2001

Closing the Gap in Criminal Jurisdiction over Civilians Accompanying the Armed Forces Abroad – A First Person Account of the Creation of the Military Extraterritorial Jurisdiction Act of 2000

Glenn R. Schmitt

Follow this and additional works at: http://scholarship.law.edu/lawreview

Recommended Citation
Available at: http://scholarship.law.edu/lawreview/vol51/iss1/7
The problem of American civilians committing crimes while accompanying the Armed Forces abroad has long plagued the United States Government. Because America's federal criminal jurisdiction generally ends at the nation's borders, it is often left to host nation countries to use their own laws to prosecute Americans who commit crimes while they are living in those countries with our Armed Forces. In many cases, however, these countries fail to prosecute crimes committed by American civilians, even very serious ones. This is especially so if the crime was committed only against an American or against American property. While our government often imposes an administrative sanction against the person committing the crime, such as barring them from American military installations, more often than not this jurisdictional gap in the law often allows the perpetrators of these crimes to go unpunished. With the dramatic increase in the number of
American troops stationed overseas since the end of the Second World War came an unprecedented number of American civilian dependents and non-military government employees accompanying those troops. As a result, the gap in the law became a serious problem for our government, one which was not solved for over forty years.

Recently, Congress closed this gap by enacting the Military Extraterritorial Jurisdiction Act of 2000 (Act). The Act effectively establishes federal criminal jurisdiction over offenses committed outside the United States by persons employed by or accompanying the United States Armed Forces. It also extends federal criminal jurisdiction to members of the Armed Forces who commit crimes abroad but who are not tried for those crimes by military authorities and who are no longer under military control. In both instances, this legislation represents a major step in extending the reach of American law outside the United States, and it is the culmination of over forty years of work by lawyers and policy makers in both the legislative and executive branches of the government.

I was privileged to have had a role in crafting the legislation that closed this gap and to have seen it through to enactment. This Article discusses that process. It first examines how the gap developed and the impact that gap caused. Next, this Article discusses the unsuccessful efforts of Congress to close the gap over the years and will trace the development of the legislation through Congress. The Article concludes by analyzing each section of the Act and discusses some gray areas in the law that may need further congressional action.

I. THE GAP IN JURISDICTION OVER CRIMES COMMITTED BY AMERICANS SERVING IN OR ACCOMPANYING THE ARMED FORCES OUTSIDE THE UNITED STATES: THE LIMITS ON PROSECUTING CRIMES COMMITTED BY AMERICANS ABROAD

In this section, I discuss the legal and practical limits our government faces in prosecuting criminal acts committed by Americans while our Armed Forces serve in foreign countries. I discuss American criminal jurisdiction over both members of the military and the civilians accompanying them.

3. See infra notes 6-134 and accompanying text.
4. See infra notes 135-275 and accompanying text.
5. See infra notes 276-361 and accompanying text.
A. United States Prosecution of Crimes Committed by Members of the Armed Forces

The Uniform Code of Military Justice (UCMJ),\(^6\) regulates the conduct of all persons serving in the United States Armed Forces.\(^7\) Its purpose is to "promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States."\(^8\) The UCMJ relates to a wide range of activities, including offenses which are unique to the military as well as common law crimes which, but for the offender's military status, would be punishable under federal or state law, depending upon where the conduct took place. Because of this overlapping jurisdiction, military members who commit criminal acts in the United States may be punished by a court-martial, applying the law of the UCMJ, or by a civilian court, applying the applicable federal or state criminal law.

When a military member commits a criminal act outside the United States, however, the person is subject to the jurisdiction of the nation in which the criminal act occurs (as well as the UCMJ), provided there is a functioning government in that nation. The determination of whether the service member will be tried by the host nation's criminal justice system or by a court-martial is often determined by a status of forces agreement, commonly called a "SOFA." The United States enters into a SOFA with the host nation, and the SOFA governs many aspects of the deployment of American forces in that country. These agreements are designed to strike a balance between the rights and obligations of the two nations involved in the deployment of troops, the "sending state" and the "receiving state," and to resolve as many issues as possible before that deployment occurs.\(^9\) The United States is a party to over one hundred SOFAs with various countries throughout the world.\(^10\)

With respect to criminal prosecutions, the most common SOFA,\(^11\) the

---

\(^7\) 10 U.S.C.A. § 802 (1994). The term "armed forces" is defined in section 101(a)(4) to mean the "Army, Navy, Air Force, Marine Corps, and Coast Guard," 10 U.S.C. § 101(a)(4) (1994), and is used in that same manner in this Article.
\(^8\) MANUAL FOR COURTS-MARTIAL, UNITED STATES I-1 (2000 ed.) (MCM).
\(^11\) The "NATO SOFA" has become the model for most of the SOFAs that the
North Atlantic Treaty Organization (NATO) SOFA,\textsuperscript{12} gives American military authorities the exclusive right to exercise jurisdiction over acts that violate United States laws but not host nation laws. The NATO SOFA further gives the host nation exclusive jurisdiction over offenses under its own laws that are not offenses under United States laws.\textsuperscript{13} When an individual's actions violate the laws of both countries, the SOFA gives either the United States or the host nation the primary right of jurisdiction, depending on the circumstances of the offense. For example, when a crime is committed as part of the official duties of the military member, where the only victim is an American, or where the injury is done to property owned by an American, the SOFA typically gives the United States primary jurisdiction. These crimes are often referred to as "official duty" and "inter se" cases, respectively.\textsuperscript{14} The nation with the primary right of jurisdiction may waive that right, either on its own initiative or at the request of the other nation.\textsuperscript{15} If no SOFA has been negotiated between the United States and the host nation, the U.S. government usually requests that the host nation waive its primary jurisdiction over the service member.

When it was first enacted, the UCMJ authorized prosecutions against military members even after they had left the military, as long as they had committed the crime while they were in the military and a federal court had no jurisdiction over the crime.\textsuperscript{16} In 1955, a military member

---

\textsuperscript{12} North Atlantic Treaty, June 19, 1951, 4 U.S.T. 1793 (1953).
\textsuperscript{13} See Eichel€e, supra note 10, at 23-24; see also JOHN WOODLIFE, THE PEACETIME USE OF FOREIGN MILITARY INSTALLATIONS UNDER MODERN INTERNATIONAL LAW 175-81 (1992); BRITTIN, supra note 11, at 214-17.
\textsuperscript{14} See WOODLIFE, supra note 13, at 178-79.
\textsuperscript{15} Id.
\textsuperscript{16} At that time, article 3(a) of the UCMJ provided:

Subject to the provisions of article 43, any person charged with having committed, while in a status in which he was subject to this code, an offense against this code, punishable by confinement of five years or more and for which the person cannot be tried in the courts of the United States or any State or Territory thereof or of the District of Columbia, shall not be relieved from amenability to trial by courts-martial by reason of the termination of said status.

challenged this provision in United States ex rel. Toth v. Quarles. This was the first case in a series of Supreme Court decisions that severely limited the military’s authority to prosecute civilians for crimes committed outside the United States. Robert Toth had served in Korea as an enlisted man in the Air Force. Five months after he was honorably discharged and had returned to the United States, Air Force police arrested Toth and charged him with the murder of a Korean national. Toth was flown to Korea to face a court-martial. His sister filed a habeas corpus petition, on Toth’s behalf, in Washington challenging the U.S. government’s authority to try him by court-martial.

In Toth, the Supreme Court held that Congress could not give the military this authority. The Supreme Court recognized that Article I of the Constitution granted Congress the power “To make Rules for the Government and Regulation of the land and naval Forces,” and that this power, as supplemented by the Necessary and Proper Clause, was the authority on which the UCMJ had been enacted. The Court explained that the natural meaning of Article I “would seem to restrict court-martial jurisdiction to persons who are actually members or part of the armed forces.” Hence, the Court held that because Toth had been discharged, he was now a civilian, and Congress’ power to regulate the military could not be used to subject him to trial by court-martial.

The Court noted that there was “a compelling reason for construing the clause this way,” namely that “any expansion of court-martial jurisdiction like that in the 1950 Act necessarily encroaches on the jurisdiction of federal courts set up under Article III of the Constitution where persons on trial are surrounded with more constitutional safeguards than in military tribunals.” The Court then noted the preference in most countries for limiting military authority to the narrowest jurisdiction deemed essential to maintain discipline among troops in active service. It also noted the differences between military

18. Id. at 13.
19. Id.
20. Id. at 25.
21. Id. at 25 (Reed, J., dissenting).
22. Id. at 13-14.
23. Id. at 14; see also U.S. CONST. art. I, § 8, cl. 14.
24. Toth, 350 U.S. at 14; see also U.S. CONST. art. I, § 8, cl. 18.
25. Toth, 350 U.S. at 15.
26. Id. at 23.
27. Id. at 15.
and civilian trials, stating "[t]here are dangers lurking in military trials which were sought to be avoided by the Bill of Rights and Article III of our Constitution."\textsuperscript{28} The Court stated that upholding the provision would sweep millions of former service personnel under the scope of military authority and deny them the benefits guaranteed them in the Constitution.\textsuperscript{29} The military authorities released Toth and he evaded punishment for his crime.\textsuperscript{30} Perhaps just as importantly, however, his case started a trend that would eventually open a significant gap in the government's ability to prosecute Americans who commit crimes while serving in or accompanying the Armed Forces abroad.\textsuperscript{31}

B. United States Prosecution of Crimes Committed by Civilians Employed by or Accompanying the Armed Forces

Civilians have served with or accompanied American Armed Forces in the field or onboard ship since the founding of the United States, though not in significant numbers until the Civil War. Since that time, civilian employees have commonly accompanied the Armed Forces to war. During Operations Desert Shield and Desert Storm, thousands of Department of Defense (DoD) civilian and contract employees were present in the host nations.\textsuperscript{32} With the rapid growth of contingency operations following Operation Desert Storm, even more civilian and contract employees have been deployed, to such places as Somalia, Haiti, Kuwait, Rwanda, and the Balkans. These employees perform a wide variety of functions, including: communications and equipment maintenance, weapon system modernization, meal preparation, clothes laundering, and logistics work. In 1999, there were more than 49,560 civilian employees of the Department of Defense working overseas.\textsuperscript{33}

\textsuperscript{28} Id. at 22.
\textsuperscript{29} Id. at 19, 23.
\textsuperscript{30} Id. at 23.
\textsuperscript{32} Approximately 4,500 DoD civilian employees and over 3,000 contractors were deployed with the force. Report of the Advisory Committee on Criminal Law Jurisdiction Over Civilians Accompanying the Armed Forces in Time of Armed Conflict 16 (Apr. 18, 1997) [hereinafter Overseas Jurisdiction Advisory Committee Report].
\textsuperscript{33} Department of Defense, Worldwide Manpower Distribution by Geographical
Similarly, when the Cold War in Europe required large numbers of American troops be stationed on military bases in foreign countries, the U.S. government was forced to allow large numbers of dependents to accompany those troops overseas. In fact, since the end of the Second World War, family members of American military personnel and DoD civilian employees have represented the largest segment of civilians who accompany United States forces overseas. In 1999, there were more than 193,000 dependent family members living with military members abroad. More than 14,000 dependents of DoD civilian employees were already living overseas that year.

1. Court-Martial Jurisdiction Over Civilians

Civilians accompanying the Armed Forces “in the field” have been subject to trial by court-martial since the Revolutionary War. The 1775 Articles of War provided that “[a]ll [s]uttlers and [r]etainers to a [c]amp, and all [p]ersons whatsoever, [s]erving with [o]ur [a]rmys in the [f]ield, [t]hough [n]o [e]nlisted [s]oldiers, are to be [s]ubject to [o]rders, according to the [r]ules & [d]iscipline of [w]ar.” The term “retainers to a camp” was understood to include civilians not actually in the government’s service (e.g., privately employed “officer’s servants” as well as “camp followers” such as suttlers and their employees, newspaper correspondents, and telegraph operators). The term “persons serving with the armies in the field” meant civilians who were employed by the government. In both cases, however, jurisdiction was dependent on their actually serving in the field; a mere employment relationship with the government did not suffice.

Area 15-17 (Sept. 30, 1999) [hereinafter DIOR Report]. This figure represents a decrease from more than 96,000 civilian employees in 1996. See Overseas Jurisdiction Advisory Committee Report, supra note 32, at 24.


35. DIOR Report, supra note 33, at 27.

36. Id.

37. See FREDERICK BERNAYS WIENER, CIVILIANS UNDER MILITARY JUSTICE 22-23 (1967). The American practice simply copied the British practice, which dated from at least 1747. Id. at 22 n.80.

38. Id. at 22; see also American Articles of War of 1775, Article XXIII, in WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 950 (1920). This provision was taken almost verbatim from the British Articles of War. See WINTHROP at 98; WIENER, supra note 37, at 22.


40. Id. at 99.

41. Ex parte Henderson, 11 F. Cas. 1067, 1069 (D. Ky. 1878).
In 1916, the Articles of War were expanded to grant court-martial jurisdiction over all civilians accompanying the Armed Forces outside the territorial jurisdiction of the United States, even those not "in the field." In addition, the articles continued to provide for jurisdiction "in time of war" over all "retainers and persons accompanying or serving with the armies of the United States in the field, both within and without the territorial jurisdiction of the United States." While the articles were used during both World Wars I and II to try civilians accompanying the Armed Forces in the field by court-martial for violations of the articles, the judicial tests of their scope were limited to the wartime "in the field" provision.

Court-martial jurisdiction in the Navy evolved in a manner similar to that of the Army. But because few civilians were commonly present aboard military vessels, court-martial jurisdiction under the Articles of the Government of the Navy was limited to "persons belonging to the Navy" or similarly defined groups. It was not until 1943 that Congress amended these articles to extend their reach to persons "accompanying or serving with the United States Navy, the Marine Corps, or the Coast Guard when serving as part of the Navy." Even then, however, the articles governed the conduct of civilians only when they were "outside the continental limits of the United States."

When the UCMJ was enacted in 1950, it contained three provisions that expressly authorized the use of courts-martial to try civilians accompanying the military for acts that violated the UCMJ. The

42. WIENER, supra note 37, at 227-29.
43. Id. at 228.
45. WIENER, supra note 37, at 229.
47. Id. at 281.
48. Id.
49. 10 U.S.C. § 802(a)(10)-(12) (1994). Article 2(a) of the UCMJ provides that:
   The following persons are subject to [the UCMJ]. . .
   (10) In time of war, persons serving with or accompanying an armed force in the field.
   (11) Subject to any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, persons serving with, employed by, or accompanying the armed forces outside the United States and outside the Commonwealth of Puerto Rico, Guam, and the Virgin Islands.
language of these provisions was very similar to the provisions in the 1916 Articles of War concerning military jurisdiction over civilians. The UCMJ provisions authorized trial by court-martial of persons serving with or accompanying the Armed Forces in the field in time of war; persons serving with, employed by, or accompanying the Armed Forces outside the United States; and persons within an area leased by or otherwise reserved or acquired for the use by the United States. Beginning in 1957, however, in the wake of the Toth decision, a series of Supreme Court decisions severely limited the application of those provisions, effectively limiting court-martial jurisdiction over civilians accompanying the military only to times of war declared by Congress.

Article 2(a)(11) was the first to fall to constitutional challenge. In 1957, the Supreme Court held, in *Reid v. Covert*, that the military did not have criminal jurisdiction over civilians who were accompanying the armed forces abroad. *Covert* actually involved a rehearing of two cases, both of which had been decided during the Court's previous (1955-1956) term. When these cases were first considered, the Court had upheld the military's authority to court-martial civilians for crimes that violated the UCMJ.

*a. The Pause Before the Fall*

In the first case, *Reid v. Covert*, Clarice Covert murdered her Air Force sergeant husband while they were living in England, where he was stationed. Covert was tried by an American court-martial in England under a 1942 executive agreement that had been entered into with the British authorities that gave the American government exclusive jurisdiction over crimes committed by Americans in those regions.

---

(12) Subject to any treaty or agreement . . . or to any accepted rule of international law, persons within an area leased by or otherwise reserved or acquired for the use of the United States which is under the control of the Secretary concerned and which is outside the United States . . .

*Id.* at 3.

50. *Id.* at 3.


52. 354 U.S. 1 (1957).

53. *Id.* at 40-41.

54. *Id.* at 3.


56. *Id.* at 488.

57. *Id.* at 488; see also Executive Agreement of July 27, 1942, 57 Stat. 1193 (1944).
Covert was convicted and sentenced to life imprisonment in the United States by the military court martial.\(^5\) Covert's conviction was then set aside by a lower federal court for errors in the treatment of her insanity defense. She was transferred from a federal prison to the District of Columbia jail and held pending a retrial by court-martial in Washington.\(^5\) While she was in the District of Columbia jail, the Supreme Court announced its decision in Toth, and ten days later Covert filed a habeas corpus petition arguing that Article 2(a)(11) of the UCMJ was unconstitutional as applied to her.\(^9\)

In the second case, Kinsella v. Krueger,\(^6\) Dorothy Krueger Smith (Smith) murdered her husband, a colonel in the Army, while he was stationed in Japan.\(^6\) The Army asserted court-martial jurisdiction over Smith under article 2(a)(11) and pursuant to an administrative agreement with Japan that granted the United States exclusive jurisdiction to try offenses against the laws of Japan committed by military personnel, civilians working for the military, and dependents.\(^6\) A court-martial in Tokyo tried, convicted, and sentenced Smith to life imprisonment.\(^6\) After she was transferred to the same federal prison where Covert was incarcerated, Smith's father learned that Covert's conviction had been set aside.\(^6\) Encouraged by this ruling, Smith's father filed a habeas corpus petition on Smith's behalf, asserting that article 2(a)(11) violated her right to a jury trial under the Sixth and Seventh Amendments to the Constitution.\(^6\)

Justice Clark, who wrote the majority opinion in both cases, noted that it had been "clearly settled" since 1922 that the jury trial provisions of the Sixth and Seventh Amendments to the Constitution did not apply outside the United States.\(^6\) As a result, the defendants were only entitled to fundamental guarantees of due process, which the Court held were found in the UCMJ.\(^6\) Justice Clark stated that the Court had

---

58. Covert, 351 U.S. at 488.
59. Id.
60. Id.
62. Id. at 471-72.
64. Krueger, 351 U.S. at 471-72.
65. WIENER, supra note 37 at 237-38.
66. Krueger, 351 U.S. at 472; WIENER, supra note 37, at 238.
68. Id. at 476.
Military Extraterritorial Jurisdiction Act of 2000

previously upheld trials by courts created by Congress where the crimes occurred in foreign countries. According to an Article III court was guaranteed to persons outside of the United States. Justice Clark noted particularly to In re Ross, a case involving an American seaman who murdered an officer aboard his ship while it was in Japan and who was later tried by a “consular court” there. In Ross, the Court held that the Constitution applied “only to citizens and others within the United States, or who are brought there for trial for alleged offen[es committed elsewhere, and not to residents or temporary sojourners abroad.” In Krueger, Justice Clark pointed out that Ross had been cited with approval in a 1929 decision of the Court. Justice Clark stated that the decisions “establish[ed] beyond question that the Constitution does not require trial before an Article III court in a foreign country for offenses committed there by an American citizen.”

Justice Clark wrote that the Court did not need to reach the question of whether Congress’ power to “make Rules for the Government and Regulation of the land and naval Forces” allowed it to subject civilians to trial under the UCMJ. Applying a reasonableness test, Justice Clark stated that it was not improper for Congress to provide, through the UCMJ, that the same legal system apply to both the civilian and military populations living together in various parts of the world because of the American military’s presence there.

In an interesting digression, Justice Clark noted that “the essential choice involved here is between an American and a foreign trial” and that foreign nations had relinquished their right to try crimes committed by Americans only pursuant to “carefully drawn agreements which presuppose[d] prompt trial by existent authority.” Justice Clark stated that absent the effective exercise of the jurisdiction, which the foreign nations had ceded to the United States government, there would be no reason to suppose that host nations “would not exercise their sovereign

69. Id. at 475.
70. Id. at 476.
71. 140 U.S. 453 (1891).
72. Id. at 456-57; see also Krueger, 351 U.S. at 475.
73. Ross, 140 U.S. at 464.
74. Krueger, 351 U.S. at 476 (citing Ex parte Bakelite Corp., 279 U.S. 438 (1929)).
75. Id. at 476.
77. Krueger, 351 U.S. at 476.
78. Id. at 476-77.
79. Id. at 479 (citation omitted).
right to try and punish for offenses committed within their borders.\textsuperscript{861} Justice Clark suggested that Congress had made a prudential decision in enacting the civilian jurisdiction provisions of the UCMJ, namely that trial by court-martial "in which the fundamentals of due process are assured" was more favorable than leaving military personnel and dependents "subject to widely varying standards of justice unfamiliar to our [own] people."\textsuperscript{861} Unfortunately, Justice Clark’s prediction as to the actions foreign governments would take to prosecute crimes committed by Americans in their countries did not prove to be correct. In fact, rather than varying standards of justice, in many cases there has been no justice imposed whatsoever.

Justice Frankfurter filed a reservation in which he chose not to take a position in the case because it had been decided only eight days after it was argued.\textsuperscript{882} However, Frankfurter’s reservation reflected a strong disagreement with the majority’s reasoning.\textsuperscript{883} Questioning the continued relevance of \textit{Ross}, Frankfurter took issue with Justice Clark’s statement in the majority opinion that the Court did not need to address the issue of whether Congress was acting within its power to regulate the military when it enacted article 2(a)(11).\textsuperscript{884} Frankfurter said that this statement raised the "plain inference. . . that the Court [was] not prepared to support the constitutional basis upon which the Covert and Smith court-martial were instituted and the convictions were secured."\textsuperscript{885} Frankfurter then chastised the majority for not allowing more time to consider more fully the views of all of the Court members.\textsuperscript{886} As it turned out, Frankfurter discomfort with the Court’s reasoning would be justified.

