



THE DEPUTY SECRETARY OF DEFENSE

WASHINGTON, D.C. 20301

JUN 29 2004

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Enclosed are the proposed Department of Defense regulations required by section 3266 of the Military Extraterritorial Jurisdiction Act of 2000 (MEJA). The Department of Defense regulations would be codified in the Code of Federal Regulations as a new Part 153 of title 32. The regulations would also be issued as a new Department of Defense Instruction. The regulations provide uniform rules and governing guidance regarding the apprehension, detention, delivery, and removal to the United States of persons who commit felony-level offenses while employed by or accompanying the Armed Forces outside the United States. The regulations also address procedures to facilitate the proceedings to be conducted overseas under MEJA and the notice requirement of potential MEJA jurisdiction to covered persons who are not nationals of the United States.

These regulations provide:

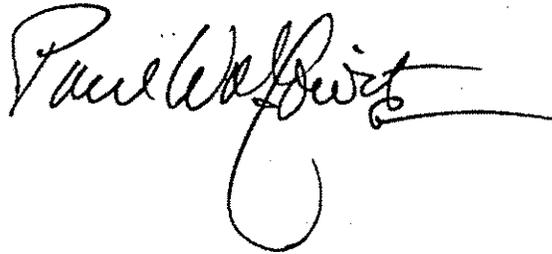
1. Uniform procedures to be employed throughout the Armed Forces in support of Department of Justice criminal prosecutions under MEJA for felony offenses committed overseas that involve DoD civilian employees, DoD contractors (including subcontractors at any tier), employees of DoD contractors, and others that accompany the Armed Forces outside the United States;
2. An extensive explanation of those persons over whom MEJA extends federal criminal investigation;
3. Procedures for working with host nation law enforcement authorities;
4. Responsibilities for the General Counsel of the Department of Defense, Inspector General of the Department of Defense, Secretaries of the Military Departments, Commanders of Combatant Commands, Military Law Enforcement Organizations, and the Defense Criminal Investigative Organizations:

5. Guidance regarding several Department of Justice responsibilities, as agreed upon, and, in particular, the liaison duties and facilitating role of the Domestic Security Section of the Criminal Division of the Department of Justice;
6. Policies to be followed when juvenile offenders are involved, guidelines for temporary detention and custody, and participation in MEJA proceedings by civilian defense counsel, as well as a process for the appointment and limited representation by qualified military defense counsel.

These comprehensive regulations are forwarded for your Committee's review in accordance with section 3266 of MEJA. The Department of Defense looks forward to working with the Congress in support of its review of these proposed regulations and this important step to ensure all persons who violate United States laws while employed by or accompanying the Armed Forces outside the United States are brought to justice.

A similar letter has been provided to the Chairman and Ranking Member of the Committee on the Judiciary in the House of Representatives, with copies provided to the Chairman and Ranking Member of the Armed Services Committees of the House of Representatives.

Sincerely,

A handwritten signature in black ink, appearing to read "Paul W. Bryant", with a large, stylized flourish extending from the bottom of the signature.

Enclosures:
As stated.

cc: The Honorable Patrick J. Leahy
Ranking Member

The Honorable John W. Warner
Chairman, Senate Armed Service Committee

The Honorable Carl Levin
Ranking Member, Senate Armed Services Committee



THE DEPUTY SECRETARY OF DEFENSE

WASHINGTON, D.C. 20301

JUN 29 2004

The Honorable F. James Sensenbrenner, Jr.
Chairman, Committee on the Judiciary
U. S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

Enclosed are the proposed Department of Defense regulations required by section 3266 of the Military Extraterritorial Jurisdiction Act of 2000 (MEJA). The Department of Defense regulations would be codified in the Code of Federal Regulations as a new Part 153 of title 32. The regulations would also be issued as a new Department of Defense Instruction. The regulations provide uniform rules and governing guidance regarding the apprehension, detention, delivery, and removal to the United States of persons who commit felony-level offenses while employed by or accompanying the Armed Forces outside the United States. The regulations also address procedures to facilitate the proceedings to be conducted overseas under MEJA and the notice requirement of potential MEJA jurisdiction to covered persons who are not nationals of the United States.

These regulations provide:

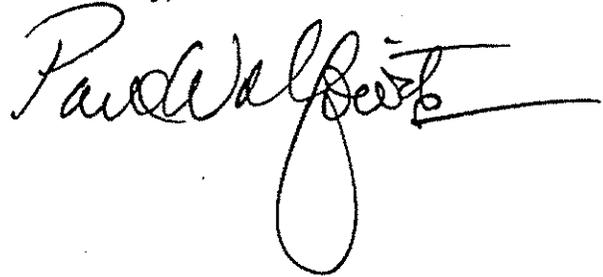
1. Uniform procedures to be employed throughout the Armed Forces in support of Department of Justice criminal prosecutions under MEJA for felony offenses committed overseas that involve DoD civilian employees, DoD contractors (including subcontractors at any tier), employees of DoD contractors, and others that accompany the Armed Forces outside the United States;
2. An extensive explanation of those persons over whom MEJA extends federal criminal investigation;
3. Procedures for working with host nation law enforcement authorities;
4. Responsibilities for the General Counsel of the Department of Defense, Inspector General of the Department of Defense, Secretaries of the Military Departments, Commanders of Combatant Commands, Military Law Enforcement Organizations, and the Defense Criminal Investigative Organizations;

5. Guidance regarding several Department of Justice responsibilities, as agreed upon, and, in particular, the liaison duties and facilitating role of the Domestic Security Section of the Criminal Division of the Department of Justice;
6. Policies to be followed when juvenile offenders are involved, guidelines for temporary detention and custody, and participation in MEJA proceedings by civilian defense counsel, as well as a process for the appointment and limited representation by qualified military defense counsel.

These comprehensive regulations are forwarded for your Committee's review in accordance with section 3266 of MEJA. The Department of Defense looks forward to working with the Congress in support of its review of these proposed regulations and this important step to ensure all persons who violate United States laws while employed by or accompanying the Armed Forces outside the United States are brought to justice.

A similar letter has been provided to the Chairman and Ranking Member of the Committee on the Judiciary in the House of Representatives, with copies provided to the Chairman and Ranking Member of the Armed Services Committees of the House of Representatives.

Sincerely,

A handwritten signature in black ink, appearing to read "Paul Wolfowitz", with a long horizontal line extending to the right.

Enclosures:
As stated.

cc: The Honorable John Conyers, Jr.
Ranking Member

The Honorable Duncan Hunter
Chairman, House Armed Services Committee

The Honorable Ike Skelton
Ranking Member, House Armed Services Committee

DoD
Instruction

Number 5525.bb
(Date -)

GC, DoD

SUBJECT: Criminal Jurisdiction Over Civilians Employed By or Accompanying the Armed Forces Outside the United States, Certain Service Members, and Former Service Members

References: (a) Chapter 212, Sections 3261 - 3267 of title 18, United States Code
(b) Chapter 47 of title 10, United States Code
(c) Report to Accompany H. R. 3380, House of Representatives Report 106-778, July 20, 2000
(d) Section 4(d) of the Inspector General Act of 1978 (5 U.S.C. App. 3)
(e) through (ah), see enclosure 1

1. PURPOSE

This Instruction:

1.1. Implements policies and procedures, and assigns responsibilities, under the "Military Extraterritorial Jurisdiction Act of 2000" (reference (a)) (hereinafter the Act) for exercising extraterritorial criminal jurisdiction over certain current and former members of the U. S. Armed Forces, and over civilians employed by or accompanying the U. S. Armed Forces outside the United States (U. S.).

1.2. Implements section 3266 of the Act.

2. APPLICABILITY AND SCOPE

2.1. This Instruction applies to the Office of the Secretary of Defense, the Military Departments (including the Coast Guard by agreement with the Department of Homeland Security when it is not operating as a Service of the Department of the Navy) the Chairman of the Joint Chiefs of Staff, the Combatant Commands, the Inspector General of the Department of Defense, the Defense Agencies, the DoD Field Activities, and all other organizational entities within the Department of Defense (hereafter referred to collectively as "the DoD Components"). The term "Armed Forces," as used herein, refers to the Army, the Navy, the Air Force, the Marine Corps, and the Coast Guard; and their respective National Guard and reserve components. The term "Military Departments," as used herein, refers to the Department of the Army, the Department of the Navy, and the Department of the Air Force.

2.2. U. S. Coast Guard. The Coast Guard ordinarily operates as a separate branch of the Armed Forces in the Department of Homeland Security (DHS). However, upon Presidential Directive, the Coast Guard operates as a Service within the Department of the Navy and becomes part of the Department of Defense. By agreement with the Secretary of the Department of Homeland Security, when the Coast Guard is operating as a separate Service within the DHS, this Instruction shall apply to the Coast Guard to the extent permitted by the Act. Whether a provision of this Instruction applies to a Coast Guard case is determined by whether the Coast Guard is operating as a Service in the DHS or as a Service within the Department of the Navy.

2.3. The Uniform Code of Military Justice (UCMJ) is established by Federal statute in title 10, United States Code (reference (b)), in which jurisdiction and prosecution of crimes is by courts-martial. The UCMJ applies in all places and, as such, UCMJ offenses are expressly extraterritorial and apply outside the U. S. *See*, section 805 of reference (b). In addition to the UCMJ, the U. S. Code establishes a separate body of U. S. criminal laws with jurisdiction and prosecution of crimes in the District Courts of the United States. As used in this Instruction, all references to "Federal" statutes, laws, or jurisdiction are to that body of law, unless otherwise indicated.

2.4. While some Federal criminal statutes are expressly or implicitly extraterritorial, many acts described therein are criminal only if they are committed within "the special maritime and territorial jurisdiction of the U. S." or if they affect interstate or foreign commerce. Therefore, in most instances, Federal criminal jurisdiction ends at the nation's borders. State criminal jurisdiction, likewise, normally ends at the boundaries of each State. Because of these limitations, acts committed by members of the Armed Forces, former members of the Armed Forces, and civilians employed by or accompanying the Armed Forces in foreign countries, which would be crimes if committed in the U. S., often do not violate either Federal or State criminal law. Similarly, civilians are generally not subject to prosecution under the UCMJ (reference (b)), unless Congress had declared a "time of war" when the acts were committed. As a result, these acts are crimes, and therefore criminally punishable, only under the law of the foreign country in which they occurred. However, there have been occasions where the foreign country has elected not to exercise its criminal jurisdiction and the person goes unpunished for the crimes committed. *See* "Report to Accompany H. R. 3380," the legislative history of the Act (reference (c)). In addition, members of the Armed Forces who are discharged, under normal circumstances, are no longer subject to the UCMJ and may not be prosecuted by courts-martial.

2.5. The Act and this Instruction are intended to address the jurisdictional gap in U. S. law with respect to criminal sanctions, as applied to civilians employed by or accompanying the Armed Forces outside the U. S., members of the Armed Forces, and former members of the Armed Forces, including their dependents. It does not enforce a foreign nation's criminal laws and, as such, does not require that the person's actions violate the foreign nation's laws and applies even if the conduct may be legal under the foreign nation's laws. The jurisdictional requirement is that the conduct be in violation of U. S. Federal laws. When, however, the same conduct violates the Act and the laws of the foreign nation, the Act provides for consideration of existing international agreements between the U. S. and the foreign nation. *See* sections 3261(b), 3262(a), 3263, and 3264(a) of the Act. The Act's jurisdiction regarding an offense committed

outside the U. S. is not otherwise limited by the geographic location in which it is committed, whether the person was performing duties at the time, whether the offense is directly or indirectly related to the person's employment or military duties, or whether the offense was committed in the foreign country in which the person is assigned or located while employed by or accompanying the Armed Forces outside the U. S.

2.6. Nothing in this Instruction may be construed to deprive a court-martial, military commission, provost court, or other military tribunal of concurrent jurisdiction with respect to offenders or offenses that by statute or the law of war may be tried by court-martial, military commission, provost court, or other military tribunal (Section 3261(c) of the Act). In some cases, conduct that violates section 3261(a) of the Act may also violate the UCMJ (reference (b)), or the law of war generally. Therefore, for members of the Armed Forces, military authorities have concurrent jurisdiction with a U. S. District Court to try the offense. The Act was not intended to divest the military of jurisdiction. Consequently, section 3261(d) of the Act prohibits the prosecution of any member of the Armed Forces under the Act, while they are subject to the UCMJ, except in the limited circumstances in which a Federal indictment or information charges that the member of the Armed Forces committed the offense with one or more other defendants, at least one of whom is not subject to the UCMJ.

2.6.1. In such cases involving multiple defendants, the prosecution of the military accused(s) may be carried out under either the Act or the UCMJ. The General Court-Martial Convening Authority over the accused(s) shall determine which venue of prosecution better serves the overall course of justice after consulting the servicing Staff Judge Advocate who, to the extent practicable, will confer with the Domestic Security Section of the Criminal Division, Department of Justice (DSS/DOJ) and the designated U. S. Attorney's Office. The limitations placed on the prosecution of members of the Armed Forces under the Act recognizes that the military has the predominant interest in disciplining its members and that section 3261(d) enacts the general preference that members of the Armed Forces be tried by court-martial for their crimes. See Section-by-Section Analysis to section 3261(d) in the Report Accompanying the Act.

2.7. This Instruction may not be construed as superceding the terms and conditions of a pre-existing Status of Forces Agreement (SOFA) agreement between the U. S. and a foreign government. See enclosure 2 for the definition of a Status of Forces Agreement (SOFA).

3. POLICY

It is DoD policy that the requirement for good order and discipline of the armed forces outside the U. S. extends to civilians employed by or accompanying the armed forces, and that such persons who engage in conduct constituting criminal offenses shall be held accountable for their actions, as appropriate. Further guidance is provided at enclosure 3.

4. DEFINITIONS

Terms used in this Instruction are defined in enclosure 2.

5. RESPONSIBILITIES

5.1. The General Counsel of the Department of Defense (GC, DoD) shall coordinate and liaison with the Departments of Justice and State, on behalf of the Departments and the Office of the Inspector General of the Department of Defense in any case for which Federal criminal prosecution under the Act is contemplated. The GC, DoD may be delegated entirely, or delegated for categories of cases, or delegated in part to The General Counsel, or designee, shall advise the Domestic Security Section, Department of Justice (DSS/DOJ), as soon as practicable, when the GC, DoD recommends that the DOJ consider the prosecution of a person subject to the Act who has committed outside the U. S. The Assistant Attorney General, Criminal Division, Department of Justice has designated the Domestic Security Section (DSS/DOJ) as the Security Section (SEC/DOJ).

5.2. The Inspector General of the Department of Defense (DoDIG) shall:

5.2.1. Pursuant to Section 4(d) of the Inspector General Act of 1978 (5 U.S.C. App. 3) (reference (d)), "report expeditiously to the Attorney General if the Inspector General has reasonable grounds to believe there has been a violation of Federal criminal law." This statutory responsibility is generally satisfied once an officer or employee of the Office of the Inspector General of the Department of Defense (OIG DoD) or a cognizant Department of Justice representative or the Assistant Attorney General (reference (d)) of the "reasonable grounds."

5.2.2. Pursuant to Section 8(c)(5) of the Inspector General Act of 1978 (5 U.S.C. App. 3) (reference (d)), and 10 U.S.C. 141(b) (reference (e)), ensure the responsibilities described in DoD Directive 5525.7, "Implementation of the Understanding Between the Department of Justice and the Department of Defense Regarding the Investigation and Prosecution of Certain Crimes," January 22, 1985 (reference (e)): "implement the investigative policies [m]onitor compliance by DoD criminal organizations [l, and p]rovide specific guidance regarding investigative matters. The GC, DoD shall be satisfied relative to violations of the Military Extraterritorial Jurisdiction Act (reference (a)).

5.3. The Heads of Military Law Enforcement Organizations and Defense Investigative Organizations, or their Designees, shall:

5.3.1. Advise the Combatant Command's Commander and Staff Judge Advocate (Legal Advisor), or designees, of an investigation of an alleged violation of the Act that may lead to arrest or criminal prosecution under the Act. Such notice shall be provided as soon as practicable. In turn, the GC, DoD or designee, shall be advised so as to ensure coordination and consultation with the Departments of Justice and State regarding information regarding a potential case, including the host nation's position regarding the case. At the request of the GC, DoD, other agencies and organizations (such as the Legal Counsel to the Joint Chiefs of Staff and Secretary of the Military Department that sponsor the case (reference (a)) (foreign country) shall be informed, as appropriate. Effective investigations shall be conducted.

5. RESPONSIBILITIES

5.1. The General Counsel of the Department of Defense (GC, DoD) shall provide initial coordination and liaison with the Departments of Justice and State, on behalf of the Military Departments and the Office of the Inspector General of the Department of Defense, regarding a case for which Federal criminal prosecution under the Act is contemplated. This responsibility may be delegated entirely, or delegated for categories of cases, or delegated for individual cases. The General Counsel, or designee, shall advise the Domestic Security Section of the Criminal Division, Department of Justice (DSS/DOJ), as soon as practicable, when DoD officials intend to recommend that the DOJ consider the prosecution of a person subject to the Act for offenses committed outside the U. S. The Assistant Attorney General, Criminal Division, Department of Justice has designated the Domestic Security Section (DSS/DOJ) as the Section responsible for MEJA.

5.2. The Inspector General of the Department of Defense (DoDIG) shall:

5.2.1. Pursuant to Section 4(d) of the Inspector General Act of 1978, as amended (5 U.S.C. App. 3) (reference (d)), "report expeditiously to the Attorney General whenever the Inspector General has reasonable grounds to believe there has been a violation of Federal criminal law." This statutory responsibility is generally satisfied once an official/special agent of the Office of the Inspector General of the Department of Defense (OIG DOD) notifies either the cognizant Department of Justice representative or the Assistant Attorney General (Criminal Division) of the "reasonable grounds."

5.2.2. Pursuant to Section 8(c)(5) of the Inspector General Act of 1978, as amended (5 U.S.C. App. 3) (reference (d)), and 10 U.S.C. 141(b) (reference (e)), ensure the responsibilities described in DoD Directive 5525.7, "Implementation of the Memorandum of Understanding Between the Department of Justice and the Department of Defense Relating to the Investigation and Prosecution of Certain Crimes," January 22, 1985 (reference (f)), to "implement the investigative policies [,m]onitor compliance by DoD criminal investigative organizations [, and p]rovide specific guidance regarding investigative matters, as appropriate" are satisfied relative to violations of the Military Extraterritorial Jurisdiction Act of 2000 (reference (a)).

