

ENSURING CONTRACTOR ACCOUNTABILITY  
OVERSEAS: A CIVILIAN EXTRATERRITORIAL  
JURISDICTION ACT WOULD BE PREFERABLE TO  
EXPANSION OF THE FALSE CLAIMS ACT

ABSTRACT

*This Note considers the advisability of amending the False Claims Act's qui tam provisions beyond instances of fraud to include criminal allegations against government contractors employed overseas. It considers the negative effects that result from qui tam actions in the fraud context and discusses alternatives for holding contractors accountable for crimes committed overseas that could avoid those negative effects. This Note particularly focuses on and recommends a civilian corollary to the Military Extraterritorial Jurisdiction Act—the Civilian Extraterritorial Jurisdiction Act. It discusses the benefits that the Civilian Extraterritorial Jurisdiction Act would provide such as increased judicial efficiency, increased prosecutorial flexibility, and even protection of the contractors implicated as compared to the relatively uncertain option of local nations' laws.*

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## INTRODUCTION

The United States federal government quite literally employs more contractors for services than it can count.<sup>1</sup> The government's limited ability to even count its service contractors can result in a lack of domestic accountability for their contract performance. This lack of accountability for service contractors is compounded when contractors commit criminal acts<sup>2</sup> because of the lack of jurisdiction by American courts to punish the wrongdoers<sup>3</sup> and a reluctance to submit American citizens to local justice. This accountability gap may remain in the public consciousness with the necessary political attention only so long as the country remains actively engaged overseas and employs service contractors. As America draws down its military engagements and troop levels in Iraq and Afghanistan, and shifts its military response tactics toward more remote, hands-off methods,<sup>4</sup> public awareness of the lack of accountability and political will to patch the accountability gap legislatively will also dwindle. Better than risk waiting for a scandal to revive public concern, the accountability gap must be solved while the issue is in the public consciousness. A legislative fix may not only help prevent future political scandals, but would also allow contracting companies to operate more effectively both internally and overseas by clearly defining their potential for liability before contract performance begins.<sup>5</sup>

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<sup>1</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-1007, CIVILIAN SERVICE CONTRACT INVENTORIES: OPPORTUNITIES EXIST TO IMPROVE AGENCY REPORTING AND REVIEW EFFORTS 3-4 (2012). The Consolidated Appropriations Act of 2010 required that forty-nine federal agencies collect and report annually, among other data, the number of contractor personnel they employ. *Id.* Other items were correctly reported, but due to conflicting guidance from the Office of Management and Budget, the tally of contractor personnel was not provided. *Id.* at 7-8. The tally will continue to be withheld pending a proposed rule change in the Federal Acquisition Regulation. *Id.*

<sup>2</sup> See *infra* notes 24-44 and accompanying text (discussing recent examples of contractors' overseas crimes from U.S. operations in the Balkans, Iraq, and Afghanistan, including rape, sex trafficking, and torture).

<sup>3</sup> See Michael J. Davidson & Robert E. Korroch, *Extending Military Jurisdiction to American Contractors Overseas*, 35 PROCUREMENT LAW. 1, 1 (Summer 2000).

<sup>4</sup> These "hands-off" methods are illustrated by America's response tactics in Libya and Syria. See Paul Harris, *Robert Gates: No US 'Boots on Ground' in Libya*, GUARDIAN (Mar. 31, 2011, 3:12 PM), <http://www.theguardian.com/world/2011/mar/31/gates-rules-out-american-troops-libya>; Jessica Taylor, *Pentagon Spokesman: No Boots on the Ground in Syria*, MSNBC (Sept. 4, 2013, 3:03 PM), <http://tv.msnbc.com/2013/09/04/pentagon-spokesman-no-boots-on-the-ground-in-syria/>. Both sources emphasize that plans in Syria and Libya did not include putting "boots on the ground." Harris, *supra*; Taylor, *supra*.

<sup>5</sup> See discussion *infra* Part II.C.1-II.C.3 regarding the potential downfalls of amending the *qui tam* provisions to include contractor crimes overseas and Part IV.B.1-IV.B.2

One proposed solution—or one element of a system of solutions—to the accountability gap is to expand the *qui tam* provisions of the False Claims Act (FCA)<sup>6</sup> beyond fraud to include criminal acts or human rights abuses.<sup>7</sup> This Note will argue that although accountability for government contractors overseas will remain a problem absent some action, legislative or otherwise, expanding the FCA’s *qui tam* provisions would be inappropriate given the provisions’ complexity, broad scope, undesirable economic incentives, and the availability of preferable statutory alternatives. Instead, this Note will argue that Congress should build on the successes of the Military Extraterritorial Jurisdiction Act (MEJA)<sup>8</sup> by passing its corollary, the Civilian Extraterritorial Jurisdiction Act (CEJA).<sup>9</sup> Even as operations in Iraq<sup>10</sup> and Afghanistan<sup>11</sup> wind down, the federal government’s need for service contractors overseas in other, non-military related capacities will remain, if not grow.<sup>12</sup> Despite—and perhaps because of—reduced military forces in

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regarding the potential benefits of a civilian corollary to the Military Extraterritorial Jurisdiction Act.

<sup>6</sup> 31 U.S.C. §§ 3729–31 (2006 & Supp. 2012).

<sup>7</sup> LAURA A. DICKINSON, *OUTSOURCING WAR AND PEACE* 96 (2011).

<sup>8</sup> Military Extraterritorial Jurisdiction Act of 2000, Pub. L. No. 106-523, 114 Stat. 2488 (2000) (codified as amended at 18 U.S.C. §§ 3261–67 (2000 & Supp. 2004)).

<sup>9</sup> See Civilian Extraterritorial Jurisdiction Act of 2010, S. 2979, 111th Cong. (2d Sess. 2010). The House version, H.R. 4567, 111th Cong. (2d Sess. 2010), was identical to the Senate version; both died in committee. See also Civilian Extraterritorial Jurisdiction Act of 2011, S. 1145, 112th Cong. (1st Sess. 2011). The corresponding House version was H.R. 2136, 112th Cong. (1st Sess. 2011); again, both died in committee. Perhaps a third attempt will be successful. However, there is no version of CEJA under consideration in the 113th Congress.

<sup>10</sup> See Jake Tapper, *Obama Announces Complete Drawdown of U.S. Troops from Iraq by Year’s End*, ABC NEWS (Oct. 21, 2011, 12:45 PM), <http://abcnews.go.com/blogs/politics/2011/10/obama-to-announce-complete-drawdown-of-u-s-troops-from-iraq-by-years-end/>. Note that while the “drawdown” of troops in Iraq happened over a year prior to the publication of this Note, approximately 17,000 government contractors remain employed to continue work in the country. See Ted Galen Carpenter, *The Iraq Debacle Continues*, NAT’L INT. (Jan. 3, 2013), <http://nationalinterest.org/commentary/the-iraq-debacle-continues-7922>.

<sup>11</sup> See Mark Landler & Michael R. Gordon, *U.S. Is Open to Withdraw Afghan Force After 2014*, N.Y. TIMES, Jan. 9, 2013, at A8.

<sup>12</sup> See *War Profiteering and Other Contractor Crimes Committed Overseas: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 110th Cong. 48 (2007) [hereinafter *War Profiteering*] (statement of Scott Horton, Adjunct Professor of Law, Columbia University School of Law) (“The force profile has changed dramatically. The current mix draws far more heavily on civilians than at any time in our history ....”).

Iraq and Afghanistan, the United States will continue to employ contractors to support the work that remains to be done there such as infrastructure and humanitarian efforts. Senator Leahy, a sponsor of the CEJA, predicted that as the drawdowns continue “fewer and fewer of the thousands of Americans who stay on in these countries will be covered by current law.”<sup>13</sup> Therefore, it remains vital that Congress pass a civilian corollary to the MEJA to close the accountability gap for contractors employed both in current and future engagements.

## I. A BRIEF HISTORY OF SERVICE CONTRACTORS, THEIR EMPLOYMENT, AND THEIR PERFORMANCE

### A. History of the Use of Service Contractors

The federal government has increasingly relied on contractors to support deployed forces since the middle of the twentieth century.<sup>14</sup> At one point before the 2007 “surge,” there were about 100,000 contractors in Iraq, compared with 125,000 uniformed personnel, or just over forty percent of total personnel.<sup>15</sup> The World War II and Korean War contractor figures are utterly dwarfed by those in Iraq and Afghanistan, “in both of those conflicts, the percentage of contract personnel involved would have run between 3 percent and 5 percent.”<sup>16</sup>

Two factors explain the dramatic increase in the use of contractors since the 1991 Persian Gulf War: (1) the change in the nature of American military engagements abroad, and (2) decreased political tolerance for increasing troop numbers overseas.<sup>17</sup> The nature of American engagements overseas has changed from the clashes of great powers seen in the two

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<sup>13</sup> Press Release, Sen. Patrick Leahy, Senate Judiciary Committee Reports Leahy-Authorized Civilian Extraterritorial Jurisdiction Act (June 23, 2011), <http://www.leahy.senate.gov/press/senate-judiciary-committee-reports-leahy-authored-civilian-extraterritorial-jurisdiction-act>.

