

MILITARY EXTRATERRITORIAL JURISDICTION
ACT OF 2000

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JULY 20, 2000.—Committed to the Committee of the Whole House on the State of
the Union and ordered to be printed
—————

Mr. MCCOLLUM, from the Committee on the Judiciary,
submitted the following

R E P O R T

[To accompany H.R. 3380]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 3380) amending 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, having considered the same, reports favorably thereon with an amendment and recommends that the bill as amended do pass.

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The amendment is as follows:

Strike out all after the enacting clause and insert in lieu thereof the following:

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.
 “3265. Initial proceedings.
 “3266. Regulations.
 “3267. 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 commission, 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 section 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 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 section 3261(a) if there is probable cause to believe that such person violated section 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 enforcement 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

“(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 for or charged with a violation of section 3261(a) shall not 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 limitation in subsection (a) does not apply if—

“(1) a Federal magistrate judge orders the person to be removed to the United States to be present at a detention hearing held pursuant to section 3142(f);

“(2) a Federal magistrate judge orders the detention of the person before trial pursuant to section 3142(e), in which case the person shall be promptly removed to the United States for purposes of such detention;

“(3) the person is entitled to, and does not waive, a preliminary examination under the Federal Rules of Criminal Procedure, in which case the person shall be removed to the United States in time for such examination;

“(4) a Federal magistrate judge otherwise orders the person to be removed to the United States; or

“(5) the Secretary of Defense determines that military necessity requires that the limitations in subsection (a) be waived, 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 section 3265(a).

“§ 3265. Initial proceedings

“(a)(1) In the case of any person arrested for or charged with a violation of section 3261(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) If the Federal magistrate judge determines that probable cause exists that the person committed an offense under section 3261(a), and if no motion is made seeking the person’s detention before trial, the Federal magistrate judge shall also determine at the initial appearance the conditions of the person’s release before trial under chapter 207 of this title.

“(b) In the case of any person described in subsection (a), any detention hearing of that person under section 3142(f)—

“(1) shall be conducted by a Federal magistrate judge; and

“(2) at the request of the person, may be carried out by telephony or such other means that enables voice communication among the participants, including any counsel representing the person.

“(c)(1) If any initial proceeding under this section with respect to any such person is conducted while the person is outside the United States, and the person is entitled to have counsel appointed for purposes of such proceeding, the Federal magistrate judge may appoint as such counsel for purposes of such hearing a qualified military counsel.

“(2) For purposes of this subsection, the term ‘qualified military counsel’ means a judge advocate made available by the Secretary of Defense for purposes of such proceedings, who—

“(A) is a graduate of an accredited law school or is a member of the bar of a Federal court or of the highest court of a State; and

“(B) is certified as competent to perform such duties by the Judge Advocate General of the armed force of which he is a member.

“§ 3266. 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 3265. 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 the case may be) to the Committee on the Judiciary of the House of Representatives and the Committee on the Judiciary of the Senate.

“§ 3267. 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 nonappropriated 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) 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 Department of Defense (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.

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

“(4) The terms ‘Judge Advocate General’ and ‘judge advocate’ have the meanings given such terms in section 801 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”.

PURPOSE AND SUMMARY

H.R. 3380 would amend Federal law to establish Federal criminal jurisdiction over offenses committed outside the United States by persons employed by or accompanying the United States Armed Forces. It would also establish Federal criminal jurisdiction over offenses committed outside the United States by members of the Armed Forces persons who commit crimes abroad while members of the Armed Forces but who are not tried for those crimes by military authorities and later cease to be subject to military control. The bill authorizes certain military personnel to make arrests of persons who commit these acts and specifies when persons arrested

are to be turned over to civil law enforcement officials. The bill also sets forth procedures defining the Government's power to forcibly remove a person arrested or charged with a crime under the bill to the United States. Finally, the bill provides procedures whereby certain initial proceedings that occur in connection with an investigation and prosecution of the new offense can occur by telephone or other electronic means before the defendant is brought to the United States.

BACKGROUND AND NEED FOR THE LEGISLATION

H.R. 3380 would amend Federal law to extend the application of its criminal jurisdiction to persons, both United States citizens and foreign nationals, who commit criminal acts while employed by or otherwise accompanying the United States Armed Forces outside the United States. It would also extend Federal criminal jurisdiction to persons who commit such acts while members of the Armed Forces but who are not tried for those crimes by military authorities and later cease to be subject to military control. Because many crimes, such as sexual assault, arson, robbery, larceny, embezzlement, and fraud, currently do not have extraterritorial effect, there is a "jurisdictional gap" that, in many cases, allows such crimes to go unpunished. Although host foreign nations have jurisdiction to prosecute such acts committed within their nation, they frequently decline to exercise jurisdiction when an American is the victim or when the crime involves only property owned by Americans. H.R. 3380 would close this gap by establishing a new Federal crime involving 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.

JURISDICTION OVER CRIMES COMMITTED BY AMERICANS OUTSIDE THE U.S.

1. U.S. Prosecution of Crimes Committed by Members of the Armed Forces.

The Uniform Code of Military Justice (UCMJ),¹ regulates the conduct of all persons serving in the United States Armed Forces. 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 punished under Federal or State law, depending upon where the conduct took place. Military members who commit criminal acts 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 usually is subject to the jurisdiction of the nation in which the criminal act occurs (as well as the UCMJ), provided that there is a functioning government in the place where the act was committed. 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

¹ 10 U.S.C. §§ 801-940.

of Forces agreement, commonly called a “SOFA,” that the United States has entered into with the host nation and which governs many aspects of the deployment of American forces in that country. With respect to criminal prosecution, the typical SOFA gives American military authorities the exclusive right to exercise jurisdiction over acts that violate United States law, but not host nation law, and gives the host nation exclusive jurisdiction over offenses under its law that are not offenses under United States law. For acts that violate the laws of both countries, the SOFA gives either the United States or the host nation a primary right of jurisdiction, depending on the circumstances of the offense (e.g., the United States will have primary right of jurisdiction over offenses against Americans or United States property or which arise out of the performance of official duty). 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.

