

39-C 1163.



**OVERSEAS  
JURISDICTION  
ADVISORY COMMITTEE**

**Section 1151, Public Law 104-106**

**Report to**

**The Secretary of Defense**

**The Attorney General**

**The Congress of the United States**



DEPARTMENT OF DEFENSE  
OFFICE OF GENERAL COUNSEL  
1600 DEFENSE PENTAGON  
WASHINGTON, DC 20301-1600



April 18, 1997

The Honorable Janet Reno  
Attorney General of the United States  
Washington, D.C. 20530

Dear Attorney General Reno:

We are pleased to submit the attached report of the Overseas Jurisdiction Advisory Committee. This committee, which was jointly appointed by you and Secretary of Defense Perry pursuant to section 1151 of the National Defense Authorization Act for Fiscal Year 1996, has reviewed and made recommendations concerning criminal jurisdiction over civilians accompanying the armed forces outside the United States.

This report reflects a year of work. Aably assisted by a working group of military lawyers, we have thoroughly researched the relevant legal issues and gathered a large body of data to support our findings and recommendations. The product of our efforts is a report that we believe will guide the Congress to the best resolution of this difficult and longstanding issue.

Very Respectfully,

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John S. Cooke

Brigadier General, JA, U.S. Army  
Advisory Committee Chair

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REPORT OF THE ADVISORY COMMITTEE  
ON CRIMINAL LAW JURISDICTION OVER CIVILIANS  
ACCOMPANYING THE ARMED FORCES IN TIME OF ARMED CONFLICT  
(THE "OVERSEAS JURISDICTION ADVISORY COMMITTEE")

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1. Section 1151, National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, 110 Stat. 186 (1996).
2. Memorandum from Dept. of Defense General Counsel to Members, Overseas Jurisdiction Advisory Comm. (Charter), May 14, 1996.
3. Draft bill.

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**Executive Summary**

The Overseas Jurisdiction Advisory Committee was appointed by the Secretary of Defense and the Attorney General, pursuant to Section 1151, National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, 110 Stat. 186 (1996). The committee's duties were to: review historical experiences and current practices concerning the use, training, discipline, and functions of civilians accompanying the Armed Forces in the field; 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 develop other recommendations as the committee considered appropriate.

The committee conducted extensive research and gathered information and opinions from within the Department of Defense, including each Service and each of the Combatant Commands with overseas areas of responsibility. The committee also gathered information from the Department of Justice, the Department of State, and from legal authorities in the United Kingdom and Canada.

The committee found that two jurisdictional "gaps" currently exist with respect to civilians accompanying the armed forces overseas.

First, civilians accompanying the armed forces in the field during military operations overseas, not involving a war declared by Congress, are not subject to the criminal jurisdiction of the United States. The committee found that this gap carries the substantial potential for serious damage to the success of military operations and the safety of United States or allied forces. With increasing reliance on DoD civilian employees and contractors to carry out mission essential functions as an integrated part of military

operations, it is essential that the United States have the authority to deter offenses, and, if necessary, punish civilians who commit crimes in such an environment. Without such authority, the unsatisfactory alternatives are trial before a foreign tribunal, if any is available, or no criminal punishment.

To close this gap, the committee recommends extending court-martial jurisdiction to cover civilians accompanying the armed forces during contingency operations so designated by the Secretary of Defense, under 10 U.S.C. section 101(a)(13)(A), in places outside the United States specified by the Secretary of Defense.

The committee recognizes that extending court-martial jurisdiction to civilians is, for both constitutional and practical reasons, a serious step. Nevertheless, to ensure the success of future military operations, the committee believes that this step is necessary. The committee's proposal is narrowly tailored. Not all military operations will trigger this court-martial jurisdiction. Specific action by the Secretary of Defense is required, and such action will specify geographic limits outside the United States for the application of court-martial jurisdiction. This mechanism will have the additional virtue of making clear exactly when, and also where, civilians may be subject to court-martial jurisdiction.

The committee also addressed a second jurisdictional gap. It is well known that civilians accompanying the armed forces overseas are not subject to the criminal jurisdiction of the United States, except those criminal statutes that have extraterritorial application. Thus, civilian employees of DoD and the Services, civilian contractors, and the family members of such civilians and of servicemembers are not subject to United States jurisdiction for most offenses overseas. While such civilians may be subject to the criminal jurisdiction of the host country, under most Status of Forces Agreements, often the host nation is not interested in prosecuting offenses by United States citizens. As a result, such civilians can and do commit serious offenses and face no more than minor administrative sanctions available to overseas commanders. It is not unusual for persons suspected of serious crimes, such as rape or child abuse, to remain in an overseas command or to return to communities in the United States without having been subjected to criminal

prosecution.

To close this gap, the committee recommends extending the jurisdiction of federal (Article III) courts to try such offenses committed by persons accompanying the armed forces overseas. This would be done by making punishable offenses committed by a civilian accompanying the armed forces in a foreign country if the act would be an offense punishable by imprisonment for more than one year if it had been committed within the special maritime and territorial jurisdiction of the United States (18 U.S.C. section 7).

Because of the substantial logistical problems associated with prosecuting such cases, the committee envisions that this authority would be used sparingly. Nevertheless, it should be available to address serious crimes by persons accompanying the armed forces overseas.

The committee's recommendations are independent of each other. Each is necessary to close a significant jurisdictional gap in United States criminal jurisdiction. Although the committee's second proposal would also partially close the first jurisdictional gap, it would, for reasons addressed more fully in the report, not entirely or adequately address the problems associated with crimes in contingency operations.

The committee believes that failure to close these gaps carries the high likelihood not only of injustice in individual cases and danger to the public safety, but of severe damage to military operations and to the foreign policy and national security interests of the United States. The committee urges favorable consideration by Congress.

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**I. INTRODUCTION**

In section 1151 of the National Defense Authorization Act for Fiscal Year 1996,<sup>1</sup> Congress required the Secretary of Defense and the Attorney General to appoint jointly an advisory committee. This advisory committee was 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."<sup>2</sup> The committee was to have at least five members and include experts in military law, international law, and federal civilian criminal law, with diverse experiences in the prosecution and defense of criminal cases.<sup>3</sup> A copy of the enabling statute is Appendix 1.

The Secretary of Defense and the Attorney General appointed the following as voting members of the "Overseas Jurisdiction Advisory Committee":

**Brigadier General John S. Cooke**, U.S. Army (Chair), Chief Judge, U.S. Army Court of Criminal Appeals, and Commander, U.S. Army Legal Services Agency;

**John F. De Pue**, Senior Attorney, Terrorism and Violent Crime Section, Criminal Division, U.S. Department of Justice;

**Florence W. Madden**, Deputy General Counsel (Military Affairs), Department of the Air Force;

**Colonel Robert E. Reed**, U.S. Air Force, Chief, Military Justice Division, Office of The Judge Advocate General, U.S. Air Force;

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<sup>1</sup> Pub. L. No. 104-106, 110 Stat. 186 (1996).

<sup>2</sup> *Id.* § 1151(a).

<sup>3</sup> *Id.* § 1151(b).

Captain Richard B. Schiff, U.S. Navy, Assistant Judge Advocate General for Civil Law, U.S. Navy;

David P. Stewart, Assistant Legal Adviser, Office of the Legal Adviser, U.S. Department of State; and

Colonel Charles E. Trant, U.S. Army, Chief, Criminal Law Division, Office of The Judge Advocate General, U.S. Army.

The Secretary of Defense and the Attorney General examined the credentials of the above members and determined the committee membership met the statutory requirements.

With the concurrence of the Attorney General, the General Counsel of the Department of Defense (DoD) issued a charter to the committee. A copy of the charter is Appendix 2. The General Counsel also supported the committee's administrative requirements by assigning an officer as an executive secretary. The executive secretary supervised a working group of three judge advocates.<sup>4</sup>

Under its enabling statute, the committee's first duty is to review the historical experiences and current practices of the Services concerning the use, training, discipline, and functions of civilians accompanying the armed forces in the field.<sup>5</sup> Based on this review, the committee must develop specific recommendations concerning the advisability and feasibility of establishing United States criminal law jurisdiction over such

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<sup>4</sup> The executive secretary is Colonel Thomas G. Becker, U.S. Air Force Associate Deputy General Counsel (Military Justice & Personnel Policy), Office of the Secretary of Defense. The working group is Lt Colonel Gregory A. McClelland, U.S. Army, presently detailed to the Department of Defense Inspector General; Commander W. L. Ritter, U.S. Navy, International Law Division, Office of The Judge Advocate General, U.S. Navy; Lt Colonel T. P. Cook, U.S. Marine Corps, Headquarters, U.S. Marine Corps; Commander James P. Winthrop, U.S. Navy, International Law Division, Office of The Judge Advocate General, U.S. Navy; and Captain Mark K. Jamison, U.S. Marine Corps, Headquarters, U.S. Marine Corps.

<sup>5</sup> Pub. L. No. 104-106, § 1151(c)(1).

persons during armed conflict.<sup>6</sup> The statute requires the committee to consider at least three options, alone or in combination: establish court-martial jurisdiction, extend Article III court jurisdiction, and establish an Article I court for this purpose.<sup>7</sup> The statute also permits the committee to develop other recommendations as it deems appropriate.<sup>8</sup>

In her charter to the committee, the DoD General Counsel provided additional guidance. The General Counsel directed the committee to consider the proper balance among the rights of victims and defendants, the needs of the armed forces, and U.S. relations with host nations. She then further instructed as follows:

Of particular importance is whether any extension of criminal jurisdiction is necessary. Initially, you should decide if there is a problem and, if so, what it is. If you identify a problem, you should consider whether criminal jurisdiction is the way to solve it. You should also consider alternatives to the criminal jurisdiction solution. Only if and to the extent you find a problem, and determine criminal jurisdiction is the best solution, should you then consider the proper means for extending jurisdiction.

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<sup>7</sup> *Id.* "Article III court" and "Article I court" refer to articles of the Constitution. See U.S. CONST., arts. I, III. Article III establishes the Supreme Court and "such other inferior courts as the Congress may from time to time ordain and establish." U.S. CONST., art. III, § 1. Although Congress may create an "Article III court," that court's general jurisdiction is established by the Constitution. See *id.* § 2. Congress creates so-called "Article I courts" for areas of specialized jurisdiction. See U.S. CONST., art. I, § 8, cl. 8. Unlike an Article III court, an Article I court's sole source of power is statutory.

<sup>8</sup> Pub. L. No. 104-106, § 1151(c)(3).

## II. Background

Criminal acts by civilians accompanying the armed forces, and the power of military commanders to deal with such crime are not new issues in American jurisprudence.<sup>9</sup>

Civilians accompanying the armed forces "in the field" have been subject to court-martial jurisdiction since the Revolutionary War. With the Cold War, for the first time large numbers of American troops and, therefore, civilians accompanying them (dependents and employees) were stationed overseas in peacetime. The Uniform Code of Military Justice (UCMJ or "Code") provided for court-martial jurisdiction over such civilians. Article 2(a)(10) and 2(a)(11) of the Code provide:

(a) The following persons are subject to [the UCMJ]: ...

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

(11) Subject to any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, persons serving with, employed by, or accompanying the armed forces outside the United States and outside the Commonwealth of Puerto Rico, Guam, and the Virgin Islands.<sup>10</sup>

With these provisions, Congress comprehensively addressed court-martial jurisdiction over civilians accompanying the

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<sup>9</sup> See, generally, Susan S. Gibson, *Lack of Extraterritorial Jurisdiction Over Civilians: A New Look at an Old Problem*, 148 MIL. L. R. 114, 118-20 (1995); Thomas G. Becker, *Justice on the Far Side of the World: The Continuing Problem of Misconduct by Civilians Accompanying the Armed Forces in Foreign Countries*, 18 HASTINGS INT. & COMP. L. R. 277, 279-84 (1995); Gregory A. McClelland, *The Problem of Jurisdiction Over Civilians Accompanying the Forces Overseas - Still With Us*, 117 MIL. L. R. 153, 168-71 (1987).

<sup>10</sup> 10 U.S.C. § 802(a)(10), (a)(11).

forces, both in war and in peace. By 1970, decisions of the United States Supreme Court and the United States Court of Military Appeals had severely restricted the application of Article 2(a)(10) and Article 2(a)(11), creating jurisdictional gaps in the ability of United States law to address crimes committed by civilians accompanying the forces overseas. The first controversy focused on Article 2(a)(11).

#### A. Article 2(a)(11), UCMJ, and the Supreme Court

Article 2(a)(11), UCMJ, is a descendant of the so-called "Crowder Article," named after Major General Enoch Crowder, former Judge Advocate General of the Army, who helped secure a similar addition to the Articles of War in 1916.<sup>11</sup> Passage of the article was based on two assumptions: (1) that the language in the Fifth Amendment to the U.S. Constitution mandating trial by jury "except in cases arising in the land or naval forces"<sup>12</sup> meant that if an offense was committed by a civilian accompanying the forces, the jury right did not apply; and (2) that constitutional rights did not follow American citizens when they traveled outside the United States.<sup>13</sup>

Based on these assumptions, Congress purported to extend court-martial jurisdiction to cover civilians accompanying the forces at all times -- peace or war. The second assumption was rejected in a series of Supreme Court cases decided before adoption of the UCMJ.<sup>14</sup> The first assumption was laid to rest in 1957, along with the peacetime application of Article 2(a)(11) of the Code, by a series of Supreme Court cases beginning with *Reid v. Covert*.

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<sup>11</sup> Art. 2(d), Articles of War, 10 U.S.C. § 1473(d) (1920) (repealed 1956).

<sup>12</sup> U.S. Const. amend. V.

<sup>13</sup> F. Wiener, *Civilians Under Military Justice* app. IV, at 228 (1967).

<sup>14</sup> Restatement (Third) of Foreign Relations Law of the United States § 422 commentary at 314-315 (1987). See also *United States v. Pink*, 315 U.S. 203, 226 (1942); *United States v. Belmont*, 301 U.S. 324, 332 (1937); *United States v. Curtiss-Wright Corp.*, 299 U.S. 304, 318 (1936).

*Reid v. Covert*<sup>15</sup> and a companion case (*Kinsella v. Krueger*<sup>16</sup>) both involved court-martial convictions of civilian wives who had killed their servicemember husbands while stationed overseas. The Supreme Court's holdings in these, and a series of successor cases,<sup>17</sup> struck down the peacetime application of Article 2(a)(11) and established the principle that the Constitution does not allow trial of civilians by court-martial in peacetime.

#### B. Article 2(a)(10), UCMJ, and the Court of Military Appeals

The Supreme Court's *Reid v. Covert* line of cases was limited to Article 2(a)(11), and did not address Article 2(a)(10) of the Code, which subjects to court-martial jurisdiction those civilians serving with armed forces in the field "[i]n time of war." Article 2(a)(10) was tested before the Court of Military Appeals during the Vietnam conflict by the case of *United States v. Averette*.<sup>18</sup>

In *Averette*, an Army civilian employee serving in Vietnam was convicted of attempted larceny by a court-martial. The U.S. Court of Military Appeals<sup>19</sup> overturned the conviction, holding, as a matter of statutory construction, that the military had no jurisdiction under Article 2(a)(10) because the phrase "[i]n time of war" -- as used in that article -- meant a congressionally declared war. As the Vietnam Conflict was not such a declared

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<sup>15</sup> 354 U.S. 1 (1957).

<sup>16</sup> Decided on rehearing along with *Reid v. Covert*. For the Court's prior opinion in *Kinsella v. Krueger* (reaching a different result), see 351 U.S. 470 (1956).

<sup>17</sup> *Reid v. Covert* involved premeditated murder, a potentially capital crime under the Code. See Art. 118, UCMJ, 10 U.S.C. § 918. The Court's opinions left open the question of whether Article 2(a)(11) could be constitutionally applied in peacetime to noncapital crimes. This question was resolved in the negative three years later. *McElroy v. United States ex rel. Guagliardo*, 361 U.S. 281 (1960); *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234 (1960).

<sup>18</sup> 19 U.S.C.M.A. 363, 41 C.M.R. 363 (1970).

<sup>19</sup> Predecessor of the present U.S. Court of Appeals for the Armed Forces.

war, the court held that Article 2(a)(10) would not support court-martial jurisdiction over the civilian employee.

While the *Reid v. Covert* line of cases and *Averette* answered many questions about the ability of military law to reach civilians accompanying U.S. forces overseas, these opinions did not address all pertinent issues. In particular, they left one issue open that has become a focal point of this committee's research. That issue is whether Congress may constitutionally extend court-martial jurisdiction over civilians serving with the forces in the field during military operations that, while not part of a declared war, do not occur in "peacetime," either.

### C. Extraterritorial Effect of Federal Criminal Law

Aside from crime by civilians serving with U.S. forces during military operations, another area of concern has been criminal acts by civilians accompanying U.S. forces overseas in peacetime conditions. Federal law does not address this problem adequately because most federal criminal statutes do not apply unless the crime occurs in U.S. territory or within the special maritime and territorial jurisdiction of the United States.<sup>20</sup>

In a 1979 report to Congress,<sup>21</sup> the General Accounting Office assessed the status of misconduct among civilians accompanying the armed forces overseas in the twenty-two years after *Reid v. Covert*. The GAO Report concluded there are two potentially serious consequences of a lack of criminal jurisdiction over these civilians: (1) in cases where the host country assumes jurisdiction, American citizens could be subjected to judicial systems which might not provide the rights, guarantees and safeguards available under the U.S. Constitution, and to trials in a foreign language; and (2) in cases where the host country declines to exercise jurisdiction, persons committing serious crimes might go free. The report noted that this potential problem could be aggravated by the U.S. policy of

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<sup>20</sup> See 18 U.S.C. § 7.

