MILITARY EXTRATERRITORIAL JURISDICTION ACT OF 1999

HEARING

BEFORE THE

SUBCOMMITTEE ON CRIME

OF THE

COMMITTEE ON THE JUDICIARY

HOUSE OF REPRESENTATIVES

ONE HUNDRED SIXTH CONGRESS

SECOND SESSION

ON

H.R. 3380

MARCH 30, 2000

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MILITARY EXTRATERRITORIAL JURISDICTION ACT OF 1999

THURSDAY, MARCH 30, 2000

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON CRIME,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to call, at 2:30 p.m. in room 2225, Rayburn House Office Building, Hon. Steve Chabot [acting chairman of the subcommittee] presiding.

Present: Representatives Steve Chabot and Robert C. Scott.

Staff present: Glenn R. Schmitt, chief counsel; Rick Filkins, counsel; Veronica L. Eligan, staff assistant; and Bobby Vassar, minority counsel.

OPENING STATEMENT OF CHAIRMAN CHABOT

Mr. CHABOT. The subcommittee will now come to order.

I am Congressman Steve Chabot. The chairman of the committee, Bill McCollum, is unable to be here this afternoon, so I will be chairing the committee.

I want to, first of all, apologize to the witnesses who will be testifying this afternoon for the lateness of the beginning of this hearing. We had votes. We were called to the floor and had a series of votes, which were the last votes of the day, so that is the reason we are running a little bit late. Please accept our apology.

The statement that I will now give is the statement that I will make on behalf of the chairman, Mr. McCollum.

Today the subcommittee will consider H.R. 3380, the Military Extraterritorial Jurisdiction Act of 1999. This bill was introduced by Congressman Saxby Chambliss, and I was pleased to be the original cosponsor of the bill—again, I am speaking on behalf of the chairman.

H.R. 3380 would amend the Federal criminal code to apply it to persons who commit criminal acts while employed by or otherwise accompanying the U.S. Armed Forces outside the United States. It would also extend Federal criminal jurisdiction to persons who commit crimes abroad while a member of the Armed Forces but who are not tried for those crimes by military authorities before being discharged from the military.

Civilians have served with or accompanied the American Armed Forces in the field or ships since the founding of the United States. In recent years, however, the number of civilians present with our military forces in foreign countries has dramatically increased. Many of these civilians are non-military employees of the Defense

Department and contractors working on behalf of DoD. In 1996, there were more than 96,000 civilian employees of the Department of Defense working and living outside the United States. Family members of American service personnel make up an even larger group of the civilians who accompany U.S. forces overseas. In 1999, there were almost 300,000 family members of military personnel and DoD civilian employees living abroad.

While military members who commit crimes outside the United States are subject to trial and punishment under the Uniform Code of Military Justice, civilians are not. In most instances, American civilians who commit crimes abroad are also not subject to the criminal laws of the United States, because the jurisdiction for those laws ends at our national borders. As a result of these jurisdictional limitations, American civilians who commit crimes in foreign countries can be tried and punished only by the host nation. Surprisingly, however, host nations are not always willing to prosecute Americans, especially when the crime involves acts committed only against another American or against property owned by Americans.

Because of this, each year incidents of rape, sexual abuse, aggravated assault, robbery, drug distribution, and a variety of fraud and property crimes committed by American civilians abroad go unpunished because the host nation declines to prosecute these offenses. This problem has been compounded in recent years by the increasing involvement of our military in areas of the world where there is no functioning government, such as Somalia, Haiti, and the Balkans. Because in those places no government exists at all to prosecute crimes, American civilians who commit crimes there go unpunished.

The bill before us today would close this gaping hole in the law by extending Federal criminal jurisdiction to crimes committed by persons employed by and accompanying the U.S. Armed Forces overseas. Specifically, the bill creates a new crime under title 18 that would make it a crime to engage in conduct outside the United States which would constitute an offense under title 18 if the crime had been committed within the United States. The new crime would also apply only to two groups of people: first, persons employed by or who accompany the Armed Forces outside the United States. This group includes dependents of military members, civilian employees of the Department of Defense, and Defense Department contractors or subcontractors and their employees. This group also includes foreign nationals who are relatives of American military personnel or contractors or who work for the Defense Department, but only to the extent that they are not nationals of the country where the act occurred or ordinarily live in that country.

The second group of people to whom the bill would apply are persons who are members of the Armed Forces at the time they commit a criminal act abroad but who later are discharged from the military without being tried for their crime. This portion of the bill is designed to authorize the Government to punish persons who are discharged from the military before their guilt was discovered and who, because of that discharge, are no long subject to court-martial jurisdiction.

We simply cannot allow violent crimes and crimes involving significant property damage to go unpunished when they are committed by persons employed by or accompanying our military. The only reason why these people are living in foreign countries is because our military is there and they have some connection to it, and so our Government has an interest in ensuring that they are punished for any crimes they commit that are there. Just as importantly, as many of the crimes are going unpunished are committed against Americans and American property, our Government has an interest in using its laws to punish those who commit these crimes.

The chairman wishes to point out that both the Defense Department and the Justice Department support the legislation before the subcommittee here today. The legislation is the product of close collaboration between the staff of the Subcommittee on Crime—that is this committee—and the representatives of these agencies, and I am pleased that both departments have seen fit to send representatives to our hearing today.

We welcome all the witnesses before the subcommittee today and look forward to receiving their testimony.

[The bill, H.R. 3380, follows:]

106TH CONGRESS
1ST SESSION

H. R. 3380

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

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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

"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. Delivery to authorities of foreign countries.
"3263. Regulations.
"3264. 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) 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, de-

tention, 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 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) 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 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; 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.

(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".

○

[The prepared statement of Mr. McCollum follows:]

PREPARED STATEMENT OF HON. BILL MCCOLLUM, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF FLORIDA, AND CHAIRMAN, SUBCOMMITTEE ON CRIME

Today the Subcommittee will consider H.R. 3380, the "Military Extraterritorial Jurisdiction Act of 1999." This bill was introduced by Congressman Saxby Chambliss and I was pleased to be the original cosponsor of the bill. H.R. 3380 would amend the Federal criminal code to apply it to persons who commit criminal acts while employed by or otherwise accompanying the U.S. Armed Forces outside of the United States. It would also extend Federal criminal jurisdiction to persons

who commit crimes abroad while a member of the Armed Forces but who are not tried for those crimes by military authorities before being discharged from the military.

Civilians have served with or accompanied the American Armed Forces in the field or ships since the founding of the United States. In recent years, however, the number of civilians present with our military forces in foreign countries has dramatically increased. Many of these civilians are nonmilitary employees of the Defense Department and contractors working on behalf of DOD. In 1996, there were more than 96,000 civilian employees of the Department of Defense working and living outside the United States.

Family members of American service personnel make up an even larger group of the civilians who accompany U.S. forces overseas. In 1999, there were almost 300,000 family members of military personnel and DoD civilian employees living abroad.

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Because of this, each year incidents of rape, sexual abuse, aggravated assault, robbery, drug distribution, and a variety of fraud and property crimes committed by American civilians abroad go unpunished because the host nation declines to prosecute these offenses. And this problem has been compounded in recent years by the increasing involvement of our military in areas of the world where there is no functioning government—such as Somalia, Haiti, and the Balkans. Because, in those places, no government exists at all to prosecute crimes, American civilians who commit crimes there go unpunished.

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The second group of people to whom the bill would apply are persons who are members of the Armed Forces at the time they commit a criminal act abroad but who later are discharged from the military without being tried for their crime. This portion of the bill is designed to authorize the government to punish persons who are discharged from the military before their guilt is discovered and who, because of that discharge, are no longer subject to court-martial jurisdiction.

We simply cannot allow violent crimes and crimes involving significant property damage to go unpunished when they are committed by persons employed by or accompanying our military. The only reason why these people are living in foreign countries is because our military is there and they have some connection to it. And so, our 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 Americans and American property, our government has an interest in using its law to punish those who commit these crimes.

I wish to point out that both the Defense Department and the Justice Department support the legislation before the Subcommittee here today. The legislation is the product of close collaboration between the staff of the Subcommittee on Crime and the representatives of these agencies, and I am pleased that both Departments have seen fit to send representatives to our hearing today. I welcome all the witnesses before the Subcommittee today and look forward to receiving their testimony.

Mr. CHABOT. I now will ask if the ranking member would like to give us an opening statement.

Mr. SCOTT. Thank you, Mr. Chairman. I, too, apologize to the witnesses and the audience. We had votes, and it just took more time than we had hoped.

I am pleased to join you, Mr. Chairman, in convening this hearing on the Military Extraterritorial Jurisdiction Act. Frankly, I was surprised to learn that civilian employees and dependents of such employees or of military personnel who commit criminal offenses while connected to a military operation overseas are not covered by either our Federal criminal code or by the military code of justice. I understand that, as a result of this loophole, a number of individuals have gone unprosecuted for some very serious offenses, such as rape and felonious assault.

This bill attempts to fix that problem by extending Federal criminal code jurisdiction to civilian employees, contractors, and dependent family members of civilian and enlisted personnel connected to overseas military operations.

Although my position is that individuals from the United States who commit serious criminal offenses overseas should be held no less accountable than they would if they had committed those offenses in the United States, it is also my position that individuals accused of such offenses are entitled to no less due process and fairness and other constitutional protections than they would if they were accused in the United States.

As we review the bill, we need to be confident that we have structured it in such a way that all constitutional protections will be accorded to someone accused of a felony outside of the United States, just as if they had been charged within the United States.

I expect that our panel of witnesses today will enlighten us on these points, and I look forward to their testimony. I am sure we will have a continuing opportunity to work on this bill as it moves through the legislative process.

Thank you, Mr. Chairman.

Mr. CHABOT. Thank you, Mr. Scott.

At this time, I would like to first acknowledge the statement that I have here from the principal sponsor of this particular thing that we are considering this afternoon, Saxby Chambliss. I would ask unanimous consent to admit it to the record.

Without objection, that will be admitted.

[The prepared statement of Mr. Chambliss follows:]

PREPARED STATEMENT OF HON. SAXBY CHAMBLISS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF GEORGIA

Mr. Chairman, thank you for having a hearing on this important issue and this bill which is critical to enforcing justice and assisting our military leaders in maintaining order and discipline among our armed forces.

Currently, there are instances where American civilians have committed crimes outside the United States but have not been prosecuted because foreign governments decline to take any action and U.S. military or civilian law enforcement agencies lack the appropriate authority to prosecute these criminals. Consequently, only minor administrative sanctions are available to punish serious crimes.

There are many troubling examples. For instance, a Department of Defense teacher raped a minor and video taped the event. The host country chose not to prosecute, and the U.S. did not have the jurisdiction to prosecute the teacher.

The son of a contractor employee in Italy committed various crimes including rape, arson, assault, and drug trafficking. Because of a lack of jurisdiction to prosecute, the son was simply barred from the base.

An Air Force employee molested twenty-four children, ages nine to fourteen. Because the host country refused to prosecute, the only recourse was to bar him from the base.

This bill will close a legal loophole that currently allows civilians accompanying the military outside the United States to avoid prosecution from crimes.

An Overseas Jurisdiction Advisory Committee has recommended to the Secretary of Defense and the Attorney General that this kind of "legislation is needed to address misconduct by civilians accompanying the force overseas in peacetime settings." We have worked with both the Department of Justice and the Department of Defense on this important legislation to give our government the ability to hold citizens accountable for criminal offenses.

Mr. Chairman, I strongly believe that now is the time for Congress to act to close the loophole that allows civilian criminals to escape prosecution of their crimes. Thank you again for the opportunity to address this issue. I appreciate your commitment to enforcing the law and reducing crime, and I thank you also for your leadership in working with me to co-author the Military Extraterritorial Jurisdiction Act.

Mr. CHABOT. I believe perhaps the ranking member has a statement that he would like to have admitted.

Mr. SCOTT. Yes. Thank you, Mr. Chairman. I have a statement from Marie Sainz-Funaro, president of the Overseas Federation of Teachers, American Federation of Teachers, AFL–CIO. It is a statement that I ask unanimous consent to have admitted into the record.

Mr. CHABOT. Without objection.

We will now introduce this afternoon's panel, following which we will receive the testimony.

First, I would like to introduce Robert E. Reed, who is the associate deputy general counsel for the Department of Defense, a position he has held since 1997, when he retired from the United States Air Force.

Mr. Reed served in the Air Force for over 20 years as a judge advocate and in numerous positions, including Chief of Military Justice for the Air Force Legal Services Agency, Deputy Staff Judge Advocate for Air Force headquarters in Europe, and as an instructor at the Air Force Judge Advocate General School.

His decorations include the Defense Superior Service Medal and the Legion of Merit.

He received his bachelor's degree from the University of Connecticut and his law degree from Suffolk University of Law School.

We welcome you this afternoon, Mr. Reed.

Mr. REED. Thank you.

Mr. CHABOT. Mr. Reed is accompanied today by Brigadier General Joseph R. Barnes, the Assistant Judge Advocate General of the Army for Civil Law and Litigation. General Barnes was commissioned as an artillery officer in 1969 and became a judge advocate in 1977. He has held a variety of positions, including deputy legal counsel of the joint staff, Staff Judge Advocate for the U.S. Army's Forces Command, and Assistant Staff Judge Advocate General for Military Law and Operations. His decorations include the Defense Superior Service Medal and the Legion of Merit, with two oak leaf clusters. He received both his undergraduate and law degree from the University of Kansas.

We welcome you here this afternoon, General.

Mr. BARNES. Thank you, Mr. Chairman.