5.3. The Heads of Military Law Enforcement Organizations and Defense Criminal Investigative Organizations, or their Designees, shall:

5.3.1. Advise the Combatant Command's Commander and Staff Judge Advocate (or Legal Advisor), or designees, of an investigation of an alleged violation of the Act that is likely to lead to arrest or criminal prosecution under the Act. Such notice shall be provided as soon as practicable. In turn, the GC, DoD or designee, shall be advised so as to ensure notification of and consultation with the Departments of Justice and State regarding information about the potential case, including the host nation's position regarding the case. At the discretion of the GC, DoD, other agencies and organizations (such as the Legal Counsel to the Chairman of the Joint Chiefs of Staff and Secretary of the Military Department that sponsored the person into the foreign country) shall be informed, as appropriate. Effective investigations lead to successful

prosecutions and, therefore, these cases warrant close coordination and cooperation between the Departments of Defense, Justice, and State.

5.3.2. Provide briefings to, and coordinate with, appropriate local law enforcement authorities in advance or, if not possible, as soon thereafter as is practicable, of investigations or arrests in specific cases brought under the Act. If not previously provided to local law enforcement authorities, such briefings about the case shall, at a minimum, describe the Host Nation's position regarding the exercise of jurisdiction under the Act that followed from any briefings conducted pursuant to paragraph E3.4 of this Instruction.

5.4. Domestic Security Section, Criminal Division, Department of Justice (DSS/DOJ), has agreed to:

5.4.1. Provide preliminary liaison with DoD, coordinate initial notifications with other Federal entities of the Department of Justice and Federal law enforcement organizations, make preliminary decisions regarding proper venue, designate the appropriate U. S. Attorney's Office, and coordinate the further assignment of DOJ responsibilities.

5.4.2. Coordinate with the designated U. S. Attorney's office to arrange for a Federal Magistrate Judge to preside over the initial proceedings required by the Act. (See enclosure 2 for the definition of a Federal Magistrate Judge as used in the Act and in this Instruction.) Although the assignment of a particular Federal Magistrate Judge shall ordinarily be governed by the jurisdiction where a prosecution is likely to occur, such an assignment does not determine the ultimate venue of any prosecution that may be undertaken. Appropriate venue is determined in accordance with the requirements of section 3238 of title 18, United States Code (reference (g)).

5.4.3. Coordinate the assistance to be provided the Department of Defense with the designated U.S. Attorney's office in the district where venue for the case shall presumptively lie; and

5.4.4. Serve as the primary point of contact for DoD personnel regarding all investigations that may lead to criminal prosecutions and all associated pretrial matters, until such time as DSS/DOJ advises that the case has become the responsibility of a specific U. S. Attorney's Office.

5.5. The Commanders of the Combatant Commands shall:

5.5.1. Assist the DSS/DOJ on specific cases occurring within the Commander's area of responsibility that are likely to lead to arrest or criminal prosecution under the Act. These responsibilities include providing available information and other support essential to an appropriate and successful prosecution under the Act with the assistance of the Commanders' respective Staff Judge Advocates (or Legal Advisors), or their designees, to the maximum extent allowed and practicable.

5.5.2. Ensure command representatives are made available, as necessary, to participate in briefings of appropriate host nation authorities concerning the operation of this Act and the implementing provisions of this Instruction.

5.5.3. Determine when military necessity in the overseas theater requires a waiver of the limitations on removal in section 3264(a) of the Act and when the person arrested or charged with a violation of the Act shall be moved to the nearest U. S. military installation outside the U. S. that is adequate to detain the person and facilitate the initial proceedings prescribed in section 3265(a) of the Act and this Instruction. Among the factors to be considered are the nature and scope of military operations in the area, the nature of any hostilities or presence of hostile forces, and the limitations of logistical support, available resources, appropriate personnel, or the communications infrastructure necessary to comply with the requirements of section 3265 of the Act governing initial proceedings.

5.5.4. Annually report to the GC, DoD, by the last day of February for the immediately preceding calendar year, all cases involving the arrest of persons for violations of the Act; persons placed in temporary detention for violations of the Act; the number of requests for Federal prosecution under the Act, and the decisions made regarding such requests.

5.5.5. Determine the suitability of the locations and conditions for the temporary detention of juveniles who commit violations of the Act within the Commander's area of responsibility. The conditions of such detention must, at a minimum, meet the following requirements: juveniles alleged to be delinquent shall not be detained or confined in any institution or facility in which the juvenile has regular contact with adult persons convicted of a crime or awaiting trial on criminal charges; insofar as possible, alleged juvenile delinquents shall be kept separate from adjudicated delinquents; and every juvenile in custody shall be provided with adequate food, heat, light, sanitary facilities, bedding, clothing, recreation, and medical care, including necessary psychiatric, psychological, or other care and treatment. (Reference (h)).

5.5.6. As appropriate, promulgate instructions to component commands consistent with and implementing this Instruction. The combatant commander's duties and responsibilities pursuant to this Instruction may be delegated.

5.6. The Secretaries of the Military Departments shall:

5.6.1. Consistent with the provisions of paragraph 6.3 of this Instruction, provide for defense counsel representation at initial proceedings conducted outside the U. S. pursuant to the Act for those persons arrested or charged with violations of the Act.

5.6.2. Issue regulations establishing procedures that, to the maximum extent practicable, provide notice to all persons covered by the Act who are not nationals of the U. S. but who are employed by or accompanying the Armed Forces outside the U. S., with the exception of individuals who are nationals of or ordinarily resident in the host nation, that they are potentially subject to the criminal jurisdiction of the U. S. under the Act.

5.6.2.1. At a minimum, such regulations shall require that employees and persons accompanying the Armed Forces outside the U. S., who are not nationals of the U. S., be informed of the jurisdiction of the Act at the time that they are hired for overseas employment, or upon sponsorship into the overseas command, whichever event is earlier applicable.

5.6.2.2. Such notice shall also be provided during employee training and any briefings provided to these persons when they first arrive in the foreign country in which they will be assigned, employed by or accompanying the Armed Forces, or residing as a dependent.

5.6.2.3. For employees and persons accompanying the Armed Forces outside the U. S. who are not nationals of the U. S., but who have already been hired or are present in the overseas command at the time this Instruction becomes effective, such notice shall be provided within 60 days of the effective date of this Instruction.

5.6.3. Although the Act's notice requirement only applies to foreign nationals who may be subject to prosecution under the Act, U. S. nationals who are employed by or accompany the Armed Forces overseas, or who are the dependents of a member of the Armed Forces, civilian employees or contractors of the Department of Defense should be made aware of the Act's potential jurisdiction. Knowledge of the Act and its potential criminal sanctions serves a deterrent purpose in helping preserve good order and discipline in military communities outside the U. S. As such, Service regulations should, to the maximum extent practicable, require information about the Act be provided to all U. S. nationals who are scheduled to be, or who currently are, employed by or accompanying the Armed Forces outside the U. S., including their dependents.

5.6.3.1. For members of the Armed Forces, civilian employees of the Department of Defense and civilians accompanying the Armed Forces overseas, notice and briefings on the applicability of the Act should, at a minimum, be provided to them and their dependents when travel orders are issued and upon their arrival at command military installations or place of duty outside the U. S.

5.6.4. Failure to provide the notice, briefings, or information about the Act pursuant to subparagraphs 5.6.2 and 5.6.3 of this Instruction, shall not create any rights or privileges in the persons referenced, and shall not operate to defeat the jurisdiction of a court of the U. S. or provide a defense or other remedy in any proceeding arising under the Act or this Instruction.

5.6.5. Provide training to personnel who are designated and authorized under the Act and this Instruction to make arrests outside the U. S. of persons who allegedly committed a violation of section 3261(a) of the Act. The training, at a minimum, should include the rights of individuals subject to arrest.

6. PROCEDURES

6.1. Applicability.

6.1.1. Offenses and Punishments. Section 3261(a) of the Act establishes a separate Federal offense under the U. S. Code for any act committed outside the U. S. that would constitute felony-level Federal crime, the same as if such act had been actually committed within the Special Maritime and Territorial Jurisdiction of the United States, as defined in section 7 of title 18, United States Code (reference (i)). Charged as a violation of section 3261(a) of the Act, the elements of the offense and maximum punishment are the same as the crime committed within the Special Maritime and Territorial Jurisdiction of the United States, but without the requirement that the conduct be committed within such geographical limits. See section 1 of the Section-by-Section Analysis and Discussion to section 3261 of the Act in the "Report to Accompany H. R. 3380," the legislative history of the Act (reference (c)).

6.1.2. Persons Subject to this Instruction. This Instruction applies to certain members of the Armed Forces, former members of the Armed Forces, and persons employed by or accompanying the Armed Forces outside the U. S., and their dependents, as those terms are defined in enclosure 2 and referenced below, who are alleged to have committed an offense under the Act while outside the U. S. For purposes of the Act and this Instruction, persons employed by or accompanying the Armed Forces outside the U. S. are subject to the 'military law' of the U. S., but only to the extent to which this term has been used and its meaning and scope have been understood within the context of a SOFA or any other similar form of international agreement.

6.1.3. Members of the Armed Forces. Members of the Armed Forces subject to the Act's jurisdiction are:

6.1.3.1. Only those active duty members of the Armed Forces who, by Federal indictment or information, are charged with committing an offense with one or more defendants, at least one of whom is not subject to the UCMJ. See section 3261(d)(2) of the Act.

6.1.3.2. Members of a Reserve component who commit an offense at a time when they are not on active duty or inactive duty for training (in the case of members of the Army National Guard or the Air National Guard of the U. S., only when in Federal service) are not subject to UCMJ jurisdiction for that offense and, as such, are amenable to the Act's jurisdiction without regard to the limitation of section 3261(d)(2) of the Act.

6.1.4. Former Members of the Armed Forces. Former members of the Armed Forces subject to the Act's jurisdiction are:

6.1.4.1. Former members of the Armed Forces who were subject to the UCMJ at the time the alleged offense was committed, but are no longer subject to the UCMJ with respect to that offense due to their release or separation from active duty.

6.1.4.2. Former members of the Armed Forces, having been released or separated from active duty, who thereafter allegedly commit an offense overseas while in another qualifying status (such as while a civilian employed by or accompanying the Armed Forces outside the U. S., or while the dependent of a civilian employed by or accompanying the Armed Forces, or the dependent of a person subject to the UCMJ).

6.1.5. Civilians Employed by the Armed Forces. Civilian employees employed by the U. S. Armed Forces outside the U. S. (as defined in enclosure 2), who commit an offense under the Act while present or residing outside the U. S. in connection with such employment, are subject to the Act and the provisions of this Instruction. Such civilian employees include:

6.1.5.1. Persons employed by the Department of Defense (including a non-appropriated fund instrumentality of the Department of Defense).

6.1.5.2. Persons employed as a DoD contractor (including a subcontractor at any tier).

6.1.5.3. Employees of a DoD contractor (including a subcontractor at any tier).

6.1.6. Civilians Accompanying the Armed Forces. Subject to the requirements of subparagraph 6.1.6.2, the following persons are civilians accompanying the Armed Forces outside the U. S. who are covered by the Act and the provisions of this Instruction:

6.1.6.1. Dependents (dependents) of:

6.1.6.1.1. Active duty members of the Armed Forces.

6.1.6.1.2. Members of the reserve component while the member was on active duty or inactive duty for training, but in the case of members of the Army National Guard or the Air National Guard of the U. S., only when in Federal service.

6.1.6.1.3. Former members of the Armed Forces who are employed by or are accompanying the Armed Forces outside the U. S.

6.1.6.1.4. Civilian employees of the DoD (including non-appropriated fund instrumentalities of the DoD).

6.1.6.1.5. DoD contractors (including a subcontractor at any tier).

6.1.6.1.6. Employees of a DoD contractor (including a subcontractor at any tier).

6.1.6.2. In addition to the person being the dependent of a person who is listed in subparagraph 6.1.6.1 above, jurisdiction under the Act requires that the dependent also:

6.1.6.2.1. Reside with one of the persons listed in subparagraph 6.1.6.1 above.

6.1.6.2.2. Allegedly commit the offense while outside the U. S.; and

6.1.6.2.3. Not be a national of, or ordinarily resident in, the host nation where the offense is committed.

6.1.6.3. Command sponsorship of the dependent is not required for the Act and this Instruction to apply.

6.1.6.4. If the dependent is a juvenile, as defined in enclosure 2, who engaged in conduct that is subject to prosecution under section 3261(a) of the Act, then the provisions of chapter 403 of title 18, United States Code (reference (h)), and any limitations or requirements therein, would apply to U. S. District Court prosecutions.

6.1.7. Persons NOT Subject to the Act or the Procedures of this Instruction.

6.1.7.1. Persons who are the nationals of, or ordinarily resident in, the host nation where the offense is committed, regardless of their employment or dependent status.

6.1.7.2. Persons who have recognized dual citizenship with the U. S. and who are the nationals of, or ordinarily resident in, the host nation where the offense is committed are not persons "accompanying the Armed Forces outside the U. S." within the meaning of the Act and this Instruction.

6.1.7.3. Persons, including citizens of the U. S., who, at the time the offense was committed outside the U. S., were not members of the Armed Forces, civilian employees of the Armed Forces, or civilians accompanying the Armed Forces outside the U. S. as that term is defined in the Act (reference (a)) and enclosure 2.

6.1.7.3.1. Persons (including members of a Reserve component) whose status outside the U. S. at the time the offense is committed, is solely that of a tourist, a student, or a civilian employee or civilian accompanying some other agency, organization, business, or entity, that is not of the Armed Forces (and thereby can not be said to be employed by or accompanying the Armed Forces) are not subject to the Act. Civilian employees of an agency, organization, business, or entity accompanying the Armed Forces outside the U. S. may, by virtue of the agency, organization, business, or entity relationship with the Armed Forces, be subject to the Act and this Instruction.

6.1.7.3.2. Persons who are subject to the Act and this Instruction remain so while present, on official business or otherwise (e.g., performing temporary duty or while in leave status), in a foreign country other than the foreign country to which the person is regularly assigned, employed, or accompanying the Armed Forces outside the U. S.

6.1.7.4. Juveniles whose ages are below the minimum ages authorized for the prosecution of juveniles in U. S. District Court under the provisions of chapter 403 of title 18, United States Code (reference (h)).

6.1.7.5. Persons subject to the UCMJ (*See* sections 802 and 803 of reference (b)) are not subject to prosecution under the Act unless, pursuant to section 3261(d) of the Act, the member ceases to be subject to the UCMJ or an indictment or information charges that the member committed the offense with one or more other defendants, at least one of whom is not subject to the UCMJ.

6.1.7.5.1. Retired members of a regular component who are entitled to pay remain subject to the UCMJ after retiring from active duty. (*See* section 802 of reference (b)). A member of the reserve component who commits a UCMJ offense while serving on active duty or inactive duty training is subject to the UCMJ and is not, by virtue of the termination of a period of active duty or inactive-duty training, relieved from amenability to UCMJ jurisdiction for that offense. (*See* section 803 of reference (b)).

6.1.7.5.1.1. Such retired members of a regular component and members of the reserve components are not subject to prosecution under the Act unless section 3261(d)(2) of the Act (reference (a)) applies. In addition, other provisions of sections 802 and 803 of reference (b) should be considered to determine whether the person should be arrested or charged with a violation of section 3261 of the Act (reference (a)).

6.1.8. U. S. Coast Guard. Persons who are subject to the Act as members of the Armed Forces, former members of the Armed Forces, civilians employed by or accompanying the Armed Forces outside the U. S., and their dependents, depends upon whether at the time of the offense the Coast Guard was operating as a separate Service in DHS or a Service in the Department of the Navy.

6.1.8.1. When operating as a separate Service in the DHS, only active duty Coast Guard members assigned outside the U. S. and their accompanying dependents are those who are subject to the Act's jurisdiction.

6.1.8.2. When the Coast Guard is operating as a Service in the Department of the Navy, civilians employed by or accompanying the Coast Guard (to include contractors and subcontractors at any tier), and their dependents, as well as Coast Guard members and their dependents, are also subject to the Act's jurisdiction.

6.1.9. Persons Having a Tenuous Nexus to the United States. Third Country Nationals who are not ordinarily resident in the host nation, and who meet the definition of "a person accompanying the Armed Forces outside the U. S.," may have a nexus to the U. S. that is so tenuous that it places into question whether the Act's jurisdiction should be applied and whether such persons should be subject to arrest, detention, and prosecution by U. S. authorities. Depending on the facts and circumstances involved, and the relationship or connection of the foreign national with the U. S. Armed Forces, it may be advisable to consult first with the DSS/DOJ before taking action with a view toward prosecution. In addition, to facilitate consultation with the government of the nation of which the Third Country National is a citizen, the State Department should be notified of any potential investigation or arrest of a Third Country National.

6.2. Investigation, Arrest, Detention, and Delivery of Persons to Host Nation Authorities.

6.2.1. Investigation.

6.2.1.1. Investigations of conduct reasonably believed to constitute a violation of the Act committed outside the U. S. must respect the sovereignty of the foreign nation in which the investigation is conducted. Such investigations shall be conducted in accordance with recognized practices with host nation authorities and applicable international law, SOFA and other international agreements. After general coordination with appropriate host nation authorities, as referenced in enclosure 3 of this Instruction, specific investigations shall, to the extent practicable, be coordinated with appropriate local law enforcement authorities, unless not required by agreement with host nation authorities.

6.2.2. Initial Coordination with the Department of Justice.

6.2.2.1. When a Military Criminal Investigative Organization is the lead investigative organization, the criminal investigator, in order to assist DSS/DoJ and the designated U. S. Attorney representative, once DSS/DOJ has made the designation, in making a preliminary determination of whether the case warrants prosecution under the Act, shall provide a copy of the Investigative Report, or a summary thereof, to the Office of the Staff Judge Advocate of the Designated Commanding Officer (DCO, as defined in enclosure 2) at the location where the offense was committed for review and transmittal, through the combatant commander, to the DSS/DOJ and the designated U. S. Attorney representative. The Office of the Staff Judge Advocate shall also furnish the DSS/DOJ and the designated U. S. Attorney representative an affidavit or declaration from the criminal investigator or other appropriate law enforcement official that sets forth the probable cause basis for believing that a violation of the Act has occurred and that the person identified in the affidavit or declaration has committed the violation.

