

Dustin Tipling

**THE MILITARY EXTRATERRITORIAL JURISDICTION ACT AND
ITS IMPLICATIONS FOR PRIVATE MILITARY COMPANIES**

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By:

Dustin Tipling

Dustin Tipling

Table of Contents

Thesis..... 1

Part I – Introduction..... 1

A. Defining “private military company” 6

 1. PMCs Have Brought Out Into The Light and Under
 The Magnifying Glass..... 8

 2. The employees of PMCs 9

B. Why does the United States use PMCs? 10

 1. Traditional reasons 11

 2. GAO report on the U.S. Government’s use of PMCs..... 12

C. Military Corporations and Mercenaries 14

Part II –

A. The Jurisdictional Gap for criminal prosecution of civilians..... 15

B. The Significance of the Military Extraterritorial Jurisdiction Act 19

C. The New Crime: MEJA..... 20

 1. Section 3267 – Definitions..... 20

 2. Section 3261 – Creating The Criminal Offense 23

 3. Section 3262 – Arrest and commitment and Section 3263 –
 Delivery to authorities of foreign countries 24

 4. Section 3263 – Delivery to authorities of foreign
 countries; Section 3264 – Limitation on removal; Section 3265 –
 Initial proceedings; and Section 3266 – Regulations..... 25

Part III – MEJA only partially fixes the problem 26

A. Other scholar’s suggestions for MEJA 27

B. My response 27

C. Positive Aspects of MEJA..... 29

D. Negative Aspects of MEJA..... 30

Conclusion 33

Dustin Tipling

Thesis

Private Military Companies (PMCs) are civilian staffed corporations that provide military (and law enforcement) services, logistics, and support under contract to a government both inside and outside the country's borders. Prior to Congress passing the Military Extraterritorial Jurisdiction Act, U.S. courts lacked jurisdiction to prosecute civilians accompanying United States' Armed Forces overseas. This article will specifically address how the United States exercises jurisdiction and prosecutes the civilian employees of PMCs in United States courts for crimes they have committed in foreign countries while working under contract to the United States government.

“There is no security on this earth. Only opportunity.”

-General Douglas MacArthur

Part I – Introduction

Private Military Companies¹ (PMCs) are playing a critical role in support of the war on terror and in support of Operation Iraqi Freedom.² PMCs are also becoming a common presence on military installations across the country and around the world.³

¹ For clarification, private military companies can also be called, private military firms (PMFs), and private security companies (PSCs). This article will use PMC to refer to both PMFs and PSCs throughout.

² See, P.W. Singer, *War, Profits, and the Vacuum of Law: Privatized Military Firms and International Law*, 42 Colum. J. Transnat'l L. 521, 522 (2004). (“PMCs...handled everything from feeding and housing U.S. troops to maintaining sophisticated weapons systems like the B-2 stealth bomber, the F-117 stealth fighter, the KC-10 refueling aircraft, U-2 reconnaissance aircraft, and numerous naval surface warships.”) *Id.*

³ See, U.S. Gov't Accountability Office, GAO-03-695, Report to the Subcommittee on Readiness and Management Support, Committee on Armed Services, U.S. Senate, GAO, *Military Operations: Contractors Provide Vital Services to Deployed Forces but Are Not Adequately Addressed in DOD Plans 7* (2003), available at <http://www.gao.gov/new.items/d03695.pdf> [hereinafter GAO-03-695] (Table 1 show the

Dustin Tipling

Although the concept of a “private military”⁴ is nothing new, the corporate nature and mission of today’s PMCs is groundbreaking and raises serious accountability questions.⁵

P.W. Singer, a noted scholar who has written extensively about PMCs,⁶ defines PMCs as “...profit driven organizations that trade in professional services intricately linked to warfare.”⁷ The concept of a *civilian* military government’s can hire for service seems contrary to state practice when a state maintains a standing military, but history tells us that private militaries have been used for centuries.⁸

The private military industry has boomed since the early 1990’s driven by what Singer says are three dynamics: “...the end of the Cold War, transformations in the nature of warfare that blurred the lines between soldiers and civilians, and a general trend toward privatization and outsourcing of government functions around the world.”⁹ He

selected services provided by contractors in deployed locations. The extensive list contains many jobs traditionally provided by military personnel.) *Id.*

⁴ This article defines a “private military” as a military force that has no particular attachment to a state and can be hired by clients to perform military tasks, such as those that are usually performed by a state sponsored military.

⁵ Public accountability is a huge criticism of the industry. See, Martha Minow, *Article: Outsourcing Power: How Privatizing Military Efforts Challenges Accountability, Professionalism, and Democracy*, 46 B.C. L. Rev 989 (2005). (Minow argues that the government’s outsourcing has led to huge accountability issues, mainly because the current system lacks transparency.) *Id.*

⁶ P.W. Singer refers to private military corporations as PMFs or Private Military Firms.

⁷ Nathaniel Stinnett, *Note: Regulating the Privatization of War: How to Stop Private Military Firms from Committing Human Rights Abuses*. 28 B.C. Int’l & Comp. L. Rev. 211 (2005), quoting, P.W. SINGER, CORPORATE WARRIORS: THE RISE OF THE PRIVATIZED MILITARY INDUSTRY AND ITS RAMIFICATIONS FOR INTERNATIONAL SECURITY, 26 Int’l Sec. 186, 188-89 (2001/02). I provide a fuller definition of PMCs in Part I(A).

⁸ *Id.* at 215 (“As long as humanity has waged war, there have been mercenaries.” Stinnett traces the history of private militaries back 3,000 years to the Numidian mercenaries that Ramses II hired to attack Kadesh in 1294 B.C. and other ancient wars. *Id.* at 212. Although in his article’s context they were actually mercenaries, I would argue that American PMCs are not mercenaries under either U.S. or international law.) See also, P.W. SINGER, CORPORATE WARRIORS 19-39 (Cornell University Press) (2003). (Singer tracks the history of PMCs from ancient times to the new corporate military that exists today.) *Id.*

⁹ Singer *supra* note 7.

Dustin Tipling

further cites the military's downsizing after the Cold War and the instability that resulted in the world left a need for services that were not being adequately provided by the traditional military forces.¹⁰ The U.S. still needed military services and support so they utilized the private sector to take over in the areas they had downsized to keep up with the demand.¹¹

Recently, military operations in Afghanistan and Iraq have created a huge new market for America's PMCs and the need for their services is almost insatiable.¹² Many American based PMCs earning large government contracts were startups that arose out of a dormant group of highly skilled former military servicemen that were able to effectively provide what the United States government did not have or were unwilling to use traditional military forces to accomplish.¹³ After 9/11¹⁴, the U.S. began two massive foreign military operations, Operation Enduring Freedom in Afghanistan and Operation Iraqi Freedom in Iraq.¹⁵ America's use of PMCs in these two operations has raised

¹⁰ *Id.*

¹¹ *Id.*

¹² See, Nathan Hodge, *Army Chief Notes 'Problematic' Potential of Armed Contractors On the Battlefield*, 6 *Defense Daily International* 32 (2005). ("Deployed U.S. forces rely heavily on private contractors, who provide everything from laundry service and dining facilities to equipment maintenance and force protection. Security work is a major growth area: the Government Accountability Office recently revealed that, by the end of 2004, U.S. agencies had obligated over \$766 million for private security in Iraq. Firms such as Blackwater USA and Triple Canopy have won major awards to protect government-funded aid and reconstruction projects, in addition to guarding U.S. government personnel and military installations.") *Id.*

¹³ Daniel Bergner, *The Other Army*, *The New York Times*, August 14, 2005. Sec. 6 Col 1. (Bergner traces the formation of "Triple Canopy," a PMC that formed shortly after 9/11. Triple Canopy used ex-U.S. Special Forces to put together a team to guard 13 Coalition Provisional Authority headquarters throughout Iraq under a contract worth about \$90 million.) *Id.*

¹⁴ On September 11, 2001, Al Qaeda terrorists hijacked four aircraft. American flight 11 and United flight 175 struck the World Trade Center in Manhattan, New York. American flight 77 struck the Pentagon in Washington D.C. United flight 93 went down in an empty field outside of Shanksville, Pennsylvania after passengers on board fought the terrorists for control of the aircraft, which was headed for the White house or the Capitol. Nat'l Comm. on Terrorist Attacks upon the U.S., *The 9/11 Comm'n Report*. 1-14.