Mr. CHABOT. Mr. Reed is also accompanied by Brigadier General James B. Smith, commander of the 18th Fighter Wing at Kadena Air Force Base in Japan. He commands over 90 fighter and surveil-

lance aircraft and helicopters and, as base commander, also has responsibility for a base population of 24,000 persons.

He was commissioned as an Air Force officer in 1974 and has held a variety of assignments as fighter pilot and commander. He has logged over 4,000 flight hours. His decorations include the Defense Superior Service Medal with oak leave cluster and the Legion of Merit. He received his bachelor's degree from the United States Air Force Academy and his master's degree from Indiana University.

We welcome you here this afternoon, General.

Mr. SMITH. Thank you.

Mr. CHABOT. The next witness is Roger A. Pauley, director of the Office of Legislation for the Criminal Division of the Justice Department. His office develops the division's legislative program and provides views on legislative proposals affecting Federal criminal law and procedure.

A career civil servant, Mr. Pauley began his career at DOJ in 1966 and has held his present position since 1979. During that time, he has also served as the DOJ representative to the U.S. Sentencing Commission and for over 20 years he has been the DOJ representative to the Judicial Conference's Advisory Committee on the Federal Rules of Criminal Procedure.

He received his undergraduate and law degrees from Harvard University, and a master of laws degree from the London School of Economics.

We welcome you here, Mr. Pauley.

Mr. PAULEY. Thank you.

Mr. CHABOT. And our final witness today is Jan A. Mohr, who is the president of the Federal Education Association, an organization that speaks on behalf of over 5,000 educators and support personnel working in schools operated by the Department of Defense. Ms. Mohr has worked in the Defense Department school system since 1969 and has taught in DoD schools in Canada and Japan. She has served as president of the FEA since 1995.

She received her bachelor's degree from James Madison University and her master's degree from Michigan State University.

We welcome you here this afternoon, Ms. Mohr.

The Chair would also like to acknowledge the presence in the hearing room today of Brigadier General John DePue. General DePue is the highest-ranking Reservist in the Army JAG Corps. He, along with Mr. Reed, was one of the members of the Defense Department's Overseas Jurisdiction Advisory Committee that reviewed the applicability of U.S. law to civilians accompanying the military abroad and which, in part, led to the introduction of the bill before us today.

General DePue, I understand that you will soon be retiring from the Reserve, and I am glad that you could be with us here today and be present as Congress considers the recommendations that your committee made. Thank you very much. We appreciate your being here, as well.

At this time—and let me just explain the time constraints that we have within the committee. We generally have 5 minutes per witness. Mr. Reed, we are going to make an exception and we will make that 10 minutes, if that would be acceptable, and then we

would ask the other witnesses, if possible, to stay within the 5 minutes, and then there will be a question period from the members that are present after that.

We have a light system. There is a little light there. What is supposed to happen, when the green light comes on it means you have got 5 minutes. If the yellow light comes on, it means you have got 1 minute to kind of wrap it up. And then the red light comes on and that means you are supposed to stop, but if you don't, we are not going to do anything about it, but we would ask you to try to stay within that if at all possible.

Mr. Reed, we will hear from you at this time.

STATEMENT OF ROBERT E. REED, ESQ., ASSOCIATE DEPUTY GENERAL COUNSEL, UNITED STATES DEPARTMENT OF DEFENSE

Mr. REED. Thank you, Mr. Chairman, I will try to do that.

Mr. Chairman and members of the subcommittee, I am Robert E. Reed, the associate deputy general counsel for military justice and personnel policy in the Office of the General Counsel, Department of Defense.

I would like to express my appreciation to you for affording me this opportunity to appear before you and present the Department's great interest and strong support for the important legislation, H.R. 3380, the Military Extraterritorial Jurisdiction Act of 1999.

Today, I am accompanied, as you mentioned, by Brigadier General Barnes, from the Army's Office of The Judge Advocate General, and, from the Pacific Theater, Brigadier General Smith, commander of the 18th Fighter Wing at Kadena Air Base, Japan.

My purpose today is to provide a summary of the Department's efforts over the past few years in addressing the issue of jurisdiction over civilians who may commit crimes while accompanying our forces overseas and briefly discuss the jurisdictional gap that has developed. I will be followed by General Barnes, who will address the operational and international law aspects of this jurisdictional situation and the benefits brought to bear by H.R. 3380, and General Smith is here today to provide you his assessment of the current environment facing commanders in the field and the significance of this legislation to the climate of good order and discipline in overseas military communities.

A joint written statement has been previously provided to the subcommittee, and I would offer it for the record at this time.

Mr. CHABOT. Without objection.

Mr. REED. To begin my remarks, I make the clear and straightforward statement that the Department of Defense strongly supports enactment of H.R. 3380, the Military Extraterritorial Jurisdiction Act of 1999. This bill will close a critical gap in United States criminal jurisdiction by establishing Federal court jurisdiction pursuant to title 18, United States Code, over felony offenses committed by persons employed by or accompanying the Armed Forces outside the United States.

In the National Defense Authorization Act for fiscal year 1996, Congress directed the Secretary of Defense and the Attorney General to jointly appoint an Advisory Committee to review and make recommendations concerning the appropriate forum for criminal ju-

risdiction over civilians accompanying the Armed Forces in the field outside the United States in time of armed conflict. This Overseas Jurisdiction Advisory Committee was comprised of attorneys from the military departments, the Departments of Defense and Justice, and an attorney from the State Department. I was honored to serve as a member of that Advisory Committee.

The committee was tasked to develop specific recommendations concerning the advisability and feasibility of establishing United States criminal jurisdiction over civilians accompanying the Armed Forces in the field outside the United States during times of armed conflict that were not declared wars.

The committee also examined the subject of the exercise of such jurisdiction over DoD civilian employees and military family members overseas during situations not involving armed conflict.

The Advisory Committee conducted extensive research and concluded that there existed significant jurisdictional gaps with regard to civilians accompanying the Armed Forces overseas. The first was that of a lack of court-martial jurisdiction over DoD civilian employees and contractors who deploy with the Armed Forces during contingency operations such as the ongoing peace enforcement efforts in the Balkans.

The second gap concerned the lack of Federal civilian criminal jurisdiction that comprehensively addresses criminal activity engaged in by civilians who regularly accompany the United States forces overseas.

The jurisdictional gap addressed by the Advisory Committee and now by H.R. 3380 can be traced to a period following World War II. In 1950, Congress enacted the Uniform Code of Military Justice, effective in May 1951. Article 2 of the UCMJ authorized the exercise of court-martial jurisdiction over civilians accompanying the Armed Forces in the field overseas in times of war. Specifically, article two provided that the following persons were subject to the UCMJ: in subparagraph 10, "in times of war, all persons serving with or accompanying and Armed Force in the field;" in subparagraph 11, "subject to the provisions of any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, all persons serving with, employed by, or accompanying the Armed Forces without the continental limits of the United States."

Beginning in 1957, the article 2 UCMJ jurisdiction over civilians serving with, employed by, or accompanying the Armed Forces overseas came under critical scrutiny, and the exercise of this jurisdiction during peacetime was held unconstitutional in a series of United States Supreme Court decisions beginning with *Reid* v. *Covert*.

In a peacetime environment, the Supreme Court found fifth and sixth amendment infirmities with the exercise of UCMJ jurisdiction over civilians where Federal court protections of grand jury indictment and trial by civilian jury were unavailable.

Subsequently, the Supreme Court would rule against the exercise of UCMJ jurisdiction over dependents accompanying the Force, and discharged or former service members.

Finally, in *United States* v. *Averette*, the United States Court of Military Appeals, which is now the United States Court of Appeals

for the Armed Forces, held that for article 2, subsection 10, jurisdictional purposes, the term "in time of war" was limited to situations of Congressionally-declared wars.

The result of these decisions is that the military is powerless to address this criminal activity within its overseas communities and the acts are beyond the reach of current Federal laws. It is this jurisdictional gap in criminal justice and accountability that H.R. 3380 now addresses.

The Advisory Committee noted that the failure to eliminate these criminal jurisdictional gaps carried the high likelihood of both injustices occurring in individual cases and a resultant danger to public safety and severe damage to military operations and the foreign policy and national security interests of the United States.

In an effort to close these jurisdictional gaps, the Advisory Committee made two principal recommendations. First, the committee recommended the extension of court-martial jurisdiction over civilians accompanying the Armed Forces during contingency operations in order to ensure the success of future military operations.

The second, the Advisory Committee recommended extending the jurisdiction of Federal courts to try certain criminal offenses committed by civilian employees and contractors, and their dependents, who accompany the Armed Forces overseas.

The recommendations were limited to felony-level offenses. The committee noted that its two recommendations were independent of one another, given the fact that the second proposal regarding title 18 also addresses the jurisdictional gap dealt with by the first, since its title 18 reach would not be limited by overseas location or the type of military mission involved.

This legislation, H.R. 3380, the Military Extraterritorial Jurisdictional Act of 1999, is consistent with the recommendation found in the Advisory Committee's report regarding title 18 jurisdiction, and effectively closes the jurisdictional gap for serious criminal misconduct committed outside the United States by persons employed by or accompanying the Armed Forces. It applies during periods of armed conflict, contingency operations, and in times of peace.

Moreover, a military member who engages in such conduct outside the United States while a member of the Armed Forces, but who thereafter ceases to be subject to the Uniform Code of Military Justice, would be subject to prosecution under our Federal criminal laws.

Of course, all other military members would remain subject to UCMJ prosecution.

For several reasons, the Department of Defense then and now supports only the extension of title 18 jurisdiction. The expansion of UCMJ jurisdiction presents unique constitutional questions. Within the Department's civilian workforce, this provision would give rise to several significant anomalies in the existing structure governing civilian disciplinary matters, to include the fact that such employees would be subject to prosecution by court-martial based on their location rather than the misconduct involved. This potential inconsistency was viewed as possibly detracting from, rather than enhancing, morale and the interests of justice.

Moreover, the most serious offenses committed by those accompanying the Armed Forces abroad would still be subject to prosecu-

tion under that portion of the bill which expands extraterritorial application of title 18 jurisdiction.

The Department thus views the extended or expanded title 18 jurisdiction as the appropriate measure to meet the needs of commanders, the military community, and the interests of justice.

Consistent with the views of the Department of Defense, H.R. 3380 extends title 18 jurisdiction in the same manner as Senate bill 768, but it does not expand or extend jurisdiction to the title 10 UCMJ jurisdiction.

Now, before I pass the presentation of our remarks to General Barnes, I would like to provide a few comments regarding the general effect of this legislation.

First of all, this legislation does not expand military criminal jurisdiction or the coverage of the Uniform Code of Military Justice. The military's role in this legislation is that of providing a support function to the United States attorney and the United States district court that will address whether the individual committed a crime, and, if so, what will be the appropriate disposition of that case.

Appropriate U.S. civilian authorities will follow their established procedures in determining what offenses are supported by the available evidence, whether the case warrants Federal prosecution, and what would be the appropriate Federal offense or offenses upon which to seek an indictment.

The purpose is to provide recourse under the laws of the United States from crimes committed overseas by civilian employees and others accompanying the Armed Forces, but under circumstances in harmony with the constitutional protections and due process provided all U.S. citizens in our Federal judicial system.

In some instances, this legislation actually provides those U.S. constitutional protections and due process guarantees that these civilian employees and others accompanying our forces overseas would not otherwise enjoy, such as when the jurisdiction to investigate and prosecute rests with the foreign country in which these employees find themselves assigned.

Finally, this legislation calls for the establishment of implementing regulations, in conjunction with the Departments of Justice and State. I believe it is fair to say that these implementing regulations in support of U.S. Federal jurisdiction, and following the prescribed Congressional review that is required, will further the expected constitutional protections and individual rights of our judicial system.

Mr. Chairman, that concludes my remarks. I would be happy to respond to any of the committee's questions.

Mr. CHABOT. Thank you very much, Mr. Reed.

[The prepared statement of Mr. Reed follows:]

PREPARED STATEMENT OF ROBERT E. REED, ESQ., ASSOCIATE DEPUTY GENERAL COUNSEL, UNITED STATES DEPARTMENT OF DEFENSE

The Department of Defense strongly supports enactment of HR 3380, "The Military Extraterritorial Jurisdiction Act." This Bill will close a critical gap in United States criminal jurisdiction by establishing jurisdiction over felony offenses committed by persons employed by or accompanying the Armed Forces, outside the United States.

The National Defense Authorization Act for Fiscal Year 1996 § 1151, Pub. L. No. 104–106, 110 Stat. 186 (1996), directed that the Secretary of Defense and Attorney

General jointly appoint 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. In 1996, the Overseas Jurisdiction Advisory Committee was appointed by the Secretary of Defense and the Attorney General, and tasked: to review historical experiences and current practices concerning the use, training, discipline, and functions of civilians accompanying the Armed Forces in the field; to develop specific recommendations concerning the advisability and feasibility of establishing United States criminal jurisdiction over civilians accompanying the armed forces in the field outside the United States during time of armed conflict not involving a war declared by Congress; and to develop other recommendations as the Committee considered appropriate. A Department of State attorney also served as a member of the Committee. In addition to reviewing the issue of the exercise of criminal jurisdiction over civilians accompanying the armed forces overseas during armed conflict, the Committee also examined the subject of the exercise of such jurisdiction over DoD civilian employees and military family members overseas during situations not involving armed conflict.

