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NOTES

UNITED STATES V. PASSARO: EXERCISING EXTRATERRITORIAL JURISDICTION OVER NON-DEFENSE DEPARTMENT GOVERNMENT CONTRACTORS COMMITTING CRIMES OVERSEAS UNDER THE SPECIAL MARITIME AND TERRITORIAL JURISDICTION OF THE UNITED STATES

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The use of government contractors in overseas military contingencies has exploded since the post-Cold War military drawdown of the early 1990s.¹

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1. E. L. Gaston, *Mercenarism 2.0? The Rise of the Modern Private Security Industry and Its Implications for International Humanitarian Law Enforcement*, 49 HARV. INT'L L.J. 221, 224 (2008).

The military downsizing of traditional military powers after the Cold War and their disengagement from select zones of influence (particularly Africa) created a demand for greater privatized military and security options, while also flooding the market with an ample supply of former soldiers. Globalization expanded opportunities for the growth of transnational business sectors like the private security industry, while neo-liberal trends toward outsourcing government functions to the private sector rationalized the outsourcing of military and security functions that previously had been guarded as the exclusive province of the state.

Id. (citations omitted).

Following the Geneva Convention in 1949 essentially outlawing the use of mercenary forces, traditional military security firms were relegated to the widely ignored, anarchic insurrections enveloping much of Africa. These firms regained legitimacy, however, by shying away from the brazen “guns for hire” image of their predecessors, focusing instead on defense work. For many outside observers, this transition began with the 1995 intervention in Sierra Leone by one (now defunct) South African firm, Executive Outcomes. Hired for an estimated \$15 million and various diamond mining concessions, two hundred well-armed “security providers” fought off approximately 10,000 rebels on behalf of the country’s besieged government. More recently, the United States hired forty private gunmen from American-based DynCorp, Inc. to protect Afghani President Hamid Karzai in 2002. Once relegated to the murky underworld of post-colonial conflict, post-Cold War demilitarization brought new demand to the market for private security providers.

With an estimated 20,000 to 30,000 private contractors present in Iraq and approximately 10,000 private contractors in Afghanistan, ensuring legal compliance has become both a domestic and international issue of top priority.² Over the past eight years, Congress has made multiple attempts to ensure that the United States has jurisdiction over civilian contractors used

Kateryna L. Rakowsky, *Military Contractors and Civil Liability: Use of the Government Contractor Defense to Escape Allegations of Misconduct in Iraq and Afghanistan*, 2 STAN. J. C.R. & C.L. 365, 369–70 (2006) (citations omitted).

2. Gaston, *supra* note 1, at 223. Recent numbers from the Government Accountability Office (GAO) now estimate that the total number of contractors working for the Department of Defense, Department of State, and U.S. Agency for International Development (USAID) in Iraq and Afghanistan is over 197,000. UNITED STATES GOV'T ACCOUNTABILITY OFFICE, GAO-09-19, CONTINGENCY CONTRACTING: DOD, STATE, AND USAID CONTRACTS AND CONTRACTOR PERSONNEL IN IRAQ AND AFGHANISTAN (2008) (prefatory note).

Although private contractors constituted one-third of the CIA workforce in 2007, then-CIA Director Michael V. Hayden admitted that contractor work “has not been efficiently managed.” Walter Pincus & Stephen Barr, *CIA Plans Cutbacks, Limits on Contractor Staffing*, WASH. POST, June 11, 2007, at A2.

The United States has been active in combat operations in Afghanistan since October 2001. See KENNETH KATZMAN, CONG. RESEARCH SERV., RL30588, AFGHANISTAN: POST-WAR GOVERNANCE, SECURITY, AND U.S. POLICY 6–7 (2008) (noting that “[m]ajor combat” began in Afghanistan on October 7, 2001).

After the September 11 attacks, the Bush Administration decided to militarily overthrow the Taliban when it refused to extradite bin Laden, judging that a friendly regime in Kabul was needed to enable U.S. forces to search for Al Qaeda activists there. . . .

Major combat in Afghanistan (Operation Enduring Freedom, OEF) began on October 7, 2001. It consisted primarily of U.S. air-strikes on Taliban and Al Qaeda forces, facilitated by the cooperation between small numbers (about 1,000) of U.S. special operations forces and the Northern Alliance and Pashtun anti-Taliban forces.

Id. at 6.

On September 18, 2001, Congress passed Senate Joint Resolution 23 which authorized the President to “use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons.” Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224 (2001). Although Passaro asserts in his appeal that his actions while interrogating Wali were authorized under this statute, this Note will not explore the constitutional issues raised by contradictory Executive Branch actions. The use of this authorization of force to employ Passaro and the subsequent use of the Justice Department to investigate and prosecute Passaro after acting under this mandate is beyond the scope of this Note.

Two military operations in Afghanistan seek to stabilize the country. *Operation Enduring Freedom* (OEF) is a combat operation led by the United States against the Taliban and al Qaeda insurgents, primarily in the eastern and southern parts of the country along the Pakistan border. . . .

The second operation is the International Security Assistance Force (ISAF). ISAF was created by United Nations Security Council Resolution 1386 on December 20, 2001.

VINCENT MORELLI & PAUL GALLIS, CONG. RESEARCH SERV., RL33627, NATO IN AFGHANISTAN: A TEST OF THE TRANSATLANTIC ALLIANCE I (2008).

overseas by the armed forces.³ Many of these attempts have narrowed the gaps in extraterritorial jurisdiction over government contractors, but no single solution has provided a panacea for holding contractors accountable for criminal acts committed while operating overseas.⁴

Prior to 2000, the application of extraterritorial jurisdiction over civilians accompanying the armed forces progressed through three phases. First, early in United States history, courts could exercise extraterritorial jurisdiction over a civilian only if that civilian both accompanied the armed forces overseas and was actually present in the field with them.⁵ The second phase began in 1916

3. See 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, 78 (2001) (discussing the expansion of United States criminal law to cover conduct occurring abroad through the drafting of the Military Extraterritorial Jurisdiction Act of 2000); see also Richard Morgan, *Professional Military Firms Under International Law*, 9 CHI. J. INT'L L. 213, 229 (2008) (stating that the USA PATRIOT ACT added language to 18 U.S.C. § 7, extending jurisdiction to embassies, missions, and residences overseas); Ian Kierpaul, Comment, *The Mad Scramble of Congress, Lawyers, and Law Students After Abu Ghraib: The Rush to Bring Private Military Contractors to Justice*, 39 U. TOL. L. REV. 407, 423 (2008) (noting that recent legislation has expanded court-martial authority over private contractors accompanying the armed forces in contingency operations).

4. For a background discussion of extraterritorial jurisdiction, see John DePue, *Fundamental Principles Governing Extraterritorial Prosecutions—Jurisdiction and Venue*, 55 U.S. ATTORNEYS' BULL. 1 (2007).

Extraterritorial jurisdiction simply relates to the authority of a government to criminalize activity that occurs outside its territorial borders, or to investigate or prosecute such activity. The exercise of extraterritorial jurisdiction by one state with respect to criminal activity necessarily encroaches, in some measure, upon the sovereignty of the nation where the offense occurred. Under customary international law, there are five generally recognized principles upon which a country can permissibly assert extraterritorial jurisdiction. . . . The jurisdictional bases include the following.

[1] The objective territorial principle—where the offense occurs in one country but has effects in another, for example, killing someone by shooting across an international border.

[2] The nationality principle—the offender is a citizen of the prosecuting state.

[3] The protective principle—the offense offends the vital interests of the prosecuting state, such as counterfeiting that nation's currency.

[4] The passive personality principle—the victim is a citizen of the prosecuting state.

[5] The universality principle—the offense, such as piracy, is universally condemned by the international community, sometimes in a multinational convention or treaty to which the United States is a signatory.