Dustin Tipling

serious accountability issues that Congress has only recently attempted to correct.¹⁶ One of the major accountability issues was that PMCs were civilian staffed and could not be prosecuted for crimes they committed overseas because U.S. courts lacked jurisdiction.¹⁷

The Abu Ghraib scandal, for example, involved civilians working for PMCs that were operating under contract to the United States government.¹⁸ Steven A. Stefanowicz, a civilian contractor for CACI International, was an interrogator for U.S. military intelligence at Abu Ghraib.¹⁹ He was identified along with others, including military servicemen, as a participant in the abuses.²⁰ For example, during the court-martial of Sgt. Michael J. Smith, a dog handler for the U.S. Army at Abu Ghraib, the court identified that Mr. Stefanowicz had directed Sgt. Smith to use his dog to terrorize particular inmates without proper authorization or direction from his supervisors.²¹ Mr. Stefanowicz has yet

¹⁵ Operation Iraqi Freedom in Iraq started at 9:34 PM EST on March 19, 2003. *Global Security.org: Operation Iraqi Freedom*, http://www.globalsecurity.org/military/ops/iraqi_freedom.htm, (last visited on March 31, 2006). Operation Enduring Freedom started October 7, 2001. *Global Security.org: Operation Enduring Freedom – Afghanistan*, <http://www.globalsecurity.org/military/ops/enduring-freedom.htm>, (last visited on March 31, 2006).

¹⁶ *See generally supra*, Minow at note 5.

¹⁷ *See*, Part II and the provisions of MEJA. There is always the possibility that the local government could exercise criminal jurisdiction over someone, but in virtually lawless countries, such as post invasion Iraq and Afghanistan, such an action by the local authorities is highly unlikely.

¹⁸ Mark Benjamin and Michael Scherer, “*Big Steve*” and *Abu Ghraib*, Salon.com, March 31, 2006. (The article discusses the court-martial of Sgt. Michael J. Smith, who testified that Steven A. Stefanowicz, a civilian contractor for CACI International, was at the helm of some of the abuses at Abu Ghraib.) *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

Dustin Tipling

to be prosecuted for his role in the abuses.²² In contrast Pvt. Ivan Frederick II, one of the U.S. servicemen prosecuted in October 2004 for his role in the prisoner abuse.²³

This paper will address the issue the U.S. government faces with regard to Mr. Stefanowicz and those like him; how does the United States prosecute civilians who accompany the military overseas for criminal acts?²⁴ For examples of the types of crimes that have gone unpunished I will refer to current operations in Iraq and past operations in Kosovo.²⁵ In both of these locations, the Department of Defense (DOD) has a military presence and PMCs are present and operating under U.S. government contracts for their services. In the later case, Iraq, PMCs account for a force of more than 20,000 personnel serving under numerous contracts and various functions.²⁶

Part I of this Article will discuss and define private military companies. This discussion should provide the reader with an understanding of what these companies do

²² *Id.*

²³ *Id.*

²⁴ This paper will only address those PMCs that are under contract to the United States government for services. I will not address PMCs operating under contract to foreign governments or American PMCs not under contract to the United State government.

²⁵ “The Kosovo crisis began in early 1998 when large-scale fighting broke out, resulting in the displacement of some 300,000 people. A ceasefire was agreed in October 1998 which enabled refugees to find shelter, averting an impending humanitarian crisis over the winter. A Verification Mission was deployed under the auspices of the Organisation for Security and Cooperation in Europe (OSCE). However, violence continued and the situation worsened significantly in January 1999. A peace conference, held in Paris, broke up on 19 March with the refusal of the Yugoslav delegation to accept a peaceful settlement. Operation Allied Force was a NATO contingency response aiming at ensuring full compliance with UN Security Council Resolution 1199 (Sept. 23rd 1998). Operation Noble Anvil was the American component of this NATO action to promote regional stability, cooperation and security, in support of the international community. At 1900 hours GMT on 24 March 1999, NATO forces began air operations over the Federal Republic of Yugoslavia.” *Global Security.org: Operation Iraqi Freedom*, http://www.globalsecurity.org/military/ops/allied_force.htm , (last visited on April 11, 2006).

²⁶ *See*, Hodge *supra* note 12. (“While precise numbers are hard to come by, the Brookings Institution estimates there are more than 20,000 private military contractors in Iraq today.”); *See also*, Stephen Fidler, *Steady growth expected after the bubble Private Security Companies: At present Iraq is providing the lion’s share of work*, Financial Times, September 13, 2005, at 4. (The private sector is the second largest of armed foreigners in Iraq after the U.S. military.) *Id.*

Dustin Tipling

and why there is a problem regarding criminal prosecution. Part II will discuss the law which seeks to extend jurisdiction, the Military Extraterritorial Jurisdiction Act (MEJA) and its substantive provisions. The first section of Part II focuses on the two major sections of the Act, the definitions of contract employees and the substantive provision that provides for jurisdiction in U.S. courts. The remaining sections of Part II discuss the other provisions of MEJA and how they relate to the employees of PMCs. Finally, Part III will discuss the positive and negative aspects of MEJA. This Article concludes that while the Act is a major improvement allowing for criminals to be brought to justice, there are still aspects of MEJA that need to be fixed for the law to truly be an effective remedy.

A. Defining “private military company”

A formal and concrete definition of a “private security company” is illusive.²⁷ PMCs escape a formal definition because there is no “model” PMC that all of the various corporations would neatly fit into without compromising clarity. Many of the new PMCs signing contracts with the U.S. government in Iraq and Afghanistan developed around a group of individuals with a specific set of skills that is useful only to the military.²⁸ The

²⁷ “Military companies offer military skills that were once the preserve of governments. Their essential purpose is to enhance the capability of a client’s military forces to function better in war, or to deter conflict more effectively. These companies are distinct from organizations operating in other areas of the security industry in that they are designed to have a strategic impact on the security and political environments of weak states facing a significant military threat.” David Shearer, *Private Armies and Military Intervention*. Adelphi Paper 316. at 23.

I think that this definition is restrictively narrow because I think it misses a gap that many PMCs play, the role of gap filler. The US uses PMCs to operate high tech machinery that would traditionally be reserved for a soldier. They aren’t necessarily “enhancing” rather they are filling a necessary function because they cost less or there is not time to train a soldier. I think these types of definitions may fit somewhat in a general description of PMCs worldwide, but they are not tailored to describe many of the PMCs the U.S. contracts with. By “enhance” I think Shearer is referring to countries that are supplementing their military with services they could not possibly develop or operate themselves. This is not the case in the U.S. because usually the U.S. uses PMCs because it would result in an inefficient use of resources to use traditional military forces to do the same job.