6.2.2.2. When the Defense Criminal Investigative Service (DCIS) is the lead investigative organization, the criminal investigator, in order to assist the DSS/DOJ and the designated U. S. Attorney representative in making a preliminary determination of whether the case warrants prosecution under the Act, shall provide a copy of the Investigative Report, or a summary thereof, to the DSS/DOJ and the designated U. S. Attorney representative, as appropriate. The criminal investigator shall also furnish the DSS/DOJ and the designated U. S. Attorney representative, an affidavit or declaration that sets forth the probable cause basis for believing that a violation of the Act has occurred and that the person identified in the affidavit or declaration has committed the violation. Within the parameters of reference (d), the Inspector General may also notify the General Counsel of the Department of Defense and the DCO's Office of the Staff Judge Advocate at the location where the offense was committed, as appropriate.

6.2.2.3. Residence Information. Determination of the individual's "last known residence" in the U. S. is important in determining *which* Federal district would be responsible for any possible future criminal proceedings. To the extent that it can be determined from an individual's personnel records, travel orders into the overseas theater, passport, or other records, or by questioning upon arrest or detention, as part of the routine "booking" information obtained,

an individual's last known residence in the U. S. shall be determined. See references (j) and (k). The available information shall be promptly forwarded to the DSS/DOJ, who, in coordination with the Executive Office for U. S. Attorneys, DOJ, will designate which U. S. Attorney's Office will be consulted regarding possible prosecution of the case. The information is necessary to assist in determining which law enforcement authorities and providers of pretrial services, including those who issue probation reports, shall ultimately have responsibility for any case that may develop.

6.2.2.3.1. Due to the venue provisions of 18 U.S.C. § 3238, the DSS/DOJ and the designated U.S. Attorney representative, as appropriate, shall be consulted prior to removal of persons arrested or charged with a violation of the Act by U. S. law enforcement officials. The venue for Federal criminal jurisdiction over offenses committed on the high seas or elsewhere beyond the jurisdiction of a particular State or District (as would be required under the Act), is in the Federal district in which the offender is arrested or first brought. However, if the individual is not so arrested in or brought into any Federal district in the U. S., i.e., is to be indicted, or an Information is obtained, prior to his return to the United States, then an indictment or information may be in the district of the person's last known residence. If no such residence is known, the indictment or information may be filed in the District of Columbia.

6.2.2.3.2. "Last known residence" refers to that U. S. location where the person lived or resided. It is not necessarily the same as a person's legal domicile or home of record. "Known" means known to the government. It has been held that the government acts reasonably in determining the last known residence for purposes of 18 U.S.C. § 3238, when it relies on prior statements of the expatriate to the government such as in passport applications. See *United States v. Minns* (reference (ah)).

6.2.2.3.3. Prompt transmittal of venue information to the DSS/DOJ and the designated U.S. Attorney representative in the U. S. may prove helpful in determining whether a particular case may be prosecuted, and ultimately a pivotal factor in determining whether the host nation or the U. S. shall exercise its jurisdiction over the matter.

6.2.2.3.4. The Investigative Report, and any affidavit or declaration, as well as all other documents associated with a case shall be transmitted promptly by the command Staff Judge Advocate to the DSS/DOJ and the designated U. S. Attorney representative. This may be accomplished through the use of facsimile or other means of electronic communication.

6.2.3. Notice of Complaint or Indictment. Upon receipt of information from command authorities or Defense Criminal Investigation Organizations that a person subject to the Act's jurisdiction has committed an offense in violation of section 3261(a) of the Act, the U. S. Attorney for the District in which there would be venue for a prosecution may, if satisfied that probable cause exists to believe that a crime has been committed and that the person identified has committed this crime, file a complaint under Federal Rule of Criminal Procedure 3 (reference (l)). As an alternative, the U. S. Attorney may seek the indictment of the person identified. In either case, a copy of the complaint or indictment shall be provided to the Office of the Staff Judge Advocate of the overseas command that reported the offense. The DSS/DOJ and the designated U. S. Attorney representative will ordinarily be the source from which the

command's Staff Judge Advocate, and the Staff Judge Advocate of the appropriate combatant command, are able obtain a copy of any complaint or indictment. Transmission of copies of these documents may be accomplished through the use of facsimile or other means of electronic communication.

6.2.4. Arrest.

6.2.4.1. Rule 4 of the Federal Rules of Criminal Procedure (reference (l)) takes the jurisdiction of the Act into consideration in stating where arrest warrants may be executed: "Location. A warrant may be executed, or a summons served, within the jurisdiction of the United States or anywhere else a federal statute authorizes an arrest." The Advisory Committee Note explains that the new language reflects the enactment of the Military Extraterritorial Jurisdiction Act permitting arrests of certain military and DoD personnel overseas.

6.2.4.2. The Act specifically authorizes persons in DoD law enforcement positions, as designated by the Secretary of Defense, to make arrests outside the U. S., upon probable cause and in accordance with recognized practices with host nation authorities and applicable international agreements, those persons subject to the Act who violate section 3261(a) of the Act. Section 3262(a) of the Act constitutes authorization by law to conduct such functions pursuant to reference (b) and therefore voids any argument or contention that the restrictions of the Posse Comitatus Act (reference (m)) might possibly apply extraterritorially regarding members of the Armed Forces providing support to civilian law enforcement agencies.

6.2.4.3. Unless not required by agreement with host nation authorities, as referenced in this Instruction, arrests in specific cases shall, to the extent practicable, be first coordinated with appropriate host nation law enforcement authorities.

6.2.4.4. Military and civilian special agents assigned to the Defense Criminal Investigative Organizations (the Defense Criminal Investigation Service, the Army's Criminal Investigation Command, the Naval Criminal Investigative Service, and the Air Force Office of Special Investigations) are authorized to make an arrest, outside the U. S., of a person who has committed an offense under section 3261(a) of the Act. Civilian special agents assigned to Defense Criminal Investigative Organizations while performing duties outside the U. S. shall make arrests consistent with the standardized guidelines established for such agents, as approved in accordance with sections 1585a, 4027, 7480, and 9027 of title 10, United States Code (references (n), (o), (p) and (q)).

6.2.4.5. Members of the Armed Forces and DoD civilian employees (including local nationals, either direct hire or indirect hire) assigned to security forces, military police, shore patrol, or provost offices at military installations and other facilities located outside the U. S. are also authorized to make an arrest, outside the U. S., of a person who has committed an offense under section 3261(a) of the Act. This authority includes similar members of the Coast Guard law enforcement community, but only when the Coast Guard is operating at such locations as a Service in the Department of the Navy.

6.2.4.6. Law enforcement personnel thus designated and authorized by the Secretary of Defense in this Instruction may arrest a person, outside the U. S., who is suspected of committing a felony offense in violation of section 3261(a) of the Act, when the arrest is based on probable cause to believe that such person violated section 3261(a) of the Act, and when made in accordance with applicable international agreements. Because the locations of the offense and offender are outside the U. S., it is not normally expected that the arrest would be based on a previously-issued Federal arrest warrant. While Federal arrest warrants and indictments are not required as predicates to arrests under the Act, when circumstances permit it is preferable to file a criminal complaint with supporting affidavits or obtain a grand jury indictment prior to arresting the person for a violation of the Act. Law enforcement personnel authorized to make arrests shall follow the Secretaries of the Military Departments' and appropriate DoD guidelines for making arrests without a warrant, as prescribed by references (n), (o), (p) and (q). Authorizations issued by military magistrates under the UCMJ may not be used as a substitute for Federal arrest warrant requirements.

6.2.4.6.1. The foregoing authorization to DoD law enforcement personnel to arrest persons subject to Chapter 212 of title 18, United States Code (reference (a)) for violations of the Act is not intended as a limitation upon the authority of other Federal law enforcement officers to effect arrests when authorized to do so. (E.g., *see* 18 U.S.C. § 3052 authorizing agents of the Federal Bureau of Investigation to make arrests "for any felony cognizable under the laws of the United States, 21 U.S.C. § 878(a)(3) for the same authority for Drug Enforcement Administration agents, and 18 U.S.C. § 3053 for the same authority for U. S. Marshals and their deputies.)

6.2.5. Temporary Detention.

6.2.5.1. The Commander of a Combatant Command, or designee, may order the temporary detention of a person, within the Commander's area of responsibility outside the U. S., who is arrested or charged with a violation of the Act. The Commander of the Combatant Command, or designee, may determine that a person arrested need not be held in custody pending the commencement of the initial proceedings required by section 3265 of the Act and paragraph 6.4 of this Instruction. The Commander of the Combatant Command may designate those component or DCO commanders who are also authorized to order the temporary detention of a person, within the commanding officer's area of responsibility outside the U. S., who is arrested or charged with a violation of the Act.

6.2.5.2. A person arrested may be temporarily detained in military detention facilities for a reasonable period, in accordance with regulations of the Military Departments and subject to the following:

6.2.5.2.1. Temporary detention should be ordered only (1) when a serious risk is believed to exist that the person shall flee and not appear, as required, for any pretrial investigation, pretrial hearing or trial proceedings, or (2) the person may engage in serious criminal misconduct (e.g., the intimidation of witnesses or other obstructions of justice, causing injury to others, or committing other offenses that pose a threat to the safety of the community or to the national security of the U. S.). The decision as to whether temporary detention is

appropriate shall be made on a case-by-case basis. Section 3142 of title 18, United States Code (reference (r)) provides additional guidance regarding conditions on release and factors to be considered.

6.2.5.2.2. A person arrested or charged with a violation of the Act who is to be detained temporarily shall, to the extent practicable, be detained in areas that separate them from sentenced military prisoners and members of the Armed Forces who are in pretrial confinement pending trial by courts-martial.

6.2.5.2.3. Separate temporary detention areas shall be used for male and female detainees.

6.2.5.2.4. Generally, juveniles should not be ordered into temporary detention. However, if circumstances warrant temporary detention, the conditions of such temporary detention must comply with the requirements of subparagraph 5.5.5 of this Instruction. Appointment of a guardian *ad litem* may be required under section 5034 of reference (h) to represent the interests of the juvenile when the juvenile's parents are not present or when the parents' interests may be adverse to that of the juvenile.

6.2.5.3. Persons arrested or charged with a violation of the Act, upon being ordered into temporary detention and processed into the detention facility, shall, as part of the processing procedures, be required to provide the location address of their last U. S. residence as part of the routine booking questions securing "biographical data necessary to complete booking or pretrial services." See reference (k). This information shall be recorded in the detention documents and made available to the DCO's Office of the Staff Judge Advocate. This information shall be forwarded with other case file information, including affidavits in support of probable cause supporting the arrest and temporary detention, to the DSS/DOJ. The information is provided so that the DSS/DOJ may make appropriate preliminary decisions about venue. See "Residence Information," subparagraph 6.2.2.3.

6.2.5.3.1. Notice of the temporary detention of any person for a violation of the Act shall be forwarded without unnecessary delay to the combatant commander. The combatant commander shall advise the GC, DoD, as the representative of the Secretary of Defense, of all such detentions. At the discretion of the GC, DoD, other agencies and organizations (such as the Legal Counsel to the Chairman of the Joint Chiefs of Staff and Secretary of the Military Department that sponsored the person into the foreign country) shall be informed, as appropriate.

6.2.5.3.2. Such notice shall include a summary of the charges, facts and circumstances surrounding the offenses, information regarding any applicable SOFA or other international agreements affecting jurisdiction in the case, and the reasons warranting temporary detention.

6.2.5.4. If military command authorities at the military installation outside the U. S. intend to request a person's detention by order of the Federal Magistrate Judge, the military representative assigned to the case shall gather the necessary information setting forth the

reasons in support of a motion to be brought by the attorney representing the government at the initial proceeding conducted pursuant to section 3265 of the Act.

6.2.5.5. This Instruction is not intended to eliminate or reduce existing obligations or authorities to detain persons in foreign countries as required or permitted by agreements with host countries. *See generally, United States v. Murphy* (reference (s)).

6.2.6. Custody and Transport of Persons While in Temporary Detention.

6.2.6.1. The DoD may only take custody of and transport the person as specifically set forth in the Act. This is limited to delivery as soon as practicable to the custody of U. S. civilian law enforcement authorities for removal to the U. S. for judicial proceedings; delivery to appropriate authorities of the foreign country in which the person is alleged to have committed the violation of section 3261(a) of the Act in accordance with section 3263; or, upon a determination by the Secretary of Defense, or the Secretary's designee, that military necessity requires it, removal to the nearest U. S. military installation outside the U. S. adequate to temporarily detain the person and to facilitate the initial appearance described in 3265(a) of the Act.

6.2.6.2. Responsibility for a temporarily detained person's local transportation, escort, and custody requirements remains with the command that placed the person in temporary detention for a violation of section 3261(a) of the Act. This responsibility includes:

6.2.6.2.1. Attendance at official proceedings and other required health and welfare appointments (e.g., appointments with counsel, medical and dental appointments, etc.).

6.2.6.2.2. Delivery to host nation officials under section 3263 of the Act.

6.2.6.2.3. Attendance at Initial Proceedings conducted under section 3265 of the Act.

6.2.6.2.4. Delivery to the custody of U.S. civilian law enforcement authorities for removal to the U. S.

6.2.6.3. A person who requires the continued exercise of custody and transportation to appointments and locations away from the detention facility, including delivery of the person to host nation officials under section 3263 of the Act, may be transferred under the custody of those law enforcement officers authorized to make arrests in subsection 6.2.4 of this Instruction. Transportation of a detainee outside an installation shall be coordinated with the host nation's local law enforcement, as appropriate and in accordance with recognized practices.

6.2.6.4. Military authorities retain responsibility for the custody and transportation of a person arrested or charged with a violation of the Act who is to be removed from one military installation outside the U. S. to another military installation outside the U. S., including when the person is transferred under the provisions of section 3264(b)(5) of the Act. Unless otherwise agreed to between the sending and receiving commands, it shall be the responsibility of the

sending command to make arrangements for the person's transportation and custody during the transport or transfer to the receiving command.

6.2.6.5. In coordination with appropriate host nation authorities, as referenced in paragraph E3.4 of this Instruction, and after complying with any case-specific provisions that may apply pursuant to paragraphs 5.2.2, 6.2.8.1.1, and 6.5.1.2, and unless a Federal Magistrate Judge orders the person's release from temporary detention on conditions, U. S. civilian law enforcement authorities shall be responsible for taking custody of a person arrested or charged with a violation of the Act and for the removal of that person to the U. S. for any pretrial or trial proceedings. DoD officials shall consult with the DSS/DOJ to determine which civilian law enforcement authority (i.e., U. S. Marshals Service, Federal Bureau of Investigation, Drug Enforcement Agency, or other Federal agency) shall dispatch an officer to the overseas' detention facility to assume custody of the person for removal to the U. S. Until custody of the person is delivered to such U. S. civilian law enforcement authorities, military authorities retain responsibility for the custody and transportation of the person arrested or charged with a violation of the Act, to include transportation within the host nation to help facilitate the removal of the person to the U. S. under the Act.

6.2.7. Release From Temporary Detention. When a person subject to the Act has been placed in temporary detention, in the absence of a Criminal Complaint or Indictment pursuant to reference (I), only the Commander who initially ordered detention, a superior Commander, or a Federal Magistrate Judge may order the release of the detained person. If a Criminal Complaint or Indictment pursuant to reference (I) exists, or if a Federal Magistrate Judge orders the detention of a person subject to the Act, a Federal Magistrate Judge may order the release of the detained person. If a Federal Magistrate Judge orders the person detained to be released from detention, the Commander who ordered detention, or a superior Commander, shall cause the person to be released. When a person is released from detention under this provision, the Commander shall implement, to the extent of the Commander's authority, any conditions on liberty directed in a Federal Magistrate Judge's order. When the commander who independently ordered the person's temporary detention without reliance on a Federal Magistrate Judge's order, or a superior commander, orders a person's release before a Federal Magistrate Judge is assigned to review the matter, the commander may, within the Commander's authority, place reasonable conditions upon the person's release from detention.

6.2.7.1. A person's failure to obey the conditions placed on his or her release from detention, in addition to subjecting that person to the Commander's or a Federal Magistrate Judge's order to be returned to detention, may, consistent with the commander's authority and applicable policy, laws, and regulations, subject the person to possible criminal sanctions, or to administrative procedures leading to a loss of command sponsorship to the foreign country, as well as the possibility of additional disciplinary or adverse action.

6.2.7.2. A copy of all orders issued by a Federal Magistrate Judge concerning initial proceedings, detention, conditions on liberty, and removal to the U. S. shall promptly be provided to the Commander of the Combatant Command concerned and the Commander of the detention facility at which the person is being held in temporary detention.

6.2.8. Delivery of Persons to Host Nation Authorities.

6.2.8.1. Persons arrested may be delivered to the appropriate authorities of the foreign country in which the person is alleged to have violated section 3261(a) of the Act, when:

6.2.8.1.1. Authorities of a foreign country request that the person be delivered for trial because the conduct is also a violation of that foreign country's laws, and

6.2.8.1.2. Delivery of the person is authorized or required by treaty or another international agreement to which the U. S. is a party.

6.2.8.2. Coast Guard personnel authorized to make arrests pursuant to 6.2.4.5 are also authorized to deliver persons to foreign country authorities, as provided in section 3263 of the Act.

6.2.8.3. Section 3263(b) of the Act calls upon the Secretary of Defense, in consultation with the Secretary of State, to determine which officials of a foreign country constitute appropriate authorities to which persons subject to the Act may be delivered. For purposes of the Act, those authorities are the same foreign country law enforcement authorities as are customarily involved in matters involving foreign criminal jurisdiction under an applicable SOFA or other international agreement or arrangement between the U. S. and the foreign country.

6.2.8.4. No action may be taken under this Instruction with a view toward the prosecution of a person for a violation of the Act if a foreign government, in accordance with jurisdiction recognized by the U. S., has prosecuted or is prosecuting such person for the conduct constituting such offense(s), except upon the approval of the Attorney General or the Deputy Attorney General (or a person acting in either such capacity). See section 3261(b) of the Act. Requests for an exception shall be written and forwarded to the combatant commander. The Combatant Commander shall forward the request to the GC, DoD, as representative for the Secretary of Defense, for review and transmittal to the Attorney General of the United States. At the discretion of the GC, DoD, other agencies and organizations (such as the Legal Counsel to the Chairman of the Joint Chiefs of Staff and Secretary of the Military Department that sponsored the person into the foreign country) shall be informed, as appropriate.

