

# MURDER OR AUTHORIZED COMBAT ACTION: WHO DECIDES? WHY CIVILIAN COURT IS THE IMPROPER FORUM TO PROSECUTE FORMER MILITARY SERVICE MEMBERS ACCUSED OF COMBAT CRIMES

## I. INTRODUCTION

“You take a 22-year-old American, you shoot at him all day long, you deprive him of sleep, you make him see his buddies being killed, he has their blood on his boots and blouse, and when you don’t see perfection in his decisions you court-martial him? It’s absurd.”<sup>1</sup> This absurdity occurred in federal district court in Riverside, California, in August 2008, when former Marine Sergeant Jose Nazario (Sgt. Nazario) faced a civilian jury on charges of voluntary manslaughter, resulting from his combat actions during Operation Phantom Fury in Fallujah, Iraq.<sup>2</sup>

In early November 2004, Operation Phantom Fury<sup>3</sup> commenced in Fallujah, a stronghold of Al Qaeda in Iraq, as a mission to clear the city of insurgents.<sup>4</sup> Various units of the United States Marine Corps spearheaded this brutal operation, including Sgt. Nazario’s unit, the Third Battalion, First Marine Division, 3/1.<sup>5</sup> These deadly battles constituted some of the heaviest fighting in Iraq, often causing soldiers to resort to hand-to-hand

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1. Thomas Watkins, *After 3 Years Fallujah Incident Raises Questions*, USATODAY, Sept. 28, 2007, [http://www.usatoday.com/news/military/2007-09-29-fallujah\\_N.htm](http://www.usatoday.com/news/military/2007-09-29-fallujah_N.htm). This is the quote of Paul Hackett, a Marine Reservist who experienced first-hand the destruction of war in Fallujah. *Id.* Hackett served as the attorney for Marine Sgt. Ryan Weemer who was acquitted by a court-martial on April 9, 2009, on charges of murdering an unarmed Iraqi detainee and dereliction of duty during combat in Fallujah. Associated Press, *Marine Acquitted of Murder in Iraq Slaying*, CBS2, (Apr. 9, 2009), <http://cbs2.com/local/Marines.acquitted.murder.2.980899.html>.

2. Steve Liewer, *Civilians to Try Iraq War Case Against Ex-Marine*, SAN DIEGO UNION-TRIB., Aug. 20, 2008, at A1.

3. *Id.*

4. Barbara Starr, *Fallujah Rebuilds, Adjusts to Peace*, CNN, Feb. 21, 2008, <http://www.cnn.com/2008/WORLD/meast/02/21/iraq.falluja/index.html>.

5. Defendant’s Notice of Motion to Dismiss the Indictment for Failure to Invoke the Court’s Jurisdiction or to State an Offense at 3, *United States v. Nazario*, No. 07-127 (C.D. Cal. Sept. 4, 2007) [hereinafter Motion to Dismiss].

combat.<sup>6</sup> Of more than twenty Navy Cross medals awarded for combat heroism in Iraq and Afghanistan, at least eight were earned in Fallujah.<sup>7</sup> Sgt. Nazario himself was decorated with valor for his actions during one particular battle, known in Marine Corps' lore as "Hell House."<sup>8</sup>

After Sgt. Nazario was honorably discharged from the Marine Corps, he began working as a police officer in Riverside, California. Allegations soon arose that, during his combat action, he unlawfully killed two Iraqi men and ordered the execution of two additional Iraqi men.<sup>9</sup> These charges were not tried in military court because Sgt. Nazario was no longer a member of the Armed Forces.<sup>10</sup> The Uniform Code of Military Justice (UCMJ) and the Manual for Courts-Martial (MCM) are two of the foundational authorities for the military justice system.<sup>11</sup> Jurisdiction under the UCMJ is currently limited to active-duty, reserve, and retired members of the armed forces; civilians serving with the military during a declared war or contingency operation; prisoners of war and lawful enemy combatants; and persons subjected to the UCMJ because of treaty or international law.<sup>12</sup> Thus, the government chose to prosecute Sgt. Nazario in civilian court under the Military Extraterritorial Jurisdiction Act (MEJA) of 2000.<sup>13</sup> Congress enacted the MEJA to extend jurisdiction over civilians who committed crimes while accompanying or working for the military overseas.<sup>14</sup> Although the technical language of the Act extends jurisdiction over former service members who are not prosecuted by court-martial before they leave the military, sparse congressional commentary or debate exists on this provision.<sup>15</sup> In fact, one of the MEJA's primary sponsors,

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6. Watkins, *supra* note 1.

7. *Id.* The Navy Cross is the second highest award a Sailor or Marine can earn, second only to the Medal of Honor. *Id.*

8. Motion to Dismiss, *supra* note 5, at 3.

9. Liewer, *supra* note 2; Catherine Elsworth, *U.S. Marine Acquitted of War Crimes in Ground-Breaking Trial*, TELEGRAPH, Aug. 29, 2008, <http://www.telegraph.co.uk/news/worldnews/middleeast/iraq/2641186/US-marine-acquitted-of-war-crimes-in-ground-breaking-trial.html>.

10. *Id.*

11. James B. Roan & Cynthia Buxton, *The American Military Justice System in the New Millennium*, 52 A.F. L. REV. 185, 186-87 (2002). Other foundational authorities include the presidential executive order that includes the rules for trial by court-martial, and the body of case law developed from the courts that review military justice cases. *Id.*

12. Uniform Code of Military Justice, 10 U.S.C. § 802(a)(1)-(13) (2006) (amended 2009). *See* discussion *infra* Part II.B.

13. Liewer, *supra* note 2. In 2004, Congress amended the MEJA to extend jurisdiction over a broader range of civilian employees. *See* discussion *infra* Part II.D.

14. 18 U.S.C. §§ 3261-3267 (2006).

15. *See infra* notes 78-81 and accompanying text. Rear Admiral Don Guter, the chief Navy and Marine Corps lawyer from 2000-2002 and now dean of the Duquesne University law school stated, "Commanders overseas were saying they just didn't have a way to [prosecute] civilians

Republican Senator Jeff Sessions from Alabama, told the Associated Press in the wake of Sgt. Nazario's trial that prosecuting former military personnel was "not the motivation" for passing the law.<sup>16</sup> Nevertheless, Sgt. Jose Nazario became the first former service member prosecuted for unlawful combat action under the MEJA.<sup>17</sup> Although the civilian jury acquitted Sgt. Nazario, issues of constitutional fairness surround his prosecution.

This Comment urges Congress to amend both the UCMJ and the MEJA to extend court-martial jurisdiction over prior-military defendants accused of combat crimes. Such legislative action would not only safeguard a defendant's Sixth Amendment right to an impartial jury of his peers, it would also further social justice. When a civilian with no military experience is forced to judge the combat actions of a service member, the civilian will likely either acquit the defendant because he feels inadequate to judge the actions of a combat veteran, or he may charge the accused because he has no concept of what wartime decisions entail. Either way, a perversion of justice ensues because the service member's verdict does not reflect his true combat actions.

In advocating such legislative action, Part II of this Comment will first describe the MEJA and explain the intent behind the Act. It will highlight the political process behind the creation and enactment of the MEJA of 2000, including developments that caused the Act to be amended in 2004. Of great importance is the express Congressional commentary regarding who is subject to the MEJA and the notable absence of dialogue regarding the prosecution of former military members under the Act. Part III will then discuss existing MEJA jurisprudence and all cases involving prosecution of non-combat crimes. Part IV will analyze *United States v. Nazario*, the only instance in which an alleged war crime was prosecuted under the MEJA. This section will describe the constitutional deficiencies and procedural obstacles of Sgt. Nazario's trial. Part V will then argue that federal district court is the improper forum in which to prosecute a former soldier for combat crimes because such jurisdiction deprives a defendant of his Sixth Amendment constitutional right to a jury of his peers. This section contrasts the protections offered under military law to the same defendant, and proposes that combat crimes should be prosecuted by military court-martial. Part VI concludes by urging Congress to modify the UCMJ and the MEJA so that former soldiers accused of combat crimes are

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who came over with military families. I don't ever remember it being contemplated that [the MEJA] would cover ex-military people." Liewer, *supra* note 2.

16. Liewer, *supra* note 2.

17. Elsworth, *supra* note 9.

prosecuted by court-martial, rather than by a civilian jury.

## II. CREATION OF THE MILITARY EXTRATERRITORIAL JURISDICTION ACT

Before the promulgation of the MEJA, heinous crimes like murder, child abuse, and rape often escaped prosecution when committed by an American civilian on an overseas military base.<sup>18</sup> Prior to the MEJA, under Title 18 of the United States Code, U.S. extraterritorial jurisdiction over civilians extended to crimes committed within the “special maritime and territorial jurisdiction of the United States.”<sup>19</sup> Such jurisdiction included the high seas and waters within the admiralty of the United States, United States flagged vessels, United States aircraft, and areas not within the jurisdiction of any other nation. However, it did not encompass crimes committed by U.S. civilian personnel in foreign countries.<sup>20</sup> Since America’s federal criminal jurisdiction is typically restricted to crimes committed within its territorial borders, the prosecution of crimes committed elsewhere was left to the host nation’s discretion.<sup>21</sup> However, immunity granted to civilian contractors under Status of Forces agreements and other treaties often stripped host countries of their jurisdiction to prosecute such crimes.<sup>22</sup> Additionally, a host nation’s unwillingness or

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18. Kathleen A. Kerrigan, *The Military Extraterritorial Jurisdiction Act 1, 3-4* (2004) (Master of Military Art and Science thesis, U.S. Army Command and General Staff College), available at <http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA429030&Location=U2&doc=GetTRDoc.pdf>.

19. *See id.* at 3; *see also* 18 U.S.C. § 7 (2006).

20. Kerrigan, *supra* note 18, at 4.

21. Glenn R. Schmitt, *Amending the Military Extraterritorial Jurisdiction Act of 2000: Rushing to Close an Unforeseen Loophole*, 2005-JUNE ARMY LAW. 41, 41 [hereinafter Schmitt, *Amending MEJA*], available at [http://www.loc.gov/frd/Military\\_Law/pdf/06-2005.pdf](http://www.loc.gov/frd/Military_Law/pdf/06-2005.pdf).

22. Don E. Stigall, *An Unnecessary Convenience: The Assertion of the Uniform Code of Military Justice over Civilians and the Implications of International Human Rights Law*, 17 CARDOZO J. INT’L & COMP. L. 59, 69 (2009). For instance, in 2000, investigations by the U.S. Army and Bosnian police confirmed reports that private contractors employed by Virginia-based DynCorp., who worked at a U.S. base near Tuzla, Bosnia, were purchasing women from local brothels. Robert Capps, *Crime Without Punishment*, SALON, June 27, 2000, <http://archive.salon.com/news/feature/2002/06/27/military/>. When the Army Criminal Investigative Command (CIC) began the investigation, the Army’s Office of the Staff Judge Advocate (SJA) for Bosnia-Herzegovina said that it did not have jurisdiction to prosecute civilian contractors, so it turned the investigation over to the Zivinice, Bosnia police. *Id.* Initially, the SJA believed that the contractors were also immune from Bosnian prosecution because of the Dayton Peace Accords, which govern the relationship between Bosnia-Herzegovina and the international stabilization forces in the region. *Id.* The issue was clarified when the CID found an “Interpretation of the Agreement Between NATO and the Republic of Bosnia-Herzegovina,” which allowed for the Bosnian prosecution of U.S. contractors. *Id.* However, the Bosnian police never developed such an understanding of the Bosnian agreement with NATO, and did not believe that it had the authority to arrest the DynCorp. employees. *Id.* Before any prosecution commenced, the Army and DynCorp. pulled the accused men out of the country, effectively

inability to prosecute crimes committed by American citizens resulted in a *de facto* immunity for perpetrators.<sup>23</sup>

### A. THE MILITARY JUSTICE SYSTEM

Service members of all branches of the U.S. military are subject to criminal jurisdiction under the military justice system, which was designed “to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States.”<sup>24</sup> The American military justice system derived from England and predates the Articles of Confederation and the United States Constitution.<sup>25</sup> In 1775, the Continental Congress passed the Articles of War, based heavily on British law, which authorized George Washington to convene courts-martial with minimum process.<sup>26</sup> Congress revised the Articles of War in 1806, 1874, and 1916, but the substantive laws and procedural rules of military justice remained relatively unchanged until after World War II.<sup>27</sup> During World War II, the military conducted almost two million courts-

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ending all investigations and extinguishing any criminal charges against the men. *Id.*; see also K. Elizabeth Waits, *Avoiding the “Legal Bermuda Triangle:” The Military Extraterritorial Jurisdiction Act’s Unprecedented Expansion of U.S. Criminal Jurisdiction over Foreign Nationals*, 23 ARIZ. J. INT’L & COMP. LAW 493, 494 (2006).

23. OFFICE OF THE INSPECTOR GENERAL, DEPARTMENT OF DEFENSE, EVALUATION OF MILITARY CRIMINAL INVESTIGATIVE ORGANIZATIONS’ INVESTIGATIVE EFFECTIVENESS REGARDING U.S. FORCES CIVILIANS STATIONED OVERSEAS, No. 99500009I, 7-10 (Sept. 7, 1999) [hereinafter OIG REPORT], available at <http://www.dodig.mil/inspections/ipo/reports/9950009I.pdf>.

Each year, numerous incidents of rape, sexual abuse, aggravated assault, arson, robbery, drug distribution, and a variety of fraud and property crimes committed by American civilians overseas go unpunished due to the host nation’s waiver of jurisdiction over these crimes. Surprisingly, most host nations do not wish to assert their jurisdiction to try American civilians in their countries.

Waits, *supra* note 22, at 511 (citing OIG REPORT, *supra*). Un-prosecuted crimes committed by military dependents and civilians are non-combat related and include crimes such as the rape of a 15-year-old American dependent by another military dependent on a military base in Japan; illegal drug-dealing by a military wife in Japan; and a string of thirty-eight car thefts committed by a teenaged-military dependent in Japan. Richard Roesler, *Civilians in Military World Often Elude Prosecution*, STARS & STRIPES, Apr. 10, 2000.

24. MANUAL FOR COURTS-MARTIAL, pt. I, at I-1 (2008) [hereinafter MCM], available at <http://www.au.af.mil/au/awc/awcgate/law/mcm.pdf>.

