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**Before the**

**SENATE COMMITTEE ON FOREIGN RELATIONS**

**“Closing Legal Loopholes: Justice for Americans Sexually Assaulted in  
Iraq and Afghanistan”**

**Wednesday, April 9, 2008**

**9:30 a.m.**

**SD-419 in the Dirksen Senate Office Building  
Washington, DC**

Good Morning Chairman Nelson and members of the Subcommittee.

I am pleased to be here today to discuss the legal framework under which the Department of Defense supports U.S. criminal investigations and prosecutions of serious crimes committed overseas.

The Department of Defense (DoD) has been instrumental in supporting past legislation and Federal district court prosecution of DoD civilian employees, DoD contractors, and their dependents who commit felony-level crimes when serving with or accompanying our Armed Forces outside the United States. This effort has been in response to civilian and military appellate court decisions that, approximately 50 years ago, precluded military criminal prosecutions of civilians under the Uniform Code of Military Justice (UCMJ) during peacetime, and created a U.S. criminal jurisdiction “gap” overseas that prevented these persons being held accountable for the crimes they committed. To explain, the jurisdictional “gap” to which I refer occurs when a civilian serving with or accompanying the Armed Forces overseas commits what would be a U.S. federal offense, but that particular offense does not have an extraterritorial reach that would enable that person to be subject to U.S. federal criminal jurisdiction, and the host nation for whatever reason does not exercise its criminal jurisdiction, and the military’s UCMJ jurisdiction does not apply. The result is that the alleged offender’s criminal actions falls into a jurisdictional “gap” wherein the offender is not held accountable for the offenses committed.

I first became involved in the effort to “fill the gap” in 1996 when appointed to be a member of the DoD/DoJ Advisory Committee on Criminal Law Jurisdiction over Civilians Accompanying the Armed Forces in Time of Armed Conflict, as called for by Section 1151 of the National Defense Authorization Act of 1996 (Public Law 104-106, February 10, 1996). In response to the Advisory Committee’s recommendation that U.S. Federal district court jurisdiction be extended to close this jurisdictional gap, the Departments of Defense and Justice worked closely with the Congress on legislation that is now commonly-referred to as MEJA (the Military Extraterritorial Jurisdiction Act of 2000; 18 U.S.C. § 3261 et seq.), which applies to felony-level offenses committed by persons employed by or accompanying the Armed Forces outside the United States. The jurisdiction applies worldwide, not just within Iraq or Afghanistan. At that time, it was generally acknowledged that the prosecution of these overseas offenses in

U.S. Federal district court would be logistically difficult and legally challenging. Recognizing this, it was then anticipated that annually only approximately a half-dozen of these cases would involve MEJA actions. MEJA first required DoD to develop regulations implementing MEJA procedures in consultation with the Attorney General and Secretary of State, which was then to be followed by a six-month review and comment period afforded to the Judiciary Committees of the Senate and House of Representatives. The events of September 11, 2001, and the various U.S. responses to that terrorist attack, interrupted that development process and postponed the inter-departmental effort to establish proposed MEJA implementing procedures.

In the interim, the Congress enacted additional U.S. criminal jurisdiction “gap-filling” measures. U.S. Federal district court jurisdiction was further extended in 2001 by the PATRIOT ACT amendment to the definition of “Special Maritime and Territorial Jurisdiction of the United States,” but in doing so excluded those persons who would be subject to MEJA jurisdiction. Section 1088 of the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005 (Public Law 108-375, October 28, 2004), amended MEJA and extended its jurisdiction to cover employees and contractors of other U.S. Government agencies and provisional authorities outside the United States, but only to the extent such employment related to supporting the mission of the Department of Defense overseas. The Defense Department supports appropriate legislative efforts to provide greater accountability for unlawful acts committed in places like Iraq where we have ongoing military operations. Throughout, MEJA jurisdiction does not apply to persons who are nationals or ordinarily residents of the host nation in which the crime is committed. The DoD regulations implementing the MEJA procedures were drafted in consultation with the Departments of Justice and State, review by the Judiciary Committees was afforded, and the regulations became effective on March 3, 2005, in the form of a Department of Defense Instruction and a corresponding rule in the Code of Federal Regulations.<sup>1</sup>