Id. at 1 (citations omitted). Further, “‘the term [extraterritorial jurisdiction] does not imply that the forum state performs any official act outside its own territory,’ but instead that the state wishes to punish an offense which occurred outside of its territorial limits.” Christopher L. Blakesley & Dan E. Stigall, *The Myopia of U.S. v. Martinelli: Extraterritorial Jurisdiction in the 21st Century*, 39 GEO. WASH. INT'L L. REV. 1, 3 (2007) (quoting LUC REYDAMS, *UNIVERSAL JURISDICTION: INTERNATIONAL AND MUNICIPAL LEGAL PERSPECTIVES* 5 (2003)).

5. See Schmitt, *supra* note 3, at 61.

when the presence “in the field” requirement was dropped.⁶ Many of the 1916 guidelines were formally adopted in 1950 with the enactment of the Uniform Code of Military Justice (UCMJ).⁷ The third phase began in 1957 when the ability to exercise jurisdiction over civilians under the UCMJ was ruled unconstitutional by the United States Supreme Court in *Reid v. Covert*.⁸ This third phase concluded and the present incarnation of overseas jurisdiction under the UCMJ began in 2007 when Congress amended the UCMJ to grant authority to military commanders to exercise jurisdiction over civilian contractors, not only in times of war but also in times of contingency operations.⁹

In 2000, Congress looked outside the UCMJ to complete a forty-year effort to exercise jurisdiction over contractors employed overseas.¹⁰ The result of this effort is the Military Extraterritorial Jurisdiction Act of 2000, codified at 18 U.S.C. §§ 3261–3267, which asserted federal district court jurisdiction over civilians accompanying the armed forces overseas.¹¹ Following the terrorist

The 1775 Articles of War provided that “[a]ll [s]uttlers and [r]etainers to a [c]amp, and all [p]ersons whatsoever, [s]erving with [o]ur [a]rmies in the [f]ield, [though] no [e]nlisted [s]oldiers, are to be [s]ubject to [o]rders, according to the [r]ules & [d]iscipline of [w]ar.” The term “retainers to a camp” was understood to include civilians not actually in the government’s service (e.g., privately employed “officer’s servants” as well as “camp followers” such as suttlers and their employees, newspaper correspondents, and telegraph operators). The term “persons serving with the armies in the field” meant civilians who were employed by the government. In both cases, however, jurisdiction was dependent on their actually serving in the field; a mere employment relationship with the government did not suffice.

Id. (alterations in original) (citations omitted).

6. See Schmitt, *supra* note 3, at 62.

7. *Id.* at 62–63.

8. *Reid v. Covert*, 354 U.S. 1, 3, 5–6 (1957).

9. See John Warner National Defense Authorization Act for the Fiscal Year 2007, Pub. L. No. 109-364, § 552, 120 Stat. 2083, 2217 (2006) (amending the UCMJ by replacing the word “war” with “declared war or a contingency operation”). A “contingency operation” is statutorily defined as

a military operation that—

(A) is designated by the Secretary of Defense as an operation in which members of the armed forces are or may become involved in military actions, operations, or hostilities against an enemy of the United States or against an opposing military force; or

(B) results in the call or order to, or retention on, active duty of members of the uniformed services under section 688, 12301(a), 12302, 12304, 12305, or 12406 of this title, chapter 15 of this title, or any other provision of law during a war or during a national emergency declared by the President or Congress.

10 U.S.C. § 101(13) (2006).

10. See Schmitt, *supra* note 3, at 56.

11. See Military Extraterritorial Jurisdiction Act of 2000, Pub. L. No. 106-523, 114 Stat. 2488.

The [Military Extraterritorial Jurisdiction] Act [of 2000] effectively establishes federal criminal jurisdiction over offenses committed outside the United States by persons

attacks of September 11, 2001, Congress acted again by amending the definition of “special maritime and territorial jurisdiction” in the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (“USA PATRIOT ACT” or “PATRIOT ACT”)—a change that broadened overseas jurisdictional authority to cover certain State Department and military locations.¹² This jurisdictional amendment stood unused and untested until *United States v. Passaro*, the case that is the focus of this Note.¹³

David Passaro, who served as a contractor for the Central Intelligence Agency (CIA), interrogated Abdul Wali over a two-day period in June 2003 at the Asadabad firebase in Afghanistan.¹⁴ During the interrogations, Passaro assaulted Wali.¹⁵ One day after Passaro interrogated Wali for the second time, Wali died.¹⁶ A year later, Passaro was indicted on two counts of intentional

employed by or accompanying the United States Armed Forces. It also extends federal criminal jurisdiction to members of the Armed Forces who commit crimes abroad but who are not tried for those crimes by military authorities and who are no longer under military control. In both instances, this legislation represents a major step in extending the reach of American law outside the United States

Schmitt, *supra* note 3, at 56. The Military Extraterritorial Jurisdiction Act of 2000 (MEJA) has raised a number of jurisdictional questions independent of those considered in this Note. Further, in its present form, MEJA would not be applicable in *Passaro*—at least as currently interpreted—because Passaro was a CIA contractor and not someone under contract through the Department of Defense. This dichotomy and a possible solution are discussed briefly in Part III.

12. See Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, Pub. L. No. 107-56, § 804, 115 Stat. 272, 377 (codified at 18 U.S.C. § 7(9) (2006)); see also Brief for Appellant at 8–9, *United States v. Passaro*, No. 07-4249 (4th Cir. Aug. 7, 2008) (discussing the legislative amendments proposed following the terrorist attacks of Sept. 11, 2001).

13. Brief for Appellant, *supra* note 12, at 28–29.

14. *Id.* at 6–7. As currently defined by the Department of Defense, a “forward operations base” is:

In special operations, a base usually located in friendly territory or afloat that is established to extend command and control or communications or to provide support for training and tactical operations. Facilities may be established for temporary or longer duration operations and may include an airfield or an unimproved airstrip, an anchorage, or a pier. A forward operations base may be the location of special operations component headquarters or a smaller unit that is controlled and/or supported by a main operations base.

DEPARTMENT OF DEFENSE, DICTIONARY OF MILITARY AND ASSOCIATED TERMS 219 (2008).

15. Special Verdict Form, *United States v. Passaro*, No. 5:01-CR-211-1-IBO (E.D.N.C. Aug. 17, 2006). Although Passaro never explicitly admitted to physically assaulting Wali, his appellate brief cites facts established at the trial court level, including testimony of guards attending his interrogations who stated that they witnessed Passaro assault Wali. Brief for Appellant, *supra* note 12, at 18. Further, some of Passaro’s arguments on appeal claim that, as a CIA contractor interrogating a non-military combatant, he was authorized to use harsh interrogation techniques, such as physical contact. *Id.* at 10–11.

16. Indictment at 1, *United States v. Passaro*, No. 5:04-CR-211-1 (E.D.N.C. June 17, 2004).

assault resulting in serious bodily harm and two counts of assault with a dangerous weapon for the injuries Wali sustained during the interrogation.¹⁷

In support of Passaro's indictment, the government relied on the USA PATRIOT ACT's expansion of the special maritime and territorial jurisdiction of the United States in 18 U.S.C. § 7 to assert extraterritorial jurisdiction over Passaro.¹⁸ Before his trial, Passaro challenged the exercise of jurisdiction on at least three grounds.¹⁹ The United States District Court for the Eastern District of North Carolina denied Passaro's jurisdictional challenges, and the case proceeded to trial.²⁰ A jury found Passaro guilty of one count of assault resulting in serious bodily injury and three counts of simple assault.²¹ Passaro has appealed this jurisdictional finding to the United States Court of Appeals for the Fourth Circuit.²²

This Note will analyze the United States' exercise of extraterritorial jurisdiction over Passaro. Although Passaro's actions towards Wali during the interrogations do not make him a sympathetic defendant, the considerations of proper jurisdiction must be analyzed without emotion.²³ The jurisdictional issue raised by the USA PATRIOT ACT's expansion of the definition of

17. *Id.* at 2-4.

18. *Id.* at 2-3.

