

# Command Authority over Contractors Serving With or Accompanying the Force<sup>1</sup>

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## I. Introduction

With over 242,657 contractors serving with or accompanying the armed forces in the U.S. Central Command (USCENTCOM) area of operations, understanding the scope of military authority that may be exercised over these persons is paramount for military commanders who are responsible for maintaining good order, morale, and discipline in Iraq, Afghanistan, and other contingency operating areas.<sup>3</sup> The sheer number of contractors living and working on the battlefield alongside our nation's armed forces suggests that civilian misconduct incidents will likely occur during the course of a unit's deployment.<sup>4</sup>

The first half of this note will examine the policies and procedures commanders should follow when contractors engage in criminal misconduct. The second half of the note will examine the use of command authority over persons serving with and accompanying the armed forces in the field during a declared war or contingency operation. While contractor misconduct on the battlefield is not a recent phenomenon unique to the contingency operations in Iraq or Afghanistan, the policies, procedures, and laws governing how commanders may address contractor misconduct in a deployed environment are an evolving, dynamic, and increasingly important area of the law for military justice practitioners. On 1 January 2009, the United States entered into a security agreement with the Government of Iraq (USG–GOI Security Agreement) that resulted in the GOI assuming primary jurisdiction over contractor misconduct in Iraq.<sup>5</sup>

### A. Understanding Command Policies for Handling Civilian Misconduct Incidents

Historically, one of the biggest challenges to gaining accountability over contractor misconduct on the battlefield was the perception that contractor misconduct was somebody else's problem and a distraction to the real business of conducting military operations. With so many contractors supporting daily military operations in Afghanistan and Iraq, the impact of contractor misconduct on operations has demanded the attention of commanders and judge advocates alike. Following the now infamous September 2007 Nisoor Square shooting incident in Baghdad, Iraq, involving several armed security contractors, the Deputy Secretary of Defense (DEPSECDEF) issued policy guidance emphasizing that contractor-employers

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<sup>1</sup> This article is the second in a series of articles written by members of the XVIII Airborne Corps Office of the Staff Judge Advocate following their deployment as the Multi-National Corps–Iraq, Headquarters, 2008–2009. Each article in the series discusses one significant legal issue that arose in each of the Corps' functional legal areas during the deployment. Articles in the series will cover issues that arose in Administrative Law, Rule of Law, Contract and Fiscal Law, Operational Law, Criminal Law, and Foreign Claims.

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<sup>3</sup> See MOSHE SCHWARTZ, DEPARTMENT OF DEFENSE CONTRACTORS IN IRAQ AND AFGHANISTAN: BACKGROUND AND ANALYSIS, CONG. RESEARCH SERV. REPORT, at CRS-4–5 (2009), available at <http://www.fas.org/spp/crs/nastec/R40764.pdf> (citing CENTCOM 2d Quarterly Contractor Census Report (as of Mar. 31, 2009)) (last visited Oct. 26, 2009); see also CONTRACTOR SUPPORT OF U.S. OPERATIONS IN USCENTCOM AOR, IRAQ, AND AFGHANISTAN, available at [http://www.acq.osd.mil/log/PS/docs/5A\\_Feb2009.doc](http://www.acq.osd.mil/log/PS/docs/5A_Feb2009.doc) (last visited Oct. 23, 2009). The total number of contractors serving in Iraq at the end of the 1st quarter for Fiscal Year 2009 were as follows: 39,262 (U.S. citizens); 70,875 (third country nationals) (TCNs); and, 37,913 (local or host country nationals) [hereinafter ADUSD Program Support Report]. *Id.*

<sup>4</sup> See MULTI-NATIONAL CORPS-IRAQ OFFICE OF THE STAFF JUDGE ADVOCATE DEPLOYMENT HISTORICAL REVIEW, FEB 2008-APR 2009 [hereinafter XVIII ABC EXSUM] (unpublished, on file with author). During the XVIII Airborne Corps' recent deployment as the Multi-National Corps–Iraq (MNC–I) Headquarters from January 2008 through April 2009, the XVIII Airborne Corps' Office of the Staff Advocate (OSJA) completed twenty-one Military Extraterritorial Jurisdiction Act (MEJA) prosecution referrals to the Department of Justice (DoJ); assisted commanders with imposing Uniform Code of Military Justice (UCMJ) pre-trial restraint or restriction upon thirty-eight civilians; helped facilitate the administrative debarment of over five hundred and fifty-eight individuals from working in the Iraq Theater of Operations (ITO) for committing acts of minor misconduct; and, successfully conducted a court-martial of a military contractor. *Id.*