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<sup>1</sup> Department of Defense Instruction 5525.11, “Criminal Jurisdiction Over Civilians Employed By or Accompanying the Armed Forces Outside the United States, Certain Service Members, and Former Service Members,” March 3, 2005; Part 153 of title 32, Code of Federal Regulations, “Criminal Jurisdiction Over Civilians Employed by or Accompanying the Armed Forces Outside the United States, Certain Service Members, and Former Service Members,” effective March 3, 2005.

Section 552 of the John Warner National Defense Authorization Act for Fiscal Year 2007 (Public Law 109-364, October 17, 2006) amended military jurisdiction under Article 2, UCMJ (10 U.S.C. § 802) and extended UCMJ jurisdiction, during declared war or a contingency operation, to persons serving with or accompanying the Armed Forces in the field. In January 2007, the General Counsel of the Department of Defense referred the amendment to the Joint Service Committee on Military Justice for review regarding the amendment's potential impact on military justice practice and procedures. The General Counsel thereafter submitted for comment and coordination by the Military Departments, Combatant Commands, and Department of Justice various recommendations for managing this extraordinary jurisdiction over civilians. On March 10, 2008, the Secretary of Defense established procedures and issued guidance to be applied when addressing UCMJ jurisdiction over civilians under Article 2, UCMJ.<sup>2</sup>

It is these statutory authorities and implementing procedures that I am today prepared to discuss with your subcommittee. I understand that the Assistant Inspector General for Communications and Congressional Liaison for the Department of Defense, in response to this subcommittee's request, recently provided a summary of DoD IG statistical information regarding the Military Criminal Investigative Organizations' collective investigations of sexual assault incidents (and resultant dispositions) associated with Operation Iraqi Freedom and Operation Enduring Freedom, and has advised that an evaluation has begun regarding the DoD response to sexual assault in these combat areas. Additional questions or requests for a further explanation of these investigative statistics should be addressed to the Office of the Inspector General.

The Department of Defense works closely with the Department of Justice whenever a MEJA case, and most-recently a potential UCMJ case, involves DOD civilians and DoD contractor personnel committing offenses overseas on a worldwide basis, including those committed in Iraq and Afghanistan. The Department of Defense has established procedures requiring that notice of such cases be provided to the Department of Justice, that DoD consult with DoJ regarding appropriate jurisdiction and, to the extent practicable, provide support to DoJ during ongoing investigations and

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<sup>2</sup> Secretary of Defense Memorandum, "UCMJ Jurisdiction Over DoD Civilian Employees, DoD Contractor Personnel, and Other Persons Serving With or Accompanying the Armed Forces Overseas During Declared War and in Contingency Operations," March 10, 2008.

any subsequent prosecutions. The Secretary of Defense memorandum of March 10, 2008, along with the Deputy Secretary of Defense memorandum of September 25, 2007,<sup>3</sup> emphasize that commanders have UCMJ authority to use law enforcement and investigative resources to respond to and, at least preliminarily, address crimes that are committed within their geographic areas of responsibility. The Military Criminal Investigative Organizations generally provide criminal investigative response to reports of ongoing serious offenses or reports of past serious offenses, including sexual assaults, in areas that are under the purview of the military commander.

Cases involving potential MEJA jurisdiction or involving civilians under Article 2, UCMJ, jurisdiction are to be expeditiously reported up the chain of command within the combatant command to the General Counsel of the Department of Defense who then notifies and refers such cases to the Department of Justice for review. As the General Counsel's representative for these MEJA and UCMJ cases, I work closely with the Domestic Security Section (DSS) of the Criminal Division, DoJ. All of the cases that have been brought to my attention (worldwide and involving a variety of offenses) have been referred to DoJ/DSS.