On April 18, 1997, the Committee submitted its report to the Secretary of Defense and Attorney General of the United States, addressing these and other issues. On June 21, 1997, the Department of Defense General Counsel and Assistant Attorney General, Office of Legislative Affairs, transmitted the Committee's report to Congress. Both the Departments of Defense and Justice deferred in making specific endorsements of the report, pending further review. However, the DoD General Counsel did emphasize that the Committee's recommendations regarding the legislation necessary to close the jurisdictional gaps identified were severable in nature.

The Committee conducted extensive research and concluded that there existed significant jurisdictional voids with regard to civilians accompanying the Armed Forces overseas. The first was that of a lack of court-martial jurisdiction over those DoD civilian employees and contractors who deploy with the Armed Forces during contingency operations, such as the ongoing peace enforcement effort in the Balkans. The second was the lack of Federal civilian criminal law that comprehensively addresses criminal activity engaged in by civilians who regularly accompany the United States forces overseas. The Committee noted that the failure to eliminate these critical jurisdictional gaps carried the high likelihood of both injustice occurring in individual cases, with a resultant danger to public safety, and severe damage to military operations and the foreign policy and national security interests of the United States.

In an effort to close these jurisdictional voids, the Committee made two principal recommendations. First, the Committee recommended the extension of court-martial jurisdiction over civilians accompanying the Armed Forces during contingency operations in order to ensure the success of future military operations. Second, the Committee recommended extending the jurisdiction of Federal courts to try certain criminal offenses committed by civilian employees and contractors, and their dependents, who accompany the Armed Forces overseas. The recommendations were limited to the punishment of offenses committed by a civilian accompanying the Armed Forces overseas when the act would be an offense punishable by imprisonment for more than one year (i.e., felony offenses)if it had been committed within the special maritime and territorial jurisdiction of the United States. In addition, the Committee noted that its two recommendations were independent of one another, given the fact that the second proposal would assist in addressing the jurisdictional void dealt with by the first, as the extended Title 18 jurisdiction would not be limited by the overseas location or the nature of the military mission being supported.

This legislation, HR 3380, "The Military Extraterritorial Jurisdiction Act", is consistent with the recommendation found in the Committee's report, regarding Title 18, and effectively closes this "jurisdictional gap" by amending Title 18, United States Code, and adding a new Chapter 212, "Military Territorial Jurisdiction," sections 3261 through 3264. This bill will establish Federal jurisdiction over certain felony offenses committed outside the United States by persons employed by or accompanying the Armed Forces, or by certain former servicemembers, during times of armed conflict, contingency operations, and times of peace.

Section 3261 (a) would provide that any person employed by or accompanying the Armed Forces outside the United States who engages in 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, will be subject to punishment for that offense under Federal criminal law. Moreover, a person who engages in such conduct outside the United States while a member of the Armed Forces, but who thereafter ceases to be subject to the Uniform Code of Military Justice (UCMJ, chapter 47 of

title 10, United States Code), would be subject to punishment for the offense under our Federal criminal laws.

In 1999, the Office of the Inspector General for the Department of Defense (DoD IG) conducted a separate evaluation of these issues that focused on Military Criminal Investigative Organizations' authorities, policies, and procedures for conducting criminal investigations involving civilians who accompany the United States Armed Forces stationed overseas. The DoD IG also examined the effectiveness of the interaction among the Military Criminal Investigative Organizations (MCIO), Department of Defense officials, military commanders, and host nation authorities in support of MCIO investigations of such civilians.

The DoD IG determined that, although MCIO's generally conduct thorough and effective investigations, and have excellent working relationships with investigative authorities of the host nations, these investigations rarely result in a criminal prosecution, due to host country disinterest in prosecuting the suspected criminal unless significant host country issues are involved and a lack of United States criminal jurisdiction over U.S. civilians suspected of committing criminal offenses while accompanying the Armed Forces overseas. The DoD IG also reported that overseas commanders expressed concern over the inadequacy of administrative sanctions available to them, as well as the amount of time and resources that they and other personnel must expend in dealing with civilian criminal misconduct.

In July 1999, the Senate introduced Senate Bill 768 to address both jurisdictional voids referenced in the 1997 Report of the Overseas Jurisdiction Advisory Committee. Senate Bill 768 proposed to add Article 2 (a) (13) to the UCMJ in order to extend overseas jurisdiction to civilians serving with or accompanying the force in contingency operations. The Senate proposal would also have added Sections 3261 through 3264 to title 18, United States Code, in order to expand Federal overseas jurisdiction over anyone serving with, employed by, or accompanying the Armed Forces overseas who engages in conduct 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. In September 1999, the Department of Defense provided its views on S. 768, supporting the extension of title 18 jurisdiction, but advising that it did not favor that portion of the bill that would expand UCMJ jurisdiction over Department of Defense civilian employees and contractors during contingency operations.

For several reasons, the Department of Defense, then and now, supports only the extended title 18 jurisdiction at this time. The expansion of UCMJ jurisdiction presents unique constitutional questions that may likely engender protracted litigation. Within the Department's civilian workforce, this provision would give rise to several significant anomalies in the existing structure governing civilian disciplinary matters, to include the fact that such employees would be subject to prosecution by court-martial based on their location, rather than the misconduct involved. This potential for inconsistency within the Departmental civilian workforce would serve to detract from, rather than enhance, morale and the interests of justice. Furthermore, the necessity for UCMJ jurisdiction has not been adequately substantiated by events occurring during previous contingency operations. Moreover, the most serious offenses committed by those accompanying the Armed Forces abroad would be subject to prosecution under that portion of the bill which expands extraterritorial application of title 18 jurisdiction. The Department thus views the expanded title 18 jurisdiction as the appropriate measure to meet the needs of commanders, the military community, and the interests of justice.

Consistent with the views of the Department of Defense, H.R. 3380, introduced in the House in November, 1999, expands Title 18 jurisdiction in the same manner as S. 768, but does not expand title 10 jurisdiction. To implement the expanded Federal jurisdiction, H.R. 3380, as did S. 768, would amend title 18 to authorize the Secretary of Defense to designate and authorize a person serving in a law enforcement position within DoD to arrest, in accordance with any applicable international agreements, a person outside the United States when there is probable cause to believe that this person engaged in conduct which constitutes a criminal offense under the expanded jurisdiction. Both bills also provide that the arrested person be delivered, as soon as practical, to the custody of U.S. civilian law enforcement authorities for removal to the United States for judicial proceedings.

Although we are now in a post-Cold War era in which the United States military has significantly decreased its size and overseas presence, there has been an increasing reliance upon DoD to respond to numerous military missions that involve Operations Other Than War. The invaluable contributions and support of DoD civilian personnel and contractor employees have been vital to the success of these complex military missions.

Civilian employees of the Military Departments and Department of Defense have regularly served with or otherwise accompanied our Armed Forces overseas in the field or aboard ship. In large measure, their behavior and contributions to our nation have been of the highest order. Unfortunately, however, criminal misconduct engaged in by some civilians accompanying the Armed Forces overseas is not a new phenomenon, and the inability to adequately address such departures from acceptable conduct by U.S. civilians accompanying the U.S. Armed Forces overseas has, for decades, frustrated and perplexed commanders and other government/military officials.

Historically, civilians have been subject to prosecution by court-martial dating back to the Revolutionary War. The Articles of War authorized court-martial jurisdiction over civilians accompanying or serving with the Army overseas, and during World Wars I and II, civilians accompanying the Armed Forces in the field were tried by court-martial.

In 1950, Congress enacted the Uniform Code of Military Justice (UCMJ), effective in May 1951. Subsections of Article 2, UCMJ, authorized the exercise of court-martial jurisdiction over civilians accompanying the Armed Forces in the field (overseas) in times of war. Specifically, Article 2 provided that the following persons were subject to the UCMJ:

(10) *In times of war*, all persons serving with or accompanying an armed force in the field.

(11) Subject to the provisions of any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, *all persons serving with, employed by or accompanying the armed forces without the continental limits of the United States.* . . .

Beginning in 1957, the Article 2(11) UCMJ jurisdiction over civilians serving with, employed by, or accompanying the armed forces overseas came under critical scrutiny, and the exercise of this jurisdiction during peacetime was held unconstitutional in a series of U.S. Supreme Court decisions, beginning with *Reid* v. *Covert*, 354 U.S. 1 (1957). In a peacetime environment, the Supreme Court found Fifth and Sixth Amendment infirmities with the exercise of UCMJ jurisdiction over civilians where Federal court protections of grand jury indictment and trial by civilian jury were unavailable. Subsequently, the Supreme Court would rule against the exercise of UCMJ jurisdiction over dependents accompanying the force and discharged or former servicemembers. Finally, in *U. S.* v *Averette*, 19 U.S.C.M.A. 363, 41 C.M.R. 363 (1970), the U.S. Court of Military Appeals (now the U.S. Court of Appeals for the Armed Forces) held that, for Article 2(10) jurisdictional purposes, the term "in time of war" was limited to situations of congressionally-declared wars. The result of these decisions was the jurisdictional gap in criminal justice and accountability that H.R. 3380 now addresses.

The support provided by DoD civilian employees and contractors has become almost a routine part of contingency operations. Their role has increased significantly in recent deployments to Somalia, Haiti, Rwanda and the Balkans. In fact, it is not unusual for the civilians accompanying the U.S. forces at a particular overseas location to outnumber uniformed personnel. Over 2000 civilian employees and contractors are now deployed, worldwide, in support of joint operations. Moreover, while there has been a substantial draw-down of U.S. military personnel assigned overseas, reports indicate that the number of family members accompanying DoD personnel has not decreased proportionately. According to statistics provided in the September 1999 DoD Report of Worldwide Manpower Distribution by Geographical Area, approximately 34,000 civilians are employed at overseas locations, with over 14,000 family dependents, and nearly 200,000 dependents accompany active duty military personnel overseas. Even given the fact that many of these dependents are young children, this overseas presence still represents nearly a quarter of a million people over whom the U.S. has not been able to exercise criminal jurisdiction.

As previously noted, although the large majority of civilians accompanying the U.S. Armed Forces overseas honorably represent the United States, criminal misconduct involving U.S. civilian employees, contractors and family members does occur. When it occurs—just as when there is misconduct by military members—it creates good order and discipline problems that generate additional frustrations for commanders charged with the total force responsibility of accomplishing difficult and demanding missions. When serious criminal misconduct is inadequately addressed, this places a great strain on the military community, the military mission, and the relationship between U.S. forces and the host nation.

Generally, the right to exercise criminal jurisdiction and to prosecute a criminal offense committed by a member of the U.S. Armed Forces, or a civilian accompanying that Force, is governed by an applicable international agreement, such as a Status of Forces Agreement (SOFA) entered into between the U.S., as a Sending State,

and the host nation, as a Receiving State. The typical SOFA provisions provide the U.S. authorities with the exclusive right to exercise jurisdiction over criminal acts that violate U.S. law, but not the host nation's law, and affords the host nation with exclusive jurisdiction over offenses that violate its law, but not that of the U.S.

For those criminal offenses that violate the laws of both the Sending and the Receiving State, a SOFA generally provides that either the U.S. or the host nation has the primary right to exercise jurisdiction, depending upon the nature and circumstances of the offense. This is referred to as concurrent jurisdiction. Under this arrangement, the U.S. will have the primary right to exercise jurisdiction over those offenses committed solely against the property or security of the U.S., solely against the person or property of other U.S. personnel, or offenses arising from the performance of official duties by U.S. personnel. The primary right to assert jurisdiction and to prosecute all other offenses will rest with the host nation.

Considerable concern has been expressed that the U.S. has been required to allow U.S. citizens to be subjected to the criminal jurisdiction of host nations whose judicial systems do not provide the rights, guarantees, and procedural safeguards available under the U.S. Constitution. For example, during Desert Storm, the U.S. entered into a jurisdictional arrangement with Saudi Arabia that did not cover civilian personnel. This legislation will better enable the U.S. to successfully negotiate the right to exercise exclusive jurisdiction over civilians employed by, or accompanying, the Armed Forces overseas during future status of forces negotiations. A host nation will now fully understand that the U.S. has the authority to prosecute and punish those civilians in issue who commit certain offenses within that State's territory.

The SOFA arrangements with the Balkan countries of Bosnia, Croatia, and the Federal Republic of Yugoslavia (Serbia) are found in the Dayton Peace Accords (DPA) or the General Framework Agreement for Peace (GFAP). These agreements provide participating countries, such as the United States, with exclusive jurisdiction over all criminal offenses committed by its U.S. civilian workforce. Unfortunately, however, if a criminal offense is committed by a U.S. civilian employee or contractor accompanying the US Armed Forces, the Task Force commander is virtually powerless to ensure that the U.S. civilian offender's misconduct is addressed, aside from imposing limited administrative sanctions.

While, as noted, a mechanism does exist to subject U.S. civilians to the criminal jurisdiction of a host nation, pursuant to a SOFA arrangement, often the host nation is not interested in prosecuting criminal offenses committed by U.S. civilians—particularly when the victim is not a citizen of the host nation. As a result, such civilians can and do commit serious criminal offenses, and face no more than minor administrative sanctions available to overseas commanders.

Local commanders have adequate disciplinary measures available to respond to minor misconduct. These sanctions include, but are not limited to, restrictions on installation privileges, termination of government housing benefits, and the suspension or revocation of exchange and commissary access. However, it is when the more serious offenses occur—and the host nation is either unable or unwilling to exercise appropriate criminal jurisdiction over a civilian accompanying the force—that a more substantial threat occurs to good order and discipline in our overseas military communities. In turn, these situations have the greatest potential to threaten or jeopardize a mission essential to the furtherance of our national interests.