19. Order at 1, *United States v. Passaro*, No. 5:04-CR-211-BO (E.D.N.C. Aug. 12, 2005). Passaro filed three primary motions to dismiss at the trial court level, arguing: (1) that the indictment was an unconstitutional infringement of the president's Commander-in-Chief powers; (2) that 18 U.S.C. § 7(9) was not proper to assert jurisdiction because it was void for vagueness; and (3) that this was a selective prosecution and therefore improper. Brief for Appellant, *supra* note 12, at 3-5.

20. Order, *supra* note 19, at 1. The court stated that "[b]ecause the language of both 18 U.S.C. §§ 7(9)(A) and (B) is sufficiently broad to supply this Court with subject matter jurisdiction over the government's prosecution of Defendant, Defendant's Motion to Dismiss for lack of subject matter jurisdiction is DENIED." *Id.* at 8. Further, the court struck down Passaro's constitutional challenges, noting that

Defendant is not entitled to invoke the President's war making power nor is he entitled to invoke Congress' authorization of that power as a shield against allegations that he violated the laws of the United States in the conduct of his duties. His challenge to the Court's jurisdiction on these grounds fails.

Id. at 9.

21. Judgment in a Criminal Case at 1, *United States v. Passaro*, No. 5:04-CR-00211-001 (E.D.N.C. Feb. 13, 2007).

22. Brief for Appellant, *supra* note 12, at 6. On August 10, 2009, the Court of Appeals for the Fourth Circuit affirmed Passaro's conviction and found, among other things, that the district court's exercise of jurisdiction under the Special Maritime and Territorial Jurisdiction was proper. *United States v. Passaro*, Nos. 07-4249, 07-4339, 2009 WL 2432356, at *6 (4th Cir. Aug. 10, 2009).

23. This Note excludes from its analysis any condemnation or endorsement of the interrogation techniques used by Passaro or any other U.S. representative acting overseas. See generally Siobhan Gorman, *CIA Likely Let Contractors Perform Waterboarding*, WALL ST. J., Feb. 8, 2008, at A3 (noting that over the past year, administration officials have admitted to the authorization and use of enhanced interrogation techniques).

“special maritime and territorial jurisdiction” in 18 U.S.C. § 7(9) is addressed in this Note and is an issue of first impression in the Fourth Circuit.²⁴

Part I of this Note begins by discussing the historical roots, based in admiralty law, of exercising extraterritorial jurisdiction. It traces the development of extraterritorial jurisdiction throughout the past ten years. Part II sets forth the factual and procedural history of *United States v. Passaro*. Part III applies the fundamental themes of extraterritorial jurisdiction and recent legislation to the facts of *Passaro*. This Note concludes that the Fourth Circuit should affirm the district court’s denial of Passaro’s jurisdictional challenges because the amendment of the special maritime and territorial jurisdiction of the United States adequately provides jurisdiction over Passaro’s criminal acts. The facial interpretation of the 2001 amendment to the Special Maritime and Territorial Jurisdiction definition is unambiguous; further, the trend of extraterritorial jurisdiction throughout United States history has been towards expansion of that jurisdiction.²⁵

I. EXERCISE OF EXTRATERRITORIAL JURISDICTION

A. Historical Roots of Extraterritorial Jurisdiction

“[A]s a general principle, the criminal laws of a nation do not operate beyond its territorial limits”²⁶ The foundation for extraterritorial

24. Brief for Appellant, *supra* note 12, at 28–29.

While this issue of 18 U.S.C. § 7(9) is one of first impression for the Fourth Circuit, its district courts have decided extraterritorial cases prior to *Passaro*. As recently as 2004, the United States District Court for the District of Maryland dismissed an indictment, finding the court lacked jurisdiction under the Special Maritime and Territorial Jurisdiction Act. *United States v. Morton*, 314 F. Supp. 509, 515 (D. Md. 2004). In *United States v. Morton*, a civilian Air Force employee was accused of sexually abusing a minor while he was stationed in Germany. *Id.* at 510. The government attempted to assert jurisdiction under 18 U.S.C. § 7(3), but the court dismissed the case, ruling that there was no evidence that the United States had either exclusive or concurrent jurisdiction over the housing area in which the actions allegedly took place. *Id.* at 511, 514–15.

25. See Ellen S. Podgor, “Defensive Territoriality”: A New Paradigm for the Prosecution of Extraterritorial Business Crimes, 31 GA. J. INT’L & COMP. L. 1, 20 (2002) (“Since 1922, the year the *Bowman* case was decided, many courts have permitted extraterritoriality in cases involving criminal conduct. Cases since *Bowman* have interpreted this decision broadly to allow for an extraterritorial application in almost all cases in which prosecutors have decided to proceed on the extraterritorial conduct.”).

26. *United States v. Rodgers*, 150 U.S. 249, 264 (1893). The “notion of confining criminal jurisdiction within territorial boundaries” did not gain popularity until after the 1648 Treaty of Westphalia and the rise of nationalism. Blakesley & Stigall, *supra* note 4, at 4–5.

Throughout the majority of legal history, the criminal jurisdiction of the kingdom followed the subject no matter where he or she roamed. During the medieval period, a system of personal jurisdiction developed in Europe known as “the personality of laws,” according to which jurisdiction over the person depended on the person’s citizenship—subjects carried their law with them as they traveled. Jurisdiction was perceived as a metaphysical link between the sovereign and the subject that transcended international borders. . . . The link to the sovereign was deemed paramount, while the

jurisdiction lies in the Constitution's grant of maritime jurisdiction over vessels of the United States while they are outside territorial boundaries.²⁷ The Constitution grants Congress the power to make laws regulating extraterritorial crime.²⁸ Further, Article III, Section 2 confers judicial power over "all [c]ases of admiralty and maritime [j]urisdiction."²⁹

In *United States v. Flores*, the trial court's dismissal of a murder charge on jurisdictional grounds was reversed because "it is the duty of the courts of the United States to apply to offenses committed by its citizens . . . its own statutes, interpreted in the light of recognized principles of international law."³⁰ In *Flores*, charges were brought against a crew member of a vessel registered in the United States but docked in a port belonging to the Belgian Congo.³¹ While the ship was docked, defendant Flores, a United States citizen, allegedly murdered another crew member who was also a United States citizen.³² The district court dismissed the case, holding that it lacked jurisdiction over the alleged crimes.³³ The United States Supreme Court reversed the district court's ruling and reinstated the indictment.³⁴ The Court held that "the United States may define and punish offenses committed by its own citizens on its own vessels while within foreign waters where the local sovereign has not asserted its jurisdiction."³⁵

The operation of these provisions has "consistently [been] interpreted as adopting for the United States the system of admiralty and maritime law . . . of England and the Colonies."³⁶ After adopting this British-style admiralty and maritime jurisdiction, it became possible to expand United States jurisdiction beyond the high seas.³⁷ "The English courts have consistently held that jurisdiction is not restricted to vessels within the navigable waters of the realm,

geographical location of the crime was seen as unimportant or, at most, a matter of secondary concern.

Id.

27. U.S. CONST. art. I, § 8, cls. 10–11. Section 8 confers upon Congress the power "[t]o define and punish [p]iracies and [f]elonies committed on the high [s]eas, and [o]ffen[s]es against the [l]aw of [n]ations" and to "make [r]ules concerning [c]aptures on [l]and and [w]ater." *Id.*

28. *Id.* at art. I, § 8, cl. 10.

29. *Id.* at art. III, § 2, cl. 1.

30. *United States v. Flores*, 289 U.S. 137, 159 (1933).

31. *Id.* at 144–45.

32. *Id.*

33. *Id.* at 145.

34. *Id.* at 159.

35. *Id.*; see also *United States v. Rodgers*, 150 U.S. 249, 266 (1893) (holding that United States jurisdiction extends to crimes committed by United States citizens on United States vessels within the territorial waters of Canada).

36. *Flores*, 289 U.S. at 148.