<sup>21</sup> General Accounting Office, *Some Criminal Offenses Committed Overseas by DOD Civilians Are Not Being Prosecuted: Legislation Is Needed*, GAO Report No. FPCD 79-45 (1979).

maximizing jurisdiction,<sup>22</sup> that is, seeking waiver of jurisdiction from host countries in all cases -- even when the U.S. may be powerless to act.

The 1979 GAO Report is the only systematic effort to date to quantify the problem of misconduct among civilians accompanying the forces overseas. According to the Report, 343,000 civilians accompanied the forces abroad in a 12-month period ending in November, 1977.<sup>23</sup> This number included civilian employees of the forces, their dependents, and dependents of servicemembers. During this time, in cases where host countries had primary right of jurisdiction under applicable Status of Forces Agreements, host countries waived their primary right of jurisdiction in favor of United States jurisdiction in 59 "serious" cases and 54 "less serious" ones. "Serious" cases were defined as murder (none released), rape (one released), manslaughter, negligent homicide (none released), arson (one released), robbery and related offenses (54 released), burglary and related offenses (one released), forgery and related offenses (none released), and aggravated assault (two released). "Less serious" crimes were simple assault, drug abuse, contraband, disorderly conduct, drunkenness, and breach of peace. In contrast, host countries did not waive their primary right of jurisdiction in 200 serious cases. Although the Report recommended that each military department maintain more comprehensive records on civilian offenses overseas, this has not been done.

The GAO made the following additional observations in the 1979 report: the inability to deal with criminal activity among DoD civilians<sup>24</sup> accompanying the armed forces overseas, except by

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<sup>22</sup> DoD Dir. 5525.1, Status of Forces Policies and Information, ¶ C (Aug. 7, 1979); AR 27-50/SECNAVINST 5820.4G, Status of Forces Policies, Procedures, and Information, ¶ 1-7.a. (Jan. 14, 1990).

<sup>23</sup> As will be discussed later in this report, because of the drawdown of U.S. forces within the last few years, especially in Europe, these figures have been significantly reduced.

<sup>24</sup> As a general practice, this report will use the term "DoD civilians" as an abbreviated way to refer to civilian employees of DoD, civilian contractors of DoD and their employees, the civilian dependents of such persons, and the civilian dependents of military members.

means of relatively inadequate administrative sanctions, has several potential consequences -- (1) lack of deterrence, (2) morale problems among military members who receive more severe punishments than civilians for similar crimes, (3) a negative perception by host countries about our ability to deal with crime committed by our citizens, and (4) a low priority among military investigators to investigations in which the suspects are DoD civilians. In addition to its recommendation that the services keep better records of civilian misconduct, the GAO called on Congress to enact legislation extending criminal jurisdiction over U.S. citizen civilian employees and dependents accompanying the forces overseas.

#### **D. The "Jurisdictional Gaps"**

The *Reid v. Covert* line of cases, *Averette*, and the GAO study reveal two distinct "jurisdictional gaps" in which United States criminal law does not adequately address crimes by civilians accompanying the armed forces in foreign countries. The first "gap" is the unavailability of military law to deter and punish criminal acts by DoD civilian employees and contractors, who serve with and directly support military operations in the field. The second is the failure of federal criminal law to comprehensively apply to crimes by DoD civilian employees, contractors, and dependents who accompany U.S. forces overseas in peacetime.

The existence of these "jurisdictional gaps" is not news to the Congress or to other U.S. Government entities. Indeed, this issue has been the subject of many proposed legislative "fixes."

#### **E. Past Legislative Proposals**

Since 1965, there have been many proposals before Congress attempting to resolve the problem of lack of jurisdiction over civilians accompanying the forces.<sup>25</sup> Some of these have reached the hearing stage, but none have become law. Generally, the proposals have taken the approach of making crimes under the U.S. Code extraterritorial in effect, that is, making crimes committed

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<sup>25</sup> See Gibson at 115 n.2.

outside U.S. territory prosecutable in U.S. courts. Some of the proposals recommended amending title 10 ("Armed Forces). Others focused on title 18 ("Federal Jurisdiction"). A brief sampling of these proposals follows:

S. 2007, introduced in 1967,<sup>26</sup> would have made some civilians accompanying the forces overseas subject to some of the substantive provisions of the UCMJ, which has extraterritorial application. The bill applied to "any citizen, national, or other person owing allegiance to the United States ... serving with, employed by, or accompanying the armed forces outside the United States."<sup>27</sup>

The Criminal Justice Reform Act of 1975<sup>28</sup> would have applied to all United States citizens overseas, if they were not subject to the "general jurisdiction of the United States" and if their crime fell within one of nine categories. These categories included violent crimes against public servants of the United States performing official duties abroad, treason, espionage, or release of classified information, fraud against the United States, manufacture or distribution of drugs for importation into the United States, and offenses committed by or against United States nationals (except those committed by service members, who are subject to the UCMJ).<sup>29</sup>

H.R. 255,<sup>30</sup> considered by the House Judiciary Committee in 1986, would have expanded the special maritime and territorial jurisdiction of the United States<sup>31</sup> to cover nationals or citizens of the United States "serving with, employed by, or

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<sup>26</sup> S. 2007, 90th Cong., 1st Sess. (1967).

<sup>27</sup> *Id.* § 951.

<sup>28</sup> S. 1, 94th Cong., 1st Sess. (1975).

<sup>29</sup> *Id.* § 204.

<sup>30</sup> H.R. 255, 99th Cong., 1st Sess. (1985).

<sup>31</sup> See 18 U.S.C. § 7.

accompanying the Armed Forces outside the United States."<sup>32</sup> Those crimes listed in title 18, which by their terms have effect only within the special maritime and territorial jurisdiction, would have applied to some civilian offenders accompanying the forces abroad who committed offenses while engaged in performance of official duties, within a U.S. military installation abroad or the area of operations of a unit in the field, or against a United States service member or another civilian accompanying the forces.<sup>33</sup>

The Department of Justice currently has formulated a legislative proposal which would add chapter 212 (sections 3261-3264) to title 18, U.S. Code. This proposal contemplates return of defendants for trial in federal court in the United States. Persons covered would include those formerly serving with the armed forces outside the U.S. and persons presently accompanying or employed by the armed forces outside U.S. territory. Such persons would be subject to the federal criminal law whenever they engaged in conduct which would be an offense punishable by imprisonment for over a year if the conduct had been engaged in within the special maritime and territorial jurisdiction of the United States. This Justice Department proposal eventually became a focus of the committee's review.

### III. COMMITTEE ACTIVITIES

The committee, with the assistance of its working group, conducted extensive research. This involved gathering information and recommendations, as well as legal research. All committee resource materials and correspondence are maintained in the Office of the General Counsel, Department of Defense.

The issue of criminal law jurisdiction over civilians accompanying the forces overseas has been a subject of many academic articles<sup>34</sup> and government studies.<sup>35</sup> As discussed above,

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<sup>32</sup> *Id.* § 16.

<sup>33</sup> *Id.*

<sup>34</sup> See, e.g., Gibson, Becker, and McClelland law review articles, *supra* at  
(continued...)

there also have been many legislative proposals. The committee reviewed the articles, studies, and each legislative proposal along with associated commentary.

The committee requested information and recommendations from the Armed Services and each Combatant Command that has a geographic responsibility outside U.S. territory. Included were requests for information on the numbers of DoD civilians (dependents, employees, and contractor employees) presently deployed and cases of misconduct by such persons.

The working group analyzed the United States Code for federal criminal statutes that already had effect outside U.S. territory. The committee then contacted the Justice Department's Executive Office of United States Attorneys. That office surveyed all United States Attorneys for their experiences and recommendations concerning overseas misconduct by civilians accompanying the armed forces.

Finally, the committee requested information from the military legal establishments of the United Kingdom and Canada. Both countries have experience with trying by court-martial civilians who are accused of offenses while accompanying their forces overseas. Each responded to the committee with extensive information on the laws and procedures governing the exercise of that jurisdiction.

#### **IV. Historical Experiences and Current Practices Concerning Civilians Accompanying the Armed Forces in the Field**

##### **A. Pre-UCMJ Experience**

Civilians have served with or otherwise accompanied American forces in the field or on board ship since the beginning of the United States, but not in significant numbers until the Civil

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<sup>34</sup>(...continued)

note 9. These articles also cite several older articles on this subject.

<sup>35</sup> E.A. Gates and Gary V. Casida, *Report to The Judge Advocate General by the Wartime Legislation Team ("WALT Report")* (1983); General Accounting Office, *Some Criminal Offenses Committed Overseas by DOD Civilians Are Not Being Prosecuted: Legislation Is Needed*, GAO Report No. FPCD 79-45 (1979).

War.<sup>36</sup> Under the Articles of War then existing, civilians accompanying U.S. armies were subject to court-martial jurisdiction only during war.<sup>37</sup> For the Sea Services, certain of the Articles for the Government of the Navy applied to civilians aboard U.S. vessels, even in peacetime.<sup>38</sup> In the last century, the Supreme Court upheld the jurisdiction of a naval court-martial over a civilian serving on board ship.<sup>39</sup> As for civilians not serving with or accompanying forces, the Supreme Court has long held that military tribunals could not exercise jurisdiction over civilians in the United States, even in wartime, where the civil courts were still functioning.<sup>40</sup>

During World Wars I and II, both of which were declared wars, civilians accompanying the armed forces in the field were tried by courts-martial.<sup>41</sup> The committee found no reported courts-martial of civilians accompanying the armed forces during other than a period of declared war in the twentieth century before the UCMJ was enacted.<sup>42</sup> The committee found no reported cases of exercise of court-martial jurisdiction under Article 2(a)(10) of the newly-enacted UCMJ during the Korean War.

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<sup>36</sup> WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 98 (2d ed. 1920).

<sup>37</sup> *Id.* at 98-102.

<sup>38</sup> See Becker at 280-81.

<sup>39</sup> *Ex Parte Reed*, 100 U.S. 13 (1879).

<sup>40</sup> *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2 (1866). But see *Ex Parte Quirin*, 317 U.S. 1 (1942) (military tribunal in U.S. has jurisdiction to try accused enemy saboteurs).

<sup>41</sup> See, e.g., *Hines v. Mikell*, 259 F. 28 (4th Cir. 1919); *In re Berue*, 54 F.Supp. 252 (S.D. Ohio 1944); *McCune v. Kilpatrick*, 53 F.Supp. 80 (E.D. Va. 1943). *Ex Parte Gerlach*, 247 F. 616 (S.D.N.Y. 1917).

<sup>42</sup> Cf. *Madsen v. Kinsella*, 343 U.S. 341 (1952) (upholding jurisdiction of military commission to try a spouse accompanying a servicemember in occupied Germany in 1950; although a state of war with Germany still technically existed, hostilities were officially declared terminated in 1946).

## B. Vietnam

In his seminal text on legal issues arising during the Vietnam War, Major General George S. Prugh stated that "[e]fforts to subject U.S. civilians [in Vietnam] to military discipline were generally not effective."<sup>43</sup> This inability to discipline civilians "became a cause for major concern to the U.S. command [United States Military Assistance Command, Vietnam (MACV)]."<sup>44</sup> Most of these civilians were U.S. contractor employees.<sup>45</sup> Technically, these U.S. civilians fell outside the terms of the Pentilateral Agreement,<sup>46</sup> the international agreement that governed the status of U.S. forces and DoD civilian employees in Vietnam.<sup>47</sup> As a practical matter, however, Vietnam was not interested in prosecuting crimes involving U.S. property or victims.<sup>48</sup> Consequently, the U.S. secured waiver of Vietnamese jurisdiction over six civilian cases, occurring between November 1966 and August 1968.<sup>49</sup>

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<sup>43</sup> GEORGE S. PRUGH, *LAW AT WAR: VIETNAM 1964-1973* 92 (1975). Major General Prugh was the Military Assistance Command, Vietnam (MACV) Staff Judge Advocate from 1964 - 1966, and assumed duties as The Judge Advocate General of the Army in 1971.

<sup>44</sup> *Id.* See also WALT Report at 13-16, app. F.

<sup>45</sup> PRUGH at 108.

<sup>46</sup> Formally known as the "Mutual Defense Assistance in Indochina Agreement," the treaty was signed by the five nations, France, Laos, Cambodia, Vietnam, and the U.S., on 23 December 1950. While the agreement is no longer in force, it is reprinted at Appendix I of *Law at War: Vietnam 1964 - 1973*. Annex B of the Agreement accords various diplomatic immunities to different levels of personnel. U.S. military personnel and DoD civilians were granted immunity from Vietnamese civil and criminal process. While the Parties obviously never envisioned the vast number of U.S. personnel that ultimately deployed to Vietnam, they continued to apply its provisions throughout the conflict. *Id.* at 88.

<sup>47</sup> *Id.* at 92.

<sup>48</sup> *Id.* Crimes such as black marketing and currency manipulation were of particular concern to U.S. MACV. *Id.* at 109.

<sup>49</sup> *Id.* at 109. There were ten other civilian cases MACV was interested in  
(continued...)

MACV ultimately tried four cases, one of which was Averette. As discussed earlier, the U.S. Court of Military Appeals in Averette rejected court-martial jurisdiction under the "[i]n time of war" provision of Article 2(a)(10), holding that "war" referred to a congressionally declared war. Because of the Averette decision, MACV prosecuted no other civilians in Vietnam.<sup>50</sup>

The alternative to criminal sanctions was administrative action. General Prugh reported that, while commanders withdrew various military privileges from civilians in 1966, 1967, and 1968, it was not until 1969 that MACV imposed more formal administrative sanctions. In September 1969, MACV made administrative debarment<sup>51</sup> a provision in all civilian employment contracts.<sup>52</sup> MACV used the debarment process frequently.<sup>53</sup>

### C. Recent Experience and Practice

#### 1. Use, Function, and Training of Civilian Employees

Operations DESERT SHIELD and DESERT STORM saw the deployment of thousands of DoD civilian and contractor employees. There

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<sup>49</sup>(...continued)

prosecuting; however, the State Department, which issued identification cards to civilian contractor employees and generally exercised authority over these U.S. civilians, preferred the imposition of administrative measures to criminal sanctions. The State Department view prevailed in these ten cases. *Id.*

<sup>50</sup> PRUGH at 110.

<sup>51</sup> The process of debarment resulted in a civilian employee's loss of military privileges and, essentially, employment in Vietnam, as the contractors agreed to terminate those debarred. *Id.*

<sup>52</sup> *Id.* The provision required all civilian employees to follow all MACV rules and regulations for conduct or face debarment. Contractor employers also agreed to terminate those employees that MACV barred. *Id.*

<sup>53</sup> *Id.* The number of civilian employees on debarment lists rose from 75 in 1968 to 943 in 1971. The type of offenses for which MACV most often debarred employees were smuggling, black marketing, and currency manipulations. *Id.*

were 4,500 DoD civilians and at least 3,000 contractor employees deployed.<sup>54</sup> With the rapid growth of contingency operations following Operation DESERT STORM, U.S. forces -- and with them a significant number of civilian employees -- have deployed to Somalia, Haiti, Kuwait, Rwanda and to the Balkans. The Army Materiel Command (AMC) deployed 32 Department of the Army Civilians (DAC) and 279 contractor employees to Operation RESTORE HOPE in Somalia.<sup>55</sup> Approximately 110 DoD civilians and 12 contractor employees deployed to Rwanda in 1994 to support that humanitarian assistance operation.<sup>56</sup> Operation VIGILANT WARRIOR saw AMC deploy 169 DAC and 126 contractor employees to Kuwait in the fall of 1994.<sup>57</sup> Seventy-four DAC and 611 contractor employees deployed from AMC to Operation UPHOLD DEMOCRACY in Haiti.<sup>58</sup> Finally, 450 DoD civilians and 1143 contractor employees deployed to various Balkan nations to support the NATO Implementation Force (IFOR).<sup>59</sup>

During these operations, deployed civilian employees have performed a wide variety of functions. During Operations DESERT SHIELD and DESERT STORM, DoD civilian employees performed technical specialties in fields such as communications, equipment maintenance, and weapon system modernization, while contractor employees were involved with aviation, weapons, and automation systems support.<sup>60</sup> In particular, contractor employees

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<sup>54</sup> DEP'T OF DEFENSE, CONDUCT OF THE PERSIAN GULF WAR: FINAL REPORT TO CONGRESS N-2-3 (April 1992). Of these deployed personnel, the Army Materiel Command alone deployed 1,178 Department of the Army Civilians (DAC) and 1,140 contractor employees. Information Paper, Army Materiel Command, subject: Deployment History (25 Nov. 1996) [hereinafter "AMC Information Paper"].

<sup>55</sup> AMC Information Paper.

<sup>56</sup> Memorandum from MAJ Shelley Econom, Labor L. Div., Off. JAG, Army, to Col Charles E. Trant, Chief, Crim. L. Div., Off. JAG, Army (June 28, 1996).

<sup>57</sup> AMC Information Paper.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> DoD FINAL REPORT, PERSIAN GULF at N-2. The report also noted that the Navy  
(continued...)

maintained such critical weapons as the Patriot Air Defense System, Multiple Launch Rocket System, and the TOW and Hellfire missiles.<sup>61</sup> Contingency operations in Somalia, Rwanda, and Haiti, utilized DoD civilians and contractor employees extensively on the Logistics Civil Augmentation Program (LOGCAP). The contractors performed tasks such as meal preparation, laundering clothes, installation maintenance, vehicle maintenance, transportation, and some stevedore work.<sup>62</sup>

The Desert Storm Assessment Team identified the need for more extensive civilian training, particularly on the issue of their legal status.<sup>63</sup> DoD subsequently formalized pre-deployment training and administration by issuing regulations for both DoD emergency-essential civilian employees and essential contractor employees.<sup>64</sup>

A discussion of international jurisdictional arrangements is necessary to an understanding of the treatment of civilian offenses during these deployments. During Operation DESERT STORM, civilians were technically subject to Saudi law because of the United States Military Training Mission Agreement.<sup>65</sup> All

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<sup>60</sup>(...continued)

deployed 500 to 600 civilian employees for ship and aircraft repair, and an additional 500 civilian mariners manning Military Sealift Command vessels. *Id.* at N-4-5.