6.2.8.5. Except for persons to be delivered to a foreign country, and subject to the limitations of section 3264 of the Act and paragraph 6.5 of this Instruction, persons arrested for conduct in violation of the Act shall, upon the issuance of a removal order by a Federal Magistrate Judge under section 3264(b) of the Act, be delivered, as soon as practicable, to the custody of U. S. civilian law enforcement authorities. See subparagraph 6.2.6.4, above.

6.3. Representation

6.3.1. Civilian Defense Counsel.

6.3.1.1. Civilian defense counsel representation shall not be at the expense of the DoD or the Military Departments.

6.3.1.2. The Act contemplates that a person arrested or charged with a violation of the Act shall be represented by a civilian attorney licensed to practice law in the U. S. However, it is also recognized that in several host nations where there has been a long-standing military presence, qualified civilian attorneys (including lawyers who are U. S. citizens) have established law practices to assist assigned U. S. personnel and to represent members of the Armed Forces in courts-martial, or before host nation courts. With the consent of the person arrested or charged with a violation of the Act who wishes to remain in the foreign country, these lawyers can provide adequate representation for the limited purpose of any initial proceedings required by the Act. When the person is entitled to an attorney or requests counsel, staff judge advocates at such locations should assemble a list of local civilian attorneys for the person's consideration. The list shall contain a disclaimer stating that no endorsement by the U. S. government or the command is expressed or implied by the presence of the attorney's name on the list.

6.3.1.2.1. To the extent practicable, military authorities shall establish procedures by which persons arrested or charged with a violation of the Act may seek the assistance of civilian defense counsel by telephone, to the extent practicable. Consultation with such civilian counsel shall be private and protected by the attorney-client privilege.

6.3.1.2.2. Civilian defense counsel, at no expense to the DoD, shall be afforded the opportunity to participate personally in any initial proceedings required by the Act that are conducted outside the U. S. When civilian defense counsel cannot reasonably arrange to be personally present for such representation, alternative arrangements shall be made for counsel's participation by telephone or by such other means that enables voice communication among the participants.

6.3.1.2.3. When at least one participant cannot arrange to meet at the location outside the U. S. where initial proceedings under the Act are to be conducted, arrangements should be made whenever possible to conduct the proceedings by video teleconference or similar means. Command video teleconference communication systems should be used for this purpose, if resources permit, and if such systems are not otherwise unavailable due to military mission requirements. When these capabilities are not reasonably available, the initial proceedings required by the Act shall be conducted by telephone or such other means that enables voice communication among the participants. *See* section 3265 of the Act.

6.3.1.2.4. The above provisions regarding the use of teleconference communication systems apply to any detention proceedings that are conducted outside the U. S. pursuant to section 3265(b) of the Act.

6.3.1.2.5. Civilian defense counsel practicing in host nations do not gain DoD sponsorship, nor any diplomatic status, as a result of their role as defense counsel. To the extent practicable, notice to this effect shall be provided to the civilian defense counsel when the civilian defense counsel's identity is made known to appropriate military authorities.

6.3.2. Qualified Military Counsel.

6.3.2.1. Counsel representation also includes qualified military counsel, as defined in enclosure 2, that the Judge Advocate General of the Military Department concerned determines is reasonably available for the purpose of providing limited representation at initial proceedings required by the Act and conducted outside the U. S. By agreement with the Department of Homeland Security, Coast Guard commands and activities located outside the U. S. shall establish local agreements for qualified military counsel of the Military Departments to provide similar limited representation in Coast Guard related cases. The Secretaries of the Military Departments shall establish regulations governing representation by qualified military counsel. At a minimum, these regulations shall require that the command's Staff Judge Advocate:

6.3.2.2. Prepare, update as necessary, and make available to a Federal Magistrate Judge upon request, a list of qualified military counsel who are determined to be available for the purpose of providing limited representation at initial proceedings required by the Act.

6.3.2.3. Ensure that the person arrested or charged under the Act is informed that any qualified military counsel shall be made available only for the limited objective of representing that person in any initial proceedings required by the Act that are to be conducted outside the U. S., and that such representation does not extend to further legal proceedings that may occur either in a foreign country or the U. S. The person arrested or charged shall also be required, in writing, to acknowledge the limited scope of qualified military counsel's representation and therein waive that military counsel's further representation in any subsequent legal proceedings conducted within a foreign country or the U. S. The "Acknowledgement of Limited Representation," at enclosure 4, may be used for this purpose. A copy of the "Acknowledgement of Limited Representation" shall be provided to the person arrested or charged under the Act, as well as to the qualified military counsel. The original acknowledgment shall be kept on file in the DCO's Office of the Staff Judge Advocate.

6.3.2.4. Provide available information that would assist the Federal Magistrate Judge make a determination that qualified civilian counsel are unavailable, and that the person arrested or charged under the Act is unable financially to retain civilian defense counsel, before a qualified military counsel who has been made available is assigned to provide limited representation. See "Report to Accompany H. R. 3380," the legislative history of the Act (reference (c)).

6.3.3. Union Representation. Agency law enforcement officials shall comply with applicable Federal civilian employee rights and entitlements, if any, regarding collective bargaining unit representation under Chapter 71 of title 5, United States Code (reference (ag)), during pretrial questioning and temporary detention procedures under this Instruction.

6.3.4. Military Representative. To assist law enforcement officers and the U. S. Attorney's representative assigned to a case, a judge advocate, legal officer, or civilian attorney-advisor may be appointed as a military representative to represent the interests of the U. S. As appropriate, the military representative may be appointed as a Special Assistant U. S. Attorney. The military representative shall be responsible for assisting the command, law enforcement, and U. S. Attorney representatives during pretrial matters, initial proceedings, and other procedures required by the Act and this Instruction. These responsibilities include assisting the U. S. Attorney representative to determine whether continued detention is warranted, and to provide information to the presiding Federal Magistrate Judge considering the following:

6.3.4.1. If there is probable cause to believe that a violation of the Act has been committed and that the person arrested or charged has committed it, and

6.3.4.2. Whether the person detained temporarily should be kept in detention or released from detention, and, if released, whether any conditions practicable and reasonable under the circumstances, should be imposed.

6.4. Initial Proceedings.

6.4.1. A person arrested for or charged with a violation of the Act may be entitled to an initial appearance before a judge and/or a detention hearing (collectively, the "initial proceedings"). The initial proceedings are intended to meet the requirements of the Federal Rules of Criminal Procedure. The initial proceedings are not required when the person under investigation for violating the Act has not been arrested or temporarily detained by U. S. military authorities, or the person's arrest or temporary detention by U. S. law enforcement authorities occurs after the person ceases to be employed by or accompany the Armed Forces outside the U. S., or the arrest or detention takes place within the U. S.

6.4.2. The initial proceedings to be conducted pursuant to the Act and this Instruction shall not be initiated for a person delivered to foreign country authorities and against whom the foreign country has prosecuted or is prosecuting the person for the conduct constituting such offense.

6.4.2.1. In these circumstances, it is only when the Attorney General or Deputy Attorney General (or a person acting in either such capacity) approves an exception allowing for a prosecution in U. S. District Court that initial proceedings may be conducted under the Act. A request that an exception be approved shall be forwarded through the Combatant Commander to the GC, DoD, in accordance with subparagraph 6.2.8.4 of this Instruction.

6.4.3. Initial proceedings required by the Act and this Instruction shall be conducted, without unnecessary delay. In accordance with the U. S. Supreme Court decision in *County of Riverside v. McLaughlin* (reference (t)) the initial appearance shall be conducted within 48 hours of the arrest. The initial proceedings required by the Act shall be conducted when:

6.4.3.1. The person arrested has not been delivered to foreign country authorities under the provisions of section 3263 of the Act; or

6.4.3.2. The foreign country authorities having custody of the person delivers the person to U. S. military authorities without first prosecuting the person for such conduct as an offense under the laws of that foreign country.

6.4.4. A Federal Magistrate Judge shall preside over the initial proceedings that are required by the Act and this Instruction. The proceedings should be conducted from the U. S. using video teleconference methods, if practicable, and with all parties to the proceedings participating. In the event that there is no video teleconference capability, or the video teleconference capability is unavailable due to military requirements or operations, the parties to the proceeding shall, at a minimum, be placed in contact by telephone.

6.4.5. Initial proceedings conducted pursuant to the Act and this Instruction shall include the requirement for the person's initial appearance under the Federal Rules of Criminal Procedure. The Federal Magistrate Judge shall determine whether probable cause exists to believe that an offense under section 3261(a) of the Act has been committed and that the identified person committed it. This determination is intended to meet the due process requirements to which the person is entitled, as determined by the U. S. Supreme Court in *Gerstein v. Pugh* (reference (v)).

6.4.6. Initial proceedings shall also include a detention hearing when required under section 3142 of reference (r), and the Federal Rules of Criminal Procedure (reference (l)). A detention hearing may be required when:

6.4.6.1. The person arrested or charged with a violation of the Act has been placed in temporary detention and the intent is to request continued detention; or

6.4.6.2. The U. S. seeks to detain a person arrested or charged with a violation of the Act who has not previously been detained.

6.4.7. A detention hearing shall be conducted by a Federal Magistrate Judge. When the person arrested or charged requests the detention hearing be conducted while the person remains outside the United States, the detention hearing shall be conducted by the same Federal Magistrate Judge presiding over the initial proceeding and shall be conducted by telephone or other means that allow for voice communication among the participants, including the person's defense counsel. If the person does not so request, or if the Federal Magistrate Judge so orders, the detention hearing shall be held in the U. S. after the removal of the person to the U. S.

6.4.8. In the event that the Federal Magistrate Judge orders the person's release prior to trial, and further directs the person's presence in the district in which the trial is to take place, the U. S. Attorney's Office representative responsible for prosecuting the case shall inform the military representative and the DCO's Office of the Staff Judge Advocate.

6.4.9. Under circumstances where the person suspected of committing an offense in violation of the Act has never been detained or an initial proceeding conducted, the presumption is that a trial date shall be established at which the defendant would be ordered to appear. Such

an order would constitute an order under section 3264(b)(4) of the Act that “otherwise orders the person to be removed.” The person’s failure to appear as ordered shall be addressed by the Court, as with any other failure to comply with a valid court order.

6.4.10. The DCO’s Office of the Staff Judge Advocate shall assist in arranging for the conduct of initial proceedings required by the Act and this Instruction, and shall provide a military representative to assist the U. S. Attorney’s Office representative in presenting the information for the Federal Magistrate Judge’s review. The military representative shall also provide any administrative assistance the Federal Magistrate Judge requires at the location outside the U. S. where the initial proceedings are to be conducted.

6.5. Removal Of Persons To The United States Or Other Countries.

6.5.1. In accordance with the limitation established by section 3264 of the Act, military authorities shall not remove, to the U. S. or any other foreign country, a person suspected of violating section 3261(a) of the Act, except when:

6.5.1.1. The person’s removal is to another foreign country in which the person is believed to have committed a violation of section 3261(a) of the Act; or

6.5.1.2. The person is to be delivered, upon request, to authorities of a foreign country under section 3263 of the Act and paragraph 6.2.8. above; or

6.5.1.3. The person is arrested or charged with a violation of the Act and is entitled to, and does not waive, a preliminary examination under Federal Rule of Criminal Procedure 5.1 (reference (l)), in which case the person shall be removed to the U. S. for such examination; or

6.5.1.4. The person’s removal is ordered by a Federal Magistrate Judge. *See* paragraph 6.5.2. of this Instruction; or

6.5.1.5. The Secretary of Defense, or the Secretary’s designee, directs the person be removed, as provided in section 3264(b)(5) of the Act and subparagraph 6.5.3. of this Instruction.

6.5.2. Removal By Order Of A Federal Magistrate Judge. Military authorities may remove a person suspected of violating section 3261(a) of the Act to the U. S., when:

6.5.2.1. A Federal Magistrate Judge orders that the person be removed to the U. S. to be present at a detention hearing; or

6.5.2.2. A Federal Magistrate Judge orders the detention of the person prior to trial (*See* section 3142(e) of reference (r), in which case the person shall be promptly removed to the U. S. for such detention; or

6.5.2.3. A Federal Magistrate Judge otherwise orders the person be removed to the U. S.

6.5.3. Removal By Direction of the Secretary of Defense or Designee. The Secretary of Defense, or designee, may order a person's removal from a foreign country within the Combatant Command's geographic area of responsibility when, in his sole discretion, such removal is required by military necessity. *See* section 3264(b)(5) of the Act. Removal based on military necessity may be authorized in order to take into account any limiting factors that may result from military operations, as well as the capabilities and conditions associated with a specific location.

6.5.3.1. When the Secretary of Defense, or designee, determines that a person arrested or charged with a violation of the Act should be removed from a foreign country, the person shall be removed to the nearest U. S. military installation outside the U. S. where the limiting conditions requiring such a removal no longer apply, and where there are available facilities and adequate resources to temporarily detain the person and conduct the initial proceedings required by the Act and this Instruction.

6.5.3.2. The relocation of a person under this paragraph does not authorize the further removal of the person to the U. S., unless further removal is authorized by an order issued by a Federal Magistrate Judge under subparagraph 6.5.2. above.

6.5.3.3. Delegation. The Commander of a Combatant Command, and the Commander's principal assistant, are delegated authority to make the determination, based on the criteria stated in subparagraph 6.5.3, that a person arrested or charged with a violation of the Act shall be removed from a foreign country under section 3264(b)(5) of the Act and this Instruction. Further delegation is authorized, but the delegation of authority is limited to a subordinate commander within the command who is designated as a general court-martial convening authority under the UCMJ (reference (b)).

6.5.4. A person who is removed to the U. S. under the provisions of the Act and this Instruction and who is thereafter released from detention, and otherwise at liberty to return to the location outside the U. S. from which he or she was removed, shall be subject to any requirements imposed by a Federal District Court of competent jurisdiction.

6.5.5. Where a person has been removed to the U. S. for a detention hearing or other judicial proceeding and a Federal Magistrate Judge orders the person's release and permits the person to return to the overseas location, the DoD (including the Military Department originally sponsoring the person to be employed or to accompany the Armed Forces outside the U. S.) shall not be responsible for the expenses associated with the return of the person to the overseas location, or the person's subsequent return travel to the U. S. for further court proceedings that may be required.

7. EFFECTIVE DATE AND IMPLEMENTATION

7.1. This Instruction, including its enclosures, is intended exclusively for the guidance of members of the Armed Forces and civilian employees of the DoD, and of the U. S. Coast Guard by agreement with the Department of Homeland Security. Nothing contained herein creates or extends any right, privilege, or benefit to any person or entity. *See United States v. Caceres* (reference (v)).

7.2. This Instruction is effective immediately.

Enclosures – 4

- E1. References, continued
- E2. Definitions
- E3. Further Guidelines
- E4. Acknowledgment Of Limited Legal Representation (Sample)

EI. ENCLOSURE 1

REFERENCES (CONTINUED)

- (e) Section 141(b) of title 10, United States Code
- (f) DoD Directive 5525.7, "Implementation of the Memorandum of Understanding Between the Department of Justice and the Department of Defense Relating to the Investigation and Prosecution of Certain Crimes," January 22, 1985
- (g) Section 3238 of title 18, United States Code
- (h) Chapter 403 of title 18, United States Code
- (i) Section 7 of title 18, United States Code
- (j) *Pennsylvania v. Muniz*, 496 U.S. 582, at 601 (1990)
- (k) *United States v. D'Anjou*, 16 F. 3d 604 (4th Cir.1993)
- (l) Federal Rules of Criminal Procedure of title 18, United States Code
- (m) Posse Comitatus Act, section 1385 of title 18, United States Code
- (n) Section 1585a of title 10, United States Code
- (o) Section 4027 of title 10, United States Code
- (p) Section 7480 of title 10, United States Code
- (q) Section 9027 of title 10, United States Code
- (r) Chapter 207 of title 18, United States Code
- (s) *United States v. Murphy*, 18 M. J. 220 (CMA 1984)
- (t) *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991)
- (u) *Gerstein v. Pugh*, 420 U.S. 103 (1975)
- (v) *United States v. Caceres*, 440 U.S. 741 (1979)
- (w) Section 101(d)(1) of title 10, United States Code
- (x) Section 101(a)(4) of title 10, United States Code
- (y) Section 3261(a) of title 18, United States Code
- (z) Chapter 13 of title 21, United States Code
- (aa) Section 206 of title 37, United States Code
- (ab) Section 101(d)(7) of title 10, United States Code
- (ac) Section 101(a)(8) of title 10, United States Code
- (ad) Section 1101(a)(43) of title 8, United States Code
- (ae) Manual for Courts-Martial, United States (2002 Edition)
- (af) Section 5 of title 18, United States Code
- (ag) Chapter 71 of title 5, United States Code
- (ah) *United States v. Minns*, 917 F. Supp. 488 (1994)

E2. ENCLOSURE 2

DEFINITIONS

E2.1.1. Accompanying the Armed Forces Outside the United States. As defined in section 3267 of the Act, the dependent of:

E2.1.1.1 A member of the Armed Forces; or

E2.1.1.2. A civilian employee of the DoD (including a nonappropriated fund instrumentality of the Department); or

E2.1.1.3. A DoD contractor (including a subcontractor at any tier); or

E2.1.1.4. An employee of a DoD contractor (including a subcontractor at any tier); and

E2.1.1.5. Residing with such member, civilian employee, contractor, or contractor employee outside the U. S.; and

E2.1.1.6. Not a national of or ordinarily resident in the host nation.

E2.1.2. Active Duty. Full-time duty in the active military service of the U. S. Such term includes full-time training duty, annual training duty, and attendance, while in the active service, at a school designated as a service school by law or by the Secretary of the Military Department concerned. Such term does not include full-time National Guard duty. See section 101(d)(1) of title 10, United States Code (reference (w)).

E2.1.3. Armed Forces. The Army, the Navy, the Air Force, the Marine Corps, and the Coast Guard. See section 101(a)(4) of title 10, United States Code (reference (x)).

E2.1.4. Arrest. To be taken into physical custody by law enforcement officials.

E2.1.5. Charged. As used in the Act and this Instruction, this term is defined as an indictment or the filing of information against a person under the Federal Rules of Criminal Procedure (reference (i)). See analysis to section 3264 of the "Report to Accompany H. R. 3380," the legislative history of the Act (reference (c)).

