Statement by Geoffrey S. Corn

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I would first like to thank the Committee for providing me the opportunity to share my perspective on the importance of enacting the Civilian Extraterritorial Jurisdiction Act (CEJA).

As a soldier and military staff officer I was taught to express my "bottom-line up front," and my bottom-line is that Congress should enact this statute. Indeed, I believe the expansion of federal civilian jurisdiction over contractors associated with the U.S. government is not only consistent with the national security interests of the nation, but is also clearly in the best interest of the U.S. armed forces. From a national security perspective, CEJA will contribute to the deterrence of contractor misconduct by placing contractors on clear notice that such misconduct is subject to federal criminal sanction, and will reduce the risk that the credibility of U.S. operations will be compromised by a perception of impunity for contractor misconduct. From a military perspective, CEJA will reduce the possibility that the military will be called upon to assert jurisdiction over contractors because of a lack of viable alternatives to address contractor misconduct.

Civilians – both civil servants and contractors – are unquestionably essential to executing the broad range of missions related to achieving the national security objective of the nation. While it is not a new phenomenon to rely on civilians to support external efforts to achieve these objectives, the numbers of civilians and range of missions performed is unprecedented in our history. Indeed, the changing nature of the strategic framework associated with executing our national security strategy will continue to push civilians into a range of functions not seen previously. In the era of conventional military threats, we rightly anticipated that employment of civilians abroad would be predominately associated with the armed forces. Unlike prior eras, the increasing imperative of inter-agency participation in the execution of national security strategy has resulted in robust presence of civilians operating in support of both the Department of Defense and other federal agencies.

This trend, coupled with the post-cold war emphasis on increasing the "tooth to tail" ratio of military deployments, has produced the inevitable reality of civilian misconduct in relation to these missions. Prior to 1970, trial by courts-martial served as the primary mechanism for responding to such misconduct. This was the result of two influences. First, civilians supporting U.S. national security objectives normally operated in association with the armed forces. Second, the exercise of military jurisdiction over such civilians was considered consistent with both the tradition of military law and the Constitution. This latter influence was fundamentally undermined when the Court of Military Appeals (the predecessor to the Court of Appeals for the Armed Forces) decided the case of *United States v. Averette* (19 C.M.A. 363, 41 C.M.R. 363

(1970)). That decision held that the jurisdiction over civilians accompanying the armed forces established by Congress in the Uniform Code of Military Justice (UCMJ) applied only during periods of formally declared war. As a result of this opinion (and the assumption that a formally declared war was a highly unlikely event), an entire generation of Judge Advocates learned that it was almost inconceivable that civilians would ever again be subject to military jurisdiction.

The impunity for civilian misconduct created by this jurisdictional void became apparent as the U.S. military focused increasingly on expeditionary operations in the decade following the end of the Cold War. In response, Congress sought to fill the void by enacting the Military Extraterritorial Jurisdiction Act (MEJA). This law reflected a clear preference for Article III civilian trial for civilians who commit misconduct when operating in association with the armed forces outside the United States, a preference perceived as logical by the military. However, a perception of contractor impunity arose during the decade following MEJA's enactment as the result of jurisdictional and implementation limitations of the statute, with certain high profile cases of civilian contractor misconduct in Iraq and Afghanistan drawing particular attention. In an apparent response to this perception, in 2006 Congress amended the UCMJ to resurrect military jurisdiction over civilians accompanying the armed forces in the field. By explicitly including contingency operations within the scope of that jurisdiction, Congress overrode Averette's "formally declared war" limitation.

This resurrection took military legal experts by surprise. Having come of age in the post Averette era, many of these experts assumed that the Constitution barred asserting military jurisdiction over civilians beyond the limited context of war crimes. This assumption was informed by both Averette and *Reid v. Covert* (354 U.S. 1 (1957)) – a seminal Supreme Court decision related to the application of Bill of Rights protections to U.S. citizens outside the United States. Ried's core holding was that trying spouses of U.S. service-members stationed abroad by courts-martial (even when authorized by international agreement) for capital offenses deprived these citizens of the protections of the Fifth and Sixth Amendment. However, Ried struck down the assertion of military jurisdiction over U.S. civilians only in locations with a mature presence of U.S. forces (like the United Kingdom, Japan, Germany, and other NATO allied nations); it did not address the assertion of such jurisdiction over civilians accompanying the armed forces in the field. In fact, the Court specifically excluded such jurisdiction from its decision.