25. Christopher W. Behan, *Don’t Tug on Superman’s Cape: In Defense of Convening Authority Selection and Appointment of Court-Martial Panel Members*, 176 MIL. L. REV. 190, 191 (2003).

26. See Jonathan Lurie, MILITARY JUSTICE IN AMERICA: THE U.S. COURT OF APPEALS FOR THE ARMED FORCES 1775-1980, at 3 (2001); William Winthrop, MILITARY LAW AND PRECEDENTS 459-65 (1920 ed.); William J. Nelson, *A Right Way and a Wrong Way: Remediating Excessive Post-Trial Delay in Light of Tardif, Moreno, and Toohey*, 198 MIL. L. REV. 1, 4 (2008).

27. Behan, *supra* note 25, at 215.

martial resulting in over one hundred executions and the incarceration of over forty-five thousand service members.<sup>28</sup> Concerns about sentence disparity, harsh treatment, and unlawful command influence produced a strong reform movement that led to the creation of the UCMJ.<sup>29</sup>

In 1950, rather than amending the Articles of War, Congress started anew and enacted the UCMJ to establish one system of justice for all five branches of the armed forces.<sup>30</sup> The UCMJ developed a more comprehensive system of military justice that added significant procedural protections for military members during all stages of the criminal justice process.<sup>31</sup> The UCMJ punishes both common law crimes and crimes unique to the military, granting jurisdiction over a military service member who commits a crime within the United States by either a military court-martial applying the UCMJ, or by a civilian court applying the applicable federal or state law.<sup>32</sup>

The UCMJ ensures that the military defendant receives the same level of constitutional protection as a civilian defendant.<sup>33</sup> In a military court-martial, the trial is adversarial and presided over by a military judge who instructs the jury (called a “panel”) and rules on the admission of evidence; counsel (military or civilian) represents the accused; and the defendant is innocent until proven guilty beyond a reasonable doubt.<sup>34</sup> The Military Rules of Evidence closely mirror the Federal Rules of Evidence, on which they were based.<sup>35</sup> However, some distinctions between military and federal law exist. For example, military commanders, who need not be judicial officers, may issue a search authorization (the military equivalent of

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28. Behan, *supra* note 25, at 220.

29. *Id.*

30. Roan & Buxton, *supra* note 11, at 187-89.

31. Nelson, *supra* note 26, at 6. These protections included independent judicial review of courts-martial, and the creation of the civilian Court of Military Appeals. *Id.*

32. Glenn R. Schmitt, *Closing the Gap in Criminal Jurisdiction over Civilians Accompanying the Armed Forces Abroad—A First Person Account of the Creation of the Military Extraterritorial Jurisdiction Act of 2000*, 51 CATH. U. L. REV. 55, 57 (2001) [hereinafter Schmitt, *Closing the Gap*]. Military offenses with no civilian equivalent include desertion, absence without leave, disrespect toward a superior commissioned officer, and failure to obey a lawful order. 10 U.S.C. §§ 885, 886, 889, 892 (2006). When overlapping jurisdiction causes a service member to be subject to both military and civilian jurisdiction (for example, if a service member committed robbery in a civilian neighborhood [as opposed to on a military base] in the United States), military and civilian authorities agree as to which judicial system will take jurisdiction over the crime. *See* Schmitt, *supra*, at 57.

33. *See* Major General Jack L. Rives & Major Steven J. Ehlenbeck, *Civilian Versus Military Justice in the United States: A Comparative Analysis*, 52 A.F. L. REV. 213, 232 (2002).

34. *See generally id.*

35. *See* Fredric I. Lederer, *The Military Rules of Evidence: Origins and Judicial Implementation*, 130 MIL. L. REV. 5, 10 (1990).

a warrant) without violating the Fourth Amendment.<sup>36</sup> Additionally, instead of a Fifth Amendment right to a grand jury, defendants subject to the UCMJ are entitled to an adversarial hearing before a military officer who performs the equivalent functions of a grand jury (called an “Article 32” hearing).<sup>37</sup> Finally, jury selection and composition differs between federal and military courts.<sup>38</sup>

### B. COURT-MARTIAL JURISDICTION

When Congress first enacted the UCMJ, former military members no longer serving in the armed forces could be prosecuted by court-martial if, while a member of the military, a crime was committed and a federal court could not exercise jurisdiction over the crime.<sup>39</sup> However, in *Toth v. Quarles*, the Supreme Court restricted Congress’s ability to authorize the court-martial of ex-military members by holding that the natural meaning of Article I of the United States Constitution “would seem to restrict court-martial jurisdiction to persons who are actually members or part of the armed forces.”<sup>40</sup>

In *Toth*, the defendant, Robert Toth, served in Korea as an enlisted member of the United States Air Force.<sup>41</sup> Five months after Toth was honorably discharged from the Air Force and while residing in the United States, Air Force police arrested Toth, charged him with the murder of a

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36. See *United States v. Stringer*, 37 M.J. 120, 126 (C.M.A. 1993); *United States v. Lopez*, 35 M.J. 35, 45 (C.M.A. 1992).

37. See *United States v. Curtis*, 44 M.J. 106, 130 (C.M.A. 1996); Theodore Essex & Leslea Pickle, *A Reply to the Cox Commission on the 50<sup>th</sup> Anniversary of the Uniform Code of Military Justice*, 52 A.F. L. REV. 233, 250-51 (2002). Thad Coakley, a Major in the Marine Reserves and a former Camp Pendleton prosecutor, said Sgt. Nazario’s case was more likely to result in a trial in federal court because civilian prosecutors present evidence to a secret grand jury with no rebuttal from the defense, whereas under the military justice system, a defendant can challenge evidence at his Article 32 hearing to determine whether there will be a trial. *Watkins*, *supra* note 1.

38. See discussion *infra* Part IV.

39. Schmitt, *Closing the Gap*, *supra* note 32, at 58-59 (citing 50 U.S.C. § 553 (repealed 1956)). When the UCMJ was first enacted, Article 3(a) stated:

Subject to the provisions of article 43, any person charged with having committed, while in a status in which he was subject to this code, an offense against this code, punishable by confinement of five years or more and for which the person cannot be tried in the courts of the United States or any State or Territory thereof or of the District of Columbia, shall not be relieved from amenability to trial by courts-martial by reason of the termination of said status.

50 U.S.C. § 553 (repealed 1956).

40. *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 15 (1955). The Court referred to Article 1, § 8 of the Constitution which gives Congress the power “To make Rules for the Government and Regulation of the land and naval Forces” as supplemented by the “necessary and proper” clause. *Id.* at 14.

41. *Id.* at 13.

Korean national, and flew him to Korea to face a court-martial.<sup>42</sup> Toth's extradition was pursuant to a 1950 Act of Congress that extended court-martial jurisdiction over prior military individuals who committed a crime while on active duty, if the crime was punishable by five years imprisonment and could not be prosecuted in state or federal court.<sup>43</sup> The defendant's sister filed a habeas corpus petition on Toth's behalf, challenging the government's authority to prosecute him by court-martial.<sup>44</sup> The Court held that Toth was not subject to prosecution by court-martial because he was a civilian and "any expansion of court-martial jurisdiction like that in the 1950 Act necessarily encroaches on the jurisdiction of federal courts set up under Article III of the Constitution where persons on trial are surrounded with more constitutional safeguards than in military tribunals."<sup>45</sup> The Court sought to narrowly restrict the circumstances under which the UCMJ could be applied because of the "dangers lurking in military trials which were sought to be avoided by the Bill of Rights and Article III of our Constitution."<sup>46</sup> After the Court's decision, the military released Toth, and he escaped any further prosecution for the charged crime.<sup>47</sup>

After *Toth*, the Supreme Court consistently refused to extend the jurisdiction of military commanders to civilian personnel, leaving a jurisdictional gap for crimes committed in foreign lands by former soldiers or U.S. civilians who accompanied the military overseas.<sup>48</sup> When the UCMJ was enacted in 1950, it expressly authorized the prosecution of civilians by court-martial for a violation of the UCMJ under three provisions: (1) if the person was serving with or accompanying the Armed Forces in the field in time of war; (2) if the person was serving with, employed by, or accompanying the Armed Forces outside the United States; or (3) if the person was within an area leased by or reserved or acquired for the use of the United States.<sup>49</sup> However, the Supreme Court narrowly

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

43. *Id.*

44. *Id.* at 25.

45. *Id.* at 15. The Court held that extending Article I military jurisdiction to civilian ex-soldiers would violate the jurisdiction of Article III federal courts. *Id.*

46. *Id.* at 22.

47. *Id.* at 23; Kerrigan, *supra* note 18, at 10-11.

48. See *Toth*, 350 U.S. at 15 (1950); Reid v. Covert, 354 U.S. 1 (1956).

49. Schmitt, *Closing the Gap*, *supra* note 32, at 63 (citing 10 U.S.C. § 802(a)(10)-(12) (1994) (amended 1996, 2006)). The original Article 2(a) of the UCMJ stated:

(a) The following persons are subject to [the UCMJ] . . .

(10) In time of war, persons serving with or accompanying an armed force in the field.

(11) Subject to any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, persons serving with, employed by, or accompanying the armed forces outside the United States and outside the Commonwealth

interpreted the applicability of these provisions, effectively limiting court-martial jurisdiction over civilians to declared instances of war.<sup>50</sup>

*Reid v. Covert* exemplifies the limitations prohibiting the court-martial of American civilians. *Covert* involved two cases of courts-martial of military spouses who resided overseas with their husbands.<sup>51</sup> The Court held that the UCMJ could not be constitutionally applied to prosecute civilian dependents for capital crimes committed in times of peace.<sup>52</sup> In the first case, Mrs. Clarice Covert, a civilian, killed her husband, a sergeant in the United States Air Force, at an airbase in England on which she resided with him.<sup>53</sup> In the second case, the defendant, Mrs. Dorothy Smith, killed her husband, an Army officer, at a post in Japan where she lived with him.<sup>54</sup> Both women were tried and convicted by a military court-martial for murder.<sup>55</sup> In rejecting the military's use of the UCMJ to try the civilian

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of Puerto Rico, Guam, and the Virgin Islands.

(12) Subject to any treaty or agreement . . . or to any accepted rule or international law, persons within an area leased by or otherwise reserved or acquired for the use of the United States which is under the control of the Secretary concerned and which is outside the United States . . .

10 U.S.C. § 802(a)(10)-(12) (1994) (amended 1996, 2006).

50. See *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955); *Reid v. Covert*, 354 U.S. 1 (1956); *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234 (1960). In the 2007 Defense Bill, Congress amended Article 2a of the UCMJ by deleting "war" and inserting "declared war or a contingency operation" to allow UCMJ jurisdiction over civilians accompanying the military in contingency operations in which a formal declaration of war was not announced. See John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364, 120 Stat. 2083, 2216 (2006); Stigall, *supra* note 22, at 68. Although the United States has used military force abroad more than 100 times, Congress has only officially declared war five times: the War of 1812, the Mexican-American War, the Spanish-American War, World War I, and World War II. John Yoo, *War-Making Under Scrutiny*, MONTEREY COUNTY HERALD (CA), Dec. 21, 2005, available at 2005 WLNR 20605398.

51. *Covert*, 354 U.S. at 5.

52. *Id.* at 64.

53. *Id.* at 3.

54. *Id.* at 4.

55. *Id.* After the court-martial found Mrs. Covert guilty, the Air Force Board of Review affirmed the judgment. *Id.* However, the Court of Military Appeals reversed the verdict because of prejudicial errors concerning the defense of insanity. *Id.* While Mrs. Covert was being held in the United States pending a proposed retrial by court-martial, her counsel petitioned the District Court for a writ of habeas corpus to release her on the ground that the Constitution forbade her to be tried by military authorities. *Id.* The District Court ruled that Mrs. Covert could not be tried by military authorities and ordered her released from custody. *Id.* The government directly appealed to the Supreme Court. *Id.* In the second case, after a court-martial found Mrs. Smith guilty of murder, the Army Board of Review and the Court of Military Appeals approved the judgment. *Id.* Mrs. Smith's father then filed a petition for habeas corpus in a District Court for West Virginia, alleging that the court-martial lacked jurisdiction because a trial under the UCMJ of a civilian dependent accompanying the military overseas was unconstitutional. *Id.* at 5. The District Court refused to issue the writ, and while an appeal was pending in the Court of Appeals for the Fourth Circuit, the Supreme Court granted certiorari at the government's request. *Id.* The two cases were

defendants, the Court held, “[a]t the beginning we reject the idea that when the United States acts against citizens abroad it can do so free of the Bill of Rights.”<sup>56</sup> The Court ruled that trial by court-martial of civilians violated the Bill of Rights because it deprived a defendant of the Fifth Amendment fundamental right to a grand jury indictment and the Sixth Amendment right to a jury trial. Court-martial proceedings did not offer a defendant such protections.<sup>57</sup> The Court held, “[w]hen the Government reaches out to punish a citizen who is abroad, the shield which is the Bill of Rights and other parts of the Constitution provided to protect his life and liberty should not be stripped away just because he happens to be in another land.”<sup>58</sup> The Court ordered both women released, and neither faced further prosecution for their crimes.<sup>59</sup>

The Supreme Court continued to erode the military’s authority to prosecute civilians under the UCMJ by applying *Covert* to later forbid the court-martial of civilians in non-capital cases.<sup>60</sup> The Court’s restriction on the use of the UCMJ to prosecute civilians applied to both military dependents and to civilian workers accompanying the military.<sup>61</sup> The

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consolidated and a majority of the Court held that a military trial of the defendants was constitutional. *Id.* The Court then granted a petition for rehearing in which it reversed its previous decision. *Id.*

56. Reid v. Covert, 354 U.S. 1, 5 (1956).

57. *Id.* at 21-22. The Fifth Amendment’s Grand Jury provision is not applicable in the military justice system. See United States v. Curtis, 44 M.J. 106, 130 (C.M.A. 1996) (“[A] court-martial has never been subject to jury-trial demands of Article III of the Constitution.”); see also United States v. Gray, 37 M.J. 751, 755 (A.C.M.R. 1993) (citing Ex Parte Quirin, 317 U.S. 1 (1942)). Instead, defendants subject to a court-martial are granted an adversarial hearing before a single military officer who performs as the rough equivalent of a grand jury. See Essex & Pickle, *supra* note 37, at 250-51. Instead of the Sixth Amendment guarantee to a trial by an impartial jury, under the UCMJ, a jury trial is comprised of “members” who are selected by a “convening authority”—a military commander with the authority to convene courts-martial. Uniform Code of Military Justice, 10 U.S.C.A. § 802(a)(1)-(13) (2006) (effective Oct. 17, 2006).

