

**THE MILITARY EXTRATERRITORIAL JURISDICTION
ACT OF 2000: IMPLICATIONS FOR CONTRACTOR
PERSONNEL**

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For a man will never be judged good who, in his work—if he wants to make a steady profit from it—must be rapacious, fraudulent, violent, and exhibit many qualities which, of necessity, do not make him good. Nor can men who practice war as a profession—great men as well as insignificant men—act in any other way, since their profession does not prosper in peacetime. Therefore, such men must either hope for no peace or must profit from times of war in such a manner that they can live off the profit in times of peace. Neither of these thoughts is found in a good man.²

I. Introduction

In the early sixteenth century, Italian military theorist Niccolo Machiavelli used a notional dialogue between two Florentine citizens as a vehicle to discuss the complexities of war and military science and their overall

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2. NICCOLO MACHIAVELLI, THE ART OF WAR 13-14 (Peter Bondanella & Mark Musa eds., 1995) (1521).

influence on a society. The passage quoted above seems to paint an absolutist and bleak picture about the inherent character of people who make their living through military pursuits. Machiavelli likely intended this, however, as a commentary on the evils of warfare itself as much as an indictment of individuals. Both prongs are worthy of exploration.

Now nearly five centuries later, warfare has been institutionalized so that a professional military is a significant part of any important nation on the world stage. Indeed, military prowess largely defines a nation's international status and credibility. Another large component of international military significance is the scope and capabilities of a nation's defense industry. Today we are no longer burdened as Machiavelli was with concepts of good versus evil in formulating military policy. We have accepted it as a necessary and integral part of modern nationhood. We have learned to live with the social structures of warfare, including a standing military and a sophisticated defense industry.

But what about individuals? The other side of Machiavelli's entreaty, the concern with individual acts of evil in the context of the martial professions, remains a concern today. As is true in all walks of life, some who derive their living from warfare will engage in criminal activity. We may have reached a social accommodation with warfare itself, but not with individual wrongdoing. The Uniform Code of Military Justice (UCMJ)³ provides a comprehensive scheme of procedural rules and proscriptive laws to cover transgressions by members of the military, but until now the judicial system has not affected the significant number of civilians accompanying the force overseas.

For over forty-three years, civilians accompanying the force overseas have been beyond court-martial jurisdiction and a significant portion of the overall criminal jurisdiction of the United States.⁴ In an unacceptable number of cases, these civilians have escaped prosecution altogether.⁵

3. 10 U.S.C. §§ 801-946 (2000).

4. *See Reid v. Covert*, 354 U.S. 1 (1957) (overturning two cases involving civilian spouses convicted at courts-martial for the murders of their Active Duty spouses at overseas bases).

5. OFFICE OF THE INSPECTOR GENERAL, DEP'T OF DEFENSE, EVALUATION OF MILITARY CRIMINAL INVESTIGATIVE ORGANIZATIONS' INVESTIGATIVE EFFECTIVENESS REGARDING U.S. FORCES CIVILIANS STATIONED OVERSEAS, REPORT NO. 99500009I, 7-10 (Sept. 7, 1999). [hereinafter DOD IG REPORT]. *See also* GENERAL ACCOUNTING OFFICE, SOME CRIMINAL OFFENSES COMMITTED OVERSEAS BY DOD CIVILIANS ARE NOT BEING PROSECUTED: LEGISLATION IS NEEDED, REPORT NO. FPCD 79-45 (1979).

With years of legislative history and careful draftsmanship⁶ to support it, Congress enacted the much-anticipated⁷ Military Extraterritorial Jurisdiction Act of 2000.⁸ The purpose of the Act is to fill this jurisdictional gap by extending many of the criminal laws of the United States to overseas areas.⁹ Historically, many of these crimes were beyond U.S. jurisdiction and involved crimes that host nations had little interest in prosecuting. This article takes a fresh look at the Military Extraterritorial Jurisdiction Act's new scheme of criminal law applicable to civilian contractor employees accompanying the force, from both international and domestic law perspectives.

Operational commanders, their legal advisors, and members of the contracting community must be aware of the implications of the Act for contractors accompanying the force in both a deployed and pre-positioned overseas environment. Commanders, contracting officers, and contractors alike will have to know how to respond when the new jurisdiction is applicable. Commanders, especially, will be challenged to fulfill the often-competing goals of maintaining positive relations with foreign states, which are governed by international agreements, exploitation of contractor support as a force multiplier, and overall mission accomplishment.

To this end, this article analyzes the Act from three necessarily inter-related perspectives. First, the article provides a brief overview of the state

6. See generally Captain Glenn R. Schmitt, *The Military Extraterritorial Jurisdiction Act: The Continuing Problem of Criminal Jurisdiction over Civilians Accompanying the Armed Forces Abroad—Problem Solved?*, ARMY LAW., Dec. 2000, at 1.

7. See generally *Military Extraterritorial Jurisdiction Act of 1999*, Hearing on H.R. 3380 Before the House Subcomm. on Crime, Comm. on the Judiciary, 106th Cong. (2000) [hereinafter *H.R. 3380 Hearing*] (containing the testimony of Department of Defense attorneys and the concerns of various employee organizations); Michael J. Davidson and Robert E. Korroch, *Extending Military Jurisdiction to American Contractors Overseas*, 35 PROCUREMENT LAW, ABA, No. 4, Summer 2000, at 1 (describing the problem of the jurisdictional gap and the history of efforts to close it); Major Susan S. Gibson, *Lack of Extraterritorial Jurisdiction over Civilians: A New Look at an Old Problem*, 148 MIL. L. REV. 114 (1995) (providing a comprehensive analysis of the problem and advocating for the limited extension of court-martial jurisdiction over civilians accompanying the deployed force); Rick Maze, *Bill to Protect Overseas Families Awaits Clinton Nod*, MARINE CORPS TIMES, Nov. 13, 2000, at 20, (reporting brief description of the issue and anecdotal information about the Act published a week before the President signed it).

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

9. See generally Major Tyler J. Harder, *Recent Developments in Jurisdiction: Is This the Dawn of the Year of Jurisdiction?*, ARMY LAW., Apr. 2001, at 12 (briefly detailing the coverage of the Act).

of the criminal law for those forty-three years leading up to the enactment of the Military Extraterritorial Jurisdiction Act of 2000. Next, the article provides a comprehensive overview of jurisdiction from an international law perspective. Last, the article addresses the import of this overall scheme of criminal and international law imposed by the Act from a perspective that has received scant attention to date—the contract law perspective.

With a forty-three year jurisdictional gap, there is a dearth of doctrine, procedure, and policy on just how this new criminal statute will affect the way the military does business with contractors. Equally unclear is how the Act will affect the actions of contractor employees and the commanders they support overseas. To that end, this article offers proposals to help fill the current doctrinal gap and to incorporate the practical effects of this new law into Joint Chiefs of Staff (JCS) doctrine, Department of Defense instructions, and the Federal Acquisition Regulation. The article ultimately intends to effect the Act's synthesis into relevant government policies and regulations to ensure a predictable continuity of contractor support to overseas commanders.

II. Criminal Law Background

While this article focuses on international and contract law implications, at its foundation, the Military Extraterritorial Jurisdiction Act is a federal *criminal* statute. The Act applies to civilians¹⁰ and is found, like most other federal criminal statutes, in title 18 of the U.S. Code.¹¹ Important for the purposes of this article, “civilians” includes both contractors and subcontractors.¹² Another significant aspect of the statute is its additional applicability to members of the armed forces and the corresponding intersection with the Uniform Code of Military Justice (UCMJ), which, like most military and defense-related matters, is found in title 10 of the U.S. Code.¹³ A brief discussion of judicial history is required to explain the development of this federal criminal statute with extraterritorial effect

10. 18 U.S.C. § 3261 (2000).

11. *Id.* §§ 3261-3267.

12. *Id.* § 3267. See also Major Louis A. Chiarella et al., *2000 Contract and Fiscal Law Developments—The Year in Review*, *ARMY LAW.*, Jan. 2001, at 70, 125 (providing a brief overview of the new Act and its applicability).

13. UCMJ arts. 1-146 (2000).

that applies to both the armed forces and those civilians accompanying the forces overseas.

Before the enactment of the UCMJ in 1950,¹⁴ military jurisdiction over both the uniformed military and civilians¹⁵ serving with the armed forces was well established in law under the Articles of War.¹⁶ With the codification of military law in 1950 came a series of provisions establishing court-martial jurisdiction over certain personnel, including active duty and Reserve military personnel, military retirees, prisoners of war, certain civilians, and others.¹⁷ The personal jurisdiction provisions of the first UCMJ came under almost immediate challenge in court.¹⁸ These provisions became the basis for judicial challenges that ultimately led to the Military Extraterritorial Jurisdiction Act of 2000. These judicial challenges were directed at Articles 2(a)(10)¹⁹ and 2(a)(11) of the UCMJ,²⁰ previously Articles 2(10) and 2(11) of the Articles of War. Article 2(a)(10) generally applies to those serving with the force in the field in time of war. Article 2(a)(11) applies to those serving with or accompanying the force overseas under an international agreement, not necessarily in time of war.

Beginning with *Reid v. Covert*²¹ and *Kinsella v. Krueger*,²² the Supreme Court decided a series of cases challenging the UCMJ's jurisdiction over civilians charged and tried at courts-martial for various crimes committed in overseas areas. These cases involved military spouses stationed overseas who were tried by courts-martial for capital offenses occurring in peacetime. The Court held that subjecting civilian dependents

14. *Id.*

15. *See, e.g.*, *Hines v. Mikell*, 259 F. 28 (4th Cir. 1919); *McCune v. Kilpatrick*, 53 F. Supp. 80 (E.D. Va. 1943).

16. *See, e.g.*, 1920 Articles of War, 41 Stat. 787, art. 2(d) (1920).

17. *See generally* UCMJ art. 2 (providing a complete list of court-martial jurisdiction over various persons: members of the armed forces, reservists, certain civilians, military retirees, prisoners of war, and others).

18. *See generally* *Toth v. Quarles*, 350 U.S. 11 (1955) (releasing jailed former service member arrested by military authority five months post-discharge and convicted at court-martial). This case stands for the proposition that a civilian is generally entitled to a civilian trial.

19. UCMJ art. 2(a)(10) reads, "[I]n time of war, persons serving with or accompanying an armed force in the field."

20. UCMJ art. 2(a)(11) reads, in pertinent part, "[S]ubject to any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, persons serving with, employed by, or accompanying the armed forces outside the United States"

21. 354 U.S. 1 (1957).

22. 351 U.S. 470 (1956).

to trial by courts-martial for capital offenses under Article 2(11) was unconstitutional.²³ Shortly thereafter, unable to find any basis in law to distinguish capital from non-capital offenses, the Court extended its holding to non-capital offenses committed by military dependents, invalidating the exercise of court-martial jurisdiction.²⁴

During the same session, the Court also considered the applicability of UCMJ Article 2(11) to other civilians who were not military dependents, but rather employees of the various military branches. In both capital²⁵ and non-capital²⁶ cases, the Court held that courts-martial had no jurisdiction to try civilian employees during peacetime.

In 1967, the Vietnam War served as the backdrop for the next challenge to UCMJ jurisdiction over civilians. A challenge came to Article 2(10), which extends jurisdiction over civilians²⁷ serving in the field “in time of war.” The Court of Appeals for the D.C. Circuit held that, even assuming a proper assertion of court-martial jurisdiction over a civilian was possible under Article 2(10) in an undeclared war, the circumstances of the offense were too remote to permit jurisdiction in that case, resulting in the release of a merchant seaman convicted by court-martial for murder.²⁸

The final blow to court-martial jurisdiction over civilians overseas came, interestingly enough, at the hands of an appellate military court in 1970 in a case involving a contractor employee, *United States v. Averette*.²⁹ As the analysis in this paper focuses on civilian contractors under the Military Extraterritorial Jurisdiction Act of 2000, this case is particularly sig-

23. *Reid*, 354 U.S. at 31.