2. *U.S. Prosecution of Crimes Committed by Civilians Employed By or Accompanying the Armed Forces.*

Civilians have served with or accompanied American forces in the field or onboard ship since the founding of the United States, but not in significant numbers until the Civil War. During Operations Desert Shield and Desert Storm, however, thousands of Department of Defense (DoD) civilian and contract employees were present in the host nations.² And with the rapid growth of contingency operations following Operation Desert Storm, significant numbers of civilian and contract employees have been deployed to places such 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 58,600 civilian employees of the Department of Defense working overseas.³

Family members of American service personnel and civilian employees represent a large segment of the civilians who accompany United States forces overseas. In 1999, there were more than 193,000 dependent family members of military personnel living with them abroad.⁴ More than 14,000 dependents of DoD civilian employees also were living overseas that year.⁵

Civilians accompanying the Armed Forces “in the field” have been subject to court-martial jurisdiction since the Revolutionary War. In World Wars I and II, civilians accompanying the force in the field were tried by court-martial.⁶ The UCMJ, enacted in 1950, contains two provisions that authorize courts martial to try civil-

²Approximately 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 (April 18, 1997)(hereinafter “Overseas Jurisdiction Advisory Committee Report”). This report was required by Congress in The National Defense Authorization Act for Fiscal Year 1996, Public Law No. 104-106 (1996).

³Directorate for Information, Operations, and Reports, Department of Defense, Worldwide Manpower Distribution by Geographical Area 15-17 (1999)(hereinafter “DIOR Report”). This figure represents a decrease from more than 96,000 civilian employees in 1996. See, Overseas Jurisdiction Advisory Committee Report at 24.

⁴DIOR Report at 27.

⁵*Id.*

⁶See, e.g., *Ex parte Gerlack*, 247 F. 616 (S.D.N.Y. 1917); *Hines v. Mikell*, 259 F. 28 (4th Cir. 1919); *In re Berue*, 54 F. Supp. 252 (S.D. Ohio 1944); *McCune v. Kilpartick*, 53 F. Supp. 80 (E.D. Va. 1943).

ians accompanying the military for acts that violate the UCMJ.⁷ Beginning in 1957, a series of Supreme Court decisions severely limited the application of those provisions, effectively limiting UCMJ jurisdiction over civilians only to times of war declared by Congress.⁸

While some Federal criminal statutes are expressly extraterritorial,⁹ most make the acts described therein criminal only if they are committed within “the special maritime and territorial jurisdiction of the United States”¹⁰ or if they affect interstate or foreign commerce. Therefore, in most instances, Federal criminal jurisdiction ends at the nation’s borders. State criminal jurisdiction, likewise, ends at the boundaries of each State. Because of these limitations, acts committed by civilians accompanying the Armed Forces in foreign countries, which would be crimes if committed in the United States, often do not violate either Federal or State criminal law. And, as discussed above, they also are not violations of the UCMJ unless a “time of war” had been declared by Congress when the acts were committed. As a result, these acts are crimes, and therefore punishable, only under the law of the country in which they occurred.

3. Prosecution of U. S. Citizens by Host Nation Governments.

Surprisingly, host countries often do not choose to assert their jurisdiction to try American civilians who commit crimes in their countries. This is most often the case when the crime was committed against another American or against property owned by an American or the United States Government. 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 and will decline to bring a case. When this happens, however, the perpetrator goes unpunished for his crime. Each year, numerous incidents of rape, sexual abuse, aggravated assault, arson, robbery, drug distribution, and a variety of fraud and property crimes committed by American civilians abroad go unpunished because the host nation chooses to waive jurisdiction over these crimes.¹¹

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) or where the U.S. has the right to exercise exclusive jurisdiction over its per-

⁷Article 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 of 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.” 10 U.S.C. § 802(a).

⁸Article 2(a)(11) was struck down by a line of cases that included *Reid v. Covert*, 354 U.S. 1 (1957) and *McElroy v. United States ex rel. Guagliardo*, 361 U.S. 281 (1960). Article 2(a)(10) was limited to apply only during times of congressionally declared war in *U.S. v. Averette*, 41 C.M.R. 363 (C.M.A. 1970).

⁹See, e.g., 18 U.S.C. § 32 (destruction of aircraft); 18 U.S.C. § 1837 (economic espionage and theft of trade secrets); 18 U.S.C. § 2332 (terrorism); 18 U.S.C. § 2401 (war crimes).

¹⁰This phrase is defined in 18 U.S.C. § 7.

¹¹Office of the Inspector General, Department of Defense, Evaluation of Military Criminal Investigative Organizations’ Investigative Effectiveness Regarding U.S. Forces Civilians Stationed Overseas, No. 995000091, 7–10 (September 7, 1999) (hereinafter “DoD IG Report”).

sonnel.¹² Because United States law does not apply to crimes committed by American civilians in these situations, such crimes go unpunished.

4. *Other Remedies Available to the U. S. Government.*

Often, the only remedy available to the United States Government with respect to military dependents and civilian employees and contractors who commit crimes in foreign countries is to limit their use of facilities on the installation where they live, or bar their entry onto the installation altogether, which often causes them to return to the United States. Persons who are civilian employees of the United States may face the further sanction of being disciplined or even fired from their job. Similarly, the government may choose to terminate the contract of a DoD contractor who commits these acts or whose employees or subcontractors have committed these 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.

RECOMMENDATIONS FOR CONGRESSIONAL ACTION

Over the past 43 years, many efforts have been made to fill this jurisdictional void. Numerous bills designed to address the problem have been introduced in Congress but have failed to be passed by both houses.¹³ The issue is routinely raised in oversight hearings of the House and Senate Armed Services Committees.

In 1979, the General Accounting Office issued a report on the problem.¹⁴ It found that in 1977, 343,000 civilians had accompanied the forces abroad in a 12 month period and, during that year, host countries waived their right of prosecution in 59 serious cases (involving rape, manslaughter, arson, robbery, and burglary) and in 54 less serious cases (involving simple assault, drug abuse, drunkenness). It also found that host countries exercised their jurisdiction in 200 serious cases. In the report, the GAO recommended that Congress enact legislation to extend criminal jurisdiction over U.S. citizens accompanying the forces overseas.

