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SEX DISCRIMINATION AND THE LAW: WHY TITLE 18 MUST BE REFORMED

Shai Fierst

Federal law ineffectively protects U.S. government personnel, whether employees, contractors, or volunteers,¹ from sexual abuse abroad.² In many cases, the United States does not have the laws in place to prosecute sexual abuse, even if the perpetrator and victim are working on behalf of the federal government and are U.S. citizens.³ Victims, who already sustain physical, emotional, and psychological injuries from sexual abuse,⁴ are unable to seek justice and the offenders are not deterred from future conduct.⁵

1. For the purposes of this Comment, employees are defined by 5 U.S.C. § 2105 (a), federal contractors by 48 CFR § 9.403, and volunteers by The Peace Corps Act, Pub. L. No. 87-293 (1961).

2. 18 U.S.C. §§ 2241-2248 (2006). Sexual abuse is prosecutable only if the alleged crime took place in Special Maritime and Territorial Jurisdiction of the United States. 18 U.S.C. § 7 (2006). The Special Maritime and Territorial Jurisdiction of the United States provides for extraterritorial jurisdiction, that being jurisdiction outside of the sovereignty and control of the United States. Special Maritime and Territorial Jurisdiction extends United States criminal jurisdiction over places, but not over people. Therefore, when an adult U.S. citizen sexually abuses another adult U.S. citizen, whether working for the federal government or not, prosecution is not possible if the location of the alleged acts did not take place in the Special Maritime and Territorial Jurisdiction of the United States. As explained later, The Military Extraterritorial Jurisdiction Act, 18 U.S.C. § 3261-3267 (2006), extends jurisdiction to employee's or contractor's employment if it "relates to supporting the mission of the Department of Defense overseas" 18 U.S.C. § 3267(1)(A)(i)(2).

3. *See generally* 18 U.S.C. § 7; 18 U.S.C. §§ 2241-2248; 18 U.S.C. §§ 3261-3267.

4. *Sexual Assault*, NAT'L CTR FOR VICTIMS OF CRIME, <http://www.victimsofcrime.org/help-for-crime-victims/get-help-bulletins-for-crime-victims/bulletins-for-teens/sexual-assault> (last visited February 1, 2013). The National Center for Victims of Crime "advocates for stronger rights, protections, and services for crime victims, provides education, training, and evaluation, serves as a trusted source of current information on victims' issues." *Id.* The organization provides information about sexual assault and describes some of the harm that victims may feel: "If You Are a Victim of Sexual Assault, You Might: Feel afraid, ashamed, angry, sad, lonely, betrayed, or depressed; Feel guilty and confused if you knew or had a relationship with the attacker, even though the assault was not your fault; Feel like you have no friends or that your friends won't believe you; Want to hurt someone else or yourself; Feel like taking steps to defend yourself; Feel helpless to stop the assault; Feel hopeless about whether

The U.S. federal government sends personnel abroad for diplomatic purposes, to serve in the military, to volunteer, and for other reasons.⁶ Government contractors and volunteers are often sent to remote and dangerous areas with little physical protections,⁷ and violence against these personnel has and continues to occur.⁸ The United States has the ability to create laws that protect officers and employees, and has done so with regard to certain crimes, including homicide and assault.⁹ However, the laws are not sufficiently protecting personnel from sexual abuse in other countries.¹⁰

anything can be done; Be afraid to go anywhere that the attacker might be; Feel anxious all the time; [or] Feel bad about yourself or your body.” *Id.*

5. *Punishment – Theories of Punishment*, FREE LEGAL ENCYCLOPEDIA, <http://law.jrank.org/pages/9576/Punishment-THEORIES-PUNISHMENT.html> (last visited Feb. 1, 2013). There are two main philosophies on punishment: retributive and utilitarian. Retributivists focus on the crime itself and believe a person should be punished for past transgressions. Utilitarianists focus on deterring future misconduct by specifically deterring the offender, incapacitation and general deterrence. *Id.*

6. *See Foreign Service Jobs: Careers Representing America*, STATE.GOV, at http://careers.state.gov/officer#.UT12I3A0w_0 (last visited Mar. 2, 2013) (discussing foreign service jobs); *see also International Corporate Accountability Roundtable*, ACCOUNTABILITYROUNDTABLE.ORG, <http://accountabilityroundtable.org/campaigns/civilian-extraterritorial-jurisdiction-act/> (last visited Mar. 2, 2013) (discussing contractors abroad); Peace Corps, PEACECORPS.GOV, www.peacecorps.gov (last visited Dec. 23, 2011) (discussing volunteer opportunities in the global south).

7. *See Are Government Contractors Exploiting Workers Overseas? Examining Enforcement of the Trafficking Victims Protection Act: Hearing Before the H. Comm. on Oversight and Government Reform*, 112th Cong. 1 (2011); *see also What About Safety?*, PEACE CORPS, <http://www.peacecorps.gov/index.cfm?shell=learn.safety> (last visited Feb. 1, 2013).

8. *See David Isenberg, The Uncounted Contractor Casualties*, THE HUFFINGTON POST (May 10, 2011), http://www.huffingtonpost.com/david-isenberg/the-uncounted-contractor_b_859206.html. For Peace Corps Volunteers. *See generally Violent Crimes Against Peace Corps Volunteers: 1989-2010*, PEACECORPWIKI.ORG, <http://www.peacecorpwiki.org/images/OIGSARC.pdf> (last visited Mar. 1, 2013).

9. 18 U.S.C. § 111 (2006); 18 U.S.C. § 1114 (2006). 18 U.S.C. § 1114 provides that “[w]hoever kills or attempts to kill any officer or employee of the United States or of any agency in any branch of the United States Government (including any member of the uniformed services) while such officer or employee is engaged in or on account of the performance of official duties, or any person assisting such an officer or employee in the performance of such duties or on account of that assistance.” 18 U.S.C. § 1114 . 18

When a U.S. officer or employee is murdered or assaulted, the perpetrator can be prosecuted irrespective of location.¹¹ Within Title 18 of the United States Code, the definitions for certain crimes, such as murder and assault, are written in a way that protects officers and employees of the United States, and apply regardless of the location of the crime.¹² However, these laws do not explicitly protect contractors¹³ and volunteers.¹⁴

Although the Title 18 murder and assault statutes apply to federal employees,¹⁵ Title 18 sexual assault statutes do not include provisions specific to federal employees.¹⁶ Sexual assaults, whether committed against federal employees, contractors, or volunteers, are prosecutable only when the crimes occur within the Special Maritime and Territorial Jurisdiction (SMTJ) of the United States.¹⁷ Because the SMTJ is a fact-sensitive

U.S.C. § 111 applies to “any person designated in section 1114 of this title while engaged in or on account of the performance of official duties” or “on account of the performance of official duties during such person’s term of service.” 18 U.S.C. § 111.

10. 18 U.S.C. §§ 2241-2248.

11. 18 U.S.C. § 111; 18 U.S.C. 1114.

12. *Id.*

13. *Id.*

14. 22 U.S.C. § 2504 (a) (2006) (“[e]xcept as provided in this chapter [The Peace Corps Act], volunteers shall not be deemed officers or employees or otherwise in the service or employment of, or holding office under, the United States for any purpose.”). Under 22 U.S.C. § 2504 (h), volunteers are deemed employees of the United States government for tort claims, claims of overpayment, passport payment exemptions, use of negotiable instruments for foreign currency, and paid transport of baggage. *Id.* Under 22 U.S.C. § 2519, volunteers are deemed government employees for the purpose of background investigations and, under 5 U.S.C. § 8142, with regard to Federal Employment Compensation Act benefits. *See* 22 U.S.C. § 2519. 22 U.S.C. § 2504 (j) provides that “[u]pon enrollment in the Peace Corps, every volunteer shall take the oath prescribed for persons appointed to any office of honor or profit by section 3331 of title 5.” *See* 22 U.S.C. § 2504 (j).

15. 18 U.S.C. § 111; 18 U.S.C. § 1114.

16. 18 U.S.C. §§ 2241-2248 (2006).