Dustin Tipling

company then either focuses on that set of skills or expands their operations from that basic area to other areas in an effort to win more government contracts.²⁹ Further, some PMCs operate as subsidiaries, divisions, or under contract with larger corporations.³⁰

First, this Article will differentiate between private contractors in general and private military contractors or PMCs. Although the scope of this paper could discuss both, their roles are very different. A private contractor can potentially be any corporation with a contract to provide services, support, labor, or any other conceivable good to the United States government. Whereas PMC contracts usually provide services that relate only to military services and support.³¹

The distinction is important because many of the current crimes and abuses that private contractors have been accused of involve PMCs, not simply government contractors in general.³² Although there is potential for regular contractors that are not classified as PMCs to commit just as serious crimes, the position of this article is that the

²⁸ See Singer *supra* note 2. See also, Hodge *supra* note 12.

²⁹ See, Bergner *supra* note 13. (Triple Canopy, a PMC, developed by Matt Mann, a retired U.S. Army Special Operations master sergeant, to put to use the training he and his fellow comrades had received while serving in the U.S. military) *Id.*

³⁰ For example, DynCorp International LLC was a fully owned corporate subsidiary of Computer Sciences Corporation. History of DI, <http://www.dyn-intl.com/subpage.aspx?id=54> (last visited on March 31, 2006).

³¹ U.S. Gov't Accountability Office, GAO-05-737, Rebuilding Iraq: Actions Needed to Improve Use of Private Security Providers (2005), available at, <http://www.gao.gov/new.items/d05737.pdf>. [hereinafter GAO-05-737]. (In Iraq and generally, PMCs provide the following services: Static security-security for housing areas and work sites; Personal security details-security for high-ranking U.S. officials; Security escorts-security for government employees, contractor employees, or others as they move through Iraq; Convoy security-security for vehicles and their occupants as they make their way into Iraq within Iraq; Security advice and planning.) *Id.* at 9; See also, Peter W. Singer, *Outsourcing War*, Foreign Affairs, March 1, 2005. ("PMFs are businesses that provide governments with professional services intricately linked to warfare; they represent, in other words, the corporate evolution of the age-old profession of mercenaries. Unlike the individual dogs of war of the past, however, PMFs are corporate bodies that offer a wide range of services, from tactical combat operations and strategic planning got logistical support and technical assistance.") *Id.*

³² I discuss these current abuses and crimes in Part II.

Dustin Tipling

focus should be placed on PMCs because of their close engagement with combat, civilians, and the military. Further, any laws that provide for prosecution of PMC employees will most likely cover non-PMC contractors as well.³³ Scholars point to government contracting with PMCs as suspect and secretive because of the semi-public function of their services but cloak and dagger style.³⁴

1. PMCs Have Brought Out Into The Light and Under The Magnifying Glass

When four Blackwater USA's³⁵ employees were brutally killed, dragged through the streets of Falluja, Iraq, and hung from a bridge by an angry mob of Iraqis in March of 2004 the debate over PMCs and their role in military conflicts really came light in the American media.³⁶ Blackwater USA, one of the many PMCs used by United States, proudly states they can provide governments with everything from a professional military to peacekeeping solutions on a global scale.³⁷ Blackwater USA is just one of dozens of

³³ My conclusion provides support for this inference. Also, MEJA's provisions do not limit criminal jurisdiction to PMCs only. *See*, Part II.

³⁴ *See generally*, Stinnett at note 7.

³⁵ Blackwater USA is an American owned PMC operating out of North Carolina.

³⁶ Jeffrey Gettleman, *4 from U.S. Killed in Ambush in Iraq; Mob Drags Bodies*, N.Y. Times, April 1, 2004.; Blackwater USA was "founded in 1997 by former Navy SEAL Eric Prince, the son of a billionaire and an active contributor to Republican causes, Blackwater won a \$21 million contract to protect U.S. Ambassador Paul Bremer, who ran the Coalition Provisional Authority in Iraq until June 2004. It still guards U.S. State Department personnel in Iraq." *Frontline: Private Warriors*, <http://www.pbs.org/wgbh/pages/frontline/shows/warriors/contractors/companies.html> (last visited March 31, 2006).

³⁷ Blackwater.com, About, <http://www.blackwaterusa.com/about> (last visited March 15, 2006). ("We are not simply a 'private security company.' We are a professional military, law enforcement, security, peacekeeping, and stability operations firm who provides turnkey solutions. We assist with the development of national and global security policies and military transformation plans. We can train, equip and deploy public safety and military professionals, build live-fire indoor/outdoor ranges, MOUT facilities and shoot houses, create ground and aviation operations and logistics support packages, develop and execute canine solutions for patrol and explosive detection, and can design and build facilities both domestically and in austere environments abroad.") *Id.*

Dustin Tipling

PMCs operating in Iraq today. For example, one of Blackwater's contracts was to protect dignitaries and high-level diplomats while they are working or serving in Iraq.³⁸ But not all PMCs provide protective security, but in Iraq for example, it is one of the biggest sectors of the industry.³⁹ Not only do PMCs provide security for all high-level dignitaries, they support and secure many of the other companies that have contracts with the United States government in Iraq.⁴⁰

2. The employees of PMCs

There is no "typical" employee of a PMC, but most of them recruit from the same talent pool. For example, most PMCs utilize military or law enforcement experts drawn from ex-Special Forces or civilian police forces to fulfill their contract obligations to the U.S. government.⁴¹ Another area the media criticizes and which has become an area of

³⁸ James Dao, *Private Guards Take Big Risks, For Right Price*, The New York Times April 2, 2004. Sec. A Col 3. (Dao describes some of Blackwater's contracts in Iraq. One was to provide personal protection for L. Paul Bremer III, the former head of the civilian administration in Iraq.) *Id.*

³⁹ . See, Steven L. Schooner, *Contractor Atrocities at Abu Ghraib: Compromised Accountability in a Streamlined, Outsourced Government*, 16 Stan. L. & Pol'y Rev 549, 552 (2005). ("No one should be surprised to find contractors involved in almost every aspect of the U.S. government's efforts in Iraq...Outsourcing...is one of the five government-wide initiatives in the Bush management agenda.") *Id.*

⁴⁰ *Id.* at 553-54.

⁴¹ For example Blackwater's basic requirements for a Protective Security Specialists (PSS) include: [Applicant] [m]ust have minimum of one (1) year experience in providing protective security services in: special operations, US military Special Forces, US Secret Service, or other federal agencies, commercial executive protection services, or law enforcement experience (i.e. US Military Police/Criminal Investigation Division, local & state law enforcement agencies).

Blackwater.com, Security Operations,
<http://www.blackwaterusa.com/securityconsulting/secopps.asp> (last visited March 15, 2006).

Dustin Tipling

concern is their salary.⁴² PMC employees can earn very attractive salaries working overseas, some as high as \$20,000 or more a month in Iraq for example.⁴³

This is in stark comparison to the salary the same person would receive as a member of the armed services performing a similar function.⁴⁴ The substantially higher salaries offered by the private sector by PMCs is causing a real and serious hardship on the U.S. Special Forces community because they are taking all of their highly trained and specialized soldiers to the private sector.⁴⁵ The U.S. government is essentially bidding against the private sector for services and skills that they paid for and developed. By this statement I mean that the U.S. government recruits and trains elite Special Forces troops only to lose them to the private sector because of their high salary offers. Then the U.S. government will turn around and contract with a PMC that has hired their former soldier. The next section discusses why exactly the United States uses PMCs and further addresses this seemingly contradictory anomaly.