37. *Id.* at 150–51 (noting that English courts' holdings have expanded jurisdiction outside the country's waters).

but follows its ships upon the high seas and into ports and rivers within the territorial jurisdiction of foreign sovereigns.”³⁸

B. Pre-9/11 Assertions of Extraterritorial Jurisdiction

1. Statutory Jurisdiction under 18 U.S.C. § 7

From its early recognition in the United States until approximately twenty years ago, the continued focus of extraterritorial jurisdiction was on its maritime roots.³⁹ The original law, asserting a consolidated special maritime and territorial jurisdiction, appeared in the 1909 version of the Criminal Code and only contained provisions surrounding maritime traffic and military bases inside the United States.⁴⁰ Amendments in 1952 and 1981 to the statutory definition of extraterritorial jurisdiction merely focused on new modes of transportation that could parallel maritime transportation methods already addressed in the statutory definition.⁴¹ Although this statutory expansion of the definition of special maritime and territorial jurisdiction did not specifically address all the issues that could arise from United States citizens committing crimes while in a foreign country, many courts have nonetheless recognized the inherent power of the United States to exercise such jurisdiction.⁴²

38. *Id.* Exercising jurisdiction over crimes committed on a ship docked in a foreign port requires that the foreign country refrain from exercising its own jurisdiction. *Id.* at 159.

39. *See* Special Maritime and Territorial Jurisdiction of the United States Defined, 18 U.S.C. § 7 Historical Note (2006).

40. *Id.*

41. *Id.*

42. *See* United States v. Chandler, 72 F. Supp. 230, 236 (D. Mass. 1947). In *Chandler*, the defendant was accused of acts of treason committed while he lived in Germany. *Id.* at 232. Chandler’s indictment used the Special Maritime and Territorial Jurisdiction Act to establish jurisdiction over Chandler when he was brought into the District of Massachusetts. *Id.* at 236. The defendant challenged this jurisdiction, asserting that because he was within a foreign country and not “upon the high seas,” jurisdiction was not proper. *Id.* The court found jurisdiction to be proper, stating that “it would be inconceivable to reach a conclusion . . . that no court in the United States had jurisdiction of the crime of treason committed in a foreign land.” *Id.* at 236 (citing United States v. Bowman, 260 U.S. 94 (1922)).

In the *Bowman* decision, the Supreme Court relaxed the territorial requirement essential to prosecute crimes.

Bowman involved an alleged “conspiracy . . . to defraud the Fleet Corporation, in which the United States was a stockholder.” The jurisdiction for the first count was “on the high seas, out of the jurisdiction of any particular State, and out of the jurisdiction of any district of the United States, but within the admiralty and maritime jurisdiction of the United States.” Jurisdiction for the second count was premised “on the high seas and at the port of Rio Janeiro, as well as in the city.” Count three’s jurisdiction was described as in the city of Rio Janeiro, the fourth count was in the harbor of Rio Janeiro, the fifth count in the city, and the sixth count at both the port and in the city. The district court found no jurisdiction in count one and “sustained the demurrer” as to the other counts. This lower court found no statement in the statute permitting jurisdiction for this offense when “committed on the high seas or in a foreign country.” This position was in keeping with the traditional view that absent a clear congressional

2. *Exercising Jurisdiction Over Civilians Under the Uniform Code of Military Justice*

The history of exercising criminal jurisdiction over civilians serving with the armed forces dates back to the Articles of War of 1775, which authorized jurisdiction only if those civilians both accompanied the armed forces and served in the field with them.⁴³ The “in the field” requirement was removed in the 1916 version of the Articles of War.⁴⁴ Yet, despite this expansion of the rule, jurisdiction was still rarely asserted unless the individual met the “in the field” requirement.⁴⁵ When the UCMJ was enacted in 1950, the requirement that a civilian be “in the field” with the armed forces was not included; therefore, jurisdiction could be exercised over all civilians accompanying the armed forces overseas, regardless of their presence in the field.⁴⁶

This expanded jurisdiction evaporated, however, in the wake of the Supreme Court’s decision in *Reid v. Covert*.⁴⁷ In *Reid*, the Court held that all constitutional safeguards embedded in the criminal process apply overseas just as they do within the United States, and that the court-martial process, as applied, eroded constitutional protections for civilians accompanying the armed forces *not* during a time of war.⁴⁸ The case arose when Clarice Covert, a civilian wife, was accused of killing her service-member husband at an airbase in England; she was subsequently tried before a court-martial and convicted despite her civilian status.⁴⁹ The Air Force Board of Review affirmed the conviction, but the Court of Military Appeals reversed the decision, citing errors concerning Covert’s asserted insanity defense.⁵⁰ While awaiting a re-trial by court-martial, Covert was released under a grant of a

statement, courts would not permit extraterritorial jurisdiction in criminal cases. The Supreme Court reversed, finding that “[t]he necessary locus, when not specifically defined, depends upon the purpose of Congress as evinced by the description and nature of the crime and upon the territorial limitations upon the power and jurisdiction of a government to punish crime under the law of nations.”

Podgor, *supra* note 25, at 18–19 (alterations in original) (citations omitted) (emphasis omitted).

43. See Schmitt, *supra* note 3, at 61.

44. See *id.* at 62.

45. See *id.*

46. See *id.* at 62–63. This jurisdiction over civilians reached both contractors assisting the armed forces and dependents accompanying their spouses on tours of duty overseas. Uniform Code of Military Justice, 10 U.S.C. § 802(a)(11) (2006) [hereinafter UCMJ].

47. *Reid v. Covert*, 354 U.S. 1, 5–6 (1957).

48. *Id.* at 34–35. In *Reid*, the Court invalidated jurisdiction under UCMJ Article 2(a)(11) (codified at 10 U.S.C. § 802(a)(11)) but did not rule on the ability of the armed forces to exercise court-martial jurisdiction over civilians in times of war. *Id.* at 33–34. In the three years following *Reid*, the Supreme Court proceeded to invalidate all incarnations of court-martial jurisdiction over civilians accompanying the armed forces regardless of dependent or employment status. See Schmitt, *supra* note 3, at 69–70 (outlining decisions contributing to “[t]he evisceration of [UCMJ] Article 2(a)(11)”).

49. *Reid*, 354 U.S. at 3–4.

50. *Id.* at 4.

habeas corpus by the district court.⁵¹ The Supreme Court received the case on direct appeal and ruled that civilians overseas not during a time of war cannot be constitutionally tried before a court-martial.⁵² After the Supreme Court removed the power of the armed forces to court martial civilians, civilians accompanying the armed forces overseas had virtual immunity from prosecution for crimes committed in foreign countries if the host nations declined to prosecute.⁵³

This court-martial jurisdictional gap was partially closed in 2006 by a provision included in the John Warner National Defense Authorization Act for Fiscal Year 2007.⁵⁴ Congress inserted the phrase “declared war or a contingency operation” in place of the word “war” that was originally contained in the UCMJ provision, thus allowing court-martial jurisdiction over civilians accompanying the armed forces during contingency operations.⁵⁵

51. *Id.*

52. *Id.* at 5. The Court wrote:

At 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. The United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution. When the Government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land.

Id. at 5–6.

Further, the Court limited the non-traditional court-martial authority over civilians, stating:

Trial by jury in a court of law and in accordance with traditional modes of procedure after an indictment by grand jury has served and remains one of our most vital barriers to governmental arbitrariness. These elemental procedural safeguards were embedded in our Constitution to secure their inviolateness and sanctity against the passing demands of expediency or convenience.

Id. at 10.

53. See Geoffrey S. Corn, *Unarmed But How Dangerous? Civilian Augmentees, the Law of Armed Conflict, and the Search for a More Effective Test for Permissible Civilian Battlefield Functions*, 2 J. NAT'L SEC. L. & POL'Y 257, 275 n.42 (2008).

54. John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364, 120 Stat. 2083, 2217 (2006).

55. *Id.* For the definition of “contingency operation,” see *supra* note 9.