17. *Id.*

determination and is specific to ships, planes, and government buildings,¹⁸ it is often times difficult to establish jurisdiction outside of these particular locations.

In addition to Title 18 offenses that suggest sexual assault laws be applied to federal government personnel, principles of international law support prosecution, especially when the alleged perpetrators are themselves U.S. citizens and federal government personnel.¹⁹ In such cases, foreign governments have little incentive to prosecute crimes committed by and against U.S. citizens, who are part of a U.S. mission and are ultimately planning on returning to the United States.²⁰

New legislation is important for many reasons. Victims of sexual assault inevitably suffer from physical injuries²¹ that can only be addressed by preventative measures. Inadequate laws also exacerbate more long-term physical and emotional injuries, including shock, anxiety, depression, and post-traumatic stress disorder, worsened when victims have little recourse and perpetrators are left unpunished.²² Proper laws are one type of preventative measure that would deter sexual assaults from taking place as well as address long-term physical and emotional injuries because the acts would be condemned morally²³ and legally. Because women are more

18. 18 U.S.C. § 7 (2006).

19. See discussion *infra* Section I.B.

20. See discussion of the lack of incentive for foreign governments to prosecute in this instance at Section III titled “The Need for Legislative Change.”

21. *Health Consequences of Sexual Assault*, THE ADVOCATES FOR HUMAN RIGHTS, http://www.stopvaw.org/health_consequences_of_sexual_assault.html (last visited Nov. 13, 2011). “The health consequences of sexual assault can be severe. In addition to the injuries that may be sustained as a result of physical abuse that may accompany the sexual assault, forced sexual contact can also result in genital injuries and gynecological complications, such as bleeding, infection, chronic pelvic pain, pelvic inflammatory disease, and urinary tract infections. Sexual violence an [sic] also put women at risk of unwanted pregnancy and sexually transmitted infections, including HIV/AIDS; unwanted pregnancies may lead to an unsafe abortion or to injuries sustained during an abortion.” *Id.*

22. *Id.*

23. THE NATIONAL CENTER FOR VICTIMS OF CRIME, *supra* note 4.

frequently the victims of sexual assault than men,²⁴ the lack of protection afforded to federal government personnel from sexual assault suggests that the laws are discriminatory.²⁵ Title 18 should therefore be amended to provide the opportunity for federal government personnel to seek relief from sexual assault crimes, just as is possible for assault and homicide-related crimes.²⁶ The need for legislative reform has been demonstrated in several high profile cases and in hearings specifically regarding contractors and volunteers. When female contractors have been sexually assaulted abroad, laws impede the federal government from criminally prosecuting the alleged perpetrators.²⁷ The same is true for U.S. Government volunteers who have been sexually assaulted.²⁸ A January 2011 *ABC News 20/20* exposé on the murder of Peace Corps Volunteer Catherine Puzey in Benin revealed the lack of protections for volunteers against sexual assault abroad.²⁹ Although highly publicized congressional hearings have addressed both contractors' and volunteers' safety and security from sexual assault,³⁰ insufficient

24. *Who are the Victims?*, RAPE, ABUSE AND INCEST NATIONAL NETWORK, <http://www.rainn.org/get-information/statistics/sexual-assault-victims> (last visited Mar. 2, 2013).

25. 18 U.S.C. §§ 2241-2248 (2006).

26. 18 U.S.C. § 1114 (2006); 18 U.S.C. § 111 (2006).

27. *Holding Criminals Accountable: Extending Criminal Jurisdiction for Government Contractors and Employees Abroad: Hearing on S. 1145 Before the S. Comm. On the Judiciary*, 112th Cong. (2011) (statement of Lanny A. Breuer, Assistant Attorney General, Criminal Division, Dep't of Justice).

28. Examples of this failure to prosecute include the cases of Jamie Leigh Jones and Kate Puzey, which are discussed later in this Comment.

29. Anna Schecter, *Parents of Slain Volunteer Say Peace Corps Error Led to Murder*, ABC NEWS, Jan. 14, 2011, <http://abcnews.go.com/Blotter/parents-slain-volunteer-peace-corps-error-led-murder/story?id=12607274>.

30. *See Peace Corps at 50: Hearing Before H. Comm. On Foreign Affairs*, 112th Cong. (2011); *Enforcement of Federal Criminal Law to Protect Americans Working for U.S. Contractors in Iraq: Hearing Before H. Comm. On the Judiciary*, 110th Cong. (2007).

legislative action has been passed to reform Title 18.³¹ This Comment discusses two high profile cases, one involving a military contractor and one involving a Peace Corps volunteer, and examines the Congressional response to the situations. By not addressing jurisdictional impediments to prosecute volunteers and non-military contractors, Congress leaves the door open for future sexual assaults against federal personnel to go unpunished.

This Comment provides a summary of Title 18 federal statutes relevant to the prosecution of sexual assault crimes against federal government personnel abroad as well as other Title 18 statutes that protect federal government personnel. Statutory analysis makes evident that Title 18's provisions inadequately protect female federal personnel and that amendments to Title 18 are necessary. This Comment focuses on the situations that contractors and volunteers face because they are both physically and legally at-risk and may not be included in provisions aimed at protecting officers and employees of the United States. New legislation must protect all federal government personnel, whether employees, contractors, or volunteers, from sexual assault abroad. This Comment also provides a description of international law principles that U.S. courts consistently apply in the context of sexual assault crimes. International law principles support the prosecution of sexual assault crimes against federal government personnel, specifically when the alleged perpetrators and victims are U.S. citizens undertaking a government mission.

Sexual assaults involving contractors and volunteers abroad have received widespread media and congressional attention. These real cases are instructive in explaining when a prosecution of sexual assault abroad may or may not take place. Through careful analysis of the cases and applicable laws, this Comment addresses how Congress should amend Title 18 so that federal government personnel are protected from sexual assault abroad. Counterarguments against amendments to Title 18 are provided and, after close scrutiny, are refuted. Like murder and assault, prosecution of sexual assault crimes should not be restricted by the special maritime and territorial jurisdiction limitation. Congress should take necessary steps to amend Title 18 so that sexual assaults against federal government personnel are prosecutable irrespective of location.

31. Kate Puzey Peace Corps Volunteer Protection Act of 2011, S. 1280, 112th Cong. (2011); H.R. 2136, 112th Cong. (2011), <http://www.govtrack.us/congress/bills/112/hr2136>. The Civilian Extraterritorial Jurisdiction Act was introduced and referred to committee on June 3, 2011 and has not yet, and may never be, reported by the committee and submitted to the House and Senate to be voted upon.

I. STATUTES AND PRINCIPLES AFFECTING SEXUAL ASSAULT AND FEDERAL PERSONNEL

A. Exploring Title 18: Federal Officer and Employee Protections

Title 18 of the United States Code provides definitions of various federal crimes and associated penalties.³² Under this provision, many statutes are in place for the purposes of protecting federal officers and employees of the United States, including statutes involving murder, manslaughter, attempted murder and manslaughter,³³ and assault.³⁴ When homicide or assault accusations are made and officers or employees of the United States are the

32. 18 U.S.C. §§ 1-2725 (2006).

33. 18 U.S.C. § 1114 (2006), Protection of Officers or Employees of the United States.

Whoever kills or attempts to kill any officer or employee of the United States or of any agency in any branch of the United States Government (including any member of the uniformed services) while such officer or employee is engaged in or on account of the performance of official duties, or any person assisting such an officer or employee in the performance of such duties or on account of that assistance, shall be punished—

- (1) in the case of murder, as provided under section 1111;
- (2) in the case of manslaughter, as provided under section 1112; or
- (3) in the case of attempted murder or manslaughter, as provided in section 1113.

34. 18 U.S.C. § 111 (2006). Assaulting, Resisting, or Impeding Certain Officers or Employees.