<sup>14</sup> See *War Profiteering*, *supra* note 12, at 48.

<sup>15</sup> *Id.* See also Scott Horton, *Providing Accountability for Private Military Contractors: Testimony before the House Judiciary Committee on June 19, 2007*, HARPER’S MAG. (June 19, 2007, 4:00 PM), <http://harpers.org/print/?pid=309>.

<sup>16</sup> *War Profiteering*, *supra* note 12, at 48.

<sup>17</sup> Charles Tiefer, *No More Nisour Squares: Legal Control of Private Security Contractors in Iraq and After*, 88 OR. L. REV. 745, 752–53 (2009). At its peak, the U.S. government employed 180,000 contractors in Iraq, of which 30,000 provided security services. *Id.* at 753. In contrast, the U.S. employed an estimated 9,200 contractors during the Persian Gulf War. Renae Merle, *Census Counts 100,000 Contractors in Iraq*, WASH. POST, Dec. 5, 2006, at D01.

World Wars to the rise of counterinsurgency operations and humanitarian efforts conducted by the Department of Defense.<sup>18</sup> The late 1990s conflict in the Balkans marked a shift in the way America finances and staffs these engagements.<sup>19</sup> Professor Laura A. Dickinson describes the political climate during the Clinton administration as one in which the nation was too disturbed to see troops involved in humanitarian conflicts following the disastrous loss of American military lives in Somalia.<sup>20</sup> Nor was there any popular enthusiasm for adding to the size of the federal workforce at the time.<sup>21</sup> In fact, both the military and federal civilian workforce were cut drastically leading up to the Balkans conflict.<sup>22</sup> Not only does the use of contractors solve the logistical issue of how to staff engagements without growing the federal work force, but to some extent, contracting with private firms for necessary services solves both of these problems.<sup>23</sup>

## *B. Contractor Accountability Failures in Recent Conflicts*

### *1. DynCorp in the Balkans*

During the 1990's U.S. engagement in the Balkans, the Department of State hired military contractor DynCorp to provide training to Bosnian police.<sup>24</sup> Employees of DynCorp were accused of running a sex trafficking operation—buying and selling women and girls as young as twelve, and purchasing passports for them so they could be “exported.”<sup>25</sup> One employee

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<sup>18</sup> See MOSHE SCHWARTZ & JENNIFER CHURCH, CONG. RESEARCH SERV., R43074, DEPARTMENT OF DEFENSE'S USE OF CONTRACTORS TO SUPPORT MILITARY OPERATIONS: BACKGROUND, ANALYSIS, AND ISSUES FOR CONGRESS 2–3 (2013).

<sup>19</sup> See DICKINSON, *supra* note 7, at 33–34.

<sup>20</sup> *Id.* at 34 (“Determined to halt ethnic cleansing in Kosovo, the Clinton administration was nevertheless haunted by the specter of U.S. soldiers being dragged through the streets in Somalia during Clinton’s first venture in committing U.S. forces to humanitarian intervention, and so the political pressure on Clinton to minimize U.S. casualties was particularly high.”).

<sup>21</sup> *Id.* at 33–34. Moreover, there was not much ability to do so; at least not in a timely manner. *Id.* (“It always was much easier to add contractors’ because funding was much more readily available. Moreover ... in filling the position [with a contractor] fewer rules applied, so ‘you could hire someone much more quickly.’” (quoting a senior official at the U.S. Government Accountability Office)).

<sup>22</sup> See *id.* at 32, 34–35.

<sup>23</sup> See *id.* at 33–34. It is estimated that by the end of the conflict, there were about as many contractors as military personnel in the Balkans. *Id.* at 34.

<sup>24</sup> See DICKINSON, *supra* note 7, at 34.

<sup>25</sup> Kelly Patricia O’Meara, *DynCorp Disgrace*, INSIGHT MAG., Feb. 4, 2002, at 12 (“[I]t was no different than slavery.” (quoting whistleblower Ben Johnston)); David Isenberg, *It’s*

even filmed himself in the act of abusing his victims.<sup>26</sup> The employees involved suffered few, if any, legal consequences: they were transferred back to the United States, the Army and the United Nations conducted investigations, and DynCorp fired some of the employees involved.<sup>27</sup>

## 2. *Abu Ghraib in Iraq*

The Abu Ghraib prison scandal is one of the most notorious U.S. abuses in Iraq; it involved not only American soldiers but also contractors employed by the Department of the Interior.<sup>28</sup> The scandal was a major motivation for amending the language<sup>29</sup> in the MEJA.<sup>30</sup> The amended language extended jurisdiction to contractors and sub-contractors employed by any federal agency “to the extent such employment relates to supporting the mission of the Department of Defense overseas.”<sup>31</sup>

## 3. *Nisour Square in Baghdad, Iraq*

In September 2007 in Baghdad’s Nisour Square, Blackwater<sup>32</sup> guards who were contracted to provide diplomatic security services were involved in a highly-publicized incident in which seventeen Iraqis died.<sup>33</sup>

*Déjà Vu for DynCorp All Over Again*, HUFFINGTON POST (Dec. 6, 2010, 8:47 AM), [http://www.huffingtonpost.com/david-isenberg/its-dj-vu-for-dyncorp-all\\_b\\_792394.html](http://www.huffingtonpost.com/david-isenberg/its-dj-vu-for-dyncorp-all_b_792394.html).

<sup>26</sup> Isenberg, *Déjà Vu*, *supra* note 25.

<sup>27</sup> *See id.*

<sup>28</sup> *See* DICKINSON, *supra* note 7, at 57. As of 2011, twelve soldiers involved had been punished by the military, yet not a single contractor involved had been held accountable. *Id.* *See also* Scott Shane, *Some U.S. Prison Contractors May Avoid Charges*, BALTIMORE SUN, May 24, 2004, at A1 (“The U.S. civilian interrogators questioning prisoners at Abu Ghraib prison in Iraq work ... under a ... contract ... from the Department of the Interior ...”).

<sup>29</sup> Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, § 1088, 118 Stat. 1811, 2066–67 (2004) (codified as amended at 18 U.S.C. § 3267(1)(A)(iii)(II)).

<sup>30</sup> Shane, *supra* note 28 (“[L]egal experts say [that] contractors for nonmilitary agencies such as the Department of the Interior may be able to escape prosecution for crimes they commit overseas because of an apparent loophole in the [MEJA]. The law, passed in 2000, applies only to contractors with the Department of Defense—a flaw some members of Congress want to remedy.”).

<sup>31</sup> § 1088, 118 Stat. at 2066.

<sup>32</sup> Blackwater changed its name in 2009 to “Xe Services,” and again in 2011 to “Academi.” *Former Blackwater Firm Renamed Again*, BBC NEWS (Dec. 12, 2011, 1:28 PM), <http://www.bbc.co.uk/news/world-us-canada-16149971>.

<sup>33</sup> DICKINSON, *supra* note 7, at 1.

One investigation found that fourteen of these deaths were “unjustified.”<sup>34</sup> A subsequent report found that none of the deaths were justified.<sup>35</sup>

#### 4. *Government Contractors Hiring and Supporting Warlords in Afghanistan*

The Senate Armed Services Committee concluded that the behavior of certain security contractors in Afghanistan represented a “sharp detour” from the U.S. mission.<sup>36</sup> The report detailed multiple instances where Afghan nationals employed by the United States as subcontractors for security services were connected with the Taliban.<sup>37</sup> The American primary contractors implicated also might have been indirectly funding local “warlords,” as well as the Taliban.<sup>38</sup> In one of the more egregious instances described in the report, a raid was conducted on a Taliban meeting, which later was discovered to have been hosted in the home of a local subcontractor.<sup>39</sup> Additionally, some subcontractors hired by the American primary contractors as guards were alleged to be Iranian intelligence agents.<sup>40</sup>

#### 5. *“Interrogations” By Central Intelligence Contractor in Afghanistan*

Mr. David Passaro’s “interrogation” of an Afghan national suspected of orchestrating attacks on an American military facility is another glaring example of contractors’ misdeeds in Afghanistan.<sup>41</sup> The interrogation spanned two days and resulted in the suspect’s death.<sup>42</sup> Mr. Passaro, a

<sup>34</sup> *Id.* (citing David Johnston & John M. Broeder, *F.B.I. Says Guards Killed 14 Iraqis Without Cause: Report on Blackwater*, N.Y. TIMES, Nov. 14, 2007, at A1).