24. *Kinsella v. Singleton*, 361 U.S. 234 (1960).

25. *Grisham v. Hagan*, 361 U.S. 278 (1960). This case involved an Army civilian employee tried by court-martial for premeditated murder in France. He was convicted of a lesser form of murder and originally sentenced to life imprisonment. *Id.*

26. *McElroy v. Guagliardo*, 361 U.S. 281 (1960) (involving non-capital offenses committed by civilian employees overseas).

27. See generally GARY D. SOLIS, *MARINES AND MILITARY LAW IN VIETNAM: TRIAL BY FIRE* 99-100 (1989).

28. *Latney v. Ignatious*, 416 F.2d 821 (D.C. Cir. 1969). In this case, a merchant seaman aboard a tanker belonging to the Navy’s Military Sea Transportation Service (now the Military Sealift Command) was court-martialed for a murder that occurred during a port call to Da Nang harbor. *Id.*

29. 19 C.M.A. 363 (1970).

nificant because it effectively removed the last vestiges of jurisdiction based on UCMJ Article 2(10).

Averette was a civilian employee of an Army contractor serving in Vietnam. He was convicted of conspiracy to commit larceny and attempted larceny in a scam involving the attempted theft of several thousand government-owned batteries.³⁰ The Court of Military Appeals ordered the charges dismissed, holding that Article 2(10) jurisdiction applies only to offenses committed “in time of war”—defined by the court as a congressionally declared war³¹—and not during a *de facto* state of war as with the Vietnam conflict.

With this comprehensive narrowing of court-martial jurisdiction under Articles 2(10) and 2(11), predictably there have not been any cases of this kind in over thirty years. Except in times of declared war, court-martial jurisdiction over civilians is effectively dead. The crimes that were previously addressed by these courts-martial, however, did not die along with the loss of jurisdiction.³²

With court-martial jurisdiction effectively removed by the courts, it devolved to Congress to come up with a legal scheme that would fill the gap. From the very outset in 1957,³³ up to the present day,³⁴ no court has ever questioned the ability of Congress to do exactly that. Federal criminal laws with extraterritorial effect have existed for years.³⁵ Likewise, jurisdiction over land under military control or put to military use within the United States has existed under the special maritime and territorial juris-

30. *Id.* at 363.

31. *Id.* at 365. There have been no declared wars since the UCMJ was enacted in 1950, the last one being World War II.

32. See DOD IG Report, *supra* note 5.

33. See *Reid v. Covert*, 354 U.S. 1, 35 (1957) (Justice Frankfurter, concurring in the result, clearly states that Congress has the power to extend criminal jurisdiction over, in this case, civilian dependents).

34. See *United States v. Gatlin*, 216 F.3d 207, 209 (2d Cir. 2000).

35. For an exhaustive list of federal criminal statutes that already have express or implied extraterritorial effect, see CHAIR, OVERSEAS JURISDICTION ADVISORY COMMITTEE, OFFICE OF THE GENERAL COUNSEL, DEP'T OF DEFENSE, REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL LAW JURISDICTION OVER CIVILIANS ACCOMPANYING THE ARMED FORCES IN TIME OF ARMED CONFLICT 40-41 (1997) [hereinafter ADVISORY COMMITTEE REPORT].

diction of the United States.³⁶ However, because this jurisdiction has no extraterritorial effect, there have been conspicuous gaps.³⁷ Courts have employed a rule of statutory construction providing a presumption that a law does not have extraterritorial effect unless there is clear congressional intent to make it so.³⁸

A significant case in 2000 explains why passage of the Military Extraterritorial Jurisdiction Act of 2000 was imperative. Decided last summer by the Court of Appeals for the Second Circuit, *United States v. Gatlin*³⁹ emphasized the fact that, in the forty-plus years since *Reid*, the civilian criminal code had still not filled the overseas jurisdictional void.⁴⁰ *Gatlin* stands for the proposition that even meritorious prosecutions under valid federal statutes fail unless these statutes have clear extraterritorial effect.

The solution seemed clear and overdue—for Congress to extend the existing criteria for special maritime and territorial jurisdiction to encompass expressly those additional crimes that it had not historically covered. That is just what the Act does, extending jurisdiction by analogy over the

36. 18 U.S.C. § 7(3) (2000) defines the special maritime and territorial jurisdiction of the United States as:

Any lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building

Id.

37. Lacking an express extraterritorial applicability, such felonious acts as rape, child sexual abuse, and robbery could not be prosecuted for want of jurisdiction. See ADVISORY COMMITTEE REPORT, *supra* note 35.

38. See, e.g., *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244 (1991).

39. *United States v. Gatlin*, 216 F.3d 207 (2d Cir. 2000). *Gatlin*, a military spouse stationed in Germany, pled guilty to repeatedly sexually abusing a minor. When the thirteen-year-old became pregnant, genetic tests proved *Gatlin* was the father. *Id.* at 210. His plea and conviction were reversed for want of jurisdiction. The court found that the criminal statute he pled guilty to, 18 U.S.C. § 2243(a), did not apply to *Gatlin*'s acts, nor was *Gatlin* within the jurisdictional ambit of the special maritime and territorial jurisdiction of the United States under 18 U.S.C. § 7(3). *Id.* at 220. In an extraordinary step, the court ordered its clerk to deliver a copy of the opinion and outcome in the case to the chairmen of both the Senate and House Armed Services and Judiciary Committees. *Id.* at 223. The opinion reads like a plea to the legislature to fix the jurisdictional gap that allows cases like *Gatlin* to occur.

40. *Id.* *Gatlin* was decided in the summer of 2000 while the Act was still under consideration in its various congressional committees.

listed individuals for crimes punishable by imprisonment for more than one year, just as though the conduct had occurred within the special maritime and territorial jurisdiction of the United States.⁴¹

The scope of civilians covered by the Act is comprehensive, specifically including government contractors⁴² and their dependents.⁴³ The jurisdictional loopholes allowing contractor personnel to escape prosecution are now largely closed. The new Act intersects with the UCMJ by pro-

41. Section 3261(a) of the Act states this application of this new jurisdiction by analogizing to the special maritime and territorial jurisdiction. “[W]hoever engages in conduct outside the United States that would constitute an offense punishable by imprisonment for more than one year if the conduct had been engaged in within the special maritime and territorial jurisdiction of the United States” 18 U.S.C. § 3261(a).

42. Section 3267(1) of the Act defines “employed by the Armed Forces outside the United States” as:

- (A) employed as a civilian employee of the Department of Defense (including a nonappropriated fund instrumentality of the Department), as a Department of Defense contractor (including a subcontractor at any tier), or as an employee of a Department of Defense contractor (including a subcontractor at any tier);
- (B) present or residing outside the United States in connection with such employment; and
- (C) not a national of or ordinarily resident in the host nation.

Id. § 3267(1).

43. Section 3267(2) of the Act defines “accompanying the Armed Forces outside the United States” as:

- (A) a dependent of—
 - (i) a member of the Armed Forces;
 - (ii) a civilian employee of the Department of Defense (including a nonappropriated fund instrumentality of the Department); or
 - (iii) a Department of Defense contractor (including a subcontractor at any tier) or an employee of a Department of Defense contractor (including a subcontractor at any tier);
- (B) residing with such member, civilian employee, contractor, or contractor employee outside the United States; and
- (C) not a national of or ordinarily resident in the host nation.

Id. § 3267(2).

viding for concurrent jurisdiction⁴⁴ over persons subject to the UCMJ when their co-accuseds are civilians.⁴⁵

III. International Law Issues

In addition to bridging the jurisdictional gap that evolved between federal criminal law and the UCMJ, the Military Extraterritorial Jurisdiction Act of 2000 also interfaces significantly with the existing scheme of international law. This article addresses this interface in three ways: by scrutinizing the wording and import of the Act from a statutory construction perspective; by analyzing the Act under the applicable Geneva Conventions and Protocols; and finally, by juxtaposing the Act on an existing international agreement, the North Atlantic Treaty Organization's Status of Forces Agreement (NATO SOFA).

A. Statutory Analysis of the Act

Before the passage of the Act, only host nations had criminal jurisdiction over many offenses committed in overseas areas by civilians accompanying the armed forces.⁴⁶ If the host nation neglected or deliberately

44. Section 3261(c) provides:

Nothing in this chapter may be construed to deprive a court-martial, military commission, provost court, or other military tribunal of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by a court-martial, military commission, provost court, or other military tribunal.

Id. § 3261(c).

45. Section 3261(d) of the Act reads:

No prosecution may be commenced against a member of the Armed Forces subject to chapter 47 of title 10 (the Uniform Code of Military Justice) under this section unless—

- (1) such member ceases to be subject to such chapter, or
- (2) an indictment or information charges that the member committed the offense with one or more other defendants, at least one of whom is not subject to such chapter.

Id. § 3261(d).

46. See DOD IG REPORT, *supra* note 5.

declined to exercise its jurisdiction and to prosecute, then the offense would go unpunished.⁴⁷

The Act addresses the issue of possible concurrent jurisdiction with a foreign government with the following provision:

No prosecution may be commenced against a person under this section if a foreign government, in accordance with jurisdiction recognized by the United States, has prosecuted or is prosecuting such person for the conduct constituting such offense, except upon the approval of the Attorney General or the Deputy Attorney General (or a person acting in either such capacity, which function of approval may not be delegated).⁴⁸

The purpose of this provision is clear, and the intent of Congress appears to be twofold. First, Congress intends to limit the use of the Act only to situations that are not already addressed by an existing scheme of criminal law. Where international agreements recognized by the United States already provide for foreign criminal jurisdiction, and that jurisdiction is exercised, then Congress is content to allow that existing scheme of law, namely foreign law, to be applied. In a recently publicized case involving a deadly stone throwing on a motorway by dependent teenagers of American service members in Germany, German law was applied, yielding sentences between seven years and eight-and-a-half years for the three defendants.⁴⁹ While these same criminal acts would now ostensibly fall under the Military Extraterritorial Jurisdiction Act, Congress intends to allow the foreign government to prosecute these cases, if it chooses. It follows that if the foreign government were to decline prosecution for some reason, then the United States could do so under the Act.

Second, Congress has expressed a desire to minimize situations where dual prosecutions by the United States and a foreign government might occur. Although the American legal doctrine of “double jeopardy”⁵⁰ does not apply where there are two separate sovereigns (for example, the

47. *Id.*

48. 18 U.S.C. § 3261(b).

49. See generally *Stone-Throwers Sent to Prison*, ASSOCIATED PRESS, Dec. 23, 2000 (reporting on the facts, offenses, and sentences in these cases prosecuted under German law as attempted murder and endangering traffic), available at <http://www.abcnews.go.com/sections/world/DailyNews/germany001222.html>.

50. The Fifth Amendment states, “nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb” U.S. CONST. amend. V.

United States and Germany), Congress wants to avoid redundancy. By vesting in the Attorney General and Deputy Attorney General the decisional authority over any contemplated prosecutions,⁵¹ Congress intends that the United States will not pursue concurrent or parallel prosecutions except in the most extraordinary of circumstances, and with the very highest level of authorization.