Without much fanfare, debate, or notice, Congress authorized the court-martial of “civilians not just in times of declared war but also [during a] contingency operation[], [like Iraq].” Many questions remain about the new law’s interpretation and implementation The new law fills the gap where the current MEJA has failed. As Peter Singer of the Brookings Institute points out, “[The current] MEJA was never designed to apply to military/security missions or in the context of conflict zones . . . [and that] [c]ourt martials, for all their faults, are designed for the context of military action and conflict”

Kierpaul, *supra* note 3, at 423 (alterations in original) (citing P.W. SINGER, BROOKINGS INST., CAN’T WIN WITH ‘EM, CAN’T GO TO WAR WITHOUT ‘EM: PRIVATE MILITARY CONTRACTORS AND COUNTERINSURGENCY 7 (2007), available at <http://www.brookings.edu/~media/Files/rc/papers/2007/0927militarycontractors/0927militarycontractors.pdf>).

3. *The Military Extraterritorial Jurisdiction Act of 2000*

Before the extension of court-martial jurisdiction over civilians, Congress passed the Military Extraterritorial Jurisdiction Act of 2000.⁵⁶ This law gave jurisdiction to U.S. district courts over crimes committed by persons “employed by or accompanying the Armed Forces outside the United States.”⁵⁷ As applied, however, this law does not provide jurisdiction over Passaro for the crimes alleged because he served as a contractor for the CIA, which is an independent agency and not a component of the Department of Defense.⁵⁸

C. Post 9/11 Special Maritime and Territorial Jurisdiction Amendment

In 2001, Congress enacted the USA PATRIOT ACT.⁵⁹ In doing so, Congress amended 18 U.S.C. § 7, extending jurisdiction to criminal acts committed within various State Department and other departmental missions located overseas.⁶⁰ Congress placed the amendment within title VIII of the PATRIOT ACT, which was given the moniker “Strengthening the Criminal Laws Against Terrorism.”⁶¹ This was seen as part of an important bundle of tools that the government could use to fight terrorism both at home and abroad.⁶²

The revised definition of special maritime and territorial jurisdiction in 18 U.S.C. § 7(9) provides:

With respect to offenses committed by or against a national of the United States as that term is used in section 101 of the Immigration and Nationality Act—

(A) the premises of United States diplomatic, consular, military or other United States Government missions or entities in foreign States, including the buildings, parts of buildings, and land appurtenant or ancillary thereto or used for purposes of those missions or entities, irrespective of ownership; and

(B) residences in foreign States and the land appurtenant or ancillary thereto, irrespective of ownership, used for purposes of

56. Military Extraterritorial Jurisdiction Act of 2000, Pub. L. No. 106-523, 114 Stat. 2488 (codified at 18 U.S.C. §§ 3261–3267).

57. 18 U.S.C. § 3261(a)(1) (2006).

58. See Today’s CIA, <https://www.cia.gov/about-cia/todays-cia/index.html> (last visited Jan. 31, 2009) (“The CIA is an independent agency responsible for providing national security intelligence to senior US policymakers.”).

59. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (codified as amended in scattered sections of the U.S.C. (2006)).

60. *Id.* § 804, 115 Stat. at 377 (codified at 18 U.S.C. § 7(9) (2006)).

61. *Id.* tit. VIII, 115 Stat. at 374.

62. Remarks on Signing the USA PATRIOT ACT of 2001, 2 PUB. PAPERS 1306, 1306–07 (Oct. 26, 2001).

those missions or entities or used by United States personnel assigned to those missions or entities.⁶³

This new definition expanded the statutory limits of the Special Maritime and Territorial Jurisdiction of the United States in order to resolve a recently emerging split among the judicial circuits.⁶⁴

1. *Congressional Intent to Codify* United States v. Erdos

In *United States v. Erdos*, the United States Court of Appeals for the Fourth Circuit upheld the extension of jurisdiction under 18 U.S.C. § 7(3) to United States embassies located within foreign countries.⁶⁵ State Department employee Alfred Erdos killed fellow State Department employee Donald Leahy in the United States Embassy located in Equatorial Guinea.⁶⁶ Although the embassy building was leased, rather than owned, by the United States, it was nevertheless considered part of United States territory.⁶⁷ The test used to determine whether property, like the leased embassy, is United States territory centers on the “practical usage and dominion exercised over the . . . federal establishment.”⁶⁸ The court focused on State Department buildings and ruled that, although ownership was not a prerequisite to jurisdiction, the property on which the criminal conduct occurred must be considered part of United States territory.⁶⁹

Almost thirty years after *Erdos*, the United States Court of Appeals for the Second Circuit split with the Fourth Circuit and held that 18 U.S.C. § 7(3) did not apply to United States government installations overseas.⁷⁰ In *United States v. Gatlin*, a military spouse who was accused of molesting his child in overseas military base housing challenged the jurisdiction of the United States district court.⁷¹ The court denied Gatlin’s pre-trial challenge, finding

63. Special Maritime and Territorial Jurisdiction of the United States Defined, 18 U.S.C. § 7(9) (2006). The definition of “national of the United States” as referenced in this statute is: “(A) a citizen of the United States, or (B) a person who, though not a citizen of the United States, owes permanent allegiance to the United States.” 8 U.S.C. § 1101(22) (2006).

64. H.R. REP. NO. 107-236, pt. 1, at 73–74 (2001).

65. *United States v. Erdos*, 474 F.2d 157, 160 (4th Cir. 1973). The jurisdiction granted by 18 U.S.C. § 7(3) includes

[a]ny 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).

66. *Erdos*, 474 F.2d at 158.

67. *Id.* at 159.

68. *Id.*

69. *Id.* at 159–60.

70. *United States v. Gatlin*, 216 F.3d 207, 210 (2d Cir. 2000) (holding that 18 U.S.C. § 7(3) did not apply extraterritorially).

71. *Id.* at 209–10.

jurisdiction pursuant to 18 U.S.C. § 7(3).⁷² Gatlin pleaded guilty and was sentenced to fifty-one months imprisonment.⁷³ Gatlin then appealed the jurisdictional finding of the trial court.⁷⁴ The Second Circuit, ruling that jurisdiction did not extend overseas, based its reversal on a statutory interpretation of 18 U.S.C. § 7(3) that there was no “clear evidence of congressional intent” to apply [the] statute beyond our borders.”⁷⁵

This split between the Second and Fourth Circuits prompted Congress to clarify the exercise of overseas jurisdiction.⁷⁶ In enacting the 2001 amendment to 18 U.S.C. § 7 as part of the PATRIOT ACT, Congress codified the *Erdos* rule and specified that jurisdiction would extend to United States embassies and embassy residences overseas.⁷⁷

2. Congressional Intent for Protection of Americans

As a matter of statutory construction, the language of a statute is to be strictly construed; it also must be “fairly construed according to the legislative intent as expressed in the enactment.”⁷⁸ Inserting this amendment to the special maritime and territorial jurisdiction of the United States into the PATRIOT ACT and, more specifically, into a section entitled “Strengthening the Criminal Laws Against Terrorism” demonstrates the implicit congressional intent that this provision was included to protect American citizens overseas.⁷⁹

72. *Id.* at 210.

73. *Id.*

74. *Id.*

75. *Id.* at 210–12 (quoting *Smith v. United States*, 507 U.S. 197, 204 (1993)). The court was “guided by a general ‘presumption that Acts of Congress do not ordinarily apply outside our borders.’” *Id.* at 211 (quoting *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 173 (1993)).

76. H.R. REP. NO. 107-236, pt. 1, at 73–74 (2001) (noting the “differing interpretations by judicial circuits” on the topic of extraterritoriality).

77. *Id.* at 74 (“This section would make it clear that embassies and embassy housing of the United States in foreign states are included in the special maritime and territorial jurisdiction of the United States.”).

78. *United States v. Bowman*, 260 U.S. 94, 102 (1922) (quoting *United States v. Lacher*, 134 U.S. 624, 629 (1890)); see also *United States v. Ron Pair Enters.*, 489 U.S. 235, 242 (1989) (“The plain meaning of legislation should be conclusive, except in the ‘rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.’ In such cases, the intention of the drafters, rather than the strict language, controls.” (alteration in original) (citation omitted) (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982))).