\textit{b. Covert Reconsidered—The Beginning of the Fall of Court-Martial Jurisdiction Over Civilians}

Later that year, the Court granted a rehearing of both cases,\textsuperscript{887} which were reargued in February of 1957. A new decision in the combined

\textsuperscript{80. Id.}
\textsuperscript{81. Id. (footnote omitted).}
\textsuperscript{82. Id. at 481-85 (Frankfurter, J., reservation). Chief Justice Warren, and Justices Black and Douglas joined in a short dissent in which they noted their intent to file full dissents during the Court’s next term because they needed more time than was available at the end of the 1955 Term in which to write their views. Id. at 486 (Warren, C.J., Black and Douglas, JJ., dissenting).
\textsuperscript{83. Id. at 484 (Frankfurter, J., reservation).}
\textsuperscript{84. Id. at 482 (Frankfurter, J., reservation).}
\textsuperscript{85. Id. at 481 (Frankfurter, J., reservation).}
\textsuperscript{86. Id. at 485 (Frankfurter, J., reservation).}
\textsuperscript{87. Reid v. Covert, 352 U.S. 901 (1956).}
cases was handed down on June 10. This time, the Court, with Justices Reed and Minton retired and new Justice William Brennan taking part in the case, reversed its holding from the prior term. Justice Black wrote a plurality opinion (joined by Chief Justice Warren and Justices Douglas and Brennan) in which he stated, "[a]t the beginning we reject the idea that when the United States acts against citizens abroad it can do so free of the Bill of Rights." Justice Black noted that because the U.S. government is created by the Constitution, it can only act within the limitations imposed on it and that, as a result, "[w]hen the Government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land."

Justice Black held that primary among these rights was the right to trial and indictment by a jury, and because courts-martial did not offer trial and indictment by a jury, court-martial jurisdiction over civilians was "inconsistent with both the 'letter and the spirit of the Constitution.'" Justice Black rejected the argument that Congress' power to regulate the land and naval forces allowed it to extend military jurisdiction to dependents.

Justice Black noted that Article III of the Constitution provided for trials by jury even when the alleged crimes were committed outside of the United States. In addition to the Article III provision, the Fifth Amendment provision regarding indictment by a grand jury and the Sixth Amendment provision guaranteeing the right to trial by jury were considered sweeping in their scope, and proved that the Constitutional protections for the individual "were designed to restrict the United States Government when it acts outside of this country, as well as here at

88. Reid v. Covert, 354 U.S. 1 (1957) (plurality opinion).
89. See id. at 3, 5. Justice Whittaker did not participate in the case. Id. at 41.
90. Id. at 3, 5.
91. Id. at 6.
92. Id. at 21-22.
93. Id. at 23.
94. Id. at 21. Article III provides:
   The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.
   U.S. CONST. art. III, § 2, cl. 3. Congress has, by statute, directed the place for the Trial of crimes committed outside the United States. 18 U.S.C. § 3238 (1994); see also infra note 349 and accompanying text.
Justice Black downplayed the importance of the *Ross* decision, relied on by Justice Clark in the prior term, as proof that Congress intended to establish legislative courts with the authority to try civilians for crimes committed outside of the country. Justice Black said, "*Ross* . . . cannot be understood except in its peculiar setting; even then, it seems highly unlikely that a similar result would be reached today." Justice Black stated that the statutes under which Ross was tried blended executive, legislative, and judicial power in one person (the American consul in each country) and that such a blending of power is ordinarily recognized as the "very acme of absolutism." Justice Black pointed out that Congress had "recently buried the consular system of trying Americans" and concluded that the holding in *Ross* that "the Constitution has no applicability abroad has long since been directly repudiated by numerous cases."

In reviewing whether the government had any authority to try Covert and Smith by court-martial, Justice Black commented on the significance of the respective agreements with England and Japan under which Covert and Smith had been tried by court-martial, rather than by a court of the host nation. Black stated that because the American government was "a creature of the Constitution," its power to enter into agreements with other nations could not exceed its authority under the Constitution. Thus, those agreements could not overcome the fact that the courts-martial in those cases did not comply with the rights that Covert and Smith enjoyed under Article III and the Sixth and Seventh Amendments to the Constitution.

Next, Justice Black turned to the government's argument that its power under the Constitution to regulate the "land and naval Forces" also gave it the power to court-martial the defendants. Justice Black stated that the clear language of the Constitution demonstrated that the provision did not apply to civilians. Justice Black then digressed into a

95. Reid, 354 U.S. at 7.
96. Id.
97. Id. at 10.
98. Id. at 11 (footnote omitted).
99. Id. at 12 (citation omitted).
100. Id. (footnote omitted).
101. Id. at 15-16.
102. Id. at 5-6.
103. Id. at 18-19.
104. Id.
105. Id.
long discussion about the abuse of military power by Great Britain during the 1700s and noted that the U.S. Constitution embodied a distrust of military power. Justice Black stated that "[i]n light of this history, it seems clear that the Founders had no intention to permit the trial of civilians in military courts, where they would be denied jury trials and other constitutional protections, merely by giving Congress the power to make rules" for the military. Citing the Court's ruling in Toth, Justice Black noted that Toth's conduct while a military member bore a closer relationship to the maintenance of good order and discipline in the Air Force than the conduct of the wives at issue in the cases before the Court. Yet in Toth, the Court had found that the military had no authority over the defendant once he had been discharged and became a civilian. Justice Black concluded that "[w]e should not break faith with this Nation's tradition of keeping military power subservient to civilian authority, a tradition which we believe is firmly embodied in the Constitution."

**c. The End of Jurisdiction Resulting From Employment by or Accompanying the Military Abroad**

Justices Frankfurter and Harlan each wrote an opinion concurring in the result reached by the plurality and indicated that their decision was based, at least in part, on the fact that the crimes at issue were capital offenses. To some observers, the Covert decision stood only for the proposition that the UCMJ could not be used to try civilians for capital crimes.

It did not take long for the Court to clarify this issue. In early 1960, the Court held that the UCMJ could not be used to try dependents in noncapital cases. On the same day, the Court decided a companion case in which it considered whether the UCMJ could be applied to civilian employees. Not surprisingly, the Court held that the UCMJ could not be used to try civilian employees for capital offenses. The Court also held that there were not "any valid distinctions" between

---

106. Id. at 28-30.
107. Id. at 30.
108. Id. at 39.
110. Reid, 354 U.S. at 40.
111. Id. at 41 (Frankfurter, J., concurring), 65 (Harlan, J., concurring).
114. Id. at 280.
civilian employees and dependents as to warrant different treatment under the UCMJ.\textsuperscript{115} The evisceration of Article 2(a)(11) was complete when the Court held in a third opinion that the UCMJ could not be used to try civilian employees in noncapital cases.\textsuperscript{116}

d. Averette—The Limiting of “Time of War” Jurisdiction Over Civilians

Article 2(a)(10), which allows the military to assert court-martial jurisdiction over civilians serving with or accompanying an Armed Force in the field in time of war,\textsuperscript{117} has been similarly limited, although perhaps not as completely or as convincingly as article 2(a)(11). During the Vietnam conflict, four civilians were court-martialed under article 2(a)(10).\textsuperscript{118} One of these civilians appealed his case to the United States Court of Military Appeals in 1970.\textsuperscript{119} In \textit{United States v. Averette},\textsuperscript{120} that court reviewed the court-martial conviction of an Army civilian employee who had been convicted in Vietnam of attempted larceny of thirty-six thousand batteries, which were the property of the U.S. government.\textsuperscript{121} The court noted the \textit{Covert} line of cases, but pointed out that those cases dealt with crimes committed during peacetime and “did not constitute authority that even in time of declared war courts-martial have no jurisdiction to try those who are not members of the armed forces. . .”\textsuperscript{122} Yet, the court held that the words “in times of war,” found in article 2(a)(10), mean a war formally declared by Congress.\textsuperscript{123} Perhaps sensing the future of American military involvement in the world, the court stated that “[a] broader construction . . . would open the possibility of civilian prosecutions by military courts whenever military action on a varying scale of intensity occurs.”\textsuperscript{124} Accordingly, the charges against Averette were dismissed.\textsuperscript{125}

The \textit{Averette} decision is now reflected in the military’s Rules for Courts-Martial. Rule 103(19) defines “time of war” as “a period of war

\begin{itemize}
\item \textsuperscript{115} \textit{Id.}
\item \textsuperscript{116} McElroy \textit{v. Guagliardo}, 361 U.S. 281, 286 (1960).
\item \textsuperscript{117} 10 U.S.C. § 802(a)(10) (1994).
\item \textsuperscript{118} LT. COL. GARY D. SOLIS, MARINES AND MILITARY LAW IN VIETNAM: TRIAL BY FIRE 168 (1989) (endnote omitted).
\item \textsuperscript{119} \textit{United States v. Averette}, 41 C.M.R. 363 (C.M.A. 1970).
\item \textsuperscript{120} \textit{Id.}
\item \textsuperscript{121} \textit{Id. at} 363.
\item \textsuperscript{122} \textit{Id. at} 364.
\item \textsuperscript{123} \textit{Id. at} 365.
\item \textsuperscript{124} \textit{Id.}
\item \textsuperscript{125} \textit{Id. at} 366.
\end{itemize}
declared by Congress or the factual determination by the President that the existence of hostilities warrants a finding that a ‘time of war’ exists . . . 

Of course, Congress has not declared war since 1941, and while the latter part of the definition in the rules might suggest some room for a future Commander-in-Chief to open the door to military prosecutions of civilians, it has not yet occurred. In fact, during Operation Desert Storm, a military conflict following the *Averette* decision that most would have warranted such a determination and thus the exercise of article 2(a)(10) jurisdiction, the President did not make such a determination. If Congress were to actually declare war in the future, the *Averette* test would be met. Until there is a declared war, however, the question remains open as to whether the trend of the *Covert* cases regarding court-martial jurisdiction over civilians will continue.

This question may never be answered given the broad jurisdiction conferred by the Military Exterritorial Jurisdiction Act of 2000. This new statute effectively eliminates any need, other than expediency, for the military to attempt to exercise court-martial jurisdiction over civilians when abroad.

*e. Article 2(a)(12) — The Untested Basis of Jurisdiction Over Civilians*

Article 2(a)(12) is the final UCMJ article that authorizes the military to try civilians accompanying the Armed Forces by court-martial. It grants the military jurisdiction over persons within an area leased by or otherwise reserved or acquired for the use of the United States and is outside the United States, however, there is no record that this article has ever been used.

The jurisdictional sweep of paragraph (a)(12) is even broader than that of paragraph (a)(11) in that there is no

126. Rules for Courts-Martial 103(19), MCM, *supra* note 8, at II-2. Interestingly, however, the official analysis of that rule in the MCM points out that the phrase “time of war” is used in six of the punitive articles of the UCMJ and that court decisions interpreting this phrase for the purposes of those other statutes did not interpret it to mean a war declared by Congress. *Id.* at A21-5. The analysis concludes that, “for at least some purposes of the punitive articles, ‘time of war’ may exist without a declaration of war.” *Id.* However, all of the cases cited in the analysis were decided before the *Averette* case. *See id.*

127. In fact, DoD went out of its way to note otherwise. *See* Gibson, *supra* note 51, at 133 n.120 (citing Message, Headquarters, Dep’t of Army, DAJA-CL, subject: Time of War Under the UCMJ and MCM (Feb. 8, 1991)) (“For purposes of the UCMJ and the MCM, Operation Desert Storm, in and of itself, does not warrant a finding that time of war exists . . . .”). *But see* United States v. Castillo, 34 M.J. 1160, 1166-67 (N.M.C.M.R. 1992) (stating that Desert Storm was a “time of war” for purposes of Article 90) (footnote omitted).


requirement that civilian defendants be employed by or accompanying the Armed Forces, but only that they be found on property under the control of the U.S. military. In light of the Covert line of cases, it is doubtful that any attempt to use article 2 as a basis to assert court-martial jurisdiction over civilians would pass constitutional review.

2. Federal and State Criminal Jurisdiction Outside the United States

While some federal criminal statutes are expressly extraterritorial, most apply only within "the special maritime and territorial jurisdiction of the United States" or if the conduct they prescribe affects interstate or foreign commerce. In most instances, therefore, federal criminal jurisdiction ends at the nation's borders. Likewise, state criminal jurisdiction ends at the boundaries of each state. Acts that civilians commit while accompanying the Armed Forces in foreign countries, which would be crimes if committed within the United States, often do not violate either federal or state criminal law because of these limitations on jurisdiction. In addition, acts committed by civilians do not violate the UCMJ unless a "time of war" has been declared by Congress when the acts are committed, and therefore these acts are crimes only under the law of the country in which they occur.

C. Prosecution of United States Citizens by Host Nation Governments

Host countries often choose not to assert their jurisdiction over American civilians who commit crimes in their countries; this is most often the case when the crimes are committed against another American or against property owned by an American. When the citizens or property of the host nation are not damaged by an act, that nation often has little interest in spending the time and resources of its police, prosecutors, and courts to try Americans for the crime. Therefore, host nations will often decline to bring a case. When a host nation decline to prosecute, the perpetrator goes unpunished for his crime. Each year, numerous incidents of rape, sexual abuse, aggravated assault, robbery, drug distribution, fraud, and property crimes are committed by American civilians abroad and go unpunished because the host nation chooses to waive jurisdiction over these crimes.

130. See, e.g., 18 U.S.C. § 32 (1994) (destruction of aircraft); id. § 1837 (economic espionage and theft of trade secrets); id. § 2332(b) (terrorism); id. § 2441 (war crimes).
131. This phrase is defined in 18 U.S.C. § 7 (1994).
This problem is compounded by the increased involvement of the military in areas of the world where no functioning government exists to prosecute these crimes (e.g., Somalia and Haiti). In other countries, the United States has negotiated the right to exercise exclusive jurisdiction over its personnel. Nonetheless, because United States law does not apply to crimes committed by American civilians in these situations the U.S. government is powerless to prosecute these crimes and the perpetrators go unpunished.

D. Other Remedies Available to the U.S. Government

The only remedy typically available to the United States with respect to military dependents, civilian employees, and contractors who commit crimes in foreign countries is to limit their use of facilities on the installation where they live, or to bar their entry onto the installation altogether. These restrictions often cause the offenders to return to the United States. Civilian employees of the United States may face the further sanction of being administratively disciplined or even fired from their job and barred from further employment by any DoD contractor. During the Vietnam conflict, partly as a result of the Averette decision, 943 contract employees were "debarred." Similarly, the government may choose to terminate the contract of a DoD contractor who commits criminal acts or whose employees or subcontractors have committed the acts. In any event, however, the fact that the person who committed the act may return to the United States does not give rise to any jurisdiction in the United States to try the crime he or she committed abroad.

II. Working To Close The Gap Once And For All

A. Recommendations for Congressional Action

For the more than forty years since the Covert decision, many efforts were made to fill the jurisdictional void left by that line of cases. Numerous bills designed to address the problem were introduced in
Congress but failed to pass both houses. The issue also was raised routinely in oversight hearings of the House and Senate Armed Services Committees. Reports on the problem were also issued by executive and legislative branch agencies.

For example, in 1979, the General Accounting Office (GAO) issued a report on the problem. The GAO found that in 1977, 343,000 civilians had accompanied the forces abroad in a twelve-month period and that, during that year, host countries exercised their jurisdiction in 200 serious cases. The GAO also found that host countries waived their right to prosecute in fifty-nine serious cases (including rape, manslaughter, rape, arson, robbery, and burglary) and in fifty-four less serious cases (including simple assault, drug abuse, and drunkenness). The GAO concluded that the lack of criminal jurisdiction over civilians and the inadequacy of administrative sanctions caused serious morale and discipline problems in overseas military communities. In the report, the GAO recommended that Congress enact legislation to extend criminal jurisdiction over American citizens accompanying the forces overseas.

In 1982, the Judge Advocate General of the Army established a "Wartime Legislation Team" to study the application of military law during combat operations. The members of that team made several recommendations, including one urging that Congress extend court-
martial jurisdiction over civilians and former military members.\textsuperscript{143}

In 1995, Congress directed the DoD and the Department of Justice (Justice) to establish jointly an advisory committee to "review and make recommendations concerning the appropriate forum for criminal jurisdiction over civilians accompanying the Armed Forces in the field outside the United States in time of armed conflict."\textsuperscript{144} The advisory committee's report was submitted to Congress in April 1997, and recommended two changes in the law. First, the report recommended that court-martial jurisdiction be extended to civilians accompanying the Armed Forces during "contingency operations" as designated by the Secretary of Defense.\textsuperscript{145} The advisory committee also recommended that the jurisdiction of federal courts be extended to reach offenses committed by civilians accompanying the Armed Forces abroad.\textsuperscript{146}

Recently, this issue was the focus of \textit{United States v. Gatlin},\textsuperscript{147} a decision by the United States Court of Appeals for the Second Circuit. In that case, the judge suggested in his opinion that Congress address the jurisdictional gap in the law.\textsuperscript{148} In Gatlin, the civilian defendant was charged with sexual abuse of his teenaged stepchild, the daughter of an enlisted soldier to whom he was married.\textsuperscript{149} The abuse occurred while the defendant was living with his wife and step-daughter in military housing in Germany.\textsuperscript{150} The abuse, however, did not come to light until they returned to the United States and the stepdaughter revealed that she was pregnant with the defendant's child.\textsuperscript{151} The defendant was charged with engaging in sexual acts with a minor\textsuperscript{152} and pled guilty, but before the plea was accepted he moved to dismiss the indictment for lack of jurisdiction.\textsuperscript{153}

The district court judge had ruled that the court had jurisdiction to try the defendant because she determined that the American military housing in Germany, where the acts occurred, was within the "special


\textsuperscript{145} Overseas Jurisdiction Advisory Committee Report, \textit{supra} note 32, at v-vi, 49.

\textsuperscript{146} \textit{Id.} at vi, 49.

\textsuperscript{147} 216 F.3d 207 (2d Cir. 2000).

\textsuperscript{148} \textit{Id.} at 223.

\textsuperscript{149} \textit{Id.} at 210.

\textsuperscript{150} \textit{Id.} at 209.

\textsuperscript{151} \textit{Id.} at 210.

\textsuperscript{152} 18 U.S.C. § 2243(a) (1994).

\textsuperscript{153} \textit{Gatlin}, 216 F.3d at 210.
maritime and territorial jurisdiction of the United States," the jurisdictional requirement for many federal criminal crimes. On appeal, the court of appeals reversed the district court decision, holding that the statute the defendant was charged with violating applied exclusively to the territorial United States. Because the jurisdictional gap existed the defendant's conviction was reversed.

In his opinion, Circuit Judge Jose Cabranes noted the evolution of the case law that gave rise to the gap in criminal jurisdiction over civilians accompanying the military overseas and the fact that various commentators had "urged Congress for over four decades to close the jurisdictional gap by extending the jurisdiction of Article III courts to cover offenses committed on military installations abroad and elsewhere by civilians accompanying the armed forces." He expressed his view that the inaction by Congress "hardly can be blamed on a lack of awareness of the gap" and that the court's decision to overturn the defendant's conviction was "only the latest consequence of Congress's failure to close this jurisdictional gap." He wrote in the opinion that he was taking "the unusual step of directing the Clerk of the Court to forward a copy of this opinion to the Chairmen of the Senate and House Armed Services and Judiciary Committees."

B. The Impact of the Gap

The most serious consequence of the jurisdictional gap in the law is that persons who commit crimes while accompanying our Armed Forces overseas often go unpunished. As discussed above, in the past, these crimes have included such serious crimes as murder, sexual assault, sexual abuse, arson, and drug trafficking. Of course, while not every

154. Id.
155. Id. at 220.
157. Gatlin, 216 F.3d at 221-22 (citing Becker, supra note 46; Captain Gregory A. McClelland, The Problem of Jurisdiction Over Civilians Accompanying the Forces Overseas - Still with Us, 117 MIL. L. REV. 153 (1987); Everett & Hourcle, supra note 31; Peter D. Ehrenhaft, Policing Civilians Accompanying the United States Armed Forces Overseas: Can United States Commissioners Fill the Jurisdictional Gap?, 36 GEO. WASH. L. REV. 273 (1967)).
158. Id. at 222-23.
159. Id. at 223.
160. See supra note 139 and accompanying text.
crime falling into the gap is a violent or sexual offense, no crime should go unpunished if possible. Our government has an obvious moral justification to seek to punish those who commit crimes while accompanying the Armed Forces. Additionally, prosecuting these crimes may deter others from committing further crimes, and is therefore another justification for the government to act. In addition to these traditional reasons to punish crime, there are several other reasons why the government would seek to close the gap.

At the hearing on House Bill 3380, held by the Subcommittee on Crime, Robert E. Reed, Associate Deputy General Counsel of the DoD (who had been a member of the Overseas Jurisdiction Advisory Committee), testified that the gap has undermined the functioning of the military. Reed testified:

The inability of the United States to appropriately pursue the interests of justice and hold its citizens criminally accountable for offenses committed overseas has undermined deterrence, lowered morale, and threatened good order and discipline in our military communities overseas. In addition, the inability of U.S. authorities to adequately respond to serious misconduct within the civilian component of the U.S. Armed Forces, presents the strong potential for embarrassment in the international community, increases the possibility of hostility in the host nation’s local community where our forces are assigned, and threatens relationships with our allies.\(^{161}\)

Clearly, if military members learn that the government is powerless to punish those who harm their families when they are stationed overseas, they may be much less willing to accept overseas assignments, perhaps even leaving the military to avoid those assignments. Word quickly gets around the military housing areas of a foreign post or base once a serious crime has occurred and the government proves unable to take action against the perpetrator. Further, a military member is concerned over the safety of his family members, he likely will be distracted from his duties, especially if he is deployed from there to a more remote post where his family may not accompany him (e.g., Bosnia, Kosovo). Compounding the problem even further, some people may choose to take matters into their own hands and seek retribution for a crime committed against their own family or the family of another once they become aware that the government cannot punish the suspected perpetrator. These actions would further undermine respect for good order and discipline within the military community. Closing the

---

\(^{161}\) Hearings, supra note 133, at 17 (statement of Reed).
jurisdictional gap prevents all of these problems.

Another area of concern involves unequal or unjust results that can occur because of the jurisdictional gap. For example, in the event that a military member and a civilian contractor commit a crime together and the host nation is unwilling or unable to prosecute, the military member would likely be punished under the UCMJ but the civilian would receive no punishment. This unequal treatment could also affect morale within the military.