Case notifications and referrals that took weeks or months to accomplish during the early years of MEJA procedures are now taking only days to accomplish because investigators and judge advocates are learning what information is required to make a MEJA jurisdictional determination and are becoming familiar with the procedures involved. There has been one DoD contractor case involving aggravated assault with a weapon that has resulted in court-martial charges pursuant to Article 2, UCMJ. That case is pending and it would be inappropriate to discuss further details of that case at this time.

The acquired investigative information is evaluated to determine the nature of any offenses committed and those persons who may have committed the offenses. This investigative information is then evaluated according to the nature of the alleged offense, the alleged date of the offense, and the precise category of alleged offender to determine which, if any, of this patchwork of "gap-filling" statutes apply. Ultimately, this investigative information and our established procedures help determine whether the

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<sup>3</sup> Deputy Secretary of Defense Memorandum, "Management of DoD Contractors and Contractor Personnel Accompanying U. S. Armed Forces in Contingency Operations Outside the United States," September 25, 2007.

alleged offender is subject to the jurisdiction, and might be held accountable, under host-nation law, U.S. federal jurisdiction, or UCMJ jurisdiction. With increased familiarity regarding the applicability of these various extraterritorial laws and the intra- and inter-departmental implementing procedures, along with the practical experience of handling these extraordinary cases, the process continues to improve and accountability is enhanced. Toward that end, I have presented numerous briefings regarding these laws and procedures to judge advocates, DoD civilian personnel organizations, contractor associations and organizations, DoD acquisition and Military Criminal Investigative Organization conferences and seminars, and the legal and acquisition communities of nearly all the Combatant Commands in which these cases might occur within their overseas areas of responsibility. DoJ representatives have been making similar presentations to military judge advocates and criminal investigators.

The Department of Defense has required notice and training of MEJA jurisdiction to persons subject to deployment to overseas locations and again upon their arrival at the various overseas locations. DoD regulations advise that DoD contractor personnel at those overseas locations should be invited to attend the military's briefings and training sessions. In addition, Defense Federal Acquisition Regulations require contractors to provide specific notice about the applicability of MEJA to their contractor employees while overseas and the Department of Defense will, along with the basic requirement that contractor personnel comply with all applicable laws, require notice and training of contractor personnel on the prohibitions and potential consequences of committing sexual assaults and sexual harassment. Initiatives are being made to ensure that military personnel, civilian employees and contractor employees overseas know how and to whom to report sexual assaults that may occur to them or come to their attention at their overseas location. Multi-National Force-Iraq (MNF-I) now utilizes posters and instructions posted in all high-traffic areas, such as mail rooms and post exchanges, to provide the information needed. Delays in reporting sexual assaults to appropriate criminal investigators, even if only a matter of days or sometimes hours, can adversely affect the ability to secure and preserve crime scene evidence, identify possible witnesses, and obtain forensic evidence critical to the case.

The Department of Defense has engaged in a concerted effort to combat sexual assaults within our stateside and overseas military communities. Beginning in early 2005, over a dozen policy memorandums

were issued that addressed sexual assault issues and care for victims of sexual assault. The Department established a Sexual Assault Prevention and Response Office to further these policy issues and, by June 2006, issued a DoD Directive and DoD Instruction on the Sexual Assault and Prevention and Response Program. The program includes a network of Sexual Assault and Response Coordinators and Sexual Assault Victim Advocates who assist victims of sexual assault. MNF-I has revised its Command Policy Regulation in accord with the Army Regulation issued on March 18, 2008, in order to reinforce its emphasis on sexual harassment prevention. That chapter revision mandates Sexual Assault Prevention and Response representatives and other activities be utilized to assist victims of sexual assault.

Thank you for the opportunity to address these issues today and I look forward to answering any questions the Committee may have.