

ALERT

Constitutionality of Military Extraterritorial Jurisdiction Act (MEJA) Upheld

April 11, 2011

The Military Extraterritorial Jurisdiction Act (MEJA), 18 U.S.C. § 3261 *et seq.* provides in relevant part that U.S. federal courts can exercise jurisdiction over any person who "engages in conduct outside the United States that would constitute an offense punishable by imprisonment for more than 1 year if the conduct had been engaged in within . . . the territorial jurisdiction of the United States while employed by or accompanying the Armed Forces outside the United States." The term "accompanying the Armed Forces outside the United States" means, among other things, "a [DoD] contractor (including a subcontractor at any tier) or an employee of a [DoD] contractor (including a subcontractor at any tier) that is not "a national of or ordinarily resident in the host nation." 18 U.S.C. § 3267(2). The term "employed by the Armed Forces outside the United States" similarly extends to contractor employees supporting DoD missions overseas. 18 U.S.C. § 3267(1)(A)(ii) & (iii). On March 30, 2011, in *United States v. Brehm*, No. 1:11-CR-11, the United States District Court for the Eastern District of Virginia upheld the constitutionality of MEJA in response to claims that the statute violated the Due Process Clause of the Fifth Amendment of the U.S. Constitution as applied to a South African employee of a U.S. contractor and further held that MEJA was a valid exercise of Congress's legislative authority under Article I, Section 8 of the Constitution.

The case arose from an alleged knife attack at Kandahar Airfield (KAF) in Afghanistan. The defendant, Brehm, was a South African citizen who had never lived in or visited the U.S. and had no relatives in the U.S. At the time, he was employed by DynCorp Int'l LLC, which was providing sustainment logistics and support to the U.S. Army, and the alleged attack occurred while the defendant was performing his

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work duties. Brehm's employment agreement with DynCorp provided that he must comply with U.S. laws and stated Brehm may be subject U.S. federal court jurisdiction under MEJA.

The court held that there was a "sufficient nexus" between Brehm and the U.S. such that his prosecution in the U.S. was neither arbitrary nor fundamentally unfair and therefore did not violate the Due Process Clause of the Fifth Amendment. The court relied upon the following "contacts": (1) Brehm's employment with DynCorp established certain privileges, benefits and services from the U.S., including access to KAF; (2) Brehm's access to KAF, obtained through DoD as a result of his DynCorp employment, directly facilitated his alleged conduct; and (3) Brehm's conduct directly impacted U.S. interests and resources by, for example, disrupting the security of KAF and requiring the U.S. to deploy resources at KAF and to address the alleged conduct and treat the victim. Finally, although the court did not find that Brehm's employment agreement waived his right to raise his constitutional challenge or constituted an agreement that he could be prosecuted under MEJA in the U.S., the agreement "was an acknowledgement and recognition on his part that he was entering into a relationship that affected [U.S.] interests over which the [U.S.] claimed jurisdiction and that the [U.S.] might assert jurisdiction over him in precisely the way that it has." Slip op. at 5.

The court then rejected Brehm's challenge to the constitutionality of MEJA under Article I, Section 8 of the Constitution, clauses 10, 14, 16, and 18, which the court identified as Congress's articulated bases for enacting MEJA. The court reasoned that although the Constitution limits Congress's authority to legislate as between the Federal Government and States and as between the other two branches of the Government, Congress's authority to legislate with respect to matters outside U.S. boundaries is based on national sovereignty in foreign affairs and, consequently, is not limited by the enumerated powers delegated to Congress. *Id.* at 6. In particular, although Article I, Section 1, of the Constitution, granting Congress legislative powers, is a limited grant of authority, the Supreme Court has held that "the 'broad statement that the federal government can exercise no powers except those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers is categorically true only in respect of our internal affairs.'" *Id.* (quoting *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 315-16 (1936)). Because States severally never had international powers, the powers granted to Congress could not be based on grants from the States. Thus, Congress's powers to act on extraterritorial matters is not limited to its enumerated powers, and the court cited numerous decisions in which courts reached similar determinations with respect to MEJA and other penal statutes. *Id.* (citing federal district and appellate court decisions).

For contractors supporting DoD missions outside the U.S., *Brehm* confirms that contractor employees who are not host country nationals, whether or not they are U.S. citizens, may be subject to U.S. federal court jurisdiction for alleged criminal conduct outside the U.S. that falls within the bounds of MEJA. Although not the basis for the court's holding, the court's emphasis on the notice Brehm received as a result of his employment contract reaffirms the need to inform employees who are performing overseas of their obligation to comply with U.S. laws and, for other than host country nationals, of their possible prosecution in the U.S. under MEJA. FAR 52.225-19 and DFARS 252.225-7040 further require compliance with U.S. laws and similar notice to contractor employees of MEJA's potential applicability.