A final reason to close the jurisdictional gap concerns our government’s ability to ensure due process to all of its citizens. Brigadier General Joseph Barnes, the Assistant Judge Advocate General of the Army, discussed this issue at the hearing before the crime subcommittee. Barnes testified that closing the jurisdictional gap would allow the United States to more “successfully negotiate the right to exercise exclusive jurisdiction over civilians” accompanying the Armed Forces in future SOFA negotiations with host nations.  

162 If host nations know that American law does not allow the United States to punish its citizens when they commit crimes while accompanying its military in a foreign country, that nation is far less likely to negotiate away its right to prosecute those civilians under its own law. As a result, Americans suspected of crimes in a foreign country would be judged by legal systems that may not offer the same protections to the falsely accused as the United States provides. Closing the jurisdictional gap addresses this problem by giving American negotiators of future SOFAs the ability to more credibly seek agreement from the host nation that Americans accused of crimes be brought to justice under the laws and procedures of American courts.

C. The Military Extraterritorial Jurisdiction Act of 2000

After more than forty years of effort, Congress has now closed the jurisdictional gap. On November 22, 2000, President Clinton signed into law the Military Extraterritorial Jurisdiction Act of 2000.  

163 This Act created a new federal crime involving conduct by military personnel and civilians accompanying the Armed Forces abroad that would have been a felony under federal law, had the conduct occurred within the United States.  

164 The punishment for the new crime is that which could have

162. Hearings, supra note 133, at 20 (statement of Barnes).
been imposed under federal law had the crime been committed in the United States.\footnote{114 Stat. 2488 (to be codified at 18 U.S.C. § 3261).}

The new crime applies only to two groups of people: persons employed by or who are accompanying the Armed Forces outside of the United States and persons who are members of the Armed Forces.\footnote{165. 18 U.S.C.A. § 3261(a) (2001).} As such, the Act applies to civilian employees of the DoD, contract employees, and dependents of military members.\footnote{166. \textit{Id.} §§ 3261(a); 3267.} The Act brings within its scope American citizens and nationals, as well as persons who are nationals of other countries.\footnote{167. \textit{Id.} § 3267.} Further, the Act allows for the prosecution of military members under certain conditions. For example, military personnel who commit acts that fall within the scope of the new crime created by the Act but are not tried for their crimes under the UCMJ before leaving military control (e.g., because the case was not solved before they were discharged from the military, or because the person is no longer on active duty) may still be prosecuted under the Act. Military personnel still on active duty could also be prosecuted under the Act if they are indicted or otherwise charged with committing the offense together with one or more non-military co-defendants.

The Act prohibits prosecution under the new statute “if a foreign government . . . has prosecuted or is prosecuting such person for the conduct constituting the offense” in accordance with jurisdiction recognized by the United States.\footnote{168. \textit{Id.} § 3261(b).} However, the Act allows the Attorney General or the Deputy Attorney General to waive this provision in appropriate cases.\footnote{169. \textit{See id.}}

The Act contains an unusual provision that requires most of the initial proceedings in any case to be conducted before the defendant is brought to the United States—in most cases by telephone.\footnote{170. \textit{Id.} § 3265.} A complementary provision generally prohibits the forced return of a defendant to the United States prior to those proceedings being held.\footnote{171. \textit{Id.} § 3264.} Each of these provisions will be discussed in greater detail.\footnote{172. \textit{See infra} notes 298-332 and accompanying text.
D. The Genesis and Evolution of the Act in Congress

1. The Senate Bill

After having been introduced in Congress in various forms for almost forty years, a bill to extend federal criminal jurisdiction to civilians accompanying the Armed Forces abroad was again introduced in the 106th Congress. Senator Jeff Sessions, a Republican from Alabama, together with Senator Mike DeWine, a Republican from Ohio, introduced Senate Bill 768.174

Sessions’ interest in creating legislation to fill the jurisdictional gap came about as the result of a constituent inquiry.175 In early 1999, Arch Galloway a staff person for military issues in Sessions’ office, received a call from a constituent, an enlisted man in the Army, who had just returned from a tour of duty in Germany.176 The caller informed Galloway that while he was in Germany, his seven-year-old daughter was molested by the twelve-year-old son of another American service person.177 After the abuse occurred, German authorities took no action against the boy.178 Subsequently, the boy and his family returned to the United States.179 When the soldier asked American authorities to punish the boy they informed him that no criminal charges could be brought against the boy in the United States.180 The soldier then called Sessions’ office to ask that he become involved.181

Because the matter involved an interpretation of criminal law, Galloway called Lloyd Peeples, a lawyer on the Senate Judiciary Committee staff who also worked for Sessions,182 and asked that Peeples

175. Interview with Lloyd Peeples, Esq., former counsel for the Committee on the Judiciary, United States Senate (Nov. 13, 2000).
176. Id.
177. Id.
178. Id.
179. Id.
180. Id.
181. Id.
182. All Members of Congress employ a staff to advise them on issues pending before Congress. These staffers typically are known as “personal staff.” Some Members, principally committee and subcommittee chairmen and ranking minority members, are authorized to hire additional staff to work for them on matters relating to their responsibilities on a committee. These staffers typically are called “committee staff.” Galloway was a personal staffer, while Peeples was a committee staffer who worked for Sessions in his capacity as chairman of the Senate Judiciary Committee’s Subcommittee on Youth Violence.
examine the case. Peeples, in turn, called the staff of the legislative affairs office in the DoD, one of several offices in the Pentagon that handles inquiries from Members of Congress and their staffs. The legislative affairs staff consulted with lawyers in the DoD’s Office of General Counsel who informed the legislative affairs office that United States law did not apply to crimes committed abroad by American military dependents. The Office of General Counsel also noted that the Overseas Jurisdiction Advisory Committee had submitted a report on the problem to Congress in 1997.

After Peeples learned all of this information, he reviewed the 1997 report and noticed that Brigadier General John Cooke, an Army lawyer, had chaired the Committee. Peeples had served as a summer intern for Cooke and called him to discuss the problem and the recommendations of the Overseas Jurisdiction Advisory Committee. Peeples also consulted with the authors of law review articles who had written on the subject. All of Peeples’ discussions confirmed that the problem was significant. In fact, some of the authors even suggested that crimes on military bases were often under-reported and that the actual magnitude of the problem might have been larger than most believed.

Peeples recommended to Sessions that he introduce the legislative recommendations contained in the report of the Overseas Jurisdiction Advisory Committee as a bill, and Sessions tentatively agreed. Peeples and Galloway then asked the staff for Senator DeWine, who had introduced similar legislation in each of the prior two Congresses, whether he would object to Sessions taking the lead on the issue in the new Congress. DeWine’s staff informed Peeples that DeWine had not planned to make the issue a priority in the 106th Congress but was interested in helping, since the mother of the abused child was from

183. Peeples interview.
184. Id.
185. Id.
186. Id.
187. Id.
188. Id.
189. Id.
190. Id.
191. Id.
192. Id.
193. See S. 172, 105th Cong. (1997); S. 2083, 104th Cong. (1996). Neither of these two bills contained the amendment to the UCMJ proposed by Senator Sessions in Senate bill 768.
194. Peeples interview.
Ohio, and so DeWine did not object to Sessions taking the lead on the issue. Peeples also informed the staff for Senator Daniel Inouye, a Democrat from Hawaii (and a Medal of Honor recipient) who also had introduced similar legislation in prior Congresses, that Sessions planned to introduce a bill.

Peeples then prepared the bill for Sessions, using the Overseas Jurisdiction Committee’s proposed language almost verbatim. Sessions introduced Senate bill 768 on April 13, 1999. As introduced, the bill would have created a new federal crime involving conduct by persons “serving with, employed by, or accompanying the Armed Forces outside of the United States” that would constitute a felony offense “if the conduct had been engaged in within the special maritime and territorial jurisdiction of the United States.” The bill also would have amended the UCMJ by adding a new paragraph to article 2(a), the jurisdiction article of the UCMJ, that would have applied the UCMJ to DoD employees and DoD contract employees if they were “serving with and accompanying an armed force” while “in support of an operation designated as a contingency operation.” This second provision, which had not been included in any of the bills introduced by Senator DeWine or Senator Inouye in the prior Congresses, had been part of the proposed legislative draft of the Overseas Jurisdiction Advisory Committee in its report to Congress. As such, the provision was included in the Sessions bill and used the committee’s proposed language verbatim. The language was a clear attempt by the Overseas Jurisdiction Advisory Committee to convince Congress to legislate around the holding in

195. Id.
196. Id.
198. Peeples interview.
199. Id.
200. Id.
201. S. 768, 106th Cong. § 3261(a) (1999). A copy of Senate bill 768 as it was originally introduced in the Senate can be found, infra, at appendix A.
202. The text of proposed paragraph 13 was:

(13) To the extent not covered by paragraphs (10) and (11), persons not members of the armed forces who, in support of an operation designed as a contingency operation as described in section 101(a)(13)(A) of this title, are serving with and accompanying an armed force in a place or places outside the United States specified by the Secretary of Defense, as follows:

(A) Employees of the Department of Defense.

(B) Employees of any Department of Defense contractor who are so serving in connection with the performance of a Department of Defense contract.

Id.
Averette, which had held that the phrase "time of war" as used in paragraph 10 of UCMJ article 2(a) limited the scope of the UCMJ's jurisdiction over civilians only to times of war formally declared by Congress.  

No committee hearings were held on the bill, as is often the case in the Senate, but the Judiciary Committee nevertheless reported the bill to the full Senate favorably on June 24, 1999. The bill was amended slightly by the Judiciary Committee, at the request of Senator Patrick Leahy, a Democrat from Vermont and the ranking minority member on the committee. Senator Leahy's amendment made three small substantive changes to the bill. The first change required the Secretary of Defense to consult with the Secretary of State when making the determination as to which foreign officials can request that an American under arrest for a violation of the new act be turned over to them for prosecution. The second change permitted the exercise of jurisdiction over DoD employees and contractors accompanying the Armed Forces only during times when the armed forces are engaged in a 'contingency operation' involving a war or national emergency declared by the Congress or the President. The final change deleted a provision that would have deemed the time necessary to return a defendant to the United States under the act as "justifiable delay."

While the work of the Judiciary Committee might not have been significant, the selection of that committee as the committee of jurisdiction might have been fortuitous. Unlike Senator Inouye's bills, which had been drafted to amend Title 10 of the United States Code (which deals with the military) and was therefore referred to the Senate Armed Services Committee, Senator Sessions' bill amended Title 18, the Federal criminal code. As a result, the committee of jurisdiction was the Judiciary Committee, the committee that regularly considers additions to the nation's criminal law. The Armed Services Committee considers criminal law issues only when an amendment to the UCMJ is proposed in an annual authorization bill. On the other hand, the Judiciary Committee considers criminal law issues as a matter of routine. This

203. See supra notes 117-125 and accompanying text.
204. Compare 145 CONG. REC. S8195-97 (daily ed., July 1, 1999) (as reported by the Judiciary Committee), with S. 768, 106th Cong. (1999) (as it was introduced in the Senate), infra, at appendix A.
205. 145 CONG. REC. S8197 (daily ed., July 1, 1999).
206. Id.
207. Id.
208. The allocation of legislative jurisdiction over the DoD and the military
fact might explain why the Sessions bill made it out of committee and to the full Senate when earlier bills with a similar intent, such as Senator Inouye's, had not.

The full Senate considered the bill introduced by Sessions on July 1, 1999. By agreement among Senators Sessions, DeWine, and Leahy, the bill was slightly amended again. One modification to the provision allowed DoD employees to arrest persons violating the Act in order to require that arrests be carried out in accordance with any applicable international agreement. Another modification required the Secretary of Defense to consult with the Secretary of State and the Attorney General when drafting regulations to implement the act. The Senate passed the amended bill by unanimous consent.

2. Moving to the House

After the bill passed the Senate, Justice and DoD raised concerns about it. Apparently, because no Senate hearings or committee deliberations had been held on the bill, DoD and Justice had been caught off guard when the bill passed the Senate. The principal concern of DoD and Justice was the provision in the bill that extended court-martial jurisdiction to civilians “serving with and accompanying” the military outside the United States in support of a “contingency operation.” Of course, the Overseas Jurisdiction Advisory Committee report to Congress had recommended that such a provision be included in any bill passed by Congress to address the jurisdictional gap. Apparently, however, that portion of the report had either not been fully considered within DoD or Justice or changes in senior agency personnel after the report was issued resulted in a change of opinion as to the utility of this department to the House and Senate committees on armed services leaves amendments to the UCMJ, the military's criminal code for its members, under the control of those committees while the vast majority of federal criminal law is under the jurisdiction of the committees on the judiciary. See, e.g., H.R. Doc. No. 106-320, at 413, 419-21, 440-43 (1999).

209. Compare 145 CONG. REC. S8195 (daily ed. July 1, 1999) (as reported by the Judiciary Committee), with S. 768, 106th Cong., 145 CONG. REC. S8196 (daily ed. July 1, 1999) (the Sessions-Leahy-DeWine amendment offered by Senator Slade Gorton); see also 145 CONG. REC. S8197 (daily ed. July 1, 1999) (statement of Sen. Leahy). Curiously, while Leahy purported to be describing the changes made by the amendment offered on the floor the Senate, the amendments he discussed were made by the committee amendment.

211. Id.
212. 145 CONG. REC. S8197 (daily ed. July 1, 1999).
213. Overseas Jurisdiction Advisory Committee Report, supra note 32, at 49.
provision. In any event, both DoD and Justice no longer supported the UCMJ amendment.

In separate letters to the chairmen of the Senate Armed Services Committee and to the House Judiciary Committee, DoD and Justice supported only the federal crime provision of the Sessions bill. In addressing the UCMJ provision, DoD General Counsel Judith Miller wrote to Senator John Warner, "that portion would raise several issues of public concern and present constitutional questions that would likely engender protracted litigation." In noting that the provision would subject some DoD employees to trial by court-martial and would exclude (those not stationed overseas) Miller wrote, "the potential for inconsistency within the departmental civilian workforce would serve to detract from, rather than enhance, morale and the interests of justice."

In a letter to Representative Henry Hyde, Assistant Attorney General for Legislative Affairs Robert Raben wrote "in our view, this provision raises substantial constitutional questions concerning the propriety of the assertion of court-martial jurisdiction over civilians." Raben stated "if section 3 [the UCMJ amendment] were stricken, we would strongly support the bill." Raben's statement implied that the Clinton Administration might oppose the bill if the provision was not removed.

Shortly after these letters were received, members of the legislative affairs staff in the Office of the Secretary of Defense (OSD) informed the legislative affairs staffs of the individual service branches that the bill would not be a priority to OSD. OSD's message was clear—if the services wanted this bill they were going to have to make it happen.

Within the Army, the matter fell to Colonel David E. Graham, Chief of the International and Operational Law Division in the Army Judge Advocate General's office. After conferring with Brigadier General

---

214. Letter from Judith A. Miller, General Counsel, Department of Defense, to Senator John W. Warner, Chairman, Committee on Armed Services, United States Senate (Sept. 3, 1999); Letter from Robert Raben, Assistant Attorney General for Legislative Affairs, Department of Justice, to Representative Henry J. Hyde, Chairman, Committee on the Judiciary, U.S. House of Representatives (Oct. 19, 1999). Both letters are on file with the Subcommittee on Crime. The letters expressed the respective views of DoD and Justice on Senate bill 768 in the form it was first passed by the Senate. Id. In the letters, both departments opposed enactment of the provision in the bill that would have extended court-martial jurisdiction over civilians. Id.

215. Letter from Judith A. Miller, supra note 214.

216. Id.


218. Id.

219. See id.
Joseph R. Barnes, who was finishing a tour as the Army’s Assistant Judge Advocate General for Military Law and Operations, Graham decided that it was in the Army’s interest to try to move the bill. Graham and Barnes asked Robert Reed, an Associate Deputy General Counsel at DoD, who was a retired Air Force colonel and who had been a member of the Overseas Jurisdiction Advisory Committee, to help them move the bill in the House of Representatives. Colonel Graham asked Major Gregory Baldwin, an officer in the Army’s Office of Congressional and Legislative Liaison, to arrange meetings with the appropriate subcommittees in the House to discuss the bill. While only the Senate Judiciary Committee had jurisdiction of the bill in that body, the House parliamentarians had referred it first to the Armed Services Committee, with a subsequent referral to the Judiciary Committee. As a result, both committees would have an opportunity to review, and possibly amend, the bill.

On October 14, a DoD delegation left the Pentagon to meet with representatives of both committees. The delegation included Reed, Barnes, Graham, and Baldwin, together with Graham’s counterparts from the Navy and Air Force—Captain Michael McGregor, the Deputy Assistant Judge Advocate General of the Navy for International Law, and Colonel Michael Schlabs, the Chief of the International and Operational Law Division of the Air Force Judge Advocate General’s Office. The first meeting was with Edward Wyatt and Debra Wada, professional staff members of the Armed Services Committee staff. They told the delegation that the committee generally disfavored changes to the UCMJ and that the UCMJ provision in the Sessions bill seemed redundant given the new federal crime provision in that bill, allowing military members to be tried in federal court. After the meeting, Wyatt briefed Representative Steve Buyer, a Republican from Indiana, chairman of the committee’s Subcommittee on Military Personnel, and a lawyer in the Army Reserve. Buyer, who had also served on the Crime Subcommittee in the prior two Congresses, agreed that the UCMJ provision was unnecessary. With the provision deleted, the Armed Services Committee had almost no jurisdictional claim to the bill, and Buyer agreed that the issue was best left to the Judiciary Committee.

After the meeting with the Armed Services staff, the group then met with staff members of the Judiciary Committee’s Crime Subcommittee—

220. Interview with Edward Wyatt, professional staff member, Committee on Armed Services, U.S. House of Representatives (Nov. 16, 2000).
Rick Filkins, one of the Republican counsels to the subcommittee and a former Assistant United States Attorney (AUSA), Iden Martyn, a current AUSA who had been detailed (i.e., loaned) by Justice to the Democratic staff of the committee, and myself. Barnes again laid out the problem and discussed the work of the Overseas Jurisdiction Advisory Committee. He then described the Senate bill and the concerns that DoD and Justice had raised. Our initial impression was favorable and we told the group that we would speak to Representative Bill McCollum, the subcommittee's chairman, and to Representative Bobby Scott, the subcommittee's ranking minority member, about the issue. After the group left we agreed that the subcommittee should address the issue, but without the UCMJ amendment. We also wondered why the problem had been ignored by Congress for so long, especially given that the answer to the problem seemed easy to achieve.

Filkins and I briefed Representative McCollum. Having served as a lawyer on active duty in the Navy and, later, in the Naval Reserve for over twenty years Representative McCollum quickly understood the problem and approved our recommendation that the subcommittee address the issue. Representative McCollum also agreed with our suggestion that the UCMJ provision be dropped. We decided to rewrite the legislation, dropping the UCMJ reference and addressing other provisions that Filkins and I thought needed to be changed. The new bill would be introduced in the House. Representative Saxby Chambliss, a member of the House Armed Services Committee and a friend of Senator Sessions, had expressed interest in sheparding the Senate bill through the House. Sessions had called Chambliss and personally asked him to help move the Senate bill because he thought having a member of the House Armed Services Committee support his bill might help ensure its passage in the House. Despite the fact that the new bill we would draft would be referred principally to the Judiciary Committee and would require McCollum's effort to move it through the committee, McCollum agreed to allow Chambliss to introduce it as the sponsor, with McCollum as the original co-sponsor.

3. Drafting the House Bill

Filkins and I began drafting the House bill. Major Baldwin gave us a draft that DoD preferred to the Senate bill. The draft incorporated many of the amendments made to the Sessions bill in the Senate. Pursuant to our usual practice when an executive branch agency supplied us with draft language we used that draft as a guide, but decided to
rewrite most of the important provisions of the bill.221

First, we dropped the UCMJ amendment proposed in the Senate bill. We also deleted its congressional findings. While the Senate often incorporates findings into a bill to explain why it acts on it, the House generally does not do the same. Congressional findings do not actually become part of the law, and members often get bogged down in debating the findings rather than the substantive portions of the bill. This problem quickly proves unworkable in the House because it consists of many more members than the Senate. We also planned to hold a hearing on the bill where witnesses would testify as to the need for the bill and would lay any factual foundation for the bill.

We rewrote the key provision in the act, section 3261, the provision that would actually state the offense, in order to make it more consistent with the style of most Title 18 sections. Rather than taking the Senate approach of listing the people to whom the offense would apply, we reordered the provision to state the prohibited conduct first. Also, while the Senate bill applied the new crime to all military members, DoD wanted its reach limited to members who had committed the crime while in service, but who were no longer subject to the UCMJ. In most cases, common law crimes committed by military personnel in the United States violate both the UCMJ and federal criminal laws. Disputes as to who will prosecute the common law cases have to be worked out between DoD and Justice officials.222 In asking us to limit the reach of the new provision, DoD was attempting to write into the statute a preference for UCMJ prosecutions by DoD if the crime occurred outside the United States. This preference seemed acceptable to us at the time we drafted the provision and so we used DoD's proposed language.

In both the Senate bill and the DoD draft, section 3261 ended with the words "shall be guilty of a like offense and subject to like punishment," a phrase used in many of the earlier bills introduced to close the gap. Filkins and I thought this language was too vague. Toby Dorsey, from

221. We sat down with Toby Dorsey of the House's Office of Legislative Counsel to rework the bill. The lawyers in that office are nonpartisan experts on the rules of legislative drafting and use special software to print bills in their peculiar format and text. More important to our work, however, each lawyer also has developed an expertise in one or more areas of substantive law and are a valuable resource to members and staff working on legislation.

the House Legislative Counsel's Office, helped us redraft the bill and pointed out that while similar language appeared in two other places in Title 18, almost all federal criminal statutes were constructed in the form: "whoever, does a specific bad thing, shall be punished." The conclusion "shall be guilty of a crime" was used only in those two statutes. In rewriting this section, we found it difficult to state the punishment for a violation of section 3261 since the punishments would vary depending on the act committed. Listing all of the possible punishments was impracticable, but mandating just one maximum punishment would have left too much discretion to the Sentencing Commission. Because the statute merely cross-referenced the prohibited conduct by reference to other statutes ("would constitute an offense. . . if [it] had been engaged in within. . . the United States"), we decided to simply cross-reference the punishment as "shall be punished as provided for that offense."