<sup>61</sup> Army Materiel Command Memorandum (Dec. 13, 1995).

<sup>62</sup> CENTER FOR LAW AND MILITARY OPERATIONS, LAW AND MILITARY OPERATIONS IN HAITI, 1994-1995: LESSONS LEARNED FOR JUDGE ADVOCATES at 142 (Dec. 11, 1995) [hereinafter HAITI AAR].

<sup>63</sup> UNITED STATES ARMY LEGAL SERVICES AGENCY, DESERT STORM ASSESSMENT TEAM'S REPORT TO THE JUDGE ADVOCATE GENERAL OF THE ARMY at F-3 (22 Apr. 1992) [hereinafter DSAT REPORT].

<sup>64</sup> DoD Dir. 1404.10, *Emergency-Essential (E-E) DoD U.S. Citizen Civilian Employees* (Apr. 10, 1992); DoD Inst. 3020.37, *Continuation of Essential DoD Contractor Services During Crises* (Nov. 6, 1990). Both regulations require service components to identify those civilian personnel who they consider essential.

<sup>65</sup> Agreement Relating to a United States Military Training Mission in Saudi Arabia, Feb. 8 & 27, 1977, art. 8, T.I.A.S. No. 8558.

(continued...)

parties understood this agreement to apply to U.S. forces deployed to Saudi Arabia. The agreement provided for exclusive U.S. jurisdiction over military personnel, but did not cover civilian personnel.<sup>66</sup> Despite this lack of coverage, commanders were unwilling to turn over civilians to the Saudi legal system. Consequently, a commander had no satisfactory option if a civilian employee committed a serious offense.<sup>67</sup> In Somalia, there was no functioning government, and no Status of Forces Agreement (SOFA) existed; thus, U.S. commanders exercised exclusive jurisdiction over all U.S. personnel, military or civilian.<sup>68</sup> The Rwandan government granted administrative and technical staff privileges and immunities to U.S. forces, including civilian employees deploying to that nation.<sup>69</sup> No agreement existed in Haiti until December 22, 1994, three months into the deployment.<sup>70</sup> The SOFA eventually provided for a consultative process for criminal jurisdiction over civilians.<sup>71</sup> The SOFAs with Bosnia, Croatia, and the Federal Republic of Yugoslavia (Serbia), contained in the Dayton Accords, provided for the status of IFOR personnel, including civilians.<sup>72</sup> Under

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<sup>65</sup>(...continued)

<sup>66</sup> DSAT REPORT at F-2.

<sup>67</sup> *Id.* at F-2. Fortunately, no such offenses occurred.

<sup>68</sup> DEP'T OF ARMY, AFTER ACTION REPORT: U.S. ARMY LEGAL OPERATIONS IN OPERATION RESTORE HOPE 3 (1993) [hereinafter SOMALIA AAR].

<sup>69</sup> Memorandum for the Record, MAJ Marc L. Warren, Int'l & Operational L. Div., The Judge Advocate General's School, U.S. Army, subject: Status of Forces in Rwanda, (31 Aug. 1994). Administrative and technical staff privileges accord those persons absolute immunity from the host-nation criminal jurisdiction and immunity from the host-nation's civil jurisdiction for those acts performed in the course of their duties. Vienna Convention on Diplomatic Relations, Apr. 18, 1961, arts. 29-35, 36, T.I.A.S. No. 7502, 50 U.N.T.S. 95.

<sup>70</sup> Haiti AAR at 52.

<sup>71</sup> *Id.* at 255.

<sup>72</sup> Bosnia and Herzegovina-Croatia-Yugoslavia: General Framework Agreement for Peace in Bosnia and Herzegovina With Annexes, Dec. 18, 1995, 35 I.L.M. 75

(continued...)

the agreements, the providing nations retained exclusive criminal jurisdiction over its civilian personnel.<sup>73</sup>

Because host-nation prosecution of civilian offenses was not available or desirable, commanders had to rely on administrative measures to handle civilian employee misconduct. Fortunately, during Operations DESERT SHIELD and DESERT STORM -- by far the largest deployment of DoD civilian employees and contractor employees -- instances of criminal conduct were rare.<sup>74</sup> The austere conditions of the region no doubt contributed to the absence of criminal activity. The DoD Final Report, Persian Gulf, also cited the volunteer spirit and professionalism of the civilian employees as factors. The cases of misconduct that did occur involved DoD civilian employees who did not report as directed to the area of operations or left the area without authority.

In Haiti, the Staff Judge Advocate (SJA), Joint Logistics Support Command reported two cases of significant crimes by civilian employees. Both involved allegations of larceny, one by a DoD civilian employee and one by a contractor employee.<sup>75</sup> The command pursued administrative action against the DoD civilian employee, and barred the contractor employee from the installation.<sup>76</sup> Minor misconduct was more prevalent, specifically violations of the General Order, such as violating the two-vehicle travel restriction, possessing or consuming alcohol, sexual relations with local nationals, and other behavior considered detrimental to good order and discipline

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<sup>72</sup>(...continued)  
(1996) [hereinafter Dayton Accords].

<sup>73</sup> *Id.* at 102-107.

<sup>74</sup> DoD FINAL REPORT, PERSIAN GULF at N-6.

<sup>75</sup> Memorandum, LTC Arthur L. Passar, AMSMI-GC-Al-D, to Staff Judge Advocate, U.S. Army Material Command, subject: After Action Report, Legal Support to Joint Logistics Support Command, Joint Task Force 190, Haiti, Operation UPHOLD DEMOCRACY, September 1994 - March 1995, paras. 6i.&j., (11 May 1995).

<sup>76</sup> *Id.* at 16.

during the operation.<sup>77</sup> The staff judge advocate reported that contractor personnel "regularly" violated the regulation.<sup>78</sup> The commander of Joint Logistics Support Command issued at least two letters of reprimand to the same DoD civilian employee for violation of the General Order.<sup>79</sup> This situation had a negative impact on soldiers' morale as they perceived a double standard in enforcing the General Order.<sup>80</sup>

In Bosnia, a senior judge advocate reported that DoD civilian and contractor employees are performing well, with few adverse incidents.<sup>81</sup> As in Haiti, eight DoD civilians and one contractor employee violated General Order Number 1 by entering a neighboring village in an unauthorized convoy. The cognizant commander imposed temporary suspensions on the DoD civilian employees. The only significant substantiated incident involved a DoD contractor employee who possessed a controlled substance with the intent to distribute. The contractor fired that employee.<sup>82</sup> One potentially serious incident occurred in Croatia as an employee of the Army and Air Force Exchange Service (AAFES) accused another AAFES employee of sexual assault. Although the

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<sup>77</sup> Commanders, beginning with Operations DESERT SHIELD and DESERT STORM have regularly promulgated a General Order No. 1 to govern the behavior of assigned military and civilian personnel deployed to a particular area of operations. The order is punitive, that is, violation by military members subjects them to discipline under Article 92, UCMJ, 10 U.S.C. § 892. See United States Central Command, General Order No. 1 (1990); Joint Task Force 190 (Haiti), General Order No. 1 (1994), quoted in INT'L & OPERATIONAL L. DIV., THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, JA-422, OPERATIONAL LAW HANDBOOK 17-10-12 (1996) (stating that they applied to those U.S. civilians serving with or accompanying the armed forces; note that the Haiti General Order added persons "employed by" the U.S.).

<sup>78</sup> Passar Memorandum.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at encl. 15.

<sup>81</sup> Memorandum, LTC George L. Hancock, U.S. Army Europe Headquarters (FWD) to U.S. Army Europe, Off. JAG., subject: Information on Civilians Accompanying the Force in Operation JOINT ENDEAVOUR (7 Jul. 1996).

<sup>82</sup> McGuire Memorandum.

alleged victim subsequently recanted the allegation, judge advocates were concerned that Croatia, the only state with effective jurisdiction, may not have had the desire to prosecute the case.

## 2. Growth in the Use of DoD Civilian and Contractor Employees

Civilian employees have played a significant in-theater role during military operations. Their role has increased in recent deployments to Somalia, Haiti, Rwanda and Bosnia as the Armed Forces transfer support functions to the civilian sector.<sup>83</sup> The development of the Logistical Support Element concept (LSE) and the use of the Logistics Civil Augmentation Program (LOGCAP) illustrate this trend.

The Army Materiel Command (AMC) established the LSE program in 1994. Made up primarily of DoD civilian employees, along with some military and contractor personnel, the LSE is designed as a rapidly deploying logistics cell that can provide a wide spectrum of logistics functions. These functions include technical advice, maintenance, contracting, and supply, to name a few. The maximum size of a LSE is nearly 1300, the number of personnel AMC anticipates it will need in a major armed conflict. The LSE is not constantly manned; it is only activated for contingencies. It does have the flexibility to deploy smaller modules for a

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<sup>83</sup> The DoD Final Report foresaw this development:

While the recitation of civilian roles and duties in this report is not exhaustive, it is illustrative of the degree to which the military has come to depend on the civilian employees and contractors. Many roles have been transferred to the civilian sector from the military because of force reductions, realignments and civilianization efforts. Civilian employed in direct support of Operations DESERT SHIELD and DESERT STORM were there because the capability they represented was not sufficiently available in the uniformed military or because the capability had been consciously assigned to the civilian component to conserve military manpower. It seems clear that future contingencies also will require the presence and involvement of civilians in active theaters of operations.

particular operation. As an example, AMC has deployed a LSE of less than one hundred DoD civilians to Bosnia.<sup>84</sup>

The purpose of the LOGCAP is to plan for civilian contractors to augment Army forces by performing selected services in wartime.<sup>85</sup> LOGCAP assists the Army in achieving its policy of increasing its "combat potential within peacetime resource allocations" by increasing the number of sources from which it can draw support.<sup>86</sup> External support sources come from LOGCAP or through host nation agreements.<sup>87</sup> Host nation agreements have not been available in Somalia, Rwanda, and Haiti, given the limitations of host nation infrastructure, the absence of a functioning government, or both.<sup>88</sup> Consequently, LOGCAP was the preeminent support resource in each of these deployments.<sup>89</sup>

One difficulty associated with this growth in the use of contractor employees is the lack of accurate accounting of such personnel by the Services. The committee was only able to obtain statistics from the Army, particularly the Army Materiel Command (AMC), which centrally processes all deploying civilians through the Continental United States Replacement Center (CRC) at Fort Benning, Georgia (formerly located at Aberdeen Proving Ground).<sup>90</sup>

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<sup>84</sup> DEP'T OF ARMY, PAMPHLET 715-XX, CONTRACTOR DEPLOYMENT GUIDE 2 (Draft) [hereinafter DA PAM 715-XX]; Jon M. Schandelmeier, *The Logistics Support Element*, ARMY LOGISTICIAN 18 (Jul/Aug 1994).

<sup>85</sup> DEP'T OF ARMY, REG. 700-137, LOGISTICS CIVIL AUGMENTATION PROGRAM, para. 1-1 (16 Dec. 1985).

<sup>86</sup> *Id.* at para. 2-1.

<sup>87</sup> *Id.*

<sup>88</sup> Indicative of the conditions in these areas is the comment of the Unified Task Force - Somalia (UNITAF) Operations Officer: "[i]f you didn't bring it, it ain't here." SOMALIA AAR at 18.

<sup>89</sup> *Id.* at 7 (citing the existence of a sophisticated LOGCAP in Somalia); HAITI AAR (stating that "[e]mployees of the LOGCAP contractor and subcontractor could be found at every turn...").

<sup>90</sup> AMC has maintained statistics for all of its personnel deploying, both  
(continued...)

Previous studies have reached similar conclusions.<sup>91</sup> Besides its major recommendations in section VI of this report, the committee recommends that DoD require the Services to keep current data on all contractor employees deployed with forces in the field, and report that figure periodically to the Office of the Secretary of Defense.

### 3. Civilian Family Members, Employees, and Contractors Accompanying the Forces Overseas

In many ways, American military communities overseas resemble small American cities. In addition to uniformed personnel, these communities are populated with many civilians: DoD employees, employees of DoD contractors, and family members.<sup>92</sup> Family members include those of civilian employees and contractors, as well as those of servicemembers. It is not unusual for the civilians accompanying U.S. forces at a particular overseas location to outnumber the uniformed personnel.

Civilians accompanying U.S. forces overseas remain a significant command responsibility, despite the recent post-Cold War drawdown. While U.S. military personnel assigned overseas have decreased by 54% since 1989, from 510,000 to 237,000, the number of family members accompanying DoD personnel has decreased by only 39%, and the number of DoD civilian employees dropped by

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<sup>90</sup>(...continued)

Department of the Army Civilians (DAC) and contractor employees, since Operations DESERT SHIELD and DESERT STORM. AMC Information Paper.

<sup>91</sup> "Due to the lack of central oversight and the absence of data at the major command and subordinate levels, we were not able to quantify the number of emergency-essential contracts." OFFICE OF THE INSPECTOR GENERAL, DEP'T OF DEFENSE, AUDIT REPORT: CIVILIAN CONTRACTOR OVERSEAS SUPPORT DURING HOSTILITIES 2 (June 26, 1991).

<sup>92</sup> Family members of military personnel, and of DoD civilian employees and contractor personnel overseas, are often referred to as "dependents," both officially and in common usage. See, e.g., 10 U.S.C. §§ 1036 (escorts for dependents of armed forces members during travel), 1059 (transitional assistance for dependents of armed forces members separated for dependent abuse); DoD Dir. 1342.6, Department of Defense Dependents Schools (Oct. 13, 1992); DoD Dir. 6010.4, Dependents Medical Care, (Apr. 25, 1962).

48%.<sup>93</sup> As of March 31, 1996, there were more than 240,000 family members of military and civilian employees overseas and nearly 96,000 civilian employees.<sup>94</sup> At the same time, the frequency of criminal incidents involving U.S. civilian employees<sup>95</sup> and U.S. family members has not fallen proportionally.<sup>96</sup>

The right to prosecute an offense committed by a member of the U.S. force, or a civilian serving with or accompanying that force, is governed by the SOFA between the U.S. and the host nation. The typical SOFA gives U.S. military authorities the exclusive right to exercise jurisdiction over acts that violate U.S. law, but not host nation law, and the host nation exclusive jurisdiction over offenses under its law that are not offenses under U.S. law.<sup>97</sup> For acts that violate the laws of both

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<sup>93</sup> DEP'T OF DEFENSE, WASH. HEADQUARTERS SERVICE, DIRECTORATE FOR INFORMATION, WORLDWIDE MANPOWER DISTRIBUTION BY GEOGRAPHICAL AREA, at 12 (1989). DEP'T OF DEFENSE, WASH. HEADQUARTERS SERVICE, DIRECTORATE FOR INFORMATION, WORLDWIDE MANPOWER DISTRIBUTION BY GEOGRAPHICAL AREA, at 12 (1996) [hereinafter 1996 WHS REPORT]. The committee chose 1989 as a year of comparison because it has become acknowledged as the last year of the Cold War, and represented a high level of troop concentration in Europe.

<sup>94</sup> 1996 WHS REPORT at 12.

<sup>95</sup> The key reference regarding the exercise of foreign criminal jurisdiction is the DoD Annual Report of Statistics on the Exercise of Criminal Jurisdiction by Foreign Tribunals over United States Personnel. DEP'T OF DEFENSE, REPORT OF STATISTICS ON THE EXERCISE OF CRIMINAL JURISDICTION BY FOREIGN TRIBUNALS OVER UNITED STATES PERSONNEL (1989 & 1995) [hereinafter DoD FCJ REPORT]. This report combines statistics for both DoD civilian employees and family members into one category for reporting purposes.

<sup>96</sup> It is important to note that these figures are not a complete picture of misconduct by DoD civilians overseas, because these statistics only address cases where the host country had primary right of jurisdiction. The committee could find no useful statistics on offenses over which the U.S. had primary right of jurisdiction. Also, the committee could not find definitive statistics concerning the number of contractor employees serving with U.S. forces overseas or misconduct associated with contractor personnel. No matter whether Congress acts on the committees recommendations in section VI of this report, the committee recommends that DoD require the Services to track this information.

<sup>97</sup> See, e.g., NATO SOFA, art. VII, § 2 (1951).

countries, the typical SOFA gives either the U.S. or the host nation a primary right of jurisdiction, depending on the circumstances of the offense. The U.S. will have primary right of jurisdiction over offenses solely against the property or security of the U.S., solely against the person or property of other U.S. personnel, or arising out of the performance of official duty by U.S. personnel.<sup>98</sup> The primary right to prosecute all other offenses rests with the host nation.<sup>99</sup> The nation with the primary right of jurisdiction may waive that right, either on its own initiative or at the request of the other nation.<sup>100</sup>

The number of cases in which civilian employees and family members were subject to the exclusive or primary right of jurisdiction<sup>101</sup> of a host nation fell from 1,576 in 1989<sup>102</sup> to 1,428 in 1995.<sup>103</sup> Of these cases, host country jurisdiction was relinquished to U.S. authorities in 240 (or 15%) in 1989 and in 326 (or 21%) in 1995.<sup>104</sup> These statistics are relevant only to

<sup>98</sup> *Id.* § 3(a).

