forces in the forty years following the *Covert* line of cases. Although members of the Navy SEALs have been charged in connection with the death of two detainees they captured in the field,¹⁷² if any members of the CIA or other government agencies were involved, they may literally get away with murder.

There are other federal statutes that criminalize very specific conduct with jurisdiction that extends beyond the geographical borders of the United States, but they are woefully inadequate. The federal torture law¹⁷³ is currently being contemplated as a means to punish conduct by CIA operatives in Afghanistan.¹⁷⁴ The difficulty with these alternatives is that they remain untested in court,¹⁷⁵ and by their terms, apply only to very narrow factual scenarios.¹⁷⁶ Given the narrow definitions, it

169. TAGUBA, *supra* note 77, at 26.

170. *See id.*

171. *Id.*

172. White, *supra* note 164.

173. 18 U.S.C.A. §§ 2340–2340B (West 2000 & Supp. 2004).

174. *See, e.g.*, Douglas Jehl and David Johnston, *CIA is Spooked by the Idea of Prosecutions*, SAN ANTONIO EXPRESS-NEWS, February 27, 2005, at A13.

175. There are currently no reported court cases examining the parameters and applicability of the federal torture law.

176. For example, torture is defined as “an act committed by a person *under the color of law* specifically *intended* to inflict *severe* physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control.” 18 U.S.C.A. § 2340(1) (emphasis added). Severe mental pain or suffering is defined as:

the *prolonged* mental harm caused by or resulting from—(A) the intentional infliction or threatened infliction of severe physical pain or suffering; (B) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (C) the threat of imminent death; or (D) the treat that another person will imminently be subjected to death, se-

is likely that neither the misconduct of Messrs. Stephanowicz and Israel nor the intentional hiding of “ghost detainees” would satisfy the rigid demands of the federal torture law. If MEJA were broadened to cover these other categories of individuals, prosecutors could rely on less ambiguous long-standing federal criminal statutes. They would not be required to try and shoe-horn conduct into statutes with limiting definitions, but instead would have the full range of federal criminal statutes at their disposal.

B. Crimes Punishable by One Year or Less are Outside the Coverage of MEJA

By the direct language of Section 3261(a), the Act only applies to felonies.¹⁷⁷ The act provides no explanation for this, but presumably the administrative actions available are thought to adequately address misdemeanors. The government can limit civilians’ use of post facilities, bar entry to the installation, and return the offenders to the United States.¹⁷⁸ Civilian employees can also be fired and even barred from future employment with any Department of Defense contractor.¹⁷⁹ While these alternatives may be sufficient in most scenarios, why should the government entirely remove one means of enforcing the law?

The vast majority of offenses committed by civilians accompanying and employed by the Armed Forces overseas are misdemeanors.¹⁸⁰ The list of misdemeanors includes simple assaults, drug abuse, violation of economic control laws, traffic offenses, disorderly conduct, and other minor infractions.¹⁸¹ In 1984, excluding traffic offenses, there were 618 misdemeanor infractions committed by civilian employees and dependents overseas.¹⁸² Of

vere physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality[.]

Id. § 2340(2) (emphasis added).

177. 18 U.S.C.A. § 3261 (West Supp. 2004).

178. Schmitt, *supra* note 2, at 73.

179. *Id.*

180. See McClelland, *supra* note 45, at 181.

181. *Id.*

182. See *id.*

those, the host nation released jurisdiction in 104 cases.¹⁸³ That equals seventeen percent of all misdemeanor offenses other than traffic violations.¹⁸⁴

Extending MEJA's coverage to these cases would give the government the *ability* to prosecute misdemeanor offenses. That is not to say that they must or should prosecute every case. Consider the situation that would arise if a civilian were accused of an aggravated assault. Necessarily, the crime scene and the witnesses would be outside the United States. Very likely some of the witnesses would not be U.S. citizens. It would be an expensive and time-consuming case for the government to try. It only makes sense to arm the assistant U.S. attorney with the option of a plea bargain to a simple assault. As the law currently stands, it is doubtful that the case could be tried as a misdemeanor. U.S. federal courts would not have jurisdiction to accept a plea to a misdemeanor offense under the current MEJA rules.

C. Implementing Regulations Have Not Been Enacted

The lack of implementing regulations may serve as an impediment to prosecution of some individuals. Although MEJA requires uniform implementation rules, they have not been published in the four years the Act has been in place.¹⁸⁵ Section 3266 specifically requires notifying any person not a national of the United States, who might fall under the jurisdiction of MEJA, that they are subject to the Act.¹⁸⁶ Although paragraph (b)(2) suggests that failure to do so will not prevent prosecution,¹⁸⁷ consider for a moment the practical implications and political fallout. As the United States looks to hire interpreters to employ in Iraq, the United States might well look to surrounding Arabic-speaking nations to supplement the employee pool. If the United States hires a Jordanian interpreter and he starts a fight in Iraq, pulling a knife on the victim,¹⁸⁸ MEJA would authorize

183. *See id.*

184. *See id.*

185. Gibson, *supra* note 4.

186. 18 U.S.C.A. § 3266(b)(1) (West Supp. 2004).

187. *Id.* § 3266(b)(2).

188. *See* U.S.S.G. § 2A2.2 (2004) (defining what constitutes an "aggravated assault").

U.S. officials to forcibly remove him to the United States and try him in a U.S. federal court, even if he had never been informed that he might be subject to U.S. jurisdiction. Whether or not the government could legally do this, should they? Politically would they be able to do so? There is no reason for the United States to expose itself to those questions and face the likely political fallout. Four years ago, MEJA was passed, and its provisions directed the Secretary of Defense to compose regulations that include procedures notifying non-U.S. citizens who might be subject to U.S. jurisdiction. The regulations should be implemented as quickly as possible, and notice provided to all foreign employees.