The only other change we made in section 3261 was in the subsection allowing military officials to deliver a defendant to civilian officials. The Senate bill had used the phrase "released," but we were concerned that someone might have misinterpreted this to mean that the defendant had to be formally released by military officials and allowed to walk out the door before he could be handed over to the civilian authorities. We changed the term to "delivered" (to emphasize the continuous nature of the custody) and added the requirement that the delivery be made "as soon as practicable." Mindful that some of the members of our subcommittee might have concerns about allowing the military to arrest and detain civilians, Filkins and I thought it was important to clarify the

223. See supra note 221.
224. 18 U.S.C.A. § 13 (2000); Id. § 1166.
225. Much later we focused on one of the two statutes. The Federal Assimilative Crimes Act allows for federal prosecution, in essence, for committing certain state crimes (such as gambling laws and child abuser reporting statute) on federal property (such as military bases) if there is no federal statute that governs the situation. 18 U.S.C.A. § 13 (2000). See infra notes 277-278 and accompanying text. The other statute that Dorsey noted, 18 U.S.C.A. § 1166 (2000), is similar. It applies state gambling laws to any Indian country in that state.
226. The United States Sentencing Commission is an independent agency of the Judicial Branch, created by Congress, whose purpose is to establish sentencing policies and practices for the federal criminal justice system. It determines ranges of sentences, under the maximum punishments established by Congress in each federal criminal statute, that judges use when determining the sentence to be imposed on a person convicted of committing a federal crime. 28 U.S.C. § 994 (Supp. V 2000).
228. Id. § 3263.
language of the statute that the military’s detention of a civilian was to last only as long as absolutely necessary.

We used DoD’s proposed language for section 3262. In section 3263, we deleted the requirement that notice of the new act be given to nonnationals serving with the military. While we saw the wisdom in giving notice to foreign civilians employed by or accompanying the military, as there would be no reason for them to know that American law might apply to them, there was less of a reason to require that the same notice be given to non-nationals actually serving in the military. All of them would have received instruction in the UCMJ as part of their military training and thus would be aware that our government, through the military, would prosecute them for misconduct. The remote possibility that those non-nationals serving might be prosecuted under the new act was not enough to require formal notice. Requiring this notice to be given to the one or two soldiers in a unit who were not American citizens might also create confusion or even resentment among other troops in the unit.

We added a requirement that the Secretary of Defense consult with the Attorney General when drafting the regulations designed to give notice of the new act to foreign nationals. The Senate bill required the Secretary of Defense to consult only with the Secretary of State.229 Because we were venturing into new legal territory by authorizing American law to apply to non-Americans outside the United States, we thought it made sense for the country’s chief legal officer also to have a say in developing the notice provision.

In section 3264, we made a cosmetic change by reordering the definitions of “employed by the Armed Forces” and “accompanying the Armed Forces” to read in the same order as they are mentioned in section 3261. Also, DoD requested that we modify our draft to clarify that the new statute would apply to both nonappropriated fund instrumentality employees as well as DoD subcontractors “at any tier.” At first, we were hesitant to apply the new statute to subcontractors several levels below the actual DoD contractor because those persons might have only a slight relationship to the U.S. military. However, the bill expressly did not apply to nationals of the host country and it was likely that most third party subcontractors would be in that country in order to work on the DoD contract, therefore we felt there was sufficient justification to bring them within the scope of the bill.

Finally, we added a new subsection to the bill to require that all

Military Extraterritorial Jurisdiction Act of 2000

regulations promulgated by the Secretary of Defense to implement the bill be submitted to Congress before they took effect. The act would be a major change in the applicability of American criminal law. Bobby Vassar, minority counsel to the Subcommittee, and I both felt strongly that we should use the committee’s oversight power to make sure that DoD’s regulations, which unlike most executive branch regulations are not subject to the public review and comment process, were consistent with the intent of the Act. In addition, I decided that the Act should require DoD to submit its draft regulations to the House and Senate Judiciary Committees specifically and also prevent the regulations from going into effect for ninety days after they are submitted. That way Congress would have time to act, informally at the staff level or formally though another statute (if DoD fought any staff recommendations to change the draft), to prevent the regulations from going into effect if it thought they were ill advised. We further drafted the provision to require any future amendments to the regulations also be submitted to Congress for a ninety-day review period. Much to my surprise, DoD did not balk at the requirement.

Representative Chambliss introduced the completed bill in the House on November 16, 1999, as House bill 3380. The House bill was referred to the Judiciary Committee, with a subsequent referral to the Armed Services Committee. Both committees had an opportunity to amend the bill, but with the UCMJ provision of the Senate bill deleted, the Judiciary Committee had the stronger claim to control the bill and received the principal referral.

4. The House Hearing

Congress soon adjourned for the end of the first session of the 106th

---

230. The requirements of the Administrative Procedures Act do not apply to military or foreign affairs functions. 5 U.S.C. § 553 (1994). Nevertheless, DoD may choose to seek public comment on the regulations that implement the Military Exterritorial Jurisdiction Act. See, e.g., U.S. Dep’t of Army, Reg. 310-4, Publication in the Federal Register of Rules Affecting the Public § 2-2 (July 22, 1977) (requiring that some Army regulations be published in the Federal Register). For example, regulations that concern the procedures by which the Army conducts its business with the public and substantive rules applicable to the public as authorized by law. This type of regulation requires that public comment be sought on any published regulation that has a substantial and direct impact on the public or any significant portion of the public. Id. at § 3-2.

231. H.R. 3380, 106th Cong. (1999). A copy of House bill 3380 as it was originally introduced in the House can be found, infra, at appendix B.

232. We later learned that the House parliamentarian also referred the bill to the Armed Services Committee because the bill required the Secretary of Defense to promulgate regulations to implement it.
Congress and, in keeping with tradition, returned to work for the State of the Union address in late January. Representative Scott, the Crime Subcommittee’s ranking minority member, was a stickler for the “regular order” and had indicated his strong preference to McCollum at the beginning of the Congress that the Subcommittee hold a hearing on any bill on which McCollum planned to take action. I recommended to McCollum that we hold a hearing on House bill 3380 in late March.

I requested that DoD propose several witnesses to discuss different aspects of the bill. When DoD speaks on issues of policy a civilian appointee usually testifies and Reed was selected to be the chief DoD spokesperson. Baldwin proposed that Barnes also testify to give a legal review of the issue and to discuss its impact on military readiness. Baldwin also suggested that DoD fly in a base commander from overseas who could speak to how the jurisdictional gap impacted the administration of a military facility. Brigadier General James B. Smith, the commander of the Air Force’s Eighth Fighter Wing located at Kadena Air Base in Japan, was selected to make the long trip to Washington. Justice proposed sending Roger Pauley, a long-serving career lawyer in Washington and Director for Legislation in the Office of Policy and Legislation of the Criminal Division to testify on its behalf.

As the date of the hearing drew nearer, Vassar called to tell me that he had been contacted by representatives of the Federal Education Association (FEA), the union that represents teachers who work in the schools run by DoD. The FEA expressed very strong concerns about the bill and wanted to testify at the hearing. Vassar indicated that Representative Scott supported the request and we planned to allow the FEA to testify at the hearing. I had hoped that the hearing would be a formality to satisfy Representative Scott’s insistence on the regular order and that the bill would sail smoothly through the Committee. Little did I know that Vassar’s call meant that most of our work on the bill lay ahead of us.

The hearing went well, but only two members of the Subcommittee attended, Representative Scott and Representative Steve Chabot, a Republican from Ohio. Representative McCollum had previously decided to run for the open Senate seat in Florida and had begun to miss subcommittee hearings that promised to be non-controversial in order to have more time to campaign. Representative Chabot presided instead and read a statement into the record that I had written for Representative McCollum. Reed, Barnes, and Smith testified as we expected, and stressed the impact of the gap on morale, good order, and discipline. Pauley presented Justice’s view of the legal ramifications of
the gap and how it could best be closed.

Jan Mohr, the president of the FEA testified on behalf of the FEA, as well as for the National Education Association (NEA), perhaps the largest teacher's union in the country. While Mohr stated that the FEA and NEA supported the intent of the bill, she asserted that it “lack[ed] sufficient due process provisions to protect civilians accused of crimes overseas.” Mohr questioned which military authorities would arrest civilians under the bill, whether military authorities would interpret the bill as allowing them to hold civilians in custody without approval from Justice whether defendants would be given access to counsel and opportunity to provide bail, and asserted that military authorities might arrest and detain a civilian without conducting any real investigation into allegations made against the person. In support of her concerns, Mohr mentioned two incidents where she believed military authorities had overreached in investigating DoD teachers. Mohr concluded by asking the subcommittee members to amend the bill to require “full and fair investigations,” to allow defendants to post bail, to obtain “release from pre-trial [sic] confinement” and to specifically provide for a right to legal counsel.

Of course, we had no intention of allowing the military to ride roughshod over defendants under the bill, as Mohr had asserted. The right to counsel, bail, and a speedy trial were long-settled under existing statues and rules, not to mention the Sixth Amendment to the Constitution. It was clear that Mohr did not understand the protections already in the law, and sometimes a misinformed opponent is harder to overcome than one who simply disagrees with you. I began to worry that the smooth sailing through the House that we had hoped for this bill might not happen.

5. The Subcommittee Markup

The next step in our process was to hold a markup of the legislation in the Crime Subcommittee. Markup sessions are where bills are formally amended and voted on by the members of a subcommittee or committee. Because Congress was not in session for the Passover/Easter holiday during the last two weeks of April, we tentatively set the markup for May 3 and began considering what changes we would make to the bill.

233. Hearings, supra note 133, at 27 (statement of Mohr).
234. Id. at 27 (statement of Mohr).
235. Id. at 27-28 (statement of Mohr).
236. Id. at 28 (statement of Mohr).
I had Filkins broach the subject of a post-arrest, overseas hearing with Pauley. He was strongly opposed to any amendment in the statute to accommodate the FEA; he simply did not think any fix was needed. Pauley pointed out that other statutes had extraterritorial reach and that the government had used them in the past with no problem. He also questioned the wisdom of drafting a special provision that would apply only to our new statute and not to other statutes. He recommended that we simply direct our concerns to the Judicial Conference. The Judicial Conference is a group of federal judges who propose changes to the various sets of court rules. Pauley thought the Judicial Conference could study whether any additional procedures should be implemented with respect to all of the extraterritorial statutes, including the new one to be enacted by the bill. He also opposed adding any provision to the bill to delay its effective date, he was concerned that another Gatlin-like result might occur in the interim.

By this time, Justice realized that the bill gave DoD the exclusive right to try its members under the UCMJ for crimes they committed outside the United States. Pauley opposed this and argued that when a crime involved both a military member and a civilian the government might prefer to try them together in a federal court. As drafted, the bill, using DoD’s language, did not permit the government to try a military member in federal court because the military member’s act would not be a crime under the statute, but only under the UCMJ. Pauley proposed that we broaden the bill to make a military member’s act a crime but to allow a joint trial only if the military member was indicted along with a civilian and then only if a judge concluded that a joint trial was appropriate. Dorsey pointed out the shortcoming of writing a statute that made an act a crime only in the event that a judge, after the fact, made a decision about the expediency of the trial of the accused. Dorsey suggested that the new statute apply to all military members in order to make the acts crimes but also suggested a separate section that would limit the prosecution of active military members to instances where they were indicted with a civilian and where the judge determined that a joint trial was appropriate.\footnote{237}

Congress recessed early on May 3, forcing us to postpone the markup to May 11, in order to ensure that enough members would be present to markup the bill.\footnote{238} Vassar was not making much headway with the FEA,
but I decided to recommend that McCollum proceed with the markup anyway, even without FEA support. I assured Vassar that we would continue to work with him but that we would probably have to leave FEA’s issues for the full committee markup in order to keep the bill on schedule to be enacted. Vassar understood and he agreed to advise Representative Scott to support the bill at this point, despite the lack of any provision to address the FEA’s concerns.

On the May 11, we amended the bill slightly, adding language to section 3261 so that it would apply to military members if they were indicted with at least one civilian. I decided to omit the provision Pauley wanted that would have allowed a judge to determine whether a joint trial was appropriate. Instead, I left that decision to be governed by existing rules on separation of witnesses. This meant, however, that it would be possible for a military member to be prosecuted alone in federal court if a judge granted a motion for separate trials. This alteration seemed a low risk compared to the benefit of not having the statute cluttered with procedural language. Additionally, we deleted a reference, in the definition section of the bill, to employees of “a military department,” since they were DoD employees and the additional language was redundant. Finally, we put the requirement that the Secretary of Defense submit his implementing regulations to Congress into the text of the new statute so that this provision would become part of the enacted statute.

6. Addressing the Objections of the FEA

After the hearing, Vassar and Martyn continued to have discussions with the FEA, the NEA, and the American Federation of Teachers, which had taken an interest in the bill. The FEA representatives presented Vassar and Martyn with a long list of amendments the group wanted made to the bill. Among the suggested amendments was a special procedure for cases of alleged child abuse by a DoD teacher that required a special review of the allegations before charges could be filed or any arrest be made. FEA also proposed the creation of an overseas magistrate program using military judges. These judges would hold probable cause and detention hearings in cases brought pursuant to the bill and would determine when arrest warrants should be issued. Further, FEA proposed amending the bill to, in essence, codify certain constitutional rights, including a right to receive a *Miranda* warning, the right to an appearance before a military magistrate within forty-eight

---

*on the Judiciary, Rules of Procedure II(g) (1999).*
hours of arrest, the right to confront adverse witnesses, the right to a speedy trial, the right to representation by a military attorney, and the right to have the government pay for all costs of transporting defendants to and from trial.

Most of the suggested amendments were unreasonable or unnecessary. As a matter of legislative drafting, constitutional rights are never included in statutory language for the simple reason that the Constitution always supercedes any statute that is inconsistent with it, and further reciting constitutional rights in a statute is unnecessary. In addition, some of the language that FEA requested involving "Miranda rights," the right of appearance, and the right to a speedy trial, were broader than the current law in these areas. We did not know if the FEA's proposed language was an attempt to enlarge these procedures or whether it was evidence that they were not familiar with the procedures in the first place. In any event, we were concerned that using the language proposed by the FEA would conflict with the long-held practice of having one uniform set of procedures that applies to all federal criminal prosecutions.

Martyn suggested a meeting between the DoD representatives, the teachers, and the American Civil Liberties Union (ACLU) in an effort to clear the air. Martyn scheduled the meeting for May 5 and invited Filkins and me to attend. The meeting did not go well. The teachers expressed a great deal of distrust in the government, in general, and seemed convinced that DoD and Justice would make only a cursory investigation of any allegations against DoD teachers before arresting them and forcibly returning them to the United States. Colonel

239. Reed, Graham, and Baldwin were regularly accompanied by Lieutenant Colonel Ronald Miller and Lieutenant Colonel Denise Lind, both of whom were lawyers working for Graham in the Office of The Judge Advocate General. The group traveled to Capitol Hill together for meetings on the bill so often that Baldwin began referring to them as "the usual suspects." Each of these officers provided invaluable legal and military expertise as we crafted the legislation.

240. Recent events in the Washington area just before the subcommittee hearing on the bill may have influenced the position of the teachers and ACLU representatives during the meeting. Two weeks before the March 30 hearing, seven grade school students in a Maryland county that bordered Washington had admitted that allegations of sexual abuse they had made against a local teacher were false. Brigid Schulte & Michael E. Ruane, Sixth-Graders Who Accused Teacher of Fondling Charged in Hoax, WASH. POST, Mar 14, 2000, at A1. The story of the alleged abuse had received a good deal of coverage in the local newspapers and on television. During the May 5 meeting, the teachers raised the specter that American students in DoD schools abroad might also make false allegations against their teachers and that the military would use the Act to remove the accused from the country to the United States before the truth about the students' false claims could be discovered. I sensed that this was why FEA president Mohr had requested, at the hearing,
Graham assured the teachers that this would not be DoD’s practice. Graham pointed out that DoD would not benefit from arresting one of its employees on an allegation only to have the case dismissed once the defendant was brought before a judge in the United States. Graham noted that such a practice would have a negative impact on the relationship between DoD and its teacher employees. The teachers seemed unconvinced. I offered to use the committee report on the bill to state the committee’s intent that all constitutional protections enjoyed by persons in the United States were to apply to any proceedings under the Act, but that did not seem to give the teacher much comfort either. The meeting concluded with no resolution.

After the meeting, Vassar, Martyn, Filkins, and I continued to discuss the bill. We agreed that the constitutional rights language the teachers wanted would not be included. However, we did agree that the teachers had a valid concern regarding a defendant’s responsibility to bear the cost of a return trip to his or her home after being removed to the United States for some proceeding short of the trial in their case (i.e. an initial appearance or a detention hearing) that did have merit. But, we ruled out the option of having the government bear the cost, because the government did not pay a defendant’s travel costs in any other situation.

We noted that the teachers seemed to see the moment of indictment as a bright line, the point where they were satisfied that sufficient investigation had been done, probable cause had been ascertained by the government, and a defendant could be forced to return to the United States. We considered allowing defendants under the new statute to remain in the country where they lived until the time of indictment. The problem, however, was ensuring that the preliminary hearing required by case law and federal rules could still take place. We considered giving the defendant the option to remain overseas and require him to waive his right to any preliminary or detention hearing. However, we thought that the teachers might argue that this was too great a price to

---

241. Gerstein v. Pugh, 420 U.S. 103, 105 n.1, 114 (1975) (requiring that persons arrested without a warrant must promptly be brought before a neutral magistrate for a judicial determination of probable cause); County of Riverside v. McLaughlin, 500 U.S. 44, 56 (1991) (explaining that “judicial determinations of probable cause within 48 hours of arrest will . . . comply with the promptness requirements of Gerstein”).

242. FED. R. CRIM. P. 5(a) (providing that an arrested person is to be taken “without unnecessary delay before the nearest available federal magistrate”).

243. While we did not know it at the time, this problem had been noted by other commentators reviewing prior legislation to close the jurisdictional gap. See Becker, supra note 46, at 292-93; Gibson, supra note 51, at 165-66.
pay for wanting to stay close to one's home pending a full investigation by the government.

Another option we considered was to allow the preliminary hearing to take place by video teleconference or by telephone. I called the Administrative Office of United States Courts, the administrative arm of the judicial branch, and asked to find a member of the Judges' Committee on the Federal Rules of Criminal Procedure to speak with me on this point. John Rabiej, the chief of the Rules Committee Support Office, told me that the Committee on Criminal Rules had been considering whether to allow initial appearances to be conducted by video teleconference. Rabiej said that video teleconferencing had been used effectively in immigration proceedings involving illegal aliens who were incarcerated for a crime or detained pending deportation and that several states conducted initial appearances in that manner. In fact, because of these examples, the Criminal Rules Committee was in the process of considering amending Rule 5 to allow video teleconferencing in federal criminal cases. The proposed amendment would have allowed the judge to use video teleconferencing to conduct the appearance if the defendant waived "the right to be present," while an alternative option would have simply given the judge the discretion to decide whether to use it.

Rabiej was not sure if video teleconferencing was available to all judges at that time, and we could not be certain that DoD's video teleconference system and any system that the judges might later put in place would be compatible. So, we were left to consider whether the bill should mandate a telephonic appearance. Under Gerstein v. Pugh, defendants do not have the right to confront witnesses at the initial appearance. Therefore, the ability of a defendant or the judge to actually see witnesses at the initial proceeding does not have a constitutional dimension. We thought that the teacher's concerns could be addressed by allowing the initial appearance to be conducted by telephone. Pauley reluctantly agreed to draft language he thought might accomplish this goal.

I asked Toby Dorsey, from the Legislative Counsel's office, to use Pauley's proposal as a starting point in drafting a provision that would

244. The Judges' Committee on the Federal Rules of Criminal Procedure is one of the groups of judges that proposes changes in the various sets of federal rules to the Chief Justice of the United States, who then proposes them to Congress where they automatically become operative unless Congress acts to prevent the proposed changes.
246. Id. at 126.
allow a defendant to remain outside the United States until he or she was indicted and would provide for the initial appearance in the case to be conducted by telephone. Dorsey's draft incorporated Pauley's idea to require the defendant to decide, within forty-eight hours of being arrested, whether he or she wished to remain outside the United States and also would have required that the defendant be informed of his or her right to make such an election. The proposal would also have provided that defendants making the election would waive any right to a preliminary examination and that, if a telephone hearing was held, it would not have any effect on the venue for the defendant's trial. Additionally, the draft required the judge to determine whether probable cause existed for the government to have arrested the defendant.

Dorsey's draft also included two other provisions I had requested. One would have allowed a judge to appoint military counsel to represent an indigent defendant. Although DoD had informed us that there were often civilian counsel available near military bases in foreign countries, including some American lawyers, I was concerned about situations where the defendant could not afford a lawyer. The second provision was a limitation on the prohibition against removing the defendant from the place where he or she was arrested. This limitation would permit the government to move the defendant if military necessity required it. The provision seemed necessary because DoD had expressed concern about being forced to hold an arrested civilian (most likely a civilian employee or contractor) in a dangerous area.

Because Dorsey's draft was a preliminary draft, we did not send it to outside parties. Filkins and I were not entirely satisfied with the approach that Pauley had proposed and that Dorsey had drafted. For example, DoD had asked us who we envisioned would advise defendants of their right to remain in the place where they were arrested. Although some consideration was given to allowing a military magistrate to inform defendants of their right to remain where they were arrested, I did not like the idea of authorizing military judges to have criminal jurisdiction over civilians. In addition, there is a lack of uniformity among the various services as to who can serve as magistrates, and I could imagine the specter of appellate litigation looming in these cases about whether the defendant had been properly advised of his or her rights.

While we were considering these issues, Pauley proposed a different approach. He suggested that the telephone hearing be automatic and that a Federal judge give the defendant notice of his right to remain in

247. See infra note 349 and accompanying text.
the foreign country. I still did not like the idea of a formal election process and feared that with each new proposal on this issue we were turning a relatively simple proceeding into a very convoluted one. Although I thought Pauley’s suggestion to hold the initial appearance by telephone in every case was a good one, I was concerned about forcing judges to hold such a hearing by telephone if the defendant objected. After all, although the teachers were adamantly opposed to allowing the government to force defendants to return to the United States prior to formal indictment, some defendants might actually prefer to appear before a judge in person rather than being held on a military base. I did not want to preclude that possibility.