B. Why does the United States use PMCs?

Critics and scholars alike often ask why does the United States, and in particular, the DOD use contractors?⁴⁶ There are many different ways to approach this question,

⁴² John Swain, *Making a Killing*, The Australina Magazine, Dec. 3, 2005, at 30. (Swain points to the large salaries paid to PMCs by the U.S. government to help stabilize Iraq. He cites that some PMCs pay more than \$1,300 a day.) *Id.*

⁴³ See, Michael N. Schmitt, *Article War, International Law, and Sovereignty: Reevaluating the Rules of the Game in a New Century*, 5 Chi. J. Int'l L. 511, 515 (2005). (PMC employees holding senior positions can earn more than \$20,000 a month. Blue color workers can earn \$80,000 to \$100,000 annual in Iraq). *Id.*

⁴⁴ A Sergeant Major in the Army (E-9) with over 16 years of service will earn \$4,363.50 a month, not including base allowance and housing pay. DOD Military Pay Tables (2006), available at <http://www.dod.mil/dfas/militarypay/newinformation/WebPayTableVersion2006updated.pdf>.

⁴⁵ *Id.*

Dustin Tipling

but the United States General Accounting Office (GAO), the investigative wing of Congress, found an apt answer in a relatively recent report when Congress asked this particular question.⁴⁷ The report limited its geographic scope to the Balkans and Southwest Asia and most of their comments relate specifically to these two geographic areas, but their comments are likely true for DOD contractors generally and other geographic locations. First, I will discuss the traditional responses given as to why the U.S. uses PMCs, and then I will discuss the findings of the GAO report.

1. Traditional reasons

As the Article mentions earlier, the post-Cold War strategy with regard to military forces included reducing the price tag of national defense.⁴⁸ The traditional view was that by using PMCs the government could save money.⁴⁹ Some scholars contend that one of many reasons they use PMCs is their cheaper price tag when compared to utilizing the traditional Armed Forces.⁵⁰ Scholars that study the industry argue about whether PMCs actually cost less than traditional military forces, but there is no clear authority favoring either argument.⁵¹ What is clear is their pervasive and growing use by the United States.

⁴⁶ See generally, STINGER, *CORPORATE WARRIORS*, *supra* note 8, at 49-70. (Singer discusses the privatization of security globally since the end of the Cold War.) *Id.*

⁴⁷ GAO-03-695 *supra* note 3.

⁴⁸ Mark W. Bina, *Comment: Private Contractor Liability and Accountability after Abu Ghraib*, 38 J. Marshall L. Rev. 1237, 1241 (2005). See also, Singer *supra* note 8.

⁴⁹ Schooner *supra* note 37, at 553.

⁵⁰ Herbert M. Howe, *The Privatization of International Affairs: Global Order and the Privatization of Security* 22 Fletcher F. World Aff. 1, 5-6 (1998). (Howe argues that PMCs are relatively inexpensive and fill can fill a void on demand.) I would argue with that proposition and side with Schooner' argument because he cites to numerous studies and reports that show they do not actually save money. I think Howe's position may be supportable if you consider all PMCs operating in all countries worldwide and for countries other than the U.S., but his argument loses support when you examine PMCs under contract with the U.S. government.

The end of the Cold War brought a drop in troop levels resulting in a deficiency that the military filled using the private sector in order to complete their objectives.⁵² After the fall of the Berlin Wall in 1990, NATO reduced its armed forces and lowered its troop levels.⁵³ At that time NATO was hesitant to commit any sizable or large forces in foreign theaters for extended durations.⁵⁴ This is when the private sector stepped into the picture. They were able to provide the “...weapons, technology, intelligence, strategy, training, and soldiers” that were necessary to complete military objectives the Armed Forces were unable to perform alone.⁵⁵ That was true in the 1990’s and it is certainly true now; military operations in Iraq and Afghanistan makes this point ring clear. The next section will discuss the findings of a government report by the GAO on the use of PMCs.

2. GAO report on the U.S. Government’s use of PMCs

The GAO report mentions two specific reasons why the United States hires PMCs: force caps and limited military skill.⁵⁶ Force caps are limitations imposed by the Executive Branch, law, or agreements with host countries and other allies on the number of U.S. military personnel that can be present in a foreign country at a given time.⁵⁷ So

⁵¹ See, *Schmittsupra* note 42, at 511. Some argue with this proposition stating they do not. See, Schooner *supra* note 37, at 553. (Schooner argues that the government’s use of PMCs does not save money, rather hiring private employees in Iraq avoids “...making toughs political choices concerning military needs, reserve call-ups and human consequences of war.” *Id.*) See, Clifford J. Rosky, *Force, Inc.: The Privatization of Punishment, Policing, and Military Force in Liberal States*, 26 Conn. L. Rev. 879, 929-30 (2004). (Rosky provides the scholarly debate on the economic efficiency of PMCs. He concedes that PMCs are economically efficient, but recognizes that the position is controversial) *Id.*

⁵² *Id.*

⁵³ Rosky, *supra* note 48, at 906.

⁵⁴ *Id.*

⁵⁵ *Id.* at 907.

⁵⁶ *Id.* at 2

⁵⁷ *Id.* at 8

basically the U.S. can stay under the force cap requirement but still have sufficient personnel in the country to conduct their operations. Once a force cap is in place, contractors take the place of servicemen and women so that can be available for strictly military activities.⁵⁸ The report also mentions for example, the U.S. Army's substitution of private contractors for soldiers at the gate and base perimeter to provide security for the base in Bosnia.⁵⁹

The second reason discussed in the GAO report is DOD's limited number of available skill to deploy in a given situation.⁶⁰ One striking example provided in the report was the use of civilian contractors to run the Air Force's Predator unmanned aerial vehicle.⁶¹ In that case, Air Force personnel simply were not trained to operate the equipment.⁶² Private contractors were used to fill the gap to keep the program up and operating. There are other examples where the military designs a program to uses PMCs to support the mission from inception. The Marine Corp's for example, operate one of their weapons systems with partial contractor by design.⁶³ Since PMCs perform functions traditionally reserved for a regular military force sponsored by the government, the media and scholars often bring up the topic of mercenaries.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.* at 9

C. Military Corporations and Mercenaries

The debate over whether employees of PMCs operating in foreign countries are mercenaries arises when scholars and the media discuss the industry. Any in-depth discussion of the distinctions made under international law is outside the scope of this paper but I will examine such a classification narrowly to bring it within the topic of this paper.⁶⁴ The US has implemented domestic legislation prohibiting mercenaries and there is not any serious legal argument that the PMCs under contract to the United States are mercenaries under any domestic definition.⁶⁵

Singer, describes the corporate PMC by its new corporate structure and distinguishes them from what traditionally would be a mercenary.

[PMCs]...are hieratically organized into incorporated and registered businesses that trade and compete openly in the international market, link to outside financial holdings, recruit more proficiently than their predecessors, and provide a wider range of military services to a greater variety and number of clients. Corporatization not only distinguishes [PMCs]...from mercenaries and other past private military ventures, but it also offers certain advantages in both efficiency and effectiveness.⁶⁶

PMCs operating under U.S. contracts do not generally meet any definition under international law as “mercenaries.”⁶⁷ But it is certainly true that until recently, there has been no way to hold employees of PMCs accountable for crimes they commit overseas

⁶⁴ For a discussion of international law and mercenaries, *See generally*, Ellen L. Frye, *Note: Private Military Firms in the New World Order: How Redefining “Mercenary” can tame the “Dogs of War,”* 73 *Fordham L. Rev.* 2607 (2005); *See also*, James R. Coleman, *Constraining Modern Mercenarism*, 55 *Hastings L.J.* 1493 (2004).