In 1995, Congress passed the National Defense Authorization Act for Fiscal Year 1996.¹⁵ Section 1151 of that act directed the Departments of Defense and Justice to jointly establish 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.” The advisory committee’s report was submitted to Congress in April, 1997. It recommended two changes in the law. First, it recommended that court-martial jurisdiction be extended to civilians accompanying the Armed Forces during “con-

¹²The Dayton Accords between the United States and the the Balkan countries specifically provided that the United States had exclusive jurisdiction over criminal offenses committed by the American civilians and military members. Serial No. 58, at 19 (testimony before the Subcommittee on Crime of Brigadier General Joseph R. Barnes, Assistant Judge Advocate General, United States Army).

¹³See, e.g., S. 2007, 90th Cong., 1st Sess. (1967); S. 1, 94th Cong., 1st Sess. (1975); H.R. 763, 95th Cong. 1st Sess. (1977); H.R. 255, 99th Cong., 1st Sess. (1985); S. 147, 101st Cong., 1st Sess. (1989); H.R. 5808, 102d Cong., 2d Sess. (1992); S. 2083, 104th Cong., 2d Sess. (1996).

¹⁴General Accounting Office, *Some Criminal Offenses Committed Overseas by DoD Civilians Are Not Being Prosecuted: Legislation is Needed*, Report No. FPCD 79-45 (1979).

¹⁵Public Law No. 104-106 (1996).

tingency operations” as designated by the Secretary of Defense.¹⁶ The advisory committee also recommended that the jurisdiction of Federal courts be extended to reach offenses committed by civilians accompanying the force abroad.¹⁷ The Departments of Defense and Justice support only the extension of Federal criminal jurisdiction to persons accompanying the Armed Forces outside the United States.¹⁸

In a recent decision by the United States Court of Appeals for the Second Circuit, Judge Jose Cabranes suggested that Congress might wish to address what he found to be a “jurisdictional gap” in the law. In that case,¹⁹ the defendant was charged with sexual abuse of his teenaged step-child, the daughter of an enlisted soldier. The abuse occurred while the defendant was living with his wife and step-daughter in military housing in Germany. However, it did not come to light until the defendant, his wife, and step-daughter returned to the United States where the stepdaughter gave birth to a child and revealed that the defendant was the father. The defendant was charged with sexual abuse of a minor,²⁰ plead guilty, but before the plea was accepted moved to dismiss the indictment for lack of jurisdiction. The district judge held 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 maritime and territorial jurisdiction of the United States. The Court of Appeals decided otherwise, holding that overseas military housing was not within the special maritime and territorial jurisdiction of the United States and that, accordingly, the statute the defendant was charged with violating applied exclusively to the territorial United States. Because of this jurisdictional gap, the defendant’s conviction was reversed.

In his opinion, Circuit Judge Cabranes noted the history of criminal prosecutions of civilians accompanying the military overseas and the fact that various commentators “have 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 noted that the inaction of 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 “is only the latest consequence of Congress’s failure to close the jurisdictional gap.” In his opinion, Judge Cabranes noted that he was even 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.”

¹⁶ Overseas Jurisdiction Advisory Committee Report at v, 49.

¹⁷ Overseas Jurisdiction Advisory Committee Report at vi, 49.

¹⁸ Letter from Judith A. Miller, General Counsel of the Department of Defense to Sen. John W. Warner, Chairman of the Senate Committee on Armed Services (September 3, 1999); Letter from Robert Rabin, Assistant Attorney General to Rep. Henry J. Hyde, Chairman of the House Committee on the Judiciary (October 13, 1999). Both letters expressed the views of those departments on S. 768, a bill passed by the Senate that would have enacted both recommendations of the Overseas Jurisdiction Advisory Committee. In those letters, both departments opposed enactment of the provision in that bill that would extend UCMJ jurisdiction over civilians.

¹⁹ *United States v. Gallin*, ___ F. 3d. ___, 2000 U.S. App. LEXIS 13970, 2000 WL 771828 (2d Cir. 2000).

²⁰ 18 U.S.C. § 2243(a).

THE NEED FOR LEGISLATION

Clearly, no crime, especially violent crimes and crimes involving significant property damage, should go unpunished when it is committed by persons employed by or accompanying our military abroad. In most, if not all cases, the only reason why these people are living in a foreign county is because our military is there and they have some connection to it. It is clear that the Government has an interest in ensuring that they are punished for any crimes they commit there. Just as importantly, as many of the crimes going unpunished are committed against American victims and American property, the Government has an interest in using its law to punish those who commit these crimes.

In addition to the moral justification in punishing these acts, punishing them will also have a beneficial effect on the functioning of the military. At the hearing on H.R. 3380 held by the Subcommittee on Crime, Robert E. Reed, Associate Deputy General Counsel of the Department of Defense testified that

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 stationed, and threatens relationships with our allies.²¹

The committee believes that it is appropriate for Congress to address these problems by enacting this legislation at this time.

H.R. 3380, THE "MILITARY EXTRATERRITORIAL JURISDICTION
ACT OF 1999"

H.R. 3380 would create a new Federal crime involving conduct by certain persons outside the United States that would be an offense under title 18, if the conduct had occurred within the special maritime and territorial jurisdiction of the United States. The new crime would apply 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. The punishment for committing this new crime would be the punishment that could have been imposed under current law had the crime been committed in the United States.

The bill defines the phrase "accompanying the Armed Forces outside the United States" to mean those persons who are dependents of members of the Armed Forces, civilian employees of a military department or the Department of Defense, or a DoD contractor or subcontractor, or an employee of a DoD contractor or subcontractor. As used in the bill, the term dependents also includes juveniles who are dependents of such persons.²² In all cases, however, the

²¹Serial No. 58, at 17 (prepared statement of Robert E. Reed).