I decided to rewrite the entire section. My draft simply prohibited the government from removing the defendant until he or she was indicted or until an information was filed against them.\textsuperscript{248} The draft allowed, but did not require, the telephonic hearing. When coupled with the prohibition on removal, however, the telephonic hearing provision had the practical effect of giving the defendant a choice of whether to stay in the foreign country, without requiring any formal notice and election, or returning to the United States. Most defendants probably would prefer to remain where they were. If a defendant objected to the telephone appearance, however, he could simply communicate this to the judge (through counsel before the hearing or even at the beginning of a telephonic hearing) and the judge could adjourn the proceeding until the defendant was brought to the United States. I also removed the automatic waiver of the right to a preliminary examination as I felt this was too extreme, but I provided that if the defendant was entitled to such an examination, he or she would have to be physically present in the United States for it to occur. Because a preliminary examination is only held if the defendant insists on it,\textsuperscript{249} it did not seem unreasonable to require the defendant to come to the United States to attend the examination. Additionally, at the preliminary examination a defendant has the right to call witnesses and to confront adverse witnesses, which could not, as a practical matter, be done by telephone.

Finally, I deleted the provision that allowed the judge to appoint military counsel for the defendant because DoD had not been very receptive to this provision during our discussions. I believed that the teachers would not push for this provision because they would be able to

\textsuperscript{248} An information serves like the filing of an indictment and provides a protection to a defendant.

\textsuperscript{249} \textit{FED. R. CRIM. P. 5}. 
afford counsel, since they had income. Moreover, even if counsel were not available in a foreign country, the teachers could hire lawyers in America who could participate in the pre-trial proceedings by telephone. Of course this approval required that indigent defendants return to the United States to receive appointed military counsel. This result was not the best outcome, but I knew that deleting the provision allowing the judge to appoint counsel would make DoD more comfortable with the removal prohibition itself. I asked Dorsey to incorporate my rewrite into the larger amendment that McCollum would offer at the full committee markup of the bill. He sent it to me on June 12 and we distributed this draft to Vassar, DoD, and Justice the following day.250

7. The June 12 Draft

After reviewing it for a few days, Pauley faxed a memo to Dorsey and me expressing strong concern with the draft. Pauley pointed out that as written, I had eliminated the possibility that a defendant who requested a detention hearing under section 3142 of Title 18 could be returned to the United States for that hearing. Pauley argued that the Supreme Court had only upheld that statute because of its procedural safeguards, including the right to call witnesses at a hearing on the issue of detention. Pauley was concerned that my draft effectively eliminated that possibility. Additionally, Pauley noted that, under the existing statute, if the defendant was ordered to be held in custody, he or she was to be held by the Attorney General (i.e. not by DoD). Pauley was correct, my draft did not allow for either the detention hearing or custody by the Attorney General. In our haste to try to forge a compromise on this issue, I had simply forgotten about the detention hearing issue and Filkins had not caught it either.

Pauley also suggested that my draft was "schizophrenic" with regard to the preliminary examination—on the one hand the draft required the defendant to be physically present for the examination but on the other hand, it prevented forcing a defendant to return to attend the examination. In drafting the provision, I had intended that if the defendant sought the hearing, then he would waive his right to remain outside the country, but apparently I had not made this provision clear. I knew that the FEA could not make a strong argument that a defendant who wanted to avail himself of his right to a preliminary examination, which would be adversarial, should also be permitted to remain outside

---

250. A copy of the amendment distributed on June 13 can be found, infra, at appendix C.
of the United States. However, the solution was not as simple with respect to the detention hearing. The detention hearing is mandatory in some cases if the prosecution moves for one and is permissible in other cases if the prosecution petitions the court. I knew the FEA would complain that prosecutors would simply use these provisions to circumvent the prohibition on requiring the defendant’s return to the United States. The FEA’s distrust of the government seemed to be limited to only prosecutors, however, and not to judges. Therefore, we decided to give the judge the discretion to order the detention hearing to be conducted by telephone.

While we were discussing this draft, Baldwin stopped by my office to tell me about the *Gatlin* decision, which had been decided only a few days before.\(^\text{251}\) I was amazed at the coincidence – an appellate court case, exactly on point, decided in the middle of the debate on a bill that would have changed the result reached in the case.\(^\text{252}\) When I saw that the judge’s opinion actually admonished Congress for its failure to close the jurisdictional gap over the decades and that the judge also stated his intention to send the opinion to Chairman Hyde for his review, I knew I had a tool to help push the bill through Congress.

We worked with Dorsey to produce another draft of the amendment that would be offered at the full committee markup. This draft allowed both the initial appearance and the detention hearing to be conducted by telephone. These hearings were addressed in a new subsection entitled “initial proceedings.” We also restructured the subsection on removal to the United States. This provision now stated the prohibition first, and then listed a number of events that would modify or terminate the prohibition (e.g. military necessity, preliminary examination, detention hearing, indictment). Again, we circulated this draft to DoD and Justice.

Unfortunately, Pauley still was not satisfied. Pauley was concerned that, under the revised draft, a judge might order the detention hearing conducted by telephone even if the prosecution and the defense objected. This seemed unlikely, but Pauley was correct that the language we used would have permitted such a result. Although Pauley argued that this right should be deleted, he suggested the bill should at least incorporate factors that the judge must consider in determining whether

\(^{251}\) United States v. Gatlin, 216 F.3d 207 (2d Cir. 2000).

\(^{252}\) In his opinion in *United States v. Corey*, Judge Kozinski suggested that the *Gatlin* decision “prodded Congress” to act. *United States v. Corey*, 232 F.3d 1166, 1172 n.3 (9th Cir. 2000). This suggestion was simply wrong. We decided, in October 1999, to move the bill, which was long before we learned about *Gatlin*. In fact, the Crime Subcommittee’s hearing on the bill and its markup of the bill were held before *Gatlin* was decided.
to hold the detention hearing by telephone. Pauley also pointed out that the detention statute required that defendants be afforded the right to be represented by counsel and suggested that the bill give judges the right to appoint military counsel. This was something that I had considered, rejected, and was trying to avoid returning to, if possible.

By this point, we were only two working days away from the full committee markup. I was frustrated that nothing we drafted seemed to be satisfactory to all sides, and I was worried that the FEA's concerns and Pauley's resistance to them might slow the bill's progress enough that Congress would adjourn for the year before we could get the bill through both houses. I asked Dorsey to amend the draft once again, this time giving the defendant the choice as to whether the detention hearing would be conducted by telephone. I relented on the issue of appointed military counsel and included a provision that allowed the judge to appoint military counsel for the defendant at the detention hearing. The appointment power was limited by permitting judges to appoint only those persons who were certified as judge advocates in the military. I knew DoD would not be happy about this provision, but I did not see much of an alternative at this point. We circulated this draft to DoD, Justice, and Vassar on Friday, June 23. I made it clear to DoD that if it wanted the jurisdictional gap problem solved, the issue of appointed counsel would be part of the price it would have to pay for that solution.

By early the next Monday morning, DoD had weighed in on the new draft. The Judge Advocates General of the three services had expressed "strong objections" to the language allowing federal judges to appoint their personnel to represent civilians. I expected them to insist that the provision be deleted, and was prepared to tell them that it could not be. Curiously enough, however, DoD asked only that the judges' power of appointment be limited to using a list of military lawyers designated by the Secretary of Defense. As a result, the services would have

---

253. We gave the defendant the choice of conducting the detention hearing by telephone by limiting the judge's discretion to conduct the hearing in this manner only to cases where the defendant requested it. I stopped short of requiring the defendant to make a formal motion, using the term "request" instead, so that the judge could simply ask the defendant at the beginning of a hearing if he or she consented to the telephonic format. If the defendant did not consent, the hearing would terminate and the defendant would be flown back to the United States. I decided not to include the list of factors urged by Pauley, as I felt that the judge's discretion had been appropriately limited. I did, however, agree to include the factors in the committee report on the bill.

still have some control over who was appointed. The request also seemed to suggest that the services actually intended to specify which judge advocates should be designated, which I hoped would result in them selecting only those lawyers with defense training and experience in handling these cases. I readily agreed to the change. Interestingly enough, when DoD sent us the language it proposed, DoD, intentionally or through oversight, suggested that the judges’ appointment power be expanded to all initial proceedings. This would have the effect of expanding the judges’ appointment power to include the initial appearance. Although the teachers had not focused on guaranteeing counsel at the initial hearing, I knew that such a broad provision would help convince the Democrats to support the amendment. So, I included that aspect of DoD’s request as well.

At about six o’clock in the evening, Vassar sent an email to tell me he was satisfied with the draft and that the FEA and the AFT both would support it as well. However, he also told me that the ACLU had expressed new concerns with the draft and that they were planning to call me to discuss it. Vassar said that he would support any changes that I might agree to make to appease them, but he could not in good faith, insist on them as we had met all of the concerns he had raised on the teachers’ behalf. Vassar also warned me, however, that the ACLU representative might try to convince the teachers to ask for more changes. When no call came before I left the office that night, however, I thought that the ACLU might have decided not to push for further changes in the bill.

8. The Full Committee Markup

The next morning, the full Judiciary Committee was scheduled to begin two days of markup. Several bills were on the agenda, including House bill 3380. Congress was to begin a two-week July Fourth recess/work period the following week. I knew that Congress also traditionally took a recess for the entire month of August and I was concerned that if we did not get the bill voted out of Committee on the June 27, it might not make it out in time to be enacted by both houses of Congress during that session. In addition, because the month of September during an election year is usually filled with disputes over the annual spending bills for the government and because the congressional leadership had already decided to end the session by October 6, I felt that we simply had to get the bill to the floor of the House before the August recess. After that time the bill could become hopelessly bogged down in the post-recess spending bill debate. In addition, the Senate had
yet to act on the House bill and so we had to ensure that it passed the House with some time left for Senate action. To me, the June 27 hearing was the last clear shot at getting a bill through Congress to close the jurisdictional gap.

Of course, Filkins and I thought we were in good shape. We had satisfied all of the teacher groups, and DoD and Justice finally supported all of the changes we had made in the bill over the last few weeks, even if only grudgingly. However, as we walked into the Judiciary Committee hearing room on the morning of the hearing, Pauley caught our eye. Pauley pointed out that the new sections, the limitation on removal and initial proceedings sections, each made reference to a person “arrested for” a violation of new section 3261. Pauley noted that there would be times when a person had been indicted but never arrested and so, as written, these sections might not apply to them. This defect would undermine the entire compromise made with the teachers. While last minute changes are common in congressional markups, I was more than a little frustrated that such a seemingly large omission had escaped all of us. There was not enough time to call Dorsey and have him make the change in typeset version of the amendment that McCollum would offer, so we dumped all of the copies of the amendment we had made and hand wrote the changes on one copy. Filkins and I stood at the copier ourselves to make the required stack of copies.

As we walked back into the room, arms full, Vassar told us that Rachel King, one of the ACLU’s lawyers in Washington was there to discuss her problems with our amendment. We walked out into the hall to talk with her, with the DoD “usual suspects” and Pauley in tow. King had a problem with one of the exceptions to the prohibition on removal, the one that allowed the defendant to be forcibly removed to the United States once he or she was indicted or an information was filed against him. All along, the teachers had expressed concerns about extreme or rash actions by DoD and Justice before a person was indicted. Therefore, the point of indictment was the bright line in our minds. After that, all bets were off and all of the special provisions we had crafted into the bill to address the FEA’s concerns would end. But King had a different take on the issue. She pointed out that nothing in the bill prevented DoD from removing a defendant to the United States once the person was indicted, even if DoD had agreed to allow the person to remain free on his or her own recognizance or if a judge had granted bail to the defendant. King feared that DoD might simply make it a policy to send all defendants back to the United States once they had been indicted. While I told King that her fears seemed extreme, I knew that if
she raised enough concerns with the Democratic members of the committee they might attempt to delay the markup of the bill. Committee Chairman Henry Hyde had scheduled a long list of bills to be marked up that day, and if he thought ours was getting bogged down in last minute debate or modification I knew he might simply put it off to another day. And I feared that if Chairman Hyde delayed the markup, the bill might never make it to the House floor in time to be enacted during the session.

Deleting the provision King disliked posed a different problem, however. That provision ended the prohibition on the government’s ability to forcibly remove the defendant to the United States. Without it, there technically would be no end to the prohibition—even for the purpose of bringing a defendant to the United States for trial. Of course, while a judge could simply order the defendant to appear for trial (and would find him or her guilty if they failed to appear), the government would still have been required to release a defendant in order for him or her to attend the trial. This would have posed a serious problem in the case of dangerous defendants who the judge had ordered held until trial. It was clear that simply deleting the provision was not sufficient.

However, as Pauley, Reed, and I discussed the problem, I realized that we had been focusing on the wrong event all along. The moment of indictment did not have any real significance, since that event did not require the defendant to be in the United States. The defendant’s presence was required at the trial and any pre-trial hearings. Because a defendant would only remain in the government’s custody if the judge had affirmatively ordered it, I realized that simply giving the judge the authority to order the defendant’s return to the United States would ensure that the defendant would be present whenever he or she was needed for trial. It also meant that the bill would not have to list all of the possible types of hearings that might require the defendant to be physically present in the courtroom. Reed and Pauley agreed with me, and I pitched the idea to King. She agreed and we made another handwritten change to the amendment that McCollum would offer. We deleted the provision ending the prohibition on return at the moment of indictment and, instead, provided that the prohibition ended if a judge ordered the defendant returned to the United States.

McCollum offered the amendment, Scott spoke in favor of it, and the committee passed it by a voice vote. We were on track to get the bill through the House and Senate before the end of the Congress.
9. The House Committee Report

Whenever the Judiciary Committee reports a bill to the full House of Representatives, it files a report on the bill. Reports describe the need for the legislation, any background for the development of the bill, and the dates of any hearings and markups of the bill. Most importantly, reports contain a detailed section-by-section analysis of a bill. It is here that the committee can describe in greater detail what its intent was in drafting the bill and exactly how each section should be interpreted.

I took the unusual step of sending a draft of the report to DoD and Pauley for their review and comment. Pauley had previously asked me to include several items in the report. Specifically, Pauley asked that the report express a preference that the initial proceedings be conducted by video teleconferencing, so I added a sentence to the report to express this preference. While we both would have preferred to have enacted this preference into the bill, we knew that facilities for the use of video would not always be available, and we did not want the lack of them to cause an issue for appeal of a conviction. However, Pauley and I did not want the fact that the telephone was permitted in one situation to undermine the future use of video in other cases. I also included Pauley's list of factors that judges were to consider in determining whether to conduct any detention hearing by telephone or video. I was not convinced that such a list was necessary and was not too keen on telling judges what they needed to consider in exercising their judicial discretion, but I had promised Pauley to include it. I made it clear in the report that the list was not exhaustive and that the committee was suggesting rather than intending that the factors be considered. Pauley did not object to the softer language.

Finally, Pauley and DoD had wanted me to include a definition of "federal magistrate judge" in the text of the bill. I resisted, in part

---

255. This is the procedure even when a bill is considered under suspension of the rules, which is a process where non-controversial bills are considered without any formal rule being issued by the Committee on Rules to govern the debate of the bill on the floor of the House. See infra note 265. In such a case, the requirement that the committee of jurisdiction file a report on the bill is waived yet the Judiciary Committee's tradition was to file a report anyway. Id.

256. Reports are usually written entirely by staff. I have always been amazed that the power to write "It is the Committee's intent" that a bill be interpreted in a particular way, is left to the unelected staff members.


258. Pauley had wanted these factors included in the statute itself. See supra note 253 and accompanying text.

because I did not think the term needed to be defined in the bill since it
was defined in the Federal Rules of Criminal Procedure and because I
did not want to cross reference a statute to a rule. It was a small matter,
but the distinction between statutes, which are acts of Congress, and
court rules, was important to Filkins and me (although probably not to
anyone else), and I was determined to respect it. Therefore, I added a
footnote to state simply that the term was to be given its meaning in the
rule.

After making a few other minor changes suggested by Pauley and
DoD, we filed the report on July 20 as House Report 106-778, Part 1.
The bill was now ready to be voted on by the full House of
Representatives.

10. Floor Consideration

Shortly before the bill was scheduled to come up for a vote of the full
House, Ed Hadden, Senator Sessions' new counsel on the Senate
Judiciary Committee, called and asked if Filkins and I would meet with
him and another member of Sessions' staff in our offices. Their
willingness to come to the House side of Capitol Hill could only mean
that they were looking for a favor from us. Most likely they would
request that we agree to allow the Senate bill number to appear on the
final version of the bill that would be presented to the President for his
approval.

Hadden asked us to allow the Senate bill to move – with our text
substituted for theirs. He pointed out that Sessions had introduced the

260. Court rules implement statutes and are made by the judicial branch at the
delagation of the legislative branch.
261. House Report, supra note 257, at 18 n.32.
262. The usual practice when a bill is referred to more than one committee is that each
committee's report on the bill becomes a "part" of one report. As it turned out, although
the bill had also been referred to the Armed Services Committee, they took no action on
it, and so did not file a report. As a result, the House Report is listed as "Part 1," even
though there are no other parts.
263. Whenever there are two versions of a bill that moves through Congress with
different bill numbers, at some point a decision must be made as to which bill number will
go forward. The stakes can be big - if a member can point to a bill that he or she
introduced, and which became law, he or she can claim credit for all of the good done by
the bill. A member who introduced only a companion bill in the other chamber of the
Congress has a much harder time getting credit for his or her work on the legislation, even
if it was significant. Sometimes the decision as to which chamber's bill moves is easy - a
bill introduced by a member of the majority party almost always moves over one
introduced by a member of the minority. But in this case, Republicans had introduced
both bills.
Senate bill first and had a constituent in his district who was following the progress of the Senate bill. Hadden noted that we had moved the House bill “only” out of a sense of good government. I pointed out all of the work we had done to overcome opposition to the bill. In addition, because the bill had changed so much from the Senate version, I argued that we had the better claim. I also expressed a more substantive concern. The Senate Judiciary Committee had not issued a report on Senate bill 768, whereas the House Judiciary Committee had filed the report I wrote on House bill 3380, which included a very detailed section-by-section analysis of the bill. All of us expected that the enacted bill would be challenged in court at some point and we knew that courts often consider the committee report as the best legislative history of a bill. I told Hadden that I was concerned that if we allowed the Senate bill number to become law, even using the House bill text, judges might ignore the House report when interpreting the statute, even though the text of the House bill discussed in the report and the text of the statute would be identical. Hadden promised that if we agreed to let the Senate bill be used, he would ask Sessions to put into the Congressional Record a statement that the Senate was adopting the House report as its own and intended that it be used to interpret the bill.

It was clear that neither side would budge, so we left it for the members to resolve. I knew that it was unlikely that McCollum would refuse a request from a member of the body he hoped to join, especially a senator of our own party, but I felt obligated to make the pitch to him to hold out for the House bill number. McCollum was in town for an important vote on the floor and we met to discuss the situation. McCollum listened politely but told me he did not think he could refuse Sessions’ request. McCollum did suggest that Sessions would now owe us a favor, a valuable commodity in Washington politics.

Later that same day, Sessions called McCollum, who agreed to allow the Senate bill to come to the House floor and be amended with the text of the House bill as it had passed the committee. Then the amended Senate bill would be sent back to the Senate for final passage. We told Chambliss’ staff of the deal and ensured them that the House would pass the bill Chambliss had introduced first, in order to give him some credit

264 Although bills are often amended on the House or Senate floor after they are reported from the committee of jurisdiction, we avoided making any amendments to House bill 3380 after it was reported by the Judiciary Committee. We did this to ensure that the analysis of the bill contained in the committee report, which discusses the bill in the form it is reported from committee, and the language of the enacted bill would match exactly.
for the final product. We explained that immediately after the House passed Chambliss' bill, we would then call up the Senate bill, strike out its text, add our text, and pass the bill.

Because the bill was no longer controversial, it was scheduled for a day when the "suspension of the rules" procedure is used to bring bills up for debate and votes. McCollum had been routinely missing the votes on suspension days in order to have more time to campaign in Florida, and so we knew that he would not be in town when the bill came to the floor. Therefore, we recruited Representative Chabot to stand in for McCollum and I wrote two statements for Chabot to use. One statement was to be read aloud on the floor and a longer, more detailed statement was to be placed into the Congressional Record. I used this opportunity to mention Pauley and the people from DoD who had helped us craft the bill.

On July 25, the bill came to the House floor. Chabot read the short statement and introduced the longer one into the record. Representatives Scott and Chambliss also spoke in support of the bill. The bill passed by voice vote because no member requested a recorded vote. A few minutes later, I realized that I had forgotten to arrange for the Senate bill to also be passed. I told the committee parliamentarian, Dan Freeman, of my mistake. Freeman wrote out by hand the appropriate request for Representative Chabot to read. Representative Chabot was still on the floor pinch-hitting for another of the committee's

---

265. Bills considered “under suspension of the rules” in the House come to the floor without a rule passed by the House Rules Committee to govern debate. The trade off for the streamlined procedure is that the bill must receive a two-thirds vote of the members voting on the bill. For this reason, generally only non-controversial bills are brought up for a vote under this procedure. Suspending the rules also means that no committee report is required to be filed prior to consideration of the bill by the full House, although the Judiciary Committee’s practice is to file one anyway. See generally Rules of the House of Representatives, 106th Congress, Rule XV (1999), in CQ PRESS, 2 GUIDE TO CONGRESS 1036 (5th ed. 2000); CHARLES W. JOHNSON, U.S. HOUSE OF REPRESENTATIVES, CONSTITUTION, JEFFERSON’S MANUAL AND RULES OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES § 886, at 621-22 (1999); LEWIS DESCHLER, 6 DESCHLER’S PRECEDENTS OF THE UNITED STATES HOUSE OF REPRESENTATIVES Ch. 21 § 9.7 (1977).