⁶⁵ *See*, Deborah Avant, *Think Again: Mercenaries*, *Foreign Policy*, July/August 1994, *available at*, http://www.foreignpolicy.com/story/cms.php?story_id=2577&print=1. (“Today’s private security companies are corporate endeavors that perform logistics support, training, security, intelligence work, risk analysis, and much more.”) *Id.* I am referring specifically to American owned and run PMCs. I am not referring to “Executive Outcomes” or any other non-U.S. owned PMC.

⁶⁶ Stinnett at 214, *quoting*, P.W. Stinger *supra* note 7, at 188-89.

⁶⁷ *See* STINGER, *CORPORATE WARRIORS*, *supra* note 8, at 42-48.

Dustin Tipling

while accompanying the military.⁶⁸ This Article posits that PMCs draw so much criticism because it is seems difficult to hold them accountable. Their pervasive foreign work alongside military forces and on behalf of governments makes international law seem like the appropriate method to regulate or at least have an impact on the industry. Any discussion of this would be outside the scope of this paper, but the United States has an easier way to hold PMCs accountable simply by exercising its legislative power, and they have—the Military Extraterritorial Jurisdiction Act.

Part II – A. The Jurisdictional Gap for criminal prosecution of civilians

Congress enacted the Military Extraterritorial Jurisdiction Act (MEJA) to provide criminal prosecution for crimes committed by civilians accompanying the military overseas. The problem (or gap) has beleaguered the Armed Forces for years before its enactment because civilians have long accompanied the military in foreign deployments.⁶⁹ MEJA was introduced in various forms for nearly forty years before President Clinton signed the act into law on November 22, 2000.⁷⁰

The problem faced by Congress was the United States usually lacked jurisdiction over its citizens outside of its borders.⁷¹ When Americans committed crimes overseas there were many instances where the local jurisdiction would not prosecute them for

⁶⁸ See Part II(A)

⁶⁹ 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 Act of 2000*, 51 Cath. U.L. Rev. 55, 55-56 (2001). (Schmitt was one of the drafters of MEJA and played a key role in its enactment.)

⁷⁰ *Id.* at 78-79

⁷¹ *Id.*

Dustin Tipling

crimes they committed.⁷² Since many of the crimes—some very serious—were committed against other Americans overseas the local jurisdiction simply did not see local prosecution as their problem. Robert E. Reed, Associate Deputy General Counsel of the DOD testified at a hearing during Congress’ deliberations of MEJA. He testified that in large part the inability of the United States to hold its citizens criminally liable for crimes committed overseas “...undermined deterrence, lowered morale, and threatened good order and discipline in our military communities overseas.”⁷³ Reed also testified about the need for the civilian component of the armed forces. He said:

...the inability of U.S. authorities to adequately respond to serious misconduct with the civilian component of the U.S. Armed Forces, presents the strong potential for embarrassment in the international community, increases the possibility of hostility in the host nation’s local community where our forces are assigned, and threatens relationships with our allies.⁷⁴

In the past, remedies available to punish civilian contractors accompanying the military overseas for crimes they committed was to administratively discipline the employee or fire them and bar further employment under a government contract.⁷⁵ This was obviously insufficient when a civilian has committed a serious crime such as murder, sexually based crimes, or a major theft. Congress implemented MEJA in 2000 to close the jurisdictional gap that allowed criminals to go unpunished for their crimes simply because they committed them overseas outside the territorial jurisdiction of U.S.

⁷² *Id.* (Also, in two important Supreme Court cases, *Reid v. Covert* 352 U.S. 77 (1956), and *Kinsella v. Krueger*, 351 U.S. 470 (1956), the Court declined to extend the Uniform Code of Military Justice to civilians in criminal cases. In both cases, spouses of servicemen were tried before a military court martial for the murder of their husbands.

⁷³ *Schmitt* supra note 68, at 77

⁷⁴ *Id.*

⁷⁵ *Id.* at 73.

Dustin Tipling

courts. The Act lay dormant without actual use until 2004 when it could have potentially brought civilian suspects of the Abu Ghraib abuses to justice.

March of 2004 provide a clear example of MEJA failing to be effective during the fallout after the Abu Ghraib scandal.⁷⁶ The investigations into the abuses found that civilians were responsible for some of the abuses, especially civilian contractors working with the military at the prison.⁷⁷ This investigation revealed that CACI, Inc. of Arlington, Virginia, who provides interrogators and Titan Corp of San Diego, California, who provided translators were responsible for some of the abuses.⁷⁸

A contract interrogator working for CACI, Steven Stefanowicz, was accused of giving military police instructions that he knew would constitute physical abuse without authority.⁷⁹ The CACI contract to provide interrogators was with the Interior Department's National Business center, not with DOD.⁸⁰ Since the contract was not with the DOD, MEJA did not apply, and the employees under the contract were not subject to U.S. criminal jurisdiction and effectively escaped any potential prosecution. In Part II below, this Article discusses the definition of a "contract employee" under MEJA and why the definition only covered those under contract to the DOD.

This was not the first time U.S. civilian contractors for PMCs accompanying the military abroad had committed crimes and escaped prosecution. A few years prior,

⁷⁶ Tony Capaccio, *U.S. Military Tightens Rules for Contractors in Combat Zones*, Bloomberg.com, Oct. 27, 2005, <http://ipoaonline.org/news/legislative/display.cfm?ID=270>.

⁷⁷ Fredrick A. Stein, *Article: 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.

⁷⁸ Stein *supra*, at 598

⁷⁹ *Id.*

⁸⁰ *Id.*

Dustin Tipling

several DynCorp employees working under contract in the Balkans⁸¹ allegedly ran a prostitution ring involving girls as young as twelve. None of the accused were prosecuted or disciplined by a court of law and have escaped any punishment other than termination of their employment.⁸² So in essence, those identified were sent home and fired and nothing more became of their criminal act.⁸³

MEJA was enacted to prevent criminals from escaping justice simply because U.S. courts lacked jurisdiction. Since MEJA was enacted only one civilian, the spouse of an Air Force servicemen, has been subject to prosecution.⁸⁴ MEJA was subsequently amended in March 2004 to close this second gap⁸⁵ in the law. Many PMCs under contract with the U.S. government were in Iraq and in other foreign countries under contract from a federal agency *other* than the DOD and the atrocities discovered in Abu Ghraib made this loophole clear to Congress. This second gap happened because some PMCs were not covered under MEJA and therefore, like offenders in years before, were not subject to criminal prosecution for their crimes for lack of jurisdiction. The CACI incident at Abu Ghraib mentioned above was a stunning example of this second gap. The

⁸¹ See *supra* note 25 and accompanying text.

⁸² Nathaniel Stinnett, *Note: Regulating the Privatization of War: How to Stop Private Military Firms from Committing Human Rights Abuses*. 28 B.C. Int'l & Comp. L. Rev. 211, 215 (2005).

