

The Case For the Civilian Extraterritorial Jurisdiction Act (CEJA):

Why U.S. Needs to Clarify U.S. Criminal Jurisdiction over U.S. Contractors Fielded Abroad

- **Private Contractors Have Been Accused of Misconduct, But Criminal Jurisdiction Is Not Clear.** Contractors have been accused of participating in torture¹ and violence against local civilian populations.² Blackwater (now XE) private security contractors working for the State Department are accused of killing 17 unarmed civilians and wounding 24 more in an unprovoked incident in Baghdad’s Nisoor Square. In 2011, an American CIA contractor, Raymond Davis, was accused of fatally killing two men at a crowded traffic stop in Pakistan. Criminal jurisdiction over civilian contractors is not clear for a range of offenses, from rape to murder. CEJA would clarify criminal jurisdiction.
- **Criminal Jurisdiction for Defense Contractors Is Clear; Just Not For Non-DoD Contractors.** U.S. federal courts have criminal jurisdiction over contractors for war crimes,³ torture,⁴ and certain felonies committed within U.S. maritime and diplomatic areas and military bases.⁵ They also have jurisdiction for serious crimes committed abroad by Defense contractors and contractors supporting the mission of the Department of Defense (DoD).⁶ But, as the Justice Department (DoJ) testified, “certain civilian U.S. Government employees [and contractors] can commit crimes abroad, yet not be subject to the jurisdiction of U.S. courts.”⁷
- **Even where there is clear jurisdiction, there has been almost no accountability.** The Justice Department testified that there are significant limitations to U.S. law that make prosecuting certain contractor crimes difficult. Specifically, in certain instances bringing charges under MEJA requires proving a contractor’s employment relates to supporting the mission of DoD, which according to DoJ, can be “extremely challenging and resource-intensive” dependent upon “highly specific facts and circumstances... and, in practice, ... has proven difficult to apply.”⁸

¹ Lieutenant General Anthony R. Jones, Article 15-6 Investigation of the Abu Ghraib Prison and 205th Military Intelligence Brigade at 130-34 (August 2004)(General George Fay identified five contractors in his official report on Abu Ghraib).

² See e.g. U.S. v. Cannon and Drotleff.

³ The War Crimes Act 18 U.S.C. § 2441(a) (authorizes prosecution of war crimes committed inside or outside the United States by or against U.S. nationals or members of the U.S. armed forces).

⁴ The Anti-Torture Act 18 U.S.C. §§ 2340, 2340A (covers conduct by U.S. nationals and those found in the United States for acts of torture committed outside the United States).

⁵ The Special Maritime and Territorial Jurisdiction 18 U.S.C. § 7 (extends U.S. criminal jurisdiction over certain felony crimes such as assault, homicide, kidnapping, and sexual abuse committed by or against U.S. nationals that are committed in U.S. admiralty and maritime areas as well as U.S. diplomatic areas and military bases).

⁶ Military Extraterritorial Jurisdiction Act of 2000, 18 U.S.C. §§ 3261 – 3267 (2010).

⁷ Statement of Lanny Breuer, Assistant Attorney General Criminal Division Department of Justice, Before the Senate Judiciary Committee for Hearing “Holding Criminals Accountable: Extending Criminal Jurisdiction for Government Contractors and Employees Abroad” (May 25, 2011) [hereinafter DoJ Testimony Before SJC] available at <http://judiciary.senate.gov/pdf/11-5-25%20Breuer%20Testimony.pdf>.

⁸ *Id.*

- **U.S. Agencies Significantly Rely on Contractors to Perform Military and Security Functions Abroad, including in War Zones.** U.S. agencies rely on private contractors to perform a range of services including, providing logistical support, training foreign police and security forces, providing humanitarian development, and providing personal, static, and convoy security in Africa, Latin America, the Middle East and elsewhere.⁹ In Iraq and Afghanistan, private contractors permeate virtually every component of the U.S. military and diplomatic mission – from filing paperwork to using deadly force. The U.S. fields a contractor force equal to, and at times outnumbering, U.S. troops there.¹⁰
- **Drawing Troops Down in Iraq and Afghanistan and Increasing Civilian Contractors In Those Regions Demands Response.** The State Department reports that it will increase its contractor force to 17,000, and double its use of private security contractors to 7,000 by the time the military exits Iraq in order to replace critical security-related functions once performed by the military.¹¹ It is imperative that U.S. criminal jurisdiction over non-DoD contractors is fully clarified.
- **Private Security Contractors Support CEJA.** Many in the private contractor industry recognize that the criminal actions of some bad contractors stain the reputation of the industry as a whole. Industry leaders who painstakingly select, vet, and train private security contractors do not want to be lumped with the negligent and criminal acts of others. Moreover, U.S. contractors who are accused of crimes in weak or failed states with unreliable legal institutions may well prefer to have claims against them heard in a U.S. federal court than in many of the countries they operate. For these reasons, industry supports fair measures to hold contractors accountable for serious crimes committed abroad.¹²
- **Bi-Partisan Commission on Wartime Contracting in Iraq and Afghanistan Calls on Congress to Clarify U.S. Criminal Jurisdiction of Civilian Contractors.** In its second interim report to Congress, the independent Commission urged Congress to “clarify U.S. criminal jurisdiction over civilian-agency contractors operating overseas.”¹³ The Commission noted that