58. *Covert*, 354 U.S. at 6.

59. *Id.* at 41. At the time of Mrs. Covert’s offense, an executive agreement between the United States and Great Britain granted United States’ military courts exclusive jurisdiction over offenses committed in Great Britain by American military members or their dependents. *Id.* at 15. A similar agreement existed in Japan when Mrs. Smith committed murder. *Id.* The Court invalidated these aspects of the agreements because the American government’s authority to enter into treaties could not violate the Constitution. *Id.* at 16-17.

60. *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234, 249 (1960). In *Kinsella*, the Army prosecuted the spouse of an Army soldier, who lived with her husband on a military post in Germany, for involuntary manslaughter under the UCMJ. *Id.* at 236. The wife was sentenced to the maximum punishment authorized by the UCMJ, but the Supreme Court reversed her conviction. *Id.* at 249.

61. *Grisham v. Hagen*, 361 U.S. 278, 280 (1960) (holding that no valid distinctions existed between civilian employees and dependents to warrant different treatment under the UCMJ). In *Grisham*, the Court held that the UCMJ could not be used to try civilian employees for capital offenses. *Id.* at 279. Later, in *McElroy v. Guagliardo*, the Court held that the UCMJ could not be

*Covert* line of cases involved crimes committed during peacetime, but did not advance the proposition that, during wartime, courts-martial have no jurisdiction to try those who are not members of the armed forces.<sup>62</sup> In *United States v. Avarette*, the Court narrowly defined “time of war” as a war formally declared by Congress because “[a] broader construction . . . would open the possibility of civilian prosecutions by military courts whenever military action on a varying scale of intensity occurs.”<sup>63</sup> The Court then dismissed the court-martial charges against an Army civilian in Vietnam convicted of attempted larceny of thirty-six thousand batteries because Congress had not declared a formal war in Vietnam.<sup>64</sup> These decisions caused crime to go unpunished as civilians who committed crimes outside of the United States, during peacetime or a period of undeclared war, escaped prosecution due to a lack of jurisdiction by both military and U.S. district courts.<sup>65</sup>

The critical need to bridge the jurisdictional gap became apparent in *United States v. Gatlin*, in which the United States Court of Appeals for the Second Circuit reversed the conviction of a spouse of an enlisted soldier, who pled guilty to the sexual abuse of a minor for sexually abusing and impregnating his thirteen-year-old stepdaughter.<sup>66</sup> The crime occurred while the defendant lived with his wife and stepdaughter in military housing in Germany; however, the abuse was not discovered until the family returned to the United States and the stepdaughter revealed that she was pregnant with the defendant’s child.<sup>67</sup> The district court judge determined that jurisdiction existed because the acts occurred within military housing in Germany, which constituted the “special maritime and territorial jurisdiction of the United States” as defined in Title 18, section 7 of the United States Code, which enumerated federal jurisdiction.<sup>68</sup> However, the

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used to try civilians in non-capital cases. *McElroy v. Guagliardo*, 361 U.S. 281, 286 (1960).

62. *United States v. Avarette*, 41 C.M.R. 363, 364 (C.M.A. 1970).

63. *Id.* at 365. Rule 103(19) of the Rules for Courts-Martial now defines “time of war” as “a period of war declared by Congress or the factual determination by the President that the existence of hostilities warrants a finding that a ‘time of war’ exists.” MCM, *supra* note 24, pt. II, at II-2.

64. *Avarette*, 41 C.M.R. at 363, 365.

65. Schmitt, *Closing the Gap*, *supra* note 32, at 72-73. Currently, “[i]n time of declared war or a contingency operation, persons serving with or accompanying an armed force in the field” are subject to the UCMJ. UCMJ, 10 U.S.C. § 802(a)(10) (2006).

66. *United States v. Gatlin*, 216 F.3d 207, 210 (2d Cir. 2000).

67. *Id.* at 210.

68. *Id.* 18 U.S.C. § 7(3) 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.

18 U.S.C. § 7(3) (2006).

Court of Appeals reversed the conviction on jurisdictional grounds, ruling that the legislative history revealed Congress's intent for section 7(3) to apply solely to the territorial United States, thus causing the defendant's acts to occur outside of the federal court's jurisdiction.<sup>69</sup>

In deciding the case, Circuit Judge Jose Cabranes noted his displeasure at Congress' apathy towards mending the jurisdictional divide that allowed civilians free reign to commit crimes while accompanying the military overseas.<sup>70</sup> He wrote that numerous authorities had "urged Congress for over four decades to close the jurisdictional gap by extending the jurisdiction of Article III courts to cover offenses committed on military installations abroad and elsewhere by civilians accompanying the armed forces."<sup>71</sup> Judge Cabranes felt that his decision was pre-determined and was "only the latest consequence of Congress's failure to close this jurisdictional gap."<sup>72</sup> In the opinion, Judge Cabranes wrote that he would take "the unusual step of directing the Clerk of the Court to forward a copy of this opinion to the Chairmen of the Senate and the House Armed Services and Judiciary Committees."<sup>73</sup>

### C. ENACTMENT OF THE MEJA

To rectify this gaping jurisdictional chasm, on November 22, 2000, President William Clinton signed Senate Bill 768, the Military Extraterritorial Jurisdiction Act of 2000 (MEJA), to extend domestic jurisdiction over civilians for conduct committed while accompanying the military abroad.<sup>74</sup> The MEJA established federal jurisdiction over offenses committed outside the United States by persons employed by or accompanying the Armed Forces, or by members of the Armed Forces who are released or separated from active duty prior to being identified and prosecuted for the commission of such offenses.<sup>75</sup> Punishment under the MEJA is that which could have been imposed under federal law, had the crime been committed in the United States.<sup>76</sup> The Act defined persons "employed by" the Armed Forces as Department of Defense (DoD) civilian

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69. *United States v. Gatlin*, 216 F.3d 207, 220 (2d. Cir. 2000).

70. *Id.* at 221-23.

71. *Id.* at 221-22.

72. *Id.* at 223.

73. *Id.*

74. 18 U.S.C. §§ 3261-3267 (2006). Around the same time the *Gatlin* decision made its way through the courts and to Congress, the MEJA was enacted. Glenn R. Schmitt, *The Military Extraterritorial Jurisdiction Act: the Continuing Problem of Criminal Jurisdiction Over Civilians Accompanying the Armed Forces Abroad—Problem Solved?*, 2000-DEC. ARMY LAW. 1, 1-3.

75. 18 U.S.C. § 3261 (2006).

76. § 3261(a).

employees or contractors.<sup>77</sup> Persons “accompanying the Armed Forces” were defined as dependents of a member of the Armed Forces or of a DoD civilian employee or contractor.<sup>78</sup> Consequently, the MEJA did not extend jurisdiction over persons employed by non-DoD government agencies.<sup>79</sup> The MEJA also resolved the *Toth* dilemma by authorizing the domestic jurisdiction over ex-service members for crimes committed while subject to the UCMJ, but not prosecuted while under military control.<sup>80</sup>

The legislative history behind the creation of the initial MEJA began with the April 18, 1997, report from the Overseas Jurisdiction Advisory Committee.<sup>81</sup> The Secretary of Defense and the Attorney General charged the Committee with investigating and recommending feasible procedures for establishing U.S. criminal jurisdiction over civilians who accompanied the military overseas.<sup>82</sup> The Committee proposed two recommendations to Congress: (1) extend court-martial jurisdiction over DoD civilians in limited circumstances during contingency operations and (2) create federal jurisdiction in Article III courts over civilians who accompany the military overseas.<sup>83</sup> In the sixty-six-page report, the Committee never mentioned the possibility of extending Article III jurisdiction over former military service members; rather, the report focused solely on the conduct of civilians.<sup>84</sup>

Following this report, Republican Senator Jeff Sessions first introduced the MEJA on April 13, 1999, as Senate Bill 768, which was co-sponsored by Democrat Senator Patrick Leahy of Vermont and Republican Senator Michael Dewine of Ohio.<sup>85</sup> The Senate bill used the Overseas Jurisdiction Committee’s proposed language almost verbatim, including extending UCMJ jurisdiction over DoD civilians and contract employees if they were “serving with and accompanying an armed force” while “in support of an operation designated as a contingency operation.”<sup>86</sup> Although the Senate did not hold a hearing on the bill, it debated the MEJA on the Senate floor on July 1, 1999, where it was slightly amended and

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77. Schmitt, *Amending MEJA*, *supra* note 21, at 42; 18 U.S.C. § 3267(1)(A) (2006).

78. Schmitt, *Amending MEJA*, *supra* note 21, at 42; § 3267(2)(A)(i)-(iii).

79. Schmitt, *Amending MEJA*, *supra* note 21, at 42.

80. § 3261(a)(2) (2000); United States *ex rel. Toth v. Quarles*, 350 U.S. 11, 15 (1955).

81. OVERSEAS JURISDICTION ADVISORY COMMITTEE, REPORT TO THE SECRETARY OF DEFENSE, THE ATTORNEY GENERAL, AND THE CONGRESS OF THE UNITED STATES, (1997) [hereinafter OJA REPORT], available at <http://www.fas.org/irp/doddir/dod/ojac.pdf>.

82. OJA REPORT, *supra* note 81, at iv-vi.

83. *Id.* at 49.

84. *See generally id.*

85. S. 768, 106th Cong. (1999); *see also* Schmitt, *Closing the Gap*, *supra* note 32, at 84.

86. Schmitt, *Closing the Gap*, *supra* note 32, at 82.

unanimously passed.<sup>87</sup> Senator Leahy provided the sparse commentary to the bill and focused his comments on the recommendations made by the Overseas Jurisdiction Advisory Committee report.<sup>88</sup> Senator Leahy described the pressing need to prosecute serious crimes committed by civilians who accompany the military overseas, such as cases involving “the sexual molestation of dependent girls, the stabbing of a serviceman and drug trafficking to soldiers.”<sup>89</sup> Senator Leahy further remarked that the MEJA would not only cure the inequity between punishments imposed upon military personnel and the civilians who accompany them, but would also provide justice to service members and dependents who are victims of crime.<sup>90</sup> Senator Leahy’s remarks focused solely on the prosecution of civilians, never mentioning the possibility of prosecuting a former military service member for combat-related actions.<sup>91</sup>

After the bill passed the Senate, the Departments of Justice and Defense raised some concerns focusing primarily on the expansion of court-martial jurisdiction to civilians accompanying the military during a “contingency operation.”<sup>92</sup> Republican Representative Saxby Chambliss from Georgia rewrote the bill with Republican Representative Bill McCollum of Florida, the Chairman of the House Subcommittee on Crime, and introduced it in the House on November 16, 1999, as Bill 3380, which deleted the UCMJ jurisdiction from the proposed Senate bill.<sup>93</sup> The House Committee on the Judiciary, Subcommittee on Crime, held a hearing on March 30, 2000, in which five witnesses testified, including representatives

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87. 145 CONG. REC. S8194-01, at S8197 (1999). The small changes included (1) requiring the Secretary of Defense to consult with the Secretary of State when making the determination as to which foreign officials could request for an arrested American to be prosecuted by them; (2) permitting UCMJ authority over DoD civilians and contractors accompanying the Armed Forces during times of ‘contingency operations’ involving a war or national emergency declared by Congress or the President; and (3) deleting a provision that would have called the time required to return a defendant to the United States for prosecution under the act a “justifiable” delay. *Id.*

88. 145 CONG. REC. S8194-01, at S8197 (1999).

89. *Id.*

90. *Id.*

91. See 14 CONG. REC. S8194-01 (1999) (statement of Sen. Leahy).

92. Schmitt, *Closing the Gap*, *supra* note 32, at 84. The Departments were concerned that such a provision would raise several issues of public concern, constitutional issues, inconsistency by subjecting some DoD employees to trial by court-martial but not others (those stationed state-side), prolonged litigation, and the erosion of morale and justice. *Id.* (citing Letter from Judith A. Miller, General Counsel, Department of Defense, to Senator John W. Warner, Chairman, Committee on Armed Services, United States Senate (Sept. 3, 1999); Letter from Robert Raben, Assistant Attorney General for Legislative Affairs, Department of Justice, to Representative Henry J. Hyde, Chairman, Committee on the Judiciary, U.S. House of Representatives (Oct. 19, 1999)).

93. See 145 CONG. REC. E2419-02 (1999).

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of the Departments of Justice and Defense.<sup>94</sup> Such witnesses re-iterated their support for the bill to prosecute previously untouchable non-combat related crimes.<sup>95</sup> Roger Pauley, the Director of the Criminal Division of the Department of Justice provided testimony on the inclusion of the bill's jurisdiction over military personnel.<sup>96</sup> There was never any mention of the need to prosecute war crimes committed by former service members; rather, Mr. Pauley's testimony centered on the practicality behind authorizing federal civilian jurisdiction when a military member jointly commits a crime with a civilian.<sup>97</sup> Mr. Pauley remarked,

The reason for this approach is to preserve the option, after the consultation with the Department of Defense, of asserting civilian court jurisdiction over an active serviceman in a situation in which, e.g., a murder or robbery was committed jointly by the serviceman and a civilian dependent. In such a case, civilian court jurisdiction over both perpetrators would avoid the need for separate military and civilian trials.<sup>98</sup>

The House bill was amended to include concurrent jurisdiction and passed by voice vote in the House on July 25, 2000.<sup>99</sup> By agreement among Senator Sessions, Representative Chambliss, and Democrat Representative Betty McCollum of Minnesota (who oversaw the amendment process of the legislation), the House substituted the text of the revised House bill for the text of Senate bill 768, passed the revised bill, and sent it back to the Senate.<sup>100</sup> The Senate passed the amended Senate bill 768 by unanimous consent on October 25, 2000, which was then signed by President Clinton

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94. *Military Extraterritorial Jurisdiction Act of 1999: Hearing Before the Subcomm. on Crime of the H. Comm. on the Judiciary*, 106th Congress (2000) [hereinafter *Hearing*], available at [http://commdocs.house.gov/committees/judiciary/hju64399.000/hju64399\\_0F.htm](http://commdocs.house.gov/committees/judiciary/hju64399.000/hju64399_0F.htm).