⁸³ Stein *supra* note 75, at 589. See also, Jennifer Murray, *Note: Who Will Police the Peace-Builders? The Failure to Establish Accountability for the Participation of United Nations Civilian Police in the Trafficking of Women in Post-Conflict Bosnia and Herzegovina*, 34 Colum Human Rights L. Rev. 475, 477 (2003). (Civilian police in post-conflict Bosnia were accused of buying and selling women, and conspiring with organized criminal groups to smuggle women.) *Id.*

⁸⁴ *Id.*

⁸⁵ I am referring to the inability of the United States to prosecute the employees of the PMCs that contracted with the DOD to perform linguistic and interrogation services at Abu Ghraib. See *supra* notes 79-89 and accompanying text.

Dustin Tipling

next section will focus specifically on MEJA's substantive provisions, including the difference between the 2000 Act and the 2004 amendment.

B. The Significance of the Military Extraterritorial Jurisdiction Act

Many scholars that study the area discuss the laws guiding PMCs generally and in the context of international law or pay only lip service to domestic law. Although international law is of prime importance in this area, it is simply too vast to consider along with purely domestic laws in depth in any one paper. Further, domestic law in the United States in this area is in a state of flux with many "gray areas" still untouched by Congress.

As I discussed in the previous section⁸⁶, many critics see PMCs as mercenaries or soldiers or fortune, lacking any accountability,⁸⁷ but such a generalization is simply an exaggeration with regard to PMCs hired by the U.S. government. PMCs are hired and contracted by the United States under rules provided by the Defense Acquisition Regulation Supplement (DFARS) and subject to contract termination.⁸⁸ Further, employees of PMCs are potentially subject to the Military Extraterritorial Jurisdiction Act (MEJA)⁸⁹, which provides for prosecution of crimes committed on foreign soil by civilians accompanying the military in US courts. These two bodies of law, the DFARS regulations and the MEJA are substantial. I will focus specifically on MEJA and the

⁸⁶ *See supra* section 1(c).

⁸⁷ James Surowiecki, *The Talk of the Town*, *The New Yorker*, January 5, 2004, http://www.newyorker.com/printables/talk/040112ta_talk_surowiecki (argues that civilian contractors are not efficient.) *Id.*

⁸⁸ Defense Procurement and Acquisition Policy, Mission and Vision, <http://www.acq.osd.mil/dpap/about/missionvision.htm>. (last accessed April 11, 2006). ("Lead defense acquisition by providing the policy, guidance, and oversight to effectively deliver the right goods and services to the warfighter") *Id.*

⁸⁹ Military Extraterritorial Jurisdiction Act, 18 *U.S.C.* §326 (2004).

Dustin Tipling

criminal jurisdiction it provides over civilians accompanying the military in foreign countries—those civilians I will discuss in particular are the employees of PMCs.

C. The New Crime: MEJA

Although its name suggests it, the MEJA is not simply a jurisdictional statute—it is a crime in and of itself.⁹⁰ Congress enacted the original statute in 2000 to prosecute crimes committed by civilians accompanying the military overseas because of a chronic problem; civilians were not being prosecuted for crimes they had committed and the local jurisdiction where the crime occurred overseas was not prosecuting them.⁹¹ In the following section I will describe each of the relevant sections of the Act with an emphasis on *civilian* prosecution and how the Act affects PMCs.

1. Section 3267 – Definitions

The “Definitions” section of the Act is one of the most critical parts of the act with regard to PMCs because it dictates whether the statute applies to the employee or not. Essentially, if the PMC does not fall into one of the specific classes of the Act, U.S. Courts will lack jurisdiction to prosecute an employee who been accused of committing a crime. This was the problem the U.S. government faced during the Abu Ghraib scandal, because the civilians found to be part of the abuses did not fall under the Act.⁹² The original definition in section 3267 of MEJA defined those “civilians” who could face potential prosecution.

⁹⁰ 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 Act of 2000*. 51 Cath. U.L. Rev. 55, 113 (2001). (Schmitt, one of the Act’s drafters, discusses a debate with DOD representative regarding whether the statute was enacting a new crime or extending the reach of all existing federal crimes to persons accompanying the military overseas. DOD was eventually convinced that it is a crime rather than simply a jurisdictional extension.)

⁹¹ See *supra* notes 71-83 and accompanying text.

⁹² *Id.*

Prior to the amendment in 2004, section 3267 stated a civilian employed by the Armed Forces outside of the United States is any civilian employee of the DOD, a DOD Contractor, (including a subcontractor at any tier) or as an employee of a DOD contractor.⁹³ This meant that if you worked for the DOD, as a civilian, or you worked for a contractor to the DOD you were potentially subject to criminal prosecution by a U.S. Court for crimes you may have committed overseas while working for the DOD or under a DOD contract. This provision essentially filled that first gap that existed for decades and created a basis for U.S. jurisdiction to prosecute civilians.⁹⁴

But, under the 2000 Act contractors servicing contracts provided by the Department of Justice (DOJ), the Department of State (DOS), or other federal agencies did not fall under the definition of section 3267 thus creating a *second* gap in the law. The employees that had committed crimes in Bosnia and at Abu Ghraib in Iraq did not

⁹³ 18 U.S.C. § 3267 (2000).:

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

(3) The term ‘Armed Forces’ has the meaning given the term ‘armed forces’ in section 101(a)(4) of title 10 [emphasis added]

⁹⁴ Unfortunately, the 2000 Act as originally passed by Congress provided for jurisdiction over only “...a Department of Defense contractor...” This explicit mention of DOD contractors effectively excluded all other contractors that might be employed under contract to the United States government.

Dustin Tipling

fall under the definition of a civilian contractor.⁹⁵ As I discussed earlier, after the prostitution ring ran by DynCorp employees in Bosnia and the Abu Ghraib scandal in Iraq, Congress felt pressure to amend the statute to include those contractors employed under contracts to other branches of the government.

On October 28, 2004, Congress amended the MEJA to include the following language, “a civilian employee of...*any other Federal agency*, or any provisional authority, to the extent such employment relates to supporting the mission of the Department of Defense overseas...”⁹⁶ The amendment was in response to the inability of the government to prosecute those offenders who were working under contract to the U.S. government at Abu Ghraib. This amendment created jurisdiction over *any* federal employee, or employee of a contractor as long as they were supporting a DOD mission overseas.⁹⁷ The amendment would effectively place the PMCs involved in Abu Ghraib under U.S. criminal jurisdiction. Titan, one of the PMC’s accused in the scandal, was contracted through the Interior Department’s National Business center, which at the time would not have fallen under MEJA.⁹⁸ After the 2004 amendment, the employees would have been subject to U.S. criminal jurisdiction. Once a civilian has met the definition of a prosecutable civilian we look to section 3261 which provides for prosecution of the individual.

⁹⁵ In reference to the abuses mentioned in Part II(A).

⁹⁶ *Id.* at (1)(A)(i)(II), (1)(A)(ii)(II), (1)(A)(iii)(II) (Oct. 28, 2004 Amendment).

⁹⁷ *Id.*

⁹⁸ *See*, Stein *supra* note 75.