<sup>99</sup> *Id.* § 3(b).

<sup>100</sup> *Id.* § 3(c).

<sup>101</sup> The terms exclusive and concurrent jurisdiction derive from the NATO SOFA, which has been often used as a model for other SOFAs. Exclusive jurisdiction refers to those categories of offenses punishable by the laws of only one of the states, e.g., national security offenses such as espionage or treason. Concurrent jurisdiction arises in cases involving offenses punishable by the laws of both states. In these cases, the SOFA grants one of the states primary concurrent jurisdiction, e.g., the NATO SOFA grants the sending state primary concurrent jurisdiction over offenses committed in the course of duty or those offenses against persons or property of the sending state. Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces, Jun. 19, 1951, art. VII, T.I.A.S. No. 2846, 199 U.N.T.S. 67. See SERGE LAZAREFF, STATUS OF MILITARY FORCES UNDER CURRENT INTERNATIONAL LAW 151 (1971).

<sup>102</sup> 1989 DoD FCJ REPORT at 1.

<sup>103</sup> 1995 DoD FCJ REPORT at 1.

<sup>104</sup> DoD policy directs military commanders to request foreign authorities

(continued...)

show that the general trend of civilian misconduct is not declining significantly. They do not reveal the primary source of commanders' concerns about overseas civilian misconduct: those cases in which, under a SOFA, the U.S. has primary right of jurisdiction, that is, offenses against U.S. persons or property, or acts by civilian employees in the performance of official duty. These cases concern commanders most, because U.S. criminal law often does not apply even when the SOFA gives the U.S. primary right of jurisdiction.

Not surprisingly, commanders of those forces accompanied by the greatest number of civilians, particularly in Korea, Japan, and Germany, expressed the greatest concern with civilian crime. In the Pacific, Japanese and Korean authorities usually choose not to prosecute cases in which no host nation victims or accomplices are involved, or when successful prosecutions are not a virtual certainty.<sup>105</sup> German authorities are also reluctant to prosecute cases in which they have no significant interest. Army judge advocates state that, when German authorities do prosecute U.S. civilians, the sentences are often "inadequate" when compared to court-martial punishments.<sup>106</sup> As a result, cases of rape, child molestation, domestic violence, drug distribution, and substantial larcenies go unpunished or inadequately punished. In such cases, and dozens of others

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<sup>104</sup>(...continued)

to waive jurisdiction in cases in which "suitable corrective action can be taken under existing administrative regulations." DEP'T OF ARMY, REG. 27-50, STATUS OF FORCES POLICIES, PROCEDURES, AND INFORMATION, para. 1-7b (14 Jan. 1990) [hereinafter AR 27-50]. This regulation is dual-titled as Secretary of the Navy Instruction 5420.4G.

<sup>105</sup> See Memorandum, General Counsel, Department of the Air Force to Overseas Jurisdiction Advisory Committee, subject: Overseas Jurisdiction Advisory Committee (15 Aug. 1996); Memorandum, Staff Judge Advocate to the Commandant of the Marine Corps to Overseas Jurisdiction Committee, subject: Overseas Jurisdiction Advisory Committee - Marine Corps Input (17 Jul. 1996); Memorandum, Fleet Judge Advocate, U.S. Pacific Fleet to Assistant Judge Advocate General (Civil Law), subject: Overseas Jurisdiction Advisory Committee (3 Jul. 1996).

<sup>106</sup> Memorandum, Judge Advocate, U.S. Army, Europe and Seventh Army to COL. Thomas G. Becker, Associate Deputy General Counsel (Military Justice and Personnel Policy), subject: Jurisdiction over Civilians Overseas (8 Aug. 1996).

reported in response to the committee's requests for information, commanders complained of the woeful inadequacy of available administrative remedies. Typical of the responses from the field were the comments of the Commander, U.S. Naval Forces, Japan, who 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."<sup>107</sup>

#### 4. Disciplinary Tools Currently Available

DoD civilian employees are subject to a variety of administrative sanctions for misconduct under federal law pursuant to their federal employment contract. These sanctions include informal actions (oral admonitions and warnings), formal actions (written reprimands), suspension for less than 14 days, and adverse actions (suspensions for more than 14 days, furloughs without pay, reductions in pay or grade, and removal).<sup>108</sup> While deployed, they are subject to the commander's general conduct policy, violations of which expose them to administrative sanctions.

DoD civilian family members are subject to administrative sanctions ranging from warnings, restricting base privileges (driving, commissary, and post exchange), and barring from the base, to the early return of family members to the United States. The last two are significant. Barring a dependent from an overseas base cuts the dependent off from the source of almost all privileges associated with membership in the American military community. Barment often has the practical effect of preventing the dependent's sponsor from living in government housing on the base. "Early return of dependents" is accomplished by revoking the dependent's status under SOFA, which often is the prerequisite for the dependent's lawful presence in the host country. Revocation of SOFA status for one dependent often has the practical effect of requiring the early return of

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<sup>107</sup> Letter from ADM B. E. Tobin, Commander, U.S. Naval Forces, Japan, to Judge Advocate General of the Navy (Jun. 12, 1996).

<sup>108</sup> 5 U.S.C. §§7501-7514 (1995); DEP'T OF ARMY, REG. 690-700, , chaps. 751-752.

all of a sponsor's family members, and may require the curtailment of a military member's tour of duty. This may have serious career consequences for the military member.

Contractor employees, unlike DoD civilian employees, are not under the direct supervision of military commanders. Instead, their relationship with the military is solely a function of the contract of employment between their employer and the government. The contract contains the statement of work the contractor is to perform. The contractor must then hire qualified personnel to perform to the standard of the statement of work. Thus, in most cases it is the contractor who must impose any sanctions on his or her employee.<sup>109</sup>

Military commanders are not powerless in this relationship. They have the responsibility to accomplish their assigned mission, and require a disciplined force to do so; such a force obviously includes those civilians accompanying the force. To ensure this discipline and unit cohesion, the Army Materiel Command recommends that contracting officers include contract provisions requiring contractor personnel to comply with the commander's guidance and instructions, such as General Order Number 1.<sup>110</sup> Failure to comply with that guidance may result in the commander barring the contractor employee from certain facilities, such as the post exchange. Ultimately, the commander can recommend that the employer remove the offending employee from the area of operations.<sup>111</sup> The Staff Judge Advocate for the Joint Logistics Support Command in Haiti reported that in the vast majority of cases, contractors were willing to remove such employees.<sup>112</sup> If a contractor is not willing to remove an employee, the commander has the power to bar the employee from installation facilities or revoke the employee's SOFA status, which would require the employee to leave the host country.

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<sup>109</sup> U.S. ARMY MATERIEL COMMAND, AMC CONTRACTOR DEPLOYMENT GUIDE FOR CONTRACTING OFFICERS 2-1 (Jul. 1996).

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> Passar Memorandum.

D. Experiences of Other U.S. Government Agencies  
and Foreign Governments

1. U.S. Department of Justice and Department of State

United States Attorneys' have had limited experience prosecuting civilians accompanying the armed forces in foreign countries. Of 93 federal judicial districts, U.S. Attorneys in only 12 could recall prosecuting a case involving a civilian who had been accused of an overseas violation of a U.S. statute having extraterritorial effect.<sup>113</sup> Most reported cases were for violent crimes such as murder or rape, but other offenses such as fraud against the U.S. have also been prosecuted. The two problems most often cited by U.S. Attorneys for the small number of successful prosecutions were the logistical difficulties of obtaining evidence and witnesses from foreign countries, and the lack of clear jurisdictional authority to support a prosecution.<sup>114</sup> Despite these concerns, the committee found considerable support among U.S. Attorneys for extension of federal jurisdiction to offenses committed by civilians accompanying U.S. forces overseas.

The State Department does not maintain statistics on the number of criminal cases that arise among its personnel overseas. However, response to committee inquiries suggests the current "jurisdictional gap" poses only a minor problem within the State Department. Usually the person accused of crime has had diplomatic immunity and, if restitution was not made voluntarily, the offending person and any family members were withdrawn from the host country. Where U.S. jurisdiction existed over the offense, the Justice Department has usually declined to prosecute.<sup>115</sup>

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<sup>113</sup> Letter from Carol DiBattiste, Director, Executive Office for United States Attorneys, to Col. Thomas Becker, USAF, Associate Deputy General Counsel (Military Justice and Personnel Policy) (Oct. 22, 1996).

<sup>114</sup> *Id.*

<sup>115</sup> Oral Report by Mr. Stewart, Department of State, Minutes of the Overseas Jurisdiction Advisory Committee (Oct. 2, 1996).

## 2. United Kingdom and Canada

Since the United States and Canada derived their judicial systems from that of the United Kingdom, a brief review of the current practices of the United Kingdom and Canada with respect to civilians accompanying the force provides suggestions as to how the U.S. jurisdictional practice might have developed, but for the *Reid v. Covert* line of cases. Both the United Kingdom and Canada have long subjected civilians to military law when accompanying the forces in foreign countries. However, their current practices demonstrate important differences in the way they handle civilian misconduct overseas.

Since 1879, British civilians accompanying the armed forces have been subject to military law when the force was on "active service."<sup>116</sup> A force is on "active service" when it is engaged in operations for the protection of life or property, or during military occupation of a foreign country.<sup>117</sup> Those civilians accompanying forces not on active service were tried in British consular courts, until this practice was gradually discontinued the first half of the twentieth century.<sup>118</sup> After that time, civilians accompanying a force not on active service were in a jurisdictional void, since in most cases they remained immune by treaty from host country jurisdiction, yet no local British authority could exercise jurisdiction over them.<sup>119</sup>

The United Kingdom extended military jurisdiction over civilians accompanying the force when not on active service for the first time by passing the Army and Air Force Acts of 1955 and

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<sup>116</sup> Letter from David Woodhead, Head of Armed Forces Bill Team, U.K. Ministry of Defence, to COL. Thomas G. Becker, USAF, Associate Deputy General Counsel (Military Justice & Personnel Policy), subject: Jurisdiction Over Civilians (Oct. 29, 1996).

<sup>117</sup> MINISTRY OF DEFENCE, MANUAL OF MILITARY LAW, PART 1, CIVILIAN SUPPLEMENT, § 4 (1977) (Eng.).

<sup>118</sup> Woodhead Letter at 2.

<sup>119</sup> *Id.*

the Navy Act of 1957.<sup>120</sup> Such civilians can now receive summary punishment from a military commander for minor offenses, but have the right to choose court-martial instead.<sup>121</sup> Since 1976, civilian Crown servants can sit on a court-martial trying a civilian, but cannot sit as president. Civilian members cannot make up a majority of the court-martial panel.<sup>122</sup>

An alternative to court-martial was created by the Armed Forces Act of 1976, which created the Standing Civilian Court (SCC). SCCs can adjudicate all but the most serious offenses involving civilians. An SCC has less sentencing power than a court-martial, but a wider range of possible sentences, particularly where juvenile offenders are concerned. A civilian judge advocate presides over a SCC, and sits alone as a magistrate except in juvenile cases, where up to two lay members may join the court.<sup>123</sup>

Whether a civilian defendant is tried by court-martial or by a SCC, the convening officer is the senior officer in the chain of command above the commanding officer of the civilian defendant's unit. This officer has the power to decide whether a case will be tried by court-martial or by SCC. When the defendant (whether civilian or military) has ceased to be subject to military law for over six months prior to the court-martial proceedings, the United Kingdom's Attorney General must consent before the trial can begin. This occurs frequently in civilian cases, since civilians cease to be subject to military law as soon as they leave the overseas territory concerned.<sup>124</sup>

According to the United Kingdom's Ministry of Defence, there is little opposition in Parliament or in the British public to the exercise of military jurisdiction over civilians. The

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<sup>120</sup> *Id.*

<sup>121</sup> Army Act, §209(3)(d) (1955) (Eng.).

<sup>122</sup> Woodhead Letter at 2.

<sup>123</sup> *Id.* at 3.

<sup>124</sup> *Id.* at 3-4.

greater focus appears to be on negotiating with host countries to obtain British jurisdiction over its nationals rather than leaving them subject to the host country's jurisdiction. From 1994-1995, U.K. Army and Air Force courts-martial tried nine civilians for offenses ranging from disorderly conduct to murder. In the same period Army and Air Force SCCs tried 52 civilians for assault, theft, burglary, and drug and traffic offenses.<sup>125</sup>

Canada provides for military jurisdiction over two groups of civilians: family members of military members serving outside Canadian territory, and civilian employees serving outside Canada who have consented to be subject to the Code of Service Discipline as a condition of their employment with the Minister of National Defence. Civilians can be tried by either a General or a Special General court-martial. A General court-martial consists of five members and one judge advocate. A Special General court-martial consists of a military trial judge sitting alone.<sup>126</sup>

When a Canadian civilian is charged with an offense, the commanding officer of the unit involved forwards the charges to the senior commander on location for disposition. Trial cannot proceed until it has been approved by the Minister of National Defence if the offense charged is under the Criminal Code of Canada or if imprisonment is possible. Offenses under the Criminal Code of Canada may be transferred to a civilian criminal court in Canada, although this has not happened. While there have been no General courts-martial involving civilian defendants in the past thirty years, there have been ninety Special General courts-martial in the past ten years. The charges have included theft, fraud, battery, drug offenses, and driving under the influence of alcohol.<sup>127</sup>

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<sup>125</sup> *Id.* at 4-5.

<sup>126</sup> Letter from COL. Guy L. Brais, Chief Military Trial Judge, Canadian National Defence Headquarters, to COL. Thomas G. Becker, USAF, Associate Deputy General Counsel (Military Justice & Personnel Policy), subject: Court Martial Jurisdiction Civilians Overseas (Oct. 29, 1996).

<sup>127</sup> *Id.*

## V. COMMITTEE FINDINGS

Based on its review, the committee finds two "jurisdictional gaps" where current military law and federal civilian criminal law fall short in satisfying the national interest. The first is the lack of court-martial jurisdiction over those DoD civilian employees and contractors who deploy with forces during contingency operations. The second is the failure of the federal civilian criminal law to address comprehensively criminal behavior by civilians who accompany U.S. forces overseas.

### A. Contingency Operations.

Article 2(a)(10) of the UCMJ<sup>128</sup> only allows for court-martial jurisdiction over civilians "[i]n time of war." As previously discussed, case law has interpreted "war" in this context to mean a congressionally declared war<sup>129</sup>. The United States has not declared war since World War II, but has engaged in several major combat operations without a congressional declaration of war. Accordingly, the committee believes the phrase "in time of war" is too narrow a concept upon which to base court-martial jurisdiction over civilians serving with forces in the field, both as a practical matter and as a matter of constitutional law.

DoD civilian workers and contractors accompany the armed forces in many operations which, while not in periods of declared war, involve actual or imminent hostilities and are of great importance to the national security interests of the United States. The narrow judicial definition given "in time of war" leaves the United States and its armed forces unable to apply meaningful punishment to (and hence deter) serious offenses by civilians who accompany the armed forces during military operations in which combat is occurring or is likely to occur. Unlike in peacetime, serious crime by civilians in these circumstances can directly affect mission accomplishment and the safety of the forces, just as much as offenses by members of the armed forces. For example, a civilian who rapes a member of the

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<sup>128</sup> 10 U.S.C. § 802(a)(10).

<sup>129</sup> *United States v. Averette*, 19 U.S.C.M.A. 363, 41 C.M.R. 363 (1970).

local population during a peacekeeping operation commits not simply a reprehensible act; the civilian undermines the entire mission by encouraging resistance to U.S. efforts to bring peace. Similarly, a civilian who disobeys an order to maintain operational security is guilty of more than a simple rule infraction; the civilian endangers the safety of others and puts at risk the success of the mission.

Because "in time of war," as currently interpreted, has too narrow a definition, the committee sought a better definitional concept upon which to base court-martial jurisdiction over civilians serving with U.S. forces. The committee applied three criteria to this search. First, the definitional concept must be broad enough to include military operations in which, because of the existence or imminence of combat, offenses by civilians would have a direct and substantial impact on the success of the operations. This is necessary to deter and punish crimes by civilians accompanying the forces on missions that are so important to American security and foreign policy interests that, in order to accomplish those missions, the United States is willing to risk combat losses. Second, the definition needs to be narrow enough that it included only those operations in which these important interests are at stake. The definition must be narrow to meet constitutional and policy concerns that court-martial jurisdiction over civilians must not be broader than absolutely necessary. Finally, the definition needs to be clear, a "bright line" so that everyone (and, above all, the civilian employees and contractors who would be subject to court-martial jurisdiction) would have no doubt when the threshold was crossed.

For these reasons, the committee did not choose "armed conflict" as its definitional notion, despite the use of that term in the statute that created this committee. "Armed conflict" does not have an agreed meaning. Even when all can agree that a certain episode constitutes "armed conflict," it is not always clear when "armed conflict" begins or ends. For example, in the Gulf War, did "armed conflict" for U.S. forces begin with their deployment to the theater during Operation DESERT SHIELD, with the start of Operation DESERT STORM, or at some point in between? Did that "armed conflict" end with the cease fire, or does it continue to this day with U.S. enforcement of the "no fly" zones in Northern and Southern Iraq? Instead of

"armed conflict," the committee has focused on "contingency operation," when such is designated by the Secretary of Defense, as the definitional concept that meets all three committee criteria.