(a) In General.— Whoever—

- (1) forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in section 1114 of this title while engaged in or on account of the performance of official duties; or
- (2) forcibly assaults or intimidates any person who formerly served as a person designated in section 1114 on account of the performance of official duties during such person's term of service,

shall, where the acts in violation of this section constitute only simple assault, be fined under this title or imprisoned not more than one year, or both, and where such acts involve physical contact with the victim of that assault or the intent to commit another felony, be fined under this title or imprisoned not more than 8 years, or both.

alleged victims, there is no geographical limit to prosecution.³⁵ But Title 18 does not contain provisions that explicitly protect officers and employees of the United States from sexual assault crimes, which are addressed in Chapter 109A.³⁶ When an officer or employee of the United States is sexually assaulted, like the case for other United States citizens, prosecution may only occur if the crime took place in the SMTJ of the United States.³⁷

35. 18 U.S.C. § 1111; 18 U.S.C. § 1113-14.

36. 18 U.S.C. §§ 2241-44.

37. 18 U.S.C. § 7 (2006). The term “special maritime and territorial jurisdiction of the United States”, as used in this title, includes:

(1) The high seas, any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State, and any vessel belonging in whole or in part to the United States or any citizen thereof, or to any corporation created by or under the laws of the United States, or of any State, Territory, District, or possession thereof, when such vessel is within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State.

(2) Any vessel registered, licensed, or enrolled under the laws of the United States, and being on a voyage upon the waters of any of the Great Lakes, or any of the waters connecting them, or upon the Saint Lawrence River where the same constitutes the International Boundary Line.

(3) Any 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.

(4) Any island, rock, or key containing deposits of guano, which may, at the discretion of the President, be considered as appertaining to the United States.

(5) Any aircraft belonging in whole or in part to the United States, or any citizen thereof, or to any corporation created by or under the laws of the United States, or any State, Territory, district, or possession thereof, while such aircraft is in flight over the high seas, or over any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State.

(6) Any vehicle used or designed for flight or navigation in space and on the registry of the United States pursuant to the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies and the Convention on Registration of Objects Launched into Outer Space, while that vehicle is in flight, which is

Jurisdiction over sexual assault crimes only can be expanded beyond the SMTJ under limited circumstances.³⁸

The SMTJ contains nine provisions that are based on geographic locations.³⁹ These include (1) the high seas, (2) inland boundary waters, (3) lands reserved or acquired for the use of the United States, (4) small lands surrounded by water, such as islands, (5) aircrafts, (6) vehicles used or designed for flight, (7) lands outside any country's jurisdiction, (8) foreign vessels departing from or arriving in the United States, and (9) premises or

from the moment when all external doors are closed on Earth following embarkation until the moment when one such door is opened on Earth for disembarkation or in the case of a forced landing, until the competent authorities take over the responsibility for the vehicle and for persons and property aboard.

(7) Any place outside the jurisdiction of any nation with respect to an offense by or against a national of the United States.

(8) To the extent permitted by international law, any foreign vessel during a voyage having a scheduled departure from or arrival in the United States with respect to an offense committed by or against a national of the United States.

(9) 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 those missions or entities or used by United States personnel assigned to those missions or entities.

Nothing in this paragraph shall be deemed to supersede any treaty or international agreement with which this paragraph conflicts. This paragraph does not apply with respect to an offense committed by a person described in section 3261 (a) of this title.

38. 18 U.S.C. §§ 3261-67 (2006).

39. 18 U.S.C. § 7 (2006).

residences of the United States when the offense is committed by or against a United States national.⁴⁰

When non-military federal personnel⁴¹ are sexually assaulted in another country by other non-military federal personnel, in order to be prosecuted, the crime must have occurred in a place as designated by provision (3),⁴² which states:

(3) Any 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.

Or under provision (9),⁴³ which states:

(9) 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—

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

Subsection (9) was added to the SMTJ in 2001, as a result of section 804 of the USA PATRIOT Act, “Jurisdiction Over Crimes Committed at U.S. Facilities Abroad.”⁴⁴ Subsections (3) and (9) have subtle differences that have implications on the ability to prosecute sexual assaults against federal

40. *Id.*

41. Non-military personnel are not explicitly covered by statute. Whereas, military personnel are covered by the Uniform Code of Military Justice. 10 U.S.C. §§ 101, 920 (2006).

42. 18 U.S.C. § 7(3).

43. 18 U.S.C. § 7(9).

44. USA PATRIOT Act of 2001, Pub. L. No. 107-56, § 804 (2001).

personnel abroad.⁴⁵ Subsection (9)(B) differs from (3) because (9)(B) applies to residences whereas (3) is not as specific in terms of location.⁴⁶ The difference between (9)(A) and (3) is less clear. Subsection (3) begins with application to “[a]ny lands reserved or acquired for the use of the United States”⁴⁷ and (9)(A) begins with application to “the premises of United States . . .”⁴⁸ This language appears to have similar meaning and (9)(A) diverges with the later modifier “used for purposes of those missions or entities, irrespective of ownership.”⁴⁹ Subsection (9)(A) makes clear that the SMTJ applies to premises where the United States does not have title.⁵⁰

Therefore, when non-military federal government personnel are sexually assaulted abroad at a premises or a residence used for government purposes, prosecution in the United States is possible. However, when the sexual assault takes place outside premises or residence of the United States, regardless of whether the perpetrator is a United States citizen, the United States does not have jurisdiction to prosecute.⁵¹ Assuming that the federal government personnel are officers or employees of the United States Government, the only available charge would be the lesser charge of assault.⁵² The most severe penalty, if prosecuted as assault with a deadly weapon, would be a twenty-year maximum penalty in the United States.⁵³ That maximum punishment is substantially less than the punishment for sexual assault crimes, which under an aggravated sexual abuse charge, can carry a penalty of life imprisonment in the United States.⁵⁴

45. 18 U.S.C. § 7.

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*; 18 U.S.C. §§ 2241-2244 (2006).

52. 18 U.S.C. § 111 (2006). Under this section, “forcibly assaults, resists, opposes, impedes, intimidates, or interfere” could include a sexual assault. *Id.*

53. *Id.*

54. 18 U.S.C. § 2241 (2006).

For contractors, unlike volunteers, there are circumstances when someone who allegedly committed sexual assault outside of a premises or residence used for government purposes can be prosecuted.⁵⁵ The principle means of prosecuting certain non-military U.S. Government personnel is the Military Extraterritorial Jurisdiction Act (MEJA), 18 U.S.C. § 3261, *et seq.*, and was enacted in 2000.⁵⁶ 18 U.S.C. § 3261 criminal offenses committed by certain members of the armed forces and by persons employed by or accompanying the armed forces outside of the United States, provides that:

(A) Whoever 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 special maritime and territorial jurisdiction of the United States—

(1) while employed by or accompanying the Armed Forces outside the United States; or

(2) while a member of the Armed Forces subject to chapter 47 of title 10 (the Uniform Code of Military Justice),

shall be punished as provided for that offense.⁵⁷

18 U.S.C. § 3267 was added by Congress in 2004⁵⁸ and defines “employed by the Armed Forces outside the United States,” as used in the chapter, to include:

(ii) a contractor (including a subcontractor at any tier) of—

(I) the Department of Defense (including a nonappropriated fund instrumentality of the Department); or

(II) any other Federal agency, or any provisional authority, to the extent such employment relates to supporting the mission of the Department of Defense overseas; or

(iii) an employee of a contractor (or subcontractor at any tier) of—

(I) the Department of Defense (including a nonappropriated fund instrumentality of the Department); or

55. 18 U.S.C. § 3261 (2006); 18 U.S.C. § 3267 (2006).

56. Military Extraterritorial Jurisdiction Act of 2000, Pub. L. No. 106-523 § 3261 (2000).

57. 18 U.S.C. § 3261.

58. Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, P. L. No. 108-375, §1088, 118 Stat. 2066-67 (2004).

