

## § 153.5

(4) Failure to provide notice or orientation training pursuant to paragraphs (f)(2) and (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

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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).

(iv) Civilian employees, contractors (including subcontractors at any tier), and civilian employees of a contractor (or subcontractor at any tier) of any other Federal agency, or any provisional authority, to the extent such employment relates to supporting the mission of the Department of Defense overseas.

(6) *Civilians Accompanying the Armed Forces.* Subject to the requirements of paragraph (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) An active duty service member.

(B) A member 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) A former service member who is employed by or is accompanying the Armed Forces outside the United States.

(D) A civilian employee of the Department of Defense (including non-appropriated fund instrumentalities of the Department of Defense).

(E) A contractor (including a subcontractor at any tier) of the Department of Defense.

(F) An employee of a contractor (including a subcontractor at any tier) of the Department of Defense.

(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) of this section.

(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 as a member of the Armed Forces, a civilian employed by the Armed Forces outside the United States, or accompanying the Armed Forces outside the United States.

(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 non-federal agency, organization, business, or entity (and thereby can not be said to be employed by or accompanying the Armed Forces within the definitions of those terms as established by the Act, as modified) 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 10 U.S.C. Chapter 47, 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 18 U.S.C. Chapter 212, Sec-

tions 3261-3267, 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 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 restric-

tions 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 when a serious risk is be-

lieved to exist that the person shall flee and not appear, as required, for any pretrial investigation, pretrial hearing or trial proceedings, or 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 paragraph (b)(2) of this section.

(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 General Counsel of the Department of Defense, as the representative of the Secretary of Defense, of all such detentions. At the discretion of the General Counsel of the Department of Defense, 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 de-

tention, 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.

(i) Coast Guard personnel authorized to make arrests pursuant to paragraph (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 General Counsel of the Department of Defense, as representative for the Secretary of Defense, for review and transmittal to the Attorney General of the United States. At the discretion of the General Counsel of the Department of Defense, 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 B 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 pro-

ceedings 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 Commander of the Combatant Command to the General Counsel of the Department of Defense, 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 18 U.S.C. 3142(e)) 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 de-

tain 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 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