The concept of "contingency operation" is familiar to practitioners of military operations law. DoD regulations use the statutory definition of "contingency operation"<sup>130</sup> as a trigger to give civilian workers, among other things, Geneva Conventions identification cards and standard identification cards, as well as training in specified subjects.<sup>131</sup> "Contingency

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<sup>130</sup> Title 10, Section 101(a)(13)(A), defines "contingency operation" as a military operation that "is designated by the Secretary of Defense as an operation in which members of the armed forces are or may become involved in military actions, operations, or hostilities against an opposing military force; . . . ." Section 101(a)(13)(B) further defines "contingency operation" to include other operations that result in the call to active duty, or retention on active duty, of certain members of the armed forces. Two recent operations were "contingency operations" by Secretarial designation under 10 U.S.C., section 101(a)(13)(A). These were Operations JOINT ENDEAVOUR (Bosnia) and RESTORE HOPE (Somalia). See SecDef memoranda of 14 December 1995 and 5 December 1992. Other operations assumed "contingency operation" status by operation of section 101(a)(13)(B). These include Operations DESERT SHIELD and DESERT STORM (the Gulf War), and UPHOLD DEMOCRACY (Haiti). Telephone Conversation with Colonel Michael McAntee, Deputy Legal Counsel to the Chairman, Joint Chiefs of Staff, March 13, 1997. As will be discussed later in this report, the committee proposes to rely only on a contingency operation expressly designated by the Secretary as such under section 101(a)(13)(A).

<sup>131</sup> DoD Instruction 1400.32, *DoD Civilian Work Force Contingency and Emergency Planning Guidelines and Procedures* (Apr. 24, 1995), at paragraph F.1., provides that civilian employees entering a possible theater of operations receive the following information:

- a. Armed forces standards of conduct training, as well as coping skills if they become Prisoners of War.
- b. Training in the use of military gear.
- c. The same immunization requirements as military personnel.
- d. Cultural awareness training.
- e. Passports, visas, and country clearances as appropriate.

(continued...)

operation," especially where one has been expressly declared by the Secretary of Defense (SecDef), has a clear and established statutory definition and presently triggers legal consequences. "Contingency operation" is the term that best describes the type of hostile environment to which today's American forces (and the civilians serving with them) now find themselves deployed, and to which they will likely find themselves deployed in the future. Accordingly, the committee believes "contingency operation" should be the definitional basis for court martial jurisdiction over civilians serving with U.S. forces in the field.

The committee was unable to find complete statistical data on civilian misconduct during contingency operations. Although there has not been a major problem with civilian misconduct during contingency operations, the potential for harm to mission safety and success, and, therefore, to the national interest, is too great to ignore. The Army has informed the committee that, during Operation DESERT STORM, four of its civilian employees were involved in significant criminal misconduct, yet faced minor sanctions when compared with those imposed on military personnel committing the same offenses.<sup>132</sup> Reports of civilian employees receiving little or no punishment during contingency operations continue.<sup>133</sup>

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<sup>131</sup>(...continued)

f. Appropriate clearances.

g. Certain legal assistance, e.g. preparation of a will or a power of attorney.

h. In case of death, a civilian has the same rights a military person would have, to include the right to an escort officer, and the purchase of a flag at government expense.

<sup>132</sup> Pursuant to a committee request, the U.S. Army Criminal Investigation Command ran a search for offenses occurring in the area of operation. Offenses ranged from importation of illegal firearms to larceny and receiving stolen property. In three of the four cases, no action was taken. The lone DoD employee who did receive punishment was suspended for 30 days without pay.

<sup>133</sup> During Operation UPHOLD DEMOCRACY (Haiti), a DoD contractor and a DoD employee were found to have committed conspiracy and larceny; however, there is no record of any action being taken on the case. In Operation JOINT

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More important than what has happened in the past, the potential for injustice and damage to U.S. foreign policy is great. If, during the present contingency operation in Bosnia, a civilian employee rapes a local national, there is no stronger response for U.S. authorities other than firing the employee. If a DoD contractor employee kills a member of an allied force in Bosnia, there is no recourse for U.S. authorities other than revoking the employee's SOFA status. The result is the same if a DoD civilian employee contractor sexually abuses a child in Bosnia or sells dangerous drugs to U.S. forces there.

The critical support provided by DoD civilian employees and contractors has become a routine part of contingency operations. As the number of civilians accompanying U.S. forces overseas increases, the committee believes that the number of serious crimes committed by civilians will also increase. Crimes such as those involving violence or major fraud against the local populace, allied forces or U.S. personnel must be handled swiftly and effectively if we are to avoid harmful effects on military operations or international relations.

It is generally recognized that the host nation has primary criminal jurisdiction over criminal misconduct occurring in its territory. However, in most recent contingency operations the United States has had primary or exclusive criminal jurisdiction over its personnel, including civilians accompanying the forces. Because of the weakness, instability, or even nonexistence of host nation governments in many contingency operations, it is likely that the United States will continue to have primary or exclusive criminal jurisdiction during such operations, either through a negotiated SOFA or by default. Accordingly, commanders must have the legal tools to maintain discipline and punish crimes among civilian members of their forces. Failure by U.S. authorities to adequately address serious criminal acts within the civilian component of the force will result in embarrassment in the international community, hostility in the local populace,

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<sup>133</sup>(...continued)

ENDEAVOUR (Bosnia), a DoD contractor was found to have possessed a controlled substance with intent to distribute, and unlawfully sent a firearm through the U.S. Mail. This contractor was terminated from his job.

loss of cohesion with our allies, and lower morale and discipline in our uniformed forces.

The ability of a commander to take disciplinary action is a key to accomplishing the mission. There is potential for serious offenses going unpunished in a protracted contingency operation. This is particularly true as involvement in contingency operations by civilian workers and contractors increases.<sup>134</sup> Undoubtedly, the austere conditions in Saudi Arabia contributed to the low rate of military and civilian criminal misconduct, as it did for the uniformed forces. In a less spartan environment, or a more protracted contingency operation, it is only a matter of time before a civilian commits a crime for which administrative sanctions are neither appropriate nor just.<sup>135</sup> In a contingency operation like JOINT ENDEAVOUR, where the mission is not easily definable and involves a long stay in the host nation, the ability of a military commander to exercise criminal jurisdiction over civilians serving with his or her unit is important. Because turning over the civilian to the host nation would be impractical, a civilian employee or contractor would escape significant punishment after committing a serious offense. This not only would adversely affect the morale of the military contingent, but would also have the potential for an international relations crisis if the victim is a local citizen or serving with an allied force. A force commander may also have an obligation, in certain circumstances, to discipline foreign nationals under his or her command who commit war crimes.<sup>136</sup> To

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<sup>134</sup> Memorandum of 9 August 1996 from Staff Judge Advocate to Commander in Chief, United States Atlantic Command, reports an ever increasing reliance by the military on civilian contractors, such as Dynacore/Brown and Root, to provide military logistical and support functions.

<sup>135</sup> Memorandum of 7 July 1996 from Office of the Staff Judge Advocate HQ, U.S. Army Europe (FWD) in Tazsar, Hungary, reported an AAFES employee accused another AAFES employee of sexual assault. Although the accuser recanted the accusation, the investigation determined that had the allegation been true, there would have been no U.S. criminal jurisdiction over the assault.

<sup>136</sup> Memorandum from Department of the Navy Law of Armed Conflict Branch, dated September 4, 1996, opines that Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, requires military commanders to take action

(continued...)

hold foreign nationals criminally accountable, without the power to do the same for U.S. civilian personnel serving with the force during a contingency operation, would be unjust and further undermine force morale.

Prosecution in federal civilian court, even if available, would not adequately address the special problems associated with a contingency operation, for three reasons. First, the commander -- and not a civilian prosecutor -- is responsible for his or her forces and the accomplishment of the mission. Crimes by members of the force, whether committed by military or civilian personnel, endanger the force and the mission. Therefore, the commander should have the power to initiate steps to hold offenders accountable, and not have to defer to a U.S. attorney located well away from the operation. Second, some serious crimes under the UCMJ, and which would have particular impact in a combat environment, do not have counterparts in federal law.<sup>137</sup> Finally, even if a crime violates federal law, as a practical matter it may only be prosecutable by a court-martial convened at or near the site of the offense, because victims and witnesses are unable or unwilling to travel abroad. In short, allegations of serious crime by civilians serving with U.S. forces during contingency operations demand a swift, efficient response. This cannot happen if decisions to prosecute, and authority over any resulting prosecutions, rest entirely with United States Attorneys located thousands of miles away from the contingency operation.

#### B. DoD Civilians and Family Members Stationed Overseas

The inability of the United States to hold its citizens criminally accountable for offenses committed overseas has undermined deterrence and resulted in injustice. The Services

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<sup>136</sup>(...continued)

against persons "under their command and other persons under their control" who violate the Geneva Conventions or Protocol I. Although the War Crimes Act of 1996 (Pub. L. No. 104-192) moots the issue of extraterritorial federal jurisdiction as to war crimes, if commanders are unable to take action, the United States potentially would be seen as failing to live up to its duty of policing its civilian employees and contractors who accompany U.S. forces.

<sup>137</sup> See, e.g., Arts. 99 (Misbehavior before enemy), 101 (improper use of countersign), 102 (forcing safeguard), 10 U.S.C. §§ 899, 901, 902.

and Combatant Commands report that serious offenses have gone unpunished, or insufficiently punished. The main problem has been cases which the U.S. cannot prosecute and the host country will not prosecute. Additionally, there have been cases where, even though the host nation has been willing to prosecute, the U.S. would prefer to do so because of concerns about American notions of due process, or perceptions that host nation punishment will be too light or too severe.

Although there is a jurisdictional gap, the actual void is less than many overseas commanders perceive. Many federal criminal statutes are expressly extraterritorial.<sup>138</sup> For others, extraterritorial application may be inferred.<sup>139</sup> Many of the most

<sup>138</sup> See, e.g.:

- 18 U.S.C. § 32 (Destruction of Aircraft)
- 18 U.S.C. § 112 (Violence against internationally protected person)
- 18 U.S.C. § 175 (Prohibition against biological weapons)
- 18 U.S.C. § 351 (Congressional, Cabinet, and Supreme Court assassination, kidnaping and assault)
- 18 U.S.C. § 793 (Espionage)
- 18 U.S.C. § 878 (Threats, etc., against internationally protected persons)
- 18 U.S.C. § 1116 (Murder or manslaughter of foreign officials, official guests, or internationally protected persons)
- 18 U.S.C. § 1119 (Murder of U.S. national by other U.S. national)
- 18 U.S.C. § 1203 (Hostage taking) Extraterritorial jurisdiction supported by legislative history and actual purpose of Hostage Taking Act)
- 18 U.S.C. § 1512 (Tampering with a witness, victim, or an informant)
- 18 U.S.C. § 1751 (Presidential and Presidential staff assassination, kidnaping or assault)
- 18 U.S.C. § 1001 (False and Fraudulent Statements)
- 18 U.S.C. § 1956 (Money laundering)
- 18 U.S.C. § 2331 (Extraterritorial jurisdiction over terrorist acts abroad against U.S. nationals)
- 18 U.S.C. § 2401 (War Crimes)
- 18 U.S.C. § 46502 (Aircraft Piracy)

<sup>139</sup> See, e.g.,

- 18 U.S.C. § 201 (Bribery)
- 18 U.S.C. § 286 (Conspiracy to defraud government)
- 18 U.S.C. § 287 (False, fictitious, or fraudulent claim against U.S.)
- 18 U.S.C. § 499 (False/counterfeit passes)
- 18 U.S.C. § 500 (Forgery/counterfeit instruments)
- 18 U.S.C. § 641 (Stealing, etc., public money, property or records)

(continued...)

common and most serious crimes are not addressed by these statutes. For example, rape, sexual assault, theft, aggravated assault, robbery, and burglary are federal crimes only if committed within the "special maritime and territorial jurisdiction of the United States," or in other special circumstances not applicable to U.S. military communities in foreign territory.<sup>140</sup> Installations in foreign countries are not currently within the special maritime and territorial jurisdiction of the United States.

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<sup>139</sup>(...continued)

- 18 U.S.C. § 844(f) (Damage to government property)
- 18 U.S.C. § 1546 (Fraud/misuse of visas and other documents)
- 18 U.S.C. §§ 2251, 2252 (Sexual exploitation of children)
- 21 U.S.C. §§ 841, 952, 960 (Drug offenses)

<sup>140</sup> For the definition of "special maritime and territorial jurisdiction of the United States," see 18 U.S.C. § 7. The following is a list of offenses under U.S. law that require acts in the "special maritime and territorial jurisdiction of the United States" as an element. Many of these are also offenses under alternative circumstances of federal interest (e.g., committed in Indian country or in interstate or foreign commerce).

- 15 U.S.C. §§ 1243, 1245 (Manufacture, sale or possession of certain knives)
- 18 U.S.C. § 13 (Assimilative Crimes Act, making state crimes are federal offenses)
- 18 U.S.C. § 81 (Arson)
- 18 U.S.C. § 113 (Assault)
- 18 U.S.C. § 114 (Maiming)
- 18 U.S.C. § 661 (Theft)
- 18 U.S.C. § 662 (Receiving stolen property)
- 18 U.S.C. § 831 (Transactions involving nuclear materials)
- 18 U.S.C. § 1025 (Fraud on high seas)
- 18 U.S.C. §§ 1111-1113 (Homicides)
- 18 U.S.C. § 1201 (Kidnaping)
- 18 U.S.C. § 1363 (Damage to real property)
- 18 U.S.C. § 1460 (Obscene matter)
- 18 U.S.C. § 1957 (Racketeering activities)
- 18 U.S.C. § 2111 (Robbery)
- 18 U.S.C. § 2119 (Carjacking)
- 18 U.S.C. §§ 2241-2244, 2252, 2252A (Sex abuse)
- 18 U.S.C. § 2261A (Stalking)
- 18 U.S.C. § 2318 (Trafficking in certain counterfeited documents)
- 18 U.S.C. § 2332b (Certain terrorist acts)
- 18 U.S.C. §§ 2422, 2423 (Coercion/enticement/transport of minor for sex)

The Military Services agree that crime by DoD civilians overseas is a serious problem. With the post-Cold War drawdown of U.S. forces, the number of civilian family members accompanying U.S. forces overseas has decreased significantly (39%). However, the incidence of crime has not dropped at the same rate.<sup>141</sup> In 1989, 1,576 DoD civilians were involved in alleged misconduct that was subject to the host nation's exclusive or primary concurrent jurisdiction. In 1995, that number had only dropped to 1,428. From October 1994 to June 1996, the Naval Criminal Investigative Service (NCIS) opened 399 overseas criminal investigations on civilian subjects. In the Pacific Theater alone, during 1991 through 1996, NCIS reported the following cases involving civilian offenders: one case of rape/carnal knowledge; three cases of child sexual abuse; one case of aggravated assault and sexual assault; four cases of robbery (including one where a dependent was detained for 15 counts of robbery); three cases of drug distribution; four cases of larceny and bad check offenses, totaling \$68,000; one case of fraud where, between 1991 and 1994, an Army employee embezzled approximately \$70,000 per year). In all these cases, the host government waived jurisdiction. Installation commanders were only able to bar the offenders from their bases and take revoke their SOFA status. These numbers suggest a disturbing trend that civilian misconduct overseas is not declining at the same rate as civilian presence, and the means for effective deterrence and justice are wanting.

The committee was unable to find statistical data regarding recent cases that are not being prosecuted by host countries.<sup>142</sup> Nevertheless, available information, although anecdotal, presents a powerful argument for extension of federal criminal

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<sup>141</sup> See FCJ Report at 1.

<sup>142</sup> In its 1979 report to Congress, the General Accounting Office strongly recommended that Congress enact legislation to extend criminal jurisdiction to civilians accompanying the armed forces overseas. The GAO reported that, in 1977, 59 cases of serious criminal misconduct (including rape, robbery, and aggravated assault) were not prosecuted by the host nation. Due to the jurisdictional void, the U.S. was unable to prosecute any of these cases. GAO Report at ii, 6-8.

jurisdiction to prevent serious crime from going unpunished. In particular, the Air Force memorandum to the committee notes disturbing evidence of past crimes that have not been prosecuted due to lack of U.S. criminal jurisdiction.<sup>143</sup> Additionally, the Staff Judge Advocate to the Commandant of the Marine Corps, in his report to the committee dated July 17, 1996, cited a case from Okinawa in which a 16 year-old dependent raped a 15 year-old dependent at a DoD school. The Japanese government waived jurisdiction.

Even if the host nation decides to prosecute, local law or procedures in use under the SOFA may make it difficult to hold an offender in pretrial confinement. Anecdotal information indicates there is a risk that, once the host nation releases an offender, he or she may flee the country or continue to create problems for the command.<sup>144</sup>

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<sup>143</sup> Memorandum from Department of the Air Force, Office of General Counsel (Aug. 15, 1996). This memorandum, signed by the Air Force General Counsel and Judge Advocate General, strongly supported the extension of extraterritorial jurisdiction. Particularly disturbing was a 1992 fatal stabbing of a 16 year old dependent. Initially, the Japanese Government did not want to prosecute, but was eventually persuaded after U.S. congressional and media interest. Eventual sentence was confinement for 4 years. See also Becker at 277-78 (discussion of same case). But see 18 U.S.C. § 1119 (foreign murder of U.S. nationals; enacted in 1994, this statute was too late to have been used in the stabbing case; even now, it is of limited utility because of statutory restrictions on prosecution; id. § 1119(c)). Other cases:

Crime	Punishment
AAFES employee stole \$20,000 from AAFES	Barred from base
Use of crystal meth.. (several wives of military members)	Barred from base
Squadron employee sexual molestation of 24 dependent girls, 9-14 years old	Barred from base
DODDS Teacher: sexual molestation	Return to CONUS
Dependent Wife: Aggravated assault	
Attempt to sever penis	Return to CONUS
Dependent Wife: Stabbing and slashing	Return to CONUS

In all these cases, the host nation declined to prosecute due to the lack of host nation interests in prosecution of the crime.