E2.1.6. Civilian Component. A person or persons "employed by the Armed Forces outside the U. S." as defined in section E2.1.11 and section 3267(a)(1) of the Act. A term used in Status of Forces Agreements (SOFAs).

E2.1.7. Defense Criminal Investigative Organizations (DCIO). The Defense Criminal Investigation Service (DCIS), the Army's Criminal Investigation Command (CID), the Naval Criminal Investigative Service (NCIS), and the Air Force Office of Special Investigations (AFOSI). References to defense criminal investigators refers to military and civilian special agents assigned to the DCIOs. When DCIS is not included in the reference to criminal investigative organizations, the others are collectively referred to as the Military Criminal Investigative Organizations (MCIO).

E2.1.8. Dependent. "Dependent," as used in the Act (reference (a)). A person for whom a member of the Armed Forces, civilian employee, contractor (or subcontractor at any tier) has legal responsibility while that person is residing outside the U. S. with or accompanying that member of the Armed Forces, civilian employee, contractor (or subcontractor at any tier), and while that responsible person is a member of the Armed Forces, or employed by or obligated to perform a contractual obligation to the DoD. For purposes of this Instruction, a person's "command sponsorship" status while outside the U. S. is not to be considered, except that there shall be a rebuttable presumption that a command-sponsored individual is a dependent. By agreement with the DHS, this definition includes those persons for whom a member of the U. S. Coast Guard has similar responsibility while that person is residing outside the U. S. with or accompanying that Coast Guard member.

E2.1.9. Designated Commanding Officer (DCO). A single military commander in each foreign country where U. S. Forces are stationed and as contemplated by DoD Directive 5525.1, "Status of Forces Policy and Information.

E2.1.10. Detention. To be taken into custody by law enforcement officials and placed under physical restraint.

E2.1.11. District. A District Court of the United States.

E2.1.12. Employed by the Armed Forces Outside the U. S.. Any person employed as:

E2.1.12.1. A civilian employee of the DoD (including a non-appropriated fund instrumentality of the Department); or

E2.1.12.2. A DoD contractor (including subcontractors at any tier); or

E2.1.12.3. An employee of a DoD contractor (including subcontractors at any tier); when the person:

E2.1.12.3.1. Is present or resides outside the U. S. in connection with such employment; and

E2.1.12.3.2. Is not a national of or ordinarily resident in the host nation.

E2.1.13. Federal Magistrate Judge. As used in the Act and this Instruction, this term includes both Judges of the United States and U. S. Magistrate Judges, titles that, in general,

should be given their respective meanings found in the Federal Rules of Criminal Procedure (reference (l)). (See footnote 32 of the Report to Accompany H. R. 3380, House of Representatives Report 106-778, July 20, 2000.) The term does not include Military Magistrates or Military Judges, as prescribed by the UCMJ, or regulations of the Military Departments or the DoD.

E2.1.14. Felony Offense. Conduct that is an offense punishable by imprisonment for more than one year. See section 3261(a) of title 18, United States Code (reference (y)). Although the Act, uses the conditional phrase "if committed within the special maritime and territorial jurisdiction of the U. S.," acts that would be a Federal crime regardless of where they are committed in the U. S., such as drug crimes contained in chapter 13 of title 21, United States Code (reference (z)), also fall within the scope of section 3261(a) of the Act. See section 7 of title 18, United States Code, and the analysis to section 3261 of the "Report to Accompany H. R. 3380," the legislative history of the Act (reference (c)).

E2.1.15. Host Country National. A person who is not a citizen of the U. S., but who is a citizen of the foreign country in which that person is located.

E2.1.16. Inactive Duty Training. Duty prescribed for Reservists by the Secretary of the Military Department concerned under section 206 of title 37, United States Code (reference (aa)), or any other provision of law; and special additional duties authorized for Reservists by an authority designated by the Secretary of the Military Department concerned and performed by them on a voluntary basis in connection with the prescribed training or maintenance activities of the units to which they are assigned. Inactive Duty Training includes those duties performed by Reservists in their status as members of the National Guard while in Federal service. See section 101(d)(7) of title 10, United States Code (reference (ab)).

E2.1.17. Juvenile. A person who has not attained his or her eighteenth birthday, as defined in reference (h).

E2.1.18. Military Department. The Department of the Army, the Department of the Navy, and the Department of the Air Force. See section 101(a)(8) of title 10, United States Code (reference (ac)).

E2.1.19. National of the United States. As defined in section 1101(a)(22), of title 8, United States Code (reference (ad)).

E2.1.20. Outside the U. S. Those places that are not within the definition of "United States" below and, with the exception of subparagraph 7(9), those geographical areas and locations that are not within the Special Maritime and Territorial Jurisdiction of the United States, as defined in sections 7 of title 18, United States Code (reference (i)). The locations defined in subparagraph 7(9) of title 18, United States Code (reference (i)) are to be considered "Outside the U. S." for the purposes of this Instruction. See reference (a).

E2.1.21. Qualified Military Counsel. A judge advocate who is a graduate of an accredited law school or is a member of the bar of a Federal court or of the highest court of a State and who

the Judge Advocate General of the Armed Force of which he or she is a member certifies as competent to perform such duties under the Act.

E2.1.22. Staff Judge Advocate. A judge advocate so designated in the Army, the Air Force, or the Marine Corps; the principal legal advisor of a command in the Navy and the Coast Guard who is a judge advocate, regardless of job title. *See* Rule for Courts-Martial 103(17), Manual for Courts-Martial, United States (2002 Edition) (reference (ae)).

E2.1.23. Status of Forces Agreement (SOFA). Status-of-forces agreements are bilateral international agreements between a sending state (SS) and a receiving state (RS), which define the legal status of SS personnel and property in the territory of the RS. The purpose of such an agreement is to set forth rights and responsibilities between the SS and the host government on such matters as criminal and civil jurisdiction over SS personnel, the wearing of uniforms and the carrying of arms by SS personnel, tax and customs relief for the SS, entry and exit of SS personnel and property, and resolution of damage claims.

E2.1.24. Third Country National. A person whose citizenship is that of a country other than the U. S. and the foreign country in which the person is located.

E2.1.25. United States. As defined in section 5 of title 18, United States Code (reference (af)), this term, as used in a territorial sense, includes all places and waters, continental or insular, subject to the jurisdiction of the U. S., except for the Panama Canal Zone.

E3. ENCLOSURE 3

PRINCIPLES AND GUIDELINES

E3.1. Civilians employed by the Armed Forces outside the U. S. who commit felony offenses while outside the U. S. are subject to U. S. Federal criminal jurisdiction under the Act (reference (a)), and should be held accountable for their actions, as appropriate.

E3.2. Civilians accompanying the Armed Forces outside the U. S. who commit felony offenses while outside the U. S. are subject to U. S. Federal criminal jurisdiction under the Act (reference (a)), and shall be held accountable for their actions, as appropriate.

E3.3. Former members of the Armed Forces who committed felony offenses while serving as a member of the Armed Forces outside the U. S., but who ceased to be subject to UCMJ court-martial jurisdiction under sections 802 and 803 of title 10, United States Code (reference (b)) without having been tried by court-martial for such offenses, are subject to U. S. Federal criminal jurisdiction under the Act (reference (a)) and should be held accountable for their actions, as appropriate.

E3.4. The procedures of this Instruction and DoD actions to implement the Act shall comply with applicable international law, SOFA, and other international agreements affecting relationships and activities between the respective host nation countries and the U. S. Armed Forces. These procedures may be employed outside the U. S. only if the foreign country concerned has been briefed or is otherwise aware of the Act and has not interposed an objection to the application of these procedures. Such awareness may come in various forms, including but not limited to SOFAs containing relevant language, Diplomatic Notes or other acknowledgements of briefings, or case-by-case arrangements, agreements, or understandings with appropriate host nation officials.

E3.5. Consistent with the long-standing policy of maximizing U. S. jurisdiction over its citizens, the Act and this Instruction provide a mechanism for furthering this objective by closing a jurisdictional gap in U. S. law and thereby permitting the criminal prosecution of covered persons for offenses committed outside the U. S. In so doing, the Act and this Instruction provide, in appropriate cases, an alternative to a host nation's exercise of its criminal jurisdiction should the conduct that violates U. S. law also violate a host nation's law, as well as a means of prosecuting covered persons for crimes committed in areas in which there is no effective host nation criminal justice system.

E3.6. In addition to the limitations imposed upon prosecutions by section 3261(b) of the Act, the Act and the procedures of the Instruction should be reserved generally for serious misconduct for which administrative or disciplinary remedies are determined to be inadequate or inappropriate. Because of the practical constraints and limitations on the resources available to bring these cases to successful prosecution in the U. S., initiation of action under this Instruction would not generally be warranted unless serious misconduct were involved.

E.3.7. The procedures set out in the Act and this Instruction do not apply to cases in which the return of fugitive offenders is sought through extradition and similar proceedings, nor are extradition procedures applicable to cases under the Act.

E4. ENCLOSURE 4

ACKNOWLEDGMENT OF LIMITED LEGAL REPRESENTATION (SAMPLE)

1. I, _____, have been named as a suspect or defendant in a matter to which I have been advised is subject to the jurisdiction of the Military Extraterritorial Jurisdiction Act of 2000 (section 3261, et. seq., of title 18, United States Code.); hereinafter referred to as "the Act"). I have also been informed that certain initial proceedings under 18 U.S.C. § 3265 may be required under this Act, for which I am entitled to be represented by legal¹counsel.

2. I acknowledge and understand that the appointment of military counsel for the limited purpose of legal representation in proceedings conducted pursuant to the Act is dependent upon my being unable to retain civilian defense counsel representation for such proceedings, due to my indigent status, and that qualified military defense counsel has been made available.

3. Pursuant to the Act, _____, a Federal Magistrate Judge, has issued the attached Order and has directed that military counsel be made available:

____ For the limited purpose of representing me at an initial proceeding to be conducted outside the U. S. pursuant to 18 U.S.C. § 3265.

____ For the limited purpose of representing me in an initial detention hearing to be conducted outside the U. S. pursuant to 18 U.S.C. § 3265(b).

4. _____, military counsel, has been made available in accordance with DoD Instruction 5525bb and as directed by the attached Order of a Federal Magistrate Judge.

5. I (do) (do not) wish to be represented by _____, military counsel
_____ (initials).

6. I understand that the legal representation of _____, military counsel, is limited to:

a. Representation at the initial proceedings conducted outside the U. S. pursuant to 18 U.S.C. § 3265. _____ (Initials)

E4.A1. ATTACHMENT TO ENCLOSURE 4

ACKNOWLEDGMENT OF LIMITED LEGAL REPRESENTATION (CONTINUED)

b. The initial detention hearing to be conducted outside the U. S. pursuant to the Military Extraterritorial Jurisdiction Act of 2000 (18 U.S.C. § 3261, et. seq.). _____ (Initials)

Signature of Person To Be Represented By Military Counsel

Signature of Witness*

Attachment:
Federal Magistrate Judge Order

(*Note: The witness must be a person other than the defense counsel to be made available for this limited legal representation.)

BILLING CODE 5001-08

DEPARTMENT OF DEFENSE

AGENCY: General Counsel of the Department of Defense

ACTION: Final Rule

SUMMARY: Chapter 212 of title 18, United States Code (Military Extraterritorial Jurisdiction Act of 2000 (MEJA)) establishes Federal criminal jurisdiction over whoever engages in conduct outside the United States that would constitute an offense punishable by imprisonment for more than one year (i.e., a felony offense) while employed by or accompanying the Armed Forces outside the United States, certain members of the Armed Forces subject to the Uniform Code of Military Justice (Chapter 47 of title 10, United States Code), and former members of the Armed Forces.

PART 153 - CRIMINAL JURISDICTION OVER CIVILIANS EMPLOYED BY OR ACCOMPANYING THE ARMED FORCES OUTSIDE THE UNITED STATES, CERTAIN SERVICE MEMBERS, AND FORMER SERVICE MEMBERS

§153.1 Purpose.

This part:

(a) Implements policies and procedures, and assigns responsibilities, under the “Military Extraterritorial Jurisdiction Act of 2000” (hereinafter the Act) for exercising extraterritorial criminal jurisdiction over certain military personnel, former service members of the United States Armed Forces, and over civilians employed by or accompanying the Armed Forces outside the United States (U. S.).

(b) Implements section 3266 of the Act.

§153.2 Applicability and scope.

(a) This part applies to the Office of the Secretary of Defense, the Military Departments (including the Coast Guard by agreement with the Department of Homeland Security when it is not operating as a Service of the Department of the Navy), the Chairman of the Joint Chiefs of Staff, the Combatant Commands, the Inspector General of the Department of Defense, the Defense Agencies, the DoD Field Activities, and all other organizational entities within the Department of Defense (hereafter referred to collectively as "the DoD Components"). The term "Military Services," as used herein, refers to the Army, the Navy, the Air Force, and the Marine Corps.

(b) Coast Guard. The Coast Guard ordinarily operates as a separate branch of the Armed Forces in the Department of Homeland Security (DHS). However, upon Presidential Directive, the Coast Guard operates as a Service within the Department of the Navy and becomes part of the Department of Defense. By agreement with the Secretary of the Department of Homeland Security, when the Coast Guard is operating as a separate Service within the DHS, this part shall apply to the Coast Guard to the extent permitted by the Act. Whether a provision of this Instruction applies to a Coast Guard case is determined by whether the Coast Guard is operating as a Service in the DHS or as a Service within the Department of the Navy.

(c) While some Federal criminal statutes are expressly or implicitly extraterritorial, many acts described therein are criminal only if they are committed within "the special maritime and territorial jurisdiction of the United States" or if they affect interstate or foreign commerce. Therefore, in most instances, Federal criminal jurisdiction ends at the nation's borders. State criminal jurisdiction, likewise, normally ends at the boundaries of each State. Because of these limitations, acts committed by military personnel, former service members, and civilians

employed by or accompanying the Armed Forces in foreign countries, which would be crimes if committed in the U. S., often do not violate either Federal or State criminal law. Similarly, civilians are generally not subject to prosecution under the Uniform Code of Military Justice (UCMJ), unless Congress had declared a "time of war" when the acts were committed. As a result, these acts are crimes, and therefore criminally punishable, only under the law of the foreign country in which they occurred. See section 2 of Report Accompanying the Act. While the U.S. could impose administrative discipline for such actions, the Act and this Part are intended to address the jurisdictional gap with respect to criminal sanctions.

(d) Nothing in this part may be construed to deprive a court-martial, military commission, provost court, or other military tribunal of concurrent jurisdiction with respect to offenders or offenses that by statute or the law of war may be tried by court-martial, military commission, provost court, or other military tribunal (Section 3261(c) of title 18). In some cases, conduct that violates section 3261(a) of the Act may also violate the UCMJ, or the law of war generally. Therefore, for military personnel, military authorities would have concurrent jurisdiction with a U. S. District Court to try the offense. The Act was not intended to divest the military of jurisdiction and recognizes the predominant interest of the military in disciplining its service members, while still allowing for the prosecution of members of the Armed Forces with non-military co-defendants in a U. S. District Court under section 3261(d) of the Act.

(e) This Part, including its enclosures, is intended exclusively for the guidance of military personnel and civilian employees of the Department of Defense, and of the United States Coast Guard by agreement with the Department of Homeland Security. Nothing contained herein creates or extends any right, privilege, or benefit to any person or entity. *See United States v. Caceres*, 440 U.S. 741 (1979).

§153.3 Definitions

Accompanying the Armed Forces Outside the United States. As defined in section 3267 of the Act, the dependent of:

- (1) A member of the Armed Forces; or
- (2) A civilian employee of the Department of Defense (including a nonappropriated fund instrumentality of the Department); or
- (3) A DoD contractor (including a subcontractor at any tier); or
- (4) An employee of a DoD contractor (including a subcontractor at any tier); and
- (5) Residing with such member, civilian employee, contractor, or contractor employee outside the United States; and
- (6) Not a national of or ordinarily resident in the host nation.

Active Duty. Full-time duty in the active military service of the United States. It includes full-time training duty, annual training duty, and attendance, while in the active military service, at a school designated as a service school by law or by the Secretary of the Military Department concerned. See section 101(d)(1) of title 10, United States Code..

Armed Forces. The Army, the Navy, the Air Force, the Marine Corps, and the Coast Guard. See section 101(a)(4) of title 10, United States Code.

Arrest. To be taken into physical custody by law enforcement officials.

Charged. As used in the Act and this part, this term is defined as an indictment or the filing of information against a person under the Federal Rules of Criminal Procedure. See the analysis to Section 3264 of the Report Accompanying the Act.

Civilian Component. A person or persons employed by the Armed Forces outside the United States, as defined in this section and section 3267(a)(1) of the Act. A term used in Status of Forces Agreements.

Dependent. A person for whom a member of the Armed Forces, civilian employee, contractor (or subcontractor at any tier) has legal responsibility while that person is residing outside the United States with or accompanying that member of the Armed Forces, civilian employee, contractor (or subcontractor at any tier), and while that responsible person is so assigned, employed or obligated to perform a contractual obligation to the Department of Defense. For purposes of this part, a person's "command sponsorship" status while outside the United States is not to be considered in determining whether the person is a dependent within the meaning of this Part, except that there shall be a rebuttable presumption that a command-sponsored individual is a dependent.

Designated Commanding Officer (DCO). A single military commander in each foreign country where U. S. Forces are stationed and as contemplated by DoD Directive 5525.1, Status of Forces Policy and Information.

Detention. To be taken into custody by law enforcement officials and placed under physical restraint.

District. A District Court of the United States.

Employed by the Armed Forces Outside the United States. Any person employed as:

- (1) A civilian employee of the Department of Defense (including a non-appropriated fund instrumentality of the Department); or
- (2) A DoD contractor (including subcontractors at any tier); or

(3) An employee of a DoD contractor (including subcontractors at any tier); when the person:

(i) Is present or resides outside the United States in connection with such employment; and

(ii) Is not a national of or ordinarily resident in the host nation.

Federal Magistrate Judge. As used in the Act and this Part, this term includes both Judges of the United States and U. S. Magistrate Judges, titles that, in general, should be given their respective meanings found in the Federal Rules of Criminal Procedure. (See footnote 32 of the Report to Accompany H. R. 3380, House of Representatives Report 106-778, July 20, 2000.) The term does not include Military Magistrates or Military Judges, as prescribed by the UCMJ, or regulations of the Military Departments or the Department of Defense.