Furthermore, DoD contractors are not subject to the same range of sanctions available to an installation commander when other civilian employees or family members of assigned military personnel commit similar offenses. In most instances, the supervisor or manager of a contractor employee is responsible for contractor discipline. However, in many cases, a contractor receives little or no punishment for criminal misconduct. Typically, the contractor is either allowed to remain overseas and simply moved or re-assigned to another location, or returned to the United States. The local commander is limited to barring the contractor from an installation and/or restricting the contractor's installation privileges and limiting the contractor's access to DoD services and support.

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.

Overseas commanders have the responsibility to accomplish their missions in an increasingly complex, and politically sensitive environment. To be successful, they must have an extremely professional and disciplined force. This assigned force will

obviously include U.S. civilians accompanying the force, to include DoD civilian employees, contractors, and family members. These civilians, just as their uniformed counterparts, represent the United States in action and word. When military personnel fail to conform to the standards of conduct expected, commanders have a mechanism to respond to these digressions. These options include administrative punishments up to and including a court-martial, depending upon the seriousness of the offense. Although overseas commanders are not powerless in responding to the same type of deviations from acceptable behavior on behalf of the civilians accompanying the force, they cannot always respond appropriately or proportionately. This inability to ensure that U.S. civilians are properly disciplined, to "make the punishment fit the crime," detracts from the military mission.

The commanders of forces accompanied by the largest number of civilians, in Korea, Japan, and Germany, have expressed the greatest concern with U.S. civilian criminal activity abroad, and the need for adequate disciplinary measures. Typical of the responses to the Overseas Jurisdictional Advisory Committee's request for information from the field were the comments of the Commander, U.S. Naval Forces, Japan, ADM B.E. Tobin. In a letter to the Judge Advocate General of the Navy, he described the inability to deal adequately with serious civilian offenses as a "significant and longstanding problem" that leaves overseas commanders and their communities "without any legal deterrent to, nor protection from, criminal activity."

Commanders must have the ability to ensure that appropriate disciplinary action is available when the misconduct is sufficiently serious to warrant referral to proper U.S. authorities for Federal criminal prosecution. This legislation will provide commanders with this ability. H.R. 3380 would amend title 18 to extend Federal criminal jurisdiction over civilian employees, contractors, and their dependents overseas. By doing so, it closes the long existing lack of jurisdiction over serious offenses committed by such individuals, while affording the protections of trial in Federal district court, indictment by grand jury, trial by civilian jury, and all of the other protections and procedures accorded U.S. citizens in the Federal court system.

Mr. CHABOT. We will hold our questions until all the panel is done.

General Barnes?

STATEMENT OF JOSEPH R. BARNES, BRIGADIER GENERAL, ASSISTANT JUDGE ADVOCATE GENERAL, UNITED STATES ARMY

Mr. BARNES. Thank you, Mr. Chairman.

Mr. Chairman, Mr. Scott, I am Brigadier General Joseph R. Barnes. I am the Assistant Judge Advocate General for Civil Law and Litigation, Department of the Army. Today I am representing all of the services, however.

I would like to first start by thanking you for this opportunity to appear in support of this important piece of legislation.

As Mr. Reed indicated, my purpose today is to address the operational and international legal aspects created by the jurisdictional gap that has been explained here today.

Let me start by putting the situation in a strategic context, if you will.

In the Post-Cold-War era, Department of Defense has responded to numerous military missions that involve operations other than war. Invaluable contributions and support of DoD civilian personnel and contract employees has been vital to the success of these complex missions. In fact, the support provided by DoD civilian employees and contractors has become an almost routine part of contingency operations, such as Somalia, Bosnia, Haiti, and others.

It is not unusual, in fact, for the number of civilians accompanying U.S. forces to actually outnumber the number of military personnel engaged in that operation.

Approximately 2,000 civilian employees and contractors are now deployed worldwide in support of contingency operations. These operations are particularly delicate from the civilian/military, civil/military relations context, and the impact of any criminal misconduct by members of our forces, either military or civilian, can have a really serious effect on mission accomplishment—an effect that is greatly multiplied if that misconduct cannot be adequately addressed due to lack of jurisdiction, our situation today.

In our more-established theaters, the size of our civilian component remains significant. This overseas presence still represents over a quarter of a million personnel over whom the U.S. has not been able to exercise criminal jurisdiction. This number does not include the many contractor personnel providing direct support to our forces in overseas theaters.

Although the large majority of civilians accompanying U.S. Armed Forces overseas honorably represent the United States, criminal misconduct involving U.S. civilian employees, contractors, and family members does, in fact, occur. When it occurs and is inadequately addressed, this places a great strain on the military community, the military mission, and the relationship between U.S. forces and the host nation.

Let me speak now to our jurisdictional arrangements with our host nations. Generally, the right to exercise criminal jurisdiction and to prosecute a criminal offense committed by a member of the U.S. Armed Forces or a civilian is governed by an applicable international agreement, such as a status of forces agreement, or SOFA.

The typical SOFA provides U.S. authorities with the exclusive right to exercise jurisdiction over criminal acts that violate our law but not the host nation law and affords the host nation with exclusive jurisdiction over the reverse situation.

For those criminal offenses that violate laws of both sending and receiving states, generally a SOFA provides that either the U.S. or the host nation has the primary right to exercise jurisdiction, depending on the nature and circumstances of the offense. This is referred to as "concurrent jurisdiction."

In essence, if the offense is committed by a U.S. civilian primarily against another U.S. citizen or U.S. property, ordinarily the United States would have the primary right to exercise jurisdiction, which, of course, we cannot if there is no jurisdictional basis, as is the situation today.

While it is noted a mechanism does exist to subject U.S. civilians to the criminal jurisdiction of a host nation, often the host nation is not interested in prosecuting criminal offenses committed by U.S. civilians, particularly when the victim is not a citizen of the host nation. As a result, such civilians can and do commit serious criminal offenses and face no more than minor administrative sanctions available to overseas commanders.

A similar but even more notable jurisdictional void is created in the arrangements we have been able to negotiate in many contingency operations. For example, the SOFA arrangements within the Balkan countries found in the Dayton Accords provide that the participating countries, such as the United States, have exclusive jurisdiction over all criminal offenses committed by U.S. civilian workforce, as well as its military personnel.

Unfortunately, however, if a criminal offense is committed by a U.S. civilian employee or contractor accompanying the U.S. Armed Forces in the Balkans, the task force commander is virtually powerless to ensure the U.S. civilian offender's misconduct is addressed.

Several examples may serve to highlight the problems that result. In 1998, for example, a U.S. national contractor employee struck and killed a civilian while driving. Under the SOFA, Bosnia could not exercise jurisdiction over the individual. Due to the jurisdictional gap, the U.S. lacked a statutory basis to prosecute. The contractor was simply transferred out of the country. During the same time frame, another contract employee, also a U.S. citizen, allegedly committed the crime of rape. Again, Bosnia was precluded from prosecution under the SOFA and the U.S. could not prosecute because no criminal statute was applicable.

It has been the longstanding policy of this Government, strongly and repeatedly supported by the Congress, to maximize U.S. jurisdiction over offenses committed by U.S. personnel stationed or operating overseas. The existing jurisdictional gap greatly hinders accomplishing that objective.

This legislation will better enable the U.S. to successfully negotiate the right to exercise exclusive jurisdiction over civilians employed by or accompanying the Armed Forces during future SOFA negotiations, particularly in contingency operations. It will also enhance our ability to request and receive a waiver of a host nations primary right to prosecute under SOFAs that provide for concurrent jurisdiction. In both situations, our host nation will now fully understand that, unlike today, the United States has the authority and effective ability to address serious offenses allegedly committed within the nation by U.S. civilian personnel.

This legislation will greatly aid our ability to accomplish our operational mission, to negotiate favorable status of forces agreements, to ensure that our personnel who are victims of crimes receive the treatment they are entitled to, and that we are able to further our longstanding policy of maximizing U.S. jurisdiction overseas.

This concludes my remarks. I will be happy to respond to questions.

Mr. CHABOT. Thank you very much, General Barnes.

General Smith?

STATEMENT OF JAMES B. SMITH, BRIGADIER GENERAL, COMMANDER, 18TH FIGHTER WING, KADENA AIR FORCE BASE, NAHA, JAPAN

Mr. SMITH. Mr. Chairman, it is a pleasure to be with you. I must tell you, though, that never in my wildest dreams did I think that I would find myself in front of Congress with a room full of lawyers, but here I am, nonetheless. [Laughter.]

The first point I would make is one might get the impression that there is an epidemic problem with either dependent misconduct or civilian misconduct. Nothing could be further from the truth.

In Okinawa, there are eight categories of crime, and they range from DUI on one extreme to violent crime on the other extreme,

and for each of those eight categories SOFA-status individuals—which include uniformed military, dependents, contractors, and civilians—in each of those categories the rate of crime by SOFA-status individuals is less than the crime rate of Okinawans, themselves. And even in violent crime, where we get the most media attention, the SOFA status rate of violent crime is 1 percentage point less than the Okinawan, and DUIs is half the Okinawan rate.

My point is that civilians, dependents overseas are representing United States honorably, in the same manner that those men and women wearing uniforms—you have every reason to be proud of them, as we are as commanders.

Now, having said that, the biggest issue here is the fact that the installation commander has no legal authority over civilians. That is true. Let me describe briefly the administrative process that we use when addressing dependent misconduct—and I think our process is similar to most other bases overseas.

At Kadena we have what we call the "Kadena department action program, so if there is dependent misconduct, they come before the base commander—the support group commander, in our case—and go through a series of administrative actions to deal with the conduct.

That administrative process is a good one and, by and large, I don't think we need any more legal authority to deal with it. It is good because, particularly in the case of dependent misconduct, it always involves restitution, it demands cooperation and presence by parents. It almost always involves community service, and community service in the organization that the sponsor works. So there is a mentoring process that goes on as we address dependent misconduct.

The problem, of course, is when we have got real crimes committed. I think a host of those have been listed, but at Kadena just this last month we had an instance of a 19-year-old dependent, who I had previously barred from base for forgery, and obviously had no legal authority over him, goes downtown—and my authority for barment does not mean he has to go back to the States. It means that I bar him from the base.

We get, generally, barment from the Marines on the other installations, but—now, in most cases it does work, because they have no infrastructure support on the island.

But he goes through a series of breaking and entering vehicles. The Japanese government does not want to prosecute a case like that, yet publicly and in the media we will be criticized for not prosecuting cases that involve American citizens. And in a highly-political area like Okinawa, that becomes very difficult when you do not have any tool with which to prosecute.

There have been several much more serious. In 1986, there was an allegation substantiated of rape and carnal knowledge on the part of a civilian. That individual was sent home and was not prosecuted because of jurisdiction issues.

In 1991, there was a retired gunnery sergeant from the Marines that was accused of molestation of a 12-year-old dependent son and a local national. Japanese government opted not to prosecute. We barred him from base, but he was living downtown. Three years

later, he molested another child, and at this time the Japanese government did prosecute.

Had this legislation been in effect, we might have saved a child, the second molestation.

I had a case just last month where a dependent husband—and, again, one of the reasons why this is becoming an issue is that 20 years ago only 4 percent of the Air Force was female, now 18 percent, so you are finding more and more dependent husbands, and we do have the ongoing challenge with domestic violence.

Well, he beat up his wife. She was in the hospital. While she was in the hospital, he came back and demanded access to the house—and he legitimately pointed out it is the sponsor's responsibility to provide housing for dependents. So here was the individual who beat up his wife, put her in the hospital, and is demanding a right to the house.

At the end of the day, all I could do was put him on an airplane and send him home. His option was that or barment.

Most of the issues involving dependent misconduct we can deal with with the administrative process, but it is my firm view that child molesters, embezzlers, and those convicted of serious crimes should have their day in court and it should be documented.

I look forward to any questions that you might have.

Mr. CHABOT. Thank you very much, General. We appreciate your testimony, as well.

We will next move to Mr. Pauley.

STATEMENT OF ROGER PAULEY, ESQ., DIRECTOR OF LEGISLATION, OFFICE OF POLICY AND LEGISLATION, UNITED STATES DEPARTMENT OF JUSTICE

Mr. PAULEY. Thank you, Mr. Chairman and Mr. Scott. I welcome the opportunity to appear on behalf of the Department of Justice to present testimony on H.R. 3380.

The Department of Justice joins the Department of Defense in strongly supporting enactment of this legislation.

Mr. Chairman, I would ask that the complete text of my statement appear in the record.

Mr. CHABOT. Without objection.

Mr. PAULEY. And, with the indulgence of the Chair, I propose to depart somewhat from it in my oral presentation because much of what is said there would merely repeat many of the things already well said by my colleagues from DoD by way of explaining the bill and the urgent need for it.

H.R. 3380's primary purpose is to fill a jurisdictional void—a void that, as has been explained, operates to prevent, in some instances, even the opportunity for a fair trial on charges of serious criminal misconduct, up to and including rape and murder. This is more than merely an unfortunate legal gap. It is repugnant to the sense of justice and adversely affects not only morale among the tens of thousands of military and civilian Defense Department personnel stationed overseas, but also the foreign relations of the United States. It is for these reasons and others that we hope the subcommittee will promptly seek to enact this measure, which, in a somewhat different form, passed the Senate last year by unanimous consent.