266. 146 CONG. REC. H6929 (daily ed. July 25, 2000); see also id. at H6930-32 (prepared statement of Representative Bill McCollum introduced into the record by Representative Chabot during the House debate on H.R. 3380).

267. Id. at H6929-30.

subcommittee chairman on another bill. Chabot read the request Freeman wrote and the House passed Senate bill 768 by voice vote, with the text of House bill 3380 substituted for its text. House bill 3380 was then “laid upon the table,” meaning that only Senate bill 768 would be sent to the Senate. 269

11. Once More in the Senate

After the August recess ended and Congress returned to work, Hadden had trouble getting Senate Democrats to allow the bill to move. In the Senate, when the majority intends to bring a bill to the floor, the staff in each party’s cloakroom sends out a message to their members. In response to this message, a senator can place a “hold” on a bill, which effectively prevents it from coming to the floor. A senator can also simply delay his or her response to the notice, effectively placing a “soft hold” on a bill. While the hold practice was originally devised to allow senators more time to review a bill, 270 the practice is often used to gain political leverage. Senate bill 768 was quickly “cleared” the Republican cloakroom, meaning that all Republican senators had responded and no objections had been received. But, there was no clearance from the Democratic cloakroom. Given that the bill was supported by DoD, Justice, and the ACLU—a very unusual combination of supporters—and that it had passed the Senate once before by unanimous consent, there was no reason to think that the delay was due to any substantive objections to the bill. Hadden and I surmised that one or more of the Democratic senators was holding up the bill so that McCollum could not take credit for it in his Senate race.

As a result, Hadden and I became very worried that Congress would adjourn for the year without sending the bill to the President. If that happened, the bill would die and we would have to start the whole process over again in the next Congress. I felt that DoD needed to do more to move the bill and called Baldwin to tell him so. Baldwin told me that the legislative affairs staff in the OSD was now calling the shots with regard to this bill and suggested that I speak to them directly. I placed a

269. 146 CONG. REC. H6940 (daily ed. July 25, 2000); see also Id. at H6930-32 (prepared statement of Representative McCollum). Because of my mental lapse, the passage of House bill 3380 occurs on page H6932 of the Congressional Record, while the motion to table that bill and pass Senate bill 768 in its place does not occur until eight pages later, at page H6940.

270. See THE ENCYCLOPEDIA OF THE UNITED STATES CONGRESS 477-78, 835 (Donald C. Bacon et al. eds., 1995); see also BARBARA SINCLAIR, UNORTHODOX LAWMAKING: NEW LEGISLATIVE PROCESSES IN THE U.S. CONGRESS 41-43 (2000).
call to one of the officers working in that office, but did not feel that I had made much headway. The officer told me that the Secretary of Defense, at their prompting, had written to Senators Trent Lott and Tom Daschel, the Republican and Democratic leaders of the Senate respectively, and that Senator Daschel’s staff had called OSD the next day to ask questions about the bill. I suggested that other Democrats were behind the stall and encouraged him to prompt a very senior officer, perhaps one of the Judge Advocates General, to make a call to key Senate Democrats to emphasize how important the bill was to the military. A few days later, Army General John M. Keane, the second most senior officer in the Army, called Senator Leahy to ask for his help in moving the bill. Later, Leahy made a speech on the floor of the Senate in support of the bill.

Hadden called me to say that the Democratic cloakroom staff had informed their Republican counterparts that the bill had finally been cleared for floor consideration. On October 26, 2000, the Senate considered the bill as it had been passed by the House. As Hadden promised, Sessions acknowledged that the House report “reflects the intentions of the Senate.” The Senate then agreed to the House amendment to the bill and passed the bill for a second and final time.

12. Getting the Bill to the President

Under the Constitution, the President has ten days to sign a bill into law once it is presented to him, but Congress delays often the formal presentment of a bill to the President. In some cases, the delay is done by congressional leadership for political reasons, such as when they are attempting to tie the enactment of a bill, or its veto, to some other event. In other cases, however, the delay is requested by the White House, most often to accommodate the President’s travel plans.

Congress did not finish its work before the election and left town, with plans to return for a rare “lame duck” session in mid-November. Baldwin called to express his concern that the bill had not been presented to the President. I called Hadden to ask that he check with the Senate Clerk’s office, as they would be responsible for formally presenting the bill to the President at the White House. President

272. Id. at S1183. Senator Leahy, the ranking minority member of the Senate Committee on the Judiciary, also acknowledged the House Report and stated, “I agree with Senator Sessions with respect to the report.” Id.
273. Id. at S11184.
Clinton had been out of Washington for much of late October and early November campaigning for the Vice President, the First Lady (in her bid for the U.S. Senate seat for New York), and for numerous other congressional candidates. Hadden called back quickly to say that the Senate clerk's office had assured him that there was no problem and that the White House had simply requested that no bills be presented while the President was expected to be gone. I called Baldwin to relay the news and to ask if the Army's Office of Congressional and Legislative Liaison had made any headway in requesting a small signing ceremony for the bill. Baldwin said that his office was working the request through the Defense Secretary's office.

On the Monday before Thanksgiving, I called up the bill on the Library of Congress website and found that it had been formally presented to the President on November 13, thus giving him ten days to sign the bill. I called Baldwin to let him know, but he had already heard news of the presentment from another source. Baldwin also informed me that the signing ceremony was not going to happen. We found out later that White House staff had opposed any ceremony for a bill sponsored by (or, in this case, merely identified with) Representative McCollum, because he had been one of the House Managers who prosecuted President Clinton in the impeachment trial in the Senate. Two days later, on November 22, Baldwin called to tell me that President Clinton had signed the bill into law that morning.

III. THE GAP IS CLOSED

A. An Analysis of the Military Extraterritorial Jurisdiction Act of 2000

The Military Extraterritorial Jurisdiction Act of 2000 enacted chapter 212 of Title 18 of the United States Code, entitled "Military Extraterritorial Jurisdiction." This section of the article discusses in depth each of the seven sections of that new chapter.

1. Section 3261: Criminal Offenses Committed by Certain Members of the Armed Forces and by Persons Employed by or Accompanying the Armed Forces Outside the United States

Section 3261 is the heart of the new chapter and states the new offense created by the Act. The section creates a new federal crime involving conduct engaged in outside the United States by members of the Armed Forces and others accompanying them.
Forces or by persons employed by or accompanying the Armed Forces abroad that would be a felony if it had occurred in the United States. Although the language of the Act uses the jurisdictional phrase “if committed within the special maritime and territorial jurisdiction of the United States,” we made it clear in the Judiciary Committee’s report on House bill 3380 that “acts that would be a Federal crime regardless of where they are committed in the United States, such as the drug crimes in title 21, also fall within the scope of [section 3261(a)].”

In essence, section 3261 is a type of assimilative crime statute. At one point in the development of the bill, Filkins and I debated with DoD representatives as to whether the statute was enacting a new crime or simply extending the reach of all existing federal crimes to persons accompanying the military overseas. While we ultimately convinced DoD that it was the former, much of our debate turned on analogies to the Federal Assimilative Crimes Act. DoD was familiar with that statute because federal prosecutors often use it to prosecute civilians who commit minor crimes on military reservations for which there is no corresponding federal statute. In drafting the bill, we had discussed this statute with federal prosecutors who told us that when they charged a defendant under that statute they often referenced in the charging document the state statute that had been “assimilated.” However, it was understood that the offense charged was a federal offense under the Title 18 section and not a violation of the state statute. The practice of noting the “assimilated” state crime was done merely to put the defendant and the court on notice as to what the government planned to prove at trial.

This analogy convinced the DoD representatives that prosecutions under section 3261 would be for violations of that section and not for violations of any other Title 18 section referenced in the charging document.

As discussed above, prosecutions under the new law may be brought

---

278. House Report, supra note 257, at 15 n.29. To help judges and defendants understand the assimilation process, we stated in the report that:

[I]t would be helpful in charging violations of section 3261 for prosecutors to make a reference to the statute that would have been violated had the act occurred within the United States, so as to put the defendant on notice of the elements of the crime that the Government will attempt to prove and the maximum punishment that may be imposed for the violation of section 3261.

Id.
only against persons who fall within two broad groups of people, both defined in the bill: (1) persons employed by or accompanying the Armed Forces outside of the United States; or (2) persons who are members of the Armed Forces and are subject to the UCMJ at the time the conduct occurred.\textsuperscript{279} The maximum punishment for the crime is determined by cross referencing the maximum punishment provided for under the federal statute that makes the same conduct an offense if it was committed within the United States.\textsuperscript{280} If the person committing the crime is a juvenile, however, the federal juvenile delinquency procedures apply.\textsuperscript{281}

In some cases, conduct may violate both section 3261 and another federal statute having extraterritorial application. We intended that Justice have the flexibility to proceed with its strongest case against the defendant, and so we noted in the report that "[i]n such cases, the Government may proceed under either statute."\textsuperscript{282} When military members violate section 3261 their acts will also likely violate the UCMJ. In such cases, however, the government does not have the discretion to choose which statute to use. The Act prohibits prosecutions of military members unless they are indicted with at least one civilian. In short, the Act gives DoD the exclusive right to prosecute military members, provided they are not part of a conspiracy or other illegal activity with civilians. If a military member is indicted with a civilian, however, the Act allows the government to prosecute the military member in federal court.\textsuperscript{283} This remains the case even if the federal judge later orders that the military and civilian defendants be tried separately.\textsuperscript{284}

\textsuperscript{279} See supra note 166-168 and accompanying text.

\textsuperscript{280} The House Report on House bill 3380 provided an example of how the maximum punishment under section 3261 would be determined:

[1]f a person described in subsection (a) were to engage in conduct outside the United States that would violate section 2242 of Title 18 (relating to sexual abuse) were it to have occurred on federal property within the United States, that conduct will violate new section 3261 and may be punished by a United States court in the same manner provided for in section 2242. The offense to be charged, however, is a violation of section 3261, not section 2242. Section 2242 only determines the maximum punishment that may be imposed for the violation of section 3261. Technically, a violation of section 2242 need not be charged.

House Report, supra note 257, at 15.


\textsuperscript{282} House Report, supra note 257, at 15 n.28 (citing United States v. Batchelder, 442 U.S. 114 (1979)).

\textsuperscript{283} House Report, supra note 257, at 16. As we stated in the House Report, the provision "is designed to allow the Government to try the military member together with a non-military co-defendant in a United States Court." Id.

\textsuperscript{284} The Military Extraterritorial Jurisdiction Act of 2000, Pub. L. No. 106-553, § 3261,
Subsection (b) of section 3261 limits prosecutions if a foreign government, in accordance with jurisdiction recognized by the United States, has prosecuted or is prosecuting a person for the conduct that constitutes the offense. However, this section contains an exception allowing a prosecution in the United States even after a foreign government has prosecuted a person for the acts that violate section 3261, if such prosecution is approved by the Attorney General, Deputy Attorney General, or a person acting in either of those capacities. Simply put, this provision allows the United States a "second bite at the apple" in order to prosecute a defendant a second time, presumably when it believes that the punishment by the host nation is insufficient.

Subsection 3261(c) provides that the act does not deprive a court-martial, or other military court, commission, or tribunal, of the jurisdiction it may otherwise have over an offender. This provision was included in the Act to preserve the use, however rare, of forums other than Article III courts to prosecute defendants – military or civilian – who violate American law. This subsection complements subsection (d), which limits prosecutions under section 3261 against persons who were members of the Armed Forces at the time they committed the crime.

The limitation under subsection (d) does not apply, however, if the person is no longer subject to the UCMJ. For example, discharged soldiers who are not eligible to receive retirement pay are no longer subject to the UCMJ. Because of this, the government is powerless to...

114 Stat. 2488. Because section 3261(d)(2) only requires that the military member be indicted, or an information filed against him, together with another person, this element of the crime will be satisfied even if the judge approves a motion for separate trials. Id. Of course, in such a situation, Justice could agree to dismiss the complaint against the military member so that DoD could proceed against him or her by court-martial, but nothing in the statute requires this.

285. House Report, supra note 257, at 16. In the House Report we noted that, in most instances, this recognition will occur through a SOFA entered into by the United States and the host nation. Id. But the existence of a SOFA is not required by the Act.


287. Id. § 3261(c).

288. Id. § 3261(d).


290. See 10 U.S.C. § 802(c) (1994). Under current law, only persons entitled to receive retirement pay (generally paid only to those who served for twenty years or more on active duty) and retired members of a reserve component who are receiving hospitalization from an Armed Force, may be recalled to active duty for the purpose of being tried for an offense under the UCMJ after they are discharged. See 10 U.S.C. § 802(a)(4)-(5) (1994). Generally, except for these two classes of persons, a properly discharged service member is no longer subject to court-martial jurisdiction. See MCM, supra note 8, at II-13 (discussing R.C.M. 202(a)(1)(A)(iii)).
Military Extraterritorial Jurisdiction Act of 2000

Prosecute them under the UCMJ, or under federal law for acts they commit outside the United States. Like the problem of crimes committed by civilians accompanying the Armed Forces, the inability to prosecute discharged soldiers has plagued the military for some time. The Act enables the government to prosecute soldiers who commit crimes while a member of the military, but are discharged before their guilt is discovered. The exception in subsection (d) helps to make this clear. The Act also allows the government to prosecute a person who commits a crime while in federal service as a member of a reserve component but then returns to civilian life, where he or she is no longer subject to the UCMJ. Finally, as discussed above, the limitation on the prosecution of military members in subsection (d) does not apply if the military member is charged for the offense together with at least one other person, who is not subject to the UCMJ. In such a case, concurrent jurisdiction would exist to try the person under either the UCMJ or under chapter 212.

2. Section 3262: Arrest and Commitment

Section 3262 authorizes employees of the DoD to arrest and detain persons suspected of violating section 3261. While military officials, such as military police and criminal investigators, arrest and detain civilians who commit crimes and infractions, such as traffic violations, on military property, their arrest power is limited to only a “reasonable period of time sufficient to investigate the crime and transfer” the accused to appropriate civil authorities. Civilian authorities, however, seldom will

290. See supra note 31 and accompanying text.
291. See supra note 16 and accompanying text.
292. See supra note 31 and accompanying text.
293. Members of the military who serve in one of the reserve components are subject to the UCMJ only when serving in a federal duty status. See 10 U.S.C. § 802(a)(1). (3) (1994). In order to use the UCMJ to prosecute members of the Reserve or National Guard who commit illegal acts abroad while in uniform, the member must be called to active duty. Id. § 802(d). The intent of the Act’s drafters was to allow the government to prosecute the person in a civilian court instead. As we made clear in the House Report: “In essence, the bill gives the Government concurrent jurisdiction with the military over members of the reserve components who commit crimes overseas.” House Report, supra note 257, at 12 n.23.
294. See Major Matthew J. Gilligan, Opening the Gate?: An Analysis of Military Law Enforcement Authority Over Civilian Lawbreakers On and Off the Federal Installation, 161 MIL. L. REV. 1, 18 (1999); see also U.S. Dep’t of Army, Reg. 190-30, Military Police Investigations §§ 4-8 (June 1, 1978); U.S. Dep’t of Army, Reg. 195-2, Criminal Investigative Activities § 3.21 (Oct. 30, 1985). The regulations do not use the term “arrest,” but speak in terms of “detain” and “apprehend,” respectively, so as to emphasize the temporary nature of the military custody. Id. We used the term “arrest” in section 3262 expressly to make the point that DoD’s authority under the Act was qualitatively
be present in a foreign country, therefore, section 3262 gives military authorities broad power to arrest and hold civilians who commit crimes while employed by or accompanying the Armed Forces abroad. Under Section 3262, the Secretary of Defense is to designate persons who may arrest civilians. The section also states that the usual standard for making arrests, requiring that probable cause exists to believe that a crime has been committed and that the person to be arrested committed such offense, applies to arrests made under section 3262. If the person is held in custody and, is later ordered detained after an initial appearance before a United States Magistrate, section 3262 requires military officials to deliver the person arrested to the custody of civilian law enforcement authorities of the United States as soon as practicable, unless the person is to be tried under the UCMJ.

3. Section 3263: Delivery to Authorities of Foreign Countries

Section 3263 requires that in the event that a host nation chooses to use its own laws to prosecute a person for acts that violate section 3261, American military officials must deliver the accused to the custody of “appropriate authorities of a foreign country.” However, delivery to foreign authorities is not automatic. Foreign officials must first request that the accused be delivered to them, and the accused may only be handed over if delivery is authorized by a treaty or other international agreement to which the United States is a party. In most cases, this agreement will be a SOFA. The decision as to which officials of a foreign country constitute “appropriate authorities” for the purposes of taking custody of a defendant is left to the Secretary of Defense, who must consult with the Secretary of State.

4. Sections 3264 and 3265

As discussed above, the Military Extraterritorial Jurisdiction Act of 2000 contains an unusual and complex pair of sections. One section

---

295. The Posse Comitatus Act, 18 U.S.C. § 1385 (1994), is generally understood not to apply outside the United States, just as most other Title 18 crimes do not. See 13 Op. Off. Legal Counsel 321 (1989); see also United States v. Cotton, 471 F.2d 744 (9th Cir. 1973). But see United States v. Kahn, 35 F.3d 426, 431 n.6 (9th Cir. 1994) (noting that the issue is not definitely resolved). In any event, however, the specific language of the Act empowering military law enforcement officials to make arrests should be seen as controlling over the nineteenth century statute’s general prohibition.


297. Id. § 3263.

298. See supra text accompanying notes 247-255.
limits the power of the government to return a defendant to the United States until certain conditions have been met\textsuperscript{299} and the other section requires some of the initial proceedings in a case to be held before the defendant is returned to the United States.\textsuperscript{300} These provisions were added to the bill during the House deliberations on House bill 3380 to address the concerns of the ACLU and FEA.\textsuperscript{301} In response to these concerns, Representative McCollum offered an amendment to the bill at the full committee markup that added sections 3264 and 3265. For the ease of understanding, each section is addressed below in reverse numerical order.

\textit{a. Section 3265: Initial Proceedings}

Section 3265 governs the initial appearance before a judge of a person who is arrested for or charged with a violation of section 3261 and is not delivered to foreign authorities for prosecution.\textsuperscript{302} The section allows a federal magistrate judge to conduct the initial appearance of the defendant before the court by telephone "or such other means that enables voice communication among the participants."\textsuperscript{303} While a telephone conference is not required under Act because the judge retains the discretion to order the defendant to be returned to the United States to attend the appearance in person,\textsuperscript{304} most initial appearances under the Act should be conducted by this means. Given the perfunctory nature of the initial appearance, there would be little benefit in requiring the defendant to physically appear in court. Section 3265 was enacted in order to appease the ACLU and FEA and was based on the expectation

\begin{itemize}
  \item 300. Id. § 3265.
  \item 301. In light of these changes to the bill, both the ACLU and FEA supported the passage of House bill 3380. Letter from Mary Elizabeth Teasley, Director of Government Relations, National Education Association, and Rachel King, Legislative Counsel, American Civil Liberties Union, to Representative Bill McCollum, Chairman, Subcommittee on Crime, U.S. House of Representatives, and Representative Bobby Scott, ranking minority member, Subcommittee on Crime, U.S. House of Representatives (July 12, 2000) (on file with the Subcommittee on Crime).
  \item 303. Id. § 3265(a)(1)(B).
\end{itemize}
that it would be routinely used. As a result, we attempted to emphasize this fact in the House report by stating the committee's view that "in the vast majority of cases, the initial appearance of a person arrested or charged under section 3261 will be conducted by telephone or other appropriate means so that the defendant may remain in the country where he or she was arrested or was found."\

In order to encourage the use of video conferencing where available, the report also notes that the preferred manner of conducting the hearing is by video teleconference or similar means.\

Section 3265 also governs any detention hearing held under section 3142(f) of Title 18. The section authorizes the judge to conduct a detention hearing by telephone or such other means that allows all parties to participate and to be heard by all other participants. Unlike the initial appearance, however, the detention hearing may be conducted by telephonic communication only when the defendant requests it. The Act treats the detention hearing differently from the initial appearance because a defendant has the right to testify, to present witnesses and other information and to confront witnesses testifying against him at the detention hearing. These rights have constitutional dimensions. Therefore, if the defendant does not request that the detention hearing be conducted by electronic means, it must be held with the defendant physically present in the United States. If the defendant is being held by military authorities at that time of the detention hearing, the government must transport the defendant to the United States for the hearing. If the defendant instead chooses to remain in the foreign country, he will be deemed to have waived any right he or she may have to be physically present before the judge. Further, even if the defendant does request the hearing to be conducted by telephone or video conference, the judge retains the discretion to determine whether to grant such request.

305. Id. at 20.
306. Id.
308. Id.
309. Id. § 3265(b)(2).
312. As I promised Pauley, I included in the House Report factors that the judge might consider in making the decision regarding an electronic hearing. The factors listed in the report are: whether the government opposes the defendant's request (to include considerations based on military exigencies or special circumstances bearing on the issue), the likelihood from information presented at the initial appearance that the defendant will
Section 3265(c) enacts a provision that is likely to cause some concern in military circles. Subsection (c) provides for the appointment of military counsel to represent defendants accused of violating section 3261 during the initial proceedings described in the Act. This subsection provides that if the defendant is financially unable to retain counsel, or if no qualified civilian counsel is available, the judge may appoint qualified military counsel to represent the defendant. The judge may appoint only those members of the military designated for that purpose by the Secretary of Defense. Neither the Act nor the House report prescribe which officers must be designated (except that they must be judge advocates) or how the fact of their designation is to be made known to the non-military magistrate judge. Clearly, this issue will have to be addressed in the implementing regulations for the Act and perhaps also in each service’s regulations that govern the administration of military law in general. The Act limits the representation by appointed military counsel to the initial proceedings described in section 3265, and then only if the defendant is not removed to the United States for those proceedings. In other words, once the government returns the defendant to the United States, or he or she returns voluntarily, the defendant may no longer be represented by a military attorney.

b. Section 3264: Limitation on Removal

The forced removal of a defendant to the United States is governed by section 3264 of the Act. This section was a major provision added to the bill by Representative McCollum in response to the concerns of the ACLU and FEA. Section 3264 limits the power of military and civil law enforcement officials to remove a person arrested for or charged with a violation of section 3261 from the country in which they are arrested or found. As noted in the House Report, the phrase “arrested for or charged with” was used “to make it clear that the limitation applies to situations where the person has been arrested and also where the person has not been arrested but has been charged by indictment or the filing of

be ordered detained, whether the parties intend to present live witness testimony at the hearing, and the residence of any witnesses. House Report, supra note 257, at 20. The language in the report makes it clear that this list is not designed to be an exhaustive list of the factors that a judge must consider.