²²Chapter 403 of title 18 would apply to proceedings against juveniles.

dependent must reside with the military member, employee, contractor or contractor employee and not be a national of or ordinarily resident in a host nation in order for United States jurisdiction to apply. The bill will bring within the scope of the new crime both American citizens and nationals, as well as persons who are nationals of other countries, provided those persons are not nationals of or ordinarily resident in the host nation. The bill also defines the phrase “employed by the Armed Forces outside the United States” to mean civilian employees of the Defense Department, DoD contractors or subcontractors, or employees of a DoD contractor or subcontractor.

As discussed above, the bill allows for the prosecution of military members, but only under certain conditions. Persons who commit acts that fall within the scope of the new crime enacted by the bill but who are not tried for their crimes under the UCMJ and who later cease to be subject to the UCMJ (e.g., because the case was not solved before they were discharged from the military, or because the person is no longer on active duty²³) may be prosecuted under the bill. Under current law, only persons entitled to receive retired pay (i.e., generally paid only to those who served for 20 years or more on active duty) may be recalled to active duty for the purpose of being tried for an offense under the UCMJ after they are discharged.²⁴ Former military members who have been discharged from the service but who are not retirees may not be recalled to duty, and so cannot be tried under the UCMJ, or under Federal law, for acts they commit outside the United States.²⁵ H.R. 3380 would allow those persons to be tried for a violation of the new title 18 crime created by the bill.

Additionally, persons who remain on active duty in the military may also be prosecuted for a violation of the new crime created by the bill, but only if they are indicted or otherwise charged with committing the offense together with one or more other defendants, at least one of whom is not subject to the UCMJ. In such case, however, the military member could not be prosecuted under both the UCMJ and the title 18 provision created by the bill.

The bill prohibits a 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, but allows the Attorney General or the Deputy Attorney General to waive this provision in appropriate cases. The bill further provides that the Secretary of Defense may designate and authorize persons serving “in a law enforcement position” in the Department of Defense to arrest those who are subject to the new statute when there is probable cause to believe that the person engaged in conduct that constitutes an offense under the new statute. Persons arrested by DoD personnel are to be delivered “as soon as practicable” to the custody of civilian law enforce-

²³ Members of the military who serve in one of the various reserve components of the services generally are subject to the UCMJ only when serving pursuant to orders that place them in a Federal duty status. See 10 U.S.C. § 802(a)(1), (3). Reserve members of the military who commit illegal acts abroad may be tried under the UCMJ, but first must be placed on active duty. Under this bill, the Government could choose to try them instead under new section 3261. In essence, the bill gives the Government concurrent jurisdiction with the military over members of the reserve components who commit crimes overseas.

²⁴ Retired members of a reserve component who are receiving hospitalization from an armed force also may be recalled to active duty and tried by court-martial. See 10 U.S.C. § 802(a)(5).

²⁵ See *Toth v. Quarles*, 350 U.S. 11 (1955).

ment authorities of the United States for removal to the United States for criminal proceedings. The bill also provides that the Secretary of Defense is to prescribe regulations governing the apprehension, detention, delivery, and removal of persons under the new chapter.

Finally, the bill addresses 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. The bill prohibits the removal of the person to the United States or 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, except for several situations in which the limitation on removal does not apply. For example, the bill does not prohibit a Federal magistrate judge from ordering the defendant to be removed to the United States to appear at a detention hearing or to be detained pending trial. The bill also allows Defense Department officials to remove the defendant from the place where he or she is arrested if the Secretary of Defense determines that military necessity requires it. In such an event, however, the defendant may only be removed 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 the bill.

HEARINGS

The committee's Subcommittee on Crime held 1 day of hearings on H.R. 3380 on March 30, 2000.²⁶ Testimony was received from 5 witnesses, representing 3 organizations, with additional material submitted by 1 organization. The witnesses at the hearing were Robert E. Reed, Esq., Associate Deputy General Counsel, Department of Defense; Brigadier General Joseph R. Barnes, Assistant Judge Advocate General, United States Army; Brigadier General James B. Smith, Commander, 18th Fighter Wing, United States Air Force; Roger Pauley, Esq., Director, Legislation, Office of Policy and Legislation, Criminal Division, Department of Justice; and Jan Mohr, President, Federal Education Association.

COMMITTEE CONSIDERATION

On May 11, 2000, the Subcommittee on Crime met in open session and ordered favorably reported the bill H.R. 3380, as amended, by a voice vote, a quorum being present. On June 27, 2000, the committee met in open session and ordered favorably reported the bill H.R. 3380 with an amendment by voice vote, a quorum being present.

VOTE OF THE COMMITTEE

No recorded votes were taken on the bill, H.R. 3380.

COMMITTEE OVERSIGHT FINDINGS

In compliance with clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the committee reports that the findings and recommendations of the committee, based on oversight activi-

²⁶Serial No. 58.

ties under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

COMMITTEE ON GOVERNMENT REFORM FINDINGS

No findings or recommendations of the Committee on Government Reform were received as referred to in clause 3(c)(4) of rule XIII of the Rules of the House of Representatives.

NEW BUDGET AUTHORITY AND TAX EXPENDITURES

Clause 3(c)(2) of House Rule XIII is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

In compliance with clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the committee sets forth, with respect to the bill, H.R. 3380, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, July 6, 2000.

Hon. HENRY J. HYDE, *Chairman,*
Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 3380, the Military Extraterritorial Jurisdiction Act of 2000.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Mark Grabowicz, who can be reached at 226-2860.

Sincerely,

DAN L. CRIPPEN, *Director.*

Enclosure

cc:

Honorable John Conyers Jr.
Ranking Democratic Member.

H.R. 3380—Military Extraterritorial Jurisdiction Act of 2000.

CBO estimates that enacting H.R. 3380 would not result in any significant cost to the federal government. Because enactment of the bill could affect direct spending and receipts, pay-as-you-go procedures would apply. However, CBO estimates that any impact on direct spending and receipts would not be significant. H.R. 3380 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would not affect state, local, or tribal governments.

Currently, the United States has limited jurisdiction over U.S. civilians who are employed by or who are accompanying U.S. Armed Forces out of the country. Under H.R. 3380, such civilians would be subject to prosecution and punishment in the United States for

certain offenses committed outside of the country. Specifically, such offenses would include any action that would constitute an offense punishable by imprisonment for more than one year if it had occurred within the maritime and territorial jurisdiction of the United States. CBO expects that enacting H.R. 3380 would not significantly increase the caseload or costs of federal law enforcement agencies, the judiciary, or the prison system. Any such additional costs would be subject to the availability of appropriated funds.