Now, H.R. 3380 does not, except for providing the necessary authority for DoD and law enforcement personnel to arrest upon probable cause and to state that persons arrested must be delivered as soon as practicable to civilian law enforcement authorities for removal into the United States for judicial proceedings, purport to regulate the criminal procedures applicable in these cases. The bill does require, as has been mentioned, that the Secretary of Defense promulgate regulations dealing with the apprehension, detention, delivery, and removal of the persons affected, which will take effect only after this committee and its Senate counterpart have had a chance to study the regulations for at least 90 days. Otherwise, the bill is silent on the applicable procedures. This silence is the subject of concern and criticism by the witness who will follow, but, with respect, because we appreciate the sincerity of that concern, we believe the concern is misguided and the criticism of the bill's lack of procedures unfounded. Let me try to give some perspective on this question.

The bill creates extraterritorial jurisdiction. Extraterritorial jurisdiction over crimes is not a novel concept under Federal law, although it is the growing trend and it is one that Congress has frequently legislated without, at any time in our Nation's history, enacting an accompanying set of procedures. Indeed, such a project would be a daunting and well nigh impossible task, since, to a large extent, the details of applicable procedures will vary from country to country under the terms of applicable treaties and international agreements between the particular nation and the United States. Congress has, rather, preferred to rely—wisely, in our view—on the Constitution, on otherwise-applicable statutes and rules, such as the Speedy Trial Act, the extraterritorial offenses venue law, and rule five of the Federal Rules of Criminal Procedure, and on the courts through case law.

To give some historical background on extraterritorial jurisdiction, the first offense, the only one defined in the Constitution, itself—namely, treason—had and has extraterritorial application. Over the ensuing years of this Nation's existence and at an accelerated rate in recent decades, Congress has enacted many statutes that explicitly provide for extraterritorial application over offenses, such as counterfeiting and hostage-taking, without simultaneously undertaking the difficult task of trying to fix the details of the applicable procedures.

Moreover, as long ago as 1922, the Supreme Court held that, even absent an explicit statutory provision calling for extraterritorial application, many statutes are to be interpreted as embodying a Congressional intent of applying overseas, such as frauds against the government, false statements on visa applications, etc. In 1994, this committee played a major role in the enactment of a statute punishing the killing abroad of one American by another, and in 1966 it played a similar role in enacting economic espionage offenses having express extraterritorial application—in both instances, without any accompanying procedures.

The point is that there exists a wide range of laws with extraterritorial application to Americans generally, and these laws have been enforced and convictions obtained using the generally-applicable set of constitutional guarantees, statutes, and rules ap-

plicable to extraterritorial offenses as to others. It is true that under H.R. 3380, because of the necessary initial participation by DoD arresting authorities, another layer of Executive Branch involvement in the criminal justice process will exist than that which applies under many but not all of the other extraterritorial statutes.

For example, under the Maritime Drug Law Enforcement Act, typically the Coast Guard makes the initial arrest on the high seas and then must, as H.R. 3380 contemplates with respect to DoD, turn over the arrested person to appropriate civilian law enforcement authorities, often after some days at sea. But this involvement of DoD and the arrest and initial detention process, I submit, does not change the fundamental legal principles and procedures that will apply.

Now, what, you may ask, are these laws and rules, and does the Constitution apply outside the United States to criminal investigations? A complete answer would take far longer than the limited time available. And perhaps the members will wish to explore some of these matters in questioning. But, in general, and, while this area of the law is still evolving, the core or fundamental guarantees under the Constitution have been held applicable to American citizens abroad, although not necessarily in the same way or with the same force, reflecting the fact that some of the Constitution's provisions and rights embody a notion of reasonableness, and what is reasonable may vary in an overseas context, as indeed these rights have been held to vary for civilians even within the United States in a military environment.

But for now and in conclusion, I merely wish to stress several things. First, that H.R. 3380 is not, in our view, deficient for failing to include specific procedural rights. As I have indicated, this is the norm when Congress creates extraterritorial criminal jurisdiction. Second, that notwithstanding the absence of statutory procedures specific to H.R. 3380's proposed offenses, the protections of the Constitution and other generally-applicable procedural rights obtain. Finally, that we care very much about affording citizens and others their rights, first and foremost because we are a law enforcement agency dedicated to following the law, and, secondarily, because any failure to do so, resulting in the denial of citizens' rights, will likely endanger future prosecutions and defeat the purpose of the bill.

Mr. Chairman, that completes my remarks, and I stand ready to answer any questions.

Mr. CHABOT. Thank you very much, Mr. Pauley.

[The prepared statement of Mr. Pauley follows:]

PREPARED STATEMENT OF ROGER PAULEY, ESQ., DIRECTOR OF LEGISLATION, OFFICE OF POLICY AND LEGISLATION, UNITED STATES DEPARTMENT OF JUSTICE

Mr. Chairman and members of the Subcomittee, I welcome the opportunity to appear on behalf of the Department of Justice to present testimony on H.R. 3380, the "Military Extraterritorial Jurisdiction Act of [2000]." The Department of Justice joins the Department of Defense in strongly supporting enactment of this legislation.

The bill would amend title 18 of the United States Code to extend federal jurisdiction over certain serious offenses committed outside the United States by persons formerly serving with, or presently employed by or accompanying, the armed forces of the United States. The offenses covered are those that would be felonies if com-

mitted within the special maritime and territorial jurisdiction of the United States. These crimes are (in addition to generally applicable federal felonies that apply wherever committed within the United States) primarily violent in nature such as murder (18 U.S.C. 1111), manslaughter (18 U.S.C. 1112), assault (18 U.S.C. 113), arson (18 U.S.C. 81), destruction of property (18 U.S.C. 1363), sexual abuse (18 U.S.C. 2241–3), and robbery (18 U.S.C. 2111).[1] So as to avoid unwarranted double punishment, the bill would preclude prosecutions for such offenses in instances where a foreign government has prosecuted or is prosecuting the offender for conduct constituting the offense unless a federal prosecution received the personal approval of the Attorney General or the Deputy Attorney General (or a person acting in either capacity). The bill further requires the Department of Defense to develop uniform regulations governing the apprehension, detention, removal, and delivery of persons subject to this proposed legislation.

This bill would address gaps in federal law that have existed for more than forty years and that have permitted many individuals, without justification, to avoid prosecution for serious misconduct. The gaps result from the fact that the Supreme Court held in *Reid* v. *Covert*, 354 U.S. 1 (1957), *Kinsella* v. *Singleton*, 361 U.S. 234 (1960), and *Toth* v. *Quarles*, 350 U.S. 11 (1955), that court-martial jurisdiction could not constitutionally be applied (1) to crimes committed in peacetime[2] by persons employed by or accompanying the armed forces of the United States abroad,[3] or (2) to crimes committed by a member of the armed forces after the member's service with the armed forces has expired. Because foreign nations often have no interest in vindicating such crimes when perpetrated against other Americans or against victims who are not citizens of the host country, the present lack of civilian court jurisdiction over such crimes, coupled with the Supreme Court's invalidation of the previously existing court-martial jurisdiction over them, means that many such offenses, although extremely serious in nature, have gone and are likely to continue to go, unpunished. In one instance, for example, a military dependent in Okinawa raped the 15 year old dependent daughter of another military service member. The Japanese government, which had no interest in prosecuting the case, waived jurisdiction. As the United States was unable to exercise jurisdiction over the offense itself, the offender went unpunished. There have also been cases in which the participation of service members in a serious crime has not come to light until after the member's discharge from the armed forces, which precluded the exercise of court-martial jurisdiction.

Further, there may be instances in which the United States will be pressured to surrender civilian employees or dependents to host country authorities for potentially harsh punishment, following a summary judicial proceeding, because the United States is unable to take appropriate enforcement action itself. Indeed, recent experience during peacekeeping operations indicates that host nations have become reluctant to enter into agreements with the United States ceding jurisdiction over United States civilian nationals accompanying the forces because of awareness that the United States lacks statutory mechanisms to exercise such jurisdiction.

This legislation is in accord 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 (P.L. 104–106), and is similar to a proposal contained in the President's 21st Century Law Enforcement and Public Safety Act, as well as in a bill passed by the Senate last year (S. 768). For all the reasons indicated, we believe its enactment will not only serve the interests of justice and American foreign policy, but will also contribute to the morale and safety of the thousands of civilian defense contractors and dependents of our armed forces assigned overseas. We therefore congratulate the sponsors of this legislation for introducing it, and the Chairman of this Subcommittee for holding this hearing on it. In our view, it is legislation that is long overdue.

While not wanting to delay the prompt enactment of the bill, we do wish to point out a few ways in which the legislation might be improved in minor respects. First, in proposed 18 U.S.C. 3261(a)(2), the bill defines the class of former servicemen whose crimes would become subject to civilian court jurisdiction as those members of the armed forces who after committing a covered offense cease to be subject to

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[1] Also covered, inter alia, are theft (18 U.S.C. 661–2), and the sale or possession of child pornography (18 U.S.C. 2252).

[2] In *United States* v. *Averette*, 19 U.S.C.M.A. 363, 41 C.M.R. 363 (1970) the former Court of Military Appeals (now the U.S. Court of Appeals for the Armed Forces) held that Article 2(10) of the Uniform Code of Military Justice, 10 U.S.C. § 802, which subjects to court-martial jurisdiction those civilians serving with the armed forces in the field "[i]n time of war," was confined to a congressionally declared war.

[3] *Reid* so held with respect to capital offenses; *Kinsella* extended *Reid* to non-capital crimes.

court-martial under the Uniform Code of Military Justice "without having been tried by court-martial with respect to such conduct." Presumably, the reason for the quoted language is to avoid the possibility of double jeopardy. It is indeed well settled that the Double Jeopardy Clause prohibits successive military court and civilian court prosecutions for the same offense, since each prosecution is by the same sovereign, the United States. See *Grafton* v. *United States*, 206 U.S. 333 (1907). But if this is the purpose, the language is not well crafted, since jeopardy will have attached before the *conclusion* of any court-martial trial. We suggest, however, that rather than trying to define when jeopardy has attached for court-martial purposes, the quoted language be eliminated. No other title 18 offense contains a comparable provision purporting to deal with double jeopardy (e.g. 18 U.S.C. 1111 does not end with an admonition that the offender cannot be tried for murder if he was previously federally convicted or acquitted for the crime).[4] Instead, such double jeopardy considerations are routinely left for assertion by any defendant who believes he or she has a valid claim that the prosecution is barred. We believe the same course is proper as a drafting matter here.

Second, there is a somewhat more significant issue involving proposed 3261(a)(2). The approach taken in the bill is to cover only servicemen who are no longer subject to court-martial jurisdiction for their crimes committed while in military service. In contrast, S. 768 and the President's proposal would create concurrent civilian court jurisdiction over *all* covered crimes committed by members of the armed forces, with the understanding that such civilian court jurisdiction would only rarely be exercised. The reason for this approach is to preserve the option, after consultation with the Department of Defense, of asserting civilian court jurisdiction over an active serviceman in a situation in which, e.g., a murder or robbery was committed jointly by the serviceman and a civilian dependent. In such a case, civilian court jurisdiction over both perpetrators would avoid the need for separate military and civilian trials.

We do not object generally to the more tailored approach taken in H.R. 3380. In fact, that approach has much to commend it. But we suggest that it may be wise to consider accommodating the circumstance contemplated above of a jointly committed crime involving both an active serviceman and a civilian employee or dependent. In the event the Subcommittee wished to provide for the possibility of a single trial of both the accused in this circumstance, proposed 18 U.S.C. 3261(a)(2) in the bill could be amended, in pertinent part, as follows: "and thereafter ceases to be subject to such chapter *(unless the indictment or information charges that the member committed the offense with another person or persons not subject to court-martial jurisdiction for the offense, and the court concludes that a joint trial of the member and at least one other such person is appropriate)*" (proposed amendment in italic). The latter clause (i.e. "and the court concludes . . .") contemplates the denial of a possible motion for separate trials under Rule 14 of the Federal Rules of Criminal Procedure, since if separate trials were ordered there would be little or nothing to be gained by allowing the active member to be tried in a civilian court.[5]

Finally, we note that in part (A) of the definition of "employed by the Armed Forces outside the United States" the words "of a military department or of" should be inserted before "the Department of Defense" so as to parallel the definition in part (A) of "accompanying the Armed Forces outside the United States."[6]

Mr. Chairman, that ends my statement, and I would be glad to try to answer any questions.

Mr. CHABOT. And our final witness this afternoon will be Ms. Mohr.

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[4] The bill's use of the phrase "tried by court-martial" is also problematic, since if the court-martial was aborted without prejudice, no jeopardy would have attached.

[5] Of course, one of the purposes of consultation with the Department of Defense would be to assure that the circumstances of the case made it very unlikely that a court would grant a motion for separate trials, before a determination was made to seek civilian court jurisdiction over an active service member.

[6] We note that the definition of a person "accompanying the Armed Forces outside the United States" in proposed section 3264(2) is broad enough to include a foreign national who is the spouse of and resides in a foreign country with another foreign national employee of a DOD contractor or subcontractor. There may be instances in which the federal interest in offenses committed by such persons is so tenuous that the assertion of federal jurisdiction could raise constitutional due process concerns. *See, e.g., United States* v. *Davis*, 905 F.2d 245, 248–49 (9th Cir. 1990), cert. denied, 498 U.S. 1047 (1991); *compare United States* v. *White*, 51 F.Supp.2d 1008, 1011 (E.D. Cal. 1997). This potential problem can be obviated by including in the implementing regulations a provision that confines the exercise of extraterritorial jurisdiction to that which is constitutionally permissible.

STATEMENT OF JAN MOHR, PRESIDENT, FEDERAL EDUCATION ASSOCIATION, WASHINGTON, DC

Ms. MOHR. Thank you, Mr. Chairman, Mr. Scott. Thank you for this opportunity to speak about the potential impact of the Military Extraterritorial Jurisdiction Act on teachers working overseas in the Department of Defense schools.