(II) any other Federal agency, or any provisional authority, to the extent such employment relates to supporting the mission of the Department of Defense overseas.⁵⁹

This means that the United States has jurisdiction under Title 18 to prosecute a sexual assault allegedly committed by a contractor, because, under 18 U.S.C. § 3261, sexual assault crimes are offenses “punishable by imprisonment for more than 1 year if the conduct had been engaged in within the special maritime and territorial jurisdiction of the United States” and if, under 18 U.S.C. § 3267 (1)(A)(ii)(II) and (iii)(II), the contractor’s employment “relates to supporting the mission of the Department of Defense overseas.”⁶⁰

But there are circumstances when a contractor’s employment does not relate “to supporting the mission of the Department of Defense overseas,” and in these instances, the United States may not be able to prosecute egregious criminal conduct.⁶¹ As Lanny Breuer, former Assistant Attorney General in the Criminal Division of the Department of Justice, testified in support of the Civilian Extraterritorial Act, a bill extending criminal jurisdiction over government contractors, “[w]hether any particular defendant falls within the scope of MEJA, therefore, depends upon highly specific facts and circumstances relating to his or her employment and, in practice, this statutory language has proven difficult to apply.”⁶² Breuer goes on to point out that while a Department of the Defense contractor who commits a particularly egregious crime is prosecutable under MEJA, “a contractor with another United States agency who commits the very same crime may not be, since he or she may not be covered by MEJA.”⁶³ Despite

59. 18 U.S.C. § 3267.

60. 18 U.S.C. § 3261; 18 U.S.C. § 3267.

61. 18 U.S.C. § 3267. Examples of this failure to prosecute include the cases of Jamie Leigh Jones and Kate Puzey which are discussed later in this Comment.

62. *Holding Criminals Accountable: Extending Criminal Jurisdiction to Government Contractors and Employees Abroad: Hearing Before the Senate Judiciary Committee, 112th Cong.* (2011) (statement of Assistant Att’y Gen. Lanny A. Breuer, Criminal Division of the Department of Justice).

63. *Id.*

government efforts, as well as justification under international law principles, the bill has not yet passed and may never pass.⁶⁴

B. International Law Principles: Federal Personnel Protections

When assessing the extraterritorial application of sexual assault crimes, international law principles support the application of U.S. law.⁶⁵ Statutes are presumed to apply strictly within the territorial jurisdiction of the United States.⁶⁶ This presumption may be overcome when the legislative act indicates the intended application is to be outside of the sovereignty or control of the United States.⁶⁷ If the statute indicates that the law be applied extraterritorially, U.S. courts then determine whether extraterritorial jurisdiction is consistent with principles of international law.⁶⁸ Certain criminal statutes are enforceable without regard to location “especially if committed by its own citizens, officers, or agents.”⁶⁹ Depending on the nature of the offense, the jurisdiction of the statute is inferred to include the high seas and foreign countries.⁷⁰

U.S. courts consistently use international law principles to bolster arguments for extraterritorial jurisdiction.⁷¹ A 1935 Harvard Law Study

64. Chris Hunter, *Filling the Accountability Gap*, STABILITY OPERATIONS, (Sept. 1, 2011), <http://web.peaceops.com/archives/1670>. The CEJA may not have passed because of concerns from that the bill under-protected intelligence activities.

65. Charles Doyle, *Extraterritorial Application of American Criminal Law*, CONGRESSIONAL RESEARCH SERVICES, Feb. 15, 2012, at 10.

66. *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949) (citing *Blackmer v. United States*, 284 US 421, 437 (1932)).

67. *E.E.O.C. v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991).

68. *United States v. Neil*, 312 F.3d 419, 421 (9th Cir. 2002).

69. *United States v. Bowman*, 260 U.S. 94, 98 (1922).

70. *Id.*

71. Military Extraterritorial Jurisdiction Act of 2000, Pub. L. No.106-523, 114 Stat. 2489-2493 (2000); see also Charles Doyle, *Extraterritorial Application of American Criminal Law*, CONGRESSIONAL RESEARCH SERVICE, Feb. 15, 2012, at 11 (citing Harvard Research in International Law, *Jurisdiction with Respect to Crime*, 29 AM. J. INT’L L. 439, 445 (1935)).

about the extraterritorial application of criminal law summarized these principles.⁷² The study divided international law principles into five categories: (1) territorial, (2) nationality, (3) passive personality, (4) protective, and (5) universality.⁷³ These principles of international law have been used “cumulatively” to further support jurisdiction.⁷⁴

The territorial principle supports jurisdiction over acts that have an impact within a given country.⁷⁵ There are three types of territorial jurisdiction: flag, subjective territorial, and objective territorial.⁷⁶ Under flag jurisdiction, states can exercise jurisdiction over their flags, such as a state’s flagged ships or planes.⁷⁷ Flag jurisdiction has been used to prosecute sexual assaults abroad when they occur on U.S. Government owned premises or residences.⁷⁸ Under the subjective territorial principle, a government can prosecute a crime that began within its territory and was completed in another state.⁷⁹ The subjective territorial principle justifies prosecutions of sexual assaults when the perpetrator, while in the United States, has the

72. Charles Doyle, CONG. RESEARCH SERV., 94-166, *Extraterritorial Application of American Criminal Law*, (2012) at 11 (citing Harvard Research in International Law, *Jurisdiction with Respect to Crime*, 29 AM. J. INT’L L. (Supp 439, 445 (1935)).

73. *Id.*

74. *United States v. Neil*, 312 F.3d 419, 422 (9th Cir. 2002) (citing *United States v. Felix-Gutierrez*, 940 F.2d 1200, 1206 (9th Cir. 1991)). In *Felix-Gutierrez*, three principles of international law (territorial, protective, and passive personality) were used to support jurisdiction over the kidnapping and murder of DEA agent in Mexico.

75. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 (1)(c) (1987); *Ford v. United States*, 273 U.S. 593, 623 (1927); *United States v. Vasquez-Velasco*, 15 F.3d 833, 841 (9th Cir. 1994) (applying drug trafficking statutes extraterritorially because such activities implicate national security interests and have a detrimental effect); *United States v. Yousef*, 327 F.3d 56, 96-97 (2d. Cir. 2003) (finding jurisdiction under the objective territorial principle because a terrorist attack was intended to produce a devastating effect on the U.S.).

76. BARRY E. CARTER AND ALLEN S. WEINER, *INTERNATIONAL LAW* 640, 641 (Wolters Kluwer Law & Business, 6th ed. 2011).

77. *Id.*

78. 18 U.S.C. § 7(9) (2006).

79. Carter & Weiner, *supra* note 76, at 641.

intent to commit a crime carried out abroad. This subjective territorial principle is most evident in laws against sexual assaults of children.⁸⁰

Under the objective territorial principle, a state can prosecute a crime that commenced outside its territory but ended or produced harm inside its territory.⁸¹ Courts have used the objective territorial principle to prosecute sexual assault crimes that were committed outside of the territory of the United States in which the victim suffered long-term harm in the United States.⁸² Sexual assaults have lasting physical and emotional impacts and victims continue to suffer after returning home.⁸³ Treatment costs for associated health effects are incurred in the United States.⁸⁴

The nationality principle applies to crimes committed by a country's nationals.⁸⁵ Congress has the power to create legislation that applies to U.S. citizens irrespective of their location.⁸⁶ The nationality principle is usually noncontroversial and is visible in tax laws, prohibitions against bribery of foreign officials, registration for the military, and laws against the sexual abuse of minors.⁸⁷ The nationality principle applies to sexual assaults when the perpetrators are themselves U.S. citizens and regardless of the victim's nationality.⁸⁸

The passive personality principle applies to acts committed outside of a State's territory by a foreign citizen against the State's own national.⁸⁹ An example of the application of the passive personality principle is *United*

80. Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act, Pub. L. No. 108-21, § 105 (b), 117 Stat. 650 (2003).

81. *Id.*

82. *United States v. Neil*, 312 F.3d 419, 420 (9th Cir. 2002).

83. THE NATIONAL CENTER FOR VICTIMS OF CRIME, *supra* note 4.

84. *Id.*

85. *Blackmer v. United States*, 284 U.S. 421, 437 (1932).

86. *Carter & Weiner*, *supra* note 76, at 670.

87. *Id.*

88. *Blackmer*, 284 U.S. at 437.

89. *United States v. Neil*, 312 F.3d 419, 419 (9th Cir. 2002); *see also United States v. Yousef*, 327 F.3d 56, 96 (2d. Cir. 2003).