Felony Offense. Conduct that is an offense punishable by imprisonment for more than one year if the conduct had been engaged in the special maritime and territorial jurisdiction of the United States. See sections 3261 of the Act and section 7 of title 18, United States Code. Although the Act, uses the conditional phrase “if committed within the special maritime and territorial jurisdiction of the United States,” acts that would be a Federal crime regardless of where they are committed in the U. S., such as drug crimes contained in chapter 13 of title 21, United States Code, also fall within the scope of section 3261(a) of the Act. See the analysis to section 3261 of the Report Accompanying the Act.

Host Country National. A person who is not a citizen of the United States, but who is a citizen of the foreign country in which that person is located.

Inactive Duty Training. Duty prescribed for Reservists by the Secretary of the Military Department concerned under section 206 of title 37, United States Code, or any other provision

of law; and special additional duties authorized for Reservists by an authority designated by the Secretary of the Military Department concerned and performed by them on a voluntary basis in connection with the prescribed training or maintenance activities of the units to which they are assigned. Inactive Duty Training includes those duties performed by Reservists in their status as members of the National Guard while in Federal service. See section 101(d)(7) of title 10, United States Code

Juvenile. A person who has not attained his or her eighteenth birthday, as defined in section 5031 of title 18, United States Code.

Military Department. The Department of the Army, the Department of the Navy, and the Department of the Air Force. See section 101(a)(8) of title 10, United States Code.

National of the United States. As defined in section 1101(a)(22), of title 8, United States Code.

Outside the United States. Those places that are not within the definition of “United States” below and, with the exception of subparagraph 7(9), those geographical areas and locations that are not within the special maritime and territorial jurisdiction of the United States, as defined in sections 7 of title 18, United States Code. The locations defined in subparagraph 7(9) of title 18, United States Code are to be considered “Outside the United States” for the purposes of this Part. See 3261 – 3267 of title 18, United States Code.

Qualified Military Counsel. Judge advocates assigned to or employed by the Military Services and designated by the respective Judge Advocate General, or a designee, to be professionally qualified and trained to perform defense counsel responsibilities under the Act.

Staff Judge Advocate. A judge advocate so designated in the Army, the Air Force, the Marine Corps, or the Coast Guard; the principal legal advisor of a command in the Navy who is

a judge advocate, regardless of job title. See Rule for Courts-Martial 103(17), Manual for Courts-Martial, United States (2002 Edition).

Third Country National. A person whose citizenship is that of a country other than the U. S. and the foreign country in which the person is located.

United States. As defined in section 5 of title 18, United States Code, this term, as used in a territorial sense, includes all places and waters, continental or insular, subject to the jurisdiction of the United States, except for the Panama Canal Zone..

§153.4 Responsibilities.

(a) The General Counsel of the Department of Defense (GC, DoD) shall provide initial coordination and liaison with the Departments of Justice and State, on behalf of the Military Departments, regarding a case for which investigation and/or Federal criminal prosecution under the Act is contemplated. This responsibility may be delegated entirely, or delegated for categories of cases, or delegated for individual cases. The General Counsel, or designee, shall advise the Domestic Security Section of the Criminal Division, Department of Justice (DSS/DOJ), as soon as practicable, when DoD officials intend to recommend that the DOJ consider the prosecution of a person subject to the Act for offenses committed outside the United States. The Assistant Attorney General, Criminal Division, Department of Justice, has designated the Domestic Security Section (DSS/DOJ) as the Section responsible for the Act.

(b) The Inspector General of the Department of Defense (DoDIG) shall:

(1) Pursuant to Section 4(d) of the Inspector General Act of 1978, as amended (5 U.S.C. App. 3), "report expeditiously to the Attorney General whenever the Inspector General has reasonable grounds to believe there has been a violation of Federal criminal law." This

statutory responsibility is generally satisfied once an official/special agent of the Office of the Inspector General of the Department of Defense (OIG DOD) notifies either the cognizant Department of Justice representative or the Assistant Attorney General (Criminal Division) of the “reasonable grounds.”

(2) Pursuant to Section 8(c)(5) of the Inspector General Act of 1978, as amended (5 U.S.C. App. 3), and 10 U.S.C. 141(b), ensure the responsibilities described in DoD Directive 5525.7, “Implementation of the Memorandum of Understanding Between the Department of Justice and the Department of Defense Relating to the Investigation and Prosecution of Certain Crimes,” January 22, 1985,¹ to “implement the investigative policies [,m]onitor compliance by DoD criminal investigative organizations [, and p]rovide specific guidance regarding investigative matters, as appropriate” are satisfied relative to violations of the Military Extraterritorial Jurisdiction Act of 2000.

(c) The Heads of Military Law Enforcement Organizations and Military Criminal Investigative Organizations, or their Designees, shall:

(1) Advise the Commander and Staff Judge Advocate (or Legal Advisor) of the Combatant Command concerned, or designees, of an investigation of an alleged violation of the Act. Such notice shall be provided as soon as practicable. In turn, the GC, DoD or designee, shall be advised so as to ensure notification of and consultation with the Departments of Justice and State regarding information about the potential case, including the host nation’s position

¹ Available from Internet site <http://www.dtic.mil/whs/directives>.

regarding the case. At the discretion of the GC, DoD, other agencies and organizations (such as the Legal Counsel to the Chairman of the Joint Chiefs of Staff and Secretary of the Military Department that sponsored the person into the foreign country) shall be informed, as appropriate. Effective investigations lead to successful prosecutions and, therefore, these cases warrant close coordination and cooperation between the Departments of Defense, Justice, and State.

(2) Provide briefings to, and coordinate with, appropriate local law enforcement authorities in advance or, if not possible, as soon thereafter as is practicable, of investigations or arrests in specific cases brought under the Act. If not previously provided to local law enforcement authorities, such briefings about the case shall, at a minimum, describe the Host Nation's position regarding the exercise of jurisdiction under the Act that followed from any briefings conducted pursuant to appendix A of this part.

(d) The Domestic Security Section, Criminal Division, Department of Justice (DSS/DOJ) has agreed to:

(1) Provide preliminary liaison with the Department of Defense, coordinate initial notifications with other entities of the Department of Justice and Federal law enforcement organizations; make preliminary decisions regarding proper venue; designate the appropriate U. S. Attorney's Office; and coordinate the further assignment of DOJ responsibilities.

(2) Coordinate with the designated U. S. Attorney's office arrangements for a Federal Magistrate Judge to preside over the initial proceedings required by the Act. Although the assignment of a particular Federal Magistrate Judge shall ordinarily be governed by the jurisdiction where a prosecution is likely to occur, such an assignment does not determine the

ultimate venue of any prosecution that may be undertaken. Appropriate venue is determined in accordance with the requirements of section 3238 of title 18, United States Code.

(3) Coordinate the assistance to be provided the Department of Defense with the U.S. Attorney's office in the district where venue for the case shall presumptively lie.

(4) Continue to serve as the primary point of contact for DoD personnel regarding all investigations that may lead to criminal prosecutions and all associated pretrial matters, until such time as DSS/DOJ advises that the case has become the responsibility of a specific U. S. Attorney's Office.

(e) The Commanders of the Combatant Commands shall:

(1) Assist the DSS/DOJ on specific cases occurring within the Commander's area of responsibility. These responsibilities include providing available information and other support essential to an appropriate and successful prosecution under the Act with the assistance of the Commanders' respective Staff Judge Advocates (or Legal Advisors), or their designees, to the maximum extent allowed and practicable.

(2) Ensure command representatives are made available, as necessary, to participate in briefings of appropriate host nation authorities concerning the operation of this Act and the implementing provisions of this part.

(3) Determine when military necessity in the overseas theater requires a waiver of the limitations on removal in section 3264(a) of the Act and when the person arrested or charged with a violation of the Act shall be moved to the nearest U. S. military installation outside the United States that is adequate to detain the person and facilitate the initial proceedings prescribed in section 3265(a) of the Act and this part. Among the factors to be considered are the nature and scope of military operations in the area, the nature of any hostilities or presence of hostile

forces, and the limitations of logistical support, available resources, appropriate personnel, or the communications infrastructure necessary to comply with the requirements of section 3265 of the Act governing initial proceedings.

(4) Annually report to the GC, DoD, by the last day of February for the immediately preceding calendar year, all cases involving the arrest of persons for violations of the Act; persons placed in temporary detention for violations of the Act; the number of requests for Federal prosecution under the Act, and the decisions made regarding such requests.

(5) Determine the suitability of the locations and conditions for the temporary detention of juveniles who commit violations of the Act within the Commander's area of responsibility.

The conditions of such detention must, at a minimum, meet the following requirements:

Juveniles alleged to be delinquent shall not be detained or confined in any institution or facility in which the juvenile has regular contact with adult persons convicted of a crime or awaiting trial on criminal charges; insofar as possible, alleged juvenile delinquents shall be kept separate from adjudicated delinquents; and every juvenile in custody shall be provided adequate food, heat, light, sanitary facilities, bedding, clothing, recreation, and medical care, including necessary psychiatric, psychological, or other care and treatment.

(6) As appropriate, promulgate regulations consistent with and implementing this Part.

The Combatant Commander's duties and responsibilities pursuant to this Part may be delegated.

(f) The Secretaries of the Military Departments shall: (1) Consistent with the provisions of paragraph (c) of this section, make provision for defense counsel representation at initial proceedings conducted outside the United States pursuant to the Act for those persons arrested or charged with violations of section 3261(a) of the Act.

(2) Issue regulations establishing procedures that, to the maximum extent practicable, provide notice to all persons covered by the Act who are not nationals of the United States but who are employed by or accompanying the Armed Forces outside the United States, with the exception of individuals who are nationals of or ordinarily resident in the host nation, that they are potentially subject to the criminal jurisdiction of the United States under the Act. At a minimum, such regulations shall require that employees and persons accompanying the Armed Forces outside the United States, who are not nationals of the United States, be informed of the jurisdiction of the Act at the time that they are hired for overseas employment, or upon sponsorship into the overseas command, whichever event is earlier applicable. Such notice shall also be provided during employee training and any initial briefings required for these persons when they first arrive in the foreign country. For employees and persons accompanying the Armed Forces outside the United States who are not nationals of the United States, but who have already been hired or are present in the overseas command at the time this Part becomes effective, such notice shall be provided within 60 days of the effective date of this Part.

(3) Ensure that orientation training, as described in section (f)(2) above, is also provided for all U. S. nationals who are, or who are scheduled to be, employed by or accompanying the Armed Forces outside the United States, including their dependents, and include information that such persons are potentially subject to the criminal jurisdiction of the United States under the Act.

(i) For members of the Armed Forces, civilian employees of the Department of Defense and civilians accompanying the Armed Forces overseas, notice and briefings on the applicability of the Act shall, at a minimum, be provided to them and their dependents when

travel orders are issued and, again, upon their arrival at command military installations or place of duty outside the United States.

(4) Failure to provide notice or orientation training pursuant to paragraphs (6)(f)(2) and (6)(f)(3) of this section shall not create any rights or privileges in the persons referenced and shall not operate to defeat the jurisdiction of a court of the United States or provide a defense or other remedy in any proceeding arising under the Act or this Part.

(5) Provide training to personnel who are authorized under the Act and designated pursuant to this Part to make arrests outside the United States of persons who allegedly committed a violation of section 3261(a) of the Act. The training, at a minimum, shall include the rights of individuals subject to arrest.

§153.5 Procedures.

(a) Applicability. (1) Offenses and Punishments. Section 3261(a) of the Act establishes a separate Federal offense under 18 U.S.C. for an act committed outside the United States that would be a felony crime as if such act had been committed within the special maritime and territorial jurisdiction of the United States, as defined in section 7 of 18 U.S.C. Charged as a violation of section 3261(a) of the Act, the elements of the offense and maximum punishment are the same as the crime committed within the geographical limits of section 7 of 18 U.S.C., but without the requirement that the conduct be committed within such geographical limits. See section 1 of the Section-By-Section Analysis and Discussion to section 3261 in the "Report Accompanying the Act.

(2) Persons Subject To This Part. This Part applies to certain military personnel, former military service members, and persons employed by or accompanying the Armed Forces outside

the United States, and their dependents, as those terms are defined in section 153.3 of this part, alleged to have committed an offense under the Act while outside the United States. For purposes of the Act and this Part, persons employed by or accompanying the Armed Forces outside the U. S. are subject to the 'military law' of the U. S., but only to the extent to which this term has been used and its meaning and scope have been understood within the context of a SOFA or any other similar form of international agreement.

(3) Military Service Members. Military service members subject to the Act's jurisdiction are:

(i) Only those active duty service members who, by Federal indictment or information, are charged with committing an offense with one or more defendants, at least one of whom is not subject to the UCMJ. See section 3261(d)(2) of the Act.

(ii) Members of a Reserve component with respect to an offense committed while the member was not on active duty or inactive duty for training (in the case of members of the Army National Guard of the United States or the Air National Guard of the United States, only when in Federal service), are not subject to UCMJ jurisdiction for that offense and, as such, are amenable to the Act's jurisdiction without regard to the limitation of section 3261(d)(2) of the Act.

(4) Former Military Service Members. Former military service members subject to the Act's jurisdiction are:

(i) Former service members who were subject to the UCMJ at the time the alleged offenses were committed, but are no longer subject to the UCMJ with respect to the offense due to their release or separation from active duty.

(ii) Former service members, having been released or separated from active duty, who thereafter allegedly commit an offense while in another qualifying status, such as while a

civilian employed by or accompanying the Armed Forces outside the United States, or while the dependent of either or of a person subject to the UCMJ.

(5) Civilians Employed by the Armed Forces. Civilian employees employed by the U. S. Armed Forces outside the United States (as defined in section 153.3), who commit an offense under the Act while present or residing outside the U. S. in connection with such employment, are subject to the Act and the provisions of this Part. Such civilian employees include:

(i) Persons employed by the Department of Defense (including a non-appropriated fund instrumentality of the Department of Defense).

(ii) Persons employed as a DoD contractor (including a subcontractor at any tier).

(iii) Employees of a DoD contractor (including a subcontractor at any tier).

(6) Civilians Accompanying the Armed Forces. Subject to the requirements of (a)(6)(ii) of this section., the following persons are civilians accompanying the Armed Forces outside the United States who are covered by the Act and the provisions of this Part:

(i) Dependents of:

(A) Active duty service members.

(B) Members of the reserve component while the member was on active duty or inactive duty for training, but in the case of members of the Army National Guard of the United States or the Air National Guard of the United States, only when in Federal service.

(C) Former service members who are employed by or are accompanying the Armed Forces outside the United States.

(D) Civilian employees of the Department of Defense (including non-appropriated fund instrumentalities of the Department of Defense).

(E) DoD contractors (including a subcontractor at any tier).

(F) Employees of a DoD contractor (including a subcontractor at any tier).

(ii) In addition to the person being the dependent of a person who is listed in paragraph (a)(6)(i) of this section, jurisdiction under the Act requires that the dependent also:

(A) Reside with one of the persons listed in paragraph (a)(6)(i).

(B) Allegedly commit the offense while outside the United States; and

(C) Not be a national of, or ordinarily resident in, the host nation where the offense is committed.

(iii) Command sponsorship of the dependent is not required for the Act and this Part to apply.

(iv) If the dependent is a juvenile, as defined in section 153.3, who engaged in conduct that is subject to prosecution under section 3261(a) of the Act, then the provisions of chapter 403 of title 18, United States Code would apply to U. S. District Court prosecutions.

(7) Persons NOT Subject to the Act or the Procedures of this Part. (i) Persons who are the nationals of, or ordinarily resident in, the host nation where the offense is committed, regardless of their employment or dependent status.

(ii) Persons, including citizens of the United States, whose presence outside the United States at the time the offense is committed, is not then either as a member of the Armed Forces, a civilian employee of the Armed Forces, or accompanying the Armed Forces.

(A) Persons (including members of a Reserve component) whose presence outside the United States at the time the offense is committed, is solely that of a tourist, a student, or a civilian employee or civilian accompanying any other agency, organization, business, or entity that is not of the Armed Forces (and thereby can not be said to be employed

by or accompanying the Armed Forces) are not subject to the Act. Civilian employees of an agency, organization, business, or entity accompanying the Armed Forces outside the U. S. may, by virtue of the agency, organization, business, or entity relationship with the Armed Forces, be subject to the Act and this Part.

(B) Persons who are subject to the Act and this Part remain so while present, on official business or otherwise (e.g., performing temporary duty or while in leave status), in a foreign country other than the foreign country to which the person is regularly assigned, employed, or accompanying the Armed Forces outside the United States.

(iii) Persons who have recognized dual citizenship with the United States and who are the nationals of, or ordinarily resident in, the host nation where the alleged conduct took place are not persons "accompanying the Armed Forces outside the United States" within the meaning of the Act and this Part.

(iv) Juveniles whose ages are below the minimum ages authorized for the prosecution of juveniles in U. S. District Court under the provisions of chapter 403 of title 18, United States Code.

(v) Persons subject to the UCMJ (*See* sections 802 and 803 of title 10, United States Code) are not subject to prosecution under the Act unless, pursuant to section 3261(d) of the Act, the member ceases to be subject to the UCMJ or an indictment or information charges that the member committed the offense with one or more other defendants, at least one of whom is not subject to the UCMJ. A member of a Reserve component who is subject to the UCMJ at the time the UCMJ offense was committed is not relieved from amenability to UCMJ jurisdiction for that offense. Such reserve component members are not subject to the Act unless section 3261(d)(2) of the Act applies. Retired members of a regular component who are entitled to pay

remain subject to the UCMJ after retiring from active duty. Such retired members are not subject to prosecution under the Act unless section 3261(d)(2) of the Act applies.

(vi) Whether Coast Guard members and civilians employed by or accompanying the Coast Guard outside the United States, and their dependents, are subject to the Act and this Part depends on whether at the time of the offense the Coast Guard was operating as a separate Service in the Department of Homeland Security or as a Service in the Department of the Navy.

(8) Persons Having a Tenuous Nexus to the United States. Third Country Nationals who are not ordinarily resident in the host nation, and who meet the definition of “a person accompanying the Armed Forces outside the United States,” may have a nexus to the United States that is so tenuous that it places into question whether the Act’s jurisdiction should be applied and whether such persons should be subject to arrest, detention, and prosecution by U. S. authorities. Depending on the facts and circumstances involved, and the relationship or connection of the foreign national with the U. S. Armed Forces, it may be advisable to consult first with the DSS/DOJ before taking action with a view toward prosecution. In addition, to facilitate consultation with the government of the nation of which the Third Country National is a citizen, the State Department should be notified of any potential investigation or arrest of a Third Country National.