<sup>5</sup> See, e.g., Agreement Between the United States of America and the Republic of Iraq on the Withdrawal of United States Forces from Iraq and the Organization of Their Activities during Their Temporary Presence in Iraq art. 12, Nov. 17, 2008, available at [http://www.mnf-iraq.com/images/CGs\\_Messages/security\\_agreement.pdf](http://www.mnf-iraq.com/images/CGs_Messages/security_agreement.pdf) (last visited Oct. 26, 2009) (entered into force Jan. 1, 2009) (providing the Iraqi Government with primary jurisdiction over all contractor misconduct in Iraq). The USG–GOI Security Agreement is unique to the Iraq Theater of Operations and should be carefully reviewed by judge advocates who will be conducting legal operations in Iraq.

who arrange for, facilitate, or allow contractor-employees to leave a country without authorization from the senior military commander in country would be subject to disciplinary action under either the Uniform Code of Military Justice (UCMJ) or the Military Extraterritorial Jurisdiction Act (MEJA).<sup>6</sup> As a result of the heightened scrutiny now given contractor criminal misconduct, contractor-employers also have an affirmative obligation to self-report suspected employee misconduct through contract administration channels.<sup>7</sup> To ensure that incidents of contractor misconduct are also reported through military command channels, the DEPSECDEF has required military commanders to “publicize the means” for instructing all persons how to notify the military chain of command whenever contractor criminal activity occurs.<sup>8</sup> Judge advocates should ensure that when commanders, law enforcement personnel, or, potentially, employers receive an initial report of suspected civilian misconduct, that information is immediately forwarded through the appropriate higher command reporting channels.

Since September 2007, all government contracts for services provided in forward deployed areas have required contractors to ensure their employees, including subcontractors, are familiar and comply with applicable U.S. law, host nation law, and other U.S. regulations, directives, instructions, policies, and procedures.<sup>9</sup> The Joint Contracting Command in Iraq/Afghanistan (JCC-I/A) has published guidance reinforcing the Department of Defense (DoD) policy by putting all contractors and their employees on notice that they are subject to U.S. law, command directives, and orders and may be disciplined by military commanders for disciplinary infractions.<sup>10</sup> While judge advocates are not responsible for implementing these notice provisions, they should at least advise their commanders that the overwhelming majority of contractors on the battlefield are third country nationals (TCNs) who may not understand the policy or may not have received notice of the policy.<sup>11</sup> Additionally, TCNs not only represent the largest group of contractors on the battlefield, they are often employed by subcontractors who may have limited interaction with the command or contracting officials. As a result of these cultural, informational, and organizational gaps between the workforce and the command, the largest group of contractors serving with or accompanying our armed forces may not realize they could be held accountable by the host nation government or the local U.S. military commander for any criminal misconduct.

On 10 March 2008, the Secretary of Defense (SECDEF) provided what is arguably the most important guidance to date concerning contractor misconduct on the battlefield when he stated, “Commanders retain authority to respond to an incident, restore safety and order, investigate, apprehend suspected offenders, and otherwise address the immediate needs of the situation.”<sup>12</sup> The SECDEF reminded both commanders and military law enforcement personnel that they have “significant authority” under the UCMJ to investigate and deal with criminal misconduct committed by persons serving with or accompanying the armed forces overseas during times of declared war and in contingency operations.<sup>13</sup> When it appears alleged misconduct constitutes a federal felony offense, the Department of Justice (DoJ) must be notified to determine whether it wishes to exercise MEJA jurisdiction over the person and pursue prosecution.<sup>14</sup> During the DoJ’s review of a

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<sup>6</sup> Memorandum from The Deputy Sec’y of Def., for Secretaries of the Military Dep’ts; Chairman of the Joint Chiefs of Staff; Under Secretaries of Def.; Commanders of the Combatant Commands; Gen. Counsel of the Dep’t of Def.; Inspector Gen. of the Dep’t of Def.; Assistants to the Sec’y of Def.; Dir., Admin. and Mgmt.; Dir., Program Analysis and Evaluation; Dirs. of the Def. Agencies; Dirs. of the DOD Field Activities, subject: Management of DOD Contractor Personnel Accompanying U.S. Armed Forces in Contingency Operations Outside the United States (Sept. 25, 2007) [hereinafter DEPSECDEF 2007 Memorandum].