Taken together, from an international law perspective, the import of § 3261(b) is to have the Act fill the apparent jurisdictional gaps, but nothing more, and certainly not to undo or supplant any part of the existing international law scheme. This is important from a constitutional law perspective, because the effect of a U.S. statute, even if merely intended as a stop-gap measure, would be of equal legal effect on the United States as any treaty currently in force.⁵²

The Military Extraterritorial Jurisdiction Act is carefully drawn not to upset existing jurisdictional schemes, including those provided by international agreements. It is equally cautious in two other key areas: exercising U.S. powers of arrest in an extraterritorial context,⁵³ and prescribing the process for either removal of suspects to the United States or delivering them to the foreign country.⁵⁴ The thrust of the Act in these two areas seems designed to assuage any potential concerns by foreign governments that the United States plans to undermine host-nation jurisdiction. Rather than offering a sweeping mandate for U.S. law enforcement to spirit suspects out of the host country to face American justice, the Act is again cautious, deliberate, and intentionally deferential to the existing international law and jurisdictional scheme.

Few issues are more sensitive than the exercise of criminal arrest powers by one state within the territory of another.⁵⁵ Indeed, the exclusive exercise of police powers within one's own borders seems to be at the very essence of statehood. Without careful wording, the Act may well have had

51. 18 U.S.C. § 3261(b).

52. The "Supremacy Clause" provides, "[T]his Constitution, and the Laws of the United States, which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme law of the land" U.S. CONST. art. VI.

53. 18 U.S.C. § 3262(a).

54. *Id.* § 3263.

55. *See generally* United States v. Noriega, 746 F. Supp. 1506 (S.D. Fla. 1990) (recounting the body of American case law regarding the extraterritorial exercise of arrest and jurisdiction).

the unintended consequence of undermining that basic sovereign power of the nations that are hosting U.S. armed forces overseas. Instead, the Act thoughtfully deals with the potentially volatile issues of arrest and confinement as follows:

The Secretary of Defense may designate and authorize any person serving in a law enforcement position in the Department of Defense to arrest, in accordance with applicable international agreements, outside the United States any person . . . (who is subject to jurisdiction of the Act) . . . if there is probable cause to believe such person violated (the Act).⁵⁶

On one hand, the statute broadly gives the Secretary of Defense the power to designate and authorize its various law enforcement agencies to arrest those United States civilians, including dependents, Department of Defense employees, and contractor personnel, in an overseas environment.⁵⁷ On the other hand, the Act constrains itself (and by implication, the Secretary of Defense) in the exercise of that power by the words “in accordance with applicable international agreements.”⁵⁸ With this one critical qualification, the Act intentionally defers to treaties and international agreements, which will require careful scrutiny before these powers of arrest are attempted, much less exercised. This area is explored in greater depth in Section III.C, where this article looks at the potential application of the Act under an existing international agreement.

The next issue the Act deals with is the concept of delivery of U.S. citizens to the authorities of foreign countries for potential prosecution. If and when the powers of arrest as described above are exercised, the Act sets the conditions that are prescribed for transferring someone under arrest to a foreign country. Section 3263 of the Act provides:

- (a) Any person designated and authorized under section 3262(a) may deliver a person described in section 3261(a) to the appropriate authorities of a foreign country in which such person is alleged to have violated section 3261(a) if—
- (1) appropriate authorities of that country request the delivery of the person to such country for trial for such conduct as an offense under the laws of that country; and

56. 18 U.S.C. § 3262(a).

57. *Id.* § 3263(b).

58. *Id.* § 3262(a).

(2) the delivery of such person to that country is authorized by a treaty or other international agreement to which the United States is a party.

(b) The Secretary of Defense, in consultation with the Secretary of State, shall determine which officials of a foreign country constitute appropriate authorities for purposes of this section.⁵⁹

Thus, the Act is purposefully deferential to existing international agreements. Consistent with the overall statutory scheme discussed so far, the wording of the Act is tailored not to break new ground, but merely to fill unacceptable gaps.

Upon closer scrutiny, one can discern the subtle extension of greater extraterritorial jurisdiction by the United States, logically at the expense of a foreign power. For example, the Act provides that those law enforcement personnel designated by the Secretary of Defense to arrest U.S. civilians covered by the Act *may*⁶⁰ deliver those persons to foreign authority in the specific circumstances that follow. The use of the word “may” instead of “shall” is critical because this choice of words introduces the element of discretion on the part of commanders exercising their disciplinary powers. More importantly, it eliminates the notion of a statutory prescription—a requirement to do a certain thing. Defense law enforcement personnel may turn U.S. civilians over to foreign countries; then again, they may not. This discretion takes on even greater significance as the Act next describes the conditional circumstances under which U.S. citizens “may” be delivered—“if” two conditions are met.

The first condition under § 3263(a)(1) is that “appropriate authorities” of the foreign country must request delivery of a U.S. citizen (who is presumably then in the custody of a U.S. law enforcement agency under to the arrest powers in the Act) for trial under the laws of that country.⁶¹ Under § 3263(b), the United States, through the offices of the Secretaries of Defense and State, will determine just who is an appropriate authority. Based on the discretion of the Secretaries, it follows that the United States

59. *Id.* § 3263.

60. *Id.*

61. *Id.*

will also determine who is *not* an appropriate authority. This implies a significant amount of latitude on the part of U.S. officials.

This first condition in § 3263(a)(1) is followed by the important conjunctive, “and,”⁶² which combines it with the second condition found in § 3263(a)(2). This requires an existing international agreement, to which the United States is a party, which authorizes the delivery of U.S. personnel. Unless Congress contemplates the re-negotiation or clarification of scores of international agreements, it stands to reason that this power must exist and be exercised in the context of existing agreements. Arguably, there cannot be very many existing international agreements to which the United States is a party that contemplate, much less specifically authorize, this type of delivery. It follows that any such pre-existing authorization contained in a treaty or status of forces agreement is applicable more by coincidence or by analogy, rather than by the express intent of the parties at the time the international agreement was entered. But as this article will demonstrate, the terms of existing agreements are sufficiently broad to subsume this new arrest and delivery procedure without modification. Therefore, the Act effectively serves its purpose to fill the gaps and fit into the existing scheme of law.

To summarize, then, this is the state of the law under § 3263: *if* a U.S. citizen covered by the Act violates the Act; and *if* he or she is arrested by an authorized Department of Defense law enforcement official for violating the Act; and *if* the foreign country where the offense occurred requests his or her delivery; and *if* the requester is found to be an appropriate authority; *and* an existing international agreement authorizes this delivery; then the Department of Defense law enforcement official *may* deliver these citizens to foreign control.⁶³

This repeated use of the subjunctive in distilling this portion of the Act is offered for two analytical reasons. The first is to give some comfort to those U.S. citizens serving with the armed forces overseas who have expressed concerns about the Act providing them with fewer protections than they would receive under the domestic law if the offense had occurred

62. *Id.*

63. *See id.*

in the United States.⁶⁴ If they were already subject to host nation law, that circumstance is largely unchanged, with the Act deferring to existing foreign jurisdiction where applicable. When U.S. law enforcement personnel arrest U.S. citizens for violation of U.S. laws, however, it seems unlikely the U.S. citizen will be summarily turned over to a foreign country. Moreover, this situation could work to the U.S. citizen's advantage, depending on the crime alleged and the law of the host nation.

Second, this analysis of § 3263 demonstrates that this one section, more so than any other, has the greatest potential for expansion of jurisdiction by the United States. Conversely, it also has the greatest potential for generating a situation of international tension based on encroachment, real or perceived, into the jurisdiction and even the sovereignty of the host nation, especially in situations where the host nation is inclined to exercise its previously exclusive jurisdiction. The rationale is simple, as the following example illustrates.

Using a hypothetical that is somewhat derivative of *Averette*,⁶⁵ suppose a contractor employee is arrested by Department of Defense law enforcement personnel for larceny of large quantities of government batteries. Suppose further that this same contractor is selling these batteries on the black market⁶⁶ of the local economy, or worse, clandestinely selling them to insurgents fighting against the host nation, thereby violating host nation law. Given a state of domestic affairs that requires a U.S. presence to assist the host nation in the first place, it stands to reason that U.S. law enforcement personnel would be able to move more quickly to investigate and make the arrest. This is even more probable since the host nation law enforcement personnel would be occupied working against the insurgency, and the contractor would likely spend most of his time in the U.S. base camp. Once in U.S. physical custody, it is difficult to imagine a circumstance where the United States would then turn over the citizen for foreign trial, particularly if that citizen had already been repatriated back to the

64. See, e.g., *H.R. 3380 Hearing, supra* note 7. In a prepared statement, the Overseas Federation of Teachers, American Federation of Teachers, AFL-CIO, opposed the Act on the bases that "host nation law has worked very well" and that the Act cannot be supported because it does not afford overseas teachers "the same balance of rights and protections as their domestic counterparts." *Id.*

65. 19 C.M.A. 363 (1970).

66. See generally GEORGE S. PRUGH, *LAW AT WAR: VIETNAM 1964-1973*, at 108-10 (1975) (discussing jurisdiction over civilians, identifying black marketeering and currency manipulation as major concerns in Vietnam, and documenting *Averette* as one of four civilians tried by courts-martial during the war).

United States. Suppose further that the American concern was the larceny itself, whereas the host nation concern was an act of treason, punishable by death under host nation law. Whether an international agreement exists that specifically provides for this circumstance is an important consideration, but there still are domestic political realities that may well make this “delivery” of the U.S. citizen to the host nation politically untenable for the United States.⁶⁷

B. Analysis Under the Geneva Conventions and Protocols

Besides the wording and potential impact of the Act itself, additional analysis is required to place the Act into the actual context in which it will operate—international agreements. The most common agreements include treaties of the United States, status of forces agreements negotiated with countries hosting U.S. armed forces overseas, and any customary international law that is binding on the United States.

Since the focus is on civilian contractors serving with the armed forces overseas, in either a garrison or operational environment, it is important to remember the essential reason for their hiring. As is now fully incorporated and reinforced in joint doctrine,⁶⁸ civilian contractors function as an “effective force multiplier.”⁶⁹ This means they are hired to provide services that will free a “trigger-puller” to fight, or they provide technical expertise to the force, thereby assisting the force in waging war or enforcing peace.

From an international law perspective, there is an intellectual inconsistency here between status as a “civilian” and service as a “force multiplier.” This is uniquely the case for contractors, whose predecessors in Machiavelli’s day were the supposed evil profiteers of war,⁷⁰ and who

67. See generally SOLIS, *supra* note 27, at 99.

68. See generally JOINT CHIEFS OF STAFF, JOINT PUB. 1-06, JOINT TACTICS, TECHNIQUES, AND PROCEDURES FOR FINANCIAL MANAGEMENT DURING JOINT OPERATIONS G-1 (22 Dec. 1999) (identifying contingency contracting as an effective force multiplier); JOINT CHIEFS OF STAFF, JOINT PUB. 5-00.2, JOINT TASK FORCE PLANNING GUIDANCE AND PROCEDURES VIII-11 (13 Jan. 1999) [hereinafter JOINT PUB 5-00.2] (discussing the importance of an effective contracting support plan as an essential tool to a Joint Task Force Commander); JOINT CHIEFS OF STAFF, JOINT PUB. 4-0, DOCTRINE FOR LOGISTIC SUPPORT OF JOINT OPERATIONS ch. V (6 Apr. 2000) [hereinafter JOINT PUB 4-0] (identifying the capabilities and discussing the employment of various types of contractor support).

69. JOINT PUB 5-00.2, *supra* note 68, at VIII-11.

70. MACHIAVELLI, *supra* note 2, at 15.

today obviously make their living supporting the operations of the military. Furthermore, for contractors, this incongruity is even more conspicuous when compared to any other civilians accompanying the force abroad. The status of a dependent spouse, a Department of Defense schoolteacher, or an Army-Air Force Exchange Service store manager accompanying the force⁷¹ is fairly innocuous. But can the same be said for the contractor providing technical support to maximize operational capabilities or freeing a soldier to fight on a one-for-one basis?