79. USA PATRIOT ACT, Pub. L. No. 107-56, § 804, 115 Stat. 272, 374, 377 (2001) (codified at 18 U.S.C. § 7(9) (2006)).

II. TRACING PASSARO'S EMPLOYMENT, ACTIONS, AND LOCATION IN AFGHANISTAN TO ANALYZE HIS CHALLENGES OF JURISDICTION

David Passaro is a former Army Special Forces medic.⁸⁰ Before receiving a position in 2003 as a CIA contractor, Passaro had a history of improper official behavior and had been previously discharged from a police department in Connecticut.⁸¹ As a CIA contractor, Passaro received no interrogation training and was stationed overseas for paramilitary support—including training of the Afghan forces—and not for intelligence-gathering purposes.⁸²

In early June 2003, American forces, including CIA contractors like Passaro, operated out of the Asadabad firebase in Afghanistan, which is located approximately five miles from the Pakistani border.⁸³ The Asadabad firebase was built by the former Soviet Union and consisted of external walls and an open-air courtyard.⁸⁴ The few permanent structures contained within these walls were supplemented with tents for troop housing and operations.⁸⁵ The primary functions of this base were training Afghani forces, gathering intelligence, and conducting counter-terrorism operations.⁸⁶

In the spring of 2003, the Asadabad firebase was the target of repeated rocket attacks.⁸⁷ On June 18, 2003, Abdul Wali, who was suspected of being involved in the rocket attacks, was taken into custody at the firebase.⁸⁸ On June 19 and 20, Passaro was directed to interrogate Wali.⁸⁹ During the course of these interrogations, Passaro struck Wali, “using his hands and feet, and a large flashlight.”⁹⁰

Prosecutors say Passaro created a “chamber of horrors” for Wali, ordering soldiers not to allow him to sleep, limiting his access to food and water and subjecting him to two consecutive nights of

80. Andrea Weigl, *Afghan's Deadly Beating Detailed*, NEWS & OBSERVER (Raleigh, N.C.), Aug. 8, 2006, at 1A.

81. Greg Miller, *Spy Shortage Has U.S. Relying on Outside Help*, SEATTLE TIMES, Sept. 18, 2006, at A3 (“Passaro was hired as a contractor with the CIA’s paramilitary service even though he had a record of abusive behavior and had been fired by a Connecticut police department.”).

82. See Weigl, *supra* note 80, at 6A (“Military officials asked those working with the CIA to interrogate Wali—a task . . . Passaro had not been trained to do.”).

83. Order, *supra* note 19, at 1–2.

84. *Id.* at 2.

85. *Id.*

86. *Id.* (“[The base] served as a launching point for counterterrorism efforts by military personnel and as a forward location to gather intelligence on terrorist activities. . . . [C]ontractors such as Defendant were training Afghan forces so they could assume responsibility for their own defense at some point in the future.”).

87. *Id.*

88. *Id.* (stating that Wali “voluntarily presented himself” to American forces).

89. *Id.* at 2–3.

90. Indictment, *supra* note 16, at 1. Passaro’s indictment alleged two counts of assault with a dangerous weapon, but the jury found Passaro guilty of only the lesser offense of “simple assault.” *Id.*; see also Special Verdict Form, *supra* note 15, at 1–2.

interrogation and beatings. . . . After the two nights of beatings, Wali begged the soldiers to shoot him in the head and was left moaning a phrase that meant, "I'm dying."⁹¹

Wali died in his cell on June 21, 2003.⁹² The Afghan government made a public statement that Wali died from heart complications prevalent in his family.⁹³ A year later, an Afghani government spokesman said that the statement regarding Wali's cause of death was only speculation.⁹⁴

Passaro's obligation to the CIA ended in July 2003, at which time he returned to his home in North Carolina.⁹⁵ Over the next year, "both the Department of Defense . . . and the CIA conducted investigations into the circumstances surrounding Wali's death."⁹⁶ In early 2004, the Department of Justice formally notified Passaro that he would be the target of a criminal investigation into Wali's death.⁹⁷

91. Andrea Weigl, *Passaro Will Serve 8 Years for Beating*, NEWS & OBSERVER (Raleigh, N.C.), Feb. 14, 2007, at 1B. The district court reported facts discovered in Passaro's trial in an order denying Passaro's motion for judgment of acquittal as follows:

Testimony by military personnel supported the Government's allegations that on June 19, 2003, Defendant kicked Abdul Wali in the groin and struck him in the abdomen with a metal flashlight. Evidence showed that Abdul Wali was handcuffed and blindfolded at the time of the beating. Abdul Wali was beaten with such force that he could no longer urinate due to internal injuries. On June 20, 2003, the beating continued, as Defendant struck Abdul Wali repeatedly with the flashlight. Abdul Wali begged the guards to kill him, and on June 21, 2003, died of unknown causes.

Order at 1–2, *United States v. Passaro*, No. 5:04-CR-211-BO (E.D.N.C. Oct. 26, 2006).

92. *Id.* at 3.

93. Associated Press, *Afghan Official: Heart Attack May Not Have Killed Prisoner*, USATODAY.COM, May 19, 2004, http://www.usatoday.com/news/world/2004-06-19-afghan-death_x.htm [hereinafter *Afghan Official*]. Wali's family, observing Islamic law, refused to allow an autopsy of the body. Andrea Weigl, *Passaro's Defense Rests Case*, NEWS & OBSERVER (Raleigh, N.C.), Aug. 16, 2006, at 5B. This caused both the prosecution and the defense to rely on witness testimony and several photographs to establish their medical conclusions. *Id.*

94. *Afghan Official*, *supra* note 93.

95. Memorandum in Support of Motion to Dismiss for Lack of Jurisdiction at 4, *United States v. Passaro*, No. 5:04-CR-211-BO(1) (E.D.N.C. Nov. 1, 2004).

96. *Id.* At the time this investigation was referred to the Department of Defense, the Army Criminal Investigation Command (CID) was conducting twenty-five investigations into deaths of people detained in Iraq and Afghanistan by the United States. See DEPARTMENT OF DEFENSE, ALLEGATIONS OF DETAINEE ABUSE IN IRAQ AND AFGHANISTAN, 2571–72 (2004), available at [http://www.aclu.org/torturefoia/legaldocuments/july_docs/\(H\)%20MISCELLANEOUS%20BAT%20CH%20%202.pdf](http://www.aclu.org/torturefoia/legaldocuments/july_docs/(H)%20MISCELLANEOUS%20BAT%20CH%20%202.pdf). In May 2004, one month before the filing of this report, the Department of Defense stated that "15 [of the] detainee deaths had been determined to be from natural causes. . . [and] [e]ight other deaths were the result of justifiable killings" Gail Gibson, *Deaths of Detainees Held by U.S. Tend to Occur Under the Radar*, BALTIMORE SUN, Dec. 19, 2004, at 1A. Any analysis of selective prosecution for these deaths, however, is beyond the scope of this Note.

97. Memorandum in Support of Motion to Dismiss for Lack of Jurisdiction, *supra* note 95, at 4–5.

Before his trial in the district court, Passaro made multiple challenges to that court's jurisdiction over his case.⁹⁸ In Passaro's initial challenge to jurisdiction, he claimed that an examination of congressional intent and application of the rule of lenity demonstrated that 18 U.S.C. § 7(9) did not apply to him as a CIA contractor operating in a forward, non-permanent base.⁹⁹ In his second jurisdictional challenge, Passaro argued that subjecting battlefield personnel to the threat of prosecution violates the president's "exclusive war-making powers" bestowed upon him, as Commander-in-Chief, by the Constitution.¹⁰⁰ Ruling that jurisdiction was proper, the district court issued an order denying all of Passaro's motions to dismiss for lack of jurisdiction.¹⁰¹

Following a jury trial, Passaro was convicted of one count of assault resulting in serious bodily injury and three counts of simple assault; Passaro was sentenced to 100 months' imprisonment.¹⁰² Passaro filed a timely notice of appeal and has challenged three aspects of the district court's exercise of jurisdiction over his case.¹⁰³ Two of Passaro's challenges—his void for vagueness argument and his re-assertion of the constitutional challenge from the district court level—will not be discussed in this Note.¹⁰⁴

98. Order, *supra* note 19, at 1.

99. Memorandum in Support of Motion to Dismiss for Lack of Jurisdiction, *supra* note 95, at 15. The "rule of lenity" is defined as "[t]he judicial doctrine holding that a court, in construing an ambiguous criminal statute that sets out multiple or inconsistent punishments, should resolve the ambiguity in favor of the more lenient punishment." BLACK'S LAW DICTIONARY 1359 (8th ed. 2004).