2. Section 3261 – Creating The Criminal Offense

The core of MEJA is section 3261 which creates the new federal criminal offense and provides jurisdiction for the U.S. to prosecute crimes in U.S. federal court for acts committed overseas.⁹⁹ The federal crime is defined as “...conduct engaged in outside the United States by a member of the Armed Forces or by persons employed by or accompanying the Armed Forces abroad that would be a felony if had occurred in the United States...” when that conduct is punishable by more than one year in prison.¹⁰⁰

Section 3261 provides that both individuals employed by or accompanying the Armed Forces outside the United States or while a member of the Armed Forces may be punished under the statute. This technically provides double jurisdiction for those who are members of the Armed Forces—they would be subject to both the Uniform Code of Military Justice (UCMJ) and civilian criminal prosecution under MEJA.¹⁰¹ However, the statute does not allow discretion; members of the Armed Forces may only be prosecuted under MEJA if they are indicted with at least one civilian for their crimes committed together.¹⁰²

This gives the DOD the responsibility to prosecute military members unless they are involved in a conspiracy or other illegal act along with a civilian.¹⁰³ PMCs always employ civilians and therefore their employees fall under only the first part of the section as “civilians” and can not be classified as a member of the Armed Forces. The situation

⁹⁹ See, 18 U.S.C. §3261 (2004).

¹⁰⁰ Schmitt *supra* note 87, at 113-14; *See also, Id.*

¹⁰¹ 18 U.S.C. §3261(a)(2)

¹⁰² *Id.*

¹⁰³ Schmitt *supra* note 87, at 115.

Dustin Tipling

where a member of the Armed Forces is prosecuted along with a civilian is foreseeable considering how closely many PMCs work with their military counterparts.¹⁰⁴ Thus, under the 2004 amendment to MEJA, Steven Stefanowicz and the military service men who assisted him in abuses at Abu Ghraib would both be subject to criminal jurisdiction.

Section 3261(b) limits the ability of the United States to prosecute civilians if the foreign government where the crime occurred has prosecuted or is prosecuting a person for the offense and it is in accord with the jurisdiction of the United States.¹⁰⁵ However, the civilian may also be prosecuted in the United States after a foreign government's prosecution for offenses that violate section 3261 if the Attorney General, Deputy Attorney General, or a person acting in either of those capacities approves.¹⁰⁶ According to Schmitt this provides the United States "...a second bite at the apple' in order to prosecute a defendant a second time, presumably when it believes that the punishment by the host nation is insufficient."¹⁰⁷ As I discussed earlier, this was to prevent criminals from escaping justice because the country where the crime occurred failed to prosecute the individual or the punishment was inadequate according to U.S. standards for the crime.

3. Section 3262 – Arrest and commitment and Section 3263 – Delivery to authorities of foreign countries

Section 3262 simply provides that a person described in section 3261(a) who the DOD has probable cause to believe has violated section 3261(a) may be arrested by any

¹⁰⁴ See *supra* notes 18-23 an accompanying text.

¹⁰⁵ Schmitt *supra* note 87, at 116

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

Dustin Tipling

person serving in a law enforcement position in the DOD to arrest. The section also provides that a person arrested “shall be delivered as soon as practicable to the custody of civilian law enforcement authorities of the United States for removal to the United States for judicial proceedings in relation to conduct...”¹⁰⁸

4. Section 3263 – Delivery to authorities of foreign countries; Section 3264 – Limitation on removal; Section 3265 – Initial proceedings; and Section 3266 – Regulations

Section 3263 provides who will deliver an alleged criminal to foreign authorities and the legal requirements for doing so.¹⁰⁹ Section 2364 places limits on the removal of an alleged criminal if a Federal magistrate judges orders such a limit or the Secretary of Defense determines that some type of military necessity requires that the limits be waived.¹¹⁰ If a suspect is to be handed over to the foreign jurisdiction the foreign authorities must request delivery for the purposes of conducting a trial for an offense under the laws of the country and a treaty or international agreement must exist allowing the delivery.¹¹¹ So, there are two prongs: there must be a request by the foreign government and a treaty must exist between the U.S. and that country allowing delivery. Section 3265 describes the necessary initial proceedings that must occur when an alleged criminal has been arrested or charged with a violation of MEJA.¹¹² These initial judicial proceedings do not need to occur with the defendant physically present in a U.S. court. If

¹⁰⁸ *Id.*

¹⁰⁹ 18 *U.S.C.* §3263

¹¹⁰ 18 *U.S.C.* §2364

¹¹¹ 18 *U.S.C.* §3263(a)(1) and (2)

¹¹² 18 *U.S.C.* §3265

Dustin Tipling

the defendant has been arrested and charged with a violation of section 3261(a), the initial appearance before a Federal magistrate judge may be carried out by telephone or another voice communication device.¹¹³ Also, the Federal magistrate judge may determine, upon finding the existence probable cause, that the conditions under which defendant is released until trial.¹¹⁴

Finally, section 3266 allows the Secretary of Defense, after the consultation with the Secretary of State and the Attorney General, to promulgate regulations governing the apprehension, detention, delivery, and removal of persons who are being prosecuted under MEJA.¹¹⁵ However, these subsequent regulations promulgated by DOD have not been put into place in the six years since the Act's passage.

Part III – MEJA only partially fixes the problem

As stated in the opening, PMCs are civilian staffed corporations that provide military (and law enforcement) services, logistics, and support under contract to a government. Prior to Congress passing the MEJA, U.S. courts lacked jurisdiction to prosecute civilians accompanying United States' Armed Forces overseas. This Article addressed how the United States exercises jurisdiction and prosecutes the civilian employees of PMCs for crimes they have committed in foreign countries in United States courts.

In this final section, this Article will start with a brief overview of common suggestions by scholars in the area because their suggestions are particularly relevant to

¹¹³ 18 U.S.C. §3265(A) and (B)

¹¹⁴ 18 U.S.C. §3265(B)(3)

¹¹⁵ 18 U.S.C. §3266

Dustin Tipling

my analysis. Next, will respond to these findings. Finally, I will discuss the positive aspects that MEJA and the negative consequences that have resulted or that might happen in the future.

A. Other scholar's suggestions for MEJA

Fredrick Stein points out several shortcomings that still existed after the 2004 amendment to MEJA. First, MEJA only applies to civilians who are working in support of a DOD mission overseas.¹¹⁶ This means that if they are not working under a contract that supports a DOD mission they do not qualify for prosecution under MEJA. Contractors for the Central Intelligence Agency, for example, would not be within the scope of MEJA because they do not fall under the definition provided in section 3267.¹¹⁷ Second, crimes punishable by less than a year are not covered by the act.¹¹⁸ Third, the Act provides that the DOD should promulgate regulations that implement the substantive provisions of the Act.¹¹⁹ Unfortunately, DOD has yet to promulgate these regulations.¹²⁰

B. My response

Some of Stein's findings need to be addressed before MEJA can really meet its legislative goals. MEJA's scope is still too narrow because other federal agencies that do not fall within the definitions of section 3267, those not supporting a DOD mission overseas but who still engage in overseas activity, are not covered in the "definitions"

¹¹⁶ See, Stein *supra* note 75, at 599.

¹¹⁷ *Id.* at 601.

¹¹⁸ *Id.* at 602.

¹¹⁹ *Id.* at 603.

¹²⁰ *Id.*

Dustin Tipling

section.¹²¹ This Article takes the position that MEJA cannot be a success if Congress does not remedy this basic flaw.

This article takes issue with Stein's suggestion that MEJA should include jurisdiction for crimes punishable with less than a year in jail. Crimes punishable for less than a year of imprisonment should not be punishable under the statute. A balance between justice and practicality should play into the decision of crimes punishable under the statute. Many PMCs operate in foreign countries, such as Iraq, which puts them in a precarious situation. Iraq lacks basic infrastructure making it simply too onerous to detect, investigate, and respond to crimes that are punishable with less than a year in jail. This is not to say that the government has no remedy; they can terminate the contract and remove the individual from the country for such minor infractions of the law. They could take further steps such as contract termination with the PMC and prevent the employee from working in any capacity for the federal government, but punishing crimes punishable with less than a year in jail is not practical.