Because those prosecuted and convicted of certain federal crimes could be subject to fines, the government might collect additional fines if H.R. 3380 is enacted. Collections of such fines are recorded in the budget as governmental receipts (i.e., revenues), which are deposited in the Crime Victims Fund and spent in subsequent years. Any additional collections from enacting H.R. 3380 are likely to be negligible because it is not likely that the federal government would pursue many cases under this bill. Because any increase in direct spending would equal the fines collected (with a lag of one year or more), the additional direct spending also would be negligible.

On July 1, 1999, CBO transmitted a cost estimate for S. 768, the Military and Extraterritorial Jurisdiction Act of 1999, as reported by the Senate Committee on the Judiciary on June 24, 1999. The two bills are very similar and the cost estimates are identical.

The CBO staff contact for this estimate is Mark Grabowicz, who can be reached at 226-2860. This estimate was approved by Robert A. Sunshine, Assistant Director for Budget Analysis.

CONSTITUTIONAL AUTHORITY STATEMENT

Pursuant to clause 3(d)(1) of rule XIII of the Rules of the House of Representatives, the committee finds the authority for this legislation in Article I, section 8, clauses 10, 14, 16, and 18 of the Constitution.

SECTION-BY-SECTION ANALYSIS AND DISCUSSION

Sec. 1. Short Title. Section 1 of the bill states the short title of the act as the “Military Extraterritorial Jurisdiction Act of 2000.”

Section 2. Federal Jurisdiction. Section 2 of the bill enacts a new chapter to title 18 of the United States Code, entitled “Military Extraterritorial Jurisdiction.” The new chapter will be numbered chapter 212 and will consist of seven sections. Each will be discussed below.

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. This section establishes a new Federal crime that involves certain conduct engaged in while outside the United States by members of the Armed Forces or by persons employed by or accompanying the Armed Forces abroad. Subsection (a) of this new section states the offense as conduct engaged in outside the United States that would be a felony if committed within the special maritime and territorial jurisdiction of the United States. Although the bill uses the conditional phrase “if committed within the special maritime and territorial jurisdiction of the United States,” 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 subsection (a).²⁷

Prosecutions for violations of the subsection may be brought only against persons who fall within two broad groups of people as defined in the bill: 1) persons who are employed by or accompanying the Armed Forces outside the United States or 2) persons who are members of the Armed Forces and subject to the Uniform Code of Military Justice at the time the conduct occurred. If a person in one of these two classes of people engages in the conduct described, the person is to be punished in the manner provided for in the statute that makes the same conduct an offense if committed in the special maritime and territorial jurisdiction of the United States. If the person engaging in such conduct is a juvenile, chapter 403 of title 18 would apply to any proceedings against them.

To illustrate the manner in which the appropriate punishment for a violation of section 3261 would be determined, if 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 2242.²⁸ 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.²⁹

In many respects, a prosecution under section 3261 is similar to a prosecution under the Federal Assimilative Crimes Act (18 U.S.C. § 13). That statute makes it a Federal crime to commit an act on lands not within the jurisdiction of a state, commonwealth, territory, possession, or district of the United States that, while not expressly a Federal crime (i.e., made punishable by an act of Congress), would be punishable if committed within the jurisdiction of a state, commonwealth, territory, possession, or district. Persons who commit such acts can be prosecuted under 18 U.S.C. § 13 and, if found guilty in Federal court, are punished under Federal law. While no State law has been violated in such case, the elements of the State offense become part of the elements of the Federal crime charged. Indeed, in nearly all cases, Federal prosecutors reference the State statute in the document that charges the defendant with a violation of section 13. In a prosecution under section 3261, therefore, the elements of the crime that the defendant would have committed had the conduct occurred within the special maritime and territorial jurisdiction of the United States also would be elements of the crime under section 3261.

²⁷For example, if a drug crime were committed on land “reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction” of the United States, the crime would have been committed within the special maritime and territorial jurisdiction of the United States. See 18 U.S.C. § 7(3). Thus, such conduct would satisfy the jurisdictional requirements of section 3261(a).

²⁸Occasionally, conduct may violate both section 3261 and another Federal statute having extraterritorial application (e.g., 18 U.S.C. § 1119). In such cases, the Government may proceed under either statute. See *United States v. Batchelder*, 442 U.S. 114 (1979).

²⁹However, it 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.

Subsection (b) of section 3261 provides that no prosecution may be commenced under section 3261 if a foreign government, in accordance with jurisdiction recognized by the United States, has prosecuted or is prosecuting such person for the conduct that constitutes the offense. The committee recognizes that in some cases, the nation in which the crime occurs may choose to prosecute the perpetrator of the offense under its own law. In that event, this subsection generally prohibits the United States from also prosecuting that person under United States law, provided the host nation prosecution occurs in accordance with jurisdiction recognized by the United States. The committee understands that, in most instances, this recognition will occur through a status of forces agreement entered into by the United States and the host nation. The section further provides, however, that the limitation on a prosecution by the United States under section 3261 does not apply where the Attorney General or Deputy Attorney General, or a person acting in either of those capacities, approves otherwise. This authority may not be delegated.³⁰

Subsection 3261(c) makes it clear that the new crime established by this act does not deprive a court-martial, or other military court, commission, or tribunal, of the jurisdiction it may otherwise have over an offender. In some cases, for example, conduct that violates new section 3261 may also violate the Uniform Code of Military Conduct or the law of war generally. Therefore, it is possible that another judicial body will have concurrent jurisdiction with a United States Court to try the offense. The committee does not intend to affect that jurisdiction through enactment of this statute.