<sup>144</sup> The Air Force memorandum of August 15, 1996, described the case of a DoD  
(continued...)

Although a complete statistical analysis does not exist, the available information and anecdotal evidence show not much has changed since 1979, when the GAO found many serious crimes committed overseas by DoD civilians went unpunished. It is clear to the committee that the federal criminal law does not adequately permit the United States to hold DoD civilians criminally liable for their actions when accompanying the forces in foreign countries.

### C. Alternatives to Criminal Jurisdiction

#### 1. Available remedies.

As discussed previously in this report, DoD civilians are subject to many administrative sanctions. These are not criminal punishments, but are directed at installation privileges and employment status.

For government employees, sanctions range from informal warnings to removal from federal service.<sup>145</sup> During a contingency operation, DoD civilian employees are subject to the commander's authority while in-theater. Accordingly, they are obliged to obey orders, including standing orders, such as the previously discussed "General Order Number 1," relating to safety of

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<sup>144</sup>(...continued)

Dependents Schools teacher who allegedly distributed drugs to his students. The Italians asserted jurisdiction, but released the alleged offender from custody believing the U.S. had jurisdiction to try the crime. The teacher fled the country. In another memorandum, the Staff Judge Advocate Office for Headquarters, V Corps, notes several cases where the German government waived jurisdiction and the U.S. was not able to prosecute due to lack of jurisdiction, and another case where the German government asserted jurisdiction, but released the alleged offender, who subsequently fled the country. Additionally, V Corps reported a case of an adult dependent who was accused of frequent drug distribution to soldiers on base. The German government declined to prosecute, as it did not view her drug involvement significant enough to prosecute. The available remedy was to bar the offender from the base. V Corps reports, however, that she continues to conduct illicit drug activities with soldiers off-base.

<sup>145</sup> Formal action includes written reprimands. Other available sanctions include suspension for less than 14 days or longer than 14 days, furloughs without pay, and reductions in grade or pay.

personnel and conduct of the mission. However, a commander's available sanctions for misbehavior -- whether a violation of General Order Number 1 or serious "street crime" such as rape or murder -- are limited to the previously described administrative actions.

Family members are subject to sanctions ranging from warnings to revocation of command sponsorship and early return to the United States.<sup>146</sup> Additionally, the commander has several tools at his or her disposal to combat minor civilian misconduct. These sanctions include restricting base driving, removal from base housing, revoking commissary and post exchange privileges, or in more severe cases, barring a person from entering the base.

DoD contract workers overseas are not subject to the same range of sanctions by the local commander as government employees or family members. The civilian contractor is the one tasked with imposing possible sanctions in cases of misconduct. The commander, however, may restrict base privileges or bar the person from the base. Ultimately, the commander can revoke a contractor employee's SOFA status, which would result in expulsion from the country.

## 2. Adequacy of Remedies.

A commander has enough disciplinary tools at his disposal to respond adequately to minor misconduct by civilians in his or her area of responsibility, particularly in the case of DoD employees. In a serious case where only a criminal prosecution is appropriate, the situation is much different. If an extraterritorial federal statute applies, a commander can ask the appropriate United States Attorney to prosecute. Otherwise, a commander is largely powerless.

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<sup>146</sup> "Command sponsorship" often forms the legal basis for the dependent's presence in the host country and may be revoked for misconduct or other reasons. See DoD Dir. 1315.7, *Military Personnel Assignments* (Jan. 9, 1987). If command sponsorship is revoked, a dependent loses base privileges (access to commissary, exchange, etc.) and the military members loses various monetary allowances. If the dependent wants to stay in the host country, he or she must satisfy that country's immigration laws.

It makes no sense to send civilians to foreign countries to represent the United States, and have no effective legal means to control their conduct. Accordingly, commanders need the ability to call in federal civilian prosecutors to deal with serious criminal behavior.

#### D. The Need for Legislation

In their responses to the committee's inquiries, the Services and Combatant Commands strongly supported legislation to close one or both of the identified "jurisdictional gaps" concerning civilian offenses overseas.<sup>147</sup> The committee agrees that legislation is needed to address misconduct by DoD civilians supporting military operations, and misconduct by civilians accompanying the forces overseas in peacetime settings.

##### 1. Contingency Operations

As discussed above, the committee believes that "in time of war" is too narrow a concept for use as a basis for court-martial jurisdiction over DoD civilians, both as a matter of constitutional law and in terms of the practical requirements of

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<sup>147</sup> The Service and Combatant Command recommendations are summarized below:

	Court-Martial Jurisdiction For Military Operations	Federal Criminal Jurisdiction
Air Force:	No	Yes
Marine Corps:	Notes Constitutional Issue	Yes
Navy:	Yes	Yes
Army:	Yes	Yes
Central Command:	Supports "US jurisdiction over civilians accompanying the force" without distinction	
Atlantic Command:	Yes	Yes
European Command:	No	Yes
Southern Command:	No	Yes
Pacific Command:	Not mentioned	Yes

modern military operations. The committee believes that a "contingency operation," as defined in title 10, U.S. Code, section 101(a)(13)(A), is broad enough to fill the jurisdictional gap, without being overly broad. Moreover, unlike the vague notion of "armed conflict," the term "contingency operation" has a specific meaning in the law of military operations.

"Contingency operation" has an established meaning, one set by law. A SecDef-designated contingency operation triggers myriad legislative provisions. Additionally, as also discussed above, designation of a military operation as a "contingency operation" results in DoD civilians receiving law of war training and Armed Forces Identification Cards. It makes sense to have the same "contingency operation" mechanism to define the limits of court-martial jurisdiction.

In the committee's view, there should be no constitutional impediment to court-martial jurisdiction over civilians who accompany the armed forces during a contingency operation. Although there may be arguments to the contrary, the committee believes the hostile environment of a Secretarially designated contingency operation makes court-martial jurisdiction over civilians constitutionally permissible. In the *Reid v. Covert* line of cases, the Supreme Court held that trials of DoD civilians by courts-martial were not constitutional. However, these holdings stand only for the proposition that, during peacetime, civilians do not fall within the scope of Congress' power over the armed forces.<sup>148</sup> Contingency operations contemplate the potential of armed hostilities, a condition that also falls outside the scope of these holdings. The constitutionality of the committee's recommendation in this area will be addressed at length in section VI of this report.

The committee recognizes that court-martial jurisdiction over DoD civilians poses public policy concerns. Such concerns present a sound reason to minimize the circumstances for court-martial jurisdiction over civilians during contingency operations. To satisfy these concerns, there must be safeguards

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<sup>148</sup> See U.S. Const., art. 1, § 8, cl. 13.

that will assure all that only serious offenses by DoD civilians are referred to trial by courts-martial.<sup>149</sup>

## 2. Peacetime Settings

The committee believes it is necessary for Congress to close the federal jurisdictional gap by extending extraterritorial application of federal criminal law to serious offenses not covered by existing extraterritorial statutes. Closing this gap will ensure relatively uniform treatment and deterrence of crimes by civilians accompanying the forces, no matter where they are stationed. The most important product of such a step will be the avoidance of manifest injustice: serious crimes, previously gone unpunished, may now be prosecuted in U.S. courts.

For reasons of cost and logistics, the federal jurisdictional gap need be closed only for serious offenses, such as those punishable by federal law by imprisonment for more than one year. The present system of administrative sanctions is still generally adequate for other, relatively minor acts of misconduct by DoD civilians.

The committee believes there are no constitutional issues associated with further extraterritorial application of federal criminal statutes in the limited circumstances proposed,<sup>150</sup> and there should be no significant public policy concerns over such an extension. As discussed above, many federal criminal statutes already have extraterritorial effect and have survived legal challenge.<sup>151</sup> Moreover, the committee views extension of jurisdiction as a protection for the rights of Americans accompanying the forces abroad. The option to prosecute an offense in American court gives U.S. officials leverage to obtain

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<sup>149</sup> See section VI of this report.

<sup>150</sup> See *Reid v. Covert*, 354 U.S. at 47 (Frankfurter, J., concurring); *Blackmer v. United States*, 284 U.S. 421 (1932); *United States v. Bowman*, 260 U.S. 94 (1922); *United States v. King*, 552 F.2d 833 (9th Cir. 1976); *United States v. Aluminum Company of America (ALCOA)*, 148 F.2d 416 (2d Cir. 1945); *United States v. Yunis*, 681 F.Supp. 896 (D.D.C. 1988), *aff'd*, 924 F.2d 1086 (D.C. Cir. 1991).

<sup>151</sup> See, e.g., *Yunis*.

a host country's waiver of its primary right of jurisdiction. Otherwise, Americans may find themselves on trial in a country with procedures and punishments far different from the American model of due process.<sup>152</sup>

Extension of federal jurisdiction can pose logistical and procedural problems. These problems are present for existing extraterritorial statutes and may be mitigated by provisions in new legislation.<sup>153</sup> In any case, these difficulties are outweighed by the need for United States jurisdiction to prosecute DoD civilians who commit crimes while accompanying U.S. forces in foreign countries, and thereby threaten our national interests.

## VI. COMMITTEE RECOMMENDATIONS

Consistent with the above findings, the committee recommends legislation to address two jurisdictional gaps. The first would establish court-martial jurisdiction over DoD civilians serving with the armed forces in the field during Secretarially designated contingency operations. The second would extend federal criminal law coverage to offenses committed by civilians accompanying the forces outside U.S. territory, regardless of the presence or absence of hostilities. A draft bill is Appendix 3.

As required by its enabling statute and charter, the committee considered establishing a special Article I court, and viewed the British and Canadian systems as potential models. The committee rejected that option as unnecessary, because present military and federal civilian courts are sufficient. In the committee's view, a new Article I court system would add expense

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<sup>152</sup> See *Sands v. Colby*, 35 M.J. 620 (A.C.M.R. 1992). In *Sands*, a DoD civilian employee in Saudi Arabia was accused of murdering his wife. Sands' status as a retired member of the Army made him subject to court-martial. Art. 2(a)(4), UCMJ, 10 U.S.C. § 802(a)(4). But for that coincidence, he would have been subject only to trial in Saudi court. Conviction for murder in a Saudi court carries a sentence of death by beheading. More recently, many Americans (including President Clinton) protested Singapore's caning punishment of an American teenager convicted of vandalism. See William Branigin, *Singapore Reduces American's Sentence; Teen's Parents Still Angry at 4-Lash Edict*, Wash. Post, May 5, 1994, at A33.

<sup>153</sup> See the committee's recommendations in section VI of this report.

and bureaucratic layers, but not improve on the ability of courts-martial and the Article III courts to address the problem of crime by civilians accompanying the armed forces.

#### A. Court-Martial Jurisdiction: Contingency Operations

The Committee recommends amendments to two articles of the Code. To Article 2(a),<sup>154</sup> the committee recommends adding a new paragraph "(13)," subjecting persons serving with or accompanying forces during a contingency operation to court-martial jurisdiction. As amended, Article 2(a)(13) would read:

Art. 2. Persons subject to this chapter.

(a) The following persons are subject to this chapter:

. . . . .

(13) During a contingency operation, civilian employees of the Department of Defense and employees of Department of Defense contractors serving with and accompanying an armed force in places outside the United States specified by the Secretary of Defense.

This amendment would also require amending Article 1 of the Code<sup>155</sup> to add a new paragraph defining "contingency operation." The committee recommends incorporating a definition of "contingency operation" commonly used throughout the law of military operations. As amended, Article 1 would read:

Art. 1. Definitions.

In this chapter.

. . . . .

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<sup>154</sup> 10 U.S.C. § 802(a).

<sup>155</sup> 10 U.S.C. § 801.

(15) The term "contingency operation" means the same as that term is defined at section 101(a)(13)(A) of this title.

Section 101 of title 10 contains definitions of terms applied throughout military law. Section 101(a)(13) defines "contingency operation" as follows:

(13) The term "contingency operation" means a military operation that --

(A) is designated by the Secretary of Defense as an operation in which members of the armed forces are or may become involved in military actions, operations, or hostilities against an enemy of the United States or against an opposing military force; or

(B) results in the call or order to, or retention on, active duty of members of the uniformed services under section 688, 12301(a), 12302, 12304, 12305, or 12406 of this title, chapter 15 of this title, or any other provision of law during a war or during a national emergency declared by the President or Congress.

The committee's recommendation, however, uses only the SecDef-designated contingency operation under subparagraph (A).<sup>156</sup> If an operation qualifies as a "contingency operation" only by operation of law under subparagraph (B),<sup>157</sup> this will have no impact on court-martial jurisdiction over DoD civilians.

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<sup>156</sup> Operations DESERT SHIELD, DESERT STORM, RESTORE HOPE, and JOINT ENDEAVOUR were designated by SecDef as "contingency operations" under 10 U.S.C., section 101(a)(13)(A). See SecDef memoranda of December 14, 1995, and December 5, 1992; McAntee Telephone Conversation.

<sup>157</sup> Operation UPHOLD DEMOCRACY (Haiti) is an example of a "contingency operation" created by operation of 10 U.S.C., section 101(a)(13)(B). McAntee Telephone Conversation.

The SecDef designation of a "contingency operation" already has several legal consequences. These include effects on acquisition procedures,<sup>158</sup> accumulation of leave by military personnel,<sup>159</sup> savings deposits of pay and allowances by military personnel,<sup>160</sup> medical and dental care for reservists,<sup>161</sup> payment of expenses incident to the death of civilian employees,<sup>162</sup> special pay for military health professionals,<sup>163</sup> language proficiency pay for military personnel,<sup>164</sup> basic allowance for quarters and variable housing allowance for reservists,<sup>165</sup> and cash payments to military personnel for unused leave.<sup>166</sup> The committee's recommended amendments to the UCMJ would add another consequence: court-martial jurisdiction over civilians serving with or accompanying the armed forces during the contingency operation.

The committee believes this amendment should cover only DoD civilians present with forces participating directly in a contingency operation. The committee intends that such a provision not be construed to cover all civilians accompanying the forces in overseas locations just because there is a contingency operation somewhere in the world. For this reason, the committee recommendation includes two safeguards. First, the committee recommends that only a "contingency operation," expressly designated as such by the Secretary of Defense under section 101(a)(13)(A), should serve to attach court-martial

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<sup>158</sup> 10 U.S.C. § 2302(7) (as amended by the Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, § 1502 (1994)).

<sup>159</sup> 10 U.S.C. § 701(f)(2).

<sup>160</sup> 10 U.S.C. § 1035(a).

<sup>161</sup> 10 U.S.C. § 1074b.

<sup>162</sup> 10 U.S.C. § 1482a.

<sup>163</sup> 37 U.S.C. § 303b.

<sup>164</sup> 37 U.S.C. § 316a.

<sup>165</sup> 37 U.S.C. §§ 403(d)(2), 403a(b)(3).

<sup>166</sup> 10 U.S.C. §§ 501(b)(5), 501(d)(2).

jurisdiction under the proposed new Article 2(a)(13). The committee believes that creation of a "contingency operation" by operation of law under section 101(a)(13)(B) is not sufficiently precise to limit application of new Article 2(a)(13) to the areas affected by the contingency operation or to give clear notice to the personnel concerned. Second, the committee's recommendation requires SecDef to also designate the places outside the United States where civilians supporting the contingency operation will be subject to court-martial jurisdiction under new Article 2(a)(13). This will permit the Secretary the flexibility to include civilians participating in the contingency operation in the place that is the objective of the contingency operation, and also those directly supporting the contingency operation in other nearby places. However, this provision will also protect civilians at installations far removed from the site of the contingency operation, even though their work may have some connection to that operation.

The committee also recommends regulatory restraints on the exercise of this jurisdiction. The committee recommends exclusion of civilians from nonjudicial punishment under Article 15 of the Code,<sup>167</sup> as the common punishments available under that article are uniquely appropriate for military personnel and would be difficult to apply to civilians, especially contractor employees.<sup>168</sup> The committee also recommends a requirement for permission from a high-level authority before a convening authority could refer a charge for trial by court-martial.<sup>169</sup> These restrictions should be imposed, in basic form, by the President in the Manual for Courts-Martial.<sup>170</sup> The Secretary of Defense and Service Secretaries may supplement these restrictions by Department of Defense directive and Service regulations.

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<sup>167</sup> 10 U.S.C. § 815.

<sup>168</sup> See 10 U.S.C. § 815(b)(2), especially correctional custody, forfeiture and detention of pay, and reduction in grade.

<sup>169</sup> See 10 U.S.C. §§ 822-824 for the officers who may convene general, special, and summary courts-martial.

<sup>170</sup> See 10 U.S.C. § 836(a) ("Pretrial, trial, and post-trial procedures, . . . may be prescribed by the President . . .").

Beyond the exclusion of nonjudicial punishment, the committee does not make detailed recommendations for these restrictions. The committee believes the matter is best left to the discretion of the Secretaries concerned, after study by the Joint Service Committee on Military Justice.<sup>171</sup>

New Article 2(a)(13) of the Code would represent a strictly limited exercise of court-martial jurisdiction over civilians that is justified by military necessity. Such jurisdiction is consistent with the Constitution, and does not subject civilians to military authority beyond what is necessary for the accomplishment of a specific mission.

1. Constitutionality of New Article 2(a)(13)

The notion behind new Article 2(a)(13) -- that courts-martial may, consistent with the Constitution, try civilians under certain circumstances -- is not a novel one in American jurisprudence. Historically, military jurisdiction has been lawfully exercised over civilians accompanying the military "in the field" during hostilities. In his highly regarded treatise on military law, William Winthrop stated that "the application of the [former] Article [of War that addressed jurisdiction over civilians] is confined both to the period and pendency of war and to acts committed on the theater of war."<sup>172</sup> Provisions for jurisdiction over civilians serving in the field were continually present in the Articles of War from 1775 to 1950, when the Uniform Code of Military Justice was adopted.