<sup>7</sup> Policy Letter, Headquarters, Joint Contracting Command-Iraq/Afghanistan, subject: Uniform Code of Military Justice Jurisdiction for Iraq and Afghanistan Contractors (5 Oct. 2007) [hereinafter JCCI/A 2007 Letter] (copy on file with author).

<sup>8</sup> Memorandum from The Deputy Sec’y of Def., for Secretaries of the Military Dep’ts; Chairman of the Joint Chiefs of Staff; Under Secretaries of Def.; Commanders of the Combatant Commands; Gen. Counsel of the Dep’t of Def.; Inspector Gen. of the Dep’t of Def.; Dir., Admin. and Mgmt., subject: Responsibility for Response to Reports of Alleged Criminal Activity Involving Contractors and Civilians Serving with or Accompanying the Armed Forces Overseas (Sept. 10, 2008).

<sup>9</sup> U.S. DEP’T OF DEF., DEF. FEDERAL ACQUISITION REG. SUPP. 252.225-7040 (Jan. 15, 2009), available at <http://www.acq.osd.mil/dpap/dars/dfars/html/current/252225.htm#252.225-7040> [hereinafter DFARS] (last visited 26 Oct. 2009). On 25 September 2007, the DEPSECDEF required the inclusion of the above contract clause, among others, in DOD contracts requiring contractors and contractor personnel to accompany U.S. forces deployed outside the U.S. See DEPSECDEF 2007 Memorandum, *supra* note 6.

<sup>10</sup> See JCCI/A 2007 Letter, *supra* note 7.

<sup>11</sup> See ADUSD (Program Support) Report *supra* note 3 (noting that by February 2009 there were 70,875 TCN contractors compared to only 39,262 U.S. citizen contractors); see also Gordon Lubold, A DRAWDOWN OF CONTRACTORS IN IRAQ, CHRISTIAN SCI. MON., Mar. 4, 2009, at 3, available at <http://www.csmonitor.com/2009/0304/p03s03-usmi.html> (last visited Oct. 26, 2009).

<sup>12</sup> Memorandum from Sec’y of Def., for Secretaries of the Military Dep’ts, Chairman of the Joint Chiefs of Staff, Undersecretaries of the Def., Commanders of the Combatant Commands, subject: 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 (Mar. 10, 2008) [hereinafter SECDEF 2008 Memorandum].

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

potential MEJA referral, the commander and military law enforcement personnel should continue their investigation and take any necessary action to address the alleged incident.<sup>15</sup> In sum, the SECDEF has declared that addressing contractor misconduct on the battlefield is first and foremost a command responsibility.

## B. Developing Procedures for Handling Civilian Misconduct Incidents

Contractor criminal activity can generate significant media interest, adversely impact strategic relationships with host nation governments, and require commanders to swiftly formulate a response when such incidents occur within their areas of operation. Judge advocates should carefully review the legal annex of their next higher headquarters' operations order to discern what command policies and procedures to follow when persons serving with or accompanying the force engage in criminal misconduct.<sup>16</sup>

Developing consistent procedures for handling civilian misconduct is essential to ensuring the transparent and consistent treatment of all contractors who are alleged to have engaged in some type of criminal activity. After a report of criminal activity is received, judge advocates should begin to gather as much information as possible about the incident and all potential witnesses. Trial counsel might first attempt to obtain key identifying information about the suspect, including a home address, last known address, passport number and country of origin, driver's license number, any available employment information including the employer's contact information, and a copy of the suspect's letter of authorization or employment contract.<sup>17</sup> After gathering information about the suspect, the inquiry should focus on obtaining similar information about the alleged victim's background, including information about how the victim had served with or accompanied the U.S. armed forces.<sup>18</sup> Information about the alleged incident should then be summarized in a situation report that can be forwarded to military law enforcement personnel, the local commander, and command judge advocate responsible for the area of operations where the incident had occurred; the staff judge advocate of the next higher headquarters should also receive a report for his situational awareness.

