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Prepared Testimony Before
The Senate Committee on the Judiciary

For a Hearing Entitled

"Holding Criminals Accountable:
Extending Criminal Jurisdiction to Government Contractors and Employees Abroad"

May 25, 2011

Chairman Leahy, Ranking Member Grassley, and distinguished members of the Committee, thank you for giving me the opportunity to testify on this important subject.[1] The United States is conducting military operations in two foreign theaters of combat and maintains diplomatic outposts throughout the world. Holding accountable representatives of the United States—whether its employees or its contractors—who engage in serious misconduct abroad is thus a recurring and complex matter. Current federal law arguably does not provide authority to prosecute some notable incidents of potential misconduct overseas by contractors or employees unassociated with the Department of Defense. The Congress and the Executive Branch have struggled with the appropriate legislative approach to this dilemma through at least two Administrations.

Addressing this problem, however, requires exceptional caution and attention to detail to protect ongoing and future intelligence and other national security operations. Legislation that extends outside the United States a wide range of federal criminal laws to employees and

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[1] The views expressed herein are my own and do not reflect those of Gibson, Dunn & Crutcher LLP.

contractors *of all federal government agencies*, including our intelligence agencies, without careful review and appropriate exceptions, would present a particular risk to national security.

I. Current Law and Foreign Policy Challenges

Current law provides mechanisms for punishing misconduct by certain U.S. government employees and contractors that occurs outside the United States. The Uniform Code of Military Justice ("UCMJ") establishes prohibitions and obligations that apply outside the United States,[2] the violation of which can result in sanctions similar to the criminal justice system.[3] These regulations were crafted with the realities of foreign armed conflict in mind. The UCMJ applies not only to members of the active and reserve units of our armed forces, but also to persons (such as contractors and civilian employees) who serve with or accompany our armed forces overseas.[4]

In 2000, the Congress passed and the President signed the Military Extraterritorial Jurisdiction Act ("MEJA").[5] That Act, as amended in 2004, applies a discrete set of federal criminal felonies overseas to members of the military and certain individuals who support or accompany the armed forces.[6] Conducting military operations under multiple and newly applicable federal criminal prohibitions ordinarily would present challenges. But MEJA sought

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[2] 10 U.S.C. §§ 805, 877–934.

[3] 10 U.S.C. §§ 855–858b.

[4] 10 U.S.C. § 802(a).

[5] Pub. L. No. 106-523, 114 Stat. 2488 (2000) (codified at 18 U.S.C. §§ 3261 *et seq.*).

[6] 18 U.S.C. § 3261(a).

to avoid these difficulties by ensuring the primacy, in most circumstances, of the UCMJ and its long history of regulating the conduct of armed conflicts.[7]

These two laws, however, stop short of U.S. government employees and contractors not closely associated with the Department of Defense. For example, our diplomats abroad or the security personnel who support the Department of State would not automatically fall under MEJA or the UCMJ.[8]

This condition can raise foreign policy challenges, particularly in foreign countries where U.S. troops are deployed for combat operations. Those operations are often conducted under a status of forces agreement concluded with the governments of those countries, should a recognized government exist. In those agreements, the United States customarily seeks immunity for all of its employees and contractors—whether associated with the military or not—from the criminal procedures of the foreign state. This immunity is important, as the nature of combat operations can inflame passions that may lead to foreign government prosecutions unwarranted by the evidence. One argument the United States makes in negotiations for this immunity is the existence of mechanisms for the United States to address the misconduct of our own troops, employees, and contractors. This argument can be unpersuasive, however, when relevant law does not reach certain notable groups of U.S. government employees and contractors in the theater. The United States faced this challenge in negotiating the 2008 status

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[7] 18 U.S.C. § 3261(d).

[8] *See* 18 U.S.C. §§ 3261(a), 3267(1)–(2); 10 U.S.C. § 802(a).

of forces agreement with the Government of Iraq and ultimately accepted a narrowed immunity for its employees and contractors from the Iraqi criminal justice system.[9]

II. Previous Efforts To Extend Federal Criminal Law Overseas to U.S. Government Employees and Contractors Unassociated with the Department of Defense

Several Congressmen and Senators introduced versions of legislation in the 110th Congress seeking to apply certain federal criminal laws overseas to a wider set of U.S. government employees and contractors. A form of such legislation advanced furthest in the House of Representatives—H.R. 2740, entitled the "MEJA Expansion and Enforcement Act."[10] That bill sought to expand MEJA to employees and contractors *of any U.S. government agency* acting in an area, such as Iraq or Afghanistan, where the U.S. military is "conducting a contingency operation."[11] The bill tracked MEJA in the substantive scope of applicable offenses, seeking to criminalize conduct that would have been a federal felony "if the conduct had been engaged in within the special maritime and territorial jurisdiction of the United States."[12]