<sup>35</sup> *Id.* (citing *Blackwater Faulted by U.S. Military: Report*, REUTERS (Oct. 5, 2007, 5:24 PM), <http://www.reuters.com/article/2007/10/05/us-iraq-contractors-report-idUSN0439965120071005?sp=true>).

<sup>36</sup> See S. REP. NO. 111-345, at ix (2010) (“Conclusion 1: The proliferation of private security personnel in Afghanistan is inconsistent with the counterinsurgency strategy.... Conclusion 2: Afghan warlords and strongmen operating as force providers to private security contractors have acted against U.S. and Afghan government interests.”); Scott Horton, *Private Security Contractors in Afghanistan Fueling the Taliban*, *Senate Report Concludes*, HARPER’S MAG. (Oct. 8, 2010, 1:33 PM), <http://harpers.org/blog/2010/10/private-security-contractors-in-afghanistan-fueling-the-taliban-senate-report-concludes/>.

<sup>37</sup> Karen DeYoung, *US Contract Failures Said to Aid the Enemy*, WASH. POST, Oct. 8, 2010, at A1.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*; see also S. REP. NO. 111-345, at iii.

<sup>40</sup> DeYoung, *supra* note 37.

<sup>41</sup> *United States v. Passaro*, 577 F.3d 207, 211 (4th Cir. 2009).

<sup>42</sup> *Id.* at 211–12.

contractor employed by the CIA, beat the suspect both with his hands and with a foot-long, Maglite-type flashlight, and kicked him forcefully enough to lift him off the ground.<sup>43</sup> The suspect later died of injuries sustained during the interrogation.<sup>44</sup>

*C. The False Claims Act's Qui Tam Provisions As an Option For Accountability*

In the face of these high-profile criminal allegations, many scholars and commentators have made suggestions to fill the accountability gap and punish contractors who commit crimes outside of the territorial jurisdiction of the United States.<sup>45</sup> For example, Professor Laura Dickinson has suggested expanding the *qui tam* provisions of the FCA beyond their traditional use in prosecutions for contractor fraud against the government to include human rights abuses.<sup>46</sup> In suggesting this, Dickinson describes the FCA generally, referring to relators—the term used to describe those members of the public who bring *qui tam* claims—as potentially recovering money for successfully “exposing contractor wrongdoing.”<sup>47</sup> Professor Dickinson’s suggestion is that, among other changes, the *qui tam* provisions of the FCA ought to be extended to include instances of reporting crimes—other than submitting fraudulent claims to the government—committed by contractors, especially human rights abuses.<sup>48</sup> This suggestion is overly simplistic considering the complexity of the FCA and its *qui tam* provisions, the undesirable economic incentives they provide, and the availability of preferable statutory alternatives.<sup>49</sup>

II. THE FALSE CLAIMS ACT AND ITS *QUI TAM* PROVISIONS

*Qui tam* is short for the Latin phrase, *qui tam pro domino rege quam pro se ipso in hac parte sequitur*—he who pursues this action on behalf of

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<sup>43</sup> *Id.*

<sup>44</sup> *See id.* at 212.

<sup>45</sup> Professor Dickinson herself suggests many other options to improve accountability for contractors. *See generally* DICKINSON, *supra* note 7.

<sup>46</sup> *Id.* at 96.

<sup>47</sup> *Id.*

<sup>48</sup> *See id.*

<sup>49</sup> *Id.* (suggesting that these changes “would go a long way toward making sure that any contract-based efforts to provide accountability will have back-end enforcement to encourage compliance.”).

the King as well as for himself.<sup>50</sup> The FCA's *qui tam* provisions incentivize private citizens to bring civil actions on behalf of the government (the King) against those suspected of defrauding the government by awarding relators—those who report the fraud and bring the suit—a portion of the damages recovered, whether or not the government chooses to intervene.<sup>51</sup>

The FCA's legislative roots date back to the Civil War era<sup>52</sup> with the Informer's Act of 1863.<sup>53</sup> However, the *qui tam* process was so abused after the Civil War that the government's ability to effectively initiate its own fraud investigations suffered.<sup>54</sup> Congress amended the *qui tam* process several times as the legislative pendulum swung back and forth between extremes of how much power individuals had to initiate and control the course of the litigation against a fraudulent contractor.<sup>55</sup>

During World War II, members of the public exploited a "loophole" in the Act that allowed a relator to bring a *qui tam* action based on information the government already had, including information from ongoing investigations.<sup>56</sup> Congress patched the loophole with the False Claims Act of 1943.<sup>57</sup> The 1943 FCA<sup>58</sup> gave complete control over the process to the Department of Justice (DOJ).<sup>59</sup> "Thereafter the *qui tam* provision was largely ignored as a dead letter of U.S. law for another 40 years."<sup>60</sup>

During the expansive military buildup under President Reagan's administration, government contractors' fraudulent claims again attracted much public attention and ire.<sup>61</sup> In 1986, Congress again amended the FCA,<sup>62</sup> restoring some power over the *qui tam* process to individual relators.<sup>63</sup> The balance of power over the litigation in *qui tam* actions is much the same

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<sup>50</sup> Robin Page West, *Being a Qui Tam Whistleblower: It's Not for Everybody*, BUS. L. TODAY, May–June 2008, at 31, 35; see also William Y. Culbertson, *Whistleblowers and Prosecutors: Achieving the Best Interests of the Public*, BUS. L. TODAY, May–June 2008, at 30, 32.

<sup>51</sup> See CARL J. PECKINPAUGH, GOVERNMENT CONTRACTS FOR SERVICES 335–36 (1997).

<sup>52</sup> See West, *supra* note 50, at 35.

<sup>53</sup> Act of Mar. 2, 1863, ch. 67, 12 Stat. 696.

<sup>54</sup> PECKINPAUGH, *supra* note 51, at 335.

<sup>55</sup> See *id.*

<sup>56</sup> See Culbertson, *supra* note 50, at 32.

<sup>57</sup> See *id.*

<sup>58</sup> Act of Dec. 23, 1943, Pub. L. No. 78-213, ch. 377, 57 Stat. 608 (current version at 31 U.S.C. § 3730).

<sup>59</sup> Culbertson, *supra* note 50, at 32.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> False Claims Amendments Act of 1986, Pub. L. No. 99-562, 100 Stat. 3153.

<sup>63</sup> See Culbertson, *supra* note 50, at 32.

today.<sup>64</sup> The 1986 FCA amendments balanced incentives for individuals to initiate proceedings with the government's interests in controlling and initiating its own fraud investigations.<sup>65</sup> "The obvious purpose for bringing back this abandoned provision in 1986 was to punish fraud and, like the old law, it had two basic components: encouraging whistleblowers and allowing its prosecution through private lawyers."<sup>66</sup> These amendments, restoring some control over the litigation to individual relators, greatly increased the number of fraud incidents reported.<sup>67</sup>

The 1986 FCA amendments differed in purpose in an important way from the 1863 Informer's Act. By 1986 the government had many more prosecutors on staff than in 1863, and thus was theoretically much more able to investigate fraud on its own, "which made it necessary for proponents to criticize the DOJ in order to rationalize the private lawyers' role in the modern era."<sup>68</sup> This difference means the Act not only sets a rogue to catch a rogue, but also sets a rogue to discover fraud that apathetic, unwary, or under-trained government watchdogs miss.

Lastly, Congress amended some FCA provisions through the Fraud Enforcement and Recovery Act<sup>69</sup> in 2009 in response to judicial interpretations of the FCA.<sup>70</sup> These amendments included statutory clarifications on the nuances of what constitutes a cognizable claim and procedures for filing a claim.<sup>71</sup>

#### A. Basic Mechanics of Qui Tam Actions

Generally, any member of the public with original knowledge of the fraud may bring a suit.<sup>72</sup> The individual who brings the action on behalf of the government is known as a relator.<sup>73</sup> However, the relator's information

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<sup>64</sup> *See id.*

<sup>65</sup> *See* PECKINPAUGH, *supra* note 51, at 335.

<sup>66</sup> Culbertson, *supra* note 50, at 32.

<sup>67</sup> *See infra* note 125 and accompanying text.

<sup>68</sup> Culbertson, *supra* note 50, at 32.

<sup>69</sup> Pub. L. No. 111-21, 123 Stat. 1617 (2009).

<sup>70</sup> CHARLES DOYLE, CONG. RESEARCH SERV., R40785, QUI TAM: THE FALSE CLAIMS ACT AND RELATED FEDERAL STATUTES 8 (2009) [hereinafter DOYLE, QUI TAM].

<sup>71</sup> *See id.*; *see also infra* Part II.C.3 (discussing other, more potentially troublesome developments in judicial interpretation).