My name is Jan Mohr. I am president of the Federal Education Association, an affiliate of the National Education Association. We have submitted written testimony, and I will try to summarize that. I will not read from that.

NEA and FEA believe that criminal actions should, in fact, result in criminal prosecution and penalties, regardless of where that crime is committed, and we commend this legislation for trying to take care of that, and also, for the protection of our teachers overseas. We are concerned, though, about the potential impact on our employees because it is not spelled out very clearly. Specifically the legislation lacks sufficient due process provisions to protect civilians accused of crimes overseas.

The legislation also fails to address the rights of the accused during the investigation of criminal conduct and during any pre-trial and detention. It is unclear who has the authority to arrest and detain civilians. Is it with the base commander, the military police, or other agencies, such as CID or OSI?

The civilian would be caught between these different authorities with different agendas, possibly.

The local military authorities could arrest and detain civilians indefinitely, without securing agreement from Federal authorities that the alleged offense should be prosecuted, and this process is vastly different from the due process required in the United States. Military authorities could arrest and detain an accused educator without interviewing the accused or any identified witness. We have had teachers arrested without even knowing why, and it was not until later, when they were taken to the military police, that they were told why they were brought in.

A teacher could be arrested and detained indefinitely by military officers with no opportunity to secure release even before there is any determination that the accused has committed an offense. There is no bail hearing or the right to secure release pending trial, which is different than in the United States. But certainly overseas, simply taking the passport from this individual would detain them and hold them in lieu of bail. They could be arrested and detained without right to legal counsel. Few civilians would have the resources to have legal counsel fly over to defend them. It is normally not available in the local community because the host nation attorney could not properly help them in that venue.

Civilians assigned like myself, was in Okinawa, if I could have been accused and sent to San Francisco, I would not have been where I was assigned and it certainly is not my home of record, which is Hampton, Virginia. So I would have no support system, and, I assume, would bear all the expense, myself.

There is a lack of due process rights, which could have devastating consequences for our educators, particularly in this day and age where, unfortunately, there is a trend to falsely accuse teachers of

child abuse. We do not want child abuse to go unprosecuted, but, in case, we do need legal defense.

We had a bus incident in Japan where a teacher mistakenly put a child on the wrong bus. The child rode the entire bus route and was brought back to the school, and then the child was taken home. The next day, the military police showed up at school to arrest the teacher. Luckily, the principal did intervene and said, "We will take care of this. This is not a crime. This was a mistake."

Right now, we are dealing with a case in Germany where a teacher was accused of using the Government-issued computer to access inappropriate material. The teacher was relieved of his duties in the classroom. The military took the computer, went through the hard drive, looked up everything. There was nothing there. For 6 weeks this teacher has not been allowed to go back into the school. In fact, the base commander has barred him from the base. We understand, as of yesterday, that possibly in a couple of weeks the commander will raise that bar, but, in the meantime, the teacher was exonerated. There was absolutely nothing there.

The legislation, in its current form, fails to provide adequate safeguards to protect educators in overseas Department of Defense schools. We need sufficient due process safeguards similar to those mandated for persons accused of crimes in the U.S.

One, we recommend full and fair investigation to determine probable cause to arrest, detain, and turn the accused over to the Federal authorities. Complete investigation reports should be produced and turned over to the appropriate U.S. Attorney for a decision as to whether to pursue an indictment. And only after indictment should authorities make the arrest and turn the accused over to Federal authorities.

Two, individuals should have the right to post bail and obtain release from pre-trail confinement—as I mentioned before, simply by taking the passport—and right to full and fair investigation and determination of probable cause to seek Federal prosecution within 60 days of arrest. Investigations should include personal interviews with the accused and all material witnesses.

Three, the right and free access to qualified legal counsel.

When our teachers signed up to go overseas to teach children of the military, they did not, in fact, sign up to lose their rights as U.S. citizens.

Thank you.

Mr. CHABOT. Thank you very much, Ms. Mohr.

[The prepared statement of Ms. Mohr follows:]

PREPARED STATEMENT OF JAN MOHR, PRESIDENT, FEDERAL EDUCATION ASSOCIATION, WASHINGTON, DC

Chairman McCollum and Members of the Subcommittee:

Thank you for the opportunity to speak with you today about the potential impact of the Military Extraterritorial Jurisdiction Act on teachers working in overseas Department of Defense (DoD) schools.

My name is Jan Mohr and I am the President of the Federal Education Association (FEA), an affiliate of the National Education Association (NEA). The FEA represents over 6,000 American teachers and education support personnel working in stateside and overseas Department of Defense schools, including schools in Europe, the Middle East, and Asia. I myself have been an educator with the Department of Defense for over 30 years.

NEA and FEA believe that criminal actions should result in criminal prosecution and penalty regardless of where the crime is committed. We certainly agree that

passage of this legislation would help protect our members working in overseas DoD schools who may be victims of a crime. We applaud the Subcommittee for turning attention to this issue and for seeking to protect Americans on overseas military bases from criminal activity.

In addition, we applaud the Subcommittee for rejecting provisions included in the Senate bill that would subject civilians to court martial jurisdiction. We believe it would be highly inappropriate to subject our members to such court martial proceedings.

NEA and FEA are concerned, however, about the potential negative impact of the Military Extraterritorial Jurisdiction Act on education employees working in DoD schools, and on other civilians stationed overseas. We believe that the legislation as currently drafted could have unintended consequences for educators working overseas. Specifically, we believe the legislation lacks sufficient due process provisions to protect civilians accused of crimes overseas.

The vast majority of educators working in Department of Defense schools are law-abiding people who do not commit felony crimes. Educators or members of their families who do commit crimes should be brought to justice just as any other individual. Unfortunately, in recent years, we have seen an increase in the number of false allegations of criminal conduct made against educators, both in the United States and overseas. In addition, there have been examples of overreaction and/or abuse on the part of military officials dealing with educators accused of crimes. It is these sorts of situations that raise the greatest concern regarding the pending legislation.

ISSUES AND CONCERNS

We believe the pending legislation lacks sufficient protections to ensure against the infringement of educators' rights, particularly as it fails to provide for due process for civilians accused of crimes. Specifically, the legislation fails to address the rights of the accused during the investigation of criminal conduct and during any pre-trial arrest and detention.

Arrest and Detention

The proposed legislation is unclear as to delegation of authority to arrest and detain civilians and turn them over to federal authorities. The legislation does not address whether such discretion rests with the base commander, base law enforcement officers, or other parties. We are concerned that this lack of clarity could lead to confusion, with civilians caught between different authorities with differing agendas.

In addition, the legislation does not require that military officials demonstrate probable cause prior to arresting and detaining a civilian. As drafted, it does not appear that local military authorities would even need to secure agreement from federal authorities that they would prosecute the accused for the alleged offense. Thus, a military commander could arrest and detain an educator indefinitely, simply on the basis of a complaint from a student. This is vastly different from the process required for crimes allegedly committed in the United States, where the government must seek an indictment and show probable cause, or—if an arrest is made prior to indictment—go swiftly before a federal magistrate to have a probable cause hearing.

Investigation

The proposed legislation fails to set out any standards for investigation of alleged criminal conduct. Under the proposed language, a military official could arrest and detain an accused educator without interviewing the accused or any identified witnesses. Military officials have limited experience in handling cases involving civilians accused of crimes. It is essential, therefore, that the law protect civilians and guarantee a full, fair investigation.

Pre-Trial Release

We are concerned that the legislation does not guarantee that individuals accused of crimes are able to seek pre-trial release. Under the legislation as currently drafted, a teacher could be arrested and detained indefinitely by military officers, with no opportunity to secure release, even before any determination that the accused has committed a prosecutable offense. Again, the legislation fails to provide civilians overseas the same protections applicable to civilians accused of crimes in the United States. Such rights include a timely bail hearing and the right to secure release pending trial, where such release would not create a risk of flight or of harm to the accused or to others. In the case of civilians residing on overseas military installa-

tions, the flight risk could be addressed simply by the individual to turn over his or her passport to military authorities.

Right to Counsel

We are also troubled that the proposed legislation could permit the arrest and detention of civilians without any right to obtain legal counsel. Few civilians residing overseas would have the resources to fly in qualified counsel from the United States. Most local attorneys in the host country would not be qualified to represent Americans in U.S. federal court proceedings. It is unclear whether the legislation contemplates the appointment of local military defense counsel or a federal defender to represent an accused civilian.

Jurisdiction

The proposed legislation is also unclear as to which federal court would have jurisdiction over a criminal case involving civilians living overseas. For example, when I served in Japan, my home base was in Virginia. Had I been accused of a crime, however, I could have been under the jurisdiction of the federal court in San Francisco—the closest venue to Japan, yet still thousands of miles from the site of the alleged crime. Under such circumstances, I would have been defending myself against charges in a venue located near neither my accuser and any evidence nor my family and network of support.

Unfounded Criminal Allegations

We believe the lack of due process rights in the proposed legislation could have devastating consequences for educators facing unfounded allegations of criminal conduct, particularly allegations of sexual or physical abuse. In such instances, officials may be influenced by the nature of the allegations to act quickly and detain the accused without a full investigation.

For example, a recent front-page Washington Post story documented the case of a Maryland teacher falsely accused of sexual harassment. Following an investigation into the alleged abuse, the students admitted to fabricating the charges. Under the proposed legislation, a teacher facing such false accusations could be arrested and detained indefinitely, with no opportunity for release, even absent sufficient proof warranting indictment and prosecution.

In addition, we are concerned that the lack of due process protections could result in abuses by military officials. For example, a teacher in a Department of Defense school in Japan mistakenly placed students on the wrong school bus. The students rode the complete bus route and returned safely to the school. The next day military police entered the school and accused the teacher of child neglect. If not for the intervention of the principal, the teacher would have been arrested in front of her students.

In another recent incident, a DoD educator in Bavaria accused of accessing inappropriate materials on a government computer was arrested, detained, and barred from any military installation, including his school, within an area comprising two thirds of Bavaria. A thorough investigation by military police of the computer hardware and all of his computer disks completely exonerated him of any wrongdoing. Yet, after more than two months, the educator has still not been permitted to return to his classroom. We believe it essential that the proposed legislation protect our members and their families against such unwarranted abuses.

CONCLUSIONS AND RECOMMENDATIONS

NEA and FEA are deeply concerned that the legislation in its current form fails to provide adequate safeguards to protect educators working in overseas Department of Defense schools. Sufficient due process safeguards—similar to those mandated for persons accused of crimes in the United States—should be put in place to protect educators and their families.

We recommend:

- Requiring a full, fair investigation to determine whether there is probable cause to arrest, detain, and turn the accused over to federal authorities. A complete investigation report should be produced and turned over to the appropriate United States attorney for a decision as to whether to pursue an indictment. Only after indictment, should base authorities make the arrest and arrange to turn the accused over to federal authorities.
- In the event pre-indictment arrest and detention is permitted, the legislation should, at a minimum, guarantee:
  - The right to post bail and obtain release from pre-trial confinement. A bail hearing should be held within 48 hours of arrest and should be con-

ducted by a neutral, federal, non-military official such as a State Department officer. Surrender of the detainee's passport should suffice as bail, except in cases where release could threaten the safety of the accused or others.

- The right to a full, fair investigation and determination of probable cause to seek federal prosecution within 60 days of arrest. Investigation should include personal interviews with the accused and with all material witnesses.
- The right to secure counsel to assist in seeking pre-trial release and to represent the accused during the investigation. The federal government should provide transportation and fees for attorneys to represent the accused. At a minimum, the accused should be afforded a federal public defender.

Our members left their homes and traveled overseas to provide an invaluable service to military families. They are dedicated to their jobs and to the children they teach. They believe that Congress should take steps to protect all who reside on overseas military installations against criminal activity. But, they also believe that neither their service overseas, nor the service of any other civilian overseas, warrants an infringement of civil liberties or the rights of U.S. citizens. On their behalf, we urge you to amend the proposed legislation to address these concerns.

I thank you for the opportunity to speak with you today and would be pleased to answer any questions.

Mr. CHABOT. We have now reached the point in the hearing where the panel members have 5 minutes to ask questions to the witnesses, and I will yield myself 5 minutes to do so.

My first couple of questions I would direct to either Mr. Reed or General Barnes or General Smith, and either one of you can answer. If you keep your answers relatively brief, it would be helpful.

First, how many civilian or former military personnel escape justice for the crimes they commit overseas each year because of the gap in Federal criminal jurisdiction you have discussed, or approximately? Would you have any sort of number?

Mr. REED. Well, I think the subcommittee has been provided a copy of the DoD IG report that was completed last September, and in that report they gave you some facts and figures on cases that they reviewed in which they reviewed 275 investigations by the military criminal investigation organizations, and, of those, there was only disposition by the host country in 8 percent, so the remainder was without any jurisdiction.

In addition to that, sir, just as a short answer, I believe the Advisory Committee's report that you have will give you some sense of the numbers of cases involving civilians overseas.

Mr. CHABOT. Okay. Thank you.

Next, do you anticipate encountering any problems implementing this legislation with a host nation, for example Germany or Italy? Will the U.S. have to amend existing international agreements such as NATO, SOFA, to fully implement this legislation?

Mr. BARNES. Mr. Chairman, if I may respond?

Mr. CHABOT. Yes, General.

Mr. BARNES. No. This legislation will be fully consistent with the arrangements that are in place. As I said, it calls for concurrent jurisdiction where both countries have jurisdiction, and this would simply allow us to implement the SOFA effectively that we already have in place, so I anticipate no problems in that regard.