The rule of lenity is based on the concept that "a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear." *McBoyle v. United States*, 283 U.S. 25, 27 (1931) (reversing a judgment against the defendant for transporting an aircraft that was known to be stolen because the applicable statute excluded aircrafts from its enumerated list of motor vehicles).

100. Memorandum in Support of Motion to Dismiss Indictment as Unconstitutional Infringement of the Commander-in-Chief's War-Making Duties and Powers, and Contrary to the Congressional Joint Resolution Authorizing Preemptive Use of "Necessary and Appropriate Force" at 12–13, *United States v. Passaro*, No. 5:04-CR-211-BO(1) (E.D.N.C. Dec. 7, 2004).

101. Order, *supra* note 19, at 1.

102. Judgment in a Criminal Case, *supra* note 21, at 1–2. Passaro was convicted of simple assault, despite the more serious offenses charged in his indictment (two counts of assault with a dangerous weapon and one count of assault resulting in serious bodily injury), because the prosecution lacked evidence to prevail on the counts carrying the more severe consequences. See Special Verdict Form, *supra* note 15 (convicting Passaro on three counts of simple assault and one count of assault resulting in serious bodily injury); see also Indictment, *supra* note 16, 2–4 (articulating the charges for which Passaro stood trial). Indeed, "[a]fter the conviction, *The News & Observer* reported that one juror stated that 'jurors couldn't tell the extent of Wali's injuries, because the Wali family refused an autopsy . . . [with an autopsy, Defendant] probably would have been convicted on all charges.'" Order, *supra* note 91, at 2 (alterations in original).

103. Brief for Appellant, *supra* note 12, at 2, 6.

104. The constitutional challenge alleged by Passaro involved the use of Commander-in-Chief powers authorized by the USA PATRIOT ACT. *Id.* at 21–22 ("Subjecting battlefield

Passaro's third argument is based on statutory interpretation and congressional intent.¹⁰⁵ Passaro claims that because the Asadabad firebase was neither a permanent nor exclusively U.S. installation, the provisions of 18 U.S.C. § 7(9) did not authorize the exercise of jurisdiction over actions occurring at the Firebase.¹⁰⁶

III. THE ASADABAD FIREBASE: SUBJECT TO U.S. JURISDICTION?

A. *Statutory Interpretation Combined with Sparse Congressional Intent*

The issue presented for the United States Court of Appeals for the Fourth Circuit's consideration is whether the district court properly exercised jurisdiction over Passaro pursuant to the definition of special maritime and territorial jurisdiction codified in 18 U.S.C. § 7(9).¹⁰⁷ This is an issue of statutory construction of 18 U.S.C. § 7(9); it is also an issue of first impression for appellate courts, including the Fourth Circuit.¹⁰⁸

The resolution of an issue of statutory construction may only require that the court read the statute and conclude that it is not ambiguous on its face; if the court finds ambiguity, however, it could require a deeper analysis of the language and congressional intent to determine the correct interpretation and application of that statute.¹⁰⁹

1. *Facial Statutory Interpretation*

A careful parsing of the statutory language requires an examination of the definitions of the statute's terms to establish whether the statute is facially ambiguous.¹¹⁰ Passaro is a citizen of the United States; therefore, the only

interrogations to Article III prosecutions . . . unconstitutionally infringes on the President's war making powers and duties."'). The challenge, however, raises intra-executive conflicts because the President is both the Commander-in-Chief of the armed forces and the Chief Executive in charge of the Department of Justice, which is the entity prosecuting Passaro's case. Brief for Appellee at 4, *United States v. Passaro*, No. 07-4249 (4th Cir. Aug. 29, 2008). An in-depth analysis of the issues raised by Passaro's constitutional challenge would require a discussion of the possible politicization of prosecutions and other political issues that are beyond the scope of this Note.

105. See Brief for Appellant, *supra* note 12, at 39-41.

106. See *id.* at 39-40 (arguing that the district court erred when it interpreted the words "premises of a military mission" to apply to the Asadabad firebase).

107. Brief for Appellee, *supra* note 104, at 2.

108. See Weigl, *supra* note 80.

109. See *United States v. Ford*, 288 F. App'x 54, 56 (4th Cir. 2008) (interpreting a statute by looking first to its plain meaning, then examining the legislative history); see also *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) ("[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there.").

110. See *Am. Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982) ("[I]n all cases involving statutory construction, our starting point must be the language employed by Congress, and we assume that the legislative purpose is expressed by the ordinary meaning of the words used.

terms applicable to this analysis are those in parts (A) and (B) of § 7(9) that describe the areas subject to jurisdiction and not the terms describing personnel subject to this jurisdiction.¹¹¹

Part (A) describes various types of overseas property over which the United States can exercise jurisdiction for criminal conduct.¹¹² The first operative word in part (A) is “premises.”¹¹³ In natural language, “premises” is defined as “a tract of land including its buildings.”¹¹⁴ This definition is reflected in the remainder of part (A), as the statute continues by “including the buildings, parts of buildings, and land appurtenant or ancillary thereto.”¹¹⁵ The other operative words of part (A) declare that these premises and buildings must be part of “United States diplomatic, consular, military or other United States Government missions or entities in foreign States . . . irrespective of ownership.”¹¹⁶ Applying the definition of premises to the descriptions that follow prompts a logical conclusion that any overseas location operated by the U.S. State Department or military is encompassed within this definition.¹¹⁷ This reading of the definition would logically include the Asadabad firebase, and thus would ultimately lead the court to find that jurisdiction exists under 18 U.S.C. § 7(9)(A).

Section 7(9)(B) addresses overseas residences “in foreign states . . . used for purposes of those missions or entities or used by United States personnel assigned to those missions or entities.”¹¹⁸ The definition of “residence” in both English natural language and in the legal context is a permanent structure in which one dwells.¹¹⁹ *Random House Webster’s Unabridged Dictionary* defines “residence” as “the place, esp. the house, in which a person lives or resides” or “a structure serving as a dwelling or home, esp. one of large proportion and superior quality.”¹²⁰ *Black’s Law Dictionary* defines “residence” as “[a] house or other fixed abode; a dwelling.”¹²¹ Examining

Thus, absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.” (citations omitted) (internal quotation marks omitted)).

111. 18 U.S.C. § 7(9) (2006); see Brief for Appellant, *supra* note 12, at 42–43 (criticizing the district court’s interpretation of 18 U.S.C. § 7(9)(A) and its failure to examine the applicable legislative history). But see Brief for Appellee, *supra* note 104, at 41 (endorsing the district court’s conclusion that the Asadabad firebase falls under 18 U.S.C. § 7(9)(A) as a “premises of a military mission”).

112. 18 U.S.C. § 7(9)(A) (2006).

113. *Id.*

114. RANDOM HOUSE WEBSTER’S UNABRIDGED DICTIONARY 1526 (2d ed. 2001).

115. 18 U.S.C. § 7(9)(A) (2006).

116. *Id.*

117. See *id.*

118. 18 U.S.C. § 7(9)(B) (2006).