For this analysis, it makes sense to start with a broad historical overview, followed by a focused examination of the current international law status of a contractor employee in an operational or contingency environment. The article begins this analysis with two critical issues in international law applicable to contractors that are not affected by the Act—their civilian status and their treatment if captured. The article then deals with the significant provisions of status of forces agreements in light of the new Act.

Following the massive destruction and suffering caused to civilian populations during World War II, the 1949 Geneva Conventions addressed the protection of non-combatants generally. Potentially affecting the issue of contractors are two key groups covered by the Conventions—civilians⁷² and prisoners of war.⁷³ Unfortunately, while providing protections to civilians, the 1949 Conventions never actually defined a “civilian.” The lack of a definition was obviously problematic, so the 1977 Protocols⁷⁴ to the 1949 Geneva Conventions sought to provide one. Unfortunately, the Protocols defined “civilian” by describing whom they were *not*—such as members of armed forces or organized militias⁷⁵—as opposed to making an affirmative statement or definition of whom they are.⁷⁶

Having supplied this definition-by-negation, the Protocols then provide a civilian with scores of protections; however, these protections are

71. Like the contractor employee, all three of these described personnel, while accompanying the force overseas, are also now subject to the jurisdiction of the United States under the Act. 18 U.S.C. § 3261 (2000).

72. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

73. Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GPW].

74. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, Dec. 12, 1977, art. 1, 1125 U.N.T.S. 3 [hereinafter Protocol I].

75. *See id.* art. 43.

76. *See id.* art. 50.

conditional, based on the actions of the person and applying “unless and for such time as they take a direct part in hostilities.”⁷⁷ Should the civilian briefly take a direct part in the hostilities, then cease to do so, the protections they receive are in turn applicable or not, based on their conduct. Importantly, the Protocols do not further define what is meant by the word “direct,” nor do they provide examples, although the official commentary to the Protocols does offer what amounts to a “causing actual harm” standard.⁷⁸

By contrast, Common Article 3 to the Geneva Conventions does not use the term “direct” and instead introduces the concept of taking an “active” part in the hostilities.⁷⁹ Particularly with contractors supporting the force, this may be an area of concern and possibly contention, because it ties directly into important law of war issues regarding targeting and the requirement of distinction in targeting.⁸⁰ One can readily imagine a military rear area activity such as a mess hall being targeted during a state of hostilities. While it is of questionable tactical value as a mess hall, it does present a large concentration of enemy troops at certain times of day, and it functions to sustain the fighting power of the force. The fact that it is run exclusively by contractor employees certainly blurs the line between combatants and noncombatants and makes targeting increasingly complex. It is instructive that, for the limited purpose of assessing the risk of direct attack on U.S. civilians accompanying the force (such as contractor employees), the Department of Defense Law of War Working Group has used the term “active” as found in Common Article 3.⁸¹

The next significant international law issue is the status of contractors in the event an opposing force captures them during international armed conflict. Prisoner of war status is significant, because those who rate it typically enjoy special protections, such as combatant immunity from prosecution for warlike acts.⁸² Just as importantly, they are not treated as

77. *See id.* art. 51.

78. YVES SANDOZ, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 619 (1987).

79. Common Article 3 provides that “persons taking no active part in the hostilities . . . shall . . . be treated humanely.” GPW, *supra* note 73, art. 3.

80. Protocol I, *supra* note 74, art. 51.

81. E-mail from Mr. W. Hays Parks, Office of the Judge Advocate General, U.S. Army, to Captain Jeanne Meyer, United States Air Force, Professor of International and Operational Law, The Judge Advocate General’s School, U.S. Army (23 Aug. 2000) (on file with author).

82. GPW, *supra* note 73, art. 85.

ordinary criminals under capturing nation law.⁸³ Prisoner of war status is accorded to “[p]ersons who accompany the armed forces without actually being members thereof, such as . . . supply contractors [and] members of labour units . . . provided they have received authorization, from the armed forces which they accompany, who shall provide them for that purpose with an identity card.”⁸⁴ Thus, contractor personnel clearly are covered. Again we see the paradox inherent in the status of contractor employees supporting the force—they are ostensibly non-combatants, yet they are to be afforded the protections of a prisoner of war. While this status is a matter of international law, numerous practical questions persist, as the lines have predictably begun to blur further between contractor support and traditional soldierly functions in the prosecution of U.S. foreign policy overseas.⁸⁵

To ensure proper treatment should they be captured, the issuance of identification cards is a significant matter affecting contractors. Identification cards also are addressed in the Geneva Convention regarding prisoners of war, which provides in part: “Each party to a conflict is required to furnish the persons under its jurisdiction who are liable to become prisoners of war, with an identity card showing the owner’s surname, first names, rank, army, regimental, personal or serial number or equivalent information, and date of birth.”⁸⁶ Contractor personnel in a deployed environment clearly are persons under U.S. jurisdiction who may indeed become prisoners of war.

To preserve their proper treatment, the importance of issuing a Geneva Convention identification card to all authorized contractor personnel in the theater cannot be overemphasized. The Department of Defense has specific guidelines requiring the issuance of identification cards to civilian personnel accompanying the armed forces in combat or contingency areas who are at risk of capture or detention.⁸⁷ These guidelines specifically provide for equivalency grading of contractor representatives, assigning them Geneva Convention categories based on their standing in

83. *Id.* art. 82.

84. *Id.* art. 4.A.(4).

85. See generally Lieutenant Colonel Lourdes A. Castillo, *Waging War With Civilians: Asking the Unanswered Questions*, AIR CHRON, 2000 (discussing numerous short- and long-term issues regarding increased contractor support to military operations), available at <http://www.airpower.maxwell.af.mil/airchronicles/apj/apj00/fal00/castillo.htm>.

86. GPW, *supra* note 73, art. 17.

87. U.S. DEP’T OF DEFENSE, INSTR. 1000.1, IDENTITY CARDS REQUIRED BY THE GENEVA CONVENTIONS (30 Jan. 1974) (C2, 5 June 1991).

their profession, aligned to the categories of company grade through flag grade officers.⁸⁸ Predictably, the importance of identification card issuance is reinforced in joint doctrine as well.⁸⁹ Ultimately, the Military Extraterritorial Jurisdiction Act of 2000 does not immediately affect or conflict with these fundamental portions of international law dealing with civilian contractors and prisoner of war status.

C. Analysis Under The NATO SOFA

The context where the Act will most often be applied under international law will be within the fabric of an existing status of forces agreement (SOFA) with a host nation overseas. In situations where the United States does not have a SOFA or other diplomatic agreement, the Act will be applied as the United States decides to apply it, because the Act's requirement to operate in the context of existing international agreements⁹⁰ would be rendered a nullity. For specific analysis, this article uses the NATO SOFA as an example.⁹¹

Beginning with *Reid*⁹² in 1957, U.S. courts, in interpreting the overall criminal law scheme, have consistently recognized the interplay between the exercise of criminal jurisdiction by the United States and the terms and conditions of treaties such as SOFAs.⁹³ These courts have also been careful to reaffirm the notion that treaties are only valid to the extent that they pass constitutional muster.⁹⁴

Despite the fact that *Reid* and its progeny effectively eliminated the exercise of court-martial jurisdiction over civilians, the importance of considering the impact of a SOFA in the context of an extraterritorial prosecution continues today. Just last year, in deciding the *Gatlin* case on the eve of the Act's passage, the Second Circuit Court of Appeals carefully analyzed the thrust and jurisdictional coverage of the NATO SOFA in determining that *Gatlin* was neither subject to the military law of the United States nor was he covered by any U.S. jurisdiction pursuant to the SOFA.⁹⁵

88. *Id.*

89. See JOINT PUB. 4-0, *supra* note 68.

90. See 18 U.S.C. § 3262(a) (2000).

91. Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Forces, June 19, 1951, 4 U.S.T. 1792, 199 U.N.T.S. 67 [hereinafter NATO SOFA].

92. 354 U.S. 1 (1957).

93. *Id.* at 15.

94. See *id.*

The NATO SOFA contains a critical definition of contractor personnel:

(b) “civilian component” means the civilian personnel accompanying a force of a Contracting Party⁹⁶ who are in the employ of an armed service of that Contracting Party, and who are not stateless persons, nor nationals of any State which is not a Party to the North Atlantic Treaty, nor nationals of, nor ordinarily resident in, the State in which the force is located.⁹⁷

From this definition, a U.S. citizen working as a defense contractor providing services to the U.S. component of a NATO force overseas is a member of the “civilian component” and entitled to SOFA status under the treaty. Other alternatives are counterintuitive and untenable, such as defining these persons as tourists, resident aliens, or businessmen unconnected to the military operation.⁹⁸ It follows that the sending state, in this case the United States, must take whatever administrative measures are necessary to ensure that the proper SOFA-status credentials are afforded to contractor personnel brought into foreign countries with which the United States has a SOFA.

Article VII of the NATO SOFA addresses jurisdiction in specific detail, with the following provisions directly applicable to contractor employees belonging to the “civilian component” as defined above:

1(b). [T]he authorities of the receiving State shall have jurisdiction over the . . . civilian component . . . with respect to offenses committed within the territory of the receiving State and punishable by the law of that State.

2(b). [T]he members of the receiving State shall have the right to exercise exclusive jurisdiction over . . . civilian components . . . with respect to offenses, including offenses relating to the

95. 216 F.3d 207 (2d. Cir. 2000).

96. See NATO SOFA, *supra* note 91. The term “Contracting Party” itself is not defined in the NATO SOFA, but is used to refer to the members and signatories to the treaty organization. The use of the word “contracting” is an unintentional coincidence in an article focusing on personnel providing services based on contracts with the Department of Defense.

97. *Id.* art. I.1.(b).

98. See *Reid*, 354 U.S. at 15.

security of that State, punishable by its law but not by the law of the sending State.

3. In cases where the right to exercise jurisdiction is concurrent . . . military authorities of the sending State shall have the primary right to exercise jurisdiction over a member of . . . a civilian component in relation to . . . offenses solely against the property or security of that State, or offenses solely against the person or property of another member of the force or civilian component of that State . . . ; in the case of any other offense the authorities of the receiving State shall have the primary right to exercise jurisdiction.⁹⁹

In this multi-layered jurisdictional scheme, the nature and type of the offense, where it is committed, and who or what entity it is committed against are critical in determining which nation is entitled to exercise primary jurisdiction or any jurisdiction at all. Congress clearly did not intend to upset this current scheme under the Extraterritorial Jurisdiction Act, but rather filled in the gap left by the elimination of court-martial jurisdiction over civilians.¹⁰⁰ The Act seamlessly fits this scheme. The receiving NATO state enjoys exclusive jurisdiction for offenses against that state and for any offense covered by its law but not by United States law, along with any violation of the security of that state, such as spying. Additionally, the receiving state enjoys concurrent jurisdiction over all offenses committed in its territory and covered by its laws in all cases except where the offense is solely an American-on-American crime or matter of United States security.

The terms in the NATO SOFA covering arrest again fit seamlessly with the scheme governing arrest and commitment in § 3262 of the Act. The complete terms of arrest and delivery are laid out in paragraph 5 of the NATO SOFA:

(a) The authorities of the receiving and sending States shall assist each other in the arrest of members of a force or civilian component or their dependents in the territory of the receiving State and in handing them over to the authority which is to exercise jurisdiction in accordance with the above provisions.

99. NATO SOFA, *supra* note 91, art. VII.

100. 18 U.S.C. § 3263 (2000).

- (b) The authorities of the receiving State shall notify promptly the military authorities of the sending State of the arrest of any member of a force or civilian component or a dependent.
- (c) The custody of an accused member of a force or civilian component over whom the receiving State is to exercise jurisdiction shall, if he is in the hands of the sending State, remain with that State until he is charged by the receiving State.¹⁰¹

As discussed earlier, the Act specifically states that arrest and confinement will be handled “in accordance with applicable international agreements.”¹⁰² Section 3263(a)(1) of the Act provides for delivery of arrested U.S. citizens when they are charged with offenses under the laws of the host nation where an international agreement to which the United States is a party specifically authorizes delivery.¹⁰³ When applied to the NATO SOFA, for example, the Act’s provisions on arrest and delivery, §§ 3262 and 3263, dovetail perfectly with paragraph 5 of the NATO SOFA.