Mr. CHABOT. Okay. Thank you.

I would assume that this legislation would apply to civilians participating in military operations, such as those presently ongoing in the Balkans, such as Bosnia and Kosovo; is that correct?

Mr. BARNES. Yes, sir.

Mr. CHABOT. Okay. Now, during recent discussions with the Department of Defense and Department of Justice, were there any significant concerns raised and addressed concerning this legislation? Have proposed changes to the bill been agreed to between the two departments? Mr. Pauley?

Mr. PAULEY. Yes, there were no significant problems unearthed. My statement does contain some suggestions for minor improvements in the legislation, which I understand DoD concurs with and which have been provided to staff.

Mr. CHABOT. Okay. All right. Thank you.

Let me follow up, Mr. Pauley, with a question for you, if I could. The bill contains a provision suggested by the Defense Department that would allow the Attorney General to authorize prosecution under this bill, even if a host nation is prosecuting or has prosecuted the person for the same crime. Could you tell us why that provision is necessary?

Mr. PAULEY. I believe it is necessary for similar reasons that we have the so-called "petite policy" that applies when an individual has been prosecuted domestically by a state. In neither situation, because the Supreme Court has indicated that states are a separate sovereign from the Federal Government for purposes of the double jeopardy clause, and certainly a foreign nation would be, is there a constitutional barrier to the dual prosecution.

The reason for reserving the opportunity is in case we believe that the prosecution by the foreign nation was fundamentally flawed in some respect.

Mr. CHABOT. If someone would be acquitted, would we tend to retry them?

Mr. PAULEY. Not necessarily, but——

Mr. CHABOT. But possibly?

Mr. PAULEY. Or even if they had been convicted and given a sentence that we regarded as wholly incommensurate with the conduct involved.

So it would be an authority, I think, that would be rarely exercised because it does require, as the bill indicates, the personal approval of the Attorney General or the Deputy Attorney General.

Mr. CHABOT. Okay.

Mr. PAULEY. But it is there to take account of those kinds of unusual circumstances in which we believe justice was not served by the original prosecution by the foreign country.

Mr. CHABOT. Okay. Thank you.

And my final question will be for Ms. Mohr. Do you believe that the possibility that American teachers in DoD schools abroad might have to stand trial in the United States for crimes that they have committed would in any way discourage other teachers from taking jobs in the DoD school system?

Ms. MOHR. Well, I think if that were the case, it probably would. I mean, luckily, as General Smith stated, we don't have a lot of crimes, and certainly very, very few committed by our teachers, but, in this day and age, as I mentioned, with allegations of child

abuse, I think it would deter teachers from readily signing up to go overseas to teach.

Mr. CHABOT. Okay. Thank you. I appreciate all of the responses to questions by the various panel members.

My time has expired. We will recognize the ranking member, Mr. Scott, for 5 minutes.

Mr. SCOTT. Thank you, Mr. Chairman.

I would just ask some of the military witnesses how many cases you anticipate trying in the United States if this bill were to pass?

Mr. REED. Sir, we have looked at this, and, because of the fact that we have intentionally reserved jurisdiction to felony-level offenses, and for the reasons stated by General Smith about all the other tools in the community, we envision that the number of cases in the United States would be very small that would warrant this type of prosecution—significant cases, but a small number, maybe a couple, half a dozen at the most, annually.

I think there is some information you have on that.

Mr. SCOTT. Now, how does the bill define "serious case"? Is it all felonies?

Mr. REED. Felony level offenses that would be punishable by over a year in confinement under title 18.

Mr. SCOTT. So that would be——

Mr. REED. Felony level.

Mr. SCOTT [continuing]. Any felony?

Mr. REED. Yes, sir.

Mr. SCOTT. Okay.

Mr. SMITH. Could I add one point?

Mr. REED. General Smith might have some comment on that.

Mr. SMITH. It is awfully appealing to add up the cases that we bring as evidence and suggest that those would be cases in the future we would try. I think it is important to understand the deterrent effect of just having the legislation.

One of the crimes that we tend to have more of is theft and embezzlement—three cases involving $30,000, $26,000, and $19,000 stolen by dependent spouses—yet, the military member knows nothing about it.

My instinct is, with this legislation in place, there will be a deterrent effect toward that kind of activity, so I don't think we can just add up the cases and say that is what the standard will be in the future.

Mr. SCOTT. Okay. Mr. Reed, all drug felony situations would be covered by this?

Mr. REED. Well, all the offenses that would be felony-level offenses that otherwise would fall under the structure of the SOFA provision.

Mr. SCOTT. Possession of cocaine, simple possession of cocaine?

Mr. REED. I believe those offenses would be felony level offenses.

Mr. SCOTT. And would you anticipate trying those as criminal offenses in the United States?

Mr. REED. Many of those offenses I think the host nation would prosecute.

Mr. BARNES. If I can add to that, typically, under our typical SOFA, the primary right of jurisdiction to prosecuting that case would rest with the host nation rather than United States, so I

would anticipate that that would be the circumstance in most cases.

Mr. SCOTT. And then can you say a word about the—this would cover people outside of the United States who are connected with the military, wherever they may be, not just on the base, but in the nearby neighborhood of the base, and halfway across the globe, if they happen to be on vacation from the base. Can you say a word about why we need the jurisdiction outside of the neighborhood of the base?

Mr. REED. Sir, many of our people that we assign overseas live in the local economy with the local host nation citizens, work on the military installation supporting the military operation, and then go home at night after work. They still——

Mr. SCOTT. Within the host nation?

Mr. REED. Within the host nation and in the local community, as well as on base. They still, as General Smith indicated, serve as an image or an ambassador, representation of the United States.

This legislation is limited, as you well know, from the fact that there has to be a nexus to the military, and it is that nexus of employed by or accompanying the Armed Forces overseas that is the factor that we look to because of the sponsorship by which we bring them overseas and place them in the international arena.

Because of that and the impact on the military from their serious misconduct, as General Smith alluded to earlier, it is important for us.

Mr. SCOTT. That would occur if you are in the host nation. If you are in Bosnia and are taking a vacation in Tokyo and get into a barroom brawl that reaches felony level in Tokyo, this bill would allow you to get extradited from Tokyo back to the United States and tried for that felony; is that right?

Mr. REED. Under that scenario I think the nation where the crime was committed would be exercising jurisdiction, because the individual would not be under that nation's SOFA arrangement.

And, second of all, I think the other point to make here is that this provides jurisdiction, it doesn't mandate prosecution. It provides jurisdiction, and so you still look to the facts and circumstances surrounding the commission of any offense and the seriousness, and the U.S. Attorney will decide whether or not, under all those circumstances, it is appropriate to bring an indictment and to prosecute.

Mr. SCOTT. Thank you. I have other questions, Mr. Chairman.

Mr. CHABOT. We will go into maybe another 3-minute round, if that is acceptable.

Mr. SCOTT. Okay.

Mr. CHABOT. Okay. I am going to yield myself an additional 3 minutes, and then do the same for Mr. Scott, as well.

General Smith, you mentioned that the host country media often is critical when the U.S. is powerless to prosecute one of its own that commits a crime there. Does this also negatively affect the morale of Americans on the base?

Mr. SMITH. Yes, sir, it does. First off, it is our position that we should maintain jurisdiction over Americans to the maximum extent possible, rather than turning them over to the host nation.

But not having a vehicle causes us to encourage the Japanese government to prosecute.

The negative part for good order and discipline is where you have, under the UCMJ, very clear punishments for serious crimes, yet a sense on the part of some few civilians that, because we have no legal authority over them, that they can do what they choose.

Mr. CHABOT. Thank you, General.

My next question is for either General Smith, Barnes, or Mr. Reed. Will this legislation allow the U.S., as it is presently drawn up, to exercise jurisdiction over juvenile family members? I assume the answer is no.

Mr. REED. Well, the military would certainly not exercise jurisdiction over the juveniles.

Mr. CHABOT. Do you think it should?

Mr. REED. The military? No, sir. Were this——

Mr. CHABOT. Dependent family member?

Mr. REED. This jurisdiction on family members, you have the U.S. jurisdiction over juveniles, and that provision would apply, but no different than it would be to any other United States citizen that was a juvenile, as far as the status and what action by the U.S. Attorney would be.

But if your question was would it vest jurisdiction in the military, the answer is no, just like it wouldn't for any of the other civilian employees.

Mr. CHABOT. Thank you.

Mr. Pauley, extraterritorial jurisdiction is exercised over U.S. citizens overseas today for a few specified crimes, is it not?

Mr. PAULEY. Well, it is more than a few, but it isn't the norm.

Mr. CHABOT. Would you describe how that jurisdiction is exercised and the rights that Americans are afforded in those circumstances?

Mr. PAULEY. Within what is remaining of your 3 minutes, I am not sure I can. In general, the constitutional rights to have counsel appointed, to have your bail or release application considered, those apply when one is presented under rule five before a Federal magistrate in the United States. So ordinarily I think what happens, assuming a foreign country——

Mr. SCOTT. Wait a minute. Could you say that again?

Mr. CHABOT. Without objection, I am going to recognize myself for an additional 2 minutes, and we will make Mr. Scott's five.

Mr. PAULEY. When a person is arrested for a Federal offense, whether the arrest occurs within the United States or by Federal authorities, as it would under this bill, outside the United States, the person first has to be taken without unnecessary delay before a Federal magistrate, and it is at that point that the Federal magistrate advises the individual initially of that person's right to counsel and ordinarily considers bail motions.

There is a difference as to what happens in the case of a person arrested without a warrant and a person arrested with a warrant. If it is without a warrant, then that first appearance also serves the purpose of having a judicial determination of probable cause.

But, in terms of extraterritorial jurisdiction and what happens, as I understand it, the basic requirement which stems from the fourth amendment is that the person be taken without unnecessary

delay before a Federal magistrate. What "without unnecessary delay" is varies, the courts have said, with the circumstances.

For example, in the *Yunis* case, which involved an arrest on the high seas under the hijacking statute, the individual was lured offshore and into international waters on a promise of a drug transaction and then arrested, and he was placed on a U.S. Navy warship and transported by that means, which took several days—I think to Hawaii.

The courts sustained that interval as "without unnecessary delay" because, had they gone on-shore to some foreign country, that would have precipitated the need for extradition proceedings, which would likely have taken even longer.

So it is a flexible concept without unnecessary delay, but the main point is that one get the individual under that standard before a Federal magistrate, and it is at that point that the other constitutional rights, the fifth and sixth amendment and eighth amendment rights to bail kick in.

Mr. CHABOT. Thank you.

My time has expired. The gentleman from Virginia is recognized for 5 minutes.

Mr. SCOTT. Thank you, Mr. Chairman.

I was reading the actual words on what is covered and what isn't covered. It is conduct that would constitute an offense punishable for imprisonment for more than a year if it had been conducted in the United States. That may or may not cover juveniles, and I am not sure what the intention of the legislation is if a juvenile is treated as an adult and they might get more than a year.

So is it your intent to cover juveniles if they would be tried as adults, or not to cover juveniles?

Mr. PAULEY. The legislation states if the conduct would have been offense if committed within the special maritime and territorial jurisdiction of the United States. The juvenile delinquency statutes do provide for prosecution as an adult of certain older juveniles for more-serious either drug or violent offenses. So I think theoretically, if you had an older juvenile charged or believed to have committed, say, a serious assault, that if a judge ultimately concurred with the motion to transfer that individual for adult prosecution, that the bill would allow it. Yes.

Mr. SCOTT. So is it your intention to cover juveniles that could be tried as adults if the conduct had occurred within the United States proper? It is your intention to cover juveniles?

Mr. PAULEY. Yes.

Mr. SCOTT. Okay.

Mr. PAULEY. But only under the limited circumstances, as I have indicated, where, had the juvenile been in the United States, that juvenile would have been also susceptible.

Mr. SCOTT. Could have been.

Mr. PAULEY. That is correct.

Mr. SCOTT. Well, the point is that you don't know whether the juvenile is covered by the criminal code or not. It is kind of discretionary—he may be, may not. We might want to make it clear that juveniles are covered or not covered so that we know what we are talking about.

Let me go through a little bit of the process so we can see the difference between what would happen under this bill for a person in a foreign land and what would happen in the United States.

For example, if a crime is committed, who arrests the person? Who would effectuate the arrest?

Mr. PAULEY. I will take a crack at it and then turn it over to Mr. Reed or someone else, if they wish.

I think it would vary. The bill gives authority, by its terms, to DoD to effect arrests on probable cause. That might occur.

On the other hand, if the offense were believed to have taken place off base, say we are in a foreign country and we get into an argument in a bar and one or the other of us commits a serious assault on the other, most likely the law enforcement authorities of the foreign country would make the initial arrest.

In either event, after the arrest, according to the SOFA or other treaty that applied, there would be an opportunity afforded to that country to assert jurisdiction.

Mr. SCOTT. Does that person who makes the arrest—I mean, are we subject to the Miranda warnings?

Mr. PAULEY. Yes, if it is—if the arrest is by a DoD individual, yes.

Mr. SCOTT. Okay. But if they are arrested by a foreign individual that doesn't know anything about Miranda, you just—it doesn't count?

Mr. PAULEY. No. Just as with all extraterritorial jurisdiction crimes that are on the books now, where the conduct, as it normally will be, is also a breach of that country's laws, if you are arrested for that murder or assault or what have you by the foreign country and held, unless they have a comparable procedure to Miranda, you——

Mr. SCOTT. I am just trying to figure out, we are arresting him and we are going to try him in the United States, so we just want to see what the difference is. If you are arrested, you don't get your Miranda warning, apparently.