95. *See generally* *Hearing*, *supra* note 94.

96. *See id.* at 52-60 (statement of Roger Pauley, Director of the Department of Justice-Criminal Division).

97. *See id.*

98. *Id.* at 59.

99. 146 CONG. REC. H6928-02 (daily ed. July 25, 2000). Before the amendment, the bill gave the DoD, not a federal court, the exclusive right to prosecute military members for crimes they committed outside the United States because such a crime violated the UCMJ, but not the MEJA. Schmitt, *Closing the Gap*, *supra* note 32, at 88, 94. Since common law crimes committed by military members in the United States generally violate both federal and military laws, the DoD and the Justice Department must resolve who will prosecute the common law offenses. *Id.* at 88. The original Senate bill attempted to thwart this process by including a preference for UCMJ prosecution if the crime occurred outside the United States. *Id.* The Clinton Administration reiterated its support for the amended bill. *See* Office of Management and Budget, Statement of Administration Policy on H.R. 3380 (July 25, 2000), available at <http://www.whitehouse.gov>.

100. 146 CONG. REC. H6938-01 (2000); *see also* 146 CONG. REC. H6928-02 (2000).

on November 22, 2000.<sup>101</sup>

#### D. 2004 MEJA AMENDMENTS

In 2004, reports began to surface describing allegations that American military personnel abused Iraqi prisoners at Abu Ghraib, an Iraqi prison in which Coalition forces held Iraqi detainees.<sup>102</sup> The media reported that civilian contractors working for the U.S. military may also have been involved in the abuses, causing then-U.S. Attorney General John Ashcroft to announce that the Department of Justice would consider the prosecution of these civilians under the MEJA.<sup>103</sup> However, the civilians involved in the prison abuse, although directly working to support U.S. military operations in Iraq, were employed under a contract with the Department of the Interior and worked for the Central Intelligence Agency (CIA).<sup>104</sup> Thus, because of the MEJA's limitation to DoD-civilians, these civilians could not be prosecuted in American court.<sup>105</sup>

Both houses of Congress held numerous hearings regarding the incidents of abuse at Abu Ghraib prison, leading to MEJA amendments, which became effective on October 28, 2004.<sup>106</sup> The amendments were

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101. 146 CONG. REC. S11181-03, at S11184 (daily ed. Oct. 26, 2000); 18 U.S.C. § 3261 (2000).

102. See Schmitt, *Amending MEJA*, *supra* note 21, at 42. In March of 2004, the Coalition Provisional Authority announced that it had concluded, but would not yet publicly release, an investigation into allegations that American military personnel abused detainees at the prison. *Id.* at n.9 (citing Transcript of Coalition Provisional Authority Briefing, Mar. 20, 2004, available at [http://www.iraqcoalition.org/transcripts/20040320\\_Mar20\\_KimmittSenor.html](http://www.iraqcoalition.org/transcripts/20040320_Mar20_KimmittSenor.html) (statement of Brigadier General Mark Kimmitt, U.S. Army, Deputy Director for Coalition Operations)). CBS News subsequently broadcast photos of the abuse and the New Yorker magazine published an in-depth report on the abuse. Seymour M. Hersh, *Torture at Abu Ghraib, American Soldiers Brutalized Iraqis: How Far up Does the Responsibility Go?*, NEW YORKER, May 10, 2004, available at [http://www.newyorker.com/archive/2004/05/10/040510fa\\_fact?](http://www.newyorker.com/archive/2004/05/10/040510fa_fact?). The Abu Ghraib abuse scandal was then extensively covered in every major media outlet. See Schmitt, *Amending MEJA*, *supra* note 21, at 42 n.9.

103. Schmitt, *Amending MEJA*, *supra* note 21, at 42 (citing Renae Merle, *Prison-Abuse Reports Adds to Titan's Trouble, Lockheed Plan to Buy Firm Already Stalled*, WASH. POST, May 7, 2004, at E03; Ariana Eunjung & Renae Merle, *Line Increasingly Blurred Between Soldiers and Civilian Contractors*, WASH. POST, May 13, 2004, at A01; Dan Eggen & Walter Pincus, *Ashcroft Says U.S. can Prosecute Civilian Contractors for Prison Abuse*, WASH. POST, May 7, 2004, at A18).

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

105. *Id.* At the time of the Abu Ghraib scandal, the MEJA's jurisdiction over individuals "employed by the Armed Forces outside the United States" meant "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)." See H.R. 4200, 108th Cong. (2004); 18 U.S.C. § 3267 (1) (A) (amended 2004).

106. See H.R. 4200, 108th Cong. (2004); 18 U.S.C. § 3267 (amended 2004).

intended to provide jurisdiction over non-DoD employees who accompanied the military overseas.<sup>107</sup> The 2004 amendments revised the term “employed by the Armed Forces of the United States” to include any civilian employee or contractor of “any other Federal agency, or any provisional authority, to the extent such employment relates to supporting the mission of the Department of Defense overseas.”<sup>108</sup> The MEJA, along with its amendments, was a legislative reaction to gaping inconsistencies in federal jurisdictional law. This Act may once again require revision if its recent use to prosecute a former soldier accused of combat crimes thwarts Congressional intent and creates injustice.

### III. PROSECUTION UNDER THE MEJA

Since the MEJA is a relatively new bill, a lack of case law renders legal interpretation of the Act difficult. Nevertheless, existing cases affirm the legislative intent to create federal jurisdiction over previously non-prosecutable non-combat crimes.<sup>109</sup> For example, in *United States v. Arnt*, the defendant lived with her husband, a Staff Sergeant in the Air Force, on a U.S. Air Base in Turkey.<sup>110</sup> The defendant fatally stabbed her husband and the government charged her with murder, asserting jurisdiction under the MEJA.<sup>111</sup> On appeal, the Ninth Circuit upheld the government’s jurisdictional basis.<sup>112</sup> The court found that “Congress enacted MEJA in response to a jurisdictional gap created by host nations’ reluctance to prosecute crimes against Americans committed by civilians accompanying the Armed Forces outside the United States.”<sup>113</sup> The court provided no additional rationale behind the creation of the MEJA.

The MEJA was also used to prosecute a civilian contractor for criminal conduct committed while accompanying the U.S. military at the Baghdad Central Confinement Facility in Baghdad, Iraq.<sup>114</sup> The Eastern

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107. Tony Capaccio, *U.S. Tightens Rules for Contractors in Combat Zones (Update 2)*, BLOOMBERG, Oct. 27, 2005, <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aaEJK2SN2SkA&refer=us>; see also Fredrick A. Stein, *Have we Closed the Barn Door yet? A Look at the Current Loopholes in the Military Extraterritorial Jurisdiction Act*, 27 HOUS. J. INT’L L. 579, 590 (2005).

108. 18 U.S.C. § 3267 (1)(A)(i)(II) (2006) (effective Oct. 28, 2004). Nothing in the language of the Act suggests that the amendments would apply retro-actively to the Abu Ghraib offenses, or to other crimes escaping prosecution under the terms of the MEJA of 2000. See 18 U.S.C. § 3261 et seq. (2006).

109. See *supra* notes 89-98.

110. *United States v. Arnt*, 474 F.3d 1159, 1160 (9th Cir. 2007).

111. *Id.*

112. *Id.*

113. *Id.*

114. Press Release, Jim Rybicki, Public Information Officer, U.S. Attorney’s Office, E. Dist. of

District of Virginia successfully prosecuted defendant Ahmed Hasan Khan of Woodbridge, Virginia, under authority of the MEJA, for possession of child pornography while working for the armed forces in Iraq.<sup>115</sup> This case, like *Arnt*, demonstrates the closing of the jurisdictional “gap” that once allowed American civilians accompanying the military overseas to elude U.S. prosecution.

Questions surrounding the scope of the MEJA are still being litigated today. Steven D. Green, a former Army private, was prosecuted and convicted under the MEJA in May of 2009, for the crimes of conspiracy, rape, and murder.<sup>116</sup> Green was accused of acting as a ringleader in the gang rape of a fourteen-year-old Iraqi girl and the murder of the girl and her family in Mahmoudiya, Iraq.<sup>117</sup> The government prosecuted Green in federal court under the MEJA because, when the allegations arose, Green had already been discharged from the Army due to an anti-social personality disorder.<sup>118</sup> Although the charges against Green stemmed from conduct committed while deployed with the armed forces to a combat zone, Green’s alleged actions, unlike Sgt. Nazario’s, were not combat-related. Green’s conduct was neither committed during a tactical battle or operation, nor performed pursuant to any military orders. Prosecution of horrific crimes, such as those committed by Green, were the stimulus behind the MEJA’s enactment.<sup>119</sup> At no point did Congress contemplate that the MEJA would be used to prosecute a former soldier for combat crimes,

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Va., Military Contractor Sentenced for Possession of Child Pornography in Baghdad (May 25, 2007), available at <http://www.justice.gov/usao/vae/Pressreleases/05-MayPDFArchive/07/20070525khannr.html>.

115. *Id.*

116. On May 21, 2009, the civilian jury in western Kentucky convicted Green of rape, conspiracy, and multiple counts of murder. *Ex-Soldier Gets 5 Life Sentences For Iraqi Rape*, CBSNEWS, Sep. 5, 2009, <http://cbs5.com/national/steven.green.iraqi.2.1166196.html>. On September 4, 2009, Green received five consecutive life sentences from the sentencing panel. *Id.* The panel could not reach a unanimous decision as to whether Green should receive the death penalty, automatically making his sentence life in prison. *Id.* The Kentucky court was the proper venue for the trial because Green was stationed with the 101st Airborne Division (Air Assault), based out of Fort Campbell, Kentucky, when the crimes occurred. *Iraq Rape-Slay Case Hits Snags*, CBSNEWS, Dec. 19, 2007, <http://www.cbsnews.com/stories/2007/12/19/iraq/main3631048.shtml> [hereinafter *Rape-Slay Case*].

117. *Rape-Slay Case*, *supra* note 116.

118. *Rape-Slay Case*, *supra* note 116. The military had the option of recalling Green from reserve status onto active duty in order to prosecute him under the UCMJ. *Id.* Green’s co-conspirators, who were serving on active duty when the allegations arose, have been tried and convicted by military court-martial. *Id.* Under the UCMJ, convicted persons have a chance for parole after ten years, while this option is not always available under federal law. *Id.* Professor Gary Solis, a former military prosecutor and law professor at the United States Military Academy at West Point, remarked that prosecuting Green in U.S. District Court “undoubtedly reflects political pressure to ensure the most severe punishment for the crime’s alleged ringleader.” *Id.*

119. Schmitt, *Closing the Gap*, *supra* note 32, at 56; *see supra* note 89 and accompanying text.

thereby distorting, rather than preserving justice.<sup>120</sup>

#### IV. PROSECUTION OF THE FIRST FORMER MILITARY SERVICE MEMBER UNDER THE MEJA

Once a stronghold for Al Qaeda in Iraq, the city of Fallujah experienced brutal urban combat after insurgents in Fallujah ambushed, killed, and mutilated four U.S. Blackwater security contractors in the spring of 2004 and left the victims' charred bodies hanging from a bridge over the Euphrates River.<sup>121</sup> In an effort to remove such rebel fighters from the city before the January Iraqi elections, the U.S. Marines spearheaded Operation Phantom Fury, an intense combat operation, in Fallujah in November 2004.<sup>122</sup> Operation Phantom Fury was one of the largest offensives of the Iraq war and included almost two weeks of house-to-house fighting.<sup>123</sup> Between November 8 and November 24, 2004, the operation's goal was to isolate and eradicate domestic and foreign insurgents infesting the city.<sup>124</sup> Throughout the operation, U.S. soldiers encountered fierce fighting, including daily attacks from improvised explosive devices (IEDs), roadside bombs, mortar attacks, and rocket-propelled grenades (RPGs).<sup>125</sup> According to the Pentagon, the battles killed about 1,200 militants, eight Iraqi soldiers, and fifty-one U.S. troops, mostly Marines.<sup>126</sup> Well before the U.S. offensive began, coalition forces warned Fallujah residents to leave the city before the heavy fighting commenced.<sup>127</sup> Despite this warning, about 25,000 people out of a total population of 300,000 remained in Fallujah when Operation Phantom Fury began.<sup>128</sup> According to intelligence reports and the perception of the command and troops, the majority of residents who remained were believed to be insurgents.<sup>129</sup> As Nazario's defense

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120. See *supra* notes 84-93 and accompanying text; see also Part V.

121. Starr, *supra* note 4.

122. Defendant's Reply to the Government's Opposition to Motion to Dismiss the Indictment for Failure to Invoke the Court's Jurisdiction or to State an Offense at 2, *United States v. Nazario*, No. 07-127 (C.D. Cal. Sept. 4, 2007) [hereinafter Reply to Opposition to Motion to Dismiss].

123. *Id.*

124. Reply to Opposition to Motion to Dismiss, *supra* note 122, at 3 (quoting statement by N.C.I.S. Special Agent Mark O. Fox). Hostilities did not cease until it was determined that every structure in the city had been searched and cleared. *Id.*

125. See James Hilder, *U.S. Troops Set to Move in on Martyrs' Land*, *TIMES*, Nov. 12, 2004, <http://www.timesonline.co.uk/tol/news/world/iraq/article390180.ece>.

126. Starr, *supra* note 4.

127. Steve Liewer, *Ex-marine on Trial in Killings of 4 Captives; '04 Deaths Occurred During Fallujah Fight*, *SAN DIEGO UNION-TRIB.*, Aug. 22, 2008, at B-1 [hereinafter Liewer, *Ex-marine on Trial*], available at <http://legacy.signonsandiego.com/news/military/20080822-9999-1m22trial.html>.