Subsection (d) limits prosecutions under new section 3261 against persons who, at the time they committed the crime, were members of the Armed Forces. The committee recognizes that the military has the predominant interest in disciplining its members and subsection (d) enacts the general preference that military members be tried by court-martial for their crimes. The limitation of subsection (d) does not apply, however, if the person is no longer subject to the UCMJ.³¹ Further, the limitation does not apply if the person is charged for the offense together with at least one other person who is not subject to the UCMJ. The latter provision is designed to allow the Government to try the military member together with a non-military co-defendant in a United States Court. In such a case, concurrent jurisdiction would exist to try the military member under either the UCMJ or under new chapter 212. Regardless of the forum in which the charge is brought, however, the statute of limitations for the crime begins to run at the time the act is committed that constitutes the crime, and not at the time a court acquires jurisdiction against a person under chapter 212.

Section 3262. Arrest and commitment. This section of new chapter 212 provides authority for employees of the Department of De-

³⁰The reference to a "person acting in either of those capacities" means a person acting in either position when the position is vacant. It does not include a person who acts, through a delegation of authority, for the Attorney General or Deputy Attorney General.

³¹For example, the person has been discharged from the military and is not eligible to receive retirement pay. See 10 U.S.C. §802(a)(4). This provision would also allow the Government to prosecute under section 3261 a person who commits a crime while in Federal service as a member of a reserve component of one of the services, but who is not serving in that capacity at the time of arrest or indictment, and therefore is not subject to the UCMJ at that time.

fense to arrest and detain persons who are suspected of violating section 3261 of that chapter.

Subsection (a) requires the Secretary of Defense to designate persons who may make arrests under this section. The committee understands that the Secretary will designate certain persons serving as military police or shore patrol officers, or assigned to one of the several criminal investigative agencies of the military services, to make arrests under this section. This subsection also states that the usual standard for making arrests, 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.

Subsection (b) of new section 3262 provides that Defense Department employees who make such arrests are required 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. This requirement is further limited by the provisions of sections 3263 and 3264. Of course, subsection (b) only applies if the person arrested continues to be held in custody. The committee notes that in some cases, military authorities may determine that a person arrested need not be held in custody pending the commencement of the initial proceedings required by section 3265.

Section 3263. Delivery to authorities of foreign countries. As discussed above, in some cases a host nation may choose to prosecute under its own law a person accompanying the United States Armed Forces who commits an act that violates section 3261. Section 3263 authorizes the persons designated by the Secretary of Defense to make arrests for violations of section 3261 to deliver the person arrested to the custody of "appropriate authorities of a foreign country" if those authorities have requested that the person be delivered to them and if delivery of the person is authorized by a treaty or other international agreement to which the United States is a party. Subsection (b) of this section authorizes the Secretary of Defense, in consultation with the Secretary of State, to determine which officials of a foreign country constitute "appropriate authorities" for the purposes of taking custody of a person arrested under section 3262.

Section 3264. Limitation on removal. New 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 the person is arrested or found. The phrase "arrested for or charged with" is 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 an information.

Section 3264(a) sets forth the general limitation that a person arrested or charged with a violation of section 3261 may not be removed to the United States or 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. Thus, if the person has been arrested, he must be held in the country in which he was arrested, or the country in which the crime is believed to have been committed (i.e., if the person is arrested in a different country). If the person is first charged through an in-

dictment or information, he may not be forcibly removed from the country in which he is found, except that he may be brought to the country in which the crime is believed to have been committed.

Subsection (b) states several situations in which the limitation of subsection (a) does not apply. The limitation does not prohibit a Federal magistrate judge³² from ordering the defendant to be removed to the United States to appear at a detention hearing held to determine the terms, if any, of the defendant's release from custody pending trial. In that event, the defendant is to be removed to the United States in time to attend the hearing. The limitation of subsection (a) also does not apply if a Federal magistrate judge orders that the defendant be detained pending trial.³³ In that event, the defendant must be detained in the United States and must be "promptly removed" to the United States for that purpose. While the committee does not intend the phrase "promptly removed" to be interpreted to require that extraordinary steps be taken to facilitate the removal of the defendant, it should be accomplished as soon as practicable.

The limitation of subsection (a) also does not apply if the defendant is entitled to, and does not waive, a preliminary examination under the Federal Rules of Criminal Procedure.³⁴ As set forth in those rules, a defendant is not entitled to such a hearing if an indictment is returned or information filed against him. In the event such a hearing is to take place, however, the hearing 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 the hearing.

Section 3264 contains two blanket exceptions to the limitation on removal of the defendant. First, a Federal magistrate judge may order the defendant to be removed to the United States at any time. While the committee expects that removal of a person for a reason other than described above would be rare, paragraph (b)(4) grants judges the discretion to order such removal. Second, Defense Department officials may remove the defendant from the place where he or she is arrested if the Secretary of Defense determines that military necessity requires it. The Secretary may delegate this decision making authority.³⁵ Generally speaking, the committee intends that this authority 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. The authority given to the Secretary under paragraph (b)(5) is further limited in that the defendant may only be removed 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

³²The term Federal magistrate judge, used throughout new chapter 212, includes both Judges of the United States and United States Magistrate Judges. In general, those terms should be given the respective meanings ascribed to them in the Federal Rules of Criminal Procedure.

³³The reference to section 3142(e) is to make it clear that if the judge orders the defendant detained, he must be committed to the custody of the Attorney General and may not be held by military authorities.

³⁴See Fed. R. Crim. P. 5, 5.1.

³⁵See 10 U.S.C. § 113(d) which provides, "Unless specifically prohibited by law, the Secretary [of Defense] may, without being relieved of his responsibility, perform any of his functions or duties, or exercise any of his powers through, or with the aid of, such persons in, or organizations of, the Department of Defense as he may designate."

section 3265.³⁶ The facility need not be one maintained by the same branch of the Armed Forces that arrested the defendant and should be one as near as possible to the place from which the defendant is removed.

Section 3265. Initial proceedings. Section 3265 provides for the manner in which certain proceedings are to take place once a person is arrested for or charged with a violation of section 3261. These provisions only apply if the person is not delivered to foreign authorities for prosecution under the law of the host nation.