Double jeopardy concerns also arise under the Act and the NATO SOFA.¹⁰⁴ As discussed earlier, the protection against double jeopardy does not apply when separate sovereigns, each with lawful jurisdiction over an offense or a person, seek to prosecute. In crafting the Act, Congress ostensibly intended simply to fill existing gaps in criminal jurisdiction over Americans overseas. In doing so, however, it specifically left open the possibility of a trial of a U.S. citizen by the United States, notwithstanding a parallel prosecution of the same citizen by a foreign government.¹⁰⁵ Congress vested the authority to authorize such a prosecution in the very highest law enforcement authorities in the United States.

In examining the overall statutory scheme of the Act, it is essential to compare this possibility of parallel prosecution to an existing international agreement such as the NATO SOFA. While not specifically addressing the American legal theory of double jeopardy, the NATO SOFA does address the exercise of disciplinary prerogatives by more than one state.

8. Where an accused has been tried in accordance with the provisions of this Article by the authorities of one Contracting Party and has been acquitted, or has been convicted and is serving, or

101. NATO SOFA, *supra* note 91, para. 5.

102. 18 U.S.C. § 3263.

103. *Id.* § 3263(a)(1).

104. *See supra* note 50 and accompanying text.

105. *See supra* note 48 and accompanying text.

has served, his sentence or has been pardoned, he may not be tried again for the same offense within the same territory by the authorities of another Contracting Party. However, nothing in this paragraph shall prevent the military authorities of the sending State from trying a member of its force for any violation of rules of discipline arising from an act or omission which constituted an offense for which he was tried by the authorities of another Contracting Party.¹⁰⁶

This provision presents several points for analysis. The first sentence of the paragraph seems to provide a conditional double jeopardy type of protection, stating that the accused cannot be twice tried for the same offense.¹⁰⁷ The prohibition applies, however, only “within the same territory by the authorities of another Contracting Party.”¹⁰⁸ This leaves open numerous other possibilities. Read as a whole, this paragraph stands for the notion that each state will get one opportunity—at most—to try an accused. In addition, the second sentence in the paragraph, which specifically allows for military discipline over the force, is inapplicable to civilians accompanying the force. This is evident because the NATO SOFA essentially limits the definition of “members of the force” to include only military personnel.¹⁰⁹

From the preceding, the Act clearly provides for the exceptional possibility of a distinct U.S. prosecution, and the NATO SOFA does not prevent such an exercise of jurisdiction by a sending state. The NATO SOFA merely provides that such a second trial, except for trials of military personnel, may not occur in the territory of the state first exercising its jurisdiction under the multi-layered scheme in the NATO SOFA. Because the Act provides for the removal of American citizens back to the United States for prosecution, it does not hinder a parallel or subsequent prosecution in the United States for the same offense. The previous hypothetical, loosely based on *Averette*, illustrates this point.

The interplay of the Act and the NATO SOFA would make it entirely possible for a contractor employee, charged with larceny and black marketing of government batteries overseas, to be tried by the host nation under the NATO SOFA or some other international agreement. After com-

106. NATO SOFA, *supra* note 91, art. VII.8.

107. *Id.*

108. *Id.*

109. *Id.*

pleting his sentence, the employee could be returned to the United States to be tried in federal court under the Act, assuming any applicable statute of limitations did not toll while he was serving his sentence overseas.

Taken together, the new Act and the existing scheme of international law based on treaties and international agreements provide a comprehensive process for the trial of civilians accompanying the force overseas. This imparts a multi-layered jurisdictional approach. Under the new scheme, the gaps created by the non-exercise of jurisdiction by a foreign state are filled by an expansion of the applicability of U.S. laws, giving them extraterritorial effect. Important safeguards under the Geneva Conventions and Protocols dealing with the status of civilians—as both civilians, generally, and as potential prisoners of war, specifically—remain unaffected by the Act. Finally, international agreements such as the NATO SOFA square neatly with the Act without further modification. Together, they provide both the sending and receiving states with the ability to protect their national interests through the exercise of criminal jurisdiction over these persons in accordance with prescribed procedures.

IV. Contract Law Analysis and Proposals

Throughout this discussion of the Military Extraterritorial Jurisdiction Act of 2000, the focus has been on analyzing the Act with special emphasis on one particular group of civilians accompanying the force overseas—contractor employees. Up to this point, this article demonstrated how a progression of judicial decisions removed civilians in general from the criminal jurisdiction of courts-martial, and then applied that same legal conclusion to civilians who happen to be contractors.¹¹⁰ Subsequent cases further narrowed the court-martial jurisdiction over civilians to declared wars only.¹¹¹ Finally, this article studied the effects of the Act under various aspects of international law and agreements. Remaining, however, is a discussion of the interplay between contract law and criminal statutes having international law implications.

This interplay has more dimensions to it than just the newfound ability to pursue an occasional criminal prosecution of a contractor who commits a crime overseas. The increasing use of contractor support is not just

110. *See* *Grisham v. Hagan*, 361 U.S. 278 (1960); *McElroy v. Guagliardo* 361 U.S. 281 (1960).

111. *See* *United States v. Averette*, 41 C.M.R. 393 (1970).

to provide expertise for particular weapons systems, but rather to perform a variety of garrison support services that in turn frees soldiers to fight. This amounts to an apparent one-for-one swap of soldiers and contractors. Current joint doctrine further acknowledges the importance of an effective contracting support plan covering the spectrum of commercially available services, including construction and the broad range of base camp or garrison services under the general category of “logistics,” as part of a commander’s overall force logistics plan.¹¹²

From a command and control perspective, however, contractors are not commanded or led as are soldiers. When contractor personnel perform soldierly functions, there is not a real one-for-one swap. A significant discrepancy remains between the concepts of “command” and “contract” that may be unnecessary or unacceptable, but at a minimum, must be addressed. The new Act provides an opportunity and impetus to do just that.

A. Contractor Discipline

The Act first must be considered in the overall context of an issue that often confounds commanders in both a deployed and garrison overseas environment—contractor discipline and its impact on mission accomplishment. In many respects, the very notion of “contractor discipline” presents a paradox. On the one hand is the idea of a contract, which is strictly a commercial transaction where the government enters a financial relationship with another party in order to obtain products or services on certain terms.¹¹³ Discipline, conversely, is commonly thought of as “correction; chastisement; punishment inflicted by way of correction and training.”¹¹⁴

The contract relationship lends itself to various remedies, normally financial or performance-based in nature, if a party does not honor or perform its part of the bargain. Discipline, however, creates a relationship between a senior and a subordinate where the senior ensures that his or her will prevails by the threat of punishing the subordinate. Because the UCMJ does not apply to contractor employees (except potentially in a declared war), and because the Act addresses only civilian criminal stat-

112. See JOINT PUB. 5-00.2, *supra* note 68, at VIII-11 (“When properly used, contracting is another essential tool of the CJTF in support of the mission.”).

113. See *generally* GENERAL SERVS. ADMIN ET AL., FEDERAL ACQUISITION REG. pt. 2 (June 1997) [hereinafter FAR].

114. THE COMPACT OXFORD ENGLISH DICTIONARY 442 (2d ed. 1998).

utes, it appears there is no relationship that could result in “discipline” over a contractor. Clearly, the options that the government has to ensure proper performance by contractors do not include any actual ability to punish individual contractor employees.

There is an existing scheme of control, however, based on contract terms and parameters of performance. Contractors enter an overseas theater expected to perform certain necessary or technical duties under the terms of their contracts. They may well have specialized skills or expertise that are not resident in the U.S. military, and which may prove essential to the operational commanders. Despite the command’s aspirations to the contrary, however, contractors are not subject to the overall military disciplinary scheme that commanders may envision for their forces.¹¹⁵ The contract relationship is based on performance, which leaves supervision to superior civilian employees within the contractors’ organizations.¹¹⁶ The fact that they may be under contract to provide services or perform skills does not translate into a command relationship over contractors. Even with the advent of the Act, commanders must still rely on the contracting officer to directly enforce contractor discipline.¹¹⁷

The overseas operational or garrison environment calls for force discipline and predictable, unambiguous, unified command relationships. Ostensibly, in an overseas contingency mission, the commander is “in command” of all assets within his force. Nevertheless, the reality with contractor employees is quite different. In fact, current doctrine defers completely to the terms of the contract, perhaps at the expense of the operational prerogatives of the commander.¹¹⁸

115. *But see* U.S. DEP’T OF ARMY, PAM. 715-16, CONTRACTOR DEPLOYMENT GUIDE 1 (27 Feb. 1998) (“Contractor employees will be expected to adhere to all guidance and obey all instructions and general orders issued by the Theater Commander or his/her representative.”).

116. *See id.* “Supervision of contractor personnel is generally performed by the respective contractor. A contracting officer’s representative (COR) acting within the limits of the authority delegated by the contracting officer, may provide guidance to the contractor regarding contractor employee performance.” *Id.*

117. *See* JOINT PUB. 4-0, *supra* note 68, at V-8 (stating that contractor employees are disciplined by their employers by the terms of their employment, and that commanders have no penal authority over either contractor performance or misconduct).

118. *See id.* (“Commanders have no penal authority to compel contractor personnel

The linchpin to this whole process—indeed the link between the commander and the contractor employee—is the contracting officer, the only person with the ability to bind the government.¹¹⁹ The contracting officer's authority includes not only entering into contracts, but also authorizing modifications to existing contracts. As such, he (and any duly appointed representative) is the only member of the command with the contractual ability to require or prohibit conduct by contractor employees, subject to the terms of the contract.

The importance of the contracting officer in a deployed overseas environment cannot be overemphasized. A consistent theme arises from the debriefs after recent U.S. overseas operations, as typified by this lesson learned in Somalia: “[A]s had been the case with Desert Storm, there was an urgent need to have contracting officers on site early—and with authority sufficient to the monumental tasks of arranging for supplies and services”¹²⁰

Contracting officers must be present in the theater to ensure that vital services are performed and, where necessary, to enforce contractor discipline. Otherwise, the commander is missing a vital link in the supervisory chain over a potentially significant portion of his own assets. The operational importance of contracting officers takes on even greater significance

118. (continued) to perform their duties or to punish any acts of misconduct.”); U.S. DEP’T OF ARMY, REG. 715-9, CONTRACTORS ACCOMPANYING THE FORCE 14 (29 Oct. 1999) (“Similar to the military chain of command, command and control of commercial support service personnel will be defined by the terms and conditions of the contract [T]he cognizant contracting officer is the only government official with the authority to increase, decrease, or materially alter a contract’s scope of work.”); U.S. DEP’T OF ARMY, PAM. 715-16, CONTRACTOR DEPLOYMENT GUIDE 1 (27 Feb. 1998) (“While the government does not directly command and control contractor employees, key performance requirements should be reflected in the contract.”); INT’L AND OPERATIONAL LAW DEP’T, THE JUDGE ADVOCATE GENERAL’S SCHOOL, U.S. ARMY, JA 422, OPERATIONAL LAW HANDBOOK, ch. 8, para. 4 (2001) (“For contractor employees command and control is tied to the terms and conditions of the government contract. Contractor employees are not under the direct supervision of military personnel in the chain of command.”).

119. See generally *Fed. Crop Ins. Corp. v. Merrill*, 332 U.S. 380 (1947) (holding that the government may only be bound by government agents acting within their actual authority to contract). For recent developments concerning *Merrill* and its progeny, see Chiarella et al., *supra* note 12, at 1-4.