128. *Id.*

129. *Id.*; see also Reply to Opposition to Motion to Dismiss, *supra* note 122, at 3.

attorney stated in his opening remarks, “[t]he overwhelming majority of those left were people who were spoiling for a fight. . . . The insurgents didn’t play fair. They didn’t follow the rules. . . . They had one idea in mind: to kill as many Marines as possible.”<sup>130</sup>

On November 9, 2004, Marine Sgt. Jose Nazario served as a squad leader during his first day of combat operations as part of Operation Phantom Fury.<sup>131</sup> Sgt. Nazario and his squad were under orders to “move to the center of [Fallujah], clearing the city of insurgents as they advanced.”<sup>132</sup> Several hours after Sgt. Nazario’s squad began its mission, it began to take fire from a house, killing one of his squad members.<sup>133</sup> Sgt. Nazario and his squad were then ordered to search the house.<sup>134</sup> The Marines advanced into the house and allegedly discovered four military-aged males, at least three AK-47s with hot barrels, spent casings, and the smell of gunpowder.<sup>135</sup>

The ensuing sequence of events served as the subject of Nazario’s criminal trial. The government alleged that after discovering the men, weapons, and ammunition, Sgt. Nazario made a radio call in which he reported finding four males.<sup>136</sup> Allegedly, the subsequent question asked of

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130. Liewer, *Ex-marine on Trial*, *supra* note 127. During Operation Phantom Fury, the residents of Fallujah were under a strict night-time curfew. Hilder, *supra* note 125. Anyone violating the curfew was treated as an insurgent and subject to being shot. *Id.*

131. Government’s Trial Memorandum at 5, *United States v. Nazario*, No. 07-127 (C.D. Cal. Aug. 13, 2008) [hereinafter Trial Memorandum]. According to the defense brief, Sgt. Nazario fought with his unit for the entire duration of the Operation, and engaged the enemy often. Motion to Dismiss, *supra* note 5, at 4.

132. Reply to Opposition to Motion to Dismiss, *supra* note 122, at 3 (quoting statement by N.C.I.S. Special Agent Mark O. Fox).

133. Acquittal of Former Marine in Landmark Case Expected to Cause Change in Legislation, Says Defense Team, <http://labarberalaw.com/html/ExMarine.html> (last visited August 26, 2010). During the two-week span of Operation Phantom Fury, of Sgt. Nazario’s battalion of approximately 1,500 men, 23 were killed and 307 were wounded. Reply to Opposition to Motion to Dismiss, *supra* note 122, at 4.

134. Both the government and defense briefs are in agreement on this fact. See Trial Memorandum, *supra* note 131, at 7; Reply to Opposition to Motion to Dismiss, *supra* note 122, at 3.

135. Acquittal of Former Marine in Landmark Case Expected to Cause Change in Legislation, Says Defense Team, *supra* note 133. The government’s trial memorandum states that the Marines encountered “four unarmed males” and discovered “firearms and ammunition.” Trial Memorandum, *supra* note 131, at 7. In the defendant’s reply to the government’s opposition to the motion to dismiss, the defendant states that “the government conveniently ignores certain inconvenient allegations from its own indictment, such as . . . that upon searching the house, the Marines found AK-47 rifles, ammunition, and four military-age males.” Reply to Opposition to Motion to Dismiss, *supra* note 122, at 3 (citing the affidavit of N.C.I.S. Special Agent Mark O. Fox).

136. Trial Memorandum, *supra* note 131, at 7.

Sgt. Nazario was, “Are they dead yet?”<sup>137</sup> The government’s indictment against Sgt. Nazario asserted that after the radio call, Sgt. Nazario killed two of the insurgents and ordered two of his subordinates, Sgt. Ryan Weemer and Sgt. Jermaine Nelson, to kill the other two insurgents.<sup>138</sup> At Sgt. Nazario’s trial for voluntary manslaughter, the Assistant U.S. Attorney contended that Nazario had the men killed because his squad did not have the time to take prisoners and to complete its house-clearing mission.<sup>139</sup> However, Nazario denied shooting any detainees, and as his defense attorney argued, no evidence substantiated the government’s claim.<sup>140</sup>

The allegations against Sgt. Nazario surfaced in 2006 when Sgt. Ryan Weemer provided details about “the most serious crime he had ever committed” to a U.S. Secret Service interviewer during a lie-detector screening.<sup>141</sup> Sgt. Weemer’s assertions triggered an investigation by the Naval Criminal Intelligence Service.<sup>142</sup> Since Sgt. Nazario was no longer a member of the Armed Forces, he became the first former military service member brought to trial under the MEJA.<sup>143</sup>

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137. Trial Memorandum, *supra* note 131, at 7.

138. *Id.*

139. Liewer, *Ex-marine on Trial*, *supra* note 127.

140. *Id.*

141. *Federal Jury Acquits Ex-Marine in Iraqis’ Deaths*, MSNBC, Aug. 28, 2008, <http://www.msnbc.msn.com/id/26443458/>.

142. Elsworth, *supra* note 9. Weemer’s statements implicated himself, Nelson, and Nazario. *Id.* Sergeants Weemer and Nelson could be tried by court-martial because they were still members of the Marine Corps when the allegations arose. Tony Perry, *Jurors Begin First Full Day of Deliberations in Ex-Marine’s Trial*, L.A. TIMES, Aug. 29, 2008. Sgt. Weemer was in the Reserves when the allegations surfaced, so the Marine Corps recalled him to active duty to face charges at a court-martial, and Sgt. Nelson remains on active duty in the Marine Corps. *Id.* On April 9, 2009, Weemer was acquitted by a court-martial on charges of murder and dereliction of duty. *Marine Acquitted of Murder in Iraq Slaying*, CBS2, Apr. 9, 2009, <http://cbs2.com/local/Marines.acquitted.murder.2.980899.html>. If convicted of murder, Weemer could have faced life in prison and a dishonorable discharge. *Id.* The maximum punishment for dereliction of duty is six months imprisonment and a bad conduct discharge. *Id.* In September of 2009, charged with murder and dereliction of duty, Nelson pled guilty to dereliction of duty after the government dropped the murder charge. Elliot Spagat, *Marine Spared Prison Time for Killing Detainee*, ABC NEWS, Sep. 30, 2009, <http://abcnews.go.com/US/wireStory?id=8714307>. Under the terms of the plea agreement, Nelson did not face jail time and remains eligible for an honorable discharge. *Id.*

143. Although former Army Private Steven Green was prosecuted under the MEJA almost a year after Sgt. Nazario, some news reports incorrectly assert that Green was the first former service member prosecuted under the MEJA. *See, e.g., supra* note 116. Nazario and Green’s cases are distinguishable because while Nazario was acquitted of combat crimes, Green’s trial focused on allegations that Green committed non-combat crimes not pursuant to military orders. *See also* Elsworth, *supra* note 9. Sgt. Nazario entered the United States Marine Corps on September 10, 1997 and was honorably discharged from the Marine Corps on October 11, 2005. Trial Memorandum, *supra* note 131, at 10. All members of the United States military incur an eight-year obligation upon entering the service, although the obligatory time-in-service

The trial was plagued with evidentiary difficulties when both Jermaine Nelson and Ryan Weemer refused to testify against Nazario.<sup>144</sup> Both men were declared in contempt of court and chose to go to jail rather than to obey a judge's order to testify against Nazario.<sup>145</sup> Since the defense would be unable to cross-examine Weemer, U.S. District Judge Stephen Larson granted a defense motion to suppress the taped statement made by Weemer during his interview with the Secret Service, a statement in which Weemer claimed he, Nelson, and Nazario killed the Iraqi men.<sup>146</sup>

The government faced a unique challenge in attempting to prove that Sgt. Nazario killed two innocent Iraqi men and ordered the killing of another two. Of the jury, comprised of three men and nine women, only one had any military experience, consisting of a brief stint in the Navy over

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commitment may be completed through either active-duty or reserve-duty status. See ARMY NAT'L GUARD & ARMY RESERVE, ARMY REGULATION 135-91: SERVICE OBLIGATIONS, METHODS OF FULFILLMENT, PARTICIPATION REQUIREMENTS, AND ENFORCEMENT PROCEDURES ch. 2-1 (2005), available at [http://www.army.mil/usapa/epubs/pdf/r135\\_91.pdf](http://www.army.mil/usapa/epubs/pdf/r135_91.pdf). Since Sgt. Nazario had fulfilled his eight-year military statutory commitment when the allegations against him arose, he was no longer a member of the armed forces and could not be prosecuted by court-martial. 10 U.S.C. § 802a(1)-(10) (2006) (effective Oct. 28, 2009).

144. Elsworth, *supra* note 9.

145. *Id.*; Liewer, *Ex-marine on Trial*, *supra* note 127. Weemer and Nelson were sent to jail in May and June of 2008 for refusing to obey a federal judge's order to testify before a grand jury concerning the allegations against Nazario. Liewer, *Ex-marine on Trial*, *supra* note 127. On August 22, 2008, when ordered to testify at trial against Nazario, both Weemer and Nelson invoked the Fifth Amendment, despite being granted full immunity from the district court judge. Steve Liewer, *Marines Won't Testify in Killings*, SIGN ON SAN DIEGO, Aug. 22, 2008, <http://legacy.signonsandiego.com/news/military/20080823-9999-1m23marine.html>. Although Judge Larson pledged that a grant of immunity would be valid in any federal court, including in a military court, Weemer and Nelson cited concerns that any testimony given could be used against them in their subsequent court-martial. *Id.* The men's attorneys sought a letter of immunity guaranteeing the sergeants immunity in military court from Lieutenant General Samuel Helland, the chief military officer who would oversee the pending courts-martial at Camp Pendleton, California. *Id.* However, Weemer and Nelsons' attorneys only received an immunity offer signed by Lieutenant General Helland's legal adviser, not from Lieutenant General Helland himself. *Id.* Regardless of Fifth Amendment implications, Weemer and Nelson previously made statements that they would not testify against Nazario under any circumstances because they "owe him their lives for his actions during the Iraq deployment." *Id.* The district judge declared the men in contempt of court and scheduled a September 29, 2008 hearing on the contempt charges. *Id.* Despite U.S. Attorney Jerry Behnk's request to immediately send Weemer and Nelson to jail for six months for refusing to testify, Judge Larson released them on their own recognizance believing that jailing the men would not cause them to testify. *Id.* Judge Larson ruled, "I've come to the conclusion that all I would be doing is punishing. My suspicion is, considering what they've been through, there's not a lot that these men fear." *Id.* Federal prosecutors later dropped the contempt charges against Weemer and Nelson citing "interests of justice." Tony Perry, *Marines' Contempt Charges Dropped*, L.A. TIMES, Sept. 24, 2008, at B-3 [hereinafter Perry, *Contempt Charges Dropped*].

146. Liewer, *Ex-marine on Trial*, *supra* note 127.

a decade earlier.<sup>147</sup> Since the jurors were unfamiliar with Marine culture, military terminology, and the reality of war, before the prosecution called any witnesses to discuss the specific charges against Sgt. Nazario, it brought in retired and active-duty Marines to explain Marine training, history, and culture.<sup>148</sup> The complexities of Marine life so overwhelmed court personnel that during trial, Judge Larson ordered lawyers and witnesses to slow down, because a juror complained of difficulty remembering all of the military acronyms and the court reporters experienced trouble with the frequency and volume of the military jargon.<sup>149</sup>

Prosecutors called Major Daniel Schmitt (Major Schmitt), who ran a mock village designed to give Marines a taste of combat stress, to describe the training Sgt. Nazario and other Marines received prior to deployment in 2004.<sup>150</sup> Major Schmitt attested that during combat “a Marine’s senses can fail to function or become extraordinarily acute. Many Marines . . . lose their ability to hear when bullets are flying. Some suffer tunnel vision. There is little time for discussion and none for debate.”<sup>151</sup> Jurors scribbled notes as Major Schmitt remarked, “Marines have to depend reflexively on their training and trust their buddies to do the same.”<sup>152</sup> He further testified that knowing when not to shoot “is the difficult part of our profession.”<sup>153</sup>

Major Schmitt’s testimony helped jurors gain a better comprehension of the realities of Sgt. Nazario’s life as a Marine squad leader in the midst of combat. Furthermore, a lack of evidence compounded the prosecution’s difficulty in proving the charges against Sgt. Nazario. Although Sgt. Nazario faced life imprisonment if convicted of voluntary manslaughter, no crime scene was preserved, no physical evidence existed, nor did the prosecution present any DNA.<sup>154</sup> Additionally, the building where the crime allegedly was committed was destroyed, and the identity of the

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147. Liewer, *Ex-marine on Trial*, *supra* note 127; *see also* email from Kevin Barry McDermott, Lead Counsel for Jose Nazario, to Olivia C. Zimmerman Miller (Jan. 23, 2009, 17:27:37 EST) (on file with author).

148. Tony Perry, *Jury’s Crash Course in Marine Culture*, L.A. TIMES, Aug. 26, 2008, at B-2 [hereinafter Perry, *Crash Course in Marine Culture*], available at <http://articles.latimes.com/2008/aug/26/local/me-marine26>. Among the details learned by the jurors were the difference between an M-16 rifle and a .50 caliber machine gun; that “RPG” stands for “rocket-propelled grenade;” that an “IED” is an improvised explosive device; and that a “daisy chain” is a series of IEDs buried by insurgents to kill a large number of Americans. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. Watkins, *supra* note 1.

victims was unknown, which forced prosecutors to refer to the alleged victims as “human beings” named “John Doe 1” and “John Doe 2.”<sup>155</sup> Nazario’s defense focused on the government’s lack of evidence, and his attorney later stated that “the U.S. government sought to convict a man of killing another human being without producing a body, the alleged victims’ I.D., any eyewitness testimony, or a shred of physical evidence. The Constitutional implications were and continue to be enormous . . . .”<sup>156</sup> After six hours of deliberation, the California civilian jury acquitted Sgt. Nazario on all charges.<sup>157</sup> No matter the forum in which Sgt. Nazario was prosecuted, a lack of available evidence would have made a conviction difficult for the prosecutor. However, a jury comprised of Sgt. Nazario’s military peers, who possess an innate understanding of combat actions, could have better evaluated the charges against the former Marine, ensuring that the verdict reflected the defendant’s actions.