States v. Neil,⁹⁰ a case indicative of jurisdiction over crimes committed on cruise ships. In *Neil*, the plaintiff was a U.S. citizen who was sexually assaulted by a foreign national on a Panamanian registered ship that originated from, and returned to, the United States.⁹¹ The Ninth Circuit concluded that there was jurisdiction based on the territorial and passive personality principles.⁹² However, unlike *Neil*, when a U.S. national is sexually assaulted abroad by another U.S. national, the passive personality principle does not apply.⁹³

The protective principle applies to crimes that impact the interests of the United States as a nation, and more specifically to crimes affecting “security, territorial integrity or political independence.”⁹⁴ In *Felix-Gutierrez*, the Ninth Circuit applied the territorial, protective, and passive personality principles to exercise jurisdiction over Mexican nationals committing a crime in Mexico.⁹⁵ The territorial principle was implicated because the defendant participated in the kidnapping and murder of a United States Drug Enforcement Agency Special Agent.⁹⁶ The Ninth Circuit reasoned that the defendant’s “actions created a significant detrimental effect in the United States and adversely affected the national interest.”⁹⁷

Using the protective principle, sexual assaults against federal government personnel abroad impacts the interests of the United States because individuals representing and working for the United States are harmed.⁹⁸ The interests of the United States are impacted when its personnel are

90. *Neil*, 312 F.3d at 419.

91. *Id.* at 420.

92. *Id.* at 421.

93. *Id.* at 423.

94. Harvard Research in International Law, *Jurisdiction with Respect to Crime*, 29 AM. J. INT’L L.) 439, 440 (1935) [hereinafter *Harvard Study*]; *United States v. Vilches-Navarrete*, 523 F.3d 1, 21-22 (1st Cir. 2008).

95. *United States v. Felix-Gutierrez*, 940 F.2d 1200, 1205-06 (9th Cir. 1991).

96. *Id.* at 1206.

97. *Id.* at 1206.

98. *United States v. Vilches-Navarrete*, 523 F.3d 1, 21-22 (1st Cir. 2008); *Harvard Study*, *supra* note 94, at 440.

harmed abroad, missions are frustrated, and media attention is directed at the failures of the government rather than successes.⁹⁹ This international law approach is especially strong when the perpetrator and victim are U.S. federal government personnel, because United States interests are impacted when its personnel are committing crimes against each other.¹⁰⁰ Jurisdiction is even further supported when the alleged victim and perpetrator are personnel working on behalf of a government mission as opposed to working for a private company or visiting as tourists.¹⁰¹

Lastly, the universality principle applies to prosecutions of individuals who commit universally condemned crimes.¹⁰² These crimes are deemed so heinous that they are universally condemned, and include such things as crimes against humanity, war crimes, genocide, and sometimes piracy and terrorism.¹⁰³ Although sexual assault is a heinous crime, it is not on the short list of crimes that fall within the application of the universality principle.¹⁰⁴

For the reasons outlined above, the territoriality, nationality, and protective principles support United States prosecution of sexual assaults committed by and against federal government personnel abroad.

The strongest case for prosecution of sexual assault crimes against federal government personnel under international law principles is when the alleged victim and perpetrator are both U.S. citizens. Often times, the alleged victim and perpetrator are colleagues and part of the same mission.¹⁰⁵ Sometimes, the alleged victim and perpetrator are both personnel of the U.S.

99. *Vilches-Navarrete*, 523 F.3d at 21-22; *Harvard Study*, *supra* note 94, at 440.

100. *Vilches-Navarrete*, 523 F.3d at 21-22; *Harvard Study*, *supra* note 94, at 440.

101. *Felix-Gutierrez*, 940 F.2d at 1206.

102. *United States v. Shi*, 525 F.3d 709, 721 (9th Cir. 2008); *Harvard Study*, *supra* note 94, at 440.

103. *Shi*, 525 F.3d at 721; *Harvard Study*, *supra* note 94, at 440.

104. *Shi*, 525 F.3d at 722; *Harvard Study*, *supra* note 94, at 440.

105. Justin Rood, *Pentagon Won't Probe KBR Rape Charges*, ABC NEWS, Jan. 8, 2008, <http://abcnews.go.com/Blotter/story?id=4099514&page=1>.

Government, but working on different missions.¹⁰⁶ For example, in 2011 a Navy SEAL was accused of raping a Peace Corps volunteer in Uganda.¹⁰⁷

Moreover, the U.S. Government is reluctant to see one of its citizens stand trial in a foreign country without sufficient due process guarantees.¹⁰⁸ Even with international law principles that strongly support United States jurisdiction over sexual assaults committed by and against U.S. citizens during federal missions abroad, there is still the practical issue of gaining custody over the alleged perpetrator. One way to gain custody is to arrest the alleged perpetrator upon voluntary return to the United States.¹⁰⁹ The other way is through extradition, “[t]he official surrender of an alleged criminal by one state or nation to another having jurisdiction over the crime charged.”¹¹⁰ The authority to extradite is by treaty,¹¹¹ but while the United States does not have extradition treaties with all countries,¹¹² many countries

106. Bill Sizemore, *Sailor Accused of Raping Teacher in Uganda*, THE VIRGINIA PILOT (Apr. 23, 2011), <http://hamptonroads.com/2011/04/sailor-accused-raping-teacher-uganda>.

107. *Id.*

108. Arrest or Detention of an American Citizen Abroad, US DEP'T OF STATE, http://travel.state.gov/travel/tips/emergencies/arrest/arrest_3879.html (last visited July 1, 2012). “We can and do monitor conditions in foreign prisons and can protest allegations of abuse against U.S. citizen prisoners when requested to do so. We work with prison officials to ensure treatment consistent with internationally recognized standards of human rights and to ensure that Americans are afforded due process under local laws.” *Id.*

109. In an August 2011, a Peace Corps volunteer who allegedly molested children in South Africa was arrested and taken into custody at his home after voluntarily returning to the United States. *Peace Corps Volunteer Charged with Sexually Abusing Children in South Africa*, DEP'T OF JUSTICE OFFICE OF PUB. AFFAIRS (Aug. 4, 2011), <http://www.justice.gov/opa/pr/2011/August/11-crm-1017.html>.

110. BLACK'S LAW DICTIONARY 665 (9th ed. 2009).

111. 18 U.S.C. § 3184 (2006).

112. Information about United States Extradition Treaties available at <http://www.uncjin.org/Laws/extradit/usa.pdf>. The U.S. does not have extradition treaties with the following countries where Peace Corps volunteers currently serve: Georgia, Macedonia, Moldova, Jordan, Micronesia and Palau, Samoa, Tonga, Vanuatu, Cambodia, China, Indonesia, Mongolia, Benin, Botswana, Burkina Faso, Cameroon, Cape Verde, Ethiopia, Guinea, Madagascar, Mozambique, Namibia, Rwanda, Senegal, and Uganda.

do grant extradition requests without one.¹¹³ In practice, failure to extradite is the reason why widely-known cases involving an alleged sexual assault by U.S. citizen federal personnel against U.S. citizen federal personnel have not been criminally prosecuted.

II. SEXUAL ASSAULTS OF FEDERAL PERSONNEL ABROAD: GOVERNMENT FAILURE TO ACT

A. Contractors Sexually Assaulted on United States Missions

Sexual assault of female military personnel by male military personnel is a serious issue within the armed forces and is on the rise.¹¹⁴ The rate at which female military personnel are sexually assaulted has been calculated as twice that of the civilian population.¹¹⁵ Many victims do not report the assaults, and when they are reported, the government often times has done nothing.¹¹⁶ Sexual assaults of female military personnel have received national attention in media reports,¹¹⁷ and Congress has made efforts to address the systemic issues.¹¹⁸ When military personnel allegedly commit a

See *Where Do Volunteers Go?*, PEACE CORPS, (Feb. 4, 2013), <http://www.peacecorps.gov/index.cfm?shell=learn.wherepc&noflash=yes>.

113. International Extradition and Related Matters 9-15.100, US DEP'T OF JUSTICE, http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/15mcrn.htm#9-15.100 (last visited Feb. 4, 2013).