120. KENNETH ALLARD, SOMALIA OPERATIONS: LESSONS LEARNED 52 (National Defense University Press, n.d.).

when one considers the supervisory-type role they play in enforcing contractor discipline.

The commander's inability to enter contracts personally or to discipline contractors is firmly established in all current doctrine.¹²¹ One would conclude from this doctrine that the contracting officer alone has the ability to discipline contractors and that the commander is virtually powerless; however, this doctrinal surrender of commanders' authority over contractors supporting their forces in the field goes too far and must be reconsidered. The inconsistency is clear. On the one hand, doctrine urges operational commanders to rely on contractor support and to work contractors into the force mix to the maximum extent possible.¹²² On the other hand, doctrine tells commanders they have no supervisory or disciplinary control whatsoever over these contractors.¹²³

The dynamics of the modern battlefield are too complex to have separate and inconsistent relationships between some members of the force vis-à-vis others. Current doctrine regarding the relationship between commanders and contractor members of the force also presents a challenge to the principle of unity of command, as the contractors are not in the chain of command. Taken to its logical extreme, this may well prove detrimental to the success of the mission. To date, the United States has been able to employ successfully contractors for garrison, commercial-type services in places like Bosnia. This success, however, has been in secure environments where base camps have not been attacked or targeted by credible threats. Where such threats are present, the corresponding need to discipline contractors will likely increase.

While contracting officers, by design, exercise independence and discretion in the performance of their duties, they also belong in a chain of command or supervisory chain. In a deployed environment, the contracting officer is responsible to the theater commander in a direct supervisory relationship.¹²⁴ The theater commander's operational control over civilian employees of the Department of Defense—such as a civilian contracting

121. *See supra* notes 116-18.

122. U.S. DEP'T. OF DEFENSE, INSTR. 3020.37, CONTINUATION OF ESSENTIAL DOD CONTRACTOR SERVICES DURING CRISES 2 (26 Jan. 1996) [hereinafter DODI 3020.37]. "It is DoD policy that . . . the DoD components shall rely on the most effective mix of the Total Force, cost and other factors considered, including Active, Reserve, civilian, host-nation, and contract resources necessary to fulfill assigned peacetime and wartime missions." *Id.*

123. *See supra* notes 117-18.

officer—is an important component of the overall contingency planning of the United States.¹²⁵

With the advent of the Act, the time has come to reassess this situation and the overall issue of command relationships with contractors. If contractors are going to supplant troops, it stands to reason that a command or supervisory relationship should exist that allows contractors to be controlled in a manner more akin to troops. This must involve a more direct relationship between the commander and the contracting officer in supervising or potentially disciplining contractor personnel. This article does not advocate replacing contracting officers' judgment or discretion with their commanders'; however, the current state of that relationship disenfranchises the commander's role unnecessarily.

The closest the United States has come to creating a traditional military relationship with contractors comes from a single, key Department of Defense Instruction.¹²⁶ This instruction seeks to institutionalize policies and procedures to ensure uninterrupted contractor support to the force in a crisis situation at home or abroad. The instruction is largely focused on including appropriate language in contracting documents to ensure continued performance.¹²⁷ In so doing, this instruction also takes a realistic but fatalistic approach to ensuring contractor support. It tasks Department of Defense activities to “[p]repare a contingency plan for obtaining the essential services from other sources if the contractor does not perform in a crisis.”¹²⁸

In the final analysis, it must be conceded that even the most flexible and carefully drafted contract ultimately may not be fully or adequately performed, leaving a financial penalty of some kind as the only available remedy. Accordingly, it is time to take down the “white flag” that exists in current doctrine and procedures, which gives an exaggerated sense of surrender of a commander's prerogatives to the nuances of a commercial

124. See generally U.S. DEP'T. OF DEFENSE, INSTR. 1400.31, DOD CIVILIAN WORK FORCE CONTINGENCY PLANNING AND EXECUTION, at 3 (28 Apr. 1995). “As an integral part of the total force...the deployed civilian work force shall be under Unified Combatant Commander operational control when employed in or deployed to theaters of operations. . . .” *Id.* Of course, where the contracting officer is a service member, the command relationship is clear.

125. *Id.*

126. DODI 3020.37, *supra* note 122.

127. *Id.*

128. *Id.*

transaction. The commander's operational control of the contracting officer in a deployed environment should be clear and immediate, and the commander should not be as far removed as current doctrine makes him.

B. Commander's Discretion and the Act

Earlier, in the discussion of the Act from an international law perspective, the issues of arrest and delivery were considered at some length. That discussion focused on the potential for much greater discretion by the United States when it comes to delivery of American citizens to foreign nations. This section will discuss the contract law implications of arrest of U.S. contractor employees by Department of Defense law enforcement personnel.

While filling several gaps, the Act does not expand court-martial jurisdiction over civilians.¹²⁹ Military commanders, however, are reintroduced into the criminal justice process regarding civilians in overseas areas, perhaps in a very significant way. With the powers of arrest now vested in designated Department of Defense law enforcement agencies, the Act insinuates additional authority in military commanders. The rationale is simple—military commanders “own” those law enforcement assets because commanders exercise command and control over the law enforcement assets of their commands. This includes the newfound powers of arrest of civilians accompanying the force, under the Act.¹³⁰ The implications of this authority are complex and as yet unknown.

Where there is command, however, there is always a considerable amount of discretion. This precept may be explored using the *Averette* hypothetical. Suppose the hypothetical contractor is once again stealing quantities of government batteries and selling them on the black market. Suppose further that the host country either cannot or will not exercise any jurisdiction over the offense. Assume further that the offense is covered by U.S. law¹³¹ and is within the jurisdictional ambit of the Act, leaving the contractor's offense strictly a matter of U.S. concern.

129. See 18 U.S.C. § 3263 (2000).

130. *Id.*

131. See *id.* § 641.

In the United States, police make decisions to arrest, and prosecutors decide whether to pursue cases in court. But in a wartime or contingency scenario, the police belong to the commander, who may or may not find the offense worthy of prosecution. In assessing the alleged transgressions of either a civilian contractor or a military member, the commander weighs the relative importance of keeping that person engaged in his mission. Clearly, a commander's concerns and priorities are different from those of local police or local district attorneys.

Suppose that the hypothetical contractor, when he isn't stealing batteries, is the only member of the task force with a specialized skill—a skill the commander absolutely requires to execute his mission. For example, perhaps the contractor programs and repairs guidance systems on “smart” munitions. Presume that he is one of five people in the world with this expertise, that no one else in the mission can do this, and that the skill is operationally necessary. What does the commander do? Does he authorize his military police to arrest the contractor pursuant to the Act, possibly repatriating him to the United States and jeopardizing the mission? Or does he affirmatively act to prohibit or delay the military police from making that same arrest?

The contract implications are numerous indeed. At some point, the premium placed on the specialized skill may compel a delay in criminal justice or may cause forbearance by the government in redressing any actions that are non-compliant with the contract. If the contractor is arrested and repatriated to stand trial, who bears the costs associated with this action? Is the contractor employer held liable for the additional expenses caused by the criminal actions of its employee? Can the government hold a contractor responsible for the unforeseen and illegal actions of an employee? Can an effective contract vehicle even be crafted to deal with crime? What if the hypothetical contractor employee commits a crime of violence, one for which he clearly must be arrested and repatriated, but the contractor does not have anyone else with the required skills? In responding to such situations, the commander finds himself in a dilemma between exercising his criminal justice prerogatives and meeting the requirements for mission accomplishment.

Taking civilians out of courts-martial, while at the same time giving military law enforcement the power to arrest civilians, introduces the commander's discretion into the initial investigation, arrest, and prosecution of civilians accompanying the force. In many respects, the initial investiga-

tion and arrest of a civilian suspect takes on a strange parallel to the process applied to a member of the armed forces subject to the UCMJ.¹³²

The preceding analysis leads to several important conclusions relating to contractor employees accompanying the force overseas. Although contract documents may be unaffected by the Act, the government contracting community must react to the new realities of contractor employees' relationships with operational military commanders in the field. Although the contracting officer necessarily remains the main conduit for contractor performance and therefore contractor discipline, under the Act the entire disciplinary calculus has changed. It now involves much greater potential for a commander's influence in criminal investigation and arrest overseas. It has changed to the point that the commander cannot simply be written out of U.S. doctrine. External to and apart from any contract document, the military commander has a significant new role in handling contractor employees, if only in the context of criminal misconduct covered by the Act. Now is the time to write the commander, through his authority over the contracting officer, back into U.S. doctrine dealing with contractors supporting the force.

C. Proposed Amendments to Implement the Act

From the multiple questions raised in the preceding section, the Act compels a reassessment of existing policy, doctrine, and regulatory language regarding potential criminal actions by contractor employees. The full breadth of this reassessment has only begun. Predictably, the first indicator was interim guidance with brief references to the Act.¹³³ Discussions among military contract attorneys are already underway,¹³⁴ but in the long-

132. See generally *MANUAL FOR COURTS-MARTIAL, UNITED STATES*, R.C.M. 301-305 (2000) [hereinafter *MCM*] (detailing a commander's intimate involvement in the initial reporting, investigating, arrest, and disposition of charges alleged against a service member under the UCMJ).

133. See Interim Policy Memorandum, Acting Secretary, United States Air Force, subject: Contractors in the Theater (8 Feb. 2001). "Under newly enacted United States law, contractor employees and other civilians accompanying the Armed Forces can also be prosecuted by the United States for Criminal Acts." *Id.*

134. E-mail from Mr. David DeFrieze, Attorney/Advisor, U.S. Army Operations Support Command, to Major Kevin M. Walker, Professor, The Judge Advocate General's School, U.S. Army (Mar. 12, 2001) (on file with author). Mr. DeFrieze is the legal advisor on the current re-solicitation of the Army's Logistics Civilian Augmentation Program or LOGCAP contract, a comprehensive contract for logistics support services to deployed forces.

term, practitioners will need a more comprehensive look at all relevant sources of guidance where the Act may have a potential impact on contractors accompanying the force. To that end, this article proposes modifications to an existing Department of Defense instruction and to a joint publication. While numerous publications need to be reassessed in light of the Act, two specific examples offered as illustrations of the need for change. Lastly, this article offers draft language for the Federal Acquisition Regulation (FAR)¹³⁵ or Defense Federal Acquisition Regulation Supplement (DFARS),¹³⁶ as appropriate, thereby writing the Act into the contract regulatory framework.

A good place to begin this reassessment is to account for and accommodate the Act in pertinent, existing Department of Defense-wide guidance, such as *Department of Defense Instruction 3020.37, Continuation of Essential DoD Contractor Services During Crises (DODI 3020.37)*.¹³⁷ Germane to the discussion of contractor support during overseas contingency or combat operations, *DODI 3020.37* already provides a useful and comprehensive definition of what constitutes a crisis.¹³⁸ The instruction also provides a framework¹³⁹ that requires contingency planning for the continuation of essential services during a crisis.¹⁴⁰ *Department of the Defense Directive 3020.37* should also account, however, for the additional scenarios that the Act may bring by incorporating two amendments to the instruction. First, the Act should be added to the list of references.

(k) *Public Law 106-523, "The Military Extraterritorial Jurisdiction Act of 2000," November 22, 2000, codified at 18 U.S. Code §§ 3261-3267 (2000).*

135. FAR, *supra* note 113.

136. U.S. DEP'T OF DEFENSE, DEFENSE FEDERAL ACQUISITION REG. SUPP. 201.103 (Apr. 1, 1984) [hereinafter DFARS].

137. DODI 3020.37, *supra* note 122.

138. DODI 3020.37 defines a "Crisis Situation" as:

Any emergency so declared by the National Command Authority (NCA) or the overseas Combatant Commander, whether or not U.S. Armed Forces are involved, minimally encompassing civil unrest or insurrection, civil war, civil disorder, terrorism, hostilities buildup, wartime conditions, disasters, or international armed conflict presenting a serious threat to DoD interests.