#### V. USE OF THE MEJA TO PROSECUTE A FORMER MARINE FOR ALLEGED COMBAT CRIMES PERVERTS JUSTICE

The *Nazario* case demonstrates that civilian courts comprised of lay jurors are not equipped to judge the wartime decisions made by soldiers in the fury of combat. Congress likely recognized this premise, as sparse commentary exists surrounding the applicability of the MEJA to former soldiers for combat crimes.<sup>158</sup> Although legislative intent does not dictate the applicability of federal laws, the Supreme Court has condemned “[l]iteral interpretation of statutes at the expense of the reason of law and producing absurd consequences or flagrant injustice.”<sup>159</sup>

Under the plain language of the MEJA, Sgt. Nazario was properly subjected to federal prosecution for his alleged combat crimes. Under the MEJA, whoever engages in criminal conduct outside of the United States “while a member of the Armed Forces subject to chapter 47 of title 10 [the UCMJ]” shall be punished,<sup>160</sup> but prosecution may not be commenced until

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155. Watkins, *supra* note 1.

156. Acquittal of Former Marine in Landmark Case Expected to Cause Change in Legislation, Says Defense Team, *supra* note 133.

157. Elsworth, *supra* note 9.

158. See *supra* note 94; see also 146 CONG. REC. H6928-02, at H6932 (daily ed. July 25, 2000).

159. Sorrells v. United States, 287 U.S. 435, 446 (1932). Federal circuits follow this guidance as the Court of Appeals for the Ninth Circuit ruled, “[o]f course, we do not limit ourselves to the apparent plain meaning of a statute, if doing so leads to absurd or impracticable consequences.” *Avendano-Ramirez v. Ashcroft*, 365 F.3d 813, 816 (9th Cir. 2004) (citing *Or. Natural Res. Council, Inc. v. Kantor*, 99 F.3d 334, 339 (9th Cir. 1996)).

160. 18 U.S.C. § 3261(a)(2) (2006).

“such member ceases to be subject to such chapter.”<sup>161</sup> Sgt. Nazario committed the crimes while in the Marine Corps and was not prosecuted until he left the military,<sup>162</sup> fulfilling the statutory requirements of the MEJA. Such an interpretation, however, when used to prosecute a former Marine for combat actions, can only lead to a perversion of justice. Unless jurors are able to comprehend the stress of a combat environment, they are unlikely to adequately judge the actions of a defendant charged with a battle crime. Judge Robinson Everett, former Chief Judge of the Court of Military Appeals described the importance of an independent military judicial system:

Military operations in modern war demand split second decisions—decisions that cannot be arrived at through the procedure of a debating society. In many military situations someone individual must be in a position to make choices for a group and have his decision enforced. For this reason, the armed services have a system of rank and of command which is designed clearly to place one person in charge when a group action must be decided upon. Of course, for American civilians, and those of many other lands for that matter, it is difficult to acquire habits of instantaneous obedience to another person’s decisions. Military justice provides a stimulus to cultivate such habits by posing the threat that disobedience of commands will be penalized.<sup>163</sup>

Justice is only frustrated when a civilian jury is forced to determine the guilt of a former soldier accused of combat crimes. A civilian jury is likely to either acquit the defendant because of a hesitation to judge a soldier’s wartime decisions or to condemn the defendant due to an ignorance of essential combat actions. Either way, a verdict rendered against a military defendant by a civilian jury is not a just reflection of the service member’s wartime actions.

For example, in *United States v. Nazario*, despite the prosecution’s attempt to educate and familiarize the jury on lawful combat actions, juror Nicole Peters, a high school guidance counselor, remarked following Nazario’s acquittal, “Who are we to decide what men in war are doing?”<sup>164</sup> Another juror said, “I think you don’t know what goes on in combat until

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161. 18 U.S.C. § 3261(d)(1) (2006).

162. *See supra* note 143.

163. Roan & Buxton, *supra* note 11, at 189 (citing ROBINSON O. EVERETT, *MILITARY JUSTICE IN THE ARMED FORCES OF THE UNITED STATES* (1956)).

164. Tony Perry, *Iraq: For Jose Nazario, the Trial and the War are Over*, L.A. TIMES, Aug. 29, 2008 [hereinafter Perry, *Trial and the War*], <http://latimesblogs.latimes.com/babylonbeyond/2008/08/iraq-for-jose-n.html>.

you are in combat.”<sup>165</sup> In fact, Kevin McDermott, lead counsel for Sgt. Nazario, stated that after the trial he discovered that the jurors were just as stressed as the defense counsel regarding their lack of knowledge about a battle zone and that the jurors did not believe it was fair for them to judge Sgt. Nazario’s actions.<sup>166</sup> Not only does a former soldier face the likelihood that a civilian jury will not render a verdict reflective of his combat conduct, a jury comprised of civilians also violates the defendant’s Sixth Amendment right to a jury of his peers.

### A. THE SIXTH AMENDMENT

The Sixth Amendment to the United States Constitution guarantees a defendant “the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed.”<sup>167</sup> An “impartial jury” is one that represents a cross-section of the community, with no person excluded on the basis of race, sex, or other impermissible factors.<sup>168</sup> The Supreme Court stated:

The purpose of a jury is to guard against the exercise of arbitrary power—to make available the common sense judgment of the community as a hedge against the overzealous or mistaken prosecutor. . . . This is not provided if the jury pool is made up of only special segments of the populace . . . .<sup>169</sup>

Although the Court ruled that jury lists or panels must be representative of the community, it further stated that no requirement existed for chosen juries to “mirror the community and reflect the various distinctive groups in the population” because “[d]efendants are not entitled to a jury of any particular composition.”<sup>170</sup> Thus, the Sixth Amendment “cross-section” requirement does not extend to voir dire or to the petit jury because, the Court noted, “[t]he point at which an accused is entitled to a fair cross-section of the community is when the names are put in the box from which the panels are drawn.”<sup>171</sup> Determining the procedures that

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165. *Federal Jury Acquits Ex-Marine in Iraqis’ Deaths*, MSNBC, Aug. 28, 2008, available at <http://www.msnbc.msn.com/id/26443458/>.

166. Email from Kevin Barry McDermott, Lead Counsel for Jose Nazario, to Olivia C. Zimmerman Miller (Jan. 7, 2009, 15:41:38 EST) (on file with author).

167. U.S. CONST. amend. VI.

168. See *Batson v. Kentucky*, 476 U.S. 79, 84-86 (1986); *Taylor v. Louisiana*, 419 U.S. 522, 527 (1975); *Martin v. Texas*, 200 U.S. 316, 321 (1906).

169. *Taylor*, 419 U.S. at 530.

170. *Taylor v. Louisiana*, 419 U.S. 522, 538 (1975); see also *Batson v. Kentucky*, 476 U.S. 79, 84-85 (1986); *Duren v. Missouri*, 439 U.S. 357, 363-64 (1979).

171. *Lockhart v. McCree*, 476 U.S. 162, 174 (1986) (quoting *Pope v. United States*, 372 F.2d 710, 725 (8th Cir. 1967), *vacated on other grounds*, 392 U.S. 651 (1968)).

uphold, and those that violate, the Sixth Amendment's guarantee to an impartial jury has been the subject of much case law, ultimately spurring the federal government into legislative action to clarify the issue.<sup>172</sup>

### B. FEDERAL JURY POOL SELECTION

The 1968 federal Jury Selection and Service Act (JSSA) codifies a defendant's "right to grand and petit juries selected at random from a fair cross-section of the community in the district or division wherein the court convenes."<sup>173</sup> Although prosecutors adhered to the JSSA when selecting jurors in *United States v. Nazario*, Sgt. Nazario's constitutional rights were neglected because jury members were selected from the community at large, rather than from the military community comprised of Sgt. Nazario's peers. The JSSA mandates that each federal court devise a written plan for its random selection of jurors.<sup>174</sup> Although federal courts may obtain the prospective juror names from voter registration lists or the lists of actual voters, the JSSA requires that when necessary, the federal court prescribe other sources of names, in addition to voter lists, to ensure representation by a cross-section of the community.<sup>175</sup> Additionally, the JSSA prohibits exclusion from jury service on account of race, color, religion, sex, national origin, or economic status.<sup>176</sup>

Although the JSSA attempted to eliminate constitutional violations in juror selection, ambiguities in legislation and Supreme Court doctrine remained. In *Duren v. Missouri*, the Supreme Court clarified the "fair cross-section" requirement of a jury pool by articulating a three-pronged test to establish such a prima facie violation:

[T]he defendant must show (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.<sup>177</sup>

The Supreme Court has "never attempted to precisely define the term 'distinctive group,'" but instead links the concept of "distinctiveness" with

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172. See generally 28 U.S.C. §§ 1861-1878 (2006); *Batson v. Kentucky*, 476 U.S. 79 (1986); *Taylor v. Louisiana*, 419 U.S. 522 (1975); *Martin v. Texas*, 200 U.S. 316 (1906).

173. 28 U.S.C. § 1861 (2006).

174. 28 U.S.C. § 1863(a) (2006).

175. § 1863(b)(2).

176. 28 U.S.C. § 1862 (2006).

177. *Duren v. Missouri*, 439 U.S. 357, 364 (1979).

the purposes of the fair-cross-section requirement.<sup>178</sup> The Court identified the purposes of the fair-cross-section requirement as:

- (1) “guarding against the exercise of arbitrary power” and ensuring that the “commonsense judgment of the community” will act as a “hedge against the overzealous or mistaken prosecutor,”
- (2) preserving “public confidence in the fairness of the criminal justice system,” and
- (3) implementing our belief that “sharing in the administration of justice is a phase of civic responsibility.”<sup>179</sup>

Thus, discrimination from the jury pool on account of race, gender, or economic class is unconstitutional.<sup>180</sup> In *Lockhart v. McCree*, the Court held the wholesale exclusion of such groups unconstitutional because the discrimination was completely unrelated to the ability of the members of the group to serve as jurors and was based instead on an immutable characteristic of group members.<sup>181</sup> Such discrimination raised the possibility that the jury composition would be arbitrarily skewed as to deny the criminal defendant the “benefit of the common-sense judgment of the community” and gave rise to an “appearance of unfairness.”<sup>182</sup>

In reality, attorneys continue to mold a jury of their choosing through the voir dire process in which potentially biased jurors are excused for cause or through preemptory challenges.<sup>183</sup> Discretion to craft “ideal” juries is not solely left in the attorneys’ hands because jurors cannot be removed solely on account of their race or gender.<sup>184</sup> However, jurors or groups

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178. *Lockhart v. McCree*, 476 U.S. 162, 174 (1986).

179. *Id.* at 174-75 (citing *Taylor v. Louisiana*, 419 U.S. 522, 530-31 (1975)).

180. *See Duren v. Missouri*, 439 U.S. 357, 364 (1979) (holding that a Missouri statute granting women an automatic exemption from serving on a jury violated the defendant’s Sixth Amendment right to a jury comprised of a “cross-section” of the community); *Castaneda v. Partida*, 430 U.S. 482 (1977) (holding that the state of Texas’s discrimination of Mexican-Americans in the grand jury selection violated the defendant’s equal protection rights); *Taylor*, 419 U.S. at 522 (holding that the systematic exclusion of women from jury trials violated a defendant’s Sixth Amendment right to a representative jury comprised of a fair cross-section of the community); *Peters v. Kiff*, 407 U.S. 493 (1972) (holding that the systematic exclusion of African-Americans from the grand jury and petit jury violated the Caucasian defendant’s Fourteenth Amendment right of due process and equal protection); *Thiel v. S. Pac. Co.*, 328 U.S. 217 (1946) (invalidating the exclusion of all “daily wage earners” from jury service).

181. *Lockhart v. McCree*, 476 U.S. 162, 175 (1986).

182. *Id.*

183. *See* FED. R. CRIM. P. 24. The term “voir dire” comes from French law and is an artificial blend of English and French terms used in medieval English courts. STEPHEN C. YEAZELL, *CIVIL PROCEDURE* 590 (Wolters Kluwer 7th ed. 2008). The term means “to speak the truth” and dates to an age where jurors were as much witnesses as they were deciders of fact. *Id.*

184. *See generally* *J.E.B. v. Alabama*, 511 U.S. 127 (1994) (holding that a state’s intentional discrimination by gender in its use of preemptory strikes in jury selection violates equal protection); *Batson v. Kentucky*, 476 U.S. 79 (1986) (holding that the Equal Protection Clause

“defined solely in terms of shared attitudes that render members of the group unable to serve as jurors in a particular case” can be removed without impinging upon the Sixth Amendment’s “cross-section” requirement.<sup>185</sup> For instance, jurors in death penalty cases can be excluded if their personal beliefs cause them to be incapable of sentencing a defendant to death.<sup>186</sup>

Likewise, civilian jurors who sat on Sgt. Nazario’s trial could have been removed for cause during voir dire if they expressed the inability to fairly judge Sgt. Nazario because of personal beliefs concerning the military, the Iraq War, or combat action.<sup>187</sup> The voir dire process in *United States v. Nazario* revealed a pro-military group: of the three hundred prospective jurors, between forty and sixty were dismissed because of their attitude against prosecuting anyone for conduct in a battle zone, whereas

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forbids the challenging of potential jurors on account of their race).

185. *Lockhart v. McCree*, 476 U.S. 162, 174, 176-77 (1986).

186. *See generally id.* (holding that the Constitution does not prohibit removal, for cause, of jurors whose opposition to the death penalty is so strong that it would prevent or substantially impair their duties at the sentencing phase of the trial); *Witherspoon v. Illinois*, 391 U.S. 510 (1968) (invalidating the death sentence of a defendant in which venire men were excluded because they raised general objections to the death penalty, as contrasted to the permissible exclusion of jurors who expressly stated that they would not or could not sentence a defendant to death).

187. *The Prospective Juror Voir Dire at 16-22, United States v. Nazario*, No. 07-127 (C.D. Cal. Sept. 4, 2007) (on file with author). Some of the over one hundred questions posed to the potential jurors during voir dire included:

1. Do you think that opinion or beliefs about the Iraq War should be considered in determining guilt or innocence?
2. What are your general feelings and opinions about deaths on a battlefield? Is there anything about taking a life on the battlefield that bothers you?
3. Can you think of any decision you have had to make which was any more serious than to decide whether someone lives or dies?
4. Do you feel that military force is used too often? Too seldom? Too randomly? Radically disproportionately?
5. Are you a member of, or have you contributed to or otherwise supported a church, religious organization, political or social advocacy group, or any other organization that takes a position for or against War or supports conscientious objectors?
6. Do you believe that there’s a difference in killing in self-defense and killing on the battlefield?
7. Nazario’s attorneys lastly reconstructed a scene from “Saving Private Ryan” which resembled the circumstances surrounding the charges against Nazario. Nazario’s attorney asked:

Do you recall the final scenes in the movie in which the Corporal, who was a clerk interpreter selected to accompany the Ranger squad, pointed his M1 rifle at four to six German Wehrmacht Army soldiers? The German soldiers dropped their weapons at the Corporal’s command. The U.S. Army Ranger unit had released one German soldier a day earlier, but at this point in the movie, the Germans had just killed several American Army Rangers in the French town. The scene next shows the German previously released by the American Rangers, speaking to the American Corporal in English, pleading for mercy. You never see the German soldier again. The camera then shifts to the American Corporal who fired his M1 rifle. Here is the question—to decide if the Corporal committed any crime on the battlefield—would you want to know what the German soldier did to either resist or not resist just before the Corporal fired?