The Administration of President George W. Bush raised serious concerns about this bill. A Statement of Administration Policy issued on October 3, 2007, explained that "[t]he bill would have unintended and intolerable consequences for crucial and necessary national security

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9 *Compare* Coalition Provisional Authority Order Number 17 (June 27, 2004), *with* Agreement Between the United States of America and the Republic of Iraq on Withdrawal of United States Forces from Iraq and the Organization of Their Activities During Their Temporary Presence in Iraq (Nov. 17, 2008).

10 H.R. 2740, 110th Cong. (2007) (as introduced in House, June 15, 2007).

11 *Id.* § 2(a)(1).

12 18 U.S.C. § 3261(a); *see* H.R. 2740, *supra* note 10, § 2(a)(1).

activities and operations."[13] Recognizing this dilemma, the version of H.R. 2740 ultimately passed by the House of Representatives included an attempt to carve from its coverage intelligence operations.[14] The Administration and Senate staff subsequently discussed potential text for a carve-out or exception to protect national security and intelligence operations. Never reaching agreement, the 110th Congress adjourned without presenting to the President legislation on this subject.

III. Unless Carefully Drafted, Expanding Federal Criminal Law to the Employees and Contractors of All U.S. Government Agencies Will Threaten Important National Security and Intelligence Operations

Any legislative measure to expand federal criminal law abroad to all government employees and contractors must carefully address the effect on national security operations.

I have reviewed S. 2979, entitled the "Civilian Extraterritorial Jurisdiction Act of 2010." It contains many of the same concerning features as H.R. 2740 introduced in the 110th Congress. Certainly, S. 2979 would authorize the prosecution of future misconduct by, for example, private security contractors protecting State Department diplomats in Iraq. At the same time, however, S. 2979 would apply wide swaths of federal criminal law to employees and contractors of our intelligence agencies and would revolutionize the carefully drawn set of legal restrictions that governs the activities of those agencies. This was the same problem presented by early drafts of H.R. 2740 in the 110th Congress. Importantly, S. 2979 lacks an exception for or any method of

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[13] Statement of Administration Policy: H.R. 2740—MEJA Expansion and Enforcement Act of 2007, American Presidency Project (Oct. 3, 2007), *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=75852#ixzz1NBl5xagQ (last visited on May 24, 2011).

[14] H.R. 2740, 110th Cong. § 6 (2007) (as passed by House, Oct. 4, 2007).

protecting crucial intelligence and national security operations from prosecution.[15] Three points are important here.

First, in part because of the effect on overseas national security or intelligence operations, the Congress has been careful explicitly to apply only a very limited set of criminal offenses to conduct occurring wholly outside the territory of the United States. The limited set of offenses with relevant extraterritorial effect include the anti-torture statute,[16] the War Crimes Act,[17] certain anti-human trafficking statutes,[18] the treason statute,[19] and the anti-genocide statute.[20]

The Congress should continue its practice of giving wholly extraterritorial effect to criminal statutes only after careful and informed study of their effects on national security and intelligence operations. Most notably in this regard, legislation proposed to cover all U.S. government employees and contractors, including those of our intelligence agencies, has tended to incorporate laws enacted to govern the Special Maritime and Territorial Jurisdiction of the

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15 In addition, the geographic scope of the threat to intelligence operations presented by S. 2979 is broader because it would apply *worldwide*. H.R. 2740, by contrast, would have applied only in and around areas of a U.S. military contingency operation, such as Iraq and Afghanistan.

16 18 U.S.C. § 2340A.

17 18 U.S.C. § 2441.

18 18 U.S.C. §§ 3271-72.

19 18 U.S.C. § 2381.

20 18 U.S.C. § 1091.

United States ("SMTJ").[21] The SMTJ includes areas where the federal Government would perform the functions of a primary sovereign, without the assistance of a State government, such as foreign military bases and embassies or aboard U.S. registered vessels. Federal criminal offenses for the SMTJ supply the type of public order crimes that residents of a city in the United States would expect their State and local governments to enact, including prohibitions on burglary, robbery, manslaughter, and assault.[22]

The inclusion of SMTJ offenses is particularly significant given the novelty of their application to intelligence operations. The current law of the Military Extraterritorial Jurisdiction Act, at first glance, also applies SMTJ offenses to members of the military while outside the United States.[23] But MEJA protects our armed forces when conducting military operations abroad by not displacing or supplementing the UCMJ, with limited exceptions.[24] The UCMJ has a long tradition of responsibly governing what can be violent military activities, and our armed forces can take comfort that the UCMJ ordinarily will not punish them for doing their jobs. Also when applied in areas of exclusive federal jurisdiction, SMTJ crimes as customary public order offenses draw on extensive bodies of law protecting activities similar to those of domestic law enforcement. But there is no such custom protecting intelligence activities abroad from general public order offenses, because they have never applied outside the United States.