One of the preliminary legal determinations that must be made following the receipt of a civilian misconduct report is whether the suspected offender is subject to the UCMJ.<sup>19</sup> After receiving a report of civilian misconduct, judge advocates should gather sufficient information about the contractor's employment status and relationship to the U.S. armed forces to determine whether he will be subject to a commander's UCMJ authority. Article 2(a)(10), UCMJ, states that jurisdiction attaches over persons either serving with or accompanying the armed forces during a declared war or contingency operation.<sup>20</sup> A person is considered to be "serving with" the armed forces if he is a DoD employee, a contractor, contractor-employee, or subcontractor (at any tier), whose employment occurs outside of the United States while supporting the armed forces, and who works alongside or is supervised by military personnel or performs work that has a direct bearing on the efficiency, discipline, and reputation of the forces in the area in which they are operating.<sup>21</sup> In contrast, a person is

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<sup>15</sup> *Id.*

<sup>16</sup> During the XVIII Airborne Corps' deployment as the MNC-I Headquarters, the XVIII Airborne Corps OSJA developed procedures for reporting, investigating, and disposing of alleged instances of contractor misconduct within the command's jurisdiction throughout Iraq. The MNC-I commander opted to withhold the authority for disposing of all civilian misconduct at his command level. HEADQUARTERS, MULTI-NATIONAL CORPS-IRAQ, APPENDIX 2 TO ANNEX U TO MNC-I OPERATIONS ORDER 09-01 (U) (EXERCISE OF ARTICLE 2 U.C.M.J. AUTHORITY OVER CIVILIAN MISCONDUCT para. 3.b (1 Dec. 2008) [hereinafter OPOD 09-01] (copy on file with author). The corps commander's decision to withhold the authority to dispose of alleged civilian misconduct at his command level was made pursuant to Rule for Courts-Martial (R.C.M.) 306. *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 306(a) (2008) [hereinafter MCM].

<sup>17</sup> *See* Captain James C. Cunningham, *Civilian Misconduct: Short History & Guide* (Nov. 2008) (unpublished notes and observations on addressing civilian misconduct in the ITO since December 2007) [hereinafter *Civilian Misconduct Guide*] (copy on file with author).

<sup>18</sup> *See* MNC-I OPOD 09-01, *supra* note 16, para. 5.b.(9).

<sup>19</sup> UCMJ art. 2(a)(10) (2008).

<sup>20</sup> *Id.*; *see also* United States v. Burney, 21 C.M.R. 98, 107 (C.M.A. 1956) (upholding UCMJ article 2(a)(10) courts-martial jurisdiction over all persons serving with or accompanying an armed force in the field).

<sup>21</sup> *See* U.S. DEP'T OF DEF., INSTR. 5525.11, CRIMINAL JURISDICTION OVER CIVILIANS EMPLOYED BY OR ACCOMPANYING THE ARMED FORCES OUTSIDE THE UNITED STATES, CERTAIN SERVICE MEMBERS, AND FORMER SERVICE MEMBERS 28, 29 (3 Mar. 2005) [hereinafter DoDI 5525.11]. The directive states in relevant part that any person employed by the armed forces outside the United States may include the following individuals:

A civilian employee of the Department of Defense (including a non-appropriated fund instrumentality of the Department of Defense); a DoD contractor (including subcontractor(s) at any tier); an employee of a DoD contractor (including subcontractor(s) at any tier); a civilian employee, contractor (including a subcontractor(s) at any tier), and a civilian employee of a contractor (or subcontractor(s) at any tier) of any other Federal Agency, or any provisional authority, to the extent such employment relates to supporting the mission of

considered to be “accompanying” the force if he is embedded within a military unit or operating as a member of a military team, or present within a military installation for reasons that are more than merely incidental; the presence must be connected with or dependent upon the U.S. armed forces, its activities, or its personnel.<sup>22</sup> Depending on the circumstances, a person may also be considered to be accompanying the force, even though his service or government contract has ended, if the individual’s continued presence with the force requires the armed forces to secure, house, feed or otherwise exercise pervasive military control over him.<sup>23</sup>