*Id.*

only one prospective juror was released because of anti-military sentiments.<sup>188</sup> Of the selected jury pool, the jury foreman was a “very pro military” physical education teacher with a doctorate degree, and another juror had a father who fought against the Nazis with the Belgian underground.<sup>189</sup> Interestingly, the lone veteran on the jury pool was the last juror to vote “not guilty.”<sup>190</sup> Although outward prejudices can eliminate a prospective juror from a jury pool, internal feelings of patriotism, national pride, and self-doubt, often undetectable through voir dire, can so permeate a juror’s decision-making that a guilty man walks free, or an innocent man loses his freedom.

### C. COURTS-MARTIAL PANEL SELECTION

Military courts also prescribe rules to challenge potential “members” of a court-martial for possible impartiality or unfairness.<sup>191</sup> However, unlike civilian court, military justice rules require that all members of courts-martial be “on active duty with the armed forces.”<sup>192</sup> Since all panel members serve in a voluntary military, they are less likely to harbor prejudices against the military. Furthermore, since these panel members have experienced combat orders and the intricacies of war or simply understand them better than their civilian counterparts, they do not feel inadequate to convict a fellow Marine for illegal wartime actions. A more just result is likely to occur in a court martial because, although patriotism and pro-military sentiments permeate the military courtroom, a military panel strives to uphold the reputation of the military profession and will not hesitate to convict a renegade soldier for unauthorized conduct that shames the United States military.

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188. Email from Kevin Barry McDermott, Lead Counsel for Jose Nazario, to Olivia C. Zimmerman Miller (Jan. 23, 2009, 16:27:37 EST) (on file with author).

189. *Id.*

190. *Id.*

191. MCM, *supra* note 24, pt. II, at II-102 to 105 (establishing Rule 912). A challenge for cause encompasses actual bias or implied bias. *Id.* at pt. II, at II-104 (establishing Rule 912(f)(1)(N)). Actual bias is “whether any bias is such that it will not yield to the evidence presented and the judge’s instructions” and is based on the military judge’s subjective determination of the member’s credibility. *United States v. Wiesen*, 57 M.J. 172, 174 (C.A.A.F. 2001). Implied bias is an objective standard “viewed through the eyes of the public, focusing on the appearance of fairness.” *United States v. Rome*, 47 M.J. 467, 469 (C.A.A.F. 1998). The judge and counsel for both sides may also question potential members about possible command influence, and if substantial doubt arises as to whether a particular member will be fair and impartial, that member may be removed for cause. 10 U.S.C. § 841 (2006).

192. MCM, *supra* note 24, pt. II, at II-102 to 105 (establishing Rule 912(f)-(g)).

**D. THE SIXTH AMENDMENT RIGHT TO AN IMPARTIAL JURY OF ONE'S PEERS IS VIOLATED WHEN A FORMER SOLDIER ACCUSED OF COMBAT CRIMES IS PROSECUTED IN CIVILIAN COURT**

The Supreme Court has recognized that “[t]he military constitutes a specialized community governed by a separate discipline from that of the civilian.”<sup>193</sup> As such, to ensure a former soldier accused of combat crimes receives his constitutional right to a jury of his peers, such a defendant should be prosecuted by military court-martial, rather than in civilian court. An analysis of the jury selection in *United States v. Nazario* highlights the constitutional deficiencies of prosecuting a former soldier for combat crimes in civilian court.

Adhering to court-made and legislative law, the Jury Selection Plan of the United States District Court, Central District of California (in which Sgt. Nazario was tried) declares, “all litigants in this Court entitled to trial by jury shall have the right to petit juries selected at random from a fair cross-section of the community in the Division wherein the Court convenes.”<sup>194</sup> To ensure a cross-section of the districts that comprise the Central District of California, a random selection of names of registered voters, in proportionate numbers to ensure that each county is substantially represented, are placed into the available jury pool.<sup>195</sup> The names are chosen through a programmed electronic data processing system in which the mathematical odds of any single name being picked are substantially equal.<sup>196</sup> All selected persons are presumed qualified, unless he is (1) unable to read, write, and understand the English language; (2) unable to speak the English language; (3) incapable, because of mental or physical infirmity, to render satisfactory jury service; or (4) has a charge pending against him or was convicted of a crime punishable by more than one year imprisonment.<sup>197</sup>

However, of the three hundred people in Sgt. Nazario’s jury pool, only three (1% of jury pool) were veterans.<sup>198</sup> This small percentage comports

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193. *Orloff v. Willoughby*, 345 U.S. 83, 94 (1953).

194. Plan of the United States District Court, Central District of California for the Random Selection of Grand and Petit Jurors, General Order No. 07-10, 1 (Nov. 28, 2007), available at [http://www.cacd.uscourts.gov/cacd/GenOrders.nsf/0/509872787427be1d882573a60055c5eb/\\$FILE/GO%2007-10.PDF](http://www.cacd.uscourts.gov/cacd/GenOrders.nsf/0/509872787427be1d882573a60055c5eb/$FILE/GO%2007-10.PDF).

195. *Id.* at 2-3. The plan further states, “To foster the policy and protect the rights secured by §§ 1861 and 1862 of the [Jury Selection and Service] Act, it is not necessary to use sources other than the voter registration lists.” *Id.* at 2.

196. *Id.* at 4.

197. *Id.* at 6-7.

198. Email from Kevin Barry McDermott, Lead Counsel for Jose Nazario, to Olivia C. Zimmerman Miller (Jan. 23, 2009, 16:27:37 EST) (on file with author). Due to the tremendous

with a cross-section of both the populations of the Central District of California, and with the United States as a whole. Although the Central District of California serves eighteen million residents,<sup>199</sup> only thirty-six thousand military veterans reside in Central California (.2% of Central California's population).<sup>200</sup> Looking at the larger "community," only 1% of the United States population consists of military veterans.<sup>201</sup> Thus, the Central District of California's jury selection procedure is consistent with the *Duren* test because (1) military veterans do not comprise a "distinctive" group in the community; (2) the representation of veterans from Sgt. Nazario's venire was reasonable in relation to the number of veterans in the Central District of California; and (3) there was no under-representation of military veterans because a systematic exclusion of veterans occurred.

However, Sgt. Nazario's "community" at the time of his alleged crime was not Riverside, California, or the American population at large; rather, he existed in the military "community"—more specifically—in the First Marine Division, whose unofficial motto is "no better friend, no worse enemy."<sup>202</sup> The Supreme Court "has long recognized that the military is, by necessity, a specialized society separate from civilian society," because unlike civilians, the primary responsibility of service members is to fight wars.<sup>203</sup> The Supreme Court affirmed the importance of military courts by stating, "[j]ust as military society has been a society apart from civilian society, so '[m]ilitary law . . . is a jurisprudence which exists separate and apart from the law which governs in our federal judicial establishment.'"<sup>204</sup>

Unlike "communities" comprised of racial, religious, or political groups, only the military "community" is so distinct that it precipitates the necessity for an independent judicial system, a legal system in which trials are judged solely by like members of the defendant's military community. Far from a homogenous community, the military is a diverse society representing every state in the United States, including various ethnicities,

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pre-trial publicity the case received, the court ordered three hundred prospective jurors to appear for voir dire, five times the usual number. *Id.*

199. District Population, United States Attorney's Office, Central District of California, <http://www.usdoj.gov/usao/cac/aboutusao/population.html> (last visited Jan. 21, 2008).

200. California Veteran Population by County, CA.gov, <http://www.cdva.ca.gov/aboutus/Demographics/DATA%20OF%20POPULATION%20BY%20COUNTY%2012L.pdf> (last visited June, 29, 2010).

201. David R. Segal & Mady Wechsler Segal, *America's Military Population*, POPULATION BULL., Dec. 2004, [http://findarticles.com/p/articles/mi\\_qa3761/is\\_200412/ai\\_n9468428?tag=artBody;coll](http://findarticles.com/p/articles/mi_qa3761/is_200412/ai_n9468428?tag=artBody;coll).

202. See Marine Corps Base Camp Pendleton, <http://www.pendleton.usmc.mil/scout/Articles/july%2019%202007/safety.asp> (last visited July 5, 2010).

203. *Parker v. Levy*, 417 U.S. 733, 743 (1974).

204. *Id.* at 743 (citing *Burns v. Wilson*, 346 U.S. 137, 140 (1953) (plurality opinion)).

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age groups, and socio-economic backgrounds.<sup>205</sup> As such, the strength of the military justice system lies in its ability to provide a defendant with a jury comprised of individuals who all adhere to military values, but simultaneously hold unique beliefs and ideologies.<sup>206</sup> Trial by civilian jury violated Sgt. Nazario's Sixth Amendment constitutional right to an "impartial jury" because instead of a jury comprised of a constitutionally mandated cross-section of society, no member of Sgt. Nazario's military community was represented on his jury.

In contrast, under a military court-martial, the "convening authority" (a military commander vested with power to convene courts-martial) individually selects all jurors (called "members"), who are best qualified based on age, education, experience, training, length of service, and judicial temperament.<sup>207</sup> Commissioned officers may serve on any court-martial; warrant officers may serve on a court-martial for a warrant officer or enlisted soldier; and upon the request of the accused, enlisted soldiers may serve as a member on the trial of another enlisted soldier.<sup>208</sup> If possible, members must not be junior in rank to the defendant.<sup>209</sup> Additionally, a standing order at Camp Pendleton, California requires the selection of members with combat experience if the defendant is accused of battlefield

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205. See OFFICE OF ARMY DEMOGRAPHICS, THE CHANGING ARMY PROFILE 4-6, available at <http://www.armyg1.army.mil/hr/docs/demographics/Changing%20Profile%20report%20December%202007.pdf>; see also Army G-1, Demographics, <http://www.armyg1.army.mil/hr/demographics.asp> (last visited June 29, 2010) (follow the applicable links).

206. Marine Corps and Navy values are "honor, courage, commitment." See Marines.com, [http://www.marines.com/main/index/making\\_marines/culture/traditions/core\\_values](http://www.marines.com/main/index/making_marines/culture/traditions/core_values) (last visited June 29, 2010). Army values are "Loyalty, Duty, Respect, Selfless Service, Honor, Integrity, Personal Courage." See Deputy Undersecretary of the Army, Knowledge Center, <http://www.army.mil/armybtkc/gov/values.htm> (last visited June 29, 2010). Air Force values are, "Integrity First; Service Before Self; Excellence in All We Do." See United States Air Force, Core Values, <http://www.usafa.af.mil/core-value/> (last visited June 29, 2010).

207. 10 U.S.C. § 825(d)(2) (2006). The selection of panel members for a court-martial has long been the subject of criticism by commentators who believe that it violates the Sixth Amendment. See Stigall, *supra* note 22, at 66; Deidra J. Fleming, *Out, Damned Error Out, I Say! The Year in Court-Martial Personnel, Voir Dire and Challenges, and Pleas and Pretrial Agreements*, 2005-MAY ARMY LAW. 45, 46 (2005), available at [http://www.loc.gov/rr/frd/Military\\_Law/pdf/05-2005.pdf](http://www.loc.gov/rr/frd/Military_Law/pdf/05-2005.pdf). However, military courts have consistently upheld court-martial panel selection procedures. See *United States v. Kemp*, 46 C.M.R. 152, 154 (C.M.A. 1973). In *Kemp*, the court stated that:

Courts-martial are not a part of the judiciary of the United States within the meaning of Article III of the Constitution. They derive their authority from the enactments of Congress under Article I of the Constitution, pursuant to congressional power to make rules for the government of the land and naval forces. Consequently, the Sixth Amendment right to trial by jury with accompanying considerations of constitutional means by which juries may be selected has no application to the appointment of members of courts-martial.

*Id.* (citations omitted).

208. 10 U.S.C. § 825(d)(2) (2006).

209. § 825(d)(1).

crimes.<sup>210</sup> These jurors march in the same government-issued boots as Sgt. Nazario: they do not need the horrors of war explained to them, nor do they require the meaning of combat stress to be defined. As such, these “jurors” are better equipped to evaluate the appropriateness of the defendant’s actions.<sup>211</sup>

Critics may argue that the military “community” is no different than a “community” of doctors, a “community” of lawyers, or a “community” of police officers, and since other highly-trained professionals are not afforded a jury comprised of their professional peers, nor should a former soldier accused of combat crimes. Although not without merit, this argument can be countered by the current existence of “special” courts, history, and public policy.

The “special” prosecution of complex cases is not unique. Federal tax courts exist solely to adjudicate tax disputes, and federal bankruptcy courts exist to decide bankruptcy matters.<sup>212</sup> Just as Congress created courts solely designed to resolve intricate financial claims by experts in tax and bankruptcy, the prosecution of combat-action cases in military court would expedite judicial efficiency because court-martial panel members are already familiar with military custom, lore, and language. Additionally, since an independent military judicial system has always existed in this country,<sup>213</sup> it can be argued that Congress has always recognized the military as a distinctive “community,” precipitating the need for the military prosecution of former soldiers accused of war crimes.