(b) Investigation, Arrest, Detention, And Delivery Of Persons To Host Nation Authorities.

(1) Investigation. (i) Investigations of conduct reasonably believed to constitute a violation of the Act committed outside the United States must respect the sovereignty of the foreign nation in which the investigation is conducted. Such investigations shall be conducted in accordance with recognized practices with host nation authorities and applicable international law, SOFA and other international agreements. After general coordination with appropriate host nation

authorities, as referenced in Appendix A of this Part, specific investigations shall, to the extent practicable, be coordinated with appropriate local law enforcement authorities, unless not required by agreement with host nation authorities.

(ii) When a Military Criminal Investigative Organization is the lead investigative organization, the criminal investigator, in order to assist DSS/DOJ and the designated U. S. Attorney representative in making a preliminary determination of whether the case warrants prosecution under the Act, shall provide a copy of the Investigative Report, or a summary thereof, to the Office of the Staff Judge Advocate of the Designated Commanding Officer (DCO) at the location where the offense was committed for review and transmittal, through the Combatant Commander, to the DSS/DOJ and the designated U. S. Attorney representative. The Office of the Staff Judge Advocate shall also furnish the DSS/DOJ and the designated U. S. Attorney representative an affidavit or declaration from the criminal investigator or other appropriate law enforcement official that sets forth the probable cause basis for believing that a violation of the Act has occurred and that the person identified in the affidavit or declaration has committed the violation.

(iii) When the Defense Criminal Investigative Service (DCIS) is the lead investigative organization, the criminal investigator, in order to assist the DSS/DOJ and the designated U. S. Attorney representative in making a preliminary determination of whether the case warrants prosecution under the Act, shall provide a copy of the Investigative Report, or a summary thereof, to the DSS/DOJ and the designated U. S. Attorney representative. The criminal investigator shall also furnish the DSS/DOJ and the designated U. S. Attorney representative, an affidavit or declaration that sets forth the probable cause basis for believing that a violation of the Act has occurred and that the person identified in the affidavit or

declaration has committed the violation. Within the parameters of reference (d), the Inspector General may also notify the General Counsel of the Department of Defense and the DCO's Office of the Staff Judge Advocate at the location where the offense was committed, as appropriate.

(2) Residence Information. To the extent that it can be determined from an individual's personnel records, travel orders into the overseas theater, passport, or other records, or by questioning upon arrest or detention, as part of the routine "booking" information obtained, an individual's last known residence in the United States shall be determined and forwarded promptly to the DSS/DOJ and the designated U.S. Attorney representative. See *Pennsylvania v. Muniz*, 496 U.S. 582, at 601 (1990) and *United States v. D'Anjou*, 16 F. 3d 604 (4th Cir. 1993). The information is necessary to assist in determining what law enforcement authorities and providers of pretrial services, including those who issue probation reports, shall ultimately have responsibility for any case that may develop. Determination of the individual's "last known address" in the United States is also important in determining what Federal district would be responsible for any possible future criminal proceedings.

(i) Due to the venue provisions of section 3238 of reference (a), the DSS/DOJ and the designated U.S. Attorney representative shall be consulted prior to removal of persons arrested or charged with a violation of the Act by U. S. law enforcement officials. The venue for Federal criminal jurisdiction over offenses committed on the high seas or elsewhere beyond the jurisdiction of a particular State or District (as would be required under the Act), is in the Federal district in which the offender is arrested or first brought. However, if the individual is not so arrested in or brought into any Federal district in the United States (i.e., is to be indicted, or an

information obtained, prior to the individual's return to the United States), then an indictment or information may be sought in the district of the person's last known residence. If no such residence is known, the indictment or information may be filed in the District of Columbia.

(ii) "First brought" connotes the location within the U. S. to which the person is returned in a custodial status.

(iii) "Last known residence" refers to that U. S. location where the person lived or resided. It is not necessarily the same as the person's legal domicile or home of record.

(iv) Prompt transmittal of venue information to the DSS/DOJ and the designated U.S. Attorney representative in the United States may prove helpful in determining whether a particular case may be prosecuted, and may ultimately be a pivotal factor in determining whether the host nation or the U. S. shall exercise its jurisdiction over the matter.

(v) The Investigative Report, and any affidavit or declaration, as well as all other documents associated with a case shall be transmitted promptly by the command Staff Judge Advocate to the DSS/DOJ and the designated U. S. Attorney representative. This may be accomplished through the use of facsimile or other means of electronic communication.

(3) Notice of Complaint or Indictment. Upon receipt of information from command authorities or Defense Criminal Investigation Organizations (the Defense Criminal Investigation Service, the Army's Criminal Investigation Command, the Naval Criminal Investigative Service, and the Air Force Office of Special Investigations) that a person subject to jurisdiction under this Act has violated section 3261(a), the U. S. Attorney for the District in which there would be venue for a prosecution may, if satisfied that probable cause exists to believe that a crime has been committed and that the person identified has committed this crime, file a complaint under Federal Rule of Criminal Procedure 3. As an alternative, the U. S. Attorney may seek the

indictment of the person identified. In either case, a copy of the complaint or indictment shall be provided to the Office of the Staff Judge Advocate of the overseas command that reported the offense. The DSS/DOJ and the designated U. S. Attorney representative will ordinarily be the source from which the command's Staff Judge Advocate is able to obtain a copy of any complaint or indictment against a person outside the United States who is subject to the jurisdiction under the Act. This may be accomplished through the use of facsimile or other means of electronic communication.

(4) Arrest. (i) Federal Rule of Criminal Procedure 4 takes the jurisdiction of the Act into consideration in stating where arrest warrants may be executed: "Location. A warrant may be executed, or a summons served, within the jurisdiction of the United States or anywhere else a federal statute authorizes an arrest." The Advisory Committee Note explains that the new language reflects the enactment of the Military Extraterritorial Jurisdiction Act permitting arrests of certain military and Department of Defense personnel overseas.

(ii) The Act specifically authorizes persons in DoD law enforcement positions, as designated by the Secretary of Defense, to make arrests outside the United States, upon probable cause and in accordance with recognized practices with host nation authorities and applicable international agreements, those persons subject to the Act who violate section 3261(a) of the Act. Section 3262(a) of the Act constitutes authorization by law to conduct such functions pursuant to 10 U.S.C. 801-946 and therefore avoids possible restrictions of the Posse Comitatus Act regarding military personnel supporting civilian law enforcement agencies.

(iii) When the host nation has interposed no objections after becoming aware of the Act, arrests in specific cases shall, to the extent practicable, be first coordinated with appropriate local law enforcement authorities, unless not required by agreement with host nation authorities.

(iv) Military and civilian special agents assigned to the Defense Criminal

Investigative Organizations are hereby authorized by the Secretary of Defense to make an arrest, outside the United States, of a person who has committed an offense under section 3261(a) of the Act. Civilian special agents assigned to Defense Criminal Investigative Organizations while performing duties outside the U. S. shall make arrests consistent with the standardized guidelines established for such agents, as approved in accordance with sections 1585a, 4027, 7480, and 9027 of title 10, United States Code.

(v) Military personnel and DoD civilian employees (including local nationals, either direct hire or indirect hire) assigned to security forces, military police, shore patrol, or provost offices at military installations and other facilities located outside the United States are also authorized to make an arrest, outside the United States, of a person who has committed an offense under section 3261(a) of the Act. This authority includes similarly-assigned members of the Coast Guard law enforcement community, but only when the Coast Guard is operating at such locations as a Service of the Department of the Navy.

(vi) Law enforcement personnel thus designated and authorized by the Secretary of Defense in this Part may arrest a person, outside the United States, who is suspected of committing a felony offense in violation of section 3261(a) of the Act, when the arrest is based on probable cause to believe that such person violated section 3261(a) of the Act, and when made in accordance with applicable international agreements. Because the location of the offense and offender is outside the United States, it is not normally expected that the arrest would be based on a previously-issued Federal arrest warrant. Law enforcement personnel authorized to make arrests shall follow the Secretaries of the Military Departments' guidelines for making arrests without a warrant, as prescribed by 10 U.S.C. 1585a, 4027, 7480, and 9027.

Authorizations issued by military magistrates under the UCMJ may not be used as a substitute for Federal arrest warrant requirements.

(vii) The foregoing authorization to DoD law enforcement personnel to arrest persons subject to Chapter 212 of title 18, United States Code, for violations of the Act is not intended as a limitation upon the authority of other Federal law enforcement officers to effect arrests when authorized to do so. (E.g., *see* 18 U.S.C. § 3052 authorizing agents of the Federal Bureau of Investigation to make arrests “for any felony cognizable under the laws of the United States, 21 U.S.C. § 878(a)(3) for the same authority for Drug Enforcement Administration agents, and 18 U.S.C. § 3053 for the same authority for U. S. Marshals and their deputies.)

(5) Temporary Detention. (i) The Commander of a Combatant Command, or designee, may order the temporary detention of a person, within the Commander’s area of responsibility outside the United States, who is arrested or charged with a violation of the Act. The Commander of the Combatant Command, or designee, may determine that a person arrested need not be held in custody pending the commencement of the initial proceedings required by section 3265 of the Act and paragraph (d) of this section. The Commander of the Combatant Command may designate those component commanders or DCO commanders who are also authorized to order the temporary detention of a person, within the commanding officer’s area of responsibility outside the United States, who is arrested or charged with a violation of the Act.

(ii) A person arrested may be temporarily detained in military detention facilities for a reasonable period, in accordance with regulations of the Military Departments and subject to the following:

(A) Temporary detention should be ordered only (1) when a serious risk is believed to exist that the person shall flee and not appear, as required, for any pretrial

investigation, pretrial hearing or trial proceedings, or (2) the person may engage in serious criminal misconduct (e.g., the intimidation of witnesses or other obstructions of justice, causing injury to others, or committing other offenses that pose a threat to the safety of the community or to the national security of the United States). The decision as to whether temporary detention is appropriate shall be made on a case-by-case basis. Section 3142 of title 18, United States Code provides additional guidance regarding conditions on release and factors to be considered.

(B) A person arrested or charged with a violation of the Act who is to be detained temporarily shall, to the extent practicable, be detained in areas that separate them from sentenced military prisoners and members of the Armed Forces who are in pretrial confinement pending trial by courts-martial.

(C) Separate temporary detention areas shall be used for male and female detainees.

(D) Generally, juveniles should not be ordered into temporary detention. However, should circumstances warrant temporary detention, the conditions of such temporary detention must, at a minimum, meet the following requirements: juveniles alleged to be delinquent shall not be detained or confined in any institution or facility in which the juvenile has regular contact with adult persons convicted of a crime or awaiting trial on criminal charges; insofar as possible, alleged juvenile delinquents shall be kept separate from adjudicated delinquents; and every juvenile in custody shall be provided with adequate food, heat, light, sanitary facilities, bedding, clothing, recreation, and medical care, including necessary psychiatric, psychological, or other care and treatment. Appointment of a guardian *ad litem* may be required under 18 U.S.C. § 5034 to represent the interests of the juvenile when the juvenile's parents are not present or when the parents' interests may be adverse to that of the juvenile.

(iii) Persons arrested or charged with a violation of the Act, upon being ordered into temporary detention and processed into the detention facility, shall, as part of the processing procedures, be required to provide the location address of their last U. S. residence as part of the routine booking questions securing "biographical data necessary to complete booking or pretrial services." See *United States v. D'Anjou*, 16 F. 3d 604 (4th Cir.1993). This information shall be recorded in the detention documents and made available to the DCO's Office of the Staff Judge Advocate. This information shall be forwarded with other case file information, including affidavits in support of probable cause supporting the arrest and detention, to the DSS/DOJ. The information is provided so that the DSS/DOJ may make appropriate preliminary decisions about venue. See "Residence Information," paragraph (b)(2).

(A) Notice of the temporary detention of any person for a violation of the Act shall be forwarded through command channels, without unnecessary delay, to the Combatant Commander, who shall advise the GC, DoD, as the representative of the Secretary of Defense, of all such detentions. At the discretion of the GC, DoD, other agencies and organizations (such as the Legal Counsel to the Chairman of the Joint Chiefs of Staff and Secretary of the Military Department that sponsored the person into the foreign country) shall be informed, as appropriate.

(B) Such notice shall include a summary of the charges, facts and circumstances surrounding the offenses, information regarding any applicable SOFA or other international agreements affecting jurisdiction in the case, and the reasons warranting temporary detention.

(iv) If military command authorities at the military installation outside the United States intend to request a person's detention by order of the Federal Magistrate Judge, the military representative assigned to the case shall gather the necessary information setting forth

the reasons in support of a motion to be brought by the attorney representing the government at the initial proceeding conducted pursuant to section 3265 of the Act.

(v) This Part is not intended to eliminate or reduce existing obligations or authorities to detain persons in foreign countries as required or permitted by agreements with host countries. See generally, *United States v. Murphy*, 18 M.J. 220 (CMA 1984).

(6) Custody and Transport of Persons While in Temporary Detention. (i) The Department of Defense may only take custody of and transport the person as specifically set forth in the Act. This is limited to delivery as soon as practicable to the custody of U. S. civilian law enforcement authorities for removal to the United States for judicial proceedings; delivery to appropriate authorities of the foreign country in which the person is alleged to have committed the violation of section 3261(a) of the Act in accordance with section 3263; or, upon a determination by the Secretary of Defense, or the Secretary's designee, that military necessity requires it, removal to the nearest U. S. military installation outside the United States adequate to detain the person and to facilitate the initial appearance described in 3265(a) of the Act.

(ii) Responsibility for a detained person's local transportation, escort, and custody requirements remains with the command that placed the person in temporary detention for a violation of section 3261(a) of the Act. This responsibility includes:

(A) Attendance at official proceedings and other required health and welfare appointments (e.g., appointments with counsel, medical and dental appointments, etc.).

(B) Delivery to host nation officials under section 3263 of the Act.

(C) Attendance at Initial Proceedings conducted under section 3265 of the Act.

(D) Delivery under the Act to the custody of U.S. civilian law enforcement authorities for removal to the United States.

(iii) A person who requires the continued exercise of custody and transportation to appointments and locations away from the detention facility, including delivery of the person to host nation officials under section 3263 of the Act, may be transferred under the custody of command authorities or those law enforcement officers authorized to make arrests in paragraphs (b)(4)(iv) and (b)(4)(v) of this section. Transportation of a detainee outside an installation shall be coordinated with the host nation's local law enforcement, as appropriate and in accordance with recognized practices.

(iv) Military authorities retain responsibility for the custody and transportation of a person arrested or charged with a violation of the Act who is to be removed from one military installation outside the United States to another military installation outside the United States, including when the person is transferred under the provisions of section 3264(b)(5) of the Act. Unless otherwise agreed to between the sending and receiving commands, it shall be the responsibility of the sending command to make arrangements for the person's transportation and custody during the transport or transfer to the receiving command.

(v) In coordination with appropriate host nation authorities, U. S. civilian law enforcement authorities shall be responsible for taking custody of a person arrested or charged with a violation of the Act and for the removal of that person to the United States for any pretrial or trial proceedings. DoD officials shall consult with the DSS/DOJ to determine which civilian law enforcement authority (i.e., U. S. Marshals Service, Federal Bureau of Investigations, Drug Enforcement Agency, or other Federal agency) shall dispatch an officer to the overseas' detention facility to assume custody of the person for removal to the United States. Until custody of the person is delivered to such U. S. civilian law enforcement authorities, military authorities retain responsibility for the custody and transportation of the person arrested or

charged with a violation of the Act, to include transportation within the host nation to help facilitate the removal of the person to the United States under the Act.

(7) Release From Temporary Detention. When a person subject to the Act has been placed in temporary detention, in the absence of a Criminal Complaint or Indictment pursuant to the Federal Rules of Criminal Procedure, only the Commander who initially ordered detention, or a superior Commander, or a Federal Magistrate Judge, may order the release of the detained person. If a Criminal Complaint or Indictment exists, or if a Federal Magistrate Judge orders the person detained, only a Federal Magistrate Judge may order the release of the person detained. If a Federal Magistrate Judge orders the person temporarily detained to be released from detention, the Commander who ordered detention, or a superior Commander, shall cause the person to be released. When a person is released from detention under this provision, the Commander shall implement, to the extent practicable within the Commander's authority, any conditions on liberty directed in the Federal Magistrate Judge's order. When the commander who independently ordered the person's temporary detention without reliance on a Federal Magistrate Judge's order, or a superior commander, orders a person's release before a Federal Magistrate Judge is assigned to review the matter, the commander may, within the Commander's authority, place reasonable conditions upon the person's release from detention.

(i) A person's failure to obey the conditions placed on his or her release from detention, in addition to subjecting that person to the Commander's, or Federal Magistrate Judge's order to be returned to detention, may consistent with the commander's authority and applicable policy, laws, and regulations, subject the person to potential criminal sanctions, or to administrative procedures leading to a loss of command sponsorship to the foreign country, as well as the possibility of additional disciplinary or adverse action.

(ii) A copy of all orders issued by a Federal Magistrate Judge concerning initial proceedings, detention, conditions on liberty, and removal to the United States shall promptly be provided to the Commander of the Combatant Command concerned and the Commander of the detention facility at which the person is being held in temporary detention.

(8) Delivery of Persons to Host Nation Authorities. (i) Persons arrested may be delivered to the appropriate authorities of the foreign country in which the person is alleged to have violated section 3261(a) of the Act, when:

(A) Authorities of a foreign country request that the person be delivered for trial because the conduct is also a violation of that foreign country's laws, and

(B) Delivery of the person is authorized or required by treaty or another international agreement to which the United States is a party.

(ii) Coast Guard personnel authorized to make arrests pursuant to (B)(4)(v) of this section are also authorized to deliver persons to foreign country authorities, as provided in section 3263 of the Act.

(iii) Section 3263(b) of the Act calls upon the Secretary of Defense, in consultation with the Secretary of State, to determine which officials of a foreign country constitute appropriate authorities to which persons subject to the Act may be delivered. For purposes of the Act, those authorities are the same foreign country law enforcement authorities as are customarily involved in matters involving foreign criminal jurisdiction under an applicable SOFA or other international agreement or arrangement between the United States and the foreign country.