314. Id. § 3265(c)(1).
315. Id. § 3265(c)(2).
316. Id. § 3265(c)(1).
317. See id. § 3264.
an information” and arrested later.\footnote{318}

Section 3264(a) states the general prohibition forbidding the forcible return to the United States of a person arrested or charged with a violation of section 3261.\footnote{319} Further, the person may not be taken to any foreign country other than a country in which the person is believed to have committed the crime or crimes for which they have been arrested or charged.\footnote{320} This means that once American authorities arrest a person for a violation of section 3261, whether because of a citizen’s complaint or after an information or indictment is returned against the person, the defendant must be held in the country in which he or she was arrested or in the country in which the crime is believed to have been committed. If a person commits a crime in one country and then flees that country, military authorities have the option of returning him or her to the country in which the crime was committed.\footnote{321}

There are five exceptions under which the prohibition on forced removal does not apply. Two exceptions relate to the issue of detention. First, federal magistrate judges may order a defendant to be removed to the United States to appear at a detention hearing.\footnote{322} If that occurs, the Act requires the defendant to be removed to the United States in time to attend the hearing.\footnote{323} Second, if a judge orders a defendant detained pending trial, the Act requires that the defendant be detained in the United States and that he be “promptly removed” to the United States for that purpose.\footnote{324} Additionally, the prohibition does not apply if the defendant is entitled to and does not waive a preliminary examination under the Federal Rules of Criminal Procedure.\footnote{325} While a defendant is not entitled to that hearing if an indictment is returned or an information is filed against him, the Act requires that if that hearing does take place, it must occur within the time limits set forth in the rules and the defendant must be removed to the United States in time to attend it.\footnote{326}

The fourth exception to the prohibition on forced removal of a defendant to the United States gives federal magistrate judges the authority to order the defendant to be removed to the United States at

\begin{footnotes}
\item[318] See House Report, supra note 257, at 18.
\item[320] Id.
\item[321] See id.
\item[322] Id. § 3264(b)(1).
\item[323] Id.
\item[324] Id. § 3264(b)(2).
\item[325] Id. § 3264(b)(3); see also FED. R. CRIM. P. 5, 5.1.
\end{footnotes}
any time. This provision, however, was intended to be a catchall for unforeseen circumstances and not a way for judges to simply ignore the prohibition on removal. To emphasize this point, the exception is described in the House Report as: “removal of a person for a reason other than [those] discussed above would be rare, paragraph (b)(4) grants judges the discretion to order such removal.”

The final exception allows DoD officials to remove a defendant from the place where he or she is arrested if the Secretary of Defense determines that military necessity requires it. The House Report explains that this authority is to be used “only in situations where the person is arrested in an ‘immature theater’ or in such other place where it is not reasonable to expect that the initial proceedings required by section 3265 can be carried out.” Section 3264 allows the military to transfer a defendant to a place other than where the crime was committed or where the person was arrested. However, even in that situation, the authority is limited to removing the defendant only to the “nearest United States military installation outside the United States that is adequate to detain the person and facilitate the initial proceedings described in section 3265.” The term “nearest” should be interpreted to mean the closest military installation to the place from which the defendant is removed.

5. Section 3266: Regulations

Section 3266 of the Act requires the Secretary of Defense to prescribe regulations governing the apprehension, detention, delivery, and removal of persons under chapter 212. The regulations should also provide for the facilitation of the initial proceedings described in section 3265. The regulations must require that, to the fullest extent practicable, notice be given to the civilians to whom the statute applies (i.e., dependents,

---

327. Id. § 3264(b)(4).
328. House Report, supra note 257, at 18; see also supra text accompanying notes 254-255.
332. House Report, supra note 257, at 18. The House Report also states that “[w]hile new section 3264(b)(5) states that the installation must be adequate to ‘facilitate the initial appearance described in section 3265(a),' as a practical matter, it should also be adequate to facilitate the proceedings described in 3265(b).” Id. at 19 n.36.
334. Id.
civilian DoD employees, and contractor personnel). The Act also provides, however, that the failure to provide this notice does not defeat the jurisdiction of the United States over the person or provide a defense to any proceeding arising under the chapter.336

The Act requires the Secretary of Defense to consult with the Secretary of State and the Attorney General in developing the regulations required by section 3266.337 In addition, because Congress intended to use its oversight power to monitor the way in which the military implements the Act, we took the unusual step of requiring the Secretary of Defense to submit a report, containing the proposed regulations and such other information as the Secretary may determine is appropriate, to the House and Senate Committees on the Judiciary.338 In fact, the Act prohibits the regulations from taking effect until ninety days have passed from the date the report is submitted to those committees.339 Any amendments to these regulations must also be submitted to the committees before they can take effect.340

6. Section 3267: Definitions

Section 3267 defines several key words and phrases used throughout chapter 212. Most important among the definitions are the phrases “employed by the Armed Forces outside the United States” and “accompanying the Armed Forces outside the United States.” The Act defines “employed by the Armed Forces outside the United States” to mean a DoD civilian employee (including a nonappropriated fund instrumentality (NAF) employee), a DoD contractor or subcontractor of any level, or an employee of such contractor or subcontractor.341 Section 3267 specifically excludes persons who are nationals of the country in which the crime is believed to have been committed or persons ordinarily residing in that country.342 The phrase “accompanying the Armed Forces outside the United States” is defined as including persons who are

335. Id. § 3266(b)(1).
336. Id. § 3266(b)(2).
337. Id. § 3266(a).
338. Id. § 3266(c).
339. Id. As of the end of December 2001, however, DoD had yet to submit the regulations to the committees for this review.
340. Id.
341. Id. § 3267(1).
342. Id. § 3267(1)(c).
dependents of and reside with military members, DoD civilian employees or NAF employees, or DoD contractors and subcontractors and their employees outside the United States. As with the prior definition, this term also excludes persons who are nationals of the country in which the crime is believed to have been committed or persons ordinarily residing in that country. Finally, the House report makes it clear that juveniles are included within these terms.

B. Issues Not Addressed in the Act

As thorough as the Act is, there are several issues that it does not address. These issues, however, must be examined in order to implement the Act. This section of the Article addresses several of the issues not addressed in the Act. Some of these were known to the drafters of the Act but were intentionally left unaddressed; other issues have been raised by lawyers who have reviewed the Act after its enactment. While many of these issues may be resolved through regulation or memoranda of agreement between the DoD and Justice, some of them may require further congressional action.

1. The Military’s Role After a Defendant is Arrested

One of the gray areas in the Act involves what role the military will play in a case once a person is arrested for violating the Act. Will military authorities contact a United States Attorney directly and present the evidence that they have collected so far, or will officials at Justice take on that responsibility? Will military officials continue to investigate the case and collect evidence against the defendant after the initial arrest? While the Act specifically authorizes military officials to arrest and detain a civilian who may have violated section 3261, it is silent as to whether military officials are to continue to investigate the case.

We wrote the Act to indicate a clear preference that civilian authorities take charge of the defendant at the earliest possible time. While we did not address whether civilian or military authorities would lead the investigation into the crime, it was always our intention that civilian authorities become involved as soon as possible. As a practical matter, federal law enforcement officials will likely seek the involvement of military investigative authorities through the end of the investigation. Given that the military authorities will likely have valuable contacts with

343. Id. § 3267(2).
344. Id. § 3267(2)(c).
host nation authorities, their continued involvement should prove helpful to the federal investigators who will be sent from the United States. As long as all of the parties are clear that the civil law enforcement officials control the investigation, this should not pose any problems.

Similarly, the Act does not address what role the military will have in deciding when and where a case will be presented to a United States Attorney for prosecution. Consistent with our preference for civilian law enforcement involvement as soon as possible, the best approach would be for a procedure to be agreed upon where military authorities communicate the fact of an arrest under the Act to Justice, perhaps to its Office of International Affairs or to a new office created specifically to coordinate prosecutions under the Act. Justice officials would then dispatch investigators to the area where the crime occurred and they would decide if and where to proceed against the defendant.

2. Host Nation Involvement

The Act acknowledges a host nation’s right to prosecute persons who commit crimes in its country, provided it does so in accordance with jurisdiction recognized by the United States.\textsuperscript{346} In most cases, a SOFA will determine which nation has the primary right to prosecute military members. The statute is intended to recognize any such agreement. Of course, absent the Act the host nation would have exclusive jurisdiction over civilians in any event. The Act does not specify when the host country must decide whether it will prosecute and the NATO SOFA only requires that the host nation make this decision “as soon as practicable.”\textsuperscript{347} Therefore, how long must U.S. authorities wait until they begin a prosecution in the United States? There is no clear answer to this question, and it may have to be addressed in future SOFAs.

A related question is the effect of the Act’s provision for host nation prosecutions if the defendant is removed to the United States or voluntarily leaves the host nation and returns to the United States for prosecution. If the host nation eventually commences a prosecution, is prosecution by the United States barred? This turn of events is not addressed in the Act. The statute was drafted with the assumption that the host nation would make a prompt decision as to whether to prosecute the defendant – before he or she returned to the United States. One reading of the statute might suggest that if the host nation commences prosecution at any time, even after the defendant returns to the United

\textsuperscript{346} 18 U.S.C.A. § 3261(b) (2001).

\textsuperscript{347} WOODLIFFE, supra note 13, at 181.
States, then United States' jurisdiction is defeated. However, we did not intend the Act to be an extradition statute requiring the United States to return a defendant to a host nation. The statute was designed to simply ensure that a prosecution in some country would occur. The better interpretation of this section is that unless an existing extradition statute requires the United States to return a defendant present in the United States, then the United States' jurisdiction is not defeated and may proceed.

Another important question concerns the power of U.S. authorities to apprehend and detain civilians in a host nation. The intent of the statute's drafters was that U.S. authorities could detain persons suspected of violating the statute for as long as necessary to deliver them to American civil authorities. But the authority of U.S. military authorities to arrest civilians in a foreign country usually comes from an agreement by the host nation in a SOFA. If a host nation has declined to prosecute a person who violates the Act, may the United States military arrest the person anyway? SOFA provisions that allow American military authorities to assert police powers over civilians are based on the assumption that the defendant may then be tried by the host nation. If they will not be tried by the host nation, does the authority to arrest still exist? If American authorities detain a civilian before the host nation is asked to decide whether to prosecute the person, how long may the defendant be held? Ordinarily, that power is limited to detaining a person for so long as local authorities take to decide whether to take custody of the person. In the event that local authorities choose not to try the person, may U.S. military authorities nevertheless continue to detain the person until American authorities decide whether to prosecute the person in the United States? The answer under present SOFAs may well be no, and many of these agreements may have to be renegotiated in order to reflect the arrest authority given the military in the Act.

3. Assignment of a Case to a United States Attorney

Another related gray area is how to determine which United States Attorney's office will handle the prosecution of a case under the Act. Usually, law enforcement authorities in the judicial district where the crime occurred will refer the case to the United States Attorney's office in that jurisdiction for prosecution. In prosecutions under the Act, which United States Attorney should be presented with the evidence collected and requested to bring the case? If one United States Attorney declines to seek an indictment, may Justice officials approach different United States Attorneys until they find one who is willing to indict? The drafters
of the Act intentionally left this issue open, believing that it was best left to Justice to decide how to implement this aspect of the statute. As discussed more fully below, however, the government could solve the problem by deciding in advance of any prosecution where the initial proceedings in cases under the Act will take place.

4. Venue for the Initial Proceedings

One of the most significant issues left unaddressed by the Act is how federal magistrate judges will be appointed to preside over the initial proceedings that are required for prosecutions under the Act. The Federal Rules of Criminal Procedure provide that venue for the prosecution of an offense is to be in the district in which the offense was committed. When the crime is not committed in any judicial district, as will be the case for all prosecutions under the Act, a Title 18 statute determines the place for trial. For that reason, we did not include a specific venue provision in the bill when we were drafting it. When the bill was amended during the markup process, however, the general prohibition on removing the defendant to the United States was added. As a result, in many cases the initial proceedings under the Act will now occur before the defendant is returned to the United States (and before the venue statute will govern). We chose not to address this issue by amending the bill further because of time limitations. But, in hindsight, we probably should have addressed this important issue.

For example, it may be that judges will not construe the federal venue statute to apply to the initial proceedings under the Act because that statute, by its terms, only determines the place of trial. Unlike Federal Rule of Criminal Procedure 18, the rule that specifies venue for crimes committed in the United States, the statute does not speak in terms of the prosecution of the offense but merely the trial of the offense.

Even if a court did look to the statute for guidance, the application of the statute could lead to conflicting decisions as to the proper jurisdiction to conduct the proceedings. For example, under the Act, the initial proceedings will often occur after the person is arrested, but before the person is brought to the United States and, in many cases, even before


349. 18 U.S.C. § 3238 (1994). Section 3238 provides that venue for trial lies in the place where the defendant is "arrested or first brought." Id. If the person is not arrest or brought, then an indictment or information is to be filed in the district of the offender's last known residence. Id. If the offender's last residence is unknown, then venue lies in the in the District of Columbia. Id. Section 3238 has a long history because it was enacted by the first Congress. See Reid v. Covert, 354 U.S. 1, 8 n.9 (1957) (citing 1 Stat. 113-14).
any indictment is filed. Applying the venue statute to such a case would cause venue to lie only in the District of Columbia. However, the government may eventually bring the defendant to the United States for trial and to a place other than the District of Columbia (as there is no airport in that judicial district). Under the venue statute, venue for trial would lie in the district to which the defendant was actually brought, i.e., where the airplane first lands in the United States. Therefore, applying the federal venue statute to the Act might result in different jurisdictions claiming the right to conduct different portions of the case. This is clearly an unsatisfactory result.

In order to avoid this confusion, the government could simply use its best guess as to where the defendant might be brought and seek out a magistrate in that district to preside over the initial proceedings. Even so, the magistrate judge might still note that no rule or statute specifically authorizes him to preside over those proceedings and so may be reluctant to act. Of course, should the government’s guess as to where the defendant will arrive in the United States be incorrect, the result might again be that a judge in one district would conduct the initial proceedings and a judge in another district would be authorized to preside over the defendant’s trial.

While this gray area is certainly not a fatal defect to prosecutions under the Act, the issue could be addressed by a revision to Federal Rule of Criminal Procedure 18, or by promulgating a new rule that would apply to prosecutions brought under the Act. Congress, however, generally allows the Judicial Conference of the United States and its various rules committees to propose changes in the several sets of rules of procedure. Congress could, instead, amend the statutory venue provision to address the unique procedures under the Act. For example, since prosecutions under this Act are not likely to be common, a single district could be established for all such prosecutions. Another approach could be that one of several districts would be identified for this purpose and assigned based on where the alleged crime occurred (e.g. the Southern District of New York for crimes in Europe, the Southern District of Florida for crimes in Central and South America, and the District of Hawaii for crimes occurring in the Pacific rim countries).

350. In the House Report on House bill 3380, we noted that the [C]ommittee expects that the Department of Justice will develop a procedure for initiating proceedings under chapter 212, which will include some means for selecting the Federal judicial district in which such proceedings will be commenced. The bill does not require, nor does it prohibit, that the initial proceedings of all cases brought under chapter 212 be held in the same judicial district.
5. Training of Military Defense Counsel and Their Liability for Malpractice

As has been discussed, the Act takes a dramatic step in allowing federal judges to appoint military judge advocates to represent civilian defendants during the initial proceedings of a case under the Act. This authority raises several issues, including what additional training should be given to military lawyers and what might be the extent of their liability for the failure to properly represent their clients. While there are similarities between military and non-military criminal practice, judge advocates generally only receive training concerning the provisions of the UCMJ and the Manual for Courts-Martial. Yet, military lawyers who are selected to represent civilians under the Act will have to be familiar with those provisions of Title 18 (including chapter 212) and the Federal Rules of Criminal Procedure that they will encounter during that representation. To ensure that these defense lawyers are properly trained for the task, the Secretary of Defense should mandate that all judge advocates he designates as eligible for appointment to represent civilians under the Act receive appropriate training from their respective services for these additional responsibilities.

Military lawyers representing civilians under the Act will be subject to liability for malpractice. Until the year 2000, the malpractice of federal public defenders acting within the scope of their appointment subjected the government to liability under the Federal Tort Claims Act (FTCA). This act has now been modified slightly. Judge advocates who commit...
malpractice while representing civilians may not render the government liable because the FTCA does not apply to claims arising in a foreign country.\footnote{355} As a result, any malpractice claims by clients represented by military lawyers in foreign countries would be barred under the FTCA and the government's sovereign immunity may preclude any other recovery against the government. The lack of a statute allowing those clients to recover from the government may lead some courts to find that judge advocates were not acting within the scope of their employment in representing defendants. If so, military lawyers representing clients in foreign countries may find themselves personally liable. However, Judge advocates will never actually defend civilian defendants at trial, and one would hope that nothing could go so wrong during the course of their short-term representation that would actually raise this issue.

6. Applicability to Foreign Nationals

One area in which there was very little discussion during the drafting, the public hearings, or the floor debate on the Act is the breadth of its applicability to foreign nationals. The Act applies to the criminal acts of all foreign nationals who are employed by or accompanying the United States Armed Forces abroad.\footnote{356} The only exception to this application is when the persons employed by or accompanying the Armed Forces are nationals of the country in which the crime occurs or they ordinarily live there.\footnote{357} This exception was included in the bill, in part out of a belief that host nations would likely take an interest in punishing the criminal acts of their own citizens, even if they were committed only against Americans or American-owned property. In addition, this exception was included to address concerns that host nations might resist the presence of American troops in their countries if allowing such presence might subject its own citizens to trial in the United States.

Yet, while the statute only extends jurisdiction to third-nation foreign nationals, it represents a significant expansion of the reach of American criminal law over non-citizens who commit acts outside of the United States. While some federal criminal statutes do apply to acts committed by foreign persons outside of the United States, those statutes also require injury to an American national or property or that some

\footnote{355} The FTCA does not apply to claims arising in a foreign country. 28 U.S.C. § 2680(k) (1994). As military lawyers will only represent clients in foreign countries under the Act, any malpractice claims would be barred under the FTCA. As a result, it may be that the government's sovereign immunity precludes any recovery by a person harmed.

\footnote{356} See supra text accompanying notes 276 and 345.

\footnote{357} 18 U.S.C.A. § 3267(1)(c), (2)(c).
consequence of their acts occur in the United States.\textsuperscript{358} The Military Exterritorial Jurisdiction Act of 2000 does not require such injury be shown; in fact, the Act does not require that any American person or property be involved at all. For example, if a third-country national accompanying the United States Armed Forces, such as a contract employee, commits a crime against another third-country national, the Act gives United States courts subject matter jurisdiction over the crime even though no American was involved in any way.

This portion of the Act will likely be subjected to a court challenge. There is, of course, ample reason for the U.S. government to prosecute these perpetrators. Many third-country nationals may only be present in a host nation because of their relationship with the United States military. Should the host nation decline to prosecute an offending third-country national, all of the potential harms of the jurisdictional gap discussed above would threaten our military again. Further, even though no American may be involved, the potential harm to the confidence of the United States military members and their dependents in the U.S. government is a sufficient interest to justify the U.S. government's desire to assert its jurisdiction over third-country nationals.

7. The Breadth of the Act

The Act was written to have a broad scope. The language we used to describe the crime—"conduct outside the United States that would constitute an offense punishable by imprisonment for more than [one] year if the conduct had been engaged in within the special maritime and territorial jurisdiction of the United States"—is very broad indeed. In drafting the statute, all of us had traditional common law crimes in mind—murder, rape and other sexual offenses, drug trafficking, larceny, etc. These crimes are found in Titles 18 and 21 of the United States Code. There are, however, other federal statutes that provide for criminal liability, which are not codified in these titles.\textsuperscript{359} Even though many of these statutes refer to acts within the United States, the language used in the Military Exterritorial Jurisdiction Act 2000 would seem to include these crimes within the scope of the Act. None of drafters specifically considered whether these crimes should have been


Because the government always retains the discretion to decide whether to bring a case, this gray area may not cause problems. If many cases are brought under the Act to punish conduct that would not fall under Titles 18 or 21, however, Congress may decide to narrow the scope of section 3261 so that it applies only to acts punishable under those titles.

8. Applicability to Other Americans Abroad

A few months after the Act had been in effect, representatives of the State Department met with staff members of the House Committee on International Relations and me to discuss several legislative changes that they wanted Congress to consider. One of them was a proposal to amend the Act to expand its applicability to include employees of the State Department and their family members accompanying them abroad. The State Department representatives noted that they have thousands of employees and accompanying family members stationed at diplomatic missions throughout the world. Any crimes these persons might commit would go unpunished because of the same jurisdictional gap in the law that the DoD had brought to our attention and which led us to draft the Act. While they did not offer examples of specific crimes that actually had been committed in the past by State Department employees or family members, the State Department representatives did mention that such cases had been discussed within the department and had prompted their request to our two committees.

When we drafted the Act, neither DoD nor Justice mentioned any concern that crimes committed by State Department personnel or their families were falling through the gap. In addition, the executive branch reports issued over the years which we reviewed at the time we drafted the Act addressed only the effect of the jurisdictional gap on crimes committed by DoD personnel and their family members. As a result, we simply never considered applying the Act to anyone other than DoD employees, contractors, and their respective family members. In hindsight, we should have thought more about this. The jurisdictional gap clearly allowed crimes committed by any Americans abroad to go unpunished. All of the justifications for enacting the new law with respect to DoD personnel and their family members also apply with respect to State Department personnel and their dependents. Further,

360. See supra notes 137-146 and accompanying text.
361. See supra text accompanying notes 160-162.
because the option of host nation prosecution is entirely prevented as to State Department personnel who are given diplomatic immunity (unless our government chooses to waive it) applying the Act to these persons might even be more important.