Finally, as a matter of sound policy, prosecution under the MEJA should not be a political vehicle used by prosecutors to subject former soldiers to harsher sentences than would be achieved under the UCMJ.<sup>214</sup>

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210. Email from Kevin Barry McDermott, Lead Counsel for Jose Nazario, to Olivia C. Zimmerman Miller (Jan. 7, 2009, 15:41:38 EST) (on file with author). Camp Pendleton is the headquarters of the First Marine Division and the location of Sgt. Nelson’s pending court-martial. Mark Walker, *Second Fallujah Trial Postponed*, N. COUNTY TIMES, Dec. 30, 2008, available at <http://www.nctimes.com/articles/2008/12/30/military/zda4f8ca3dfe904118825752f0060baa8.txt>. If Sgt. Nazario had been subject to the UCMJ when the allegations against him arose, he would have been prosecuted at Camp Pendleton. *Id.*

211. The conviction rate for general courts-martial is only slightly lower than for felonies in federal district courts. Behan, *supra* note 25, at 302 n.573. The overall conviction rate for general courts-martial in fiscal year 2001 was 95%. *Id.* In the federal system, the conviction rate for felonies (including guilty pleas) that were not dismissed was 98.37%. *Id.*

212. See United States Tax Court, <http://www.ustaxcourt.gov/about.htm> (last visited June 29, 2010); United States Bankruptcy Courts, <http://www.uscourts.gov/bankruptcycourts.html> (last visited June 29, 2010).

213. See discussion *supra* part II.A.

214. See *supra* note 118 in which a commentator notes that the government’s decision to prosecute Steven Green under the MEJA in federal court is a political decision because if

For example, Sgt. Nazario faced a minimum sentence of ten years had he been convicted of voluntary manslaughter in federal court. In contrast, no mandatory minimum sentence exists for the same offense under court-martial.<sup>215</sup> If found guilty by a military panel, Sgt. Nazario could have received anywhere from no prison time to life in prison.

Just as American criminal law is based on the principle of legality (or *nulla poena sine lege*)<sup>216</sup> a defendant should not be sentenced under guidelines that differ from those that governed his conduct when the crime was committed. Public policy and constitutional justice demands a legislative fix to the current inequities that exist when a former soldier is prosecuted for combat crimes under the MEJA.

#### **VI. CONGRESS SHOULD AMEND THE UCMJ AND MEJA TO EXTEND COURT-MARTIAL JURISDICTION OVER FORMER SOLDIERS ACCUSED OF WAR CRIMES**

Congress would best serve the interests of society by amending the UCMJ and the MEJA to extend jurisdiction over former military members accused of combat crimes. In such cases, an all-military jury is ideal, as it constitutes the only “community” with the requisite knowledge and experience to adequately judge the defendant’s actions. Prosecution of such defendants in federal court is impracticable because, unless such trials are solely prosecuted in venues in which a large segment of retired and prior-service military members reside, it is highly unlikely that any civilian jury pool could produce a uniform jury of combat veterans. In contrast, military courts are designed to prosecute alleged violations of war, and all panel members are thoroughly familiar with the intricacies of military life.

Currently the MEJA extends jurisdiction over criminal offenses committed by “member[s] of the Armed Forces subject to chapter 47 of title 10 [of the UCMJ].”<sup>217</sup> However, prosecution under the MEJA may not commence unless the service member is no longer subject to the UCMJ,

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convicted under military law Green could have the chance of parole after ten years, but may not have that option under federal law.

215. Email from Kevin Barry McDermott, Lead Counsel for Jose Nazario, to Olivia C. Zimmerman Miller (Mar. 7, 2009) (on file with author). Except for murder where the UCMJ prescribes a mandatory minimum sentence, a court-martial may adjudge any sentence from no punishment to the maximum authorized. MCM, *supra* note 24, pt. II, at II-123 to 124 (establishing Rule 1002); *see also* Jack L. Rives & Steven J. Ehlenbeck, *Civilian Versus Military Justice in the United States: A Comparative Analysis*, 52 A.F. L. REV. 213, 229-31 (2002).

216. The full Latin term is “nulle crimen sine lege; nulla poena sine lege,” which means “no crime without (pre-existent) law, no punishment without (pre-existent) law.” HERBERT L. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 79-80 (1968).

217. 18 U.S.C. § 3261(a)(2) (2006).

except when the indictment charges that the military member committed the offense with one or more other defendants, at least one of whom is not subject to the UCMJ.<sup>218</sup> Though the UCMJ restricts military prosecution to active, reserve, and retired members of the military, during a “declared war or a contingency operation, persons serving with or accompanying an armed force in the field,” are also subject to UCMJ jurisdiction.<sup>219</sup> If Congress deemed civilian misconduct during war important enough to be prosecuted under the UCMJ, why should crimes committed during actual combat operations, even if prosecuted after the defendant has left the military, not be subject to military jurisdiction?

An easy solution would exist if Congress first amended the UCMJ. Currently, the UCMJ extends jurisdiction over a member of the armed forces “until such person’s active service has been terminated in accordance with law or regulations promulgated by the Secretary concerned.”<sup>220</sup> An additional provision reading “unless prosecuted for a crime in combat committed during a declared war or contingency operation” would rectify the current inequity that exists when a former soldier is prosecuted under the MEJA for a crime committed in combat. To distinguish between non-combat actions that took place during a war or contingency operation (such as the charges pending against Steven Green)<sup>221</sup> and actions that occurred during ongoing combat operations (such as the allegations against Sgt. Nazario), “crime in combat” must be further defined. Such a definition should read:

Crime in combat includes actions taken pursuant to military authorization or orders during the performance of military duties in a combat theater. Such conduct must violate the Law of Land Warfare, the Geneva Conventions, or the Uniform Code of Military Justice, in addition to violating federal law. To qualify as a “combat crime,” the alleged crime(s) must have been committed during engagement in active hostile combat operations and not in a defendant’s individual capacity.<sup>222</sup>

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218. 18 U.S.C. § 3261(d)(1)(2).

219. 10 U.S.C. § 802a(1)-(10) (2006) (effective Oct. 17, 2006).

220. 10 U.S.C. § 802 (c)(4).

221. See discussion *supra* Part III.

222. A “war crime” is defined in 18 U.S.C. § 2441(c) (2006) as any conduct “defined as a grave breach in any of the international conventions signed at Geneva” or any conduct of “a person who . . . willfully kills or causes serious injury to civilians.” This article proposes a broader definition of “combat crime” to ensure no jurisdictional “gap” occurs—by punishing only violations of the Geneva Conventions, an individual who violates the UCMJ or federal law may escape prosecution if his actions did not also violate any international convention. Since only conduct committed pursuant to military orders in a combat zone need be prosecuted by court-martial, the author distinguishes between actions committed during active hostile operations, and those committed in

### A. DISTINGUISHING *TOTH V. QUARLES*

Including prosecution under the UCMJ for combat crimes committed by former military members does not conflict with the Supreme Court's pronouncement in *Toth v. Quarles*, which held that Congress could not subject ex-servicemen to trial by court-martial.<sup>223</sup> In *Toth*, the defendant was not charged with any war crime—rather, he was prosecuted for the murder of a Korean national—an action that was not committed during combat operations or as a result of an Air Force order.<sup>224</sup> The Court ruled that court-martial jurisdiction over the defendant could not arise out of Congress's constitutional authority “to raise and support Armies;” “to declare War;” or “to make Rules for the Government and Regulation of the land and naval Forces” as supplemented by the Necessary and Proper Clause.<sup>225</sup> The Court also determined that the President's “Commander-in-Chief” power could not grant such broad military jurisdiction.<sup>226</sup>

The Court sought to define distinct functions for both the military and for the courts, never articulating the circumstances in which these roles become blurred. It stated:

Unlike courts, it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise. But trial of soldiers to maintain discipline is merely incidental to an army's primary fighting function. To the extent that those responsible for the performance of this primary function are diverted from it by the necessity of trying cases, the basic fighting purpose of armies is not served.<sup>227</sup>

Unlike *Toth*, former soldiers would not be prosecuted in military courts merely to maintain discipline within the armed forces; rather, such courts-martial would bolster the military's primary mission of fighting wars. When members of the military are not held accountable for illegal combat atrocities, their acts tarnish the military's reputation. This may potentially sully the image of the United States, souring diplomatic relations with the international community. If Congress has the authority to declare War or to order the military into battle, so too, should it have the constitutional authority to ensure that a service member is justly tried by a jury of his peers for crimes committed while deployed.

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a soldier's individual capacity.

223. See *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 23 (1955); see also *supra* notes 40-47.

224. See *Toth*, 350 U.S. at 13.

225. *Id.* at 13-14 (quoting U.S. CONST. art. I, § 8).

226. *Id.* at 14.

227. *Id.* at 17.

Although the *Toth* Court acknowledged that “military personnel because of their training and experience may be especially competent to try soldiers for infractions of military rules,” it invalidated the use of a court-martial against a former Airman because “the premise underlying the constitutional method for determining guilt or innocence in federal courts is that laymen are better than specialists to perform this task.”<sup>228</sup> This logic becomes skewed when, rather than judging a defendant for an easily definable federal crime such as murder, civilian jurors are asked to assess the actions a service member made in the midst of combat, where “murder” is not readily definable. “Specialists” (as the *Toth* Court characterized military members) are required to judge such actions because no amount of testimony could ever re-create the tension, anxiety, and stress inherent in armed combat, information needed to fairly render a verdict against a defendant accused of combat crimes.

### B. JOINTLY COMMITTED CRIMES

Besides closing the jurisdictional gap by which ex-service members escaped federal prosecution for crimes committed while overseas, the MEJA provides for the efficient resolution of cases involving crimes jointly committed by military members and civilians.<sup>229</sup> Although individuals subject to the UCMJ cannot be prosecuted under the MEJA, an exception is made if “the [military] member committed the offense with one or more other defendants, at least one of whom is not subject to [the UCMJ].”<sup>230</sup> Since civilians serving with the military during a “declared war or contingency operation” are already subject to the UCMJ, if the UCMJ were amended as proposed, any combat crime jointly committed by a military member and a civilian accompanying the military would be prosecuted by court-martial.<sup>231</sup> Thus, federal courts would retain jurisdiction over non-combat crimes jointly committed by a service member and civilian, upholding the legislative intent of granting the government the prosecutorial discretion to try such defendants together.<sup>232</sup>

A jurisdictional question may arise if the crime was committed in concert with a civilian *not* accompanying the U.S. armed forces—for instance, an enemy combatant or a host country national. If such a person were a prisoner of war or lawful enemy combatant, jurisdiction lies with the

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228. See United States *ex rel.* *Toth v. Quarles*, 350 U.S. 11, 18 (1955).

229. 18 U.S.C. § 3261(d)(2) (2006); see also *Hearing*, *supra* note 94, at 52-60 (statement of Roger Pauley, Director of the Department of Justice—Criminal Division).

230. 18 U.S.C. § 3261(d)(2) (2006).

231. See 10 U.S.C. § 802(a)(2) (2006).

232. See *Hearing*, *supra* note 94.

U.S. military judicial system, stripping the MEJA of jurisdiction.<sup>233</sup> If the co-conspirator was an unlawful enemy combatant not subject to the UCMJ, a myriad of jurisdictional, venue, procedural, and substantive questions arise, which are beyond the scope of this comment.<sup>234</sup>

Regardless of the status of the co-conspirator, to prevent any possible confusion, the MEJA must be amended to guarantee a former soldier accused of combat crimes his constitutional right to an impartial jury. Once the UCMJ is amended, former soldiers accused of combat crimes would only be subjected to the MEJA if they committed the crime with a defendant not subject to the UCMJ.<sup>235</sup> Supplementing Section (d)(2) with “unless prosecuted for a crime in combat committed during a declared war or contingency operation,” would remedy the defendant’s Sixth Amendment quandary and ensure that all combat crimes committed by former soldiers were prosecuted in military court.<sup>236</sup>

## VII. CONCLUSION

“*War is Hell.*”<sup>237</sup>

So long as the United States remains embattled in armed conflict, crimes will be committed in the often-remote lands to where the military is sent. The difficult aspect lies in distinguishing actions that constitute crimes in peacetime from those actions committed pursuant to U.S. wartime policy. While all wartime scenarios may resemble “hell” to a lay juror, military members are trained to operate in combat environments.

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233. See 10 U.S.C. § 802(a)(9)-(13) (2006).

234. The Bush Administration sought to prosecute unlawful enemy combatants, imprisoned at Guantanamo prison in Cuba, by military tribunal. See *Boumediene v. Bush*, 553 U.S. 723 (2008). On his second day in office, President Barack Obama ordered the closure of Guantanamo prison by January 22, 2010. *Obama Closing Guantanamo as he Reshapes U.S. Policy*, CHICAGO SUN-TIMES, Jan. 22, 2009, available at <http://www.suntimes.com/news/politics/obama/1392243,w-obama-guantanamo-gitmo-closing-012209.article>. President Obama’s administration also suspended trials of terrorist suspects for 120 days, until a review of military tribunals is completed. *Id.* However, the January 22, 2010 deadline to close Guantanamo has passed and President Obama has not offered a new deadline. *One Year Later, Guantanamo Still Open*, CBSNEWS, Jan. 22, 2010, <http://www.cbsnews.com/stories/2010/01/22/politics/main6129494.shtml>. It is uncertain what legal status unlawful enemy combatants and/or terror suspects will be granted, and how future prosecution of such individuals will occur.

235. Cf. 18 U.S.C. § 3261(d)(2) (2006).

236. Such an amendment should only occur after the UCMJ has been amended to extend jurisdiction over a former service member accused of combat crimes. See *supra* pp. 68-70. Otherwise, a new jurisdictional “gap” would occur, preventing the prosecution in U.S. courts of military members who commit combat crimes in concert with other individual(s).

237. This famous quote is attributed to General William Tecumseh Sherman, a leader of the Union Army during the American Civil War.

Only a mockery of justice is achieved when a former soldier, accused of combat crimes, is prosecuted in federal court and judged by a civilian jury. Society runs a high risk that a guilty ex-soldier will be exonerated because of a jury's refusal to condemn a man for actions committed in an environment of which they know nothing about. In the alternative, a sparse understanding of lawful military orders and the rules of war may cause a lay jury to convict a man for actions taken pursuant to his vested military authority. In contrast, military members, especially combat veterans, are familiar with the stresses of armed conflict, and are better equipped to determine whether a fellow soldier violated a law of war.

The enactment of MEJA resolved the jurisdictional gap that once allowed heinous crimes committed by Americans overseas to go unpunished. However, Congress never intended for the MEJA to create federal jurisdiction over former soldiers accused of combat crimes. Before another *United States v. Nazario* occurs, Congress should amend the MEJA and the UCMJ to provide for the military prosecution of former soldiers accused of combat crimes. Only then will such a defendant receive a constitutionally fair trial, one judged by an impartial panel comprised of his military peers.

Olivia Zimmerman Miller