While Averette relied heavily on Reid, it is clear that the resurrection of military jurisdiction over civilians accompanying the armed forces during contingency operations was not clearly unconstitutional. Nonetheless, as I have written in the attached law review article, this resurrection does raise significant constitutional questions. If the exercise of military jurisdiction over civilians is understood as a measure of last resort – as I believe it must be based on our historic aversion to the intrusion of military authority into the realm of civil affairs – then the enactment of federal criminal statutes like MEJA and the War Crimes Act (and the overall increases in long-arm federal criminal jurisdiction) represents a fundamental change in circumstances from the pre-Averette era. Prior to this evolution of federal criminal law, military

jurisdiction provided near exclusive criminal jurisdiction over civilians accompanying the armed forces in the field. It is therefore unsurprising that since the inception of the nation, military courts have been vested with such jurisdiction. Today, however, this is no longer the case. As a result, the imprimatur of necessity no longer provides a compelling justification for subjecting civilians to military criminal jurisdiction.

This is not to suggest that I consider courts-martial somehow defective. Indeed, it is my belief that trial by court-martial is fundamentally fair, and in many respects more protective of an accused's right to a fair trial than Article III trials. However, courts-martial process simply does not afford the full panoply of rights to a criminal defendant provided by the Constitution. Most notably, trial by courts-martial does not require Grand Jury indictment, life tenured judges, or a jury composed of the defendant's peers. While these differences have historically been considered acceptable for members of the armed forces subject to the special criminal justice system of the military, it is difficult to justify subjecting civilians to criminal trials absent these protections unless doing so is a genuine measure of last resort. In my opinion, most civilians would simply not understand why a civilian would be tried in such a unique criminal system, being judged not by a jury of his or her peers but instead by a panel of military officers.

It is because of this I believe it was critically important to enact MEJA. However, MEJA was based on an assumption that has become increasingly stale: that civilians present in areas of military operations will be connected to the military by employment or contract. Civilians supporting the complex missions of today, although often operating in close proximity with the military, are routinely connected to other government agencies. The employment or contractual relationship between these civilians and the U.S. government places them outside the scope of MEJA jurisdiction, producing the same type of jurisdictional gap MEJA sought to close. CEJA is therefore a necessary complement to MEJA. Its enactment will ensure all civilians present in operational areas as the result of an employment or contractual relationship with the United States (other than host nation nationals) are subject to federal civilian criminal jurisdiction. As a result, it will reduce the likelihood that the military will be called upon to exercise criminal jurisdiction over incidents of misconduct committed by these civilians, thereby averting the complex policy and constitutional issues resulting trying civilians by courts-martial.

I also support the enumeration of offenses in CEJA. While MEJA employs the alternate method of incorporating Title 18 offenses, I believe the enumeration approach provides two important benefits. First, it provides clear notice of the scope of criminal proscription imposed on civilians subject to CEJA. Second, it limits the type of offenses that might result in a CEJA prosecution to serious crimes. This latter benefit also reveals another concern with subjecting civilians to UCMJ jurisdiction. When Congress amended the UCMJ to resurrect military jurisdiction over civilians accompanying the force, it in no way limited the offenses applicable to civilians. As a result, that amendment subjects civilians to every offense in the military code – a range of offenses that extends beyond serious common law crimes and includes unique military offenses. While I believe it is unlikely that a military commander would pursue charges against a civilian

for unique military offenses (such as disobedience of orders, absence without official leave, or dereliction of duty), CEJA would substantially reduce even the risk of such an odd assertion of military jurisdiction.

There are other situations where CEJA, like MEJA, could prove quite beneficial, most notably for addressing acts of misconduct by civilian employees and family members serving abroad in more stable environments. Military experience over the decades indicates that there are times when these civilians engage in misconduct that the host nation is either not interested in, or does not have valid jurisdiction to address. CEJA would provide a means for prosecuting acts of serious misconduct committed by civilians associated with U.S. government agencies in other countries. In fact, the ability to exercise such jurisdiction might result in the host nation foregoing prosecution at the request of the U.S. government even when they initially pursue such cases, allowing the U.S. civilian to be prosecuted in the United States instead of a foreign jurisdiction.

Ultimately, I can see no good reason not to enact CEJA. While I don't think it is possible to guarantee that resort to military jurisdiction for civilian misconduct will never be necessary and appropriate, I believe enhancing the scope of federal civilian jurisdiction over civilians abroad is an important means of limiting such resort to situations of genuine necessity. MEJA was the first step in achieving that goal; CEJA will be the next. The ever increasing reliance on civilian support to U.S. government functions abroad necessitates an ability to ensure accountability for the small minority of civilians who engage in misconduct. Unless federal civilian criminal jurisdiction is comprehensive, pressure to resort to the broad grant of military jurisdiction over civilians resurrected by the 2006 amendment to the UCMJ is almost inevitable. It is therefore in the interests of the nation, the military, and potential civilian defendants to enact CEJA.