Subsection (a) of section 3265 governs the initial appearance before a judge of a person arrested for or charged with a violation of section 3261 and not delivered to foreign authorities for prosecution. The initial appearance should be conducted in accordance with the Federal Rules of Criminal Procedure, except to the extent section 3265 provides otherwise. Subsection (a) requires a Federal magistrate judge to conduct the initial appearance, as is the current practice in all Federal criminal prosecutions, but allows the judge to conduct the initial appearance by telephone “or such other means that enables voice communication among the participants. . . .” It is the committee’s intent 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. The committee points out that, in many instances, the defendant’s counsel may not be in the same place as the defendant but nevertheless must be included as a participant in the proceeding. It is the committee’s preference that these proceedings will be conducted by video teleconference or similar means whenever possible, so that all participants can hear and see each other. The committee encourages the Secretary of Defense to direct military officials to make available for these proceedings the video communication systems under their command.

Subsection (a) also requires that, during the initial appearance, the Federal magistrate judge also determine whether there is probable cause to believe that an offense under section 3261 has been committed and that the defendant committed it. This determination will satisfy the due process requirements to which the defendant is due, as determined by the United States Supreme Court in *Gerstein v. Pugh*.³⁷ The committee notes that in cases where an indictment has been returned or an information filed against the defendant in lieu of an indictment, the existence of probable cause necessarily is determined by that event and, therefore, subsection (a) is satisfied by the judge “determining” that probable cause was previously established.

Subsection (b) of section 3265 governs any detention hearing held under section 3142(f) of title 18. Any such hearing also is to be conducted by a Federal magistrate judge, as is current practice in all other Federal criminal prosecutions. Subsection (b) provides, however, that the judge may also conduct this hearing by telephony or such other means that allows all parties to participate and to be heard by all other participants, including the defendant’s counsel.

³⁶ While 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).

³⁷ 420 U.S. 103 (1975).

Unlike the initial appearance, however, the detention hearing may only be conducted in this manner if the defendant requests it. Obviously, in so requesting, the defendant necessarily waives any right he or she may have to be physically present before the judge.

Even if the defendant does request the hearing to be conducted in this manner, the judge retains the discretion to determine whether to grant the request. While the committee has not attempted to include in the bill a list of the factors that the judge may wish to consider in making this determination, it does suggest that the following should be considered: 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 be ordered detained, and whether the parties intend to present live witness testimony at the hearing and the place of residence of any witnesses.

Subsection (c) of section 3265 is intended to ensure that counsel will be available for persons arrested or charged under section 3261. In most instances, the person arrested or charged will be responsible for obtaining his or her own counsel. The committee notes that in those foreign countries in which the United States has had a long standing military presence, qualified civilian counsel (including lawyers who are American citizens) are available to represent military personnel in courts martial, and American civilians and military personnel before host nation courts. The committee believes that these counsel will provide adequate representation for persons arrested or charged under section 3261 for the limited purpose of the initial appearance, and also for any detention hearing that may be held, when the defendant desires to remain in the host nation. In the event the defendant is financially unable to retain counsel, or if no qualified civilian counsel are available, the judge may appoint qualified military counsel to represent the defendant. These counsel may represent the defendant only in connection with the initial proceedings described in section 3265, and then only in the event the defendant is not removed to the United States for such proceedings. The judge may appoint only those members of the military designated for that purpose by the Secretary of Defense.

Section 3265 does not provide for the manner in which a Federal magistrate judge will be appointed to preside over any initial proceedings that occur under section 3265. The committee 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. The committee notes that venue for the trial of a violation of section 3261 is governed by section 3238 of title 18. Nothing in the bill changes that. The committee also notes that, in some cases, initial proceedings under section 3265 may be conducted by a judge who does not sit in the judicial district in which a trial of the person arrested or charged may take place. That fact has no bearing on the determination of venue under section 3238.

Section 3266. Regulations. New section 3266 requires the Secretary of Defense to prescribe regulations governing the apprehension, detention, delivery, and removal of persons under new chapter 212. The regulations are also to provide for the facilitation of the initial proceedings described in new section 3265. The regulations must also require that, to the fullest extent practicable, notice be given to the civilians to whom the statute applies (i.e., the persons described in 3261(a)(1)) that they are subject to the criminal jurisdiction of the United States under chapter 212. Failure to provide this notice, however, does not defeat the jurisdiction of the United States over the person or provide a defense to any proceeding arising under the chapter. Because members of the Armed Forces receive regular instruction in the provisions of the UCMJ, the regulations issued under this section need not require that notice of the provisions of chapter 212 be given to them.

The Secretary is to consult with the Secretary of State and the Attorney General in developing the regulations required by section 3266. The Secretary is required to submit a report containing those regulations, and such other information as the Secretary may determine is appropriate, to the House and Senate Committees on the Judiciary. The regulations may not take effect until 90 days have passed from the date the report is submitted to those committees. Likewise, any amendments to these regulations in the future also must first be submitted to the House and Senate committees in the form of a report and the amendments proposed may not take effect until 90 days have passed from the submission of the report transmitting the amendments to Congress.

While nothing in the bill prohibits prosecutions under section 3261 from being brought until the regulations take effect, the committee believes that, to the extent possible, the Government should refrain from such prosecutions until that time. The committee notes, however, that in some cases, such as where there is a risk that a defendant may flee or commit further crimes, the Government may well have to proceed with prosecution under section 3261 in order to protect the public.

Section 3267. Definitions. This section of new chapter 212 defines certain key words and phrases used throughout the chapter. Included in this section are definitions of the phrases “employed by the Armed Forces outside the United States” and “accompanying the Armed Forces outside the United States.” As discussed above, new section 3261 applies only to certain members of the military and to civilians who fall into one of these two groups.

In general, a person employed by the Armed Forces outside the United States means a Defense Department civilian employee, a Defense Department contractor or subcontractor, or an employee of such contractor. It does not include persons who are nationals of the country in which the crime is believed to have been committed or persons ordinarily resident there. This limitation recognizes that the host nation has the predominant interest in exercising criminal jurisdiction over its citizens and other persons who make that country their home. The phrase “accompanying the Armed Forces outside the United States” refers to persons who are dependents of and who reside with military members, Defense Department civilian employees, or Defense Department contractors or their employees outside the United States. Included within this definition are

juveniles who are dependents of and reside with these persons. The term does not include persons who are nationals of the country in which the crime is believed to have been committed or persons ordinarily resident there.