(iv) No action may be taken under this Part with a view toward the prosecution of a person for a violation of the Act if a foreign government, in accordance with jurisdiction

recognized by the United States, has prosecuted or is prosecuting such person for the conduct constituting such offense(s), except upon the approval of the Attorney General or the Deputy Attorney General (or a person acting in either such capacity). See section 3261(b) of the Act. Requests for an exception shall be written and forwarded to the Combatant Commander. The Combatant Commander shall forward the request to the GC, DoD, as representative for the Secretary of Defense, for review and transmittal to the Attorney General of the United States. At the discretion of the GC, DoD, other agencies and organizations (such as the Legal Counsel to the Chairman of the Joint Chiefs of Staff and the Secretary of the Military Department that sponsored the person into the foreign country) shall be informed, as appropriate.

(v) Except for persons to be delivered to a foreign country, and subject to the limitations of section 3264 of the Act and paragraph (e)(5) of this section, persons arrested for conduct in violation of the Act shall, upon the issuance of a removal order by a Federal Magistrate Judge under section 3264(b) of the Act, be delivered, as soon as practicable, to the custody of U. S. civilian law enforcement authorities. See paragraph (b)(6)(iv) of this section.

(c) Representation. (1) Civilian Defense Counsel. (i) Civilian defense counsel representation shall not be at the expense of the Department of Defense or the Military Departments.

(ii) The Act contemplates that a person arrested or charged with a violation of the Act shall be represented by a civilian attorney licensed to practice law in the United States. However, it is also recognized that in several host nations where there has been a long-standing military presence, qualified civilian attorneys (including lawyers who are U. S. citizens) have established law practices in these host nations to assist assigned U. S. personnel and to represent service members in courts-martial, or before host nation courts. With the consent of the person

arrested or charged with a violation of the Act who wishes to remain in the foreign country, these lawyers can provide adequate representation for the limited purpose of any initial proceedings required by the Act. When the person entitled to an attorney or requests counsel, staff judge advocates at such locations should assemble a list of local civilian attorneys for the person's consideration. The list shall contain a disclaimer stating that no endorsement by the United States government or the command is expressed or implied by the presence of an attorney's name on the list.

(A) To the extent practicable, military authorities shall establish procedures by which persons arrested or charged with a violation of the Act may seek the assistance of civilian defense counsel by telephone. Consultation with such civilian counsel shall be in private and protected by the attorney-client privilege.

(B) Civilian defense counsel, at no expense to the Department of Defense, shall be afforded the opportunity to participate personally in any initial proceedings required by the Act that are conducted outside the United States. When civilian defense counsel cannot reasonably arrange to be personally present for such representation, alternative arrangements shall be made for counsel's participation by telephone or by such other means that enables voice communication among the participants.

(C) When at least one participant cannot arrange to meet at the location outside the United States where initial proceedings required by the Act are to be conducted, whenever possible arrangements should be made to conduct the proceedings by video teleconference or similar means. Command video teleconference communication systems should be used for this purpose, if resources permit, and if such systems are not otherwise unavailable due to military mission requirements. When these capabilities are not reasonably available, the proceedings

shall be conducted by telephone or such other means that enables voice communication among the participants. See section 3265 of the Act.

(D) The above provisions regarding the use of teleconference communication systems apply to any detention proceedings that are conducted outside the United States under section 3265(b) of the Act.

(E) Civilian defense counsel practicing in host nations do not gain Department of Defense sponsorship, nor any diplomatic status, as a result of their role as defense counsel. To the extent practicable, notice to this effect shall be provided to the civilian defense counsel when the civilian defense counsel's identity is made known to appropriate military authorities.

(2) Qualified Military Counsel. (i) Counsel representation also includes qualified military counsel that the Judge Advocate General of the Military Department concerned determines is reasonably available for the purpose of providing limited representation at initial proceedings required by the Act and conducted outside the United States. By agreement with the Department of Homeland Security, Coast Guard commands and activities located outside the United States shall seek to establish local agreements with military commands for qualified military counsel from the Military Departments to provide similar limited representation in cases arising within the Coast Guard. The Secretaries of the Military Departments shall establish regulations governing representation by qualified military counsel. These regulations, at a minimum, shall require that the command's Staff Judge Advocate:

(ii) Prepare, update as necessary, and make available to a Federal Magistrate Judge upon request, a list of qualified military counsel who are determined to be available for the purpose of providing limited representation at initial proceedings.

(iii) Ensure that the person arrested or charged under the Act is informed that any qualified military counsel shall be made available only for the limited purpose of representing that person in any initial proceedings that are to be conducted outside the United States, and that such representation does not extend to further legal proceedings that may occur either in a foreign country or the United States. The person arrested or charged shall also be required, in writing, to acknowledge the limited scope of qualified military counsel's representation and therein waive that military counsel's further representation in any subsequent legal proceedings conducted within a foreign country or the United States. The "Acknowledgement of Limited Representation," at appendix A of this Part, may be used for this purpose. A copy of the "Acknowledgement of Limited Representation" shall be provided to the person arrested or charged under the Act, as well as to the qualified military counsel. The original acknowledgment shall be kept on file in the DCO's Office of the Staff Judge Advocate.

(iv) Provide available information that would assist the Federal Magistrate Judge make a determination that qualified civilian counsel are unavailable, and that the person arrested or charged under the Act is unable financially to retain civilian defense counsel, before a qualified military counsel who has been made available is assigned to provide limited representation. *See Analysis and Discussion of Section 3265 (c), Report Accompanying the Act.*

(3) Union Representation. Agency law enforcement officials shall comply with applicable Federal civilian employee rights and entitlements, if any, regarding collective bargaining unit representation under Chapter 71 of title 5, United States Code, during pretrial questioning and temporary detention procedures under this Part.

(4) Military Representative. (i) To assist law enforcement officers and the U. S. Attorney's representative assigned to a case, a judge advocate, legal officer, or civilian attorney-

advisor may be appointed as a military representative to represent the interests of the United States. As appropriate, the military representative may be appointed as a Special Assistant U. S. Attorney. The military representative shall be responsible for assisting the command, law enforcement, and U. S. Attorney representatives during pretrial matters, initial proceedings, and other procedures required by the Act and this Part. These responsibilities include assisting the U. S. Attorney representative determine whether continued detention is warranted, and to provide information to the presiding Federal Magistrate Judge considering the following:

(ii) If there is probable cause to believe that a violation of the Act has been committed and that the person arrested or charged has committed it,

(iii) If the person being temporarily detained should be kept in detention or released from detention, and, if released, whether any conditions practicable and reasonable under the circumstances, should be imposed.

(d) Initial Proceedings. (1) A person arrested for or charged with a violation of the Act may be entitled to an initial appearance before a judge and/or a detention hearing (collectively, the "initial proceedings"). The initial proceedings are intended to meet the requirements of the Federal Rules of Criminal Procedure. The initial proceedings are not required when the person under investigation for violating the Act has not been arrested or temporarily detained by U. S. military authorities, or the person's arrest or temporary detention by U. S. law enforcement authorities occurs after the person ceases to accompany or be employed by the Armed Forces outside the United States, or the arrest or detention takes place within the United States.

(2) The initial proceedings to be conducted pursuant to the Act and this Part shall not be initiated for a person delivered to foreign country authorities and against whom the foreign country is prosecuting or has prosecuted the person for the conduct constituting such offense,

except when the Attorney General or Deputy Attorney General (or a person acting in either such capacity) has approved an exception that would allow for prosecution in the United States may initial proceedings under the Act be conducted, under these circumstances. Requests for approval of such an exception shall be forwarded through the Combatant Commander to the GC, DoD, in accordance with paragraph (b)(8)(iv) of this section.

(3) Initial proceedings required by the Act and this Part shall be conducted, without unnecessary delay. In accordance with the U. S. Supreme Court decision in *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991), the initial appearance shall be conducted within 48 hours of the arrest. The initial proceedings required by the Act shall be conducted when:

(i) The person arrested has not been delivered to foreign country authorities under the provisions of section 3263 of the Act; or

(ii) The foreign country authorities having custody of the person delivers the person to U. S. military authorities without first prosecuting the person for such conduct as an offense under the laws of that foreign country.

(4) A Federal Magistrate Judge shall preside over the initial proceedings that are required by the Act and this Part. The proceedings should be conducted from the United States using video teleconference methods, if practicable, and with all parties to the proceedings participating. In the event that there is no video teleconference capability, or the video teleconference capability is unavailable due to military requirements or operations, the parties to the proceeding shall, at a minimum, be placed in contact by telephone.

(5) Initial proceedings conducted pursuant to the Act and this Part shall include the requirement for the person's initial appearance under the Federal Rules of Criminal Procedure. The Federal Magistrate Judge shall determine whether probable cause exists to believe that an

offense under section 3261(a) of the Act has been committed and that the identified person committed it. This determination is intended to meet the due process requirements to which the person is entitled, as determined by the U. S. Supreme Court in *Gerstein v. Pugh*, 420 U.S. 103 (1975).

(6) Initial proceedings shall also include a detention hearing where required under 18 U.S.C. § 3142 and the Federal Rules of Criminal Procedure. A detention hearing may be required when:

(i) The person arrested or charged with a violation of the Act has been placed in temporary detention and the intent is to request continued detention; or

(ii) The United States seeks to detain a person arrested or charged with a violation of the Act who has not previously been detained.

(7) A detention hearing shall be conducted by a Federal Magistrate Judge. When the person arrested or charged requests, the detention hearing be conducted while the person remains outside the United States, detention hearing shall be conducted by the same Federal Magistrate Judge presiding over the initial proceeding and shall be conducted by telephone or other means that allow for voice communication among the participants, including the person's defense counsel. If the person does not so request, or if the Federal Magistrate Judge so orders, the detention hearing shall be held in the United States after the removal of the person to the United States.

(8) In the event that the Federal Magistrate Judge orders the person's release prior to trial, and further directs the person's presence in the district in which the trial is to take place, the U. S. Attorney Office's representative responsible for prosecuting the case shall inform the military representative and the DCO's Office of the Staff Judge Advocate.

(9) Under circumstances where the person suspected of committing an offense in violation of the Act has never been detained or an initial proceeding conducted, the presumption is that a trial date shall be established at which the defendant would be ordered to appear. Such an order would constitute an order under section 3264(b)(4) of the Act that "otherwise orders the person to be removed." The person's failure to appear as ordered shall be addressed by the Court as with any other failure to comply with a valid court order.

(10) The DCO's Office of the Staff Judge Advocate shall assist in arranging for the conduct of initial proceedings required by the Act and this Part, and shall provide a military representative to assist the U. S. Attorney's Office representative in presenting the information for the Federal Magistrate Judge's review. The military representative shall also provide any administrative assistance the Federal Magistrate Judge requires at the location outside the United States where the proceedings shall be conducted.

(e) Removal Of Persons To The United States Or Other Countries. (1) In accordance with the limitation established by section 3264 of the Act, military authorities shall not remove, to the United States or any other foreign country, a person suspected of violating section 3261(a) of the Act, except when:

(i) The person's removal is to another foreign country in which the person is believed to have committed a violation of section 3261(a) of the Act; or

(ii) The person is to be delivered, upon request, to authorities of a foreign country under section 3263 of the Act and paragraph (b)(8) of this section; or

(iii) The person is arrested or charged with a violation of the Act and the person is entitled to, and does not waive, a preliminary examination under Federal Rule of Criminal Procedure 5.1, in which case the person shall be removed to the U. S. for such examination; or

(iv) The person's removal is ordered by a Federal Magistrate Judge. See paragraph (e)(2) of this section; or

(v) The Secretary of Defense, or the Secretary's designee, directs the person be removed, as provided in section 3264(b)(5) of the Act and paragraph (e)(3) of this section.

(2) Removal By Order Of A Federal Magistrate Judge. Military authorities may remove a person suspected of violating section 3261(a) of the Act to the United States, when:

(i) A Federal Magistrate Judge orders that the person be removed to the United States to be present at a detention hearing; or

(ii) A Federal Magistrate Judge orders the detention of the person prior to trial (*See* section 3142(e) of 18 U.S.C., in which case the person shall be promptly removed to the United States for such detention; or

(iii) A Federal Magistrate Judge otherwise orders the person be removed to the United States.

(3) Removal By Direction of the Secretary of Defense or Designee. The Secretary of Defense, or designee, may order a person's removal from a foreign country within the Combatant Command's geographic area of responsibility when, in his sole discretion, such removal is required by military necessity. See section 3264(b)(5) of the Act. Removal based on military necessity may be authorized in order to take into account any limiting factors that may result from military operations, as well as the capabilities and conditions associated with a specific location.

(i) When the Secretary of Defense, or designee, determines that a person arrested or charged with a violation of the Act should be removed from a foreign country, the person shall be removed to the nearest U. S. military installation outside the United States where the limiting

conditions requiring such a removal no longer apply, and where there are available facilities and adequate resources to temporarily detain the person and conduct the initial proceedings required by the Act and this Part.

(ii) The relocation of a person under this paragraph does not authorize the further removal of the person to the United States, unless that further removal is authorized by an order issued by a Federal Magistrate Judge under paragraph (e)(2) of this section.

(iii) Delegation. The Commander of a Combatant Command, and the Commander's principal assistant, are delegated authority to make the determination, based on the criteria stated in paragraph (e)(3) of this section, that a person arrested or charged with a violation of the Act shall be removed from a foreign country under section 3264(b)(5) of the Act and this Part. Further delegation is authorized, but the delegation of authority is limited to a subordinate commander within the command who is designated as a general court-martial convening authority under the UCMJ.

(4) A person who is removed to the United States under the provisions of the Act and this Part and who is thereafter released from detention, and otherwise at liberty to return to the location outside the United States from which he or she was were removed, shall be subject to any requirements imposed by a Federal District Court of competent jurisdiction.

(5) Where a person has been removed to the United States for a detention hearing or other judicial proceeding and a Federal Magistrate Judge orders the person's release and permits the person to return to the overseas location, the Department of Defense (including the Military Department originally sponsoring the person to be employed or to accompany the Armed Forces outside the United States) shall not be responsible for the expenses associated with the return of

the person to the overseas location, or the person's subsequent return travel to the United States for further court proceedings that may be required.

APPENDIX A TO PART 153 - GUIDELINES

(a) Civilians employed by the Armed Forces outside the United States who commit felony offenses while outside the U. S. are subject to U. S. criminal jurisdiction under the Act, and shall be held accountable for their actions, as appropriate.

(b) Civilians accompanying the Armed Forces outside the United States who commit felony offenses while outside the U. S. are subject to U. S. criminal jurisdiction under the Act, and shall be held accountable for their actions, as appropriate.

(c) Former members of the Armed Forces who commit felony offenses while serving as a member of the Armed Forces outside the U. S., but who ceased to be subject to UCMJ court-martial jurisdiction without having been tried by court-martial for such offenses, are subject to U. S. criminal jurisdiction under the Act and shall be held accountable for their actions, as appropriate.

(d) The procedures of this Part and DoD actions to implement the Act shall comply with applicable Status of Forces Agreements, and other international agreements affecting relationships and activities between the respective host nation countries and the U. S. Armed Forces. These procedures may be employed outside the United States only if the foreign country concerned has been briefed or is otherwise aware of the Act and has not interposed an objection to the application of these procedures. Such awareness may come in various forms, including but not limited to Status of Forces Agreements containing relevant language, Diplomatic Notes or other acknowledgements of briefings, or case-by-case arrangements, agreements, or understandings with appropriate host nation officials.

(e) Consistent with the long-standing policy of maximizing U. S. jurisdiction over its citizens, the Act and this Part provide a mechanism for furthering this objective by closing a jurisdictional gap in U. S. law and thereby permitting the criminal prosecution of covered persons for offenses committed outside the United States. In so doing, the Act and this Part provide, in appropriate cases, an alternative to a host nation's exercise of its criminal jurisdiction should the conduct that violates U. S. law also violate the law of the host nation, as well as a means of prosecuting covered persons for crimes committed in areas in which there is no effective host nation criminal justice system.

(f) In addition to the limitations imposed upon prosecutions by section 3261(b) of the Act, the Act and these procedures should be reserved generally for serious misconduct for which administrative or disciplinary remedies are determined to be inadequate or inappropriate. Because of the practical constraints and limitations on the resources available to bring these cases to successful prosecution in the United States, initiation of action under this Part would not generally be warranted unless serious misconduct were involved.

(g) The procedures set out in the Act and this Part do not apply to cases in which the return of fugitive offenders is sought through extradition and similar proceedings, nor are extradition procedures applicable to cases under the Act.

APPENDIX B TO PART 153 - ACKNOWLEDGMENT OF LIMITED LEGAL
REPRESENTATION (SAMPLE)

1. I, _____, have been named as a suspect or defendant in a matter to which I have been advised is subject to the jurisdiction of the Military Extraterritorial Jurisdiction Act of 2000 (section 3261, et. seq., of title 18, United States Code.); hereinafter referred to as "the Act"). I have also been informed that certain initial proceedings under 18 U.S.C. § 3265 may be required under this Act, for which I am entitled to be represented by legal counsel.

2. I acknowledge and understand that the appointment of military counsel for the limited purpose of legal representation in proceedings conducted pursuant to the Act is dependent upon my being unable to retain civilian defense counsel representation for such proceedings, due to my indigent status, and that qualified military defense counsel has been made available.

3. Pursuant to the Act, _____, a Federal Magistrate Judge, has issued the attached Order and has directed that that military counsel be made available:

____ For the limited purpose of representing me at an initial proceeding to be conducted outside the United States pursuant to 18 U.S.C. § 3265,

____ For the limited purpose of representing me in an initial detention hearing to be conducted outside the United States pursuant to 18 U.S.C. § 3265(b),

4. _____, military counsel, has been made available in accordance with Department of Defense Instruction 5525.bb, and as directed by the attached Order of a Federal Magistrate Judge.

5. I (do) (do not) wish to be represented by _____, military counsel
_____ (initials).

6. I understand that the legal representation of _____, military counsel, is limited to:

a. Representation at the initial proceedings conducted outside the United States pursuant to 18 U.S.C. § 3265. _____ (Initials)

b. The initial detention hearing to be conducted outside the United States pursuant to the Military Extraterritorial Jurisdiction Act of 2000 (18 U.S.C. § 3261, et. seq.). _____
(Initials)

c. Other proceedings (Specify): _____ (Initials)

Signature of Person To Be Represented By Military Counsel

Signature of Witness*

Attachment:

Federal Magistrate Judge Order

(*Note: The witness must be a person other than the defense counsel to be made available for this limited legal representation.)