The MEJA complements UCMJ authority by providing jurisdictional authority over civilians employed by or accompanying the armed forces outside the United States, members of the armed forces, and former members of the armed forces, including their dependents for U.S. federal criminal statute violations.<sup>24</sup> Whenever a contractor has engaged in serious criminal misconduct involving a felony offense, the subsequent investigation and notifications are most often reviewed as a potential MEJA referral by the DoJ.<sup>25</sup> Initiating a MEJA referral is an administrative process that requires detailed coordination between military law enforcement personnel, the military chain of command, the contractor’s supervisor or employee representative, and the DoJ Domestic Security Section (DSS).<sup>26</sup> Within fourteen days of receiving a referral, the DoJ must determine whether it intends to exercise MEJA jurisdiction over the alleged offenses.<sup>27</sup> During the review period, a DSS attorney evaluates whether the alleged misconduct constitutes a MEJA violation and conducts a venue analysis to determine where the potential case could be tried.<sup>28</sup> After completing the initial review, the DSS attorney forwards the MEJA referral to the U.S. Attorneys’ Office (USAO) where venue would properly lie, thereby transferring responsibility for conducting further investigation and for coordinating with the command’s legal advisor to the USAO.<sup>29</sup> The USAO retains discretion over the MEJA referral and decides whether to accept or decline the referral for prosecution.<sup>30</sup> If the referral is accepted for prosecution, an Assistant U.S. Attorney (AUSA) is assigned to coordinate the investigation, the arrest of suspects, and the prosecution of the alleged offenses with the assistance of the referring SJA office.

When incidents of civilian misconduct are referred to the DoJ under MEJA, commanders and their legal advisors should prepare for the possibility that the USAO may elect to decline prosecution.<sup>31</sup> Meanwhile, pending the DoJ’s decision on prosecution, judge advocates should determine whether the alleged offenses might be prosecuted under UCMJ jurisdiction.<sup>32</sup> If the DoJ declines an investigation for MEJA prosecution, the military commander who exercises authority over the suspect must then decide whether compelling reasons exist to assert military jurisdiction under Article 2(a)(10)<sup>33</sup> and pursue the matter by means of court-martial, non-judicial punishment, or some other adverse administrative action.<sup>34</sup>

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the Department of Defense overseas; and, when the person: is present or resides outside the United States in connection with such employment; and, is not a national of or ordinarily resident in the host nation.

*Id.*; see also OPORD 09-01, *supra* note 16, para. 6.a(1).

<sup>22</sup> *Burney*, 21 C.M.R. at 110.

<sup>23</sup> See *Perlstein v. United States*, 151 F.2d 167, 170 (3d Cir. 1945) (stating that court-martial jurisdiction over a civilian accompanying the force did not expire upon employment termination).

<sup>24</sup> DoDI 5525.11, *supra* note 21.

<sup>25</sup> A copy of the MEJA checklist developed for use when making a MEJA referral to the DoJ is located at the end of this article at Appendix A. Military Extraterritorial Jurisdiction Act Jurisdiction Determination Checklist (Version 1, Aug. 2008).

<sup>26</sup> UNITED STATES ATTORNEY’S MANUAL, TITLE 9, § 9-20.116D, available at [http://www.usdoj.gov/usao/eousa/foia\\_reading\\_room/usam/title9/20mcrm.htm](http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/20mcrm.htm) [hereinafter USAO MANUAL] (last visited Oct. 21, 2009).

<sup>27</sup> SECDEF 2008 Memorandum, *supra* note 12, attachment 3.

<sup>28</sup> USAO MANUAL, *supra* note 26, § 9-20.116D.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> For example, of the nineteen MEJA referrals made by the XVIII Airborne Corps OSJA during its last deployment, at least seven were declined by the DoJ for prosecution. See XVIII ABC EXSUM, *supra* note 4, at 8.

<sup>32</sup> DEPSECDEF September 2007 Memorandum, *supra* note 6.

<sup>33</sup> See UCMJ art. 2(a)(10)(2008).

<sup>34</sup> SECDEF 2008 Memorandum, *supra* note 12, attachment 2 (stating that only those commanders assigned or attached to the combatant command who possess general court-martial convening authority may exercise court-martial convening authority and impose nonjudicial punishment over persons subject to UCMJ Article 2(a)(10) jurisdiction).

Before asserting Article 2(a)(10) jurisdiction, commanders should carefully weigh the impact of the contractor's alleged criminal misconduct on the preservation of good order, morale, and discipline to the command.<sup>35</sup> Ultimate authority to initiate court-martial charges or nonjudicial punishment over persons subject to Article 2(a)(10) is reserved to the geographic combatant commanders.<sup>36</sup> Before initiating any UCMJ disposition, the commander must forward the matter to the first general court-martial convening authority (GCMCA) in the chain of command for that GCMCA's consideration under Rule for Courts-Martial (RCM) 407.<sup>37</sup> Ultimately, regardless of the DoJ's final decision on prosecution, judge advocates should be familiar with the MEJA referral process and how the process impacts a commander's authority to exercise Article 2(a)(10) jurisdiction over contractor misconduct on the battlefield.