114. Nancy Gibbs, *Sexual Assaults on Female Soldiers: Don't Ask, Don't Tell*, TIME MAGAZINE, Mar. 8, 2010, <http://www.time.com/time/magazine/article/0,9171,1968110,00.html>. "The Pentagon's latest figures show that nearly 3,000 women were sexually assaulted in fiscal year 2008, up 9% from the year before; among women serving in Iraq and Afghanistan, the number rose 25%. When you look at the entire universe of female veterans, close to a third say they were victims of rape or assault while they were serving — twice the rate in the civilian population." *Id.*

115. *Id.*

116. Katie Couric, *Does Policy Endanger Female Soldiers?* CBS EVENING NEWS, Mar. 19, 2009, <http://www.cbsnews.com/stories/2009/03/18/eveningnews/main4874927.shtml>.

117. *Id.*

118. Gibbs, *supra* note 114.

sexual assault, jurisdiction exists under the Uniform Code of Military Justice (UCMJ).¹¹⁹ However, when non-military personnel, such as contractors, allegedly commit a sexual assault, there may only be jurisdiction under Title 18.¹²⁰ In addition to addressing widespread misconduct in the military, Congress made attempts to increase the protections of contractors in 2007,¹²¹ 2009,¹²² and 2011.¹²³

In 2007, with H.R. 2070, Congress addressed the loophole in Title 18 that prevented certain prosecutions of sexual assaults involving contractors that took place abroad.¹²⁴ The bill was passed in the House, but not in the

119. 10 U.S.C. § 101 (4)-(5) (2006). The UCMJ applies to uniformed services, meaning members of the armed services (Army, Navy, Marine Corps, and Coast Guard), the commissioned corps of the National Oceanic and Atmospheric Administration; and the commissioned corps of the Public Health Service. See 10 U.S.C. § 920 (2006 & Supp. V 2007).

120. 10 U.S.C. § 101. Under 18 U.S.C. § 3261 (a), “[w]hoever 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 special maritime and territorial jurisdiction of the United States— (1) while employed by or accompanying the Armed Forces outside the United States; or (2) while a member of the Armed Forces subject to chapter 47 of title 10 (the Uniform Code of Military Justice), shall be punished as provided for that offense.” 18 U.S.C. § 3261 (a) (2006). Therefore, the SMTJ applies to contractors unless they are employed by or accompany Armed Forces outside of the United States.

121. *Enforcement of Federal Criminal Law to Protect Americans Working for U.S. Contractors in Iraq: Hearing Before H. Comm. On the Judiciary*, 110th Cong. (2007) [hereinafter *Protect Americans Working for U.S. Contractors in Iraq*].

122. David Arkush, *Senate Vote Will Hold Military Contractors Accountable, Protect Employees Who Are Victims of Sexual Assault*, PUBLIC CITIZEN PRESS (Dec. 19, 2009), <http://www.citizen.org/pressroom/pressroomredirect.cfm?ID=3020>; see also Cynthia Dyzikes, *Senate Passes Franken Amendment Aimed at Defense Contractors*, MINNPOST.COM (Oct. 6, 2009), http://www.minnpost.com/stories/2009/10/06/12247/senate_passes_franken_amendment_aimed_at_defense_contractors.

123. H.R. 2136, 112th Cong. (2011), <http://www.govtrack.us/congress/bills/112/hr2136>. The Civilian Extraterritorial Jurisdiction Act was introduced and referred to committee on June 3, 2011 and has not yet, and may never be, reported by the committee and submitted to the house and senate to be voted upon.

124. See *Protect Americans Working for U.S. Contractors in Iraq*, *supra* note 121, at 20. The Honorable Robert C. Scott (Chairman of the Subcommittee on Crime, Terrorism, and Homeland Security Committee on the Judiciary) stated, “[t]he bill I

Senate.¹²⁵ Two years later, Congress again addressed sexual assaults against contractors.¹²⁶

In conjunction with Congressional hearings in 2009, over 40 women working for civilian military contractors came forward to report sexual abuse, assault, and discrimination.¹²⁷ The hearings focused on civil recourse for employees of defense contractors who have been sexually assaulted.¹²⁸ Defense contractors had been including arbitration clauses in their contracts that limited available civil remedies for victims to an arbitration system created by the companies.¹²⁹ The Senate voted to deny contracts to contractors that imposed such arbitration.¹³⁰ Congress did not address criminal prosecution at that time.¹³¹

Probably the most prominent case of alleged sexual assault of a contractor occurred in Iraq in 2005 when Jamie Leigh Jones, a KBR/Halliburton employee, alleged that she was gang raped by her co-workers.¹³² Neither the Department of Defense nor the Department of Justice pursued the case,¹³³ and Jones eventually lost a civil action.¹³⁴ Jones testified in front of Congressional committees about sexual assaults against contractors abroad,

mentioned, H.R. 2740, would close the loophole to cover all private security contractors, not just those contracted through the Department of Defense, to ensure that all contractors overseas are accountable under United States law." *Id.*

125. H.R. 2740, 110th Congress (2007).

126. David Arkush, *Senate Vote Will Hold Military Contractors Accountable, Protect Employees Who Are Victims of Sexual Assault*, PUBLIC CITIZEN PRESS (Dec. 19, 2009), <http://www.citizen.org/pressroom/pressroomredirect.cfm?ID=3020>.

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. Rood, *supra* note 105.

133. *Id.*

134. *See generally* Jones v. Halliburton Co., 791 F. Supp. 2d 567 (S.D. Tex. 2011).

including at the 2009 hearings.¹³⁵ Since the U.S. Government did not prosecute Jones' alleged attackers, Jones filed a civil suit.¹³⁶ The case dragged on for years and Jones was subject to vast public scrutiny including media ridicule.¹³⁷ News reports did not include any mention of prosecuting Jones' alleged attackers in Iraq.¹³⁸ The Department of Justice has not made public comments as to why they did not prosecute in the United States.¹³⁹

It is unclear why the Department of Justice refused to prosecute, but there was discussion in Congress that MEJA did not provide jurisdiction over this incident.¹⁴⁰ The inquiry, as stated by Congress, had to do with the contractor's employment and, as mentioned earlier, "the extent such employment relates to supporting the mission the Department of Defense oversees."¹⁴¹ At the time, Congress determined that there was not enough information to adequately conduct the fact-sensitive inquiry.¹⁴²

If, after completing the fact-sensitive inquiry, it was deemed that the contractors were not employed in a capacity that supports the mission of the Department of Defense overseas,¹⁴³ the SMTJ would have applied.¹⁴⁴ Then

135. Mark Schone, *Jamie Leigh Jones Claims After Iraq Rape Employer Held Her Against Her Will*, ABC NEWS, June 21, 2011, <http://abcnews.go.com/Blotter/jamie-leigh-jones-claims-iraq-rape-employer-held/story?id=13884264>.

136. Rood, *supra* note 105.

137. Mike Tolson, *Defeated at Trial, KBR Rape Accuser Sticks to her Story*, HOUSTON CHRONICLE (Oct. 3, 2011), <http://www.chron.com/news/houston-texas/article/The-perfect-victim-vs-the-perfect-villain-2198497.php>.

138. *Id.*; see also Wade Goodwyn, *Rape Case Highlights Arbitration Debate*, NPR (June 9, 2009), <http://www.npr.org/templates/story/story.php?storyId=105153315>.

139. Tolson, *supra* note 137.

140. *Enforcement of Federal Criminal Law to Protect Americans Working for U.S. Contractors in Iraq: Hearing Before H. Comm. on the Judiciary*, 110th Cong. 21-22 (2007).

141. *Id.* at 22.

142. *Id.* (stating that "[t]here seems to be some dispute amongst the expert about whether MEJA applies in this instance. But the simple fact is that we don't have enough facts to make the determination yet.")