Id. at 8.

139. *Id.* at 2-5.

Second, a new paragraph should be added, which states:

4.5. The DoD Components, cognizant DoD Component Commanders, and contractors, in planning for the continuation of essential services during crises, shall consider the possibility of disruption of essential contractor services due to criminal prosecutions under the Military Extraterritorial Jurisdiction Act of 2000 (reference (k)) and shall include in contingency plans, to the maximum extent possible, alternatives and procedures to ensure continuity of contractor services in this eventuality.

These two brief amendments do not go into exhaustive detail, because that is unnecessary for the desired impact on this instruction. In their brevity and general guidance, these additions fit into the overall tenor and broad-brush guidance of the rest of the instruction, alerting readers to issues and directing them to consider certain issues. More importantly, however, the amendments alert government personnel to the existence of the Act and the need to consider its potential implications in planning for the continuity of contractor support. Lastly, by using the imperative “shall,” it carries greater force and effect, requiring Department of Defense planners to consider the Act’s consequences in advance in order to avoid unexpected disruptions or crises later.

Much as it will be necessary to reconsider various Department of Defense and service-specific guidance in light of the Act, it is also neces-

140. DODI 3020.37 defines “Essential Contractor Services” as:

E2.1.3. A service provided by a firm or an individual under contract to the Department of Defense to support vital systems including ship’s (sic) owned, leased, or operated in support of military missions or roles at sea and associated support activities including installation, garrison, and base support serviced (sic) considered of utmost importance to the U.S. mobilization and wartime mission. That includes services provided to FMS customers under the Security Assistance Program. Those services are essential because of the following:

E2.1.3.1. DoD Components may not have military or DoD civilian employees to perform these services immediately.

E2.1.3.2. The effectiveness of defense systems or operations may be seriously impaired, and interruption is unacceptable when those services are not available immediately.

Id. at 8.

sary to look at joint doctrine and its treatment of contractor support.¹⁴¹ The following changes are offered as a sample of the various revisions needed to accommodate the Act in joint publications. The paragraph below, proposing an amendment to *Joint Publication 4-0, Doctrine for Logistic Support to Joint Operations*, removes the current “white flag” language by inserting a new paragraph (b).¹⁴²

b. Commanders have no penal authority to compel contractor personnel to perform their duties; however, commanders do have the authority within their commands, as exercised by their Contracting Officers, to ensure contractor compliance with the terms of their contracts. Should contractor personnel commit criminal offenses while accompanying the force in overseas areas, jurisdiction over these offenses must be clarified in close consultation with the command judge advocate. Host-nation law may apply, and its applicability to contractor employees will be dictated by the status afforded them under a SOFA or other agreement with the host nation, if one exists. Additionally, the criminal jurisdiction of the United States covers contractor employees overseas under the Military Extraterritorial Jurisdiction Act of 2000 (Title 18, Sections 3261-3267). The commander plays an important role in the implementation of this Act, as military law enforcement personnel belonging to the commander will be the agents responsible for any investigation, arrest, and international removal to the United States of contractor employees suspected of felony-level criminal offenses under U.S. law. Contractor employees remain subject to trial in U.S. district courts for war crimes under U.S. law (Title 18, Section 2441).

With changes such as this worked into existing joint publications, the Act can be incorporated into doctrine throughout the Department of Defense to define properly the role of the commander with respect to contractor employees. By alerting commanders to their role, to the interplay of international agreements, and to the need for consulting with their legal

141. See *supra* note 118 and accompanying text.

142. JOINT PUB 4-0, *supra* note 68, at V-8, currently reads, “Commanders have no penal authority . . . to punish any acts of misconduct.”

advisors, the Act will become a component part of overall doctrinal considerations for contractor support in overseas theaters.

To consider and incorporate fully the provisions of the Act into contract formation, administration, and law, it makes sense to examine the most pervasive and authoritative doctrinal or regulatory sources. To that end, this article next proposes amendments to the FAR or DFARS, as appropriate, where new or altered language is indicated in italics.

The following changes are proposed to the language of the FAR text. Part 23 should be renamed:

Part 23—Environment, Conservation, Occupational Safety, Drug-Free Workplace, *and Military Extraterritorial Jurisdiction.*

Section 23.000, Scope of Part, should be amended to read:

This part prescribes acquisition policies and procedures supporting the Government's program for ensuring a drug-free workplace and for protecting and improving the quality of the environment through pollution control, energy conservation, identification of hazardous material, and use of covered materials. *This part also prescribes policies and procedures for ensuring continued contractor performance in situations arising under the Military Extraterritorial Jurisdiction Act.*"

A new subpart 23.11 should be added, which reads:

Subpart 23.11-- Contractor Obligation to Perform Under the Military Extraterritorial Jurisdiction Act of 2000, Public Law 106-523.

23.1101 Purpose.

This subpart implements Public Law 106-523, the Military Extraterritorial Jurisdiction Act of 2000, ("the Act"); codified at 18 U.S.C. §§ 3261-3267.

23.1102 Applicability.

The requirements of this subpart apply to contracts or those parts of contracts that are to be performed outside of the United States by contractor personnel accompanying the Armed Forces.

23.1103 Definitions.

As used in this subpart, the terms “essential,” “necessary,” and “supporting,” as applied to contractor and subcontractor positions in support of the United States Armed Forces outside of the United States, have the following meanings:

(1) “Essential,” which will be applied to contractor and subcontractor employee positions providing mission-essential services. Essential services are so categorized because the Government may not have either military or civilian employees to perform these services immediately, and the effectiveness of systems or operations may be seriously impaired, and interruption is unacceptable when those services are not available immediately. Mission-essential services include services relating to: (i) equipment owned, leased, or operated in support of military missions and associated installation, garrison, and base support; (ii) command, control, communications and intelligence systems, including tactical and strategic information, intelligence collection and computer subsystems; (iii) selected operational weapons systems, including fielded systems, those being brought into the defense inventory or international customer inventory; (iv) operational logistics support of the systems described in (i-iii) above, medical services, non-combatant evacuation activities, and other services if determined vital for mission continuance by the component commander.¹⁴³

(2) “Necessary,” which will be applied to contractor and subcontractor employee positions providing mission-sustaining services involving technical skill or specialized training. Necessary services are so categorized because the Government is relying primarily on contractor support for this service and has not otherwise planned its manpower or force structure to provide this same service, except in emergent situations. Brief, temporary interruptions in service may be acceptable without causing a serious impairment to mission readiness.

143. See generally DODI 3020.37, *supra* note 122, at 8-9.

(3) "Supporting," which will be applied to contractor and subcontractor employee positions providing mission-sustaining services not involving technical skills or specialty training. Supporting services are so categorized because the Government is relying primarily on contractor support for this service and has not otherwise planned its manpower or force structure to provide this same service, except in emergent situations. Interruptions in the delivery of these unskilled services may be acceptable for longer temporary periods without causing a serious impairment to mission readiness.

23.1104 Requirements.

(a) The Act establishes U.S. criminal jurisdiction over contractor personnel accompanying the Armed Forces outside of the United States.

(b) Every new contract that provides for performance or partial performance by contractor or contractor personnel accompanying the Armed Forces outside of the United States shall identify positions designated as essential, necessary, or supporting in the contract statement of work.

(c) Contracting officers shall ensure that the statement of work provides reasonable assurances of continuation of essential, necessary, and supporting services in the event that any contractor employee or subcontractor employee is arrested and removed to the United States under the provisions of the Act. Such assurances may be in the form of a contingency plan, contingency personnel roster, or other assurances as the contracting officer may require.

(d) Contracting officers shall ensure that existing contracts being performed outside of the United States be modified to include the position designations described in subparagraph (b) above, contingency plans or other assurances described in subparagraph (c) above, and the clause at 52.223-15. The contracting officer shall negotiate a reasonable consideration for the modifications.

23.1105 Contract clause.

The contracting officer shall insert the clause at 52.223-15, Contractor Obligation to Perform Under the Military Extraterritorial Jurisdiction Act of 2000, Public Law 106-523, in all solicitations and contracts that provide for performance, in whole or in part, by contractor or subcontractor personnel accompanying the Armed Forces outside of the United States.

23.1106 Disallowance of costs, suspension of payments, and termination of the contract.¹⁴⁴

(a) After determining in writing that the contractor has failed to comply with the requirements of the clause at FAR 52.223-15, Contractor Obligation to Perform Under the Military Extraterritorial Jurisdiction Act of 2000, Public Law 106-523, the contracting officer may disallow any associated costs in accordance with FAR 42.8 or suspend contract payments in accordance with FAR 32.503-6.¹⁴⁵

(b) After determining in writing that the contractor has failed to comply with the requirements of the clause at FAR 52.223-15, Contractor Obligation to Perform Under the Military Extraterritorial Jurisdiction Act of 2000, Public Law 106-523, the contracting officer may terminate the contract for default in accordance with the termination clause of the contract.¹⁴⁶

(c) A determination under this section to disallow costs, suspend payments, or to terminate a contract for default may be waived by the agency head for a particular contract in accordance with agency procedures if such waiver is necessary to prevent a severe disruption of the agency operation to the detriment of the federal government or the general public.¹⁴⁷

The following FAR clause is also proposed to complement the new subpart 23.11 previously outlined:

144. See generally FAR, *supra* note 113, at 23.506 (discussing disallowance of costs, suspension of payments, and termination of a contract in the context of the Drug-Free Workplace statute).

145. *Id.* at 23.506(a).

146. *Id.* at 23.506(b).

147. *Id.* at 23.506(e).

52.223-15 Contractor Obligation to Perform Under the Military Extraterritorial Jurisdiction Act of 2000, Public Law 106-523; codified at 18 U.S.C. §§ 3261-3267.

(a) *Definitions: As used in this clause—*

“The Act” refers to the Military Extraterritorial Jurisdiction Act of 2000, Public Law 106-523.

“Essential” shall be applied to contractor and subcontractor employee positions providing mission-essential services. Essential services are so categorized because the Government may not have either military or civilian employees to perform these services immediately, and the effectiveness of systems or operations may be seriously impaired, and interruption is unacceptable when those services are not available immediately. Mission-essential services include services relating to: (i) equipment owned, leased, or operated in support of military missions and associated installation, garrison, and base support; (ii) command, control, communications and intelligence systems, including tactical and strategic information, intelligence collection and computer subsystems; (iii) selected operational weapons systems, including fielded systems, those being brought into the defense inventory or international customer inventory; (iv) operational logistics support of the systems described in (i-iii) above, medical services, non-combatant evacuation activities and other services if determined vital for mission continuance by the component commander.¹⁴⁸

“Necessary” shall be applied to contractor and subcontractor employee positions providing mission-sustaining services involving technical skill or specialized training. Necessary services are so categorized because the Government is relying primarily on contractor support for this service and has not otherwise planned its manpower or force structure to provide this same service, except in emergent situations. Brief, temporary interruptions in service may be acceptable without causing a serious impairment to mission readiness.

148. DODI 3020.37, *supra* note 122, at 8-9.

“Supporting” shall be applied to contractor and subcontractor employee positions providing mission-sustaining services not involving technical skills or specialty training. Supporting services are so categorized because the Government is relying primarily on contractor support for this service and has not otherwise planned its manpower or force structure to provide this same service, except in emergent situations. Interruptions in the receipt of these unskilled services may be acceptable for longer temporary periods without causing a serious impairment to mission readiness.