Military jurisdiction over civilians has been upheld by the courts, for civilians accompanying the armed forces in the field, for offenses committed in both times of declared war and in situations involving hostilities short of declared war, such as the Indian Wars. At the same time it has condemned peacetime courts-martial of civilians, the Supreme Court has commented

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<sup>171</sup> See DoD Dir. 5500.17, *Roles and Responsibilities of the Joint Service Committee (JSC) on Military Justice* (Mar. 8, 1996).

<sup>172</sup> WINTHROP at 101. The quotation refers to Article 63 of the Articles of War of 1892, which subjected to military jurisdiction "persons serving with the armies of the United States in the field."

favorably on this historical exercise of military jurisdiction over civilians during undeclared hostilities:

To be sure, the 1872 opinion of the Attorney General, dealing with civilians serving with troops in the building of defensive earthworks to protect against threatened Indian uprisings, is entitled to some weight.... [L]ike other examples of frontier activities based on the legal concept of troops being "in the field," ... [t]hey were in time of "hostilities" with the Indian tribes....<sup>173</sup>

There is nothing in the pertinent judicial opinions on military jurisdiction that undermines this historical precedent. While *Reid v. Covert*<sup>174</sup> and its progeny establish the constitutional principle that civilians cannot be subjected to trial by court-martial in time of peace, the Supreme Court has not excluded the exercise of military jurisdiction over civilians accompanying the forces during war or other hostilities. The Court of Military Appeals in *Averette* construed Article 2(a)(10) of the Code to support court-martial jurisdiction over civilians only during a congressionally declared war. While the *Averette* court construed Article 2(a)(10) against a constitutional backdrop of limiting military jurisdiction over civilians, the case nonetheless remains one of statutory construction -- one that may be affected by Act of Congress. Accordingly, the *Reid v. Covert* line of cases and *Averette* present no obstacle to the enactment of a new Article 2(a)(13), as this committee recommends.

Major Susan Gibson, in her recent law review article,<sup>175</sup> provides a blueprint for the constitutional analysis supporting the committee's recommendation for a new Article 2(a)(13). Major

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<sup>173</sup> *McElroy v. United States ex rel. Guagliardo*, 361 U.S. at 285-286.

<sup>174</sup> 354 U.S. 1 (1957).

<sup>175</sup> Gibson, *supra* note 9.

Gibson demonstrates that military jurisdiction over civilians may be constitutionally extended to include situations involving civilians deploying with the forces during contingency operations, even when actual combat has not occurred. As Major Gibson points out, the Supreme Court has established strict military necessity as the guiding principle that serves both as the source and the limit of military jurisdiction over civilians:

[M]ilitary tribunals must be restricted "to the narrowest jurisdiction deemed absolutely essential to maintaining discipline among troops in active service," [citation omitted].<sup>176</sup>

As described by Major Gibson, the Supreme Court has applied a necessity doctrine more than once in our history to uphold exercises of power by the President and Congress in the interest of national security, even when such exercise may have limited individual rights.<sup>177</sup>

The principle of military necessity fully applies to support court-martial jurisdiction over civilians serving with U.S. forces during contingency operations. As discussed by Major Gibson, misconduct by civilians accompanying the forces during any contingency operation (whether or not involving actual fighting) can have a significant adverse effect on troop effectiveness and morale and, therefore, on mission accomplishment; accordingly, court-martial jurisdiction over civilians in limited circumstances is justified by military necessity. Major Gibson emphasizes that the exercise of military jurisdiction in such situations would be limited in scope and time: few civilians would be covered and contingency operations are, by definition, of limited duration. In short, the exercise of military jurisdiction is both defined and limited by the military situation that necessitates it.

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<sup>176</sup> *Kinsella v. United States ex rel. Singleton*, 361 U.S. at 240 (quoting *United States ex rel. Toth v. Quarles*, 350 U.S. 1, 21-22 (1955)).

<sup>177</sup> Gibson at 174-175, citing, *inter alia*, *Parker v. Levy*, 417 U.S. 733 (1974), and *Youngstown Sheet and Tube v. Sawyer*, 343 U.S. 579 (1952).

The committee agrees with Major Gibson's constitutional analysis for the exercise of military jurisdiction over civilians during contingency operations. This analysis is bolstered by features of the committee's recommendation that ensure the exercise of such jurisdiction will be limited to circumstances of strict military necessity. These features are the application of new Article 2(a)(13) only to operations expressly designated by SecDef as "contingency operations" and then only in specified places, and the recommendations for regulatory restrictions against nonjudicial punishment and requiring permission from a high-level authority before a charge against a civilian could be referred to trial by court-martial.

In summary, the Supreme Court has set out military necessity as the guiding principle that both justifies and limits court-martial jurisdiction under the Constitution. Because of the important role of civilians serving with U.S. forces during contingency operations, court-martial jurisdiction over such civilians is fully supported by the principle of military necessity. The committee's specific recommendations are consistent with the Supreme Court's guidance that military jurisdiction must be limited by the circumstances that give rise to it, that is, by military necessity. Accordingly, the committee believes the limited application of court-martial jurisdiction to civilians represented in new Article 2(a)(13) will pass constitutional muster.

## 2. Policy Concerns

The committee believes its recommendations appropriately balance the individual rights of DoD civilians with military necessity. Although military justice has had a checkered reputation with the federal courts and the public over the years, there can be no question that today's military justice system grants every defendant "a fair trial in a fair tribunal."<sup>178</sup> Nonetheless, as described above, the committee urges regulatory restrictions on the exercise of the recommended jurisdiction. The committee also considers it essential that all civilian

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<sup>178</sup> *Weiss v. United States*, 510 U.S. 163, 177 (1994) (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)).

government or contractor employees, who would accompany U.S. forces in the field on Secretarially designated contingency operations, be notified of possible court-martial jurisdiction before deployment and receive training on the UCMJ similar to that given military personnel.<sup>179</sup>

American citizens are right to be wary of military authority over civilians. The American public also has a rightful expectation that its armed forces will be employed effectively, and Congress will give our commanders the legal tools necessary to carry out their mission and protect our forces.

#### B. Federal Jurisdiction: Peacetime Settings

Although the committee's activities focused on "armed conflict," Congress also empowered the committee to "[d]evelop additional recommendations as the committee considers appropriate as a result of the review."<sup>180</sup> The committee considers it appropriate to recommend legislation to close a second jurisdictional gap concerning offenses in a peacetime setting by civilians accompanying the American military overseas.

Three factors influenced the committee's decision to address the issue of criminal jurisdiction during peacetime. First, criminal acts by DoD civilians overseas during peacetime has been a historical source of injustice and has undermined order and morale in overseas military organizations and communities. Peacetime offenses produced *Reid v. Covert* and its progeny, and prompted most of the academic articles on this subject. Second, most of the legislative proposals over the years, including the current proposal by the Department of Justice, address criminal jurisdiction over civilians in a peacetime setting. Finally, the recommendations of the Services and Combatant Commands focus on the need for criminal law jurisdiction over civilians accompanying the military overseas, regardless of whether hostile conditions exist. Indeed, a majority of United States Attorneys has acknowledged this need. Accordingly, the committee believes

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<sup>179</sup> See Art. 137, UCMJ, 10 U.S.C. § 937.

<sup>180</sup> Pub. L. No. 104-106, § 1151(c)(3).

additional recommendations that address peacetime misconduct would better serve Congress and, ultimately, the nation.

The committee has considered the various legislative proposals introduced in recent years and adopts the present Justice Department proposal as its recommendation, with one additional provision. This proposal has been incorporated into the committee's draft bill at Appendix 3.

The Justice Department proposal would create a new chapter 212 to title 18, United States Code, entitled "Criminal Offenses Committed Outside the United States." This new chapter features a new section 3261, which would punish offenses committed by a civilian accompanying the armed forces in a foreign country, if the act would be an offense punishable by imprisonment for more than one year if it had been committed within the special maritime and territorial jurisdiction of the United States.<sup>181</sup> The Justice Department proposal would also address offenses committed in foreign territory by military members, whose military status ends before they can be prosecuted at courts-martial.<sup>182</sup>

At one time in our history, this legislation may have generated controversy as an unprecedented extension of federal criminal law beyond the borders of the United States. In modern times the proposal represents a logical step in Congress' move to apply United States law whenever it is in the national interest to do so. Extraterritorial application of criminal statutes is

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<sup>181</sup> See 18 U.S.C. § 7 (defining the "special maritime and territorial jurisdiction of the United States"). New section 3261 would also punish such offenses committed by "persons formerly serving with . . . the armed forces outside the United States." This provision would address another longstanding issue in military/civilian criminal law -- jurisdiction over a crime committed by a servicemember in a foreign country, but not prosecuted until after the member separates from the military. See *United States ex rel. Toth v. Quarles*, 350 U.S. 1 (1955).

<sup>182</sup> See *United States ex rel. Toth v. Quarles*, 350 U.S. 1 (1955) (court-martial jurisdiction over former member of armed forces for offenses committed while a member of the armed forces was unconstitutional, where person's military status had ended before court-martial prosecution).

both constitutional<sup>183</sup> and, over the years, has become common.<sup>184</sup> However, there is a jurisdictional gap for many common and serious crimes for which civilians accompanying the forces overseas escape punishment unless the host country chooses to prosecute.<sup>185</sup> The need for legislation to close this gap is something on which commentators, the General Accounting Office, military commanders, United States Attorneys, and now this committee have all agreed. The committee believes the Justice Department's proposal meets this need.

As previously discussed in this report, any extraterritorial application of U.S. law must be consistent with international law. Five grounds are traditionally recognized by international law as justifying an extraterritorial application of a nation's criminal laws: territorial, based on the place where an offense is committed, or where its effects are intended or felt; national, based on the nationality of the person committing the crime; protective, based on a particular offense's threat to the national interest, such as counterfeiting and espionage; universal, based on the nature of certain crimes considered to be particularly heinous and harmful to humanity, such as slavery and piracy; and passive personality, based on the nationality of the victim of an offense.<sup>186</sup>

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<sup>183</sup> See *Reid v. Covert*, 354 U.S. at 47 (Frankfurter, J., concurring); *Blackmer v. United States*, 284 U.S. 421 (1932); *United States v. Bowman*, 260 U.S. 94 (1922); *United States v. King*, 552 F.2d 833 (9th Cir. 1976); *United States v. Aluminum Company of America (ALCOA)*, 148 F.2d 416 (2d Cir. 1945); *Yunis*. See also Becker at 288 ("[T]he ability of Congress to apply United States law abroad appears to be a firmly rooted constitutional principle").

<sup>184</sup> As discussed earlier, the committee analyzed U.S. criminal statutes for extraterritorial application. The committee found a score of offenses which Congress expressly made extraterritorial (see, e.g., 18 U.S.C. § 1119 (murder of U.S. national); 18 U.S.C. § 1956 (money laundering)), and many more where Congress' intent to do so may be inferred from the statute (see, e.g., 18 U.S.C. § 844(f) (damage to government building); 21 U.S.C. § 841 (drug offenses)).

<sup>185</sup> See Becker at 294-95; McClelland at 180-82; GAO Report at ii, 4-8.

<sup>186</sup> RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 402, § 402 commentary (1987); *Yunis*, 681 F.Supp at 899-900. See also "Harvard Research in International Law With Respect to Crimes," 29 AM. J. INT'L L. SUPP. 435

The proposed legislation is intended primarily to apply to U.S. citizens or nationals serving with, employed by or accompanying the armed forces outside the United States. Such persons constitute the vast majority of DoD civilians in the circumstances under consideration and, because they lack host country nationality, their crimes are most likely to fall within the jurisdictional gap identified by the committee (i.e., not to be prosecuted by host country authorities). The United States has the clearest responsibility for ensuring that such crimes do not go unpunished. Moreover, the United States has a clear basis under international law for extending its criminal law to the actions of its nationals overseas, and Congress has already done so on several recent occasions.<sup>187</sup>

Not all DoD civilians overseas are U.S. nationals, however. The Justice Department proposal would exclude host country nationals from the definition of persons "employed by the armed forces outside the United States" in proposed section 3264 (1)(iii). The committee agrees with this approach. In most situations, the relevant status of forces agreement will address the respective competencies of U.S. and host country authorities to deal with criminal activity by their nationals. Even where there is no SOFA, host country nationals are not likely to escape punishment by their own criminal justice authorities, and an effort by the United States to assert extraterritorial criminal jurisdiction over their actions within their own country could well cause unnecessary conflicts of jurisdiction and other difficulties. The committee believes that the same exclusion should be incorporated into the definitions of a person "employed by the armed forces outside the United States" and a person "accompanying the armed forces outside the United States" at new section 3264. The committee has therefore revised the Department of Justice's language at subparagraph (iii) of new section 3264(1), and added a corresponding subparagraph (iii) to new

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<sup>186</sup>(...continued)

(1935). The "Harvard Research" remains the most authoritative discussion of customary international law and extraterritorial application of criminal statutes.

<sup>187</sup> See Blackmer; see also, e.g., 18 U.S.C. § 1119.

section 3264(2), to exclude from those definitions a person who "is not a national of or ordinarily resident in the host nation."

The issue of third country nationals poses greater difficulties. While they are likely to be comparatively few in number, third country nationals serve with U.S. armed forces abroad, are employed by DoD contractors, and, perhaps most frequently, accompany U.S. service members as resident dependents. Their criminal misconduct can be just as disruptive as that of U.S. nationals, and where no status of forces arrangement exists, may be equally likely to go unpunished by the local authorities. The authority of the United States under international law to assert criminal jurisdiction over the acts of third country nationals in host countries may be challenged. Nonetheless, in the view of the committee, the exercise of such jurisdiction could be justified when such individuals are present in the foreign jurisdiction because of their association or affiliation with the U.S. armed forces and when, but for prosecution by U.S. authorities, their crimes would go unpunished. The committee has in mind, for example, the situation of a crime committed by the spouse of a DoD contractor, neither of whom has either U.S. or host country nationality but who are both in the host country only by virtue of their association with the U.S. forces.

The committee therefore proposes that the Justice Department give additional consideration to this aspect of its proposed legislation by providing guidance to U.S. Attorneys that third country nationals should be subject to the extraterritorial application of the U.S. criminal law only in those circumstances where they are present in the host country because of their direct affiliation with U.S. forces. The committee also recommends that the Department of Defense ensure such individuals receive appropriate notice of their responsibilities and the possibility that criminal activity in the host country could be the subject of prosecution under United States law.

Jurisdiction for crimes committed outside U.S. territory also raises issues of criminal procedure, specifically, venue, arrest power, and magistrate hearings. Existing law adequately deals with venue, and the Justice Department's proposed legislation addresses arrest power. However, the committee

recommends an addition to that proposal to cover an important issue involving a defendant's initial appearance before a federal magistrate.

Section 3238 of title 18, United States Code, governs venue for crimes committed outside any state or district. This statute provides that venue in such cases will be in the district where a defendant is arrested or first brought or, if a defendant is not arrested or brought into any district, venue will be the district of a defendant's last known residence or, if no residence is known, the District of Columbia. These rules have proven satisfactory for the prosecution of other extraterritorial violations of federal law. The committee does not recommend special venue rules for offenses outside U.S. territory by civilians accompanying the armed forces.

Concerning arrest power, the Department of Justice proposal includes authority for the Secretary of Defense to designate Department of Defense (DoD) law enforcement personnel to make arrests of persons covered by the new statute. However, the Department of Justice proposal would require DoD personnel to release such persons to the custody of civilian law enforcement authorities for removal to the United States, unless they are delivered to host country authorities or prosecuted under the UCMJ. The committee believes these provisions give adequate powers to military authorities to enforce the law, while properly requiring transfer of civilian arrestees to civilian authorities as soon as is practicable.

The Justice Department proposal does not address one important procedural issue, the initial appearance and probable cause determination by a magistrate where there has been an arrest without a warrant. The Supreme Court has held the Fourth Amendment requires such a hearing.<sup>188</sup> Further, the Court has held the hearing must occur within 48 hours of a warrantless arrest, absent a showing of emergency or extraordinary circumstances.<sup>189</sup> This 48-hour requirement presents a practical problem, unless the

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<sup>188</sup> *Gerstein v. Pugh*, 420 U.S. 103 (1975). See also F.R.Cr.P. 5(a).

<sup>189</sup> *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991).

courts are willing to consider the foreign origins of the case as "extraordinary circumstances."

Often, persons arrested by military authorities for crimes in foreign countries will not be able to appear before a United States magistrate within 48 hours, given the military/civil coordinations, distances, and time zones involved. The committee believes that Congress should express its will that the courts consider these factors as "extraordinary circumstances" in judging any failure to meet the 48-hour standard. Although not controlling on the outcome of a case, the committee believes such an expression will be persuasive. Accordingly, the committee recommends an additional paragraph to section 3261(d) of the Justice Department's proposal:

(3) The arrest of a person outside the United States by a person designated under paragraph (1) of this section, and the removal of the arrested person to the United States under paragraph (2) of this section, are extraordinary circumstances justifying delay in bringing the arrested person before a magistrate as required by the Fourth Amendment to the United States Constitution and Rule 5 of the Federal Rules of Criminal Procedure.