143. 18 U.S.C. § 3267 (2006).

begins another fact-sensitive inquiry as to whether the Halliburton barracks, where the offense was allegedly committed, were reserved or acquired for the United States or premises or residences of the United States, irrespective of ownership.¹⁴⁵ Again, without more facts, it is impossible to make that determination. Although we do not know exactly why the Department of Justice did not attempt criminal prosecution of Jones' alleged attackers, her case is illustrative of the need to reform Title 18. If Jones had been in the military, her complaint may have been addressed under the United States military code.¹⁴⁶ If the offense occurred in the United States, there would be jurisdiction under state law¹⁴⁷ or in the SMTJ.¹⁴⁸ Since the offense was committed abroad and she and the alleged perpetrators were contractors, the reason for not prosecuting is murky, and there is a possibility that prosecution did not occur because of jurisdictional impediments.

B. Sexual Assaults Against Peace Corps Volunteers

Peace Corps volunteers ("Volunteers") represent the U.S. Government and are federal personnel abroad.¹⁴⁹ They are considered federal employees for certain purposes not inclusive of Title 18.¹⁵⁰ Like contractors,

144. 18 U.S.C. § 7 (2006). The SMTJ does "not apply with respect to an offense committed by a person described in section 3261 (a) of this title." *Id.* Section 3261 (a) is part of the aforementioned MEJA. 18 U.S.C. § 3261 (a) (2006).

145. 18 U.S.C. § 7(9).

146. *See generally* 10 U.S.C. § 920 Art. 120 (2012).

147. *The Laws in Your State, RAPE, ABUSE AND INCEST NATIONAL NETWORK*, <http://www.rainn.org/public-policy/laws-in-your-state> (last visited Mar. 2, 2013).

148. 18 U.S.C. §§ 2241-2248 (2006); 18 U.S.C. § 7.

149. The Peace Corps is a federal government entity within the executive branch created under The Peace Corps Act, as amended, Pub. L. No. 87-293 (1961). *See Mission, PEACE CORPS*, <http://www.peacecorps.gov/index.cfm?shell=about.mission> (last visited Mar. 2, 2013): "In 1961, President John F. Kennedy established the Peace Corps to promote world peace and friendship. The Peace Corps' mission has three simple goals: Helping the people of interested countries in meeting their need for trained men and women. Helping promote a better understanding of Americans on the part of the peoples served. Helping promote a better understanding of other peoples on the part of Americans."

150. 22 U.S.C. § 2504 (a) (2006).

Volunteers have less physical protections than federal personnel such as Foreign Service officers and the military. Volunteers are often in remote locations with inconsistent access to communication devices.¹⁵¹ Housing is generally not fortified and the main means of protection comes from being looked after by persons in the local community.¹⁵²

The risks for Volunteers, and more specifically female Volunteers, were brought to the public's attention through a January 2011 *ABC News 20/20* exposé on the murder of Peace Corps Volunteer Catherine Puzey in Benin.¹⁵³ Puzey had sent a confidential e-mail to the local Peace Corps office accusing a Beninese Peace Corps contractor of sexually abusing children in the community where she lived.¹⁵⁴ His brother was a Peace Corps manager in the Peace Corps office, and the contents of the e-mail were disclosed to the alleged abuser. She was found murdered days later.¹⁵⁵ In addition to reporting on Peace Corps' involvement in Puzey's death,¹⁵⁶ *ABC News 20/20* interviewed several other women who had been sexually assaulted while serving in the Peace Corps.¹⁵⁷

Puzey's alleged murderer has been in custody in Benin,¹⁵⁸ but if the Beninese government had not elected to prosecute locally, prosecution in the United States would be difficult. In the event that the Beninese government would extradite its own citizen, because a Peace Corps Volunteer is not an

151. Peace Corps What About Safety?, <http://www.peacecorps.gov/index.cfm?shell=learn.safety> (last visited Dec. 23, 2011); *Peace Corps at 50: Hearing Before H. Comm. On Foreign Affairs*, 112th Cong. (2011) (statement of Kathy A. Buller, Peace Corps Inspector General).

152. *Peace Corps at 50: Hearing Before H. Comm. on Foreign Affairs*, 112th Cong. 2 (2011).

153. Brian Ross, *Why Would Anyone Want to Kill Kate?*, ABC NEWS, Jan. 10, 2011, <http://abcnews.go.com/Blotter/peace-corps-murder/story?id=12583120>.

154. Anna Schecter, *Parents of Slain Volunteer Say Peace Corps Error Led to Murder*, ABC NEWS, Jan. 14, 2011, <http://abcnews.go.com/Blotter/parents-slain-volunteer-peace-corps-error-led-murder/story?id=12607274>.

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

officer or employee of the United States for Title 18 purposes,¹⁵⁹ the United States could only prosecute if the murder was in the SMTJ.¹⁶⁰ Puzey was found on her balcony and an argument can be made that a Volunteer's balcony is, under 18 U.S.C. § 7(9), part of a residence used for U.S. Government mission.¹⁶¹ The argument is not well-settled law and if Puzey was murdered just a few feet away, there would not be jurisdiction. The same reasoning applies to sexual assaults, because they can only be prosecuted in regards to Volunteers if they occurred in the SMTJ.¹⁶² If a Volunteer sexually assaults another Volunteer, there may only be jurisdiction if the assault occurred on a government premises or residence.¹⁶³

In response to the exposé, Congress held hearings in May 2011, which shed light on the risk of being a female Peace Corps Volunteer and the proclivity of sexual assaults against them.¹⁶⁴ Three victims of sexual assaults described being assaulted by foreign nationals and the response by the Peace Corps that exacerbated the events.¹⁶⁵ Lois Puzey and Jennifer Marsh testified as well. Lois Puzey, Kate's mother, testified about the circumstances surrounding her daughter's death.¹⁶⁶ Marsh, director of the National Sexual Assault Hotline at the Rape, Abuse and Incest National Network, made recommendations as to how Peace Corps should better address sexual assaults of Volunteers.¹⁶⁷

The hearings focused on the need for Peace Corps institutional change in that the agency should respond by being more compassionate instead of

159. 18 U.S.C. § 1114 (2006); *see also* The Peace Corps Act, Pub. L. No. 87-293 (1961).

160. 18 U.S.C. § 1111 (2006).

161. 18 U.S.C. § 7(9)(b).

162. 18 U.S.C. §§ 2241-2248 (2006); 18 U.S.C. § 7.

163. 18 U.S.C. § 7(9).

164. *Peace Corps at 50: Hearing Before H. Comm. On Foreign Affairs*, 112th Cong. (2011).

165. *Id.* at 41-42, 52-54, 64-67.

166. *Id.*

167. *Id.* at 78.

blaming the victim.¹⁶⁸ The hearings did not address Title 18 impediments to prosecuting sexual assaults abroad.¹⁶⁹ The hearings also did not address instances of Volunteers sexually assaulting other Volunteers.¹⁷⁰

Congress responded by passing The Kate Puzey Peace Corps Volunteer Protection Act of 2011, comprehensive legislation for institutional change within Peace Corps.¹⁷¹ A new Office of Victim Advocacy was created to provide better support for victims of sexual assaults.¹⁷² Peace Corps now must submit reports to Congress on the progress made to prevent and respond to sexual assaults.¹⁷³ These changes, although positive, do not rectify the inability to prosecute incidents where Volunteers sexually assault other Volunteers. Without the ability to prosecute the sexual assault crimes, perpetrators are less likely to be deterred from committing such acts. Furthermore, changes to Title 18 would incentivize a more comprehensive response by Peace Corps to address sexual assaults because the assaults would be prosecutable.¹⁷⁴

The new legislation highlights an issue at the crux of criminal prosecutions of crimes committed by and against U.S. Government

168. *Id.* at 119-20; see also *Peace Corps Commitment to Sexual Assault Victims*, <http://multimedia.peacecorps.gov/multimedia/pdf/documents/Commitment%20to%20Sexual%20Assault%20Victims.pdf> (last visited Mar. 2, 2013).

169. *Peace Corps at 50: Hearing Before H. Comm. On Foreign Affairs*, 112th Cong. (2011).

170. For an example of Peace Corps Volunteer sexual assaults against Peace Corps Volunteers, see page 38 of Peace Corps Office of Inspector General Semiannual Report to Congress April 1, 2010 to September 30, 2010. *Peace Corps Office of Inspector General Semiannual Report to Congress*, http://files.peacecorps.gov/multimedia/pdf/policies/SARC_20100930.pdf (last visited Apr. 11, 2013).