<sup>72</sup> PECKINPAUGH, *supra* note 51, at 337 ("The relator must be the original source of at least some of the information that serves as the basis for the suit."). The meaning of "original source" is a hotly debated topic, even after the 2009 amendments. *See* discussion *infra* Part II.C.3.

<sup>73</sup> PECKINPAUGH, *supra* note 51, at 335-37.

may not have been obtained solely through public disclosure and must be voluntarily disclosed by the relator to the government.<sup>74</sup> This requirement often serves to disqualify some government employees due to the nature of their public sector employment.<sup>75</sup> However, “[t]here is no blanket exclusion of government employees as potential *qui tam* relators in False Claims Act suits.”<sup>76</sup> The 2009 FCA amendments did not change the qualifications for becoming a *qui tam* relator.<sup>77</sup> Other portions of the 2009 FCA amendments expand the nature of claims that bring liability, including a negative or “reverse” fraud claim for contractors who seek to avoid making obligatory payments to the government rather than to obtain unearned payments from the government.<sup>78</sup>

The *qui tam* provisions are intended to encourage private individuals to prosecute fraud on behalf of the government, but the government always retains the right to intervene in the suit.<sup>79</sup> The Attorney General has discretion to bring the action and to control the litigation from the outset.<sup>80</sup> Even when the government does not intervene, the “litigation takes place in the shadow of the government’s prerogatives.”<sup>81</sup> The government may also dismiss or settle the action over the objections of the relator,<sup>82</sup> though the government rarely exercises its option to dismiss the case to the disadvantage of the relator.<sup>83</sup>

### B. Reward Scheme of Qui Tam Provisions

The relator is entitled to an incentive scheme of payouts if the *qui tam* suit is successful, though the amount of the reward depends upon several

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<sup>74</sup> *Id.*

<sup>75</sup> See, e.g., *United States ex rel. Fine v. Chevron, U.S.A., Inc.*, 72 F.3d 740 (9th Cir. 1995) (observing that allowing government employees to commence *qui tam* suits on frauds they learned of while on duty would create “perverse incentives”). Non-voluntary disclosures, such as those required by the terms of certain government employees’ duty to report fraud, will not suffice to establish the relator’s status as the original source of the information. *Id.* at 744.

<sup>76</sup> 5B FED. PROC., L. ED. § 10:61 (2004).

<sup>77</sup> See DOYLE, QUI TAM, *supra* note 70, at 8.

<sup>78</sup> *Id.* at 14.

<sup>79</sup> *Id.* at 9.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* (citing 31 U.S.C. § 3730(c)(2)(A)-(B)).

<sup>83</sup> See Paula J. Zimmerman, Note, *The Sequoia Significance: The Role of the Civil False Claims Act’s Dismissal Provision in Procurement Reform*, 29 PUB. CONT. L.J. 329, 338 (2000) (discussing the only case in which the DOJ has exercised the dismissal provision).

factors.<sup>84</sup> A relator who pursues the litigation alone is entitled to between twenty-five and thirty percent of the proceeds of the suit or settlement.<sup>85</sup> If the government chooses to intervene, the relator is entitled to between fifteen and twenty-five percent.<sup>86</sup> If the relator's contribution was minimal—such as if the information provided was gleaned from easily accessible sources or constituted only a small piece of the “puzzle”—his reward might be as low as ten percent.<sup>87</sup> If the court finds that the relator participated in the fraud at issue, the court can decrease the reward.<sup>88</sup>

*C. Issues Resulting from Expansion Beyond Fraud Purposes of Qui Tam Provisions in False Claims Act*

At first glance, the FCA seems like an attractive option for increasing accountability over government contractors by bringing more crimes to light and by holding the contracting companies accountable for the crimes of their employees. At the most general level, the FCA is an investigative force multiplier, turning everyday citizens into investigators for the government.<sup>89</sup> However, the potential efficacy and desirability of the FCA in this context are constrained in several important ways even when applied to instances of fraud, as initially was intended.

The Informer's Act of 1863,<sup>90</sup> also known as the “Lincoln Law,”<sup>91</sup> was enacted to incentivize civilians to root out Union suppliers' corrupt and fraudulent practices.<sup>92</sup> Or, as one sponsor of the Informer's Act put it, the law's purpose was “setting a rogue to catch a rogue.”<sup>93</sup> Expanding the FCA to encourage reporting service contractors' overseas crimes would not be just another application of economic incentives for civilians to

<sup>84</sup> 31 U.S.C. § 3730(d) (2012).

<sup>85</sup> § 3730(d)(2).

<sup>86</sup> § 3730(d)(1).

<sup>87</sup> § 3730(d)(1).

<sup>88</sup> § 3730(d)(3).

<sup>89</sup> See PAUL VERKUIL, *OUTSOURCING SOVEREIGNTY* 178 (2007) (“By incentivizing private relators who retain a portion of the amounts recovered when the government has been defrauded, the government adds significantly to its contract monitoring resources at a time when contracting personnel are in short supply.” (footnote omitted)); West, *supra* note 50, at 35 (“Because of the complexity of these frauds and the insider knowledge necessary to understand them, the government would be at a loss to discover or piece together the schemes without the help of insiders.”).

<sup>90</sup> §§ 3729–33.

<sup>91</sup> West, *supra* note 50, at 35.

<sup>92</sup> *See id.*

<sup>93</sup> Culbertson, *supra* note 50, at 32.

reveal and explain to the government their co-workers' accounting trickery. Such an expansion would be more akin to a government scheme offering rewards to encourage criminal witnesses to come forward, with the amount of the award varying according to the severity of the crime and the criminals' employers paying for those rewards, but only if the prosecution is successful. To elaborate on this analogy, these results could all be accomplished without ever prosecuting the individual criminals, who would be tried in separate proceedings. Without Congress passing the CEJA<sup>94</sup> the United States may not have the necessary criminal jurisdiction to follow up with those prosecutions, even if the crimes are known to the government absent reporting by the public.

While the FCA permits the government to hold accountable *organizations* that have defrauded the government, *qui tam* actions fail to hold criminally accountable the individual perpetrators of the fraud, as only the company is liable for damages.<sup>95</sup> Fining government contracting firms for their employees' individual overseas criminal actions makes little sense from a policy perspective, unless the relator can show some privity or knowledge by the contracting company. It would be absurd to fine employers because their employees committed crimes outside the scope of their duties here at home; it would be equally absurd to do so for crimes committed by employees outside of the United States.

### *1. Perverse Incentives Created By Qui Tam Provisions*

Even "normal" *qui tam* actions for fraud are affected by perverse economic incentives that influence a potential relator's decision to bring the fraud to light, a lawyer's decision to take or encourage the suit, and a contracting company's decision to maintain internal compliance systems. These incentives are all the more distasteful when considering the possibility they affect the reporting of such misdeeds described above in Part I.B. that could otherwise be prosecuted under the MEJA or the CEJA.

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<sup>94</sup> See *infra* notes 169–84 and accompanying text (discussing CEJA and its benefits). The jurisdictional gap that currently allows contractors to escape punishment can be closed without changing the FCA and incurring its negative consequences. *Infra* notes 169–84.

<sup>95</sup> The FCA does contain criminal provisions for prosecuting individual defrauders, but those criminal sanctions are prosecuted by the government rather than civilian whistleblowers. See Sharon Finegan, *The False Claims Act and Corporate Criminal Liability*, 111 PENN. ST. L. REV. 625, 627–28 (2007). In some cases the defrauder could be risking execution. *Id.* at 625–26, 625 n.4 (citing Joseph L. Lester, *Presumed Innocent, Feared Dangerous: The Eighth Amendment's Right to Bail*, 32 N. KY. L. REV. 32 (2005)).

*a. Perverse Incentives For Individual Relators*

The structure of the *qui tam* provisions incentivizes relators to wait for the fraud to accumulate until the potential reward outweighs the potential costs of coming forward, including the costs of litigation.<sup>96</sup> A reward based upon the severity of the crime or fraud uncovered creates the temptation to allow the fraud to accumulate in order to earn a larger reward, resulting in the fraud continuing past the point at which it is socially optimal to intervene—which most would agree is immediately upon discovering the crime or fraud.<sup>97</sup> Additionally, “[t]he incentive to delay will be greatest where few people know of the misconduct, and thus the number of potential competing relators is small.”<sup>98</sup> Security classifications would shield contractors’ actions from public view in some instances, constraining the universe of people who could discover the wrongdoing, and thereby encouraging potential relators to sit on the information until the most opportune moment. All of the security contractor misconduct examples discussed above involved a relatively small number of potential competing *qui tam* relators, especially the *Passaro* case.<sup>99</sup>

*b. Perverse Incentives For Relators’ Attorneys*

Incentive structures intended as enforcement systems, such as the *qui tam* provisions of the FCA, “can generate excessive litigation,”<sup>100</sup> undermining efficiency gains from deputizing the public as fraud investigators. Relators’ attorneys suffer, and succumb to, the temptation of this system as much as any other party to *qui tam* actions:

When private lawyers litigate on behalf of our government, shouldn’t the DOJ be expected to pay for the benefit? Defendants are never required to pay the tab of the public prosecutor, and to say that private lawyers are paid on a contingency basis does not make it free to the public, let alone to defendants.... Given the extraordinary protections built into the FCA, which prevent innocent defendants from holding

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<sup>96</sup> See William E. Kovacic, *Whistleblower Bounty Lawsuits as Monitoring Providers in Government Contracting*, 29 LOY. L.A. L. REV. 1799, 1829 (1996); see also Ben Depoorter & Jef De Mot, *Whistle Blowing: An Economic Analysis of the False Claims Act*, 14 SUP. CT. ECON. REV. 135, 136 (2006).