We told the State Department representatives who met with us that we were hesitant to amend the new statute until after it had been used on at least a few occasions. Such a delay would presumably permit the Act to be subjected to legal challenges of its constitutionality. However, I do believe that amending the statute to apply it to State Department employees and their family members abroad is necessary. Congress should also consider what other personnel should be subjected to the Act. For example, there are an increasingly large number of Justice Department personnel, including Federal Bureau of Investigation and Drug Enforcement Administration employees, stationed or operating around the world. In some cases, these employees are accompanied by family members. Should not these employees also be subject to prosecution in the United States if they commit crimes abroad? Unquestionably, the answer is yes. To ensure that this can happen, Congress should amend the Act, at the appropriate time, to apply it to all American government employees stationed abroad and their family members who accompanying them.

IV. CONCLUSION

Despite the issues that remain to be considered, the Military Extraterritorial Jurisdiction Act of 2000 is a significant development in American criminal law. The Act closes a jurisdictional gap in the law that has plagued DoD and Justice officials for decades. In doing so, the Act will help the military instill confidence in its personnel and their families that the government is doing all it can to protect them when it sends them abroad in defense of the nation's interests. Knowing that the Act has been passed will also build trust with our allies who will now be more confident that the United States can effectively police the actions of its personnel who are deployed to a foreign country. Most importantly, closing the jurisdictional gap will help to ensure that justice can be done whenever a member of our military or a person accompanying it abroad commits a crime.
To establish court-martial jurisdiction over civilians serving with the Armed Forces during contingency operations, and to establish Federal jurisdiction over crimes committed outside the United States by former members of the Armed Forces and civilians accompanying the Armed Forces outside the United States.

IN THE SENATE OF THE UNITED STATES
APRIL 13, 1999

Mr. SESSIONS (for himself and Mr. DeWINE) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To establish court-martial jurisdiction over civilians serving with the Armed Forces during contingency operations, and to establish Federal jurisdiction over crimes committed outside the United States by former members of the Armed Forces and civilians accompanying the Armed Forces outside the United States.

Be it enacted by the Senate and House of Representa-
tives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the “Military and Extraterritorial Jurisdiction Act of 1999”.
SEC. 2. FINDINGS.

Congress makes the following findings:

(1) Civilian employees of the Department of Defense, and civilian employees of Department of Defense contractors, provide critical support to the Armed Forces of the United States that are deployed during a contingency operation.

(2) Misconduct by such persons undermines good order and discipline in the Armed Forces, and jeopardizes the mission of the contingency operation.

(3) Military commanders need the legal tools to address adequately misconduct by civilians serving with Armed Forces during a contingency operation.

(4) In its present state, military law does not permit military commanders to address adequately misconduct by civilians serving with Armed Forces, except in time of a congressionally declared war.

(5) To address this need, the Uniform Code of Military Justice should be amended to provide for court-martial jurisdiction over civilians serving with Armed Forces in places designated by the Secretary of Defense during a "contingency operation" expressly designated as such by the Secretary of Defense.

(6) This limited extension of court-martial jurisdiction over civilians is dictated by military nee--
sity, is within the constitutional powers of Congress
to make rules for the government of the Armed
Forces, and, therefore, is consistent with the Con-
stitution of the United States and United States
public policy.

(7) Many thousand civilian employees of the
Department of Defense, civilian employees of De-
partment of Defense contractors, and civilian de-
pendents accompany the Armed Forces to install-
tions in foreign countries.

(8) Misconduct among such civilians has been a
longstanding problem for military commanders and
other United States officials in foreign countries,
and threatens United States citizens, United States
property, and United States relations with host
countries.

(9) Federal criminal law does not apply to
many offenses committed outside of the United
States by such civilians and, because host countries
often do not prosecute such offenses, serious crimes
often go unpunished and, to address this jurisdic-
tional gap, Federal law should be amended to punish
serious offenses committed by such civilians outside
the United States, to the same extent as if those of-
fenses were committed within the special maritime
and territorial jurisdiction of the United States.

(10) Federal law does not apply to many crimes
committed outside the United States by members of
the Armed Forces who separate from the Armed
Forces before they can be identified, thus escaping
court martial jurisdiction and, to address this jurisdic-
tional gap, Federal law should be amended to
punish serious offenses committed by such persons
outside the United States, to the same extent as if
those offenses were committed within the special
maritime and territorial jurisdiction of the United
States.

SEC. 3. COURT-MARTIAL JURISDICTION.
(a) JURISDICTION DURING CONTINGENCY OPER-
ATIONS.—Section 802(a) of title 10, United States Code
(article 2(a) of the Uniform Code of Military Justice), is
amended by inserting after paragraph (12) the following:
"(13) To the extent not covered by paragraphs
(10) and (11), persons not members of the armed
forces who, in support of an operation designated as
a contingency operation as described in section
101(a)(13)(A) of this title, are serving with and ac-
companying an armed force in a place or places out-
side the United States specified by the Secretary of
Defense, as follows:

"(A) Employees of the Department of De-
fense.

"(B) Employees of any Department of De-
fense contractor who are so serving in connec-
tion with the performance of a Department of
Defense contract.”.

(b) EFFECTIVE DATE.—The amendment made by
subsection (a) shall take effect on the date of the enact-
ment of this Act and apply with respect to acts or omis-
sions occurring on or after that date.

SEC. 4. FEDERAL JURISDICTION.

(a) CRIMINAL OFFENSES COMMITTED OUTSIDE THE
UNITED STATES.—Title 18, United States Code, is
amended by inserting after chapter 211 the following:

"CHAPTER 212—CRIMINAL OFFENSES
COMMITTED OUTSIDE THE UNITED
STATES

"See.
"3261. Criminal offenses committed by persons formerly serving with, or pres-
ently employed by or accompanying, the Armed Forces outside
the United States.

"3262. Delivery to authorities of foreign countries.
"3263. Regulations.
"3264. Definitions.
§ 3261. Criminal offenses committed by persons formerly serving with, or presently employed by or accompanying, the Armed Forces outside the United States

(a) In General.—Whoever, while serving with, employed by, or accompanying the Armed Forces outside of the United States, engages in conduct 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, shall be guilty of a like offense and subject to a like punishment.

(b) Concurrent Jurisdiction.—Nothing in this chapter may be construed to deprive a court-martial, military commission, provost court, or other military tribunal of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by a court-martial, military commission, provost court, or other military tribunal.

(c) Action by Foreign Government.—No prosecution may be commenced against a person under this section if a foreign government, in accordance with jurisdiction recognized by the United States, has prosecuted or is prosecuting such person for the conduct constituting such offense, except upon the approval of the Attorney General or the Deputy Attorney General (or a person act-
"(d) ARRESTS.—

"(1) LAW ENFORCEMENT PERSONNEL.—The Secretary of Defense may designate and authorize any person serving in a law enforcement position in the Department of Defense to arrest outside of the United States any person described in subsection (a) if there is probable cause to believe that such person engaged in conduct that constitutes a criminal offense under subsection (a).

"(2) RELEASE TO CIVILIAN LAW ENFORCEMENT.—A person arrested under paragraph (1) shall be released to the custody of civilian law enforcement authorities of the United States for removal to the United States for judicial proceedings in relation to conduct referred to in such paragraph unless—

"(A) such person is delivered to authorities of a foreign country under section 3262; or

"(B) such person has had charges brought against him or her under chapter 47 of title 10 for such conduct.

"(3) JUSTIFIABLE DELAY.—The arrest of a person outside the United States by a person designated under
paragraph (1), and the removal of the arrested person to the United States under paragraph (2), are extraordinary circumstances justifying delay in bringing the arrested person before a magistrate as required by the fourth amendment to the United States Constitution and the Federal Rules of Criminal Procedure.

“§ 3262. Delivery to authorities of foreign countries

“(a) In General.—Any person designated and authorized under section 3261(d) may deliver a person described in section 3261(a) to the appropriate authorities of a foreign country in which such person is alleged to have engaged in conduct described in section 3261(a) of this section if—

“(1) the appropriate authorities of that country request the delivery of the person to such country for trial for such conduct as an offense under the laws of that country; and

“(2) the delivery of such person to that country is authorized by a treaty or other international agreement to which the United States is a party.

“(b) Determination by the Secretary.—The Secretary of Defense shall determine which officials of a foreign country constitute appropriate authorities for purposes of this section.
"§ 3263. Regulations

The Secretary of Defense shall issue regulations governing the apprehension, detention, and removal of persons under this chapter. Such regulations shall be uniform throughout the Department of Defense.

"§ 3264. Definitions

In this chapter—

(1) a person is 'accompanying the Armed Forces outside of the United States' if the person—

(A) is a dependent of—

(i) a member of the Armed Forces;

(ii) a civilian employee of a military department or of the Department of Defense; or

(iii) a Department of Defense contractor, or is a dependent of an employee of a Department of Defense contractor;

(B) is residing with such member, civilian employee, contractor, or contractor employee outside the United States; and

(C) is not a national of or ordinarily resident in the host nation;

(2) the term 'Armed Forces' has the same meaning as in section 101(a)(4) of title 10; and

(3) a person is 'employed by the Armed Forces outside of the United States' if the person—
“(A) is employed as a civilian employee of the Department of Defense, as a Department of Defense contractor, or as an employee of a Department of Defense contractor;

“(B) is present or residing outside of the United States in connection with such employment; and

“(C) is not a national of or ordinarily resident in the host nation.”.

(b) CLERICAL AMENDMENT.—The table of chapters at the beginning of part II of title 18, United States Code, is amended by inserting after the item relating to chapter 211 the following:

"212. Criminal Offenses Committed Outside the United States ......................................................... 3621".
To amend title 18, United States Code, to establish Federal jurisdiction over offenses committed outside the United States by persons employed by or accompanying the Armed Forces, or by members of the Armed Forces who are released or separated from active duty prior to being identified and prosecuted for the commission of such offenses, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

NOVEMBER 16, 1999

Mr. CHAMBLISS (for himself and Mr. MCCOLLUM) introduced the following bill; which was referred to the Committee on the Judiciary, and in addition to the Committee on Armed Services, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned.

A BILL

To amend title 18, United States Code, to establish Federal jurisdiction over offenses committed outside the United States by persons employed by or accompanying the Armed Forces, or by members of the Armed Forces who are released or separated from active duty prior to being identified and prosecuted for the commission of such offenses, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,
SECTION 1. SHORT TITLE.

This Act may be cited as the "Military Extraterritorial Jurisdiction Act of 1999".

SEC. 2. FEDERAL JURISDICTION.

(a) Certain Criminal Offenses Committed Outside the United States.—Title 18, United States Code, is amended by inserting after chapter 211 the following new chapter:

"CHAPTER 212—MILITARY EXTRATERRITORIAL JURISDICTION"

"§ 3261. Criminal offenses committed by certain members of the Armed Forces and by persons employed by or accompanying the Armed Forces outside the United States

“(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) in accordance with section 802 of such title, and thereafter ceases to be subject to such chapter without having been tried by court-martial with respect to such conduct;

shall be punished as provided for that offense.

“(b) Nothing in this chapter may be construed to deprive a court-martial, military commission, provost court, or other military tribunal of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by a court-martial, military commission, provost court, or other military tribunal.

“(c) No prosecution may be commenced against a person under this section if a foreign government, in accordance with jurisdiction recognized by the United States, has prosecuted or is prosecuting such person for the conduct constituting such offense, except upon the approval of the Attorney General or the Deputy Attorney General (or a person acting in either such capacity), which function of approval may not be delegated.

“(d)(1) The Secretary of Defense may designate and authorize any person serving in a law enforcement position in the Department of Defense to arrest, in accordance with applicable international agreements, outside the...
United States any person described in subsection (a) if there is probable cause to believe that such person engaged in conduct that constitutes a criminal offense under subsection (a).

"(2) A person arrested under paragraph (1) shall be delivered as soon as practicable to the custody of civilian law enforcement authorities of the United States for removal to the United States for judicial proceedings in relation to conduct referred to in such paragraph unless—

"(A) such person is delivered to authorities of a foreign country under section 3262; or

"(B) such person has had charges brought against him or her under chapter 47 of title 10 for such conduct.

§3262. Delivery to authorities of foreign countries
"(a) Any person designated and authorized under section 3261(d) may deliver a person described in section 3261(a) to the appropriate authorities of a foreign country in which such person is alleged to have engaged in conduct described in section 3261(a) if—

"(1) appropriate authorities of that country request the delivery of the person to such country for trial for such conduct as an offense under the laws of that country; and
“(2) the delivery of such person to that country is authorized by a treaty or other international agreement to which the United States is a party.

“(b) The Secretary of Defense, in consultation with the Secretary of State, shall determine which officials of a foreign country constitute appropriate authorities for purposes of this section.

§ 3263. Regulations

“(a) The Secretary of Defense, after consultation with the Secretary of State and the Attorney General, shall prescribe regulations governing the apprehension, detention, delivery, and removal of persons under this chapter. Such regulations shall be uniform throughout the Department of Defense.

“(b) (1) The Secretary of Defense, after consultation with the Secretary of State and the Attorney General, shall prescribe regulations requiring that, to the maximum extent practicable, notice shall be provided to any person employed by or accompanying the Armed Forces outside the United States who is not a national of the United States that such person is potentially subject to the criminal jurisdiction of the United States under this chapter.

“(2) A failure to provide notice in accordance with the regulations prescribed under paragraph (1) shall not defeat the jurisdiction of a court of the United States or
provide a defense in any judicial proceeding arising under
this chapter.

§ 3264. Definitions

As used in this chapter—

(1) to be ‘employed by the Armed Forces outside the United States’ means to be—

(A) employed as a civilian employee of the Department of Defense (including a non-appropriated fund instrumentality of the Department), as a Department of Defense contractor (including a subcontractor at any tier), or as an employee of a Department of Defense contractor (including a subcontractor at any tier);

(B) present or residing outside the United States in connection with such employment; and

(C) not a national of or ordinarily resident in the host nation;

(2) to be ‘accompanying the Armed Forces outside the United States’ means to be—

(A) a dependent of—

(i) a member of the Armed Forces;

(ii) a civilian employee of a military department or of the Department of De-
fense (including a nonappropriated fund instrumentality of the Department); or

"(iii) a Department of Defense contractor (including a subcontractor at any tier) or an employee of a Department of Defense contractor (including a subcontractor at any tier);

"(B) residing with such member, civilian employee, contractor, or contractor employee outside the United States; and

"(C) not a national of or ordinarily resident in the host nation; and

"(3) ‘Armed Forces’ has the meaning given the term ‘armed forces’ in section 101(a)(4) of title 10.”.

(b) EFFECTIVE DATE OF REGULATIONS.—The regulations prescribed by the Secretary of Defense under section 3263 of title 18, United States Code, as added by subsection (a) of this section, and any amendments to those regulations, shall not take effect before the date that is 90 days after the date on which the Secretary submits a report containing those regulations or amendments (as applicable) to the Committee on the Judiciary of the House of Representatives and the Committee on the Judiciary of the Senate.

**HR 3380 IH**
(c) Clerical Amendment.—The table of chapters for part II of title 18, United States Code, is amended by inserting after the item relating to chapter 211 the following new item:

"212. Military Extraterritorial Jurisdiction ..................... 3261".
APPENDIX C

AMENDMENT TO H.R. 3380
OFFERED BY MR. MCCOLLUM

(Page & line nos. refer to Subcommittee Amendment in the Nature of a Substitute as Ordered Reported on May 11, 2000)

Amend the text to read as follows:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Military Extraterritorial Jurisdiction Act of 2000".

SEC. 2. FEDERAL JURISDICTION.

(a) CERTAIN CRIMINAL OFFENSES COMMITTED OUTSIDE THE UNITED STATES.—Title 18, United States Code, is amended by inserting after chapter 211 the following new chapter:

"CHAPTER 212—MILITARY EXTRATERRITORIAL JURISDICTION"

"Sec.

"3261. Criminal offenses committed by certain members of the Armed Forces and by persons employed by or accompanying the Armed Forces outside the United States.

"3262. Arrest and commitment.

"3263. Delivery to authorities of foreign countries.

"3264. Limitation on removal, initial appearance.

"3265. Regulations.

"3266. Definitions."
§3261. Criminal offenses committed by certain members of the Armed Forces and by persons employed by or accompanying the Armed Forces outside the United States

(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.

(b) No prosecution may be commenced against a person under this section if a foreign government, in accordance with jurisdiction recognized by the United States, has prosecuted or is prosecuting such person for the conduct constituting such offense, except upon the approval of the Attorney General or the Deputy Attorney General (or a person acting in either such capacity), which function of approval may not be delegated.

(c) Nothing in this chapter may be construed to deprive a court-martial, military commission, provost court, or other military tribunal of concurrent jurisdiction with
respect to offenders or offenses that by statute or by the
law of war may be tried by a court-martial, military com-
mission, provost court, or other military tribunal.

“(d) No prosecution may be commenced against a
member of the Armed Forces subject to chapter 47 of title
10 (the Uniform Code of Military Justice) under this sec-
tion unless—

“(1) such member ceases to be subject to such
chapter; or

“(2) an indictment or information charges that
the member committed the offense with 1 or more
other defendants, at least 1 of whom is not subject
to such chapter.

“§ 3262. Arrest and commitment

“(a) The Secretary of Defense may designate and au-
 thorize any person serving in a law enforcement position
in the Department of Defense to arrest, in accordance
with applicable international agreements, outside the
United States any person described in section 3261(a) if
there is probable cause to believe that such person violated
3261(a).

“(b) Except as provided in sections 3263 and 3264,
a person arrested under subsection (a) shall be delivered
as soon as practicable to the custody of civilian law en-
forcement authorities of the United States for removal to
the United States for judicial proceedings in relation to conduct referred to in such subsection unless such person has had charges brought against him or her under chapter 47 of title 10 for such conduct.

§ 3263. Delivery to authorities of foreign countries

“(a) Any person designated and authorized under section 3262(a) may deliver a person described in section 3261(a) to the appropriate authorities of a foreign country in which such person is alleged to have violated section 3261(a) if—

“(1) appropriate authorities of that country request the delivery of the person to such country for trial for such conduct as an offense under the laws of that country; and

“(2) the delivery of such person to that country is authorized by a treaty or other international agreement to which the United States is a party.

“(b) The Secretary of Defense, in consultation with the Secretary of State, shall determine which officials of a foreign country constitute appropriate authorities for purposes of this section.

§ 3264. Limitation on removal; initial appearance

“(a) Except as provided in subsection (b), and except for a person delivered to authorities of a foreign country under section 3263, a person arrested under section
3262(a) shall not, before the indictment of the person (or the filing of an information if indictment is waived), be removed—

“(1) to the United States; or
“(2) to any foreign country other than a country in which such person is believed to have violated section 3261(a).

“(b) The Secretary of Defense may waive the limitation in subsection (a) if the Secretary determines that military necessity so requires, in which case the person shall be removed to the nearest United States military installation outside the United States adequate to detain the person and to facilitate the initial appearance described in subsection (c).

“(c)(1) In the case of each person arrested under section 3262(a) who is not delivered to authorities of a foreign country under section 3263, the initial appearance of that person under the Federal Rules of Criminal Procedure—
“(A) shall be conducted by a federal magistrate judge; and
“(B) may be carried out by telephony or such other means that enables voice communication among the participants, including any counsel representing the person.
“(2) In conducting the initial appearance, the federal magistrate judge shall also determine whether there is probable cause to believe that an offense under section 3261(a) was committed and that the person committed it.

“(3) This subsection shall not affect whether, or in what manner, any preliminary examination of the person under the Federal Rules of Criminal Procedure is conducted, except that the person shall be physically present at any such preliminary examination.

“(4) The location of the federal magistrate judge conducting the initial appearance under this subsection shall not establish venue, under section 3238 of this title or otherwise, for any further proceedings concerning the person.

“§ 3265. Regulations

“(a) The Secretary of Defense, after consultation with the Secretary of State and the Attorney General, shall prescribe regulations governing the apprehension, detention, delivery, and removal of persons under this chapter and the facilitation of proceedings under section 3264. Such regulations shall be uniform throughout the Department of Defense.

“(b)(1) The Secretary of Defense, after consultation with the Secretary of State and the Attorney General, shall prescribe regulations requiring that, to the maximum extent practicable, notice shall be provided to any person
employed by or accompanying the Armed Forces outside the United States who is not a national of the United States that such person is potentially subject to the criminal jurisdiction of the United States under this chapter.

“(2) A failure to provide notice in accordance with the regulations prescribed under paragraph (1) shall not defeat the jurisdiction of a court of the United States or provide a defense in any judicial proceeding arising under this chapter.

“(c) The regulations prescribed under this section, and any amendments to those regulations, shall not take effect before the date that is 90 days after the date on which the Secretary of Defense submits a report containing those regulations or amendments (as applicable) to the Committee on the Judiciary of the House of Representatives and the Committee on the Judiciary of the Senate.

“§ 3266. Definitions

“As used in this chapter:

“(1) The term ‘employed by the Armed Forces outside the United States’ means—

“(A) employed as a civilian employee of the Department of Defense (including a non-appropriated fund instrumentality of the Department), as a Department of Defense con-
tractor (including a subcontractor at any tier),
or as an employee of a Department of Defense
contractor (including a subcontractor at any
tier);

"(B) present or residing outside the
United States in connection with such employ-
ment; and

"(C) not a national of or ordinarily resi-
dent in the host nation.

"(2) The term ‘accompanying the Armed
Forces outside the United States’ means—

"(A) a dependent of—

"(i) a member of the Armed Forces;

"(ii) a civilian employee of the De-
partment of Defense (including a non-
appropriated fund instrumentality of the
Department); or

"(iii) a Department of Defense con-
tractor (including a subcontractor at any
tier) or an employee of a Department of
Defense contractor (including a subcon-
tractor at any tier);

"(B) residing with such member, civilian
employee, contractor, or contractor employee
outside the United States; and
“(C) not a national of or ordinarily resident in the host nation.

“(3) The term ‘Armed Forces’ has the meaning given the term ‘armed forces’ in section 101(a)(4) of title 10.”.

(b) CLERICAL AMENDMENT.—The table of chapters for part II of title 18, United States Code, is amended by inserting after the item relating to chapter 211 the following new item:

“212. Military Extraterritorial Jurisdiction .................. 3261".