AGENCY VIEWS

GENERAL COUNSEL OF THE
DEPARTMENT OF DEFENSE,
Washington, DC, February 28, 2000.

Hon. FLOYD D. SPENCE, *Chairman,*
Committee on Armed Services,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: This is in response to your request for the views of the Department of Defense on H.P. 3380, a bill "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."

H.R. 3380 recommends legislation to close an existing gap in United States jurisdiction for offenses committed abroad. It would extend certain Federal criminal statutes, most of which are codified in title 18 of the United States Code to persons formerly serving with, or currently employed by, or accompanying, the Armed Forces outside the United States.

This legislation is consistent with one of the recommendations of the Overseas Jurisdiction Advisory Committee in a report issued in response to Section 1151 of the National Defense Authorization Act for Fiscal Year 1996 (Public Law 104-106, 110 Stat. 186 (1996)). This report concluded that the inability of the United States to hold its citizens criminally accountable for offenses committed overseas has undermined deterrence and resulted in injustice. While civilians may be subject to the criminal jurisdiction of the host country, often the host country is not interested in prosecuting these offenses. As a result, civilians committing serious offenses overseas often face no more than the minor administrative sanctions available to overseas commanders.

The Department supports this bill, which would expand the jurisdiction of Federal district courts over offenses punishable by imprisonment for over one year committed by those accompanying the Armed Forces outside the United States. This provision fills a critical void in criminal jurisdiction over civilians serving with the Armed Forces abroad. Increased uniformity and consistency in prosecutions will contribute to the morale and safety of those assigned overseas, will promote the interests of justice, and will help maintain United States foreign policy and national security interests. H.R. 3380 fully addresses the concerns expressed by the Department to similar legislation, S. 768, that was passed by the Senate in the First Session of this Congress.

The bill requires the Department to consult with the Department of State and the Department of Justice in the development of Department of Defense regulations governing the apprehension, detention, delivery, and removal of persons subject to the proposed legislation. The Department notes that the effective implementa-

tion of the expanded jurisdiction will require the support and cooperation of the Department of Justice to develop guidelines and procedures concerning matters such as investigative responsibilities, venue, prosecution of specific crimes and trial support. The Department looks forward to working with the Departments of State and Justice on these matters.

In this regard, it is noted that the broad definition of a person accompanying the Armed Forces outside the United States contained in section 3264(2) of the bill conceivably could be applied to foreign nationals whose nexus with the United States is so tenuous as to raise certain Constitutional concerns. The Department will work to develop a mechanism that will obviate the possibility of such applications. Preferably, such a measure would take the form of a provision in the statutorily—mandated implementing regulations that would preclude the apprehension, detention and prosecution of certain foreign nationals, employed by or accompanying a defense contractor, whose relationship with the United States is of such a tenuous nature.

The Office of Management and Budget advises that, from the standpoint of the Administration's program, there is no objection to the presentation of this report for the consideration of the Committee.

Sincerely,

DOUGLAS A. DWORKIN, *Acting General Counsel.*

cc: Honorable Ike Skelton, Ranking Democrat

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (new matter is printed in italics and existing law in which no change is proposed is shown in roman):

TITLE 18, UNITED STATES CODE

* * * * *

PART II—CRIMINAL PROCEDURE

Chap.		Sec.
201.	General provisions	3001
	* * * * *	
212.	<i>Military extraterritorial jurisdiction</i>	3261
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CHAPTER 212—MILITARY EXTRATERRITORIAL JURISDICTION

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§ 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 commission, 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 section 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 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 section 3261(a) if there is probable cause to believe that such person violated section 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 enforcement 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

(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 for or charged with a violation of section 3261(a) shall not 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 limitation in subsection (a) does not apply if—

(1) a Federal magistrate judge orders the person to be removed to the United States to be present at a detention hearing held pursuant to section 3142(f);

(2) a Federal magistrate judge orders the detention of the person before trial pursuant to section 3142(e), in which case the person shall be promptly removed to the United States for purposes of such detention;

(3) the person is entitled to, and does not waive, a preliminary examination under the Federal Rules of Criminal Procedure, in which case the person shall be removed to the United States in time for such examination;

(4) a Federal magistrate judge otherwise orders the person to be removed to the United States; or

(5) the Secretary of Defense determines that military necessity requires that the limitations in subsection (a) be waived, 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 section 3265(a).

§ 3265. Initial proceedings

(a)(1) In the case of any person arrested for or charged with a violation of section 3261(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) *If the Federal magistrate judge determines that probable cause exists that the person committed an offense under section 3261(a), and if no motion is made seeking the person's detention before trial, the Federal magistrate judge shall also determine at the initial appearance the conditions of the person's release before trial under chapter 207 of this title.*

(b) *In the case of any person described in subsection (a), any detention hearing of that person under section 3142(f)—*

(1) shall be conducted by a Federal magistrate judge; and

(2) at the request of the person, may be carried out by telephony or such other means that enables voice communication among the participants, including any counsel representing the person.

(c)(1) *If any initial proceeding under this section with respect to any such person is conducted while the person is outside the United States, and the person is entitled to have counsel appointed for purposes of such proceeding, the Federal magistrate judge may appoint as such counsel for purposes of such hearing a qualified military counsel.*

(2) *For purposes of this subsection, the term "qualified military counsel" means a judge advocate made available by the Secretary of Defense for purposes of such proceedings, who—*

(A) is a graduate of an accredited law school or is a member of the bar of a Federal court or of the highest court of a State; and

(B) is certified as competent to perform such duties by the Judge Advocate General of the armed force of which he is a member.

§ 3266. 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 3265. 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 the case may be) to the Committee on the Judiciary of the House of Representatives and the Committee on the Judiciary of the Senate.*

§ 3267. 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 nonappropriated 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) *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 Department of Defense (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.

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

(4) *The terms “Judge Advocate General” and “judge advocate” have the meanings given such terms in section 801 of title 10.*