## II. The Commander's UCMJ Article 2(a)(10) Authority

One of the most complex and challenging legal issues facing military commanders on the battlefield is knowing how their inherent command authority may be used to preserve the good order, morale, and discipline over persons who serve with and accompany the armed forces in the field during a declared war or contingency operation.<sup>38</sup> The SECDEF has adopted the view that commanders are authorized under Article 2(a)(10) to respond proportionately and judiciously to acts of civilian misconduct, including, if necessary, the imposition of pre-trial restrictions in lieu of arrest, apprehension and detention of persons who have engaged in criminal misconduct while serving with or accompanying the armed forces.<sup>39</sup> Because Article 2(a)(10) limits jurisdiction to those civilians serving with or accompanying the force in the field, contractors who successfully leave forward deployed areas are no longer part of the command or subject to the commander's UCMJ authority. Consequently, it is imperative that commanders take swift and affirmative steps to restrict the movement of persons alleged to have engaged in criminal misconduct immediately after receiving misconduct incident reports.

### A. Restriction

Commanders may order conditions on liberty or place restrictions in lieu of arrest on contractors, as an administrative measure, to ensure their presence in forward deployed areas pending completion of a law enforcement investigation.<sup>40</sup> Commanders' authority to impose conditions on a person's liberty derives from RCM 304(a)(1) while the authority to impose certain restrictions in lieu of arrest stems from RCM 304(a)(2).<sup>41</sup> Commanders use verbal or written orders to impose these restrictions. Commanders may also opt to confiscate documentation that might facilitate a contractor's departure from a deployed area, including the immediate vicinity of a Forward Operating Base (FOB). Such documentation can include an individual's administrative letter authorizing entrance onto the FOB; a DoD-issued common access card (CAC), which is required to manifest on military air and ground transportation; and, if necessary, the individual's passport.<sup>42</sup> Commanders should memorialize any restrictions imposed on civilians in writing, and written orders are preferable to verbal orders since written orders can be shared with law enforcement and the suspect's immediate supervisor or employer.

Pretrial restrictions may only be imposed as an administrative measure and not as punishment.<sup>43</sup> Additionally, various forms of pretrial restraint may be used in combination but should be no more restrictive than is required to maintain

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<sup>35</sup> *Id.* attachment 3.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* (referring to the John Warner National Defense Authorization Act for Fiscal Year 2007, [H.R. 5122], § 552, which amended paragraph (10) of section 802(a) of title 10, UCMJ Article 2(a)(10), by extending the application of the UCMJ during a declared war or contingency operation)).

<sup>39</sup> *Id.* (referring to the pre-trial authorities that may be exercised in accordance with R.C.M. 302 (Apprehension), R.C.M. 304 (Pretrial restraint), R.C.M. 305 (Pretrial confinement) and R.C.M. 306 (Initial disposition)); *see also* DEPSECDEF 2007 Memorandum, *supra* note 6; MCM, *supra* note 16, R.C.M. 301 discussion.

<sup>40</sup> *See* SECDEF 2008 Memorandum, *supra* note 12 ("Commanders possess significant authority to act whenever criminal activity may relate to or affect the commander's responsibilities, including situations in which the offender's precise identity or actual affiliation is to that point undetermined.").

<sup>41</sup> MCM, *supra* note 16, R.C.M. 304(a)(1), 304(a)(2).

<sup>42</sup> The temporary seizure of an individual's passport to ensure the person's continued presence in a forward deployed area of operation during the pendency of an investigation is a subject worthy of further examination. Arguably, the passport is the property of the country that issued it and is not the personal property of the individual that possesses it. Coordination through the consular office of the country that issued the individual's passport and U.S. Embassy channels should therefore be conducted whenever a passport is seized from a TCN.

<sup>43</sup> MCM, *supra* note 16, R.C.M. 304(f).

administrative accountability over an individual until completion of the law enforcement investigation or to prevent the individual from committing additional criminal misconduct.<sup>44</sup> For example, a commander may require a contractor to check in with the local provost marshal's office on a daily basis to maintain physical accountability over the person.<sup>45</sup> A commander may also restrict a person's movement by ordering the suspect to avoid any area where an alleged victim or key witness may live or work; any violation of the commander's restriction would, therefore, be a violation of a lawful order. Overall, commanders have a great deal of discretion to fashion appropriate restrictions or conditions on liberty so long as the restrictