COMMENTS

THE MAD SCRAMBLE OF CONGRESS, LAWYERS, AND LAW STUDENTS AFTER ABU GHRAIB: THE RUSH TO BRING PRIVATE MILITARY CONTRACTORS TO JUSTICE

*Ian Kierpaul**

I. INTRODUCTION

THE world will always remember Abu Ghraib as the place where U.S. military police engaged in "sadistic, blatant, and wanton criminal abuse."[1] Some of the abuse included:

> Punching, slapping, and kicking detainees …; Videotaping and photographing naked male and female detainees ….; Forcing male detainees to masturbate themselves while being photographed and videotaped ….; Breaking chemical lights and pouring the phosphoric liquid on detainees …; Beating detainees with a broom handle and a chair …; [and] Sodomizing a detainee with a chemical light and perhaps a broom stick.[2]

After the Abu Ghraib abuse became public, Congress and the world decried the actions of the military police, resulting in the prosecution of several military personnel.[3] The military police, however, had accomplices in the abuse. Private military contractors accounted for one-third of the abuses at Abu Ghraib.[4] Yet,

* J.D. candidate, University of Toledo College of Law 2008; B.A., Oakland University 2002. I would like to thank Professor Ben Davis for his guidance and assistance with this article.

1. ANTONIO M. TAGUBA, ARTICLE 15-6 INVESTIGATION OF THE 800TH MILITARY POLICE BRIGADE 16 (2004), *available at* http://www.npr.org/iraq/2004/prison_abuse_report.pdf.

2. *Id.* at 16-17.

3. *See* Charlie Savage, *Rank and File Have Taken Heat for Abu Ghraib*, BOSTON GLOBE, Apr. 28, 2005, at A22; Eric Schmitt, *Charges Expected against Officer at Abu Ghraib*, ST. LOUIS POST-DISPATCH, Apr. 26, 2006, at A13.

4. P.W. Singer, *Can't Win with 'Em, Can't Go to War without 'Em: Private Military Contractors and Counterinsurgency*, BROOKINGS INSTITUTION, Sept. 2007, at 7, http://www.brookings.edu/~/media/Files/rc/papers/2007/0927militarycontractors/0927militarycontractors.pdf. Private military contractors from CACI and Titan accounted for all the translators and half of the interrogators at Abu Ghraib. *Id.*

none of those private military contractors ever faced criminal prosecution for their role in the abuse.[5]

The lack of prosecution gave way to a mad scramble. Congress,[6] lawyers,[7] and law students[8] introduced solutions on how to bring private military contractors to justice. Nonetheless, private military contractors continue to commit crimes without any criminal prosecution.[9] This lack of prosecution came to light again after a September 16, 2007 incident in which contractors for Blackwater allegedly fired at innocent Iraqi civilians.[10] The incident angered the Iraqi government[11] and the House of Representatives went on yet another mad scramble to ensure that, in the future, private military contractors will face criminal prosecution.[12]

Part II of this article describes the impetus behind the initial mad scramble after Abu Ghraib. Part III analyzes the congressional solution that resulted from the initial mad scramble, the Military Extraterritorial Jurisdiction Act ("MEJA"). Part III also discusses reasons why MEJA will fail to withstand judicial scrutiny and argues that further congressional response will suffer the same fate. Part IV describes the other congressional solution, court-martial, and why it also fails as a viable solution. Part V analyzes the other proposed solutions to bring private military contractors to justice and describes why they will not work. Part VI

5. *Id.* Army investigations identified six private military contractors as having a role in the abuse. *Id.*

6. Congress now provides for two remedies, court-martial and 18 U.S.C.A. §§ 3621-3627 (West 2000 & Supp. 2007), the Military Extraterritorial Jurisdiction Act ("MEJA"). Peter W. Singer, *The Law Catches Up to Private Militaries, Embeds*, BROOKINGS INSTITUTE, Jan. 4, 2007, http://www.brookings.edu/views/articles/psinger/20070104.htm; Katherine Jackson, Comment, *Not Quite a Civilian, Not Quite a Soldier: How Five Words Could Subject Civilian Contractors in Iraq and Afghanistan to Military Jurisdiction*, 27 J. NAT'L ASS'N ADMIN. L. JUDICIARY 255, 256 (2007).

7. *See, e.g.*, Laura A. Dickinson, *Public Law Values in a Privatized World*, 31 YALE J. INT'L L. 383 (2006) (arguing for contract law as a means to regulate private military contractors).

8. *See, e.g.*, Atif Rehman, Note, *The Court of Last Resort: Seeking Redress for Victims of Abu-Ghraib Torture through the Alien Tort Claims Act*, 16 IND. INT'L & COMP. L. REV. 493 (2006). *See also* Matthew J. Gaul, Comment, *Regulating the New Privateers: Private Military Service Contracting and the Modern Marque and Reprisal Clause*, 31 LOY. L.A. L. REV. 1489 (1998) (discussing the need to regulate private military contractors five years before the problem came to light with Abu Ghraib).

9. Sudarsan Raghavan et al., *Blackwater Faulted in Military Reports from Shooting Scene*, WASH. POST, Oct. 5, 2007, at A1. In 2005, U.S. Marines detained contractors for indiscriminately discharging their weapons at Iraqi civilians and at the Marines. Singer, *supra* note 4, at 7. Those contractors, however, avoided criminal prosecution. *Id.* Another group of contractors posted a video on the Internet of them shooting at Iraqi civilians. *Id.* The video included an Elvis song playing in the background. *Id.* On Christmas Eve of 2006, a contractor working for Blackwater, while drunk, shot and killed an Iraqi vice president's bodyguard. John M. Broder, *Report Says Firm Tried Cover-Ups after Shootings*, N.Y. TIMES, Oct. 2, 2007, at A1.

10. *Blackwater Loses License in Iraq*, GRAND RAPIDS PRESS (Michigan), Sept. 17, 2007, at A10.

11. *Id.*

12. Jonathan Weisman, *House Acts in Wake of Blackwater Incident*, WASH. POST, Oct. 5, 2007, at A6.

discusses a proposed solution that addresses the shortcomings of current congressional approaches.

II. ABU GHRAIB: THE FORCE BEHIND THE INITIAL MAD SCRAMBLE

Abu Ghraib served as the force behind the initial mad scramble. The force came in the form of jurisdictional deficiencies. Due to a lack of jurisdiction, private military contractors implicated in the abuse at Abu Ghraib avoided criminal prosecution. No law[13] covered the actions of private military contractors despite the availability of the Torture Statute,[14] the War Crimes Statute,[15] MEJA,[16] and the USA Patriot Act.[17]

First, "[t]he federal Torture Statute allows the government to prosecute torture committed outside the United States."[18] At the time of Abu Ghraib, however, the statute only applied to torture committed "outside the special maritime and territorial jurisdiction of the United States"[19] and the USA PATRIOT ACT defined places such as Abu Ghraib as within the special maritime and territorial jurisdiction of the United States.[20] Consequently, the Torture Statute did not apply to private military contractors.[21]

Second, the War Crimes Statute "criminalizes 'grave breach[es]' of the Geneva Conventions,"[22] but only when the Geneva Conventions apply to the victim.[23] At the time of Abu Ghraib, President Bush deemed that the Geneva Conventions failed to apply to unlawful combatants.[24] With the status of most

13. This includes no Iraqi law. Foreign contractors in Iraq are immune from Iraqi law. Editorial, *Legal Loopholes in Iraq*, N.Y. TIMES, Nov. 5, 2007, at A24. The United States is currently negotiating with Iraq on whether to continue the immunity. Thom Shanker & Steven Lynn Myers, *U.S. Asking Iraq for Wide Rights in Fighting War*, N.Y. TIMES, Jan. 25, 2008, at A1.

14. 18 U.S.C. § 2340A (2000).

15. 18 U.S.C. § 2441 (2000).

16. 18 U.S.C. §§ 3261–3267 (2000).

17. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107- 56, 115 Stat. 272 (2001) (codified as amended in scattered sections of 12, 15, 18 and 31 U.S.C.).

18. John Sifton, *United States Military and Central Intelligence Agency Personnel Abroad: Plugging the Prosecutorial Gaps*, 43 HARV. J. ON LEGIS. 487, 496 (2006) (citing 18 U.S.C.A § 2340A (West 2004)).

19. *Id.* at 500 (quoting 18 U.S.C.A. § 7 (West 2005)).

20. 18 U.S.C.A § 7(9)(A) (West 2000 & Supp. 2007). The special maritime and territorial jurisdiction of the United States includes such places as U.S. military installations. *Id.* When the Abu Ghraib incident occurred, it was a U.S. military prison. TAGUBA, *supra* note 1. *See also* Sifton, *supra* note 18, at 500-01.

21. Sifton, *supra* note 18, at 500-01.

22. *Id.* at 501 (citing 18 U.S.C. § 2441(c)(1), (3) (2000)).

23. *Id.* at 502 (citing Geneva Convention Relative to the Treatment of Prisoners of War art. 130, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 147, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287).

24. *Id.* (citing Memorandum from President George W. Bush to Nat'l Sec. Advisors, Humane Treatment of al Qaeda and Taliban Detainees (Feb. 7, 2002), *available at* http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.02.07.pdf). The Supreme Court eventually limited the President's authority to label people as unlawful combatants, see Hamdi v. Rumsfeld, 542 U.S.

detainees at Abu Ghraib uncertain, and with the President's power to label such detainees as unlawful combatants, the War Crimes Statute became immaterial.[25]

Third, MEJA allowed prosecution of civilians employed by the Department of Defense ("DOD") who commit a crime punishable by one year or more "within the special maritime and territorial jurisdiction [("SMTJ")] of the United States,"[26] which included Abu Ghraib.[27] The Department of Interior ("DOI"), however, employed the private military contractors at Abu Ghraib.[28] Since MEJA only applied to DOD contractors, it failed to provide jurisdiction over the contractors.[29]

Finally, The USA PATRIOT ACT provided the needed jurisdiction because it extended jurisdiction to cover the SMTJ of the United States. The United States used it previously to prosecute a private military contractor in Afghanistan under the jurisdictional reach of the Act.[30] On June 17, 2004, the United States charged Central Intelligence Agency ("CIA") contractor David Passaro with assault.[31] The assault stemmed from Passaro's actions while he worked as an

507, 516 (2004). In this case, the Court curtailed the Executive's ability to detain American citizens as unlawful enemy combatants. *Id.* at 509. The Court held that due process allows a person detained as an enemy combatant to challenge their detention. *Id.* Prior to this decision, the Government asserted that it could hold unlawful enemy combatants indefinitely "without formal charges or proceedings." *Id.* at 510. *See also* Jared S. Simmons, Note, *The Labeling of United States Citizens Captured on American Soil as Enemy Combatants: Due Process vs. National Security*, 37 IND. L. REV. 579, 581 (2004) ("[T]he President is acting within his constitutional powers to declare a citizen of the United States an enemy combatant ….").

25. The Supreme Court has attempted to limit the President's power. The Court ruled that the President must abide by the Geneva Conventions. Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2796 (2006). The issue in *Hamdan* centered on the President's authority to set up military tribunals and to use such tribunals to try suspected terrorists. *Id.* at 2759. The Court also held that the use of the military tribunals violated Common Article III of the Geneva Convention which "requires that Hamdan be tried by a 'regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.'" *Id*. at 2796. In response, Congress passed the Military Commission Act. 10 U.S.C.A. § 948b (West 2000 & Supp. 2007). Under the Military Commission Act, Congress declared that "[a] military commission established under this chapter is a regularly constituted court, affording all the necessary 'judicial guarantees which are recognized as indispensable by civilized peoples' for purposes of common Article 3 of the Geneva Conventions." 10 U.S.C.A. § 948b(f). The law passed by Congress overrules the Court's decision in *Hamdan*. Boumediene v. Bush, 476 F.3d 981, 986 (D.C. Cir. 2007) ("Everyone who has followed the interaction between Congress and the Supreme Court knows full well that one of the primary purposes of the [Military Commission Act] was to overrule *Hamdan*."). Congress also stripped courts of jurisdiction to review the law. 10 U.S.C.A. § 948b(e).

26. 18 U.S.C. § 3261(a) (2000).

27. 18 U.S.C.A § 7(9)(A) (West 2000 & Supp. 2007). Sifton, *supra* note 18 at 500-01.

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

29. *Id.*

30. Passaro Indictment, *available at* http://www.cdi.org/news/law/cia-contractor-indictment-passaro.pdf (last visited Jan. 18, 2008). The indictment asserts jurisdiction over Passaro because he committed a crime within the special maritime and territorial jurisdiction of the United States ("SMTJ"). *Id. See also* Andrea Weigl, *Passaro Convicted of Assaulting Afghan*, THE NEWS & OBSERVER (Raleigh, N.C.) Aug. 18, 2006, at A1, *available at* http://www.newsobserver.com/497/story/476483.html.

31. Passaro Indictment, *supra* note 30.

interrogator at a military base in Afghanistan on June 19, 2003.[32] The Government asserted that on that day, Passaro beat an Afghani, Abdul Wali, with "a dangerous weapon, namely a flashlight, with the intent to do bodily harm …."[33] Roughly two years after the indictment, a jury convicted Passaro for the assault and he became the first CIA contractor to face justice.[34] Yet, despite the successful prosecution of Passaro, no private military contractor involved with the abuses at Abu Ghraib ever faced criminal charges.[35]

After Abu Ghraib, the legal community went on a mad scramble. Congress sought to fix the jurisdiction problem by creating the two current solutions: (1) an amended MEJA and (2) authorization to use court-martial proceedings.[36] The legal world provided alternative solutions such as international remedies,[37] contract,[38] industry self-regulation,[39] and tort law;[40] however, both Congress and the legal world failed in their mad scramble to effectively address the problem.

III. CONGRESSIONAL SOLUTION NUMBER ONE: MEJA

The United States can prosecute private military contractors under MEJA if they (1) engage in an offense punishable by a prison term of one year or more; (2) "within the special maritime or territorial jurisdiction of the United States";

32. *Id.*

33. *Id.* Abdul Wali died shortly after the beating. *Id.* In total, Passaro faced four counts of assault. *Id.*

34. Josh White & Dafna Lizner, *Ex-Contractor Guilty of Assaulting Detainee*, WASH. POST, Aug. 18, 2006, at A8.

35. *Id.* The use of the USA Patriot Act has limitations. Since it only provides jurisdiction for crimes committed within the SMTJ of the United States, crimes committed outside the SMTJ are beyond the reach of the USA Patriot Act. *See* Laura Dickinson, Filartiga's *Legacy in an Era of Military Privitization*, 37 RUTGERS L.J. 703, 710-11 (2006).

36. Singer, *supra* note 6; Jackson, *supra* note 6, at 256.

37. *See, e.g.,* Mark Calaguas, *Military Privatization: Efficiency or Anarchy*, 6 CHI.-KENT J. INT'L & COMP. L. 58, 76-78 (2006) (suggesting that an international remedy is ideal but not attainable); Todd S. Milliard, *Overcoming Post-Colonial Myopia: A Call to Recognize and Regulate Private Military Companies*, 176 MIL. L. REV. 1, 85 (2003); Heather Carney, Note, *Prosecuting the Lawless: Human Rights Abuses and Private Military Firms*, 74 GEO. WASH. L. REV. 317, 336 (2006); James R. Coleman, Note, *Constraining Modern Mercenarism*, 55 HASTINGS L.J. 1493, 1537 (2004); Kristin Fricchione, Note, *Casualties in Evolving Warfare: Impact of Private Military Firms' Proliferation on the International Community*, 23 WIS. INT'L L.J. 731, 760 (2005).

38. *See, e.g.,* Deven R. Desai, *Have Your Cake and Eat It Too: A Proposal for a Layered Approach to Regulating Private Military Companies*, 39 U.S.F. L. REV. 825, 858 (2005); Laura A. Dickinson, *Government for Hire: Privatizing Foreign Affairs and the Problem of Accountability under International Law*, 47 WM. & MARY L. REV. 135, 142-43 (2005).

39. *See, e.g.,* Laura A. Dickinson, *Torture and Contract*, 37 CASE W. RES. J. INT'L L. 267, 274 (2006). *See also* Mark W. Bina, Comment, *Private Military Contractor Liability and Accountability after Abu Ghraib*, 38 J. MARSHALL L. REV. 1237, 1260 (2005). Bina does not argue for industry self-regulation, but points out that industry self-regulation is one way to hold private military contractors accountable for their actions. *Id.*

40. *See, e.g.,* Bina, *supra* note 39, at 1253; Scott J. Borrowman, Comment, Sosa v. Alvarez-Machain *and Abu Ghraib—Civil Remedies for Victims of Extraterritorial Torts by U.S. Military Personnel and Civilian Contractors*, 2005 BYU L. REV. 371, 372.

and (3) are employed by or "support[] the mission of the [DOD]."[41] MEJA prosecutions follow the same pattern as a regular criminal prosecution.[42] Unlike a regular criminal prosecution, MEJA allows the country where the alleged crime took place to prosecute the suspect, preempting prosecution by the United States.[43] MEJA, however, is a recent law.[44]

A. Historical Roots of MEJA

MEJA's passage traces its roots to the beginning of warfare and warfare's historic reliance on civilians during combat.[45] The reliance on civilians brought problems, primarily what to do when a civilian commits a crime or violates military code.[46] The British responded with the Articles of War.[47] The early American Republic followed with a draft of its own.[48] The American Articles of War evolved into the Uniform Code of Military Justice ("UCMJ").[49] Like the original articles of war, the UCMJ applied to civilians during a time of war.[50] When Congress drafted the UCMJ, Congress regularly declared war whenever U.S. troops took up arms against a foreign nation.[51] The drafters probably never foresaw that, after World War II, Congress would never formally declare war, despite the numerous armed conflicts involving the United States.[52] The importance of the distinction between declared and undeclared wars, coupled with a string of court cases, worked to eventually keep civilians, including private military contractors, out of the court-martial process envisioned by the UCMJ.

The U.S. Supreme Court struck a blow to civilian court-martial proceedings in the case of *Reid v. Covert*.[53] In *Reid*, Covert, a civilian, murdered her husband who served in the Air Force.[54] A court-martial convened and "found [Covert]

41. 18 U.S.C. §§ 3261-3267 (2000), § 3267 amended to 18 U.S.C.A. § 3627 (West 2000 & Supp. 2007).

42. 18 U.S.C. §§ 3262, 3265 (2000).

43. 18 U.S.C. § 3263(a) (2000).

44. *See* Singer, *supra* note 4. MEJA came into law in 2000 and the amended version in 2004. *Id.*

45. *See* P.W. SINGER, CORPORATE WARRIORS: THE RISE OF THE PRIVATIZED MILITARY INDUSTRY 19 (2003). "Civilians" refers to any non-military personnel, including private military contractors.

46. *See* Wm. C. Peters, *On Law, Wars, and Mercenaries: The Case for Courts-Martial Jurisdiction over Civilian Contractor Misconduct in Iraq*, 2006 BYU L. REV. 367, 376-77.

47. John Alan Cohan, *Legal War: When Does It Exist, and When Does It End?*, 27 HASTINGS INT'L & COMP. L. REV. 221, 287 (2004).

48. *Id.*

49. Peters, *supra* note 46, at 379.

50. *Id.*

51. *See* Learn about Congress, How Can the U.S. Fight Wars When Congress Doesn't Declare One First? How Many Times Has Congress Declared War?, http://congress.indiana.edu/learn_about/topic/rc_qa.php#CongressAndW (last visited Jan. 17, 2008).

52. *Id.*

53. 354 U.S. 1, 5 (1957).

54. *Id.* at 3.

guilty of murder and sentenced her to life imprisonment."[55] Afterwards, Covert "petitioned … for a writ of habeas corpus to set her free on the ground that the constitution forbade her trial by military authorities."[56] The district court agreed and the "Government appealed directly to [the Supreme Court] under 28 U.S.C § 1252 …."[57]

The Supreme Court agreed to take the appeal and affirmed the district court's decision.[58] The Supreme Court held that "[t]he term 'land and naval Forces' refers to persons who are members of the armed services and not to their wives, children and other dependents."[59] The Court further held that "under our Constitution courts of law alone are given power to try civilians for their offenses against the United States."[60] Consequently, Covert went free.[61] Subsequent cases further narrowed the military's ability to court-martial civilians.[62] Yet, another lingering issue remained. Covert's court-martial occurred during a time of peace and the UCMJ still left open the possibility of the court-martial of a civilian during a time of war.[63] Thus, the meaning of a "time of war" remained unaddressed until the U.S. Court of Military Appeals in *United States v. Averette* provided the definition.[64]

In *Averette*, a private military contractor, while serving with the Army in Vietnam, committed a crime.[65] A court-martial convened and found Averette guilty.[66] Undoubtedly, the UCMJ allowed the court-martial of civilians during a "time of war,"[67] but did the Vietnam conflict constitute a "time of war"?[68]

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55. *Id.* at 4.

56. *Id.*

57. *Id.*

58. *Id.* at 4-5.

59. *Id.* at 19-20.

60. *Id.* at 40-41.

61. The Supreme Court in this case had some case precedent, including *Ex parte* Milligan, 71 U.S. 2, 3 (1866). In that case, the Court held that when federal courts are open, military commissions have no jurisdiction over civilians not part of the rebellion. *Id.* at 123. The Court also cited Duncan v. Kahanamoku, 327 U.S. 304 (1946). In that case, Hawaii declared martial law after the Pearl Harbor attacks. *Id.* at 307. The martial law order authorized the military to conduct all trials using military tribunals. *Id.* at 307-08. These tribunals had jurisdiction over civilians. *Id.* The Court struck down those tribunals reasoning that military tribunals present dangers to the liberty of the people. *Id.* at 322-24. The Court also cited United States *ex rel.* Toth v. Quarles, 350 U.S. 11 (1956). In that case, a former member of the armed forces was tried by court-martial for a crime he committed while serving. *Id.* at 13. The Court ruled that only current service members could be court-martialed. *Id.* at 23.

62. Kinsella v. United States *ex rel.* Singleton, 361 U.S. 234, 248-49 (1960) (holding that dependants of the military could not be brought before a court-martial for non-capital offenses); Grisham v. Hagan, 361 U.S. 278, 280 (1960) (holding that civilian employees accompanying the military overseas charged with a capital offense have the right to a traditional jury trial); McElroy v. United States *ex rel*. Guagliardo, 361 U.S. 281, 282-87 (1960) (holding that courts-martial lacked jurisdiction to try civilian employees accompanying the military overseas for non-capital offenses).

63. 10 U.S.C. §802(a)(10) (2000).

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

65. *Id.* at 363.

66. *Id.*

67. 10 U.S.C. §802(a)(10).

The court deemed Vietnam "a major military action," and held the court-martial improper,[69] because "a major military action" does not equate to Congress declaring war.[70] The court held that "for a civilian to be triable by court-martial in a 'time of war,' Article 2(10) [of the UCMJ] means a war formally declared by Congress"[71] and "Congress never officially declared war against North Vietnam."[72] Thus, the private military contractor went free.[73]

The *Covert* and *Averette* decisions form the backbone to the current problem. Absent a declaration of war, a court-martial lacks jurisdiction over civilians accompanying the military overseas. Consequently, these cases created a jurisdictional loophole because when crimes occur overseas, without an express intent to the contrary, U.S. law ends at the border.[74] Thus, a civilian accompanying the military overseas will not face prosecution under U.S. law. Moreover, the increased use of private military contractors in military actions overseas further complicates this jurisdictional problem.[75]

The increased use of private military contractors began with the Cold War.[76] The United States and the Soviet Union both relied on private military contractors to act as proxies around the globe.[77] The private military contractors also acted as a permanent force, readily mobilized to take action, unlike the days before the Cold War where such mobilization only happened during actual conflict.[78] The continuous presence of the private military contractors created a "[close alliance] to the Department of Defense."[79] These alliances became so close that as the "head of DynCorp [put it,] 'You could fight without us, but it would be difficult …. Because we're so involved, it's difficult to extricate us from the process.'"[80] The end of the Cold War did not end the problem either. Instead, the use of private military contractors grew due to economic pressures created by the termination of the Cold War.[81]

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

69. *Id.* at 365-66.

70. *Id.* at 365.

71. *Id.*

72. Vietnam Veterans Memorial Collection, Frequently Asked Questions, http://www.nps.gov/mrc/vvmc/faqs.htm (last visited Jan. 17, 2008).

73. *Averette*, 19 C.M.A. at 365-66.

74. *See* EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991) (citing Foley Bros., Inc. v. Filardo, 336 U.S. 281, 285 (1949)).

75. Clifford J. Rosky, *Force, Inc.: The Privatization of Punishment, Policing, and Military Force in Liberal States*, 36 CONN. L. REV. 879, 905-06 (2004).

76. *Id.* at 905.

77. *See id.* at 905-06.

78. *Id.*

79. *Id.* at 906.

80. Desai, *supra* note 38, 853-54 (citing Nelson D. Schwartz & Noshua Watson, *The Pentagon's Private Army*, FORTUNE, Mar. 17 2003, at 100-03, *available at* 2003 WLNR 13891324). This close alliance extends today to the Department of State. Broder, *supra* note 9; David Stout, *Democrat Opens Inquiry into Whether State Dept. Official Impeded Investigations*, N.Y. TIMES, Sept. 19, 2007, at A10.

81. SINGER, *supra* note 45, at 49.

At the end of the Cold War, nation states cut their large militaries due to cost.[82] Non-combat positions shifted to private military contractors[83] based on the theory that by shifting those positions, and allowing the free market to work, it would save costs associated with training green recruits.[84] Instead of training green recruits, the military could just outsource to experienced private military contractors,[85] resulting in a deal that "saves money, allows the military to tap private sector skills it lacks and forces it to concentrate on its core mission of protecting the country."[86] Private military contractors also benefit with a pay rate twice that of military personnel.[87] The end result constituted "a massive economic benefit in outsourcing."[88] With the confluence of a rapid increase in private military contractors due to economics,[89] and a lack of jurisdiction over them, problems began to arise, as illustrated by the egregious events in the Balkans.

U.S. intervention in the Balkans required the use of private military contractors.[90] Some of those private military contractors engaged in sex trafficking.[91] They "purchas[ed] young girls as sex slaves and … videotaped [a] rape."[92] For that crime "the contractors … were sent home and fired."[93] The Balkans situation, however, failed to catch the attention of Congress. Congress needed a case out of the Second Circuit to make urgent the problem of private military contractors committing crimes overseas and avoiding prosecution.[94]

In that Second Circuit case, *United States v. Gatlin*, a male civilian living oversees with his wife, a member of the Army, and her two daughters from a previous marriage engaged in sexual relations with his wife's thirteen year old daughter.[95] The sexual relations began in 1996 and occurred while they lived on

82. *See* Bina, *supra* note 39, at 1241 (citing Major Michael E. Guillory, *Civilianizing the Force: Is the United States Crossing the Rubicon?*, 51 A.F. L. REV. 111, 111 (2001)).

83. *See* Fricchione, *supra* note 37, at 748 (citing Mary H. Cooper, *Private Affair: New Reliance on America's Other Army*, 62 CONG. Q. WKLY. 2186, 2192 (2004)).

84. *See id.* at 747-48.

85. *Id.*

86. Bina, *supra* note 39, at 1242 (citing Ariana Eunjung Cha & Renae Merle, *Line Increasingly Blurred between Soldiers and Civilian Contractors*, WASH. POST, May 13, 2004, at A1).

87. Fricchione, *supra* note 37, at 748 (citing Mary H. Cooper, *Private Affair: New Reliance on America's Other Army*, 62 CONG. Q. WKLY. 2186, 2197 (2004)).

88. *Id.* at 747.

89. SINGER, *supra* note 45, at 49-60 (discussing in depth the various factors that have led to a rise in private military companies after the cold war).

90. Dickinson, *supra* note 39, at 191-92. President Clinton needed private military contractors to minimize troop deaths in order to "maintain public support for the military engagement." *Id.*

91. K. Elizabeth Waits, Note, *Avoiding the "Legal Bermuda Triangle": The Military Extraterritorial Jurisdiction Act's Unprecedented Expansion of U.S. Criminal Jurisdiction over Foreign Nationals*, 23 ARIZ. J. INT'L & COMP. L. 493, 493-94 (2006).

92. Gail Gibson, *Prosecuting Abuse of Prisoners*, BALT. SUN, May 29, 2004, at A4.

93. *Id.*

94. United States v. Gatlin, 216 F.3d 207 (2d Cir. 2000). The judge in this case found the result so egregious he instructed the clerk of the court to direct the case to the respective congressional committees. *Id.* at 223.

95. *Id.* at 209-10.

an Army base in Germany.[96] When the family returned to the United States, the wife's daughter gave birth.[97] She stated that Gatlin fathered the child and "[a] subsequent genetic test confirmed Gatlin's paternity."[98] Initially, Gatlin plead guilty "to engaging in sexual acts with a minor."[99] Gatlin, however, moved "to dismiss … for lack of jurisdiction."[100]

The trial court rejected the argument and convicted Gatlin;[101] however, the Second Circuit overturned his conviction[102] finding that Congress never granted jurisdiction over someone like Gatlin.[103] Nonetheless, the Second Circuit noted that Congress had the authority to extend jurisdiction.[104] Congress received the message and passed the original MEJA.[105]

1. *Congress Acts Part I: The Original MEJA*

After *Gatlin*, Congress decided to act.[106] Senators Jeff Sessions and Mike DeWine introduced the original MEJA bill and Bill Clinton signed it into law.[107] The bill extended federal jurisdiction over civilians who accompany members of the DOD, or are employed by the DOD, and commit a crime punishable by one year or more while located in the SMTJ of the United States.[108] Despite these efforts, flaws in the original MEJA became apparent after Abu Ghraib. The Taguba report indicated that contractors employed by the DOI engaged in the heinous acts.[109] The original MEJA, however, only covered contractors employed by the DOD.[110] Thus, contractors employed by the DOI went free of any charges.[111] The original MEJA had a gap and all non-DOD contractors could slip through it.[112] In reaction, Congress decided to act again.

96. *Id.*

97. *Id.* at 210.

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.* at 223.

103. *Id.* Since Gatlin's crime did not occur during a formally declared war, the Army could not conduct a court-martial. *See* United States v. Averette, 19 C.M.A. 363, 365 (1970). Also, since the crime occurred in Germany, U.S. law did not apply. *See* EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991) (citing Foley Bros., Inc. v. Filardo, 336 U.S. 281, 285 (1949)).

104. United States v. Gatlin, 216 F.3d 207, 223 (2d Cir. 2000).

105. Glenn Schmitt, *Closing the Gap in Criminal Jurisdiction over Civilians Accompanying the Armed Forces Abroad*, 51 CATH. U. L. REV. 55, 78 (2001).

106. David A. Melson, *Military Jurisdiction over Civilian Contractors: A Historical Overview*, 52 NAVAL L. REV. 277, 314 (2005).

107. Schmitt, *supra* note 105, at 78-80.

108. 18 U.S.C. §§ 3261-3267 (2000).

109. Singer, *supra* note 4, at 7.

110. Merle & McCarthy, *supra* note 28.

111. Singer, *supra* note 4, at 7.

112. Melson, *supra* note 106, at 317 (citing Andrew Higgins, *Contract Cops: As It Wields Power Abroad, U.S. Outsources Law and Order Work*, WALL ST. J., Feb. 2, 2004, at A1).

2. *Congress Acts Part II: The Current MEJA*

After Abu Ghraib, Congress amended the original MEJA through the 2005 Defense Authorization Bill.[113] The amendment attempted to encompass all military contractors by extending it to any military contractor "supporting the mission of the DOD."[114] Though Congress hoped this would finally fill the gap,[115] it created other potential problems: the political question and the void-for-vagueness doctrines.

B. The First Mad Scramble: The Current MEJA Is Vulnerable to the Political Question and Void-for-Vagueness Doctrines

The language of MEJA applying it to any contractor "supporting the mission of the DOD,"[116] opens it to attack under the political question and void-for-vagueness doctrines. This language leads to two questions: who determines the mission of the DOD[117] and what does support mean?[118] Congress left those questions for the courts to answer.[119] Given court precedence concerning these doctrines, current MEJA may not survive constitutional scrutiny.

1. *Political Question Doctrine*

Courts refuse to hear cases involving a political question[120] because "the political question doctrine excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch." [121] The language in MEJA revolves around policy choices and value determinations of the Executive Branch. The mission and who supports the mission of the DOD constitutes a policy choice and value determination of the Executive Branch.[122] Therefore, whenever courts confront a MEJA prosecution, they must consider whether the political question doctrine applies.

The Supreme Court outlined the inquiry to determine if a political question is present.[123] The inquiry consists of six factors which include the following:

113. H.R. 4200, 108th Cong. (2004). *See also* 18 U.S.C.A. § 3267 (West 2000 & Supp. 2007).

114. 18 U.S.C.A. § 3267(1)(A)(ii)(II).

115. *See* Glenn Schmitt, *Amending the Military Extraterritorial Jurisdiction Act of 2000: Rushing to Close an Unforeseen Loophole*, ARMY LAW., Jun. 2005, at 42-43, *available at* WL 2005-JUN ARMY LAW.

116. *Id*. at 44.

117. *Id.*

118. *Id*.

119. *Id*. *See also* Carney, *supra* note 37, at 332.

120. Vieth v. Jubelirer, 541 U.S. 267, 277 (2004).

121. Japan Whaling Ass'n v. Am. Cetacean Soc'y, 478 U.S. 221, 230 (1986).

122. U.S. CONST. art. II, § 2, cl. 1. The President is the Commander in Chief of the United States military and directs all its activities. *Id.*

123. Baker v. Carr, 369 U.S. 186, 217 (1962).

> … a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question. [124]

Courts have identified the first factor as the most important of the six factors.[125] The first factor implicates the political question doctrine when "a textually demonstrable constitutional commitment of the issue [is with] a coordinate political department."[126] The current MEJA implicates this factor because the Constitution commits the mission of the DOD to the Executive.[127] As a result, courts refuse to hear cases that involve policy determinations regarding the military.[128]

Very recent cases shed light on the political question doctrine, the military, and private military contractors in Iraq. The recent cases involve civil complaints in federal district courts, but they demonstrate the courts' unwillingness to hear cases involving policy determinations regarding the military's use of private military contractors. In the case of *Fisher v. Halliburton, Inc*., plaintiffs sued Halliburton for the wrongful death of six military contractors who were killed on April 9, 2004 while delivering fuel to Baghdad International Airport.[129] The defendant argued that the decisions made by the private military contractor firm were "so interwoven with Army decisions, the court lacks jurisdiction over the case under the political question doctrine."[130] The court agreed.[131] The court reasoned that "it cannot try a case set on a battlefield during war-time without an impermissible intrusion into the powers expressly granted to the Executive [Branch] by the Constitution."[132] The court also found significant that the "Army [played an] integral part of any decision to

124. *Id.*

125. *See, e.g.*, *Veith*, 541 U.S. at 227.

126. *Id*.

127. U.S. CONST. art. II, § 2, cl. 1.

128. *See, e.g.*, Haig v. Agee, 453 U.S. 280, 292 (1981) ("Matters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention."); Gilligan v. Morgan, 413 U.S. 1, 10 (1973) (reasoning that courts lacked the competency to judge military affairs as that is the province of the elected branches); Pauling v. McNamara, 331 F.2d 796, 799 (D.C. Cir. 1963), *cert. denied*, 377 U.S. 933 (1964) ("In framing policies relating to the great issues of national defense, the people are and must be, in a sense, at the mercy of their elected representatives.").

129. Fisher v. Halliburton, Inc., 454 F. Supp. 2d 637, 639 (S.D. Tex. 2006).

130. *Id.* at 640.

131. *Id.*

132. *Id.* at 641.

deploy and protect convoys."[133] Based on that role, "the court would inexorably be drawn into an examination of Army decisions."[134] Therefore, the court could not differentiate between Army decisions and those of the defendants.[135]

Furthermore, the court also held that if the case continued, they would have to answer questions requiring an "[examination into the policies] of the Executive Branch during wartime."[136] The court reasoned that deciding this case would require answering political questions regarding the use of private military contractors during war and only the Executive Branch could address those questions.[137]

In another case, *Whitaker v. Kellogg Brown & Root, Inc*., the court cited similar concerns regarding the use of private military contractors stating, "[W]hat a reasonable driver [would do] in a combat zone, subject to military regulations and orders … [is] a classic political question …."[138] In *Whitaker*, the parents of a soldier who died in Iraq while escorting a convoy driven by private military contractors sued the defendant operator of that convoy.[139] An accident occurred that resulted in the death of the soldier through the actions of the private military contractors.[140] The plaintiff's sought to hold the defendant liable through respondeat superior.[141] To resolve the issue of liability, the court felt that it would have to answer questions regarding the "military's strategic and tactical decisions."[142] The holding in this case shows the reluctance of courts to question military policy and the actions of a private military contractor taking orders from the military during a time of war.[143] The *Whitaker* court implied that it had no business questioning the mission of the DOD or who supports the mission.

133. *Id.* at 643.

134. *Id.* at 644.

135. *Id.* at 643-44.

136. *Id.* at 644.

137. *Id.*

138. Whitaker v. Kellogg Brown & Root, Inc., 444 F. Supp. 2d 1277, 1282 (M.D. Ga. 2006).

139. *Id.* at 1278.

140. *Id.*

141. *Id.*

142. *Id.* at 1282.

143. Smith-Idol v. Halliburton, No. H-06-1168, 2006 U.S. Dist LEXIS 75574, at *4-5 (S.D. Tex. Oct. 11, 2006) (finding that since the Army made all the decisions as to how to use the private military contractors, it implicated the political question doctrine); Lane v. Halliburton, No. H-06-1971, 2006 U.S. Dist. LEXIS 63948, at *13-14 (S.D. Tex. Sept. 7, 2006) (noting that if the Army made all the decisions of where to deploy the private military contractors, that could implicate the political question doctrine). *But see* Carmichael v. Kellogg, Brown & Root Services, Inc., 450 F. Supp.2d 1373, 1376 (N.D. Ga. 2006). This case had very similar facts to *Whitaker*, but the court held that since discovery had been limited, it was uncertain if the case would be barred by the political question doctrine. *Id.* If the actions were completely independent of the military, then the court would not have to go into the military's role in the accident. *Id. See also* Lessin v. Kellogg, Brown & Root, No. H-05-01853, 2006 U.S. Dist. LEXIS 39403, at *8-9 (S.D. Tex. June 12, 2006). The court in *Lessin* called the actions of the military officer, Lessin, negligent. *Id.* at *8-9. The court reasoned that claims of negligence do not invoke the political question doctrine or inquire into the policy decisions of the military. *Id. See also* McMahon v. Presidential Airways, Inc., 460 F. Supp. 2d 1315, 1324 (M.D. Fla. 2006) (finding the political question doctrine inapplicable in a negligence claim that implicated no military tactics); Potts v. Dynacorp International, 465 F. Supp.

While neither of these cases were prosecuted using the current MEJA, they indicate the reluctance of courts to adjudicate a case brought under the current MEJA. Before adjudication, the court would need to answer the question of whether the private military contractor "support[ed] the mission of the DOD."[144] The Executive Branch could help answer that inquiry through DOD regulations such as the Logistics Augmentation Program ("LOGCAP").[145] LOGCAP allows the use of private military contractors for Army motor transport operations "when contractor support is determined to be the most effective, expeditious, or cost effective."[146] Thus, if the Army assigns a transport to a private military contractor, then that private military contractor must support the mission of the DOD. That conclusion, however, does not follow as LOGCAP language presented itself in *Fisher* and *Whitaker* and the courts still refused to hear the cases based on the political question doctrine.[147]

The legislative history of MEJA further hampers court assessment of whether a private military contractor supports the mission of the DOD. The legislative history of MEJA provides no guidance as to what "supporting the mission of the DOD" means.[148] With no clear guidance from Congress, courts must rely on the Executive Branch. Thus, the Executive Branch determines whether a private military contractor supports the mission of the DOD because a court will not engage in an "[examination into the policies] of the Executive Branch during wartime"[149] or answer questions regarding the "military's strategic and tactical decisions."[150] With deference given to the Executive Branch on the use of private military contractors[151] and no legislative history to counter the Executive Branch's determination of whether a private military contractor supports the mission of the DOD, a court should strike down the current MEJA as void for vagueness.

2. *Void-for-Vagueness Doctrine*

The void-for-vagueness doctrine is a judicial remedy that strikes down penal statutes that "encourage arbitrary and discriminatory enforcement."[152] By

2d 1245, 1250 (M.D. Ala. 2006) (finding the political question doctrine inapplicable where the court only had to examine the internal policies of the private military contractor).

144. 18 U.S.C.A. § 3267(1)(A)(i)(II) (West 2000 & Supp. 2007).

145. *Whitaker*, 444 F. Supp. 2d at 1279 (citing Logistics Civil Augmentation Program, U.S. Army Reg. 700-137, at 1-1 (Dec. 16, 1985)).

146. *Id.* (citing Army Motor Transport Units and Operations, Army Field Manual 55-30, at 1-11 (Sept. 15, 1999)).

147. *Whitaker*, 444 F. Supp. 2d at 1279; Fisher v. Halliburton, Inc., 454 F. Supp. 2d 637, 643 (S.D. Tex. 2006).

148. Schmitt, *supra* note 115, at 44.

149. *Fisher*, 454 F. Supp. 2d at 644.

150. Whitaker v. Kellogg Brown & Root, Inc., 444 F. Supp. 2d 1277, 1282 (M.D. Ga. 2006).

151. *Fisher*, 454 F. Supp. 2d at 644.

152. Kolender v. Lawson, 461 U.S. 352, 357 (1983). *See also* City of Chicago v. Morales, 527 U.S. 41, 56 (1999). The doctrine can also strike down a law the "fails to provide the kind of notice that will enable ordinary people to understand what the conduct prohibits." *Morales*, 527 U.S. at

striking vague penal statutes, the courts protect the people from "a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections.[153] That concern led the Supreme Court to strike down a penal law in the case of *City of Chicago v. Morales* because it gave "too much discretion to the police" in how they enforced a city ordinance.[154] Similar concerns regarding the current MEJA suggest that a court should strike it down as void for vagueness.

The suspect language in the current MEJA that implicates the void-for-vagueness doctrine is "supporting the mission of the [(DOD)]."[155] MEJA only applies if the contractor "support[s] the mission of the [DOD]."[156] Again, who determines the mission of the DOD and what does support mean? As discussed above, Congress left those terms undefined and provided very little legislative history as to their meaning.[157] Thus, the Executive Branch determines who supports the mission of the DOD. Due to the political question doctrine, a court would have to accept those determinations. With no congressional definition of support, the Executive Branch has free reign to pick and choose which private military contractors support the mission of the DOD.

With a free reign on determining who supports the mission of the DOD, what prevents the Executive Branch from pursuing "arbitrary and discriminatory enforcement"[158] using the current MEJA? Without any congressional definition, support could mean anything and its definition could change depending on the contractor and the situation. Furthermore, public outcry after an incident could lead to a prosecution that is nothing more than "a standardless sweep [that] allows … [Department of Justice] prosecutors … to pursue their personal predilections"[159] in order to appease public sentiment. The language of the current MEJA gives "too much discretion to the police,"[160] or in this case, the Executive Branch, to allow a fair prosecution using the current MEJA. Thus, a court should strike down the current MEJA as void for vagueness.

The current construction of MEJA has serious language problems. Perhaps if Congress had not gone on a mad scramble, it would have realized the language problems of the current MEJA. These language problems unfortunately allow the political question and void-for-vagueness doctrines to work together to strike down the current MEJA. These vulnerabilities also doom the most recent proposed congressional solution, the MEJA Expansion and Enforcement Act of 2007.

56. The void-for-vagueness doctrine also applies to civil statutes. *See* Karen A. Goldman & Montgomery K. Fisher, *The Constitutionality of the "Other Serious Deviation from Accepted Practices" Clause*, 37 JURIMETRICS J. 149, 155 (1997).

153. *Kolender*, 461 U.S. at 358 (citing Smith v. Goguen, 415 U.S. 566, 575 (1974)).

154. *Morales*, 527 U.S. at 64.

155. 18 U.S.C.A. § 3267(1)(A)(ii)(II) (West 2000 & Supp. 2007).

156. *Id.*

157. Schmitt, *supra* note 115, at 43-44. *See also* Carney, *supra* note 37, at 332.

158. *Kolender*, 461 U.S. at 357.

159. *Id.* at 358 (citing Smith v. Goguen, 415 U.S. 566, 575 (1974)).

160. *Morales*, 527 U.S. at 64.

C. The Second Mad Scramble: The MEJA Expansion and Enforcement Act of 2007

On October 4, 2007 the House of Representatives, by a vote of 389 to 30, passed the MEJA Expansion and Enforcement Act of 2007.[161] The House acted in response to the incident of September 16, 2007 in which contractors from Blackwater shot and killed at least fourteen innocent Iraqi civilians.[162] The House envisioned this expansion as filling in all the jurisdictional loopholes that plagued their prior attempts.[163] The new bill should suffer the same weaknesses as MEJA if passed into law.[164]

The new bill eliminates the "supporting the mission of the DOD" language and instead institutes a proximity element.[165] Rather than having to support the mission of the DOD, contractors now need to "work under [a] contract … carried out in an area, or in close proximity to an area (as designated by the Department of Defense), where the Armed Forces is conducting a contingency operation."[166] Much like MEJA, Congress left key terms undefined in the new bill. In the new bill, Congress provides no definition for proximity.[167] The undefined term provides no guidance to the private military contractors as to when the new bill would apply to them. Leaving the term "proximity" undefined could subject private military contractors to "arbitrary and discriminatory enforcement." Thus, the bill contains a vague term. In responding to the bill, the Bush Administration raised the same concern, commenting that the bill depended on "vague notions of proximity."[168] Therefore, the new bill should fail to overcome the void-for-vagueness doctrine. If Congress had not gone on a mad scramble again, perhaps it would have realized the problem with using ambiguous words such as "proximity."

161. Weisman, *supra* note 12. About a month later, Congresswoman Jan Schakowsky (D-IL) proposed a radical new solution, removing all the private military contractors from Iraq. H.R. 4102, 110th Cong. (2007). *See also* Press Release, Congresswoman Jan Schakowsky, Senate and House Members Introduce Bill to Phase-Out Private Security Contractors (Nov. 7, 2007), *available at* http://www.house.gov/list/press/il09_schakowsky/pr_phaseoutbill_110707.shtml. The bill is still in several different committees. THOMAS (Library of Congress), http://thomas.loc.gov/cgi-bin/bdquery/z?d110:h.r.04102: (last visited Jan. 17, 2008).

162. Raghavan et al., *supra* note 9. Blackwater claimed that its personnel acted in self-defense. *Id.* The U.S. military reports indicate otherwise, finding that Blackwater security "guards opened fire without provocation and used excessive force against Iraqi civilians." *Id.*

163. H.R. REP. NO. 110-352, at 4 (2007).

164. The Senate introduced its version of the bill on October 4, 2007. S. 2147, 110th Cong. (2007). No other action has been taken. After its introduction, the bill was referred to the Senate Judiciary Committee. THOMAS (Library of Congress), http://thomas.loc.gov/cgi-bin/bdquery/z?d110:s.02147: (last visited Jan. 17, 2008).

165. H.R. 2740, 110th Cong. (2007).

166. *Id.*

167. *Id.*

168. Weisman, *supra* note 12.

The current MEJA and its proposed expansion represent only part of the congressional solution. Congress also provides for court-martial proceedings to bring private military contractors to justice.[169]

IV. CONGRESSIONAL SOLUTION NUMBER TWO: COURT-MARTIAL

Without much fanfare, debate, or notice, Congress authorized the court-martial of "civilians not just in times of declared war but also [during a] contingency operation[], [like Iraq]."[170] Many questions remain about the new law's interpretation and implementation[171] because the Pentagon has yet to issue the pertinent guidelines.[172] Nevertheless, the military supports the new law.[173] The new law fills the gap where the current MEJA has failed.[174] As Peter Singer of the Brookings Institute points out, "[The current] MEJA was never designed to apply to military/security missions or in the context of conflict zones … [and that] [c]ourt martials, for all their faults, are designed for the context of military action and conflict …."[175] The change in the law to allow court-martial is not a new idea. Many legal experts endorse the court-martial of civilians.[176]

A. Court-Martial: The Argument and Rebuttal

Several military lawyers advocate court-martial[177] for civilians.[178] The basis for their support stems from history, "wrongly" decided court decisions, and the

169. Peter W. Singer, *Frequently Asked Questions on the UCMJ Changes and Its Applicability to Private Military Contractors,* BROOKINGS INSTITUTION, Jan. 12, 2007, http://brookings.edu/views/op-ed/psinger/20070112.htm.

170. *Id*. *See also* Singer, *supra* note 4.

171. Singer, *supra* note 169.

172. Griff Witte, *New Law Could Subject Civilians to Military Trial*, WASH. POST, Jan. 15, 2007, at A1; Peter W. Singer, *Banned in Baghdad: Reactions to the Blackwater License Being Pulled*, BROOKINGS INSTITUTION, Sept. 17, 2007, http://www.brookings.edu/views/op-ed/psinger/20070917.htm.

173. Singer, *supra* note 169.

174. *Id.*

175. *Id.*

176. *See, e.g.,* Michael J. Davidson & Robert E. Korroch, *Extending Military Jurisdiction to American Contractors Overseas*, 35 PROCUREMENT LAW. 1, 15-16 (2000); Peters, *supra* note 46, at 372; Lawrence J. Schwarz, *The Case for Court-Martial Jurisdiction over Civilians under Article 2(A)(10) of The Uniform Code of Military Justice*, ARMY LAW., Oct.-Nov. 2002, at 31, *available at* WL 2002-NOV ARMY LAW. 31.

177. The U.S. military uses a court-martial system as part of its justice system. James W. Smith, *A Few Good Scapegoats: The Abu Ghraib Courts-Martial and the Failure of the Military Justice System*, 27 WHITTIER L. REV. 671, 684 (2006). Commanders have a variety of means to deal with the misconduct of military personnel and a court-martial is "the most punitive option available." *Id.* at 686. Courts-martial are much like civilian criminal trials. *Id.* Court-martial proceedings provide many of the same rights to a defendant as a civilian criminal trial. *Id.* at 686-87. One significant difference exists. Court-martial proceedings use panels rather than juries. *Id.* at 687. While both serve the same essential functions, such as finding of facts and determining guilt beyond a reasonable doubt, a panel does not comply with the Sixth Amendment. Christopher W. Behan, *Don't Tug on Superman's Cape: In Defense of Convening Authority Selection and*

idea that a court-martial provides fair and adequate safeguards, more so than the U.S. Constitution provides.[179]

The argument that history supports the use of court-martial stems from the American Revolution. The Continental Army adopted certain standards for the conduct of civilians serving alongside the military and used court-martial to enforce those standards.[180] Those standards created the "legal tradition [that] creates the basis for current statutes that allow military court jurisdiction over certain civilians accompanying soldiers in the field during time of war."[181] This legal tradition, set during the American Revolution, evolved into the UCMJ.[182] Therefore, history indicates that court-martial provides an appropriate means to try civilians.

With the history argument explained, advocates of court-martial attack the court cases that stripped court-martial of its jurisdiction over civilians.[183] This attack on court decisions dates back to the Civil War,[184] and ends with perhaps the most heavily criticized case, *United States v. Averette*.[185] The criticisms of that case stem from history,[186] the judges who heard the case,[187] current international law,[188] and current U.S. law.[189] The most intriguing argument is that current international and U.S. law fulfills the requirements laid down by *Averette* and that a formal declaration of war is no longer needed to extend court-martial jurisdictional reach to civilians.[190]

Court-martial advocates argue that a formal declaration of war made by Congress is a nullity.[191] They also point out that international law no longer recognizes a formal declaration of war.[192] Their argument continues by suggesting that the War Powers Resolution negates any need for a formal

Appointment of Court-Martial Members, 176 MIL. L. REV. 190, 192-93 (2003); Dwight H. Sullivan, *Playing the Numbers: Court-Martial Panel Size and the Military Death Penalty*, 158 MIL. L. REV. 1, 19 (1998). Unlike a jury, members of a panel are chosen by a convening authority rather than randomly chosen, consist of military personnel with a higher rank than the defendant, and panel deliberations and voting can be influenced by the military rank structure. Sullivan, *supra* note 177, at 15, 28. Court-martial panels do not have to comply with the Sixth Amendment. *Id.* at 19.

178. *See, e.g.,* Davidson & Korroch, *supra* note 176, at 15-16; Peters, *supra* note 46, at 372; Schwarz, *supra* note 176, at 31.

179. Peters, *supra* note 46, at 398-411.

180. *Id.* at 376-77.

181. *Id.* at 376.

182. *Id.* at 379.

183. *Id.* at 399.

184. *Id.* at 401.

185. *Id.* at 399.

186. *Id.* at 376-80.

187. Schwarz, *supra* note 176, at 34.

188. Peters, *supra* note 46, at 404.

189. *Id.* at 404-05.

190. *Id*. *Averette* held that a civilian could only be court-martialed during a formally declared war. United States v. Averette, 19 C.M.A. 363, 365 (1970).

191. Peters, *supra* note 46, at 404.

192. *Id.* at 403.

declaration of war[193] because "specific congressional authorization for the use of force [is] on the same constitutional plateau as a formal declaration of war."[194] The requirement that Congress formally declare war is met by any congressional authorization of force;[195] thus, superseding *Averette* which required a formal declaration of war before a civilian could be subject to a court-martial.[196] Consequently, when Congress authorizes use of force, as in the current conflict in Iraq,[197] it essentially declares war and the UCMJ applies to civilians. Accordingly, the new law passed by Congress authorizing court-martial may not even be necessary.

Court-martial advocates also point out that a court-martial is fair and provides more safeguards than the Constitution.[198] This argument attempts to downplay fears that civilians would not receive a fair trial or protection of their fifth and sixth amendment rights.[199] Court-martial advocates argue that court-martial provides more due process protections than the equivalent civilian process.[200] In addition, private military contractors prefer a court-martial panel[201] rather than a jury[202] because a panel would be in a better position to judge the actions of the private military contractor rather than a detached civilian jury.[203] Therefore, a court-martial provides more safeguards to the private military contractor.

Those supposed safeguards constitute the problem. While a military panel provides better representation of the private military contractor's peers, the danger is that those peers would sanction the otherwise criminal behavior.[204] William C. Peters argues that

> a contractor accused of abusing a battlefield detainee in the rough and tumble of a wartime environment, who might the contractor truly prefer on his jury: courts-martial service members on site who have shared a common purpose and mission or twelve civilians thousands of miles away from the battle zone, drawn from the safety and comfort of suburban America, who cannot possibly

193. *Id.* at 404-05.

194. *Id.* at 405.

195. *Id.*

196. *Averette*, 19 C.M.A. at 365.

197. Joint Resolution to Authorize the Use of United States Armed Forces against Iraq, *available at* http://www.whitehouse.gov/news/releases/2002/10/20021002-2.html (last visited Jan. 17, 2008).

198. Peters, *supra* note 46, at 408-11.

199. *Id.*

200. *Id.* at 409.

201. For information about a court-martial panel, see *supra* note 177.

202. Peters, *supra* note 46, at 411. The Sixth Amendment provides for the right of a jury trial. U.S. CONST. amend. VI, cl. 1.

203. Peters, *supra* note 46, at 411.

204. *Id.*

> understand 'ground truth' and may not even support the goals of the underlying military campaign.[205]

The dangers are very real that a military panel may look the other way on detainee abuse or any other crime. Private military contractors subject to the courts-martial system may continue to evade prosecution. Yet, those who argue in favor of using courts-martial seem sensitive to balancing "ground truth" with accountability.

Moreover, the argument that a congressional authorization of force is the same as a declaration of war is suspect. It is suspect for two reasons. First, the court in *Averette*[206] distinguished a formal declaration of war from an authorization of force and held that, for the purposes of subjecting civilians to court-martial Congress needs to formally declare war.[207] Second, the Supremacy Clause places constitutional provisions above statutory provisions[208] and it is dangerous to suggest that the express power of Congress to declare war should be read out of the Constitution just because current trends suggest such a power is a nullity.[209] A formal declaration of war is substantially different from an authorization of force.

Furthermore, the historical underpinnings of allowing the court-martial of civilians are suspect. Specifically, the Supreme Court in *Reid v. Covert* rebutted the assertion that the common law at the time of the American Revolution allowed for the court-martial of civilians.[210] After discussing English common law and the colonial experience under British rule, the Court concluded that "it seems clear that the Founders had no intention to permit the trial of civilians in military courts."[211]

> There is no indication that the Founders contemplated setting up a rival system of military courts to compete with civilian courts for jurisdiction over civilians

205. *Id.*

206. The new law passed by Congress supersedes *Averette*. Since *Averette* was not a constitutional decision, Congress could have superseded it with a statute. *See* Jill E. Fisch, *The Implications of Transition Theory for Stare Decisis*, 13 J. CONTEMP. LEGAL ISSUES 93, 98 (2003). If *Averette* had been a constitutional decision, then a constitutional amendment would have been required. *But see* Amy L. Padden, Note, *Overruling Decisions in the Supreme Court: The Role of a Decisions Vote, Age, and Subject Matter in the Application of Stare Decisis after* Payne v. Tennessee, 82 GEO. L.J. 1689, 1717-18 (1994) (pointing out the various ways Congress could address a constitutional decision).

207. United States v. Averette, 19 C.M.A. 363, 365-66 (1970).

208. *See* Marbury v. Madison, 5 U.S. 137, 178-80 (1803). Chief Justice Marshall writes that constitutional provisions are superior to any laws passed by the legislature. *Id.* Chief Justice Marshall concludes with this famous quote, "Thus, the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that *courts,* as well as other departments, are bound by that instrument." *Id.* at 180.

209. The power referred to here is the power to declare to war. Only Congress can declare war. U.S. CONST. art. I, § 8, cl. 11.

210. 354 U.S. 1, 40-41 (1957); Peters, *supra* note 46, at 376-77.

211. *Reid*, 354 U.S. at 30.

> who might have some contact or relationship with the armed forces. Courts-martial were not to have concurrent jurisdiction with courts of law over non-military America.[212]

Thus, the Supreme Court rejects any assertion that the common law allowed for the court-martial of civilians.

The use of court-martial is now a reality and one that must be guarded against. The Founders thought it dangerous and it is questionable if a military panel is capable of effectively punishing private military contractors. Congress, however, because of the mad scramble, failed to adequately address those issues.[213]

Many legal commentators shared Congress's desire to bring private military contractors to justice. They too took part in the mad scramble; proposing solutions based on international remedies,[214] contract law,[215] industry self-regulation,[216] and tort law.[217]

V. THE MAD SCRAMBLE OF THE LEGAL COMMUNITY

Noting the void of legal or civil accountability that many private military contractors fall into, the legal world proposed various solutions from the use of international law[218] to civil remedies.[219] The proposed solutions, however, like the current MEJA and court-martial, face limitations precluding them from being viable and effective.

A. International Criminal Court

Some commentators advocate the International Criminal Court ("ICC") as a method for bringing private military contractors to justice.[220] The argument is two pronged: (1) abuses committed by private military contractors are international in nature and (2) "as states themselves are the entities hiring and

212. *Id.* at 30.

213. One Congressman, Representative David E. Price, realized the dangers of court-martial, and on January 10, 2007, introduced a bill to serve as a preferred method to court-martial. Price Introduces Private Security Contractor Legislation, http://price.house.gov/list/press/nc04_price/011007a.shtml (last visited Jan. 21, 2007); H.R. 369, 110th Cong. (2007); Witte, *supra* note 172, at A1.

214. *See, e.g.*, Calaguas, *supra* note 37, at 76-78; Milliard, *supra* note 37, at 85; Carney, *supra* note 37, at 336; Coleman, *supra* note 37, at 1537; Fricchione, *supra* note 37, at 760.

215. *See, e.g.*, Desai, *supra* note 38, at 858; Dickinson, *supra* note 39, at 142-43.

216. *See, e.g.*, Dickinson, *supra* note 39, at 274; Bina, *supra* note 39, at 1260.

217. *See*, *e.g.*, Bina, *supra* note 39, at 1253; Borrowman, *supra* note 40, at 372.

218. *See, e.g.*, Calaguas, *supra* note 37, at 76-78; Milliard, *supra* note 37, at 85; Carney, *supra* note 37, at 336; Coleman, *supra* note 37, at 1537; Fricchione, *supra* note 37, at 760.

219. *See, e.g.*, Desai, *supra* note 38, at 858; Dickinson, *supra* note 38, at 142-43; Bina, *supra* note 39, at 1253; Borrowman, *supra* note 40, at 372.

220. Carney, *supra* note 37, at 336.

benefiting from [private military contractors], they may be reluctant to prosecute them…."[221]

The case for the use of the ICC to bring military contractors to justice goes further.[222] "First, the ICC is already established … [and] prepared to investigate and try international crimes of great magnitude."[223] The ICC has the advantage of impartial judges and the mechanisms by which to investigate international crimes.[224] More importantly, "[t]he ICC was instituted to prosecute war crimes and crimes against humanity, particularly when there is a lack of domestic enforcement."[225]

The lack of domestic enforcement is especially important when considering the United States. The United States has an estimated 180,000 civilians working as private contractors in Iraq.[226] Yet, not one has faced criminal prosecution.[227] Whether this lack of prosecution is due to the current jurisdiction problem or to the relationship between the private military contractors and the DOD, the ICC was established to deal with that issue. Nevertheless, no U.S. civilian has been brought before the ICC[228] because the ICC is an unrealistic and impracticable solution.

First, the ICC is unrealistic and impracticable because history dictates that no American administration will ever allow an American to come under the jurisdiction of an international tribunal.[229] During the formation of the ICC, the United States "worked to preserve the right of the U.S. military to investigate and prosecute personnel according to procedures already in place, and to maintain the legitimacy of the Status of Forces Agreements ("SOFAs") with foreign governments."[230] The result of maintaining SOFAs allowed two nations to sign "bilateral non-surrender agreements between nations."[231] Today, the United States has over eighty bilateral treaties with other countries that prohibit those countries from turning Americans over to the ICC.[232] The United States also

221. *Id.*

222. *Id.*

223. *Id.* (citing Rome Statute of the International Criminal Court art. 1, July 17, 1998, U.N. Doc. A/CONF. 183/9 (2002), *available at* http://www.un.org/law/icc/statute/english/rome_statute(e).pdf).

224. *Id.* (citing ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 441 (2003)).

225. *Id.* (citing Rome Statute of the International Criminal Court art. 1, July 17, 1998, U.N. Doc. A/CONF. 183/9 (2002), *available at* http://www.un.org/law/icc/statute/english/rome_statute(e).pdf).

226. H.R. REP NO. 110-352, at 4 (2007).

227. *Id.* at 5 (noting that seventeen cases are pending).

228. *See* Golzar Kheiltash, *Ocampo Turns Down Iraq Case: Implications for the US*, GLOBAL POLICY FORUM, Feb. 2006, http://www.globalpolicy.org/intljustice/icc/2006/02ocampo.htm.

229. Diane F. Orentlicher, *Unilateral Multilateralism: United States Policy towards the International Criminal Court*, 36 CORNELL INT'L L.J. 415, 418-22 (2004) (describing the U.S. government's concern with the ICC).

230. Fricchione, *supra* note 37, at 760 (citing David Scheffer, *Article 98(2) of the Rome Statute: America's Original Intent*, 3 J. INT'L CRIM. JUST. 333, 335-36 (2005)).

231. *Id.*

232. Carney, *supra* note 37, at 337 (citing Bilateral Immunity Agreements: Country Positions (Oct. 6, 2004), http://www.amicc.org/docs/CGStableofBIAsbyICCstatus%2010-04.pdf).

limited the ability of the ICC to assert jurisdiction over Americans by its decision to pull out of the Rome Statute.[233]

The Rome Statute "[intended] to institute international jurisdiction over atrocity crimes."[234] The United States, however, is a non-party state to the Rome Statute.[235] Party states to the Rome Statute "must surrender [people] at the ICC's request."[236] The ICC, however, cannot request an American citizen from a party state if the United States and that party state have a non-surrender bilateral treaty.[237] Furthermore, if countries like Russia and China are not parties to the ICC, the United States is unlikely to join.[238] Although U.S. hostility to the ICC is a barrier to prosecutions; the ICC itself may not want to prosecute private military contractors.

Second, the ICC is unrealistic and impracticable as a prosecutorial solution because it lacks authority. The ICC recently released an opinion from the chief prosecutor that stated, "[T]he Statute requirements to seek authorization to initiate an investigation [into] the situation in Iraq have not been satisfied."[239] The statements from the chief prosecutor are not surprising based on the ICC's statement regarding its jurisdiction.

> The Court's jurisdiction will be limited to the most serious crimes of concern to the international community as a whole. It will therefore have jurisdiction with respect to the crimes of genocide, crimes against humanity and war crimes, all of which are fully defined in the Statute and further elaborated by the Elements of Crimes.[240]

It is not surprising then that the chief prosecutor decided to stay out of Iraq. His report indicated that the evidence did not indicate that genocide, crimes against humanity, or any war crimes occurred.[241] Therefore, given the statements from the ICC and what international criminal courts are designed to handle, it is unlikely that the ICC would prosecute a private military contractor for one isolated incident of abuse.[242] With international remedies failing to adequately

233. Fricchione, *supra* note 37, at 760-61 (citing Notes on the Rome Statute of the International Criminal Court, http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty11.asp (last visited Feb. 4, 2006)).

234. *Id.* at 760 (citing David Scheffer, *Article 98(2) of the Rome Statute: America's Original Intent*, 3 J. INT'L CRIM. JUST. 333, 335-36 (2005)).

235. *Id.* at 760-61.

236. *Id.* at 761.

237. *Id. See also* Carney, *supra* note 37, at 337.

238. Carney, *supra* note 37, at 337 (citing *World War Crimes Court Opens as US Steps Up Opposition*, AGENCE FRANCE-PRESSE, July 1, 2002, http://www.commondreams.org/headlines02/0701-04.htm).

239. Opinion of the Chief Prosecutor of the International Criminal Report on the Situation in Iraq, http://www.icc-cpi.int/library/organs/otp/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf [hereinafter Opinion] (last visited Jan. 17, 2008).

240. International Criminal Court, Subject Matter, http://www.icc-cpi.int/about/ataglance/whatistheicc/jurisdiction.html (last visited Jan. 17, 2008).

241. Opinion, *supra* note 239.

242. *See supra* notes 30-34 and accompanying text discussing the Passaro case.

address the problem, some commentators argue that contract law might present a viable solution.[243]

B. Contractual Oversight

The basic argument for a contract-based solution is "that contracts can, through their terms, make substantive and procedural 'public law' values applicable to private parties."[244] In effect, "states 'could require compliance with both procedural and substantive standards that might otherwise be inapplicable or unenforceable against private providers.'"[245] Furthermore, "contracts could also require compliance with specific performance standards and include performance benchmarks, graduated penalties, oversight by contract managers or independent observers, and reporting requirements."[246] Contract law could also allow claims by third parties and interest groups.[247] This is especially important where states may be reluctant to bring breach of contract claims.[248] Thus, an outside agency or watchdog group could provide the enforcement of the contract when the Pentagon may be unwilling to do so.[249]

Advocates for contract-based solutions emphasize the success of domestic states in contracting out traditional state functions to private actors.[250] Domestic states, such as Oklahoma and Texas, have recently turned to private actors to manage their prisons.[251] When the domestic states contract with the private actors, the states include provisions that require the private actors to follow all the same rules and regulations that the domestic state would have to follow.[252] The domestic states also include provisions in the contract that set performance standards, require that the private actor receive the same training as a state employee would receive, and have a self-monitoring plan.[253] Having such provisions ensures accountability.[254] Those contracts then, should serve as a model for when the United States contracts with private military contractors.[255] To ensure accountability, such contracts should have "clear requirements that contractors abide by international human rights and humanitarian law standards

243. Desai, *supra* note 38; Dickinson, *supra* note 39, at 137.

244. Dickinson, *supra* note 39, at 171 (citing Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U.L. REV. 543, 634 (2000)).

245. *Id.*

246. *Id.* (citing Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U.L. REV. 543, 635 (2000)).

247. *Id.* (citing Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U.L. REV. 543, 636 (2000)).

248. *Id.* at 173.

249. *Id.*

250. *Id.* at 199.

251. *Id.* at 199-200.

252. *Id.* This would include all constitutional protections and rights, along with all federal and state law. *Id.*

253. *Id.* at 200.

254. *Id.* at 199.

255. *Id.* at 206.

applicable to government actors and receive training at least equivalent to that received by government actors."[256] Contract law, however, has failed to live up to its suggested benefits.

The suggested benefits of contract seem attractive in theory, but history and current circumstances demonstrate otherwise. The DOD has a dubious history in monitoring private military contracts.[257] As early as 1988, the DOD recognized it had failed to implement adequate procedures for the monitoring of contracts.[258] A 2003 GAO report noted that the DOD has known for sometime that it has failed to properly monitor contracts.[259] For example, during the war in the Balkans, the DOD failed to effectively monitor its contracts despite established procedures governing the administration and management of such contracts.[260] The DOD also cannot rely on its contracting officers.[261] Contracting officers monitor contract performance but a representative of the contracting officer often does the job instead.[262] In Iraq, the Army noted that the representatives rarely performed their job and that contract work went on without any representative overseeing the work.[263] The Army also found that it is impossible to monitor a contract when a representative fails to oversee the work.[264] Another Army report indicated that lack of training of Army personnel at Abu Ghraib on how to monitor contractual performance contributed to the abuses that occurred at Abu Ghraib.[265] Despite the abuse, the DOD made no clear efforts to improve the monitoring of its contracts.[266] Instead, the private military contractor company implicated for the abuse at Abu Ghraib received a contract extension.[267] The DOD also decided not to train the private military contractors and outsourced that problem to another private military contractor.[268] The problems with DOD monitoring and oversight of its contracts should not be a surprise. The DOD's reliance on private military contractors may restrict effective monitoring.

The DOD's need for private military contractors suggests that the DOD bargains from a position of weakness. The DOD cannot operate without private military contractors.[269] Private military contractors often employ former DOD officials, which supports a close relationship between the contracting parties and evokes a bias against tougher DOD contracting standards.[270] Lack of political

256. *Id.*
257. Fricchione, *supra* note 37, at 753-58.
258. *See id.* at 753 (citations omitted).
259. *See id.* at 754 (citations omitted).
260. *See id.* (citations omitted).
261. *See id.* 754-55.
262. *Id.*
263. *Id.* at 754 n.176 (citations omitted).
264. *Id.* (citations omitted).
265. *Id.* at 755 n.182 (citations omitted).
266. Dickinson, *supra* note 39, at 201.
267. *Id.*
268. Fricchione, *supra* note 37, at 756.
269. Desai, *supra* note 38, at 833-34.
270. *Id.* Dick Cheney, the former CEO of Halliburton, was Secretary of Defense before becoming CEO of Halliburton. *Id.* Cheney is the current Vice President of the United States. *Id.*

will in the Executive Branch also makes it questionable if the DOD could even require tougher contract standards.[271] In September of 2001, former Secretary of Defense Donald Rumsfeld made it his goal to transform the DOD and make "corporate America an official part of the military establishment."[272] Rumsfeld's vision has become true and "President Bush seeks to expand the amount of privatized troops within the military[] …."[273] Since the need for private military contractors is now so great, tough training and hiring requirements may be unrealistic.[274] Thus, great uncertainty exists whether the DOD could or even wants to require private military contractors to agree to tough standards in their contracts.

The market and the relationship between the DOD and private military contractors make enforcement through contract unrealistic. Private military contractors, however, have proposed their own solution—let the industry regulate itself.[275]

C. Industry Oversight

The industry argues that self-regulation provides the best way to hold private military contractors accountable.[276] Self-regulation would require the industry to create certain norms and regulate itself by imposing standards on its members.[277] Other industries utilize this approach, and in those contexts, self-regulation works.[278] The industry also emphasizes that it has a code of ethics.[279] Relying on this industry, however, is fraught with peril. The success of standards in an industry where member firms have been referred to as mercenaries is doubtful.[280] What kind of standards or code of ethics can be expected from an industry made up of former members of the South African Defense Forces ("SADF"), which enforced the Apartheid?[281] The Apartheid segregated the races

271. *See* Barbara Barrett, *Behavior of Security Contractors Targeted*, LEXINGTON HERALD-LEADER, Jan. 17, 2008, at A4. Human Rights First, an international human rights organization, claims that a "lack of political will" exists in the Department of Justice to prosecute private military contractors. *Id.*

272. John Donoghue, Editorial, *Mercenaries R Us*, PITT. POST-GAZETTE, Nov. 25, 2007, at G1.

273. *Id.*

274. Desai, *supra* note 38, at 833-34.

275. Bina, *supra* note 39, at 1260.

276. *Id.* (citing United Kingdom Foreign and Commonwealth Office Green Paper, Private Military Companies: Options for Regulation 2001-02, 21 (2002), *available at* http:sandline.com/home/Green_Paper_12-2-02.pdf).

277. Dickinson, *supra* note 39, at 174-77.

278. *Id.* International trade association groups and nonprofit hospitals thrive when operating under industry norms. *Id.* at 174-75.

279. Bina, *supra* note 39, at 1260 (citing United Kingdom Foreign and Commonwealth Office Green Paper, Private Military Companies: Options for Regulation 2001-02, 21 (2002), *available at* http:sandline.com/home/Green_Paper_12-2-02.pdf).

280. Saad Gul, *The Secretary Will Deny All Knowledge of Your Actions: The Use of Private Military Contractors and the Implications for State and Political Accountability*, 10 LEWIS & CLARK L. REV. 287, 287 (2006).

281. Fricchione, *supra* note 37, at 766.

in South Africa and ensured white supremacy in the country from 1948 until 1990.[282] The enforcement of the Apartheid severely restricted personal liberties and turned the country into a police state.[283] Yet, the industry claims to have standards and a code of ethics.

Relying on industry self-regulation seems to be a dangerous proposition. Too many uncertainties remain within the industry for it to be a viable option. Thus, commentators suggest regulation through tort.

D. The Alien Tort Claims Act ("ATCA"): A Tort Law Solution

The theoretical benefits of tort law lead some commentators to advocate for its use to "hold private military contractors accountable for wrongful conduct."[284] Tort regulation would define the standard of allowable conduct and damages for breach of such standard would potentially act as a deterrent to violating that standard.[285] The military contracting firms that hire employees to work for the military overseas, might additionally be responsible for damages through respondeat superior.[286] Plaintiffs can use various methods to sue private military contractors using tort law such as the Alien Tort Claims Act[287] and the Torture Victims Protection Act ("TVPA").[288]

1. *The ATCA and TVPA*

The ATCA provides a cause of action in tort.[289] The ATCA grants federal district courts "original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[290] Accordingly, only foreign nationals may bring a suit under the ATCA, and they must do so in the United States.[291] What exactly, however, does a "violation of the laws of nations" mean?

In *Filartiga v. Pena-Irala*, the Second Circuit held that "an act of torture committed by a state official against one held in detention violates established norms of international law of human rights, and hence the law of nations."[292]

282. Apartheid, MSN Encarta, http://encarta.msn.com/encyclopedia_761561373/Apartheid.html (last visited Jan. 17, 2008).

283. *Id.*

284. Bina, *supra* note 39, at 1249.

285. JAMES HENDERSON, THE TORTS PROCESS 135-36 (2003).

286. *Id.*

287. 28 U.S.C. § 1350 (2000).

288. *Id.*

289. For a more detailed history of the development of the ACTA, see Rehman *supra* note 8, at 499-508.

290. Bina, *supra* note 39, at 1253 (quoting 28 U.S.C. § 1350 (2000)).

291. *Id.*

292. Bina, *supra* note 39, at 1254 (quoting Filartiga v. Pena-Irala, 630 F.2d 876, 880 (2d Cir. 1980)). After that decision, the floodgates opened on ATCA claims. *See, e.g.*, Kadic v. Karadzic, 70 F.3d 232, 236 (2d Cir. 1995) (noting that the *Filartiga* decision allowed "suits alleging torts committed anywhere in the world against aliens in violation of the law of nations"); Abebe-Jira v.

The ACTA, however, still had one unanswered question, "[W]hether the ATCA was strictly a jurisdictional statute or whether it imparts an independent cause of action for violations of international law-based norms?"[293]

The Supreme Court answered by stating that the ATCA is a jurisdictional statute.[294] The Court, however, held "that at the time of enactment the jurisdiction enabled federal courts to hear claims in a very limited category defined by the law of nations recognized at common law."[295] The Court, after considering historical precedent on the laws of nations, concluded that a cause of action must be "gauged against the current state of international law."[296] More importantly, one of the historical precedents cited recognized torture as against the laws of nations.[297] Therefore, a victim of torture in Iraq could sue a private military contractor using ATCA.[298]

Even if the ATCA is just a jurisdictional statute, a victim of torture could rely on the TVPA's cause of action for torture.[299] Thus, a victim of torture by a private military contractor in Iraq could bring an ATCA claim because torture fulfills the requirement that a cause of action must be "gauged against the current state of international law."[300] Current cases, however, suggest otherwise.

In *Ibrahim v. Titan Corp.*, Iraqi nationals sued private military contractors for "acts of torture inflicted upon them at the Abu Ghraib prison in Iraq."[301] The plaintiffs sued using among other things, the ATCA.[302] In adjudicating the claim, the court had to consider if non-state actors fell within the scope of the ATCA.[303] Finding that the ATCA only applied to state actors, the court dropped the plaintiff's ATCA claims.[304]

In a similar case, *Saleh v. Titan Corp.*, plaintiffs alleged acts of torture committed by private military contractors at Abu Ghraib.[305] The plaintiffs this time, however, asserted that the private military contractors conspired with the United States to commit the torture.[306] The plaintiffs had hoped this would

Negewo, 72 F.3d 844, 848 (11th Cir. 1996) ("conclud[ing] that the Alien Tort Claims Act establishes a federal forum where courts may fashion domestic common law remedies to give effect to violations of customary international law").

293. Bina, *supra* note 39, at 1254.

294. *Id.* at 1255 (citing Sosa v. Alvarez-Machain, 542 U.S. 692, 724 (2004)).

295. *Sosa*, 542 U.S. at 712.

296. *Id.* at 733.

297. Bina, *supra* note 39, at 1255. For a more complete list of what constitutes as a violation against international law, see Francisco Rivera, *Inter-American Justice: Now Available in a U.S. Federal Court near You*, 45 SANTA CLARA L. REV. 889, 901 (2005).

298. Bina, *supra* note 39, at 1256. For a discussion of the difficulties in suing under the ATCA, see Rivera, *supra* note 297, at 898-903.

299. 28 U.S.C. § 1350 (2000).

300. *See* Borrowman, *supra* note 40, at 399.

301. Ibrahim v. Titan Corp., 391 F. Supp. 2d 10, 12 (D.D.C. 2005).

302. *Id.* at 13.

303. *Id.* at 14.

304. *Id.* at 15.

305. Saleh v. Titan Corp., 436 F. Supp. 2d 55, 56 (D.D.C. 2006).

306. *Id.* at 58.

amount to state action as required in *Ibrahim*.[307] The court, however, found the argument unpersuasive and dismissed the ATCA claim.[308] So far, the courts seem unwilling to allow ATCA claims against private parties. Even if a court allowed an ATCA claim against a private military contractor, that contractor may have various defenses available to an ATCA claim.

2. *Defenses to an ATCA Claim*

Even if a court allows an ATCA claim against a private military contractor, that contractor still has the possibility of avoiding justice. Private military contractors have available to them various defenses they can raise to defeat a plaintiffs claim.[309] Such defenses that could excuse their conduct include: the government contractor defense, the political question doctrine, and the state secrets privilege. The use and availability of these defenses, however, remain uncertain.

a. Government contractor defense

The government contractor defense is an affirmative defense to the Federal Tort Claims Act ("FTCA").[310] The FTCA waives federal governmental immunity in certain circumstances and allows suits against the federal government.[311] The courts, however, created exceptions to the FTCA if the alleged tortious act resulted from military activities.[312] The case of *Koohi v. United States* greatly expanded that exception to private military contractors.[313] The case involved a U.S. naval ship misidentifying and shooting down a civilian Iranian airplane during the undeclared tanker war between Iraq and Iran.[314] A government contractor manufactured the weapon system that led to the misidentification.[315] As a result, the various estates of the deceased Iranian passengers sued the United States and the government contractor.[316] The case

307. *Id.*

308. *Id.*

309. Hartford Fire Ins. Co. v. Annapolis Bay Charters, Inc., 69 F. Supp. 2d 756, 762 (D. Md. 1999) ("Affirmative defenses, if accepted by the court, will defeat an otherwise legitimate claim for relief." (quoting FDIC v. Haines, 3 F. Supp. 2d 155, 166 (D. Conn. 1997))).

310. For a more complete history of the government contractor defense, see Kateryna L. Rakowsky, Note, *Military Contractors and Civil Liability: Use of the Government Contractor Defense to Escape Allegations of Misconduct in Iraq and Afghanistan*, 2 STAN. J. CIV. RTS. & CIV. LIBERTIES 365, 378-88 (2006).

311. Koohi v. United States, 976 F.2d 1328, 1332-33 (9th Cir. 1992).

312. *See* Rakowsky, *supra* note 310, at 380 ("[T]he government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." (quoting Feres v. United States, 340 U.S. 135, 146 (1950))).

313. *Koohi*, 976 F. 2d at 1330-31.

314. *Id.* at 1330.

315. *Id.*

316. *Id.*

turned on whether the FTCA applied in this circumstance.[317] If the actions of the Navy took place during a time of war, then the military activities exception would apply.[318] The court held that the undeclared tanker war constituted a time of war so the exception applied.[319] The holding of this case is important to the current problem because the current military action in Iraq is an undeclared war like the undeclared tanker war in *Koohi*.[320] If a time of war occurred in *Koohi*, certainly the current Iraq situation constitutes a time of war. Thus, the combat activities exception is a defense for FTCA claims arising out of the Iraq war. The next question is whether the combat activities exception applies to government contractors.[321] The court in *Koohi* answered yes.[322] Thus, private military contractors in Iraq have available to them the government contractor defense.[323] The defense, however, only applies to FTCA claims, not to ATCA claims, but private military contractors in Iraq argue for the government contractor defense to extend to ATCA claims.[324] Presently, the courts have passed on the issue,[325] and it remains uncertain whether the defense will apply to ATCA claims.

b. Political question doctrine

Private military contractors can also assert the political question doctrine as a defense.[326] In *Ibrahim v. Titan Corp.*, private military contractors argued that the political question doctrine precluded the court from adjudicating the case.[327] The court refused to dismiss the case based on the political question doctrine,[328] but reserved the option to dismiss based on the political question doctrine, if

317. *Id.* at 1333.

318. *Id.*

319. *Id.* The issue here was whether a declaration of war was needed in order for this conflict to constitute a time of war. *Id.* at 1333-34. The court reasoned that since many conflicts constituted a time of war without an actual declaration of war, such as the Vietnam War, it could find the conflict between the United States and Iran as a time of war. *Id.* This decision, however, conflicts with the decision in *Averette* in which that court held that a time of war only existed when Congress declared war. United States v. Averette, 19 C.M.A. 363, 363 (1970). *See also supra* notes 65-71 and the accompanying text discussing the *Averette* decision.

320. *Id.* at 1330.

321. Koohi v. United States, 976 F.2d 1328, 1336 (9th Cir. 1992).

322. *Id.*

323. The government contractor defense also applies to service contracts. This is important because "service contractors are more likely to violate human rights than manufacturing or design contractors." Ryan Micallef, Note, *Liability Laundering and Denial of Justice: Conflicts between the Alien Tort Statute and the Government Contractor Defense*, 71 BROOK. L. REV. 1375, 1405 (2006).

324. Rehman, *supra* note 8, at 517. *See also* Rakowsky, *supra* note 310, at 389. It is argued, however, that extending the government contractor defense to ATCA claims would "thwart[] the purpose[] of the [ACTA]." Micallef, *supra* note 323, at 1406. For a general discussion on the problems of allowing the defense in ATCA claims, see *id.* at 1406-13.

325. Ibrahim v. Titan Corp., 391 F. Supp. 2d. 10, 16-19 (D.D.C. 2005).

326. For a discussion of the political question doctrine, see *supra* section III B 1.

327. *Ibrahim*, 391 F. Supp. 2d at 13.

328. *Id.* at 15.

manageability problems occurred.[329] The importance of this case is that private military contractors cannot rely on the political question doctrine to shield themselves from claims alleging torture. Thus, it appears that the political question doctrine will not preclude tort claims alleging torture at the hands of private military contractors.

c. State secrets privilege

Another potential stumbling block to an ATCA claim is the state secrets privilege. While not an affirmative defense, its use could block damaging evidence that would otherwise support a plaintiff's claim.[330] The state secret privilege, however, is the government's privilege.[331] A private party cannot assert the privilege.[332] The availability of this defense to private military contractors is suspect. Private military contractors may only benefit from it if the U.S. government is a party to the lawsuit and asserts the privilege.[333] Thus, the availability of the privilege is a potential obstacle to pursuing an ATCA claim.

Even if plaintiffs successfully bring an ATCA claim against private military contractors and defeat the defenses, one more issue remains—how to compensate the plaintiffs?

3. *Compensating Victims of Torture*

If a victim of torture were to successfully win, the issue remains on how to compensate the victims. Some commentators contend that "to ensure an independent and fair allocation of compensation, the United States should consider using an external compensation vehicle."[334] "An example of such a vehicle is the United Nations Compensation Commission, ("UNCC")"[335] created "after the Gulf War in 1991 in order to process claims for damages and award payments stemming from Iraq's invasion of Kuwait."[336] It is argued that establishing something similar to the UNCC to deal with "the current Iraq war would provide an independent arbiter and administrator to award damages quickly and fairly to the victims of Abu Ghraib and other wartime injuries."[337] The situations, however, are not similar.[338] Even those who argue for a UNCC realize the improbability of forming a UNCC for Iraq.[339] The alternative of using

329. *Id.* at 16.

330. ACLU v. Nat'l. Sec. Agency, 438 F. Supp. 2d 754, 759 (E.D. Mich. 2006).

331. United States v. Reynolds, 345 U.S. 1, 7 (1952).

332. *Id.*

333. *Ibrahim*, 391 F. Supp. 2d. at 16.

334. Bina, *supra* note 39, at 1261.

335. *Id.* (citing Rosemary E. Libera, *Divide, Conquer, and Pay: Civil Compensation for Wartime Damages*, 24 B.C. INT'L & COMP. L. REV. 291, 295-96 (2001)).

336. *Id.*

337. *Id.*

338. *Id.* at 1262 (noting the unique political and economic impediments to forming a UNCC in present-day Iraq).

339. *Id.*

traditional juries is also problematic. Two questions come to mind: would an American jury really award damages to a suspected terrorist or someone who took up arms against an American soldier[340] and would the Supreme Court uphold the award of damages to that person?[341] Thus, the compensation issue may preclude the effective use of the ATCA as a viable remedy to torture victims.

Too many obstacles rule out the ATCA as a viable solution because of recent court cases, possible contractor defenses, and questions on how best to compensate victims of torture. The ATCA is not alone in its failure to adequately bring private military contractors to justice. All current and proposed solutions fail to effectively bring private military contractors to justice. Perhaps if the legal community had not participated in the mad scramble, legal commentators would have noted the failings of their solutions. Bringing private military contractors to justice requires a solution that avoids the pitfalls of the mad scramble. The following proposed solution does just that.

VI. PROPOSED SOLUTION

The solution presented below combines some of the above proposed solutions and offers new proposals to bring private military contractors to justice. First and foremost, Congress needs to repeal MEJA and the law allowing the court-martial of civilians. Instead, Congress should consider a solution that requires some revisions to U.S. law, expansion of federal courts, and the imposition of fines.

A. Proposed Change to U.S. Law

The proposed change to U.S. law involves a two-pronged approach. First, Congress should pass a law stating that any private military contractor that does business with the United States consents to the jurisdiction of U.S. law and

340. The rebuttal is of course, what if he or she is innocent. Still a danger exits that a jury will not award money to someone they believe to be a suspected terrorist. Chief Justice Burger echoed similar thoughts, "Jurors may well refuse to penalize a police officer at the behest of a person they believe to be a 'criminal' …." Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 421 (1971) (Burger, C.J., dissenting). Although Chief Justice Burger was speaking in the context of police misconduct, his observation sheds light on how people might believe that even an innocent person might be thought of as a terrorist.

341. Posting of Marty Lederman to SCOTUSblog, http://www.scotusblog.com/movabletyp/archives/2006/03/justice_scalia.html (Mar. 25, 2006, 20:44 EST). The author talks about a speech made by Justice Scalia in Switzerland. Some quotes provided in the blog include: "foreigners, in foreign countries, have no rights under the American Constitution" and that "*nobody* has ever thought otherwise." *Id.* "If he was captured by my army on a battlefield, that is where he belongs. I had a son on that battlefield and they were shooting at my son. *And I am not about to give this man who was captured in a war a full jury trial. I mean it's crazy*." *Id.* (emphasis added by the author of the blog). The author also writes, "Justice Scalia expresses incredulity at the notion that detainees captured 'on the battlefield' should receive a trial in civil courts. It is, he says, a 'crazy idea.'" *Id.*

courts.[342] Jurisdiction would be granted for any act committed in any part of the world if that act would constitute a crime under U.S. law.[343] Such a law would criminalize misdemeanor offenses, which MEJA does not.[344] This law would also eliminate the need to prove that the crime took place within the special maritime and territorial jurisdiction of the United States. This proposal is certainly plausible as others have proposed something very similar, but in the context of contract.[345] Contract advocates want language that would require stricter hiring standards or consent to U.S. law as part of the contract.[346] The contract approach is problematic because those terms would be optional and could be contracted around.[347] The proposed solution would make those terms necessary to any contract as a matter of law.[348]

Second, Congress should pass a law requiring certain hiring, training, and operational standards before a private military contractor may qualify for a contract, thus creating a registration system.[349] If the private military contractor proves they are in compliance with the law, then registration will be allowed. Registration entitles the private military contractor to obtain contracts from the United States. Once the contract is obtained, the private military contractor would have a continuing duty to abide by the law that enabled registration. Furthermore, Congress should pass a law requiring the United States to contract only with registered private military contractors. Private military contractors that engaged in abuses or criminal activity, or contracted with others requiring abuse or criminal acts would be excluded from the process.[350] This proposal draws heavily from contract-based solutions,[351] but as a statutory approach, it makes the standards law and prevents private military contractors from contracting around the terms.[352] The statute would also strengthen the ability of U.S. agencies to

342. Desai, *supra* note 38, at 858. Desai has a similar proposal, but he would only require that the private military contractor consent to the jurisdiction of the United States as part of the contract. *Id.* The proposed solution, however, does not give the parties an opportunity to contract around that term.

343. *Id.* Desai thinks that such a provision should be a term in the contract. *Id*.

344. 18 U.S.C. § 3261(a) (2000); Fredrick A. Stein, *Have We Closed the Barn Door Yet? A Look at the Current Loopholes in the Military Extraterritorial Jurisdiction Act*, 27 HOUS. J. INT'L L. 579, 602-03 (2005).

345. Desai, *supra*, note 38, at 858-59.

346. *Id.*

347. *See, e.g.*, John T. Brady & Co. v. City of Stamford, 599 A.2d 370, 376 (Conn. 1991) ("[A]bsent bad faith or duress, contracting parties are free to impose conditions upon their contractual liability.") (citations omitted).

348. *See, e.g.*, Schiro v. W.E. Gould & Co., 165 N.E.2d 286, 290 (Ill. 1960) ("[T]he law existing at the time and place of the making of the contract is deemed a part of the contract, as though expressly referred to or incorporated in it.") (citations omitted).

349. *But see* Desai, *supra* note 38, at 854-55 (arguing that single state licensing has failed).

350. Desai points out that if a private military contractor entity were to get a reputation for committing abuses, it could simply break up and form new entities. *Id.* at 855.

351. *Id.* at 858-59.

352. *See, e.g.*, *Schiro*, 165 N.E.2d at 290 ("[T]he law existing at the time and place of the making of the contract is deemed a part of the contract, as though expressly referred to or incorporated in it.") (citations omitted).

negotiate from a position of strength when dealing with private military contractors.

In the world of contracts, the United States is the largest and richest customer.[353] Private military contractors would want to register and adhere to the laws of registration in order to do business with the United States.[354] The money involved plus the potential for repeat business with the United States would be too much of an incentive for the private military contractor not to abide by U.S. law.[355] With new laws in place, the next issue is enforcement of those laws. Enforcement would be needed, not just in the United States, but overseas where the problems with private military contractors occur.[356] Establishing overseas federal courts, special prosecutors' offices, and special FBI offices[357] to handle crimes committed by private military contractors would provide a solution to the enforcement issue.

B. Establish Federal Courts Overseas

The establishment of federal courts overseas along with a special prosecutor and FBI office would quell the concern that U.S. attorneys would not have the time or knowledge to handle prosecutions of private military contractors.[358] The issues, however, are whether Congress can establish such courts and whether those federal courts infringe upon the sovereignty of the foreign nations in which they sit. The first issue is easily disposed of because Congress has the constitutional authority to establish lower federal courts.[359] Furthermore, nothing in the Constitution prevents Congress from establishing courts overseas.[360] Questions, however, remain regarding the sovereignty of the foreign nation where the federal court would be established.

353. Desai, *supra* note 38, at 858 n.185.

354. *See id.* at 858 nn.183-84.

355. *See id.*

356. *See generally supra* notes 1-9 and accompanying text (discussing the Abu Ghraib detainee abuse crimes and the continuing problem of unprosecuted crimes by private military contractors).

357. The MEJA Expansion and Enforcement Act of 2007 provides for such an FBI unit. H.R. 2740, 110th Cong. (2007). The legislation would create a Theater Investigative Unit to investigate potential crimes committed by private military contractors. *Id.*

358. *See* Singer, *supra* note 169 (pointing out the many obstacles that plague a MEJA prosecution such as travel to wherever the private military contractor committed the offense, finding witnesses, and actually winning the case). The proposed solution puts the court, prosecutor, and police where the private military contractors are located. The issue then, is who makes up the jury. Under the proposed solution, the jury would consist of other private military contractors. The jury pool under the proposed solution would also include resources such as cooks and janitors, which is unlike the jury pool of similarly situated private military contractors advocated by the proponents of court-martial. *See* Peters, *supra* note 46, at 411.

359. U.S. CONST. art. III, § 1.

360. Maryellen Fullerton, *Hijacking Trials Overseas: The Need for an Article III Court*, 28 WM. & MARY L. REV. 1, 71 n.237 (1986). Fullerton states that establishing such courts is unwise. *Id.* at 71-72.

A U.S. court overseas is not a new idea.[361] The United States has established overseas diplomatic and other non-Article III courts, like military courts.[362] Furthermore, the courts would be located within a U.S. embassy. Since the land on which U.S. embassies are located is considered U.S. territory,[363] the courts would not create any sovereignty concerns because they are within U.S. sovereignty. Plus, these courts would only be established in areas where a significant number of private military contractors are located, such as Iraq.[364] With these courts, the special U.S. prosecutors, and the special FBI agents in place, more prosecutions might be possible to bring an end to one glaring statistic: that not one private military contractor in Iraq has ever faced any criminal prosecution.[365]

C. Assess Fines

If a private military contractor were to face criminal charges and be convicted, then another U.S. law would apply. That law would require the levying of automatic fines against the company that employed the convicted private military contractor. Imposing fines on the company borrows a concept from tort. That concept is respondeat superior[366] and would hold the company responsible for the acts of its employees.[367] The collected fines, in turn, would help to maintain the enforcement system and provide restitution to the victim.[368]

VI. CONCLUSION

The tragedy at Abu Ghraib should have never happened. Yet, the world and the United States often wait until a tragedy happens before they act. Waiting to act caused countless Iraqis to suffer the humiliation of torture. While the Iraqi victims continue to live their lives, perhaps even a more sinister form of torture will inflict them: the knowledge that some of the perpetrators will never face any kind of justice for their actions. For whatever reasons, private military

361. *Id.* at 58-60.

362. *Id.* at 29, 58-60.

363. Prior to the passage of the USA Patriot Act, uncertainty existed as to whether U.S. embassies were within the territorial jurisdiction of the United States. United States v. Erdos, 474 F.2d 157, 160 (4th Cir. 1973) (holding that U.S. embassies are within the territorial jurisdiction of the United States). *But see* United States v. Bin Laden, 92 F. Supp. 2d 189, 206 (S.D.N.Y. 2000) (disagreeing with the *Erdos* holding). The USA Patriot Act resolved the issue and expressly incorporated U.S. embassies within the territorial jurisdiction of the United States. 18 U.S.C.A. § 7(9)(A) (West 2000 & Supp. 2007).

364. H.R. REP NO. 110-352, at 4 (2007) (reporting that approximately 180,000 contractors work in Iraq).

365. *Id.* at 5.

366. HENDERSON, *supra* note 285, at 135-36.

367. *Id.* Historically, the criminal law did not recognize respondeat superior. Commonwealth v. Koczwara, 155 A.2d 825, 827 (Pa. 1959). However, the criminal law is beginning to accept the idea. *Id.*

368. Bina, *supra* note 39, at 1257-58 (arguing that it is necessary to compensate victims of abuse at the hands of private military contractors).

contractors avoided justice after Abu Ghraib and the United States and the world must see to it that Abu Ghraib and incidents like it never happen again.

The United States can do its part by implementing the proposed solution. The implementation of this plan should end the justice avoiding holiday[369] to which so many private military contractors are accustomed. With U.S. law reaching everywhere, and for any crime, private military contractors would no longer evade prosecution due to some quirky jurisdictional issue in a statute. Furthermore, private military contractors would not be able to hide behind their contracts to avoid prosecution because U.S. law would automatically grant jurisdiction to the federal courts to prosecute any private military contractor that commits any crime in any part of the world. Justice would be timelier with a federal court sitting in the same country where the private military contractor works and the alleged criminal acts took place. While the private military contractor serves time in jail, the victim not only receives satisfaction knowing that justice has been served, but also receives restitution for his suffering. The time has come to end the mad scramble for solutions and to institute effective legislation.

369. Justice avoiding holiday refers to the lack of any current law or solution to bring private military contractors to justice. Private military contractors seem able to freely operate without much restraint. In a sense, the contractors are on a holiday from facing any type of justice.