119. BLACK’S LAW DICTIONARY 1335 (8th ed. 2004); RANDOM HOUSE WEBSTER’S UNABRIDGED DICTIONARY 1638 (2d ed. 2001).

120. RANDOM HOUSE WEBSTER’S UNABRIDGED DICTIONARY 1638 (2d ed. 2001).

121. BLACK’S LAW DICTIONARY 1335 (8th ed. 2004).

these definitions leads to the conclusion that in order to exercise jurisdiction over criminal conduct under part (B), the crime must be committed in some permanent physical structure used as a dwelling. Under the facts of *Passaro*, finding jurisdiction under 18 U.S.C. § 7(9)(B) would be difficult because most of the personnel occupying the firebase lived in tents or other temporary structures, not permanent dwellings.¹²² This does not, however, preclude a finding of jurisdiction, because only a finding under one of the subsections—either (9)(A) or (9)(B)—is required.¹²³ Although both parts (A) and (B) have reasonable facial interpretations, the possibility of other reasonable interpretations must be considered, particularly with regard to congressional intent.

2. *A Look Behind the Face of the Statute*

While a facial interpretation of the statute provides a reasonable solution for the Fourth Circuit, another issue underlies the explicit language of the statute and may influence the court's holding. The congressional intent to codify *Erdos* could influence the court's reasoning.¹²⁴ In codifying *Erdos* and resolving the circuit split, a reasonable understanding of the legislative intent could be that Congress sought to have courts exercise jurisdiction over only what the United States considered permanent overseas installations, regardless of ownership.

The Asadabad firebase is neither a State Department diplomatic residence nor a consular establishment as addressed in *Erdos*.¹²⁵ This, however, does not preclude its classification as a permanent installation of our government.¹²⁶ Such classification would need to be determined by the military.¹²⁷ The United States Department of Defense creates and publishes a listing of all bases it maintains worldwide.¹²⁸ The Asadabad firebase was not included in the report

122. Order, *supra* note 19, at 2.

123. 18 U.S.C. § 7(9) (2006) (setting forth locations over which the special maritime and territorial jurisdiction of the United States extends “with respect to offenses committed by or against a national of the United States”).

124. See H.R. REP. NO. 107-236, pt. 1, at 73–74 (2001).

125. See Order, *supra* note 19, at 2 (noting that the Firebase is occupied by military units and CIA contractors). The trial court found that “[a]t the time [Passaro] was working at the [Asadabad] firebase, it was occupied by members of the United States Army’s 82nd Airborne Division and Special Operations personnel.” *Id.*; see also *United States v. Erdos*, 474 F.2d 157, 158–59 (4th Cir. 1973) (describing the establishment at issue as an embassy).

126. See 18 U.S.C. § 7(9)(A); see also *supra* note 123 and accompanying text (noting that only a finding under either § 7(9)(A) or § 7(9)(B) is required to establish jurisdiction).

127. See DEP’T OF DEFENSE, BASE STRUCTURE REPORT: FISCAL YEAR 2003 BASELINE (2003) [hereinafter BASE STRUCTURE REPORT].

128. BASE STRUCTURE REPORT, *supra* note 127. This report is self-proclaimed as “a comprehensive listing of installations and sites used by the Department [of Defense].” *Id.* at DoD-2. This report shows that the Department of Defense owned 44,870 buildings overseas and leased an additional 4,844. *Id.* at DoD-71. The report does not list any property within Afghanistan that the Department of Defense owned or leased within fiscal year 2003. See *id.*

for 2003.¹²⁹ The absence of the firebase from the list of current Department of Defense assets could justify a conclusion that the United States did not consider the firebase to be a permanent mission overseas; thus, it would not be subject to jurisdiction under 18 U.S.C. § 7(9). This finding, however, should not be dispositive, because the more reasonable conclusion is the one based on a facial interpretation of the terms in subsection (9)(A) that encompass the firebase at issue in *Passaro*.¹³⁰

Based on the plain meaning of the terms contained in 18 U.S.C. § 7(9)(A), the Fourth Circuit should affirm the district court's holding and find proper jurisdiction over Passaro and the acts he committed while interrogating Wali at the Asadabad firebase in Afghanistan.

B. A More Permanent Solution is an Expansion of MEJA Authority

While the Fourth Circuit should uphold jurisdiction over Passaro and contractors similarly situated under 18 U.S.C. § 7(9), Congress may be better equipped to permanently clarify the authority that can be exercised by United States courts. A bill introduced in the 110th Congress would have expanded the authority of MEJA to anyone "employed under a contract . . . awarded by any department or agency of the United States, where the work under such contract is carried out in an area, or in close proximity to an area . . . where the Armed Forces is conducting a contingency operation."¹³¹ An amendment to MEJA would grant jurisdiction over all contractors working in the vicinity of military contingency operations and would not contradict any language under 18 U.S.C. § 7(9), as this section contains the disclaimer that "[t]his paragraph does not apply with respect to an offense committed by a person described in section 3261(a) of this title."¹³² This solution would close any loophole currently existing for contractors working in overseas jurisdictions.¹³³ This amendment would apply to all overseas contractors, removing any ambiguity in existing law and preventing an inevitable circuit split that looms as a result of the current statutory language.¹³⁴

129. *Id.*

130. See 18 U.S.C. § 7(9)(A) (2006); Order, *supra* note 19, at 2.

131. MEJA Expansion and Enforcement Act of 2007, H.R. 2740, 110th Cong. § 2 (2007) (as passed by House of Representatives on Oct. 4, 2007).

132. 18 U.S.C. § 7(9)(B) (2006). Section 3261(a) refers to the Military Extraterritorial Jurisdiction Act (MEJA). 18 U.S.C. § 3261 (2006).

133. Schmitt, *supra* note 3, at 55–56.

134. See Kierpaul, *supra* note 3, at 411–12. The Amendment also has critics who claim the same jurisdictional issues will continue to arise if the language is not made clearer in the legislation. See *id.* at 422.

Rather than having to support the mission of the DOD, contractors now need to "work under [a] contract . . . carried out in an area, or in close proximity to an area (as designated by the Department of Defense), where the Armed Forces is conducting a contingency operation." Much like MEJA, Congress left key terms undefined in the new bill. In the new bill, Congress provides no definition for proximity. The

IV. CONCLUSION

In analyzing whether the district court had the authority to exercise jurisdiction over Passaro for his actions while stationed overseas at the Asadabad firebase in Afghanistan, the Fourth Circuit should find that jurisdiction was proper under the definition of the Special Maritime and Territorial Jurisdiction contained in 18 U.S.C. § 7(9). The statutory language is broad enough to reach the firebase, and Passaro is a United States citizen, meeting the requirements of this statute.¹³⁵

As addressed above, however, Congress should permanently close the potential loophole created by relying on courts to interpret the language of 18 U.S.C. § 7(9) on a case-by-case basis. This can be accomplished by amending the Military Extraterritorial Jurisdiction Act, 18 U.S.C. §§ 3261–3267, which would provide jurisdiction over all government contractors operating in a contingency operation, regardless of the department with which they had contracted.

undefined term provides no guidance to the private military contractors as to when the new bill would apply to them. Leaving the term “proximity” undefined could subject private military contractors to “arbitrary and discriminatory enforcement.”

Id. (citations omitted).

135. See 18 U.S.C. § 7(9) (2006); Brief for Appellee, *supra* note 104, at 16–17. Another possible avenue of affirming the exercise of jurisdiction is under the principle of protective jurisdiction used by the Fourth Circuit in *United States v. Birch*. 407 F.2d 808, 811–12 (4th Cir. 1972). In *Birch*, the court found that extraterritorial jurisdiction was proper even in the absence of a specific statement from Congress providing for the statute’s application outside the United States. *Id.* The court held that jurisdiction could be asserted when a crime committed overseas injures a national interest, which draws a relevant parallel to the facts present in *Passaro*. *Id.*

This theory also finds support in other countries’ application of their law extraterritorially. Israeli Penal Law was amended in 1972 to read in part that “[t]he courts in Israel are competent to try under Israeli law a person who has committed abroad an act which would be an offense if it had been committed in Israel and which harmed or was intended to harm the State of Israel, its security, [or] property” Note, *Extraterritorial Jurisdiction and Jurisdiction Following Forcible Abduction: A New Israeli Precedent in International Law*, 72 MICH. L. REV. 1087, 1088 (1974).