Finally, the DOD needs to develop and implement the supplemental regulations provided for under MEJA. As I discussed earlier, these regulations relate to the apprehension, detention, delivery, and removal of persons who are being prosecuted under MEJA.¹²² These regulations are necessary to properly prosecute an individual under MEJA and provide for adequate due process for individuals charged with a crime.

¹²¹ See part III(D) below for a full discussion of this criticism of MEJA.

¹²² See *supra* note 93, and accompanying text.

C. Positive Aspects of MEJA

The basic point and legislative goal of MEJA is to provide an avenue for the U.S. to ensure that criminals are brought to justice.¹²³ The Act provides U.S. prosecutors with a means to hold civilians accountable for their actions overseas when they are deployed with the military or working with the DOD. The current wording of MEJA will cover any civilian contractor who meets the definition of section 3267. Not only are most PMCs covered by the 2004 amendment, but so are virtually all other government contractors operating overseas in support of a DOD mission.

MEJA can prevent the disastrous embarrassment that resulted from the United States' past inability to prosecute criminals. No longer will rapists, human traffickers, drug dealers, and murders escape justice simply because of the government's lack of jurisdiction to prosecute them. The Abu Ghraib scandal is a scar on President George W. Bush's presidency and has brought shame to America's armed forces. Abu Ghraib will be a lasting image in many viewers' minds about the Iraq war. Those that will violate laws, like Steven Stefanowicz's, will now lose their free pass and face justice before a U.S. Court because of MEJA.

Further, MEJA allows the United States to prosecute an alleged criminal even after the jurisdiction where the crime occurred has finished prosecuting them.¹²⁴ Under section 3261(b), the Attorney General can still bring the defendant before a U.S. Federal court on criminal charges under MEJA. This is a useful provision because a foreign jurisdiction could do many things other than prosecute an alleged criminal under what the U.S. government (and the American people) would consider satisfactory and just. In that

¹²³ See *supra* notes 75-77, and accompanying text.

¹²⁴ See *supra* notes 99-100.

Dustin Tipling

same respect, it protects the defendant by preventing double prosecution for the same offense. The U.S. cannot prosecute a defendant who is currently or has been prosecuted by a foreign jurisdiction without the approval of the Attorney General.¹²⁵

Section 3265 of MEA allows many of the preliminary judicial proceedings to occur without bringing the civilian back to the United States to appear before the court in person. This is good for a defendant and the PMC he is employed by because it does not remove him from his job, which may be critical in certain situations. Further, after the initial hearing before the Federal magistrate and upon the finding of probable cause that a crime has occurred, the judge may set the terms of the defendant's release before trial. These two provisions taken together protect and preserve the ability of the contractor to continue their contractual obligations. In Iraq, for example, it can be extremely difficult to replace an employee in a timely fashion. This can become critical in the security industry because if the contract is to protect dignitaries and the PMC is short on staff because an employee needs to appear before a court in the United States, they jeopardize the safety of the dignitary.

D. Negative Aspects of MEJA

Congress must keep a balance between prosecuting criminals and recognizing the situation that the employee's of PMCs are put into while performing their duties under the contract. PMCs operate in austere locations around the world with utter chaos around them. As I discussed in Part I, many employees of PMCs are former military servicemen, some with substantial combat experience. They are accustomed to dangerous work and they are familiar with operating under a military protocol. If the law is enforced too

¹²⁵ *Id.*

Dustin Tipling

strictly or without regard to the environment in which the PMC operate injustice could potentially result.

For example, PMC civilian employees that private security detail for government officials and other dignitaries can be put in situations where they need to make quick, tough choices.¹²⁶ Hypothetically speaking, if a member of the private security detail shot an innocent civilian during an armed engagement he could potentially be faced with a criminal prosecution for his error.¹²⁷ In contrast, if a member of the armed forces shot an innocent civilian during an armed engagement he would not be subject to civilian criminal penalties for his actions. Rather, only his peers and those that truly understand or have the ability to understand his situation would judge him at his/her military hearing. Human rights must be preserved and guarded, but politically motivated prosecution of a civilian in U.S. civilian courts for acts he/she may have committed could result and Congress should design the law to prevent this from happening.

Further, as Stein states, there still is a gap in jurisdiction because MEJA does not cover all federal agencies and therefore, not all civilian contractors are covered under its provisions. For example, the Central Intelligence Agency (CIA) is potentially beyond the scope of MEJA.¹²⁸ Also, the 2004 amendment to section 3267 still requires that the employment relate “...to supporting the mission of the Department of Defense overseas...”¹²⁹ This still leaves a porous jurisdictional gap because the DOD is not the only federal agency that hires contractors to perform work overseas.

¹²⁶ See *supra*, notes 32-34.

¹²⁷ I make this hypothetical only to provide an example and I base its facts in no real world example.

¹²⁸ See, Fidler *supra* note 25.

¹²⁹ 18 U.S.C. § 3267(1)(a)

Dustin Tipling

For example, in May 2005, DynCorp International LLC signed a contract with State Department's Bureau for International Narcotics and Law Enforcement Affairs (INL) for annual contract value of \$174 million (or more) to "...assist foreign governments in the eradication and interdiction of illicit crops such as coca and opium poppy."¹³⁰ The contract is between the Department of State and the PMC with no direct DOD involvement. Many activist groups have been critical of DynCorp contractors in South America, although none cite any actual crimes.¹³¹ But the potential exists and the U.S. would have no criminal jurisdiction over one of DynCorp's employees operating in South America under a contract with the State Department because they do not fall within the definition in section 3267. Absent prosecution by the local South American government, any violations of law could potentially go unpunished.

Finally, if a foreign jurisdiction requests that the United States deliver an alleged criminal they must meet the two prongs of section 3262(a).¹³² If a treaty is not in place allowing such a delivery of the civilian to a foreign authority then he/she cannot be delivered to the foreign jurisdiction. This could potentially be an issue because many civilians working overseas for PMCs work on U.S. military installations. They are essentially isolated from the general population of the foreign country—and their government. Any discussion of the types of treaties or international agreements required to satisfy the prong is outside the scope of this Article, but it could potentially create a

¹³⁰ *DynCorp International LLC Press Release: DynCorp International Again Wins State Department Contract for Narcotics Eradication and Interdiction*, <http://www.dyn-intl.com/subpage.aspx?id=67> (last visited on March 31, 2006).

¹³¹ *See generally*, Jason Vest, *State Outsources Secret War*, *The Nation*, May 23, 2001, <http://www.thenation.com/doc/20010604/vest20010523>.

¹³² *See supra* note 104 and accompanying text.

Dustin Tipling

diplomatic or political problem if the foreign jurisdiction is seeking the employee of a PMC for local prosecution.

Conclusion

In conclusion, MEJA is a giant step forward in bringing criminals to justice but the shoe still is not big enough to include all the potential civilians that it should. Congress needs to expand the definitions of 3267 to include all federal agencies to ensure criminal jurisdiction for any PMCs working under a contract for the United States government. Also, the United States needs to ensure that the employees of PMCs have some guarantees that they will not be held to an unreasonable standard when they are put in dangerous situations doing extremely dangerous work. Justice is not done if someone does not perform to the best of their ability because they fear criminal. The Act can and will be an effective tool to help insure that criminals are held accountable and victims of crimes can seek justice, Congress just needs to work out the details.