D. Citizens and Those Ordinarily Resident in the Host Nation Are Excluded

Section 3267 of Title 18 of the United States Code specifically removes individuals who are citizens of, or ordinarily resident in, the host nation from the jurisdictional reach of MEJA.¹⁸⁹ The exception was not an accident. It was included based on the belief that host nations would punish the criminal conduct of their own residents, even if the misconduct were directed entirely against American interests.¹⁹⁰

Abu Ghraib poignantly illustrates why legislatures may wish to broaden the coverage. In one instance, an investigation by Colonel Falcone determined that an Iraqi guard gave a detainee in Abu Ghraib a pistol and knives.¹⁹¹ In another instance, a Serious Incident Report determined that an Iraqi guard assisted a detainee's escape by signing him out on a work detail and then disappearing with the prisoner.¹⁹² As MEJA is currently written, the United States cannot prosecute those guards. Perhaps our steadfast dependence on the host nation to prosecute those guards is misplaced.

The difficulties with reliance on host nations extend beyond the borders of war-torn Iraq. Consider the scenario of a Turkish

189. Schmitt, *supra* note 2, at 131.

190. *Id.*

191. TAGUBA, *supra* note 77, at 29.

192. *Id.* at 31.

immigrant living in Germany and working on a military installation. If he becomes angry, attacking and seriously injuring a service member, Germany might determine the appropriate action is simply to deport him back to Turkey. As MEJA is currently written, the United States would have no jurisdiction over the individual and could take no action against him. Consider also the early stages of a conflict. The United States could easily find itself in a situation similar to Somalia or Haiti, where there simply is no functioning government to prosecute the crime.¹⁹³ At the same time, the United States would have no jurisdiction under the current MEJA rules, over individuals residing in the host nation.

A literal reading of MEJA might leave some to assert that there is no host nation within the meaning of the Act if there is no functioning government. Therefore, individuals in lawless countries would be removed from the host-nation exception to MEJA. That would be a very forced interpretation of the Act, and even if it withstood judicial scrutiny, would it withstand public scrutiny? Imagine telling Haitians that they actually have no citizenship. A more straightforward approach would simply be to amend MEJA to encompass these situations. Certainly there may be diplomatic ramifications from amending the Act in this manner. To assuage those worries, concerned nations should be reminded that MEJA generally does not authorize U.S. jurisdiction whenever the host nation exercises its jurisdiction. In addition, implementing the notice provisions of MEJA will ensure that all employees have knowledge of the provisions before they accept employment with a U.S. entity.

E. Civilians Must Be Employed by a U.S. Federal Agency

Even under the new terms that broaden MEJA, it is still required that civilians are employed by a U.S. federal agency or provisional authority.¹⁹⁴ In the current age where coalitions often include countries that supply money but not troops, a loop-

193. Schmitt, *supra* note 2, at 73.

194. Military Extraterritorial Jurisdiction Over Contractors Supporting Defense Missions Overseas, 108 Pub. L. No. 108-375, Sec. 1088, § 3267(1)(A), 118 Stat. 1811, 2066-67 (2004) (to be codified as amended at 18 U.S.C. § 3267(1)(A)).

hole might exist. If Country X decides to support the current effort in Iraq but has no troops to send, the normal alternative is for them to help pay the bill generated by the rebuilding effort.¹⁹⁵ If instead, Country X learns of a labor need, contracts with Halliburton directly, and then assigns Halliburton to the United States for oversight in Iraq, those Halliburton employees would not fall under the provisions of MEJA. Halliburton's employees could be performing exactly the same functions that they currently do, but if their paycheck is ultimately funded by country X, they will not be employed by a U.S. federal agency.

V. CONCLUSION

For forty years, the jurisdictional gap left in the wake of the *Covert* line of cases went unaddressed. Civilians accompanying, or employed by, the Armed Forces were beyond the reach of U.S. criminal courts. In 2000, Congress finally started to close those jurisdictional gaps by passing MEJA. With Abu Ghraib making headlines across the world, Congress realized they did not sufficiently close the barn door. Congress responded by amending MEJA in 2004. What remains today are at least five areas where MEJA fails to shut the barn door: employees and family members of other government agencies living and working abroad; misdemeanor offenses; the lack of implementing regulations that will at least provide grounds for challenge if not outright dismissal of some cases; individual citizens of, or ordinarily resident in, the host nation; and U.S. citizens working for the U.S. overseas but ultimately paid by other countries.

The gaps in jurisdictional reach can be closed by amending the statutory provisions of MEJA. Prior to making the changes, the ramifications should be carefully considered from all viewpoints: constitutional, political, economic, diplomatic, principles of justice, and any other manner that is appropriate to the issue. Amending the Act to extend jurisdiction does not mean that jurisdiction must or should be exercised in every circumstance

195. See generally Al Goodman & Sheila MacVicar, *Iraq Pledges at Least \$13 Billion*, CNN.com, at <http://www.cnn.com/2003/WORLD/meast/10/24/sprj.irq.donors> (Oct. 24, 2003) (identifying countries who did not send troops, but have pledged money to help rebuild Iraq).

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where it exists. It would simply provide the United States the flexibility to exert jurisdiction as it sees fit. Waiting for another Abu Ghraib is the wrong way to address these jurisdictional gaps. It is far better for Congress to proactively consider the gaps highlighted in this article and close the barn door before the horses escape.