171. Ted Poe, *Poe Hails Unanimous Congressional Passage of the Kate Puzey Peace Corps Volunteer Protection Act*, U.S. Congressman 2nd District of Texas, http://poe.house.gov/index.php?option=com_content&task=view&id=8424&Itemid (last visited Nov. 13, 2011). A major proponent for the changes was Congressman Ted Poe. He also was instrumental in having Jones testify at Congress years earlier.

172. Kate Puzey Peace Corps Volunteer Protection Act of 2011, S. 1280, 112th Cong. (2011); H.R. 2136, 112th Cong. (2011).

173. *Id.*

174. S. 1280, 112th Cong. (2011).

personnel abroad. Peace Corps must now provide “[a]n explanation to the volunteer of available law enforcement and prosecutorial options, and legal representation.”¹⁷⁵ When a Peace Corps Volunteer is accused of a crime, Peace Corps may have to provide legal services to the Volunteer.¹⁷⁶ Now, Peace Corps may also have a legal obligation to retain counsel on behalf of victims.¹⁷⁷ Thus, when a Peace Corps Volunteer commits a sexual assault against another Peace Corps Volunteer, Peace Corps could be obligated to advocate on behalf of the perpetrator and the victim, causing a conflict of interest.¹⁷⁸ This conflict of interest exemplifies complexities in the Kate Puzey Act that will only become clearer as implementation progresses. A simpler approach that would address impediments to prosecuting sexual assaults against Volunteers abroad, which is missing from the legislation, is to amend Title 18.

III. THE NEED FOR LEGISLATIVE CHANGE

Title 18 Chapter 109A on Sexual Abuse should be amended to include a victim-oriented provision, just as there is for homicide and assault.¹⁷⁹ Current sexual assault provisions focus on the alleged perpetrator and not on the victim.¹⁸⁰ A victim-oriented provision would enable prosecutions based on who is assaulted and would not be dependent upon the location of the crime. Such a victim-oriented provision does not need to be inclusive of U.S. citizen non-federal government personnel who are sexually assaulted

175. *Id.*

176. The Peace Corps Act, as amended, Pub. L. No. 87-293 (1961).

177. Kate Puzey Peace Corps Volunteer Protection Act of 2011, S. 1280, 112th Cong. (2011).

178. *Id.*; see also Peace Corps Manual Section 774, RETENTION OF COUNSEL AND PAYMENTS FOR EXPENSES, http://www.peacecorps.gov/multimedia/pdf/manual//700_Financial_Management/770-779_Legal_Counsel_and_Payment_of_Claims/MS_774/Retention_of_Counsel_and_Payment_of_Expenses.pdf (last visited Mar. 2, 2013). This section permits Peace Corps to hire counsel for the victim and Volunteer for representation in foreign courts even though the Volunteer may have perpetrated the crime.

179. 18 U.S.C. § 111 (2006); 18 U.S.C. § 1114 (2006).

180. See generally 18 U.S.C. § 7 (2006); 18 U.S.C. §§ 2241-2248 (2006).

abroad.¹⁸¹ International law principles more strongly support the prosecution of perpetrators of sexual assaults when the victims are U.S. federal government personnel on a United States mission, especially when the perpetrators are also U.S. federal government personnel.¹⁸² A new provision would be in line with other Title 18 provisions that protect federal government officers and employees.¹⁸³ The new provision should be inclusive of all personnel, including contractors and volunteers who are often times more at risk.¹⁸⁴

There are some justifications for not amending Title 18. The U.S. Government may not want the negative publicity when prosecuting crimes committed by and against U.S. nationals on government missions. Such attention exposes the fallibility of the United States. Nevertheless, there is already significant media focus on sexual assaults against federal government personnel and continued poor protections and responses to sexual assaults would continue to be in the public sphere.

Another concern may be the high costs of prosecuting a sexual assault crime committed abroad. Evidentiary findings are difficult in a local setting, let alone a global setting. Sending investigators across the world for protracted cases may be a cost the United States does not want to bear. Yet the government has already proven that it will undertake such costs in

181. *United States v. Felix-Gutierrez*, 940 F.2d 1200, 1206 (9th Cir. 1991). Given the facts, the Ninth Circuit noted that jurisdiction would probably not be possible if the victim was a tourist. Because the victim was working for the United States Government, a DEA Agent in this case, prosecution was more likely possible. *Id.*

182. *United States v. Vilches-Navarrete*, 523 F.3d 1, 21-22 (1st Cir. 2008); *Harvard Study*, *supra* note 94, at 440.

183. *See generally* 18 U.S.C. § 111; 18 U.S.C. § 1114.

184. A suggestion for a new provision in Title 18 is: Protection of Personnel of the United States

Whoever sexually assaults or attempts to sexually assault personnel of the United States while such personnel are engaged in or on account of the performance of official duties, shall be punished-

- (1) in the case of aggravated sexual abuse, as provided under section 2241;
- (2) in the case of sexual abuse, as provided under section 2242;
- (3) in the case of sexual abuse of a minor or ward, as provided under section 2243; or
- (4) in the case of abusive sexual contact, as provided under section 2244.

As used in this chapter, "personnel of the United States" includes all officers, employees, contractors, and volunteers of the United States who serve a United States mission or entity.

prosecuting sex offenses.¹⁸⁵ In 2003, Congress enacted the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003 (“Protect Act”).¹⁸⁶

The act makes it a crime for U.S. citizens to travel abroad to engage in illegal commercial sex acts with minors.¹⁸⁷ Interviewing minors who speak foreign languages is more difficult and controversial than gathering evidence from adult U.S. citizens who speak English. Even so, the law punishes U.S. citizens for sexually abusing foreign citizens abroad.¹⁸⁸ Recently, Peace Corps used this authority to begin prosecution of a former Volunteer who molested children while volunteering in South Africa.¹⁸⁹ Therefore, if high costs of prosecution are a deterrent to amending Title 18 to cover sexual assaults abroad against U.S. Government personnel, the fact that U.S. citizens are prosecuted for sexually assaulting minors abroad should refute that argument.¹⁹⁰ Nevertheless, there would still be an ethical cost-benefit analysis in deciding which sexual assaults to prosecute.

If enacted, the legislation would incentivize the prosecution of sexual assault crimes against federal government personnel abroad because prosecution would be possible. There would still be diplomatic impediments to prosecution, especially if a foreign national commits a sexual assault against a U.S. federal government personnel and the United States seeks extradition. Foreign governments are unlikely to consent to abridgements of their legal sovereignty in these types of sexual assault cases.

However, when the perpetrator and victim are both U.S. Government personnel, a foreign government does not have the incentive and will not prosecute. In these cases, the United States should prosecute sexual assault crimes committed by and against its nationals. Yet, as the law stands today, the U.S. Government does not have jurisdiction to prosecute many cases

185. Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003, Pub. L. No. 108-21, 117 Stat. 650 (2003).

186. *Id.*

187. *Id.*

188. *Id.*

189. *Peace Corps Volunteer Charged with Sexually Abusing Children in South Africa*, DEP'T OF JUSTICE OFFICE OF PUBLIC AFFAIRS (Aug. 4, 2010), <http://www.justice.gov/opa/pr/2011/August/11-crm-1017.html>.

190. *Id.*

when U.S. citizens who are contractors sexually assault other contractors or U.S. citizens who are Volunteers sexually assault other Volunteers. Title 18 must be reformed so that perpetrators do not walk free, justice is served, and healing can begin.

VI. CONCLUSION

Recent cases and exposés have brought to the public's attention that federal government personnel are often times unprotected, both physically and legally, from sexual assault abroad. Congress has responded with new legislation. Yet, United States prosecution is still not possible in many instances when volunteers or non-military contractors sexually assault their co-volunteers or workers abroad. In these cases, international law principles support United States jurisdiction over the offenses as opposed to prosecution abroad. In order to address what appears to be gender inequality in the law, Congress must amend Title 18 so that sexual assaults against federal government personnel are prosecutable irrespective of location.