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[21] 18 U.S.C. § 7.

[22] 18 U.S.C. §§ 2111, 1112, 113.

[23] 18 U.S.C. § 3261(a).

[24] 18 U.S.C. § 3261(d).

Legislation extending SMTJ offenses to all government employees throughout the world thus places intelligence activities at particular risk.

It is difficult to address in an open hearing how these offenses, if applicable to all federal government employees and contractors while outside the United States, might affect intelligence or other national security operations. For purposes of this setting, I strongly agree with Assistant Attorney General Breuer that the Congress should explicitly except national security and intelligence activities from the contemplated expansion of criminal law abroad. Legislation with an appropriately strong exception would prevent interference with vital national security and intelligence operations, while authorizing future prosecutions, if appropriate, in circumstances similar to recent difficult cases. Alleged grave misconduct by diplomatic security personnel, and civilian employees and contractors' outrageous and embarrassing offenses against the civilians of foreign countries, often committed on personal time while stationed abroad, come to mind. Any restrictions on intelligence activities should not be a byproduct of addressing an unrelated problem.

At a minimum, any legislative effort in this area that lacks a broad national security exception must not proceed without a fully informed evaluation of how various criminal laws, never before applied abroad, would affect current and potential national security and intelligence operations. In such circumstances, committees of the Congress should hold closed hearings where they can address these issues with the benefit of classified information. The congressional intelligence committees, given their regular responsibility in setting rules for the conduct of intelligence operations and overseeing their execution, should have an important role in any such inquiry.

Second, the prospect of prosecutorial discretion would not solve the national security threat identified above. Some might say that the Department of Justice would not prosecute intelligence officers for carrying out authorized overseas operations, even if those officers transgressed one of the criminal statutes the proposed legislation would make applicable. In my experience, however, intelligence officers and their supervisors are generally unwilling to undertake an operation if a U.S. criminal statute potentially prohibits it. Nor should they be expected to rely for their continued liberty on the exercise of prosecutorial discretion after the fact. Without protection in statute, broad expansions of criminal laws abroad, leaving unanswered questions, may chill vital national security and intelligence activities.

Third, if legislation were to apply a wide selection of criminal offenses to intelligence and other national security activities, we should expect further strain on the Classified Information Procedures Act ("CIPA").[25] Several members of this Committee have noted the need for CIPA reform.[26] CIPA was enacted in 1980 to combat the threat of graymail in espionage prosecutions.[27] To that end, CIPA established elaborate, information-forcing procedures that require defendants to give notice before disclosing any classified information in open court.[28] As this Committee made clear when considering CIPA, the principal purpose of these procedures was to make manageable cases against U.S. government employees who

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25 18 U.S.C. app. 3 §§ 1–16.

26 *See*, *e.g.*, Classified Information Procedures Reform Act, S. 1726, 111th Cong. §§ 201-05 (2009) (introduced by Sens. Kyl and Cornyn, Sept. 29, 2009).

27 S. Rep. No. 96-456, *Classified Information Procedures Act* (June 18, 1980), *reprinted in* 1980 U.S.C.C.A.N. 4294, 4295.

28 18 U.S.C. §§ 2, 5–9.

possess classified information independently of anything that occurs in the criminal prosecution.[29]

Enforcement of a broad new set of criminal statutes against intelligence or national security operations abroad would be another application beyond the specific circumstance that prompted CIPA in 1980. The expansion of federal criminal law contemplated by the proposed legislation cannot be considered in isolation from efforts to update CIPA for the last three decades of new challenges.

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Thank you again for the opportunity to discuss this important issue with the Committee. I am prepared to answer the Committee's questions.

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[29] The Judiciary Committee's report of the bill explained the extensive study of "cases in which intelligence information had been passed to foreign powers through espionage or through leaks in the media." S. Rep. No. 96-456, *supra*, at 4295. The key finding of the Committee's study was that "prosecution of a defendant for disclosing national security information often requires the disclosure in the course of trial of the very information that the law seeks to protect." *Id.*