⁹ See e.g. AFRICOM, CENTCOM, SOUTHCOM, and NORTHCOM.

¹⁰ CENTCOM 2nd Quarter FY2011 Contractor Census Report.

¹¹ The Commission on Wartime Contracting in Iraq and Afghanistan has noted 14 security-related tasks that State contractors will have to perform that are of special concern including, recovering killed and wounded personnel, recovering damaged vehicles, recovering downed aircraft, clearing travel routes, operations-center monitoring of PSCs, PSC inspection and accountability services, convoy security, explosive-ordnance disposal, counter-rocket, artillery, and mortar notification, counter-battery neutralization response, communications support, tactical-operations center dispatch of armed response teams, policing Baghdad’s International Zone, and maintaining electronic counter-measures, threat intelligence, and technology capabilities. Special Report on Iraq Transition Planning, Better planning for Defense-to-State transition in Iraq needed to avoid mistakes and waste at 4 (July 12, 2010) *available at* http://www.wartimecontracting.gov/docs/CWC_SR2010-07-12.pdf.

¹² See ISOA, fka IPOA, letter of support for CEJA, March 24, 2010.

¹³ At what risk? Correcting over-reliance on contractors in contingency operations 57 (Feb. 24, 2011) *available at* http://www.wartimecontracting.gov/docs/CWC_InterimReport2-lowres.pdf.

the “U.S. government’s limited jurisdiction over criminal behavior and limited access to records, have contributed to an environment where contractors misbehave with limited accountability.”¹⁴

- **Justice Department and State Department Strongly Support CEJA Passage.** Before Congress, DoJ testified, “Given the evolving nature of our engagement in various countries such as Iraq and Afghanistan, and given the large number of employees and contractors being utilized by agencies other than the Department of Defense, we view the enactment of CEJA as crucial to ensuring accountability and demonstrating to other countries that we do not give U.S. Government employees license to commit crimes overseas.”¹⁵ Moreover, in its testimony before the Commission on Wartime Contracting, the State Department stated that it “strongly supports” the passage of CEJA because it “would serve as a valuable tool for ensuring that U.S. contractors accused of committing crimes abroad are held accountable, both by avoiding some of the difficulties associated with applying the MEJA and by extending extraterritorial jurisdiction to fill current gaps.”¹⁶

- **CEJA Holds Civilian Contractors To Same Standards as DoD Contractors And Service Members.** CEJA establishes an effective accountability mechanism to hold U.S. contractors accountable for serious crimes committed abroad. CEJA would:
 - ☑ **Clarify and Expand Criminal Jurisdiction.** CEJA would extend U.S. criminal jurisdiction over federal government contractors and employees fielded abroad for serious crimes committed while employed by any U.S. department or agency other than the Department of Defense without impacting the conduct of U.S. intelligence agencies abroad. There would be no requirement that the contract support the mission of the Department of Defense.

 - ☑ **Increase Oversight.** CEJA would establish Investigative Task Forces for Contractor and Employee Oversight. These units would investigate allegations of criminal offenses committed by contractors when deployed abroad. These units would provide the Justice Department the manpower resources to increase oversight and accountability over contractors fielded abroad. The legislation also would require the Attorney General to submit annual reports to Congress on the number of prosecutions carried out, including the nature of the offenses and any dispositions reached, during the previous year.

¹⁴ *Id.* at 4.

¹⁵ DoJ Testimony Before SJC, *supra* note 7.

¹⁶ Statement by Patrick F. Kennedy, Department of State, Under Secretary for Management, Before the Commission on Wartime Contracting Hearing “State Department contracting, response to CWC recommendations, and transition effort in Iraq and Afghanistan” (June 6, 2011) available at <http://www.wartimecontracting.gov/index.php/hearings/commission/hearing2011-06-06>.