Mr. PAULEY. No.

Mr. SCOTT. And that would mean—I am sorry?

Mr. PAULEY. You do if you are arrested by a Federal official.

Mr. SCOTT. And if you are not, you don't? If you are arrested by somebody from Bosnia, then you don't.

Mr. PAULEY. That is correct.

Mr. SCOTT. So you lose your Miranda—if this bill passes, you lose your Miranda rights. You may lose your Miranda rights.

Mr. PAULEY. No. I don't think that follows, Congressman, because that arrest would occur in any event. With or without this bill, the foreign country would make the arrest. It is that this bill affords the opportunity for either a DoD initial arrest or, at least, ultimately the surrender of the individual to United States authority for prosecution.

Mr. CHABOT. The gentleman's time has expired.

Mr. SCOTT. May I have two additional minutes, Mr. Chairman?

Mr. CHABOT. Without objection.

I think it looks like General Barnes would like to——

Mr. BARNES. If I could just add quickly to that, I just want to clarify that the situation right now is that U.S. citizens are subject

to foreign arrest, and that arrest procedure is governed by foreign, not U.S. law. This bill would not change that, whether it is enacted or not.

By giving arrest authority to other U.S. officials designated by the Secretary of Defense in here, it brings those protections that we are used to into that procedure, which would not now apply to foreign arrests.

Mr. SCOTT. You kind of went into the bail situation a little bit and your right to counsel. When would you be entitled—you would be entitled to bail, when, after you would been hauled back to the United States and not before?

Mr. PAULEY. That is my understanding. Now, it would be in the discretion of the commander.

Mr. SCOTT. See, one of the problems we have with these criminal statutes is that you only have one system. You have the same system for people that are actually innocent as the ones that are guilty, and so we would kind of have to see how this works with both. For the guilty it is no big deal, but if they are innocent and they are over in, say, Italy somewhere, when do they get an opportunity to be heard on their innocence? Is that back in the United States?

Mr. PAULEY. Just as with the individual I described who was transported by Navy vessel for several days, it is when you reach the United States.

Mr. SCOTT. Okay. So the innocent person from Italy will get bail when they get back to New York? Then they can do bail, then they can get bail, entitled to discuss bail, I guess?

Mr. PAULEY. Yes.

Mr. SCOTT. Okay. How does this kind of work if you are trying to mount a defense? What guarantee do you have to have access to witnesses, to investigate the crime scene, and things of that nature? We have a little disadvantage now that you are back in New York. Are you guaranteed the right to call witnesses back to the United States?

Mr. REED. Yes, sir. As I stated in my opening statement, the intent of this is for the Department of Defense to support the Department of Justice in its prosecution, and all the procedures and all the guarantees and all the protections in United States law that currently apply under our Federal court system would apply to these cases.

As a practical matter, from experience over the years, we do not use confinement or jail, as you may be using the term "arrest," on a regular basis. It is rarely used at all.

Under this statute, we would, at that time, if we did have to arrest someone, I believe the instruction by the regulation, is to turn them over to U.S. authorities for their transport, and that would kick in the Department of Justice procedures, protections that all Americans enjoy.

So this legislation is to——

Mr. SCOTT. Well, one protection that they enjoy now—I have one additional question after this, with the indulgence of the Chair.

Mr. CHABOT. After this question?

Mr. SCOTT. After this one.

Mr. CHABOT. All right.

Mr. SCOTT. One protection you enjoy is as soon as you are arrested you are taken pretty well forthwith to somebody who could, having heard both sides, discuss bail. Here you don't get to discuss that in Rome where you start off. You have to discuss it back in New York. I mean, you are essentially incarcerated for that period of time before you can even discuss it.

Mr. PAULEY. I believe under this legislation that the intent is that the Department would essentially be detaining the individual and turning him over to U.S. authorities for action in the States, and——

Mr. SCOTT. Can you discuss bail back in Rome? Is that——

Mr. PAULEY. At the moment, no. And there are reasons. I mean, that inherent in the notion of creating extraterritorial jurisdiction is a balancing.

In theory, Congress could mandate the stationing of magistrates at strategic locations around the world, with the approval or permission of the host countries, who could conduct initial appearances under rule five, but there is a considerable expense associated with that, obviously, and the volume of cases that is currently in existence under all extraterritorial jurisdiction authority has not been deemed to merit that kind of attempted judicial presence in a foreign country.

Mr. SCOTT. Okay. Another——

Mr. CHABOT. The gentleman's——

Mr. SCOTT. This is the last question.

Mr. CHABOT. For real?

Mr. SCOTT. For real.

Mr. CHABOT. Okay. [Laughter.]

Mr. SCOTT. For real.

Mr. CHABOT. All right.

Mr. SCOTT. Another right you have is when somebody wants to take you away somewhere is that you get to discuss the appropriateness of the extradition. If you are in Idaho and they want to try you in Virginia, you can argue back in Idaho that you should not be extradited. Where do you get to or do you get to argue against the extradition while you are back in Italy, or do you say back in New York, "These are flimsy charges—they got the wrong person, and I shouldn't have been extradited to begin with"? Do you get to discuss that at all anywhere in this process?

Mr. PAULEY. Well, to some extent I think you may be misapprehending the nature of what you get to argue in extradition. It is merely identity of yourself. In other words, if the——

Mr. SCOTT. Okay.

Mr. PAULEY [continuing]. Extraditing persons call for Roger Pauley to be sent for murder, say, from Idaho to New York, I don't get to argue at the extradition hearing whether I am guilty of murder or whether probable cause exists, just am I the Roger Pauley mentioned in the indictment. And it is not until I get back to New York that I get to challenge.

Mr. SCOTT. So if they got the wrong person, when do you get to discuss that?

Mr. PAULEY. If they got the wrong person—well, since there is not an extradition——

Mr. SCOTT. And I have seen extraditions where, in fact, you do discuss the propriety of the prosecution. It is rare, but there was a case, a 20-year-old drug case in Virginia where they actually didn't extradite.

But if you are the wrong person, when do you get to discuss the appropriateness of extradition, or do you get to discuss that at all?

Mr. PAULEY. This isn't an extradition proceeding. What is contemplated by the bill is not an extradition proceeding. If there were to be an extradition proceeding——

Mr. SCOTT. So what you are saying is, if you are picked up in Italy, you can't discuss whether you are, in fact, the right person until you get back to New York?

Mr. PAULEY. That is correct.

Mr. CHABOT. The gentleman's time has long ago expired, and I will take the privilege of the Chair to recognize General Barnes, who I think is jumping up to the microphone and would like to respond, and we will give him that opportunity.

Mr. BARNES. Sorry if I gave that appearance, Mr. Chairman.

Mr. SCOTT. Mr. Chairman, I appreciate your indulgence. That was, in fact, my last question.

Mr. CHABOT. Quite all right. "For real," by the way, is a legal term that we use around here every once in a while. [Laughter.]

Mr. BARNES. Perhaps it might be useful in this discussion, though, to bring us back to the context in which we are operating. I mean, we have civilian employees, contractor personnel, in over 100 countries around the world. It is in our interest, certainly, when we have an offense like that, to ensure that they are not subjected to the potentially draconian jurisdiction of whatever state we happen to be operating in, and particularly in operational context but even in mature theaters.

In processing the matter as fairly and quickly as possible, the Department of Defense is not the action agent here, it is the Department of Justice. It is in our interest in the Department of Defense to expeditiously and fairly resolve such matters.

So the sort of inference of indefinite detention and those sorts of matters, I think if you will examine the context—or mistaken identity, for that matter—if you will examine the context in which this legislation would enact, I think you will see that those may not be serious concerns.

Mr. CHABOT. Thank you, General.

Yes, Mr. Pauley?

Mr. PAULEY. If I could just add, because a thought occurred, better late than never, perhaps—or you can be the judge of that—there is authority to bring a habeas corpus action in the United States for anyone who believes that he or she is detained in violation of the constitutional laws of the United States.

The way that that would operate in this context is that one would bring an action under title 28, section 2241, and you would bring it against the supervisor of the custodian. If you were being held by an Army commander, it would be potentially the Secretary of the Army. And the court with jurisdiction over the Secretary of the Army, either the District of Columbia or the Eastern District of Virginia, as the case may be—and there may be other districts—would adjudicate the merits of that.

So the notion that someone could be held indefinitely by the Department of Defense under this legislation without the same legal recourse to habeas corpus that exists for people in the United States is not accurate.

Mr. CHABOT. Thank you. My time has expired. All time has expired.

We would like to thank the panel for their testimony here this afternoon. I would like to particularly thank General Smith, who I understand came here all the way from Japan to be with us here this afternoon. We appreciate that very much.

At this time, this subcommittee is adjourned.

[Whereupon, at 4 p.m., the subcommittee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

PREPARED STATEMENT OF MARIE SAINZ-FUNARO, PRESIDENT, OVERSEAS FEDERATION OF TEACHERS, AMERICAN FEDERATION OF TEACHERS, AFL-CIO

Mr. Chairman and members of the Subcommittee, the Overseas Federation of Teachers (OFT), an affiliate of the American Federation of Teachers, AFL–CIO, represents teachers and other staff in a number of Department of Defense schools at overseas locations. As president of the OFT, I would like to address some concerns that our members have about H.R. 3380, the Military Extraterritorial Jurisdiction Act of 1999. This bill and companion legislation passed by the Senate, S.768, would establish federal criminal jurisdiction over civilian personnel, employed by or accompanying the US armed forces overseas.

The OFT believes loopholes should not exist that invite criminal behavior or that allow serious criminals to escape punishment. We place the highest value on the safety and well being of our members, their dependents, and the children they serve. None should be exposed to the threat of sexual or physical assault, or other forms of criminal behavior, without the protection of law. None should be put at risk because of inadequate legal protections. Moreover, as a matter of general principle, actions that are. clearly and seriously criminal in nature should not escape punishment.

However, the OFT cannot support H.R. 3380, as it is presently written. The possibility of our members, their dependents, or those, they serve being the victims of unpunished crime must be balanced by a need to protect the basic rights of overseas employees and their dependents. H.R. 3380 gives rise to deep concerns about adequate due process protections, about the consequences of extending federal criminal law to behavior in other countries, and about the possible misuse of unbridled authority against our union's members. Unquestionably, the purposes of the bill are reasonable and well intentioned, but there is significant need for improvements with respect to legal protections for civilian employees and their dependents.

The OFT believes H.R. 3390 is seriously remiss in not assuring basic due process protections for those who are accused of crimes. Unfortunately, it is not difficult to imagine a course of events in which an overseas teacher is accused, detained, and then transported thousands of miles from his or her family and residence, on the basis of perhaps unfounded allegations. It is not clear how such a person would be arrested, under what circumstances they would be detained, or to what specific jurisdiction they would be transported. Is provision made for a bail hearing and for reasonable determination of bail—or is indefinite detainment possible? Does the accused have the guarantee of free legal counsel? Does this include the travel and accommodations that would be necessary for adequate legal representation? Would this include an assurance of counsel that is competent in federal criminal code and procedures? Is provision made for an independent hearing to determine if there is probable cause for prosecution? What rights do the accused have with respect to discovery, subpoenas, or presenting witnesses and other evidence? What assurance is there of prompt and speedy determination of the outcome? It is not clear that reasonable concerns such as these are appropriately dealt with in H.R. 3380.

A second area of concern is the apparently broad extension of federal criminal law to the behavior of civilian employees of the military, and their dependents, in other countries. Does this mean that an individual who is not on a military base, and is not violating a law of the host country, is nonetheless subject to prosecution for what would be considered a crime in the US? At the very least, any extension of the reach of federal law carries with it a host of federal obligations. Individuals subject to US federal law when overseas must enjoy no less in the way of protections than individuals subject to the law within the US. There must be no double stand-

ard in this respect. They should have the same balance of rights and protections as their domestic counterparts. This includes not only basic constitutional protections, but other substantive and procedural protections that have been firmly established over time. At bottom, there must be the presumption of innocence until proven guilty that underlies US criminal law and procedures.

A third area of concern is the possibility of harassment of overseas employees in the exercise of their union rights. The OFT believes H.R. 3380, as it is presently written, will increase the possibility of employee harassment. There will be greater possibility of overseas teachers being threatened with, or subject to, criminal prosecution for exercising basic employee rights. Accordingly, we believe there should be additional employee protections built into the legislation. For example, there should be a threshold that must be crossed before the provisions of H.R. 3380 are invoked. We would suggest that before the host nation rule is set aside, there should be a finding by the US Department of State that the host country's laws and enforcement are not working. Is it the case that the agreement with the host country is so flawed that it permits loopholes in criminal prosecution? Secondly, if there is abuse of process and malicious prosecution, the accused individual should have access to the same civil protections as are enjoyed domestically. This should include the right to bring an action and pursue civil damages.

The OFT believes the issues addressed by H.R. 3380 are serious and important matters. However, they are rare, and iii all but a few cases the current system has worked very well. The host nation rule has offered our members, their dependents, and the children they serve good protection. In addition, it has allowed a flexibility in which many issues can be resolved informally. Accordingly, we urge the subcommittee to balance the extension of authority envisioned in H.R. 3380 with reasonable employee protections, including those outlined above.

Mr. Chairman and members of the subcommittee, thank you for the opportunity to submit a statement on H.R. 3380. The OFT and its parent organization, the American Federation of Teachers, will be happy to provide additional information, including legal citations, to clarify the concerns we have raised.

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