<sup>97</sup> See Depoorter & De Mot, *supra* note 96, at 136.

<sup>98</sup> See Kovacic, *supra* note 96, at 1829.

<sup>99</sup> See *supra* notes 41–44 and accompanying text.

<sup>100</sup> Kovacic, *supra* note 96, at 1825.

whistleblowers or their lawyers responsible for filing speculative complaints, most simply settle.<sup>101</sup>

Relators' attorneys, fully aware of the government contractors' tendency to settle, have no incentive to temper their clients' enthusiasm for filing over-zealous complaints.

*c. Perverse Incentives For the Government Agencies Defrauded*

Even assuming that the fraud is reported, and that the DOJ intends to intervene in the suit, a conflict of interest can exist for the agencies that have been defrauded.<sup>102</sup> When making the decision to intervene in a *qui tam* action, the DOJ receives advice from the federal agency that was defrauded.<sup>103</sup> Those agencies might be less than enthusiastic about publicizing the fraud, particularly if the facts show that the agencies' employees turned a blind eye to the issue.<sup>104</sup> Approval, tacit or otherwise, by the federal agency is likely to be raised as a defense by contractors, as occurred in the prosecution of the *Passaro* case.<sup>105</sup>

*2. Claims Can Result In Taxpayer-Funded Waste In and Of Themselves*

Pursuing a *qui tam* action after the DOJ has declined to intervene might amount to a waste of taxpayer funds itself, even absent greed on the part of the relator.<sup>106</sup> A relator's ability to bring a *qui tam* action can weaken the

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<sup>101</sup> Culbertson, *supra* note 50, at 32–33.

<sup>102</sup> See VERKUIL, *supra* note 89, at 179.

<sup>103</sup> See *id.*

<sup>104</sup> In the conversations surrounding the amendments to the *qui tam* provisions in the 1980s, it was revealed that the DOJ dropped three prosecutions for fraud because “the procurement agencies had tacitly approved the contractors’ conduct and, as a result, prosecution was unwarranted.” Culbertson, *supra* note 50, at 32. See VERKUIL, *supra* note 89, at 179 (“The [defrauded] agencies’ judgment is a function both of [sic] the merits of the claims and the potential embarrassment public revelation might produce. In some circumstances, this may result in a conflict. The Department of the Interior’s decision to settle or not pursue claims against companies who have oil leases on government land, which are being maintained by private relators is an example in this regard.” (citing Edmund L. Andrews, *Suits Say U.S. Impeded Audits for Oil Leases*, N.Y. TIMES, Sept. 21, 2006, at A1)).

<sup>105</sup> R. Jeffrey Smith, *Interrogator Says U.S. Approved Handling of Detainee Who Died*, WASH. POST, Apr. 13, 2005, at A07; see also *supra* notes 41–44 and accompanying text (discussing *United States v. Passaro*, 577 F.3d 207 (2009)).

<sup>106</sup> See Culbertson, *supra* note 50, at 32–33 (“Once the DOJ declines to intervene in *qui tam* cases, the role of private lawyers is fraught with conflicts and causes demonstrable

government's bargaining power with the fraudulent contractor, making contractors less willing to negotiate and adopt mediating measures.<sup>107</sup> Even if the contracting company were to comply with the proposed solutions or settlements for the challenged behavior that the DOJ might suggest, the government cannot always prevent a suit by a *qui tam* relator,<sup>108</sup> which can be costly to contracting firms, even if the contracting companies go on to settle with the relator. An additional flaw of the *qui tam* provisions, which often leads to waste, is the lack of proper disincentives for filing frivolous *qui tam* actions.<sup>109</sup> Therefore, as the number of suits filed increases, "it is inevitable that there are more meritless suits among them."<sup>110</sup> As *qui tam* actions have skyrocketed,<sup>111</sup> the lack of repercussions for frivolous suits seems likely to create a vicious cycle in which the contracting companies are ever more likely to settle with frivolous relators as a cost of doing business.

### 3. *Effects of Qui Tam Provisions On Contractors' Internal Management Actions*

Additionally, the possibility of *qui tam* suits distorts the business decision-making processes of the contracting firms themselves. The statutory scheme discourages contracting firms from creating an open atmosphere within their company for fear that employees might discover potential fraud and attempt to cash in through a *qui tam* suit. This could force a company to operate less efficiently by stifling internal communication.<sup>112</sup> The company might also over-invest in consensus, seeking to discourage

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waste of taxpayer money and palpable abuse of innocent defendants."); *see also* Kovacic, *supra* note 96, at 1829–30 (discussing a scenario in which the relator argued that he waited to file his action not out of greed but due to "his fear that the recipient of the bribe was prepared to have [him] killed").

<sup>107</sup> Depoorter & De Mot, *supra* note 96, at 158.

<sup>108</sup> Under some circumstances, the government can dismiss a *qui tam* suit over the objections of the relator, though it rarely utilizes this option. *See* Zimmerman, *supra* note 83, at 330 ("[As of 2000, the DOJ] has only dismissed one such case against the wishes of the relator.").

<sup>109</sup> *Id.* at 330.

<sup>110</sup> *Id.* at 345.

<sup>111</sup> *See* U.S. DEP'T. OF JUSTICE, CIVIL DIV., FRAUD STATISTICS-OTHER (NON-HHS, NON-DOD) 2 (2012), [http://www.justice.gov/civil/docs\\_forms/C-FRAUDS\\_FCA\\_Statistics.pdf](http://www.justice.gov/civil/docs_forms/C-FRAUDS_FCA_Statistics.pdf) (reporting that newly received referrals, investigations, and *qui tam* actions ballooned from 7 in 1987 to 178 in 2012).

<sup>112</sup> Kovacic, *supra* note 96, at 1834.

those on the losing end of internal decisions from initiating a lawsuit.<sup>113</sup> The temptation to bring *qui tam* actions also discourages employees who have uncovered fraud from using any internal reporting systems.<sup>114</sup> Contractors might also hesitate to discipline employees that might become litigious, or might terminate employees on overly generous terms in order to avoid *qui tam* suits.<sup>115</sup>

#### 4. Increased Litigation Costs To Contractors

In addition to the impacts on internal decision-making, contracting firms must also prepare for the eventuality of becoming the subject of a baseless *qui tam* suit. Relators can be wrong, spiteful, or over-zealous in their pursuit of *qui tam* actions. Some relators might initiate litigation based on a mistaken understanding of the behavior, or might deliberately mischaracterize an innocuous situation in order to extract a settlement.<sup>116</sup> The *qui tam* scheme could also create a race to file suit. The scheme might prompt the government to litigate before its case is sufficiently prepared in order to keep a potential relator from participating—or interfering—in the litigation and ultimately sharing in the proceeds collected from the contracting company, mimicking the race to court seen between relators.<sup>117</sup>

Recent developments in the judicial interpretation of the *qui tam* provisions also leave contracting companies in doubt of the relative strength of their case. In *Little v. Shell Exploration & Production Co.*,<sup>118</sup> the Fifth Circuit recently held that *qui tam* actions *can* be brought by relators who uncover fraud in the course of their duties as government employees only so long as their reporting of the discovered fraud was “voluntary.”<sup>119</sup> However, the decision also leaves room for increased litigation from other government employees whose job description is less clear on the point of duty to disclose fraud than auditors such as those in *Little*.<sup>120</sup> “[I]t suggests

<sup>113</sup> *See id.* at 1827.

<sup>114</sup> *See Kovacic, supra* note 96, at 1830–31. Contracting companies are encouraged to establish internal compliance systems such as hotlines and internal audits. *Id.* at 1831. Their FCA fines might be reduced if they have these systems in place. *Id.*

<sup>115</sup> *See id.* at 1826–27.

<sup>116</sup> *See id.* at 1831–32.

<sup>117</sup> *See id.* at 1839.

<sup>118</sup> 690 F.3d 282 (5th Cir. 2012).

<sup>119</sup> *See id.* at 294 (“[T]he fact that a relator ‘was employed specifically to disclose fraud is sufficient to render his disclosures nonvoluntary.’” (quoting *United States ex rel. Fine v. Chevron, U.S.A., Inc.*, 72 F.3d 740, 744 (9th Cir. 1995) (en banc))).

<sup>120</sup> Roderick L. Thomas et al., *Little v. Shell—Bad News for Government Contractors*, GOV’T CONT. L. 360 (Aug. 6, 2012), available at <http://www.wileyrein.com/publication.s.cfm?sp=articles&id=8251>.

that contract administrators and other government employees can bring whistleblower actions even if their agency superiors do not find the alleged misconduct worthy of further investigation,” which leaves open the potential for an increase in the number of actions by disgruntled government employees.<sup>121</sup> The *Little* decision falls in accord with other, similarly expansive decisions from the First and Ninth Circuits.<sup>122</sup>

To illustrate the scope of *qui tam* actions, in fiscal year 2012 alone there were 178 new *qui tam* matters in which the defrauded agency was neither the Department of Health and Human Services (HHS) nor DoD.<sup>123</sup> For DoD alone, in 2012 there were 57 *qui tam* matters.<sup>124</sup> In 1987 there were no *qui tam* actions for either DoD or HHS in which the government intervened.<sup>125</sup>

These increased costs of operation in the government contracting market—especially as compared to the relatively less risky opportunities available in the private market for like services—create a disincentive for firms to enter the market, and thus to compete for government contracts.<sup>126</sup> Firms whose current business portfolio involves a mix of private- and public-sector opportunities might be tempted to leave the market or re-balance their portfolio in favor of private sector opportunities.<sup>127</sup> As in any market, decreased competition generally “creat[es] the potential for a costlier, lower-quality product.”<sup>128</sup> One need only imagine the dire results of employing a “lower quality” security contractor in the chaotic or high-stress situations that arise in the course of security contractors’ duties overseas to see that this effect is undesirable.

### III. CONTRACTOR ACCOUNTABILITY MECHANISMS ALREADY IN FORCE

#### A. Market Preferences for “Good” Companies

Several accountability mechanisms already exist to encourage government contracting firms to act legally and in accordance with public

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<sup>121</sup> *Id.*

<sup>122</sup> See *United States ex rel. Fine v. Chevron, U.S.A., Inc.*, 72 F.3d 740 (9th Cir. 1995); *United States ex rel. LeBlanc v. Raytheon Co.*, 913 F.2d 17 (1st Cir. 1990).

<sup>123</sup> U.S. DEP’T. OF JUSTICE, CIVIL DIV., FRAUD STATISTICS, *supra* note 111. “Matters” include newly received referrals, investigations, and *qui tam* actions. *Id.* at 2.

<sup>124</sup> *Id.* at 6. By comparison, there were only twelve non-*qui tam* actions in 2012. *Id.*

<sup>125</sup> *Id.* at 5.

<sup>126</sup> Kovacic, *supra* note 96, at 1839–40 (“For firms that previously have not done business with federal agencies, the existence of such costs can discourage entry into government procurement markets.”).

<sup>127</sup> Kovacic, *supra* note 96, at 1840.

<sup>128</sup> *Id.*

norms. Contracting companies that provide military or security services to the government, like any other business, stand to suffer or benefit from their public reputation.<sup>129</sup> The interest in maintaining a good public reputation presumably dissuades contractors from violations of the same criminal laws enforced “at home.” For example, there was a 2010 movie loosely based on the DynCorp Bosnian sex-trafficking scandal.<sup>130</sup> The movie, entitled *The Whistleblower*,<sup>131</sup> and a non-fiction book with the same title co-authored by one of the women who brought the DynCorp scandal to light,<sup>132</sup> elicited a public statement from DynCorp International.<sup>133</sup> In the statement, the company attempted to distance itself from the decade-old scandal and to highlight the procedures it had since put in place to prevent such behavior in the future.<sup>134</sup> The company’s reputation was seriously tarnished by the actions of its employees, and its name became synonymous with contractor scandal long before Blackwater achieved its present level of notoriety.<sup>135</sup> Blackwater

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<sup>129</sup> See P. W. Singer, CORPORATE WARRIORS 217 (Robert J. Art et al. eds., 2003) (“By privatizing military services, certain motivations for good behavior appear to be increased. In specific, military firms do not simply kill for no good reason. Thus, blanket accusations of the industry as a whole as being an enterprise of evil, violent greed, generally ring false on deeper examination. Rather, [private military firms] are businesses with certain goals. Military provider firms do use violence, but their general goal is not violence for its own sake, but rather to achieve the task for which they were hired. Considering the increasingly messy wars of the twenty-first century, the firms’ personnel also operate with far greater military professionalism than most actors in local conflicts.”). Note that the author is comparing private military firms with local actors worldwide, including local militias in sub-Saharan Africa, not necessarily American or coalition troops in the recent operations in Iraq and Afghanistan. *But see id.* at 218 (“[C]orporate responsibility and a nice public image have their limits. As profit-driven actors, they will make operational decisions also influenced by their bottom lines. So, although it is wrong to assume that military provider firms just kill for money, there may be some situations where transgressing human rights may be in their corporate interests.”).

<sup>130</sup> Isenberg, *Déjà Vu*, *supra* note 25.

<sup>131</sup> THE WHISTLEBLOWER (Samuel Goldwyn Films 2010).

<sup>132</sup> KATHRYN BOLKOVAC & CARI LYNN, THE WHISTLEBLOWER: SEX TRAFFICKING, MILITARY CONTRACTORS, AND ONE WOMAN’S FIGHT FOR JUSTICE (2011).

<sup>133</sup> Press Release, DynCorp International, DynCorp International Statement on “The Whistleblower” (on file with author).

<sup>134</sup> *Id.*

<sup>135</sup> See Isenberg, *Déjà Vu*, *supra* note 25. To illustrate the extent to which DynCorp was marred by this incident, “[t]he negative impact of just those two cases cannot be overstated. Indeed, search online for ‘dyncorp AND sex scandal’ as I just did and you get nearly nine thousand hits. DynCorp spent many years trying to move past the bad publicity resulting from these cases.” *Id.*

also tried to distance itself from its own scandal, rebranding itself as Xe.<sup>136</sup> When that did not work—Xe lost a State Department contract despite the new name—the name was changed again to Academi.<sup>137</sup>

### *B. Local Nations' Laws*

Although contractors are currently protected from prosecution under local laws in Iraq and Afghanistan, one accountability solution would be to expose them to criminal or civil liability under local laws.<sup>138</sup> In the wake of the Nisour Square incident, one response to the contractor accountability gap was a call to waive the immunity that had been negotiated with the Iraqi government.<sup>139</sup> “One remedy is not being discussed: the State Department can waive immunity for contractors and let the case be tried in the Iraqi courts under Order 17, which is the section of the Transitional Administrative Law approved in 2004 that gives contractors immunity.”<sup>140</sup>

### *C. The Military Extraterritorial Jurisdiction Act*

There have been a handful of successful criminal prosecutions of contractors under the MEJA.<sup>141</sup> The DOJ announced in January 2012 that Keith Strimple pleaded guilty under the MEJA to multiple child exploitation charges.<sup>142</sup> When these crimes were committed in 2007, Strimple was employed by a government contractor as a plumber at Camp Fallujah in

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<sup>136</sup> *Blackwater Name Change: Private Security Firm Switches Name Again to Academi From Xe*, HUFFINGTON POST (Dec. 15, 2011, 4:02 PM), [http://www.huffingtonpost.com/2011/12/12/blackwater-name-change-private-security-firm-academi\\_n\\_1143789.html](http://www.huffingtonpost.com/2011/12/12/blackwater-name-change-private-security-firm-academi_n_1143789.html).

<sup>137</sup> *Id.*

<sup>138</sup> In Afghanistan, the legal status of contractors was “ambiguously” addressed in diplomatic notes. David Isenberg, *Dogs of War*, U.P.I. (Jan. 12, 2009, 10:33 AM), [http://www.upi.com/Top\\_News/Special/2009/01/12/Dogs-of-War-The-future-of-contractor-accountability-immunity-or-impunity/UPI-88801231774390/tab-photos/](http://www.upi.com/Top_News/Special/2009/01/12/Dogs-of-War-The-future-of-contractor-accountability-immunity-or-impunity/UPI-88801231774390/tab-photos/). In Iraq, the order granting immunity from the local justice system was negotiated such that in exchange for not trying contractors in local courts contractors would be subject to the Uniform Code of Military Justice. See Alissa J. Rubin & Paul von Zielbauer, *The Judgment Gap in a Case Like the Blackwater Shootings, There Are Many Laws But More Obstacles*, N.Y. TIMES, Oct. 11, 2007, at A1; *infra* notes 158–62 and accompanying text (discussing the Uniform Code of Military Justice).

