



Department of Justice

STATEMENT OF

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DEPUTY ASSISTANT ATTORNEY GENERAL
CRIMINAL DIVISION
DEPARTMENT OF JUSTICE

BEFORE THE

COMMITTEE ON FOREIGN RELATIONS
UNITED STATES SENATE

CONCERNING

CLOSING LEGAL LOOPHOLES: PROSECUTING SEXUAL ASSAULTS AND
OTHER VIOLENT CRIMES COMMITTED OVERSEAS BY AMERICAN
CIVILIANS IN A COMBAT ENVIRONMENT

PRESENTED

APRIL 9, 2008

**Statement of
Sigal P. Mandelker
Deputy Assistant Attorney General
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Committed Overseas by American Civilians in a Combat Environment**

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Chairman Nelson, Ranking Member Vitter, and distinguished Members of the Committee, thank you for inviting the Department of Justice to testify at this hearing. Sexual assault cases often involve the most vulnerable victims and must be treated with the utmost seriousness. Whether this conduct occurs within the United States or overseas and in a dangerous military zone, these offenders must be brought to justice.

At the Department of Justice, we take very seriously allegations that United States citizens employed as United States government personnel and contractors in direct service to our nation may have committed sexual assault. As the Deputy Assistant Attorney General in the Criminal Division who supervises one of the key participants in that mission—the Domestic Security Section (DSS)—I am pleased to address the Department of Justice’s ongoing efforts to hold these offenders accountable.

I will focus my remarks today on three major areas: the scope of the Military Extraterritorial Jurisdiction Act (MEJA), the principal statute under which we prosecute these cases; the Department’s role in MEJA cases; and interagency coordination on MEJA cases, including the steps that the Department is taking to build upon and improve cooperation on these cases.

I. Military Extraterritorial Jurisdiction Act

The Military Extraterritorial Jurisdiction Act, Title 18 U.S.C. § 3261, et seq., is the principal Federal statute used to prosecute sexual assault crimes committed by certain U.S. government personnel and contractors in Iraq, Afghanistan, and elsewhere. MEJA was enacted on November 22, 2000, and was designed to extend Federal criminal jurisdiction to a variety of Department of Defense employees and dependents overseas who were not subject to the court-martial process under the Uniform Code of Military Justice (the UCMJ).

As originally enacted, MEJA permitted Federal courts to exercise criminal jurisdiction over conduct that was engaged in outside of the United States that would have been a felony offense if the conduct had been engaged in within the special maritime and territorial jurisdiction of the United States, provided that the offender was within one of three classes of individuals associated with the Department of Defense, namely—

- (1) civilian employees, contractors, and contract personnel employed by the Department of Defense overseas;
- (2) members of the Armed Forces overseas; and
- (3) dependents of members of the Armed Forces or of civilian employees, contractors, and contract personnel employed by the Department of Defense residing overseas.

In 2004, Congress amended MEJA to cover civilian employees, contractors, and contract employees of other Federal agencies, but only to the extent that their employment “relates to supporting the mission of the Department of Defense overseas.” In any particular case, the exact scope of this expansion depends upon the facts and circumstances of an individual’s employment and the individual’s relationship to the mission of the Department of Defense.

MEJA contains a number of important restrictions. First, MEJA does not cover crimes committed by a person who is a national of the foreign country where the offense occurred or who ordinarily resides in the foreign country where the offense occurred. Second, no prosecution may be commenced against a member of the Armed Forces unless at the time of prosecution the member is no longer subject to the UCMJ or the member is charged with committing an offense with one or more other defendants not subject to the UCMJ. Third, MEJA extends Federal jurisdiction only over felony offenses; Federal misdemeanors are excluded. Finally, MEJA may not be used to prosecute someone who has already been prosecuted or is being prosecuted by a foreign government for the same conduct without the approval of the Attorney General or Deputy Attorney General (or a person acting in either capacity).

The Department supports legislative efforts to hold Federal employees and contractors accountable for serious misconduct they may commit abroad. We look forward to continuing to work with the Congress to ensure that we have the laws we need to hold United States contractors properly accountable.

II. The Department of Justice’s Role in MEJA Cases

The Department’s involvement in MEJA typically starts when a Department of Defense or Department of State law enforcement agency presents or refers a case to the Department for possible prosecution. As a general matter, these agencies contact the Department of Justice’s Criminal Division, which serves as the central point of contact within the Department of Justice for MEJA referrals from investigating agencies. On certain occasions, an investigating agency refers a matter directly to a United States Attorney’s Office (USAO).