(b) If any contractor or subcontractor personnel become subject to the provisions of the Act during the performance of the contract, the contractor shall remain liable to perform the contract in accordance with its terms and conditions. The Government shall retain all of its rights and remedies under the existing terms of the contract, including, but not limited to, its rights under the termination clause and the disputes clause.

(c) Contracts which may be performed wholly or partially outside of the United States by contractor or subcontractor personnel accompanying the Armed Forces shall identify and designate each contractor and subcontractor employee position, as “essential,” “necessary,” or “supporting” per the definitions in subpart (a) above.

(d) Upon the arrest and pending removal to the United States of a contractor or subcontractor employee under the criminal jurisdiction of the Act, the contracting officer shall notify the contractor. The contractor shall identify immediately the designation of the employee position: essential, necessary, or supporting.

(1) If the contractor or subcontractor employee position has been designated under the contract as “essential,” then the contractor shall act immediately to ensure continued and uninterrupted provision of the essential service.

(2) If the contractor or subcontractor employee position has been designated as “necessary” under the contract, then the contractor shall act immediately to minimize the interruption of service and take action to mitigate the impact of any disruption on

the provision of the necessary service. In no case shall the service be disrupted for a period greater than seven days.

(3) If the contractor or subcontractor employee position has been designated as “supporting” under the contract, then the contractor shall act immediately to minimize the interruption of service and take action to mitigate the impact of any disruption on the provision of the necessary service. In no case shall the service be disrupted for a period greater than fourteen days.

(e) Any costs associated with replacing employees under this Subpart shall be borne by the contractor and shall not be allowable under the contract.

(f) In addition to other remedies available to the government, the contractor’s failure to comply with the requirements of paragraph (c), (d), or (e) of this clause may, pursuant to FAR 23.1106, render the contractor subject to disallowance of costs, suspension of contract payments, and/or termination of the contract, in whole or in part, for default.

In reviewing the FAR, there does not seem to be any particular place to insert language readily dealing with the contract implications of a new criminal law, such as the Act. Ultimately, it makes sense to choose Part 23, in part because it has a certain “cats and dogs” quality to it, but more importantly because it contains various other statutory compliance and implementation issues.¹⁴⁹ Because the Act does not fit into any existing scheme covered in the FAR, it follows that it belongs in its own subpart.

In deciding who should bear the costs of replacing contractor employees, the options are finite: the government pays; the contractor pays; or the government and the contractor agree on a means of splitting the costs. The decision to make the contractor pay is based on a review of other portions of the FAR, analogous situations, and practical considerations.

Relocation costs are normally allowable under a contract, provided the relocation is for at least twelve months;¹⁵⁰ however, the government’s willingness to pay relocation costs is premised on its receipt of a benefit—

149. FAR, *supra* note 113, at 23.2 (dealing with Energy Conservation), 23.5 (dealing with a Drug-Free Workplace), and 23.7 (dealing with environmental and energy issues).

150. *Id.* at 31.205-35.

the services of the person it is paying to relocate at the new location. The government's willingness to pay, based on one year's minimum service at the new locale, reflects the government's need to recoup the benefit of a year's services in order to justify the expense of the relocation. Therefore, if an employee "resigns within 12 months for reasons within the employee's control, the contractor shall refund or credit the relocation costs to the Government."¹⁵¹ By analogy, if a contractor resignation within a year of a government-funded relocation results in a refund to the government, then a contractor employee decision to commit a crime while accompanying the force abroad should also result in no costs to the government. While "relocation" is not the same as a criminal removal action or forced repatriation, if the government will not allow the expense in the event of a resignation within a year after a government-funded relocation in non-criminal circumstances, then it seems counterintuitive for the government to pay the costs associated with a criminal removal action. Where the FAR specifically addresses costs relating to legal proceedings, there is language suggesting that costs relating to criminal proceedings are typically not allowable, at least not in situations resulting in a conviction.¹⁵²

Considering these provisions together, the logical conclusion for the government is to disallow the expenses incurred by a contractor if a contractor employee is removed or repatriated under the Act.¹⁵³ This rationale is reflected in the proposed FAR language above.

In distinguishing the three categories of contractor employee positions, careful consideration should be given to the operational needs of the commander who is relying on contractor support to accomplish his mission. The terms governing the replacement of contractor personnel reflect the operational necessity of their various functions and skill levels. In the event a crime is committed, however infrequent or unlikely, a predictable and responsive replacement scheme must exist and the mission must come first.

If a commander has only a single contractor avionics technician, whose services are absolutely necessary to keep the air component in the

151. *Id.* at 31.205-35(d).

152. The FAR provides, "Costs incurred in connection with any proceeding brought by a Federal, State, local, or foreign government for violation of, or failure to comply with, law or regulation by a contractor (including its agents or employees) . . . are unallowable if the result is—(1) In a criminal proceeding, a conviction. . . ." *Id.* at 31.205-47(b).

153. *But see id.* at 52.249-14(a) (which does include in its definition of excusable delays "acts of the Government in either its sovereign or contractual capacity").

fight, that contractor position must be classified as “essential.” Accordingly, the contracting officer must be satisfied with the depth of the contractor’s capability before he awards the contract to avoid having the absence of a single employee unnecessarily jeopardize a military mission. For “essential” positions, the commander simply cannot do without that capability for any length of time, and he should not have to do so. In recognition of that imperative, the proposed language requires advance planning by the contractor to ensure those essential services are delivered without interruption. Such high assurances will naturally have a price tag attached.

If an essential contractor employee does commit a crime covered by the Act, and there is no likelihood of replacement when that capability is needed, then it is increasingly likely that the commander will feel pressure to delay pursuing any criminal action against that contractor employee. For a “supporting” contractor employee, however, such as a cook or truck driver, the commander is unlikely to delay any investigation or arrest. Although differing timelines for replacing different types of contractor personnel are offered to meet the commander’s needs, the proposed guidance also allows for waiver of the timelines in the government’s discretion.

It is vitally important to include in the contract terms the point in time when the contracting officer must give the contractor notice that the government is pursuing criminal action against a contractor employee under the Act. In deciding on the circumstances of “arrest and pending removal” as the point of notification, several issues must be considered. First and foremost is the impracticality of giving notice to the contractor any earlier than when the arrest is made. In the event of a violent crime calling for immediate removal to the United States, this entire process is likely to be extremely abbreviated. But a known point for contractor notification is essential, and it makes sense to choose a point linked to arrest so as not to jeopardize the investigative process. Until that point, the criminal investigative process often relies on secrecy to collect and analyze evidence. Then a decision must be made whether to arrest at all, as the government works to perfect whatever case it has. Until this time, depending on the secrecy of the investigation, the contracting officer is unlikely to be privy to the details.

The prerogatives of the criminal investigative process and the commander’s exercise of discretion combine to make contractor notification in advance of arrest impractical. In addition, the privacy rights of the individual under investigation demand prudence by the government in notify-

ing the contractor. Arrest is deliberately coupled with the concept of “pending removal,” because the Act calls for trial in the United States. It is unlikely that a contractor employee will be arrested and then released to continue performance under the contract. The draft language above reflects these considerations.

This article proposes a methodology for incorporating language addressing the potentially significant impact of the Act into future contracts for contractor support of military operations. It also recognizes the need to make these same provisions part of existing contracts, which will require re-negotiation and, probably, consideration.¹⁵⁴ This will be time and money well spent should a scenario arise involving a contractor employee prosecuted under the Act, because commanders require and deserve predictable delivery of contractor services to accomplish their missions.

If the United States relies on contractor services with greater regularity in the battlefield of the future, it must eliminate variables and make the contract vehicle as comprehensive and circumspect as possible. By writing the Act into Department of Defense instructions, joint doctrine, and contract law regulations, future contracts will contain the provisions necessary to ensure the uninterrupted delivery of contractor services in support of forces deployed abroad.

V. Conclusion

With the enactment of the Military Extraterritorial Jurisdiction Act of 2000, Congress has given a far-reaching, new criminal law affecting civilians accompanying the armed forces overseas. Filling a decades-old void, the new Act stands ready to extend the criminal jurisdiction of the United States to persons and places that have been deemed beyond the reach of American justice since the *Reid* line of cases.

From an international law perspective, the Act fits neatly within the existing scheme of criminal jurisdiction found in status of forces agreements. The status of a civilian accompanying the force remains unchanged in the critical Geneva Convention areas of prisoner of war status and status as a civilian generally. Under the Act, there are potential areas, particularly regarding arrest and delivery, where the United States has the ability to use

154. *Id.* at 52.243-2.

greater discretion in the exercise of its jurisdictional authority and law enforcement powers outside of the United States. Military law enforcement agencies will now have a greater power of arrest over American civilians overseas; by extension, so will overseas commanders. It remains to be seen whether this authority will create situations that prove discordant with existing international agreements, and whether it will come to be perceived as a threat to host-nation sovereignty. Ultimately, the contractor employee accompanying the force, like all other civilians affected by the Act, can expect a comprehensive criminal justice scheme to cover virtually any criminal actions under host nation or United States law.

The notion of contractor discipline, however, remains an oxymoron. While the essence of a contract relationship does not necessarily lend itself to matters of punishment *per se*, it does lend itself to corrections in performance. As the Act enters into force, this is a good time to reassess the overall issue of contractor discipline, particularly in a deployed setting overseas. The Act provides the criminal jurisdiction that has for so long left gaps in the overall disciplinary scheme. Military law enforcement assets will be the means to the exercise of that jurisdiction, and the overseas commander owns those law enforcement assets. Whether intended or not, the contracting officer is no longer the sole arbiter of contractor conduct in the overseas environment.

To the extent that contractors are becoming an even greater presence on the battlefield, and to the extent that they are taking over more and more traditional soldier functions, the issues of overall command and control, force discipline, and contract performance raised by a new extension of U.S. criminal jurisdiction abroad require a fresh look. While contracting officers or their representatives will necessarily remain the most important conduit for corrections in performance-related matters, the greater potential role of the commander and command discretion cannot be ignored, particularly if criminal conduct is alleged. It is time to institute—as a matter of doctrine, regulation, and practice—those steps necessary to tighten and clarify the lines of command and control of contractors accompanying the force. It is also time to incorporate this significant Act into standard contract practices. The aspirations of various Department of Defense policies, aimed at ensuring the continuity of essential services, should be elevated to a contract-based reality to the extent possible. The Act gives the impetus and opportunity to do so now.

If contractor employees are destined to support the modern battlefield or contingency environment, then the prerogatives of command and the

imperatives of mission accomplishment must find their way into the contracting process. The role of the contracting officer in this environment must include the clear realization of commanders' intent, including crafting contracts with sufficient foresight and flexibility to meet that intent. Failing this, the substitution and use of contract support for traditional soldier functions will become a false economy that ultimately may degrade U.S. ability to prosecute wars and enforce peace.

After Machiavelli wrote the foreboding words about the evils of war and the men who make their living from warfare, we now casually live in a world where warfare in some guise is our national business, with a civilian industry whose purpose is to assist us in that business. As for addressing the individual's propensity to commit bad acts, we now have the Act to prevent potential wrongdoers from escaping American justice.

If contractor employees are going to be part of the engine of war, then our contracts and practices must reflect the need for unity of command and properly account for the commander's role in the discipline of troops and contractor employees alike. With the commander's considerable newfound discretion under the Act in investigating and prosecuting overseas offenses by contractor employees, now is the time to readdress the commander's role in doctrine. The Military Extraterritorial Jurisdiction Act of 2000 is an essential part of that discussion. Changes must be made so the Act becomes an integral part of United States contract practice. To that end, we can take counsel in Machiavelli's words again: "Whosoever desires constant success must change his conduct with the times."¹⁵⁵

155. NICCOLO MACHIAVELLI, DISCORSI IX 3 (1531), in ROBERT DEBS HEINL, *DICTIONARY OF MILITARY AND NAVAL QUOTATIONS* 314 (1966).