## VII. CONCLUSION

The problem of criminal conduct by civilians accompanying the armed forces in foreign countries has been with us since the end of World War II and the start of the Cold War. Although Congress addressed the problem when it first adopted the UCMJ in 1950, the Supreme Court invalidated the peacetime application of these provisions in the line of cases beginning with *Reid v. Covert*. Since then, it has been up to Congress to consider extending the jurisdiction of the civilian federal courts. In the almost 40 years since *Reid v. Covert*, there have been many legislative initiatives, but none has been enacted. As a result, U.S. authorities have been left with only administrative tools to deal with much of the civilian crimes committed within military communities overseas. These may be adequate for minor offenses, but serious crimes warrant prosecution in a criminal court. If

the host country does not prosecute, the offender goes unpunished unless there is an extraterritorial statute vesting a United States court with jurisdiction.

Since World War II, the role of the American military also has changed. The American tradition of a small standing army and navy, which are augmented during times of declared war, has given way to large, forward deployed land, sea, and air forces. Instead of declared wars, these forces fight undeclared regional wars, and deploy to hostile environments in what are now called "contingency operations." During these operations, United States forces have come to rely on civilian employees and contractors to deploy with them. To maintain order and discipline in their fighting forces, commanders must have the legal tools to address crimes committed by these civilians. For serious matters, mere administrative sanctions will not suffice. Military law, which only attaches court-martial jurisdiction to civilians in time of "war," has failed to keep pace with these changes.

The committee's proposals fill these jurisdictional voids, but do not go beyond what is needed to solve the problems. Congress and the American people should not fear abuse of the jurisdiction recommended in this report. The proposed court-martial jurisdiction over civilians during those military operations, expressly designated by the Secretary of Defense as "contingency operations," is limited and tied directly to military necessity. With the additional regulatory restrictions recommended by the committee, and the good judgment of field commanders acting on advice of their legal counsel, the committee is confident this power will be used judiciously. The recommended extension of federal jurisdiction is a logical continuation of Congress' determination to apply American criminal law to overseas activities by American nationals. By its terms, this proposal is limited to serious offenses. This limitation, the logistical difficulties attendant to any prosecution under this proposal, and the sound prosecutorial discretion of United States Attorneys, will combine to confine the exercise of this jurisdiction to appropriate cases.

The committee recognizes the controversy associated with these issues, especially the notion of court-martial jurisdiction over civilians, no matter how limited and justified it may be. Accordingly, the committee requests that the Congress consider

its recommendations as distinct. If the Congress declines to adopt one recommendation, it should still consider the other.

By establishing this committee, Congress has recognized the need for a comprehensive study of a longstanding problem for U.S. authorities and source of injustice for American society. The committee's review has revealed a remarkable degree of consensus among the Services, Combatant Commands, the Department of Justice, and the United States Attorneys in support of legislation. The committee respectfully submits this report, and hopes it will persuade Congress also to recognize the need for this legislation.

“(C) An order or ruling which directs the disclosure of classified information.

“(D) An order or ruling which imposes sanctions for nondisclosure of classified information.

“(E) A refusal of the military judge to issue a protective order sought by the United States to prevent the disclosure of classified information.

“(F) A refusal by the military judge to enforce an order described in subparagraph (E) that has previously been issued by appropriate authority.”

(b) DEFINITIONS.—Section 801 (article 1) is amended by inserting after paragraph (14) the following new paragraphs:

“(15) The term ‘classified information’ means (A) any information or material that has been determined by an official of the United States pursuant to law, an Executive order, or regulation to require protection against unauthorized disclosure for reasons of national security, and (B) any restricted data, as defined in section 11(y) of the Atomic Energy Act of 1954 (42 U.S.C. 2014(y)).

“(16) The term ‘national security’ means the national defense and foreign relations of the United States.”

**SEC. 1142. REPEAL OF TERMINATION OF AUTHORITY FOR CHIEF JUSTICE OF THE UNITED STATES TO DESIGNATE ARTICLE III JUDGES FOR TEMPORARY SERVICE ON COURT OF APPEALS FOR THE ARMED FORCES.**

Subsection (i) of section 1301 of the National Defense Authorization Act for Fiscal Years 1990 and 1991 (Public Law 101-189; 10 U.S.C. 942 note) is repealed.

## **Subtitle E—Other Matters**

**SEC. 1151. ADVISORY COMMITTEE ON CRIMINAL LAW JURISDICTION OVER CIVILIANS ACCOMPANYING THE ARMED FORCES IN TIME OF ARMED CONFLICT.**

(a) ESTABLISHMENT.—Not later than 45 days after the date of the enactment of this Act, the Secretary of Defense and the Attorney General shall 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.

(b) MEMBERSHIP.—The committee shall be composed of at least five individuals, including experts in military law, international law, and Federal civilian criminal law. In making appointments to the committee, the Secretary and the Attorney General shall ensure that the members of the committee reflect diverse experiences in the conduct of prosecution and defense functions.

(c) DUTIES.—The committee shall do the following:

(1) Review historical experiences and ~~current~~ practices concerning the use, training, discipline, and functions of civilians accompanying the Armed Forces in the field.

(2) Based upon such review and other information available to the committee, develop specific recommendations concerning the advisability and feasibility of establishing United States criminal law jurisdiction over persons who as civilians

accompany the Armed Forces in the field outside the United States during time of armed conflict not involving a war declared by Congress, including whether such jurisdiction should be established through any of the following means (or a combination of such means depending upon the degree of the armed conflict involved):

(A) Establishing court-martial jurisdiction over such persons.

(B) Extending the jurisdiction of the Article III courts to cover such persons.

(C) Establishing an Article I court to exercise criminal jurisdiction over such persons.

(3) Develop such additional recommendations as the committee considers appropriate as a result of the review.

(d) REPORT.—(1) Not later than December 15, 1996, the advisory committee shall transmit to the Secretary of Defense and the Attorney General a report setting forth its findings and recommendations, including the recommendations required under subsection (c)(2).

(2) Not later than January 15, 1997, the Secretary of Defense and the Attorney General shall jointly transmit the report of the advisory committee to Congress. The Secretary and the Attorney General may include in the transmittal any joint comments on the report that they consider appropriate, and either such official may include in the transmittal any separate comments on the report that such official considers appropriate.

(e) DEFINITIONS.—For purposes of this section:

(1) The term "Article I court" means a court established under Article I of the Constitution.

(2) The term "Article III court" means a court established under Article III of the Constitution.

(f) TERMINATION OF COMMITTEE.—The advisory committee shall terminate 30 days after the date on which the report of the committee is submitted to Congress under subsection (d)(2).

**SEC. 1152. TIME AFTER ACCESSION FOR INITIAL INSTRUCTION IN THE UNIFORM CODE OF MILITARY JUSTICE.**

Section 937(a)(1) (article 137(a)(1)) is amended by striking out "within six days" and inserting in lieu thereof "within fourteen days".

**SEC. 1153. TECHNICAL AMENDMENT.**

Section 866(f) (article 66(f)) is amended by striking out "Courts of Military Review" both places it appears and inserting in lieu thereof "Courts of Criminal Appeals".



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[14 MAY 1996

MEMORANDUM FOR MEMBERS, OVERSEAS JURISDICTION ADVISORY COMMITTEE

SUBJECT: Charter for Overseas Jurisdiction Advisory Committee

On behalf of the Secretary of Defense and the Attorney General, I express appreciation to you for accepting the invitation to serve on the Overseas Jurisdiction Advisory Committee, formed pursuant to section 1151 of the National Defense Authorization Act for Fiscal Year 1996 (Pub. L. No. 104-106). Section 1151 requires the Secretary of Defense and the Attorney General jointly to appoint a committee of at least five persons to review and make recommendations concerning criminal jurisdiction over civilians accompanying the Armed Forces outside the United States in time of armed conflict. Specifically, section 1151(c) tasks the committee to do the following:

(1) Review historical experiences and current practices concerning the use, training, discipline, and functions of civilians accompanying the Armed Forces in the field.

(2) Based upon such review and other information available to the committee, develop specific recommendations concerning the advisability and feasibility of establishing United States criminal law jurisdiction over persons who as civilians accompany the Armed Forces in the field outside the United States during time of armed conflict not involving a war declared by Congress, including whether such jurisdiction should be established through any of the following means (or a combination of such means depending upon the degree of armed conflict involved):

(A) Establishing court-martial jurisdiction over such persons.

(B) Extending the jurisdiction of the Article III courts to cover such persons.



(C) Establishing an Article I court to exercise criminal jurisdiction over such persons.

(3) Develop such additional recommendations as the committee considers appropriate as a result of the review.

Section 1151(d) requires that the committee submit its report to the Secretary of Defense by December 15, 1996. Besides the above recommendations, please offer proposed legislative language, modifications to the Manual for Courts-Martial or Federal Rules of Criminal Procedure, and other guidance you believe is appropriate. Your analysis should include full consideration of the proper balance of the rights of victims and defendants, the needs of the armed forces, and United States relations with host nations, to include applicable international treaties and agreements.

Of particular importance is whether any extension of criminal jurisdiction is necessary. Initially, you should decide if there is a problem and, if so, what it is. If you identify a problem, you should consider whether criminal jurisdiction is the way to solve it. You should also consider alternatives to the criminal jurisdiction solution. Only if and to the extent you find a problem, and determine criminal jurisdiction is the best solution, should you then consider the proper means for extending jurisdiction.

The Secretary of Defense and the Attorney General are required jointly to transmit the committee's report to Congress by January 15, 1997, along with any joint comments they consider appropriate. The committee will end 30 days after submission of its report to Congress.

We appreciate your willingness to contribute to this important project. Colonel Thomas G. Becker, of my staff, is my point of contact for this committee. His telephone number is (703) 695-1055.

  
Judith A. Miller

# A Bill

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

1           *Be it enacted by the Senate and House of Representatives of*  
2           *the United States of America in Congress assembled,*

3  
4           **SECTION 1. SHORT TITLE.**

5  
6           This Act may be cited as the "Military and Extraterritorial  
7           Jurisdiction Act of 1997".

8  
9           **SEC. 2. FINDINGS.**

10  
11           (a) The Congress finds that --

12  
13           (1) Civilian employees of the Department of Defense,  
14           and civilian employees of Department of Defense contractors,  
15           provide critical support to armed forces deployed during a  
16           contingency operation;

1           (2) Misconduct by such persons undermines good order  
2 and discipline in an armed force, and jeopardizes the mission of  
3 the contingency operation;

4  
5           (3) Military commanders need the legal tools to  
6 address adequately misconduct by civilians serving with armed  
7 forces during a contingency operation;

8  
9           (4) In its present state, military law does not permit  
10 military commanders to address adequately misconduct by civilians  
11 serving with armed forces, except in time of a congressionally  
12 declared war;

13  
14           (5) To address this need, the Uniform Code of Military  
15 Justice should be amended to provide for court-martial  
16 jurisdiction over civilians serving with armed forces in places  
17 designated by the Secretary of Defense during a "contingency  
18 operation" expressly designated as such by the Secretary of  
19 Defense; and

20  
21           (6) This limited extension of court-martial  
22 jurisdiction over civilians is dictated by military necessity, is

1       within the Congress' constitutional powers to make rules for the  
2       government of the armed forces, and, therefore, is consistent  
3       with the Constitution and American public policy.

4  
5       (b) The Congress further finds that --

6  
7           (1) Many thousand civilian employees of the Department  
8       of Defense, civilian employees of Department of Defense  
9       contractors, and civilian dependents accompany the armed forces  
10      to installations in foreign countries;

12           (2) Misconduct among such civilians has been a  
13      longstanding problem for military commanders and other United  
14      States officials in foreign countries, and threatens United  
15      States citizens, United States property, and United States  
16      relations with host countries;

17  
18           (3) In its present state, federal criminal law does  
19      not cover many offenses committed outside the United States by  
20      such civilians and, because host countries often do not prosecute  
21      such offenses, serious crimes often go unpunished; and

--

1  
2           (4) To address this jurisdictional gap, federal law  
3 should be amended to punish serious offenses committed by such  
4 civilians outside the United States, to the same extent as if  
5 those offenses were committed within the special maritime and  
6 territorial jurisdiction of the United States.

7  
8           (c) The Congress further finds that --

9  
10           (1) Federal law does not cover many crimes committed  
11 outside the United States by members of the armed forces who then  
12 separate from the armed forces before they can be identified,  
13 thus preventing court-martial jurisdiction (see *United States ex*  
14 *rel. Toth v. Quarles*, 350 U.S. 1 (1955)); and

15  
16           (2) To address this jurisdictional gap, federal law  
17 should be amended to punish serious offenses committed by such  
18 persons outside the United States, to the same extent as if those  
19 offenses were committed within the special maritime and  
20 territorial jurisdiction of the United States.

21  
22       **SEC. 3. COURT-MARTIAL JURISDICTION.**

1           (a) JURISDICTION DURING CONTINGENCY OPERATIONS. -- Section 802(a)  
2 of title 10, United States Code (article 2(a), Uniform Code of  
3 Military Justice), is amended by inserting after paragraph (12)  
4 the following:

5  
6           "(13) During a contingency operation, civilian employees of  
7 the Department of Defense and employees of Department of Defense  
8 contractors serving with and accompanying an armed force in  
9 places outside the United States specified by the Secretary of  
10 Defense."

12           (b) DEFINITION. -- Section 801 of title 10, United States  
13 Code (article 1, Uniform Code of Military Justice), is amended by  
14 inserting after paragraph (14) the following:

15  
16           "(15) The term "contingency operation" means the same as  
17 that term is defined at section 101(a)(13)(A) of this title."  
18

19 **SEC. 4. FEDERAL JURISDICTION.**

20  
21           (a) CRIMINAL OFFENSES COMMITTED OUTSIDE THE UNITED STATES. -- Title  
22 18, United States Code, is amended by inserting after chapter 211

1 the following:

2  
3 "CHAPTER 212 - CRIMINAL OFFENSES COMMITTED OUTSIDE THE  
4 UNITED STATES

5  
6 "§ 3261. Criminal offenses committed by persons formerly  
7 serving with, or presently employed by or accompanying, the armed  
8 forces outside the United States

9  
10 "(a) Whoever, while serving with, employed by, or  
11 accompanying the armed forces outside the United States, engages  
12 in conduct which would constitute an offense punishable by  
13 imprisonment for more than one year if the conduct had been  
14 engaged in within the special maritime and territorial  
15 jurisdiction of the United States, shall be guilty of a like  
16 offense and subject to a like punishment.

17  
18 "(b) Nothing contained in this chapter deprives courts-  
19 martial, military commissions, provost courts, or other military  
20 tribunals of concurrent jurisdiction with respect to offenders or  
21 offenses that by statute or by the law of war may be tried by  
22 courts-martial, military commissions, provost courts, or other

1 military tribunals.

2

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

12       "(d) (1) The Secretary of Defense may designate and  
13 authorize any person serving in a law enforcement position in the  
14 Department of Defense to arrest outside the United States any  
15 person described in subsection (a) of this section who there is  
16 probable cause to believe engaged in conduct which constitutes a  
17 criminal offense under such section.

18  
19       "(2) A person arrested under paragraph (1) of this  
20 section shall be released to the custody of civilian law  
21 enforcement authorities of the United States for removal to the  
22 United States for judicial proceedings in relation to conduct

1 referred to in such paragraph unless --

2

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

5

6 "(B) such person has had charges preferred against  
7 him under chapter 47 of title 10 for such conduct.

8

9 "(3) The arrest of a person outside the United States  
10 by a person designated under paragraph (1) of this subsection,  
and the removal of the arrested person to the United States under  
12 paragraph (2) of this subsection, are extraordinary circumstances  
13 justifying delay in bringing the arrested person before a  
14 magistrate as required by the Fourth Amendment to the United  
15 States Constitution and the Federal Rules of Criminal Procedure.

16

17 "§ 3262. Delivery to authorities of foreign countries.

18

19 "(a) Any person designated and authorized under section  
20 3261(d) of this title may deliver a person described in section  
21 3261(a) of this title to the appropriate authorities of a foreign  
22 country in which such person is alleged to have engaged in

1 conduct described in subsection (a) of this section if --

2  
3 "(1) the appropriate authorities of that country  
4 request the delivery of the person to such country for trial for  
5 such conduct as an offense under the laws of that country; and  
6

7 "(2) the delivery of such person to that country is  
8 authorized by a treaty or other international agreement to which  
9 the United States is a party.  
10

"(b) The Secretary of Defense shall determine what  
12 officials of a foreign country constitute appropriate authorities  
13 for the purpose of this section.  
14

15 "§ 3263. Regulations.  
16

17 "The Secretary of Defense shall issue regulations governing  
18 the apprehension, detention, and removal of persons under this  
19 chapter. Such regulations shall be uniform throughout the  
20 Department of Defense.  
21

-- "§ 3264. Definitions for this chapter.

1 "As used in this chapter --

2  
3 "(1) a person is "employed by the armed forces outside  
4 the United States" if he or she --

5  
6 "(i) is employed as a civilian employee of a  
7 military department or of the Department of Defense, as a  
8 Department of Defense contractor, or as an employee of a  
9 Department of Defense contractor;

10  
11 "(ii) is present or residing outside the United  
12 States in connection with such employment; and

13  
14 "(iii) is not a national of or ordinarily resident  
15 in the host nation.

16  
17 "(2) a person is "accompanying the armed forces outside  
18 the United States" if he or she --

19  
20 "(i) is a dependent of a member of the armed  
21 forces, is a dependent of a civilian employee of a military  
22 department or of the Department of Defense, is a dependent of a

1 Department of Defense contractor, or is a dependent of an  
2 employee of a Department of Defense contractor;

3

4 "(ii) is residing with such member, civilian  
5 employee, contractor, or contractor employee outside the United  
6 States; and

7

8 "(iii) is not a national of or ordinarily resident  
9 in the host nation."

10

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

15

16 "212. Criminal Offenses Committed Outside the United States .....3261".

17

18

19

20

21