When an agency refers a potential MEJA case, Criminal Division attorneys review the investigative materials presented by the referring agency to determine (1) if jurisdiction exists under MEJA, (2) if sufficient facts exist to proceed, and (3) where appropriate venue lies within the United States. If the Department determines that the case falls within MEJA and there are sufficient facts to proceed, the Criminal Division refers the matter to the appropriate United States Attorney's Office for its consideration. United States Attorneys' Offices ultimately determine whether to prosecute or decline a case in the same manner that they make such determinations in other cases—pursuant to the Principles of Federal Prosecution in the United States Attorneys' Manual.

The Criminal Division also offers guidance and assistance to every USAO to which it refers a MEJA case. This assistance generally comes in the form of legal guidance regarding MEJA, assistance in obtaining information from and working with military law enforcement agencies, and coordinating international issues. In certain circumstances, the Criminal Division will also provide direct prosecutorial support by assigning a trial attorney to partner with the local Assistant United States Attorney assigned to the case.

If a case is initially investigated or later joined by a law enforcement agency within the Department—generally the Federal Bureau of Investigation (FBI)—the Department fulfills the roles of both investigator and prosecutor. On the investigatory side, however, the Department generally plays a supporting role as most MEJA cases are initially investigated overseas by the Department of Defense or the Department of State, because these investigative agencies are usually the first to respond to the alleged criminal activity in the conflict area. The FBI may participate in certain investigations, mainly those of particular complexity or seriousness.

Since the enactment of MEJA in 2000, the Department of Justice has received referrals of potential MEJA cases from both the Departments of Defense and State. Of these cases, twelve have resulted in the filing of a Federal indictment, information, or complaint and another has resulted in a conviction in State court. A number of other cases are under active investigation, and some have been declined.

Of the twelve cases that have been charged in Federal court, seven have resulted in conviction, and the remaining five await trial. These cases include allegations of sexual abuse (including the possession or use of child pornography). Indeed, four cases involving sexual abuse have been successfully prosecuted in Federal court; another case has been indicted; and others are currently under active investigation. Because of confidentiality, privacy, and court-imposed restrictions, I cannot address ongoing investigations of sexual abuse.

The successful prosecutions include: the conviction, in the Western District of Washington, of a DOD civilian employee for abusive sexual contact of a minor while he was residing in Japan; the conviction, in the Southern District of Georgia, of a DOD contractor employed in Iraq for abusive sexual contact; the conviction, in the Western District of Texas, of a DOD contractor in Qatar on child pornography charges; and the conviction, in the Eastern District of Virginia, of another DOD contractor in Iraq on child pornography charges.

It must be noted that even with the broadest scope of jurisdiction, however, investigating and prosecuting serious crimes in Iraq and Afghanistan are very challenging. As a general matter, investigations in any foreign country face particular difficulties of language, evidence collection, logistical support, and coordination with a sovereign power. In addition, the present circumstances in Iraq and Afghanistan raise further obstacles. Field investigation in an active war zone is extremely difficult and requires extensive security precautions. Witnesses are difficult to locate and when found are often reluctant to come to the United States to testify. In short, investigating and prosecuting serious crimes in a war zone is a very difficult and costly proposition, and the associated challenges cannot be underestimated. These logistical challenges help explain why investigations and prosecutions under MEJA may take significant time to complete.

III. Interagency Coordination

The Department of Justice coordinates regularly, often on a daily basis, with other Departments and agencies on MEJA cases, both at the initial referral stage and subsequently at the investigation and prosecution stage. For example, the Department receives referrals from the Department of Defense pursuant to procedures set forth in March 2005 in Department of Defense Instruction 5525.11.

In practice, the General Counsel's Office of the Department of Defense initiates the referral by sending the Criminal Division a summary of the case describing the basic allegations and facts. In some cases, the General Counsel's Office also provides a military law enforcement report with the initial referral. Once a case is referred to a United States Attorney's Office, prosecutors and agents likewise coordinate, often on a daily basis.

While these established procedures have been quite effective in ensuring appropriate coordination, we are always looking for ways to improve. Thus, in recent months, the Department has been working very closely with the Departments of Defense and State to improve the process by which both Departments investigate and refer cases to the Department of Justice for prosecution. The results of these efforts include the recent March 10, 2008, memorandum from the Secretary of Defense governing how offenses that are both a violation of MEJA and the UCMJ should be handled.

In addition, the Department recognizes that training and education is key to the successful investigation and prosecution of these highly complex cases. As a result, the Criminal Division has been proactively offering training courses on MEJA to military investigative agencies, such as the Army Criminal Investigation Command and the Naval Criminal Investigative Service, and has provided instruction on MEJA to the Judge Advocate General Corps of the Armed Services as well. This training has already contributed to an increase in 2008 of MEJA referrals from the Department of Defense.

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In conclusion, Mr. Chairman, I would like to express to you and the Committee the Department's appreciation for your interest in this issue. The Department is committed to remaining vigilant in our efforts to bring sexual offenders to justice. I look forward to answering the Committee's questions.