<sup>139</sup> See Rubin & von Zielbauer, *supra* note 138.

<sup>140</sup> *Id.*

<sup>141</sup> 18 U.S.C. §§ 3261–67 (2000).

<sup>142</sup> Press Release, Dep’t of Justice, Former Employee of Government Contractor Pleads Guilty in Oklahoma to Child Pornography Charge (Jan. 4, 2012), *available at* <http://www.justice.gov/opa/pr/2012/January/12-crm-007.html>.

Iraq for approximately five months.<sup>143</sup> Mr. Strimple admitted that during that time, “he searched for and downloaded videos of minors that he believed to be as young as 12 years old engaging in sexually explicit conduct and downloaded such images using the contractor’s computer system.”<sup>144</sup> Incidentally, even without financial incentives such as the *qui tam* provisions, Mr. Strimple was caught as a result of information provided by an anonymous tipster.<sup>145</sup>

Another successful use of the MEJA<sup>146</sup> is illustrated in *United States v. Arnt*.<sup>147</sup> In this case, the defendant, Mrs. LaTasha Arnt, fatally stabbed her husband, a staff sergeant assigned to a military base in Turkey.<sup>148</sup> Though this case had a complicated history, the government was ultimately able to show that Mrs. Arnt was “accompanying” the armed forces as a military dependent.<sup>149</sup> This case did not involve a contractor, but it highlights another potential gap in accountability: that of families accompanying contractors to posts overseas. While families are not likely to accompany contractors to a combat zone, there is greater potential for this situation at other locations overseas where non-DoD agencies and their employees operate. These successful prosecutions are not only a testament to the potential of a civilian corollary to the MEJA, but also to the flexibility required of such a corollary due to the changing structure and mission of the government’s employees overseas.

Despite these successes, accountability gaps remain. In a hearing on the CEJA, Assistant Attorney General of the Criminal Division of the DOJ, Lanny Breuer, described some of those gaps:

The unfortunate consequence of the current state of the law is that, for example, a Department of Defense contractor who murders a colleague in Iraq may be prosecuted under MEJA, while a contractor with another U.S. agency who commits the very same crime may not be, since he or she may not be covered by MEJA. Similarly, an employee with a non-Department of Defense agency who rapes a foreign national in the employee’s diplomatic residence may be prosecuted for committing a

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<sup>143</sup> David Harper, *Tulsa Who Worked in Iraq Sentenced in Child Porn Case*, TULSA WORLD (Apr. 12, 2012, 2:40 AM), [http://www.tulsaworld.com/news/courts/tulsa-an-who-worked-in-iraq-sentenced-in-child-porn-case/article\\_8f8fe907-d18c-5df7-b427-4fec05d4e93a.html](http://www.tulsaworld.com/news/courts/tulsa-an-who-worked-in-iraq-sentenced-in-child-porn-case/article_8f8fe907-d18c-5df7-b427-4fec05d4e93a.html); Press Release, Dep’t of Justice, *supra* note 142.

<sup>144</sup> *Id.*

<sup>145</sup> Harper, *supra* note 143.

<sup>146</sup> Note that this outcome would not be possible under the proposal to alter the *qui tam* provisions, making a civilian corollary to the MEJA preferable.

<sup>147</sup> 474 F.3d 1159 (9th Cir. 2007).

<sup>148</sup> *Id.* at 1161.

<sup>149</sup> *See id.* at 1162–63.

crime within the special maritime and territorial jurisdiction of the United States, while the same person might not be able to be prosecuted if he commits the same crime in the victim's apartment.<sup>150</sup>

These hypothetical gaps are not unreasonable or far-fetched.

The government's successful prosecution of Mr. David Passaro,<sup>151</sup> a contractor supporting the CIA in Afghanistan,<sup>152</sup> illustrates the continued challenges of conducting criminal prosecution under the MEJA's jurisdiction.<sup>153</sup> Though Mr. Passaro was ultimately successfully convicted, he was convicted under the USA PATRIOT Act,<sup>154</sup> not the MEJA, due to the MEJA's limited application only to contractors supporting the DoD.<sup>155</sup>

The Blackwater security guards implicated in the Nisour Square shooting in Iraq were contractors employed by the Department of State, whose contract stated their mission was diplomatic rather than supporting the DoD.<sup>156</sup> Thus, because the case was dismissed on other grounds,

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<sup>150</sup> *Holding Criminals Accountable: Extending Criminal Jurisdiction For Government Contractors And Employees Abroad*: Hearing before the S. Comm. on the Judiciary, 112th Cong. 5 (2011) (statement of Lanny A. Breuer, Assistant Attorney Gen. Criminal Div., Dep't of Justice).

<sup>151</sup> *United States v. Passaro*, 577 F.3d 207 (4th Cir. 2009), *cert. denied*, 559 U.S. 956 (2010).

<sup>152</sup> See *supra* notes 41–44 and accompanying text.

<sup>153</sup> Associated Press, *CIA Contractor Is Charged Under the Patriot Act*, U.S.A. TODAY (June 18, 2004, 5:05 PM), [http://usatoday30.usatoday.com/news/nation/2004-06-18-pat-act-charge\\_x.htm](http://usatoday30.usatoday.com/news/nation/2004-06-18-pat-act-charge_x.htm) (“A federal law, the Military Extraterritorial Jurisdiction Act of 2000, allows for the prosecution in U.S. federal courts of civilians hired by the Defense Department, relatives of U.S. military members, and a few other types of people who accompany military personnel in foreign countries. But the law is written in such a way that CIA contractors are not subject to it.”).

<sup>154</sup> *Passaro*, 577 F.3d at 212, 216.

<sup>155</sup> See *Holding Criminals Accountable*, *supra* note 150, at 2 (statement of Lanny A. Breuer, Assistant Attorney Gen. Criminal Div., Dep't of Justice). Similarly, another CIA contractor was convicted within the special maritime and territorial jurisdiction of the United States for “abusive sexual contact” committed while he was stationed in Algiers. *Id.* at 5 (statement of Lanny A. Breuer, Assistant Attorney Gen. Criminal Div., Dep't of Justice) (discussing *United States v. Warren*, 713 F. Supp. 2d 1 (D.D.C. 2010)).

<sup>156</sup> Their case was ultimately dismissed in *United States v. Slough*, 677 F. Supp. 2d 112 (D.D.C. 2009). However, the dismissal means that “the jurisdiction of MEJA for contractors working for a department other than Defense is uncertain. The decision by Judge Urbina meant that the defendants’ argument that MEJA didn’t apply to them as contractors working for the State Department in support of its mission never reached trial.” David Isenberg, *Contractors and the Civilian Extraterritorial Jurisdiction Act*, HUFFINGTON POST (Feb. 2, 2010, 2:37 PM), [http://www.huffingtonpost.com/david-isenberg/contractors-and-the-civil\\_b\\_446298.html](http://www.huffingtonpost.com/david-isenberg/contractors-and-the-civil_b_446298.html) [hereinafter Isenberg, *Contractors*].

the question remains as to whether these contractors could have been held accountable under the MEJA.<sup>157</sup>

#### *D. The Uniform Code of Military Justice (UCMJ)*

The Uniform Code of Military Justice (UCMJ) was amended at the end of 2006 under legislation proposed by Senator Lindsey Graham,<sup>158</sup> a South Carolina Republican who is also in the Judge Advocate General Corps of the United States Air Force Reserve,<sup>159</sup> to hold accountable contractors “in declared wars or contingency operations.”<sup>160</sup> However, disputes have arisen regarding whether this formulation would include State Department contractors like Blackwater who provide security services for a civilian agency like the Department of State.<sup>161</sup> Therefore, under either the MEJA or the UCMJ, prosecutorial doubt remains as to the effect of the contractors’ status supporting an agency other than the DoD.<sup>162</sup>

### IV. THE CIVILIAN EXTRATERRITORIAL JURISDICTION ACT AND SIMILAR LEGISLATIVE ATTEMPTS

#### *A. Predecessors to the CEJA*

Representative David Price, a Democrat from North Carolina, the sponsor of both the 2010 and the 2011 CEJA bills in the House,<sup>163</sup> has been working to find a solution for the accountability gap since long before introducing the CEJA of 2010.<sup>164</sup> In October 2007, Rep. Price introduced legislation to amend the MEJA to cover all contractors working for the U.S. government in war zones.<sup>165</sup>

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<sup>157</sup> See Rubin & von Zielbauer, *supra* note 138.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* (“As recently as Oct. 3, Defense Secretary Robert M. Gates indicated that no decision had been made on how to apply the new language. In other statements, Pentagon officials have suggested that they would apply the military code to Defense Department contractors. That could leave contractors working for other agencies, such as Blackwater, outside military law.”).

<sup>163</sup> H.R. 4567, 111th Cong. (2d Sess. 2010); H.R. 2136, 112th Cong. (1st Sess. 2011).

<sup>164</sup> Isenberg, *Contractors*, *supra* note 156.

<sup>165</sup> *Id.*

Remarking on the difficulty of trying the Blackwater contractors for the Nisour Square shootings under either the MEJA or the UCMJ, one journalist noted:

One irony is that back in October 2007 the House approved a bill introduced by Congressman Price which would ensure that the U.S. government has the legal authority to prosecute crimes committed by U.S. contractor personnel working in war zones. Defense Department contractors were already covered under U.S. law, but contractors who worked for the State Department and other agencies, were not liable for criminal activity under current law. Price's bill extended the jurisdiction of MEJA to cover all contractors working for the government in a war zone.<sup>166</sup>

However, even the 2007 version of the bill introduced by Rep. Price would have left open the legal question of the MEJA's application to contractors employed by other government agencies operating in areas other than war zones.

### *B. The 2010 and 2011 CEJA Proposals*

Rep. Price and Sen. Leahy introduced versions of the CEJA in both 2010 and 2011.<sup>167</sup> The 2011 version is quite similar to the one introduced in 2010, though it addresses some concerns that were raised regarding the 2010 version of the bill.<sup>168</sup>

#### *1. The CEJA Benefits To the Public*

The CEJA of 2011 directs the DOJ to increase the number of investigators dedicated to contractor criminal allegations,<sup>169</sup> which would seem to be redundant of the force multiplier effect of an FCA extension. However, in many of the instances cited as failures of contractor accountability, there is not much need for an investigative "force multiplier" that includes everyday citizens, as the number of U.S. citizens privy to useful information is necessarily low. In the Nisour Square incident, for example, the Department of State contractors who fired into a crowd were surrounded by witnesses,

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<sup>166</sup> *Id.*

<sup>167</sup> S. 2979, 111th Cong. (2d Sess. 2010); H.R. 4567, 111th Cong. (2d Sess. 2010); H.R. 2136, 112th Cong. (1st Sess. 2011); S. 1145, 112th Cong. (1st Sess. 2011).

<sup>168</sup> Charles Doyle, Cong. Research Serv., R42358, *Civilian Extraterritorial Jurisdiction Act: Federal Contractor Criminal Liability Overseas 1* (Feb. 2012) [hereinafter Doyle, CEJA].

<sup>169</sup> Isenberg, *Contractors*, *supra* note 156.

but most of them were Iraqi citizens and therefore would not have been able to bring *qui tam* actions.<sup>170</sup> In that type of situation, there is already a limited number of potential relators, regardless of the potential financial reward. No amount of potential *qui tam* reward could multiply the investigative force in that instance.

The CEJA in its 2011 form would also allow the Attorney General to authorize federal agents to arrest contractors who are suspected of having committed crimes while they are still overseas.<sup>171</sup> The Attorney General would also be required to report to Congress annually on the number of offenses prosecuted under the CEJA.<sup>172</sup> Among other topics to be addressed, the annual report would recommend changes to make the CEJA more effective,<sup>173</sup> which would allow the law to be more responsive as the use of contractors overseas continues to evolve.

The CEJA of 2011<sup>174</sup> would also give the government many procedural advantages. If the defendant is located overseas at the time the government is prepared to bring its case, the government is permitted to pick the district in which to bring its case.<sup>175</sup> If the defendant has already returned to the United States when the government is prepared to make an arrest or seek an indictment, the government has slightly less freedom in choosing a venue.<sup>176</sup> However, both the Senate and House versions would still provide the government some additional flexibility.<sup>177</sup> The government could choose to pursue the case in the district in which “the employing or contracting agency maintains its headquarters.”<sup>178</sup> This prosecutorial flexibility for the government might inconvenience some defendants who do not reside in the district the government chooses, but such an inconvenience in itself might be a valuable bargaining chip for the government to encourage plea agreements.<sup>179</sup>

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<sup>170</sup> See *supra* notes 89–95 and accompanying text.

<sup>171</sup> Isenberg, *Contractors*, *supra* note 156.

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> H.R. 2136, 112th Cong. (2011); see also S. 1145 112th Cong. (2011). The House version of the bill was introduced by Rep. David Price, and the Senate version was introduced by Sen. Patrick Leahy. The two versions are nearly identical.

<sup>175</sup> Doyle, CEJA, *supra* note 168, at 11 (citing H.R. 2136, § 4(a), proposed 18 § U.S.C. 3245; S. 1145, § 2(b), proposed 18 U.S.C. § 3245).

<sup>176</sup> *Id.*

<sup>177</sup> *Id.* The Senate bill would also provide this flexibility in choice of venue for prosecutions under the MEJA. *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> *Id.* Though the defendant might be inconvenienced, other parties, such as witnesses from the defendant’s employer or the contracting government agency—and thus the public as bill-payers—will be better served.

Under the CEJA of 2011, prosecutions would no longer become bogged down in the jurisdictional issues that currently hamper prosecutions under the MEJA.<sup>180</sup> Without a civilian complement to the MEJA, “[c]ases that would otherwise be straightforward can turn into complex investigations.”<sup>181</sup> The cases can be stalled while investigating the criminal conduct in question, the specific terms of the defendant’s employment and duties under the contract, and other facts to determine the exact nature of the defendant’s employment.<sup>182</sup> These complex, fact-specific investigations can become even more complicated when they need to be conducted in a combat zone or other remote location.<sup>183</sup> Occasionally, the investigations are further complicated by security classification issues.<sup>184</sup> These complications could be avoided entirely if the CEJA or another civilian complement to the MEJA is passed.

## 2. *The CEJA Benefits to Defendants*

If passed, the CEJA may also be considered protective of individual contractors. Rather than imposing an additional burden on contractors, the CEJA could be part of a local agreement on contractors’ legal status. Considering some of the alternatives, such as prosecution under local laws, Americans implicated in criminal prosecutions may prefer that their proceedings be handled by the more familiar American justice system.

A civilian corollary to the MEJA, such as the CEJA bills introduced by Rep. Price in 2010 and 2011, would, at the most basic level, extend federal criminal jurisdiction to wherever government contractors operate.<sup>185</sup> As such, there is not much of a learning curve for companies or their employees required; acts that would constitute federal crimes at “home” are most likely also federal crimes when committed abroad. Consider the successful use of the MEJA to prosecute incidents of child pornography as discussed

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<sup>180</sup> See *Holding Criminals Accountable*, *supra* note 150, at 4–5 (statement of Lanny A. Breuer, Assistant Attorney Gen. Criminal Div., Dep’t of Justice).

<sup>181</sup> *Id.* at 4.

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> *Id.* (“Although the Justice Department may use procedures set out under the Classified Information Procedures Act, such procedures may not be adequate to protect national security information and also establish to a jury beyond a reasonable doubt that a defendant is subject to MEJA.”).

<sup>185</sup> See Doyle, CEJA, *supra* note 168, at 7 (“The list [of covered offenses] includes drug trafficking, terrorism offenses, assault, murder, and most of the other common law offenses that would be subject to federal prosecution had they occurred within the United States ....”).

above, for example.<sup>186</sup> These types of crimes are not the most obvious when one mentions crimes committed by contractors overseas, yet the illegality of those acts and criminal liability of those involved should be utterly clear to any contractor, contracting company, or, especially, legal counsel examining their potential liability.

#### CONCLUSION

The proposed expansion of the *qui tam* provisions of the FCA to reward relators who report instances of contractor crimes would be ineffective. Such a change would actually exacerbate the existing issues and incentives with the *qui tam* scheme and might create a few more by causing changes to the internal operations of contracting companies. The same end result—increased contractor accountability—could be achieved by passing some version of the Civilian Extraterritorial Jurisdiction Act as a complement to the Military Extraterritorial Jurisdiction Act, which is a proven criminal law scheme.

The successful convictions under the MEJA discussed above extend far beyond the types of crimes typically associated in the headlines with contractors overseas. This potential to adapt to new types of crimes and new uses of contractors makes passing a law along the lines of the CEJA preferable over changes to the *qui tam* provisions. Passing a version of the CEJA would also ward off the perverse economic incentives inherent in the *qui tam* provisions of the FCA. With any luck, Congress will be proactive and pass a civilian corollary to the MEJA *now*—in the relative calm of large military drawdowns—rather than wait for some *future* scandal before summoning the will to act.

*Rachel M. Kelly\**

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<sup>186</sup> *Supra* text and accompanying notes 142–45 (discussing the prosecution of Keith Strimple).

\* J.D. Candidate, 2014, William & Mary Law School. B.A. Political Science and Economics, Boston College, 2008. I would like to thank my husband for his unfailing support, throughout law school and particularly while writing this Note. I would also like to thank the staff members of the *William & Mary Business Law Review* for their invaluable insight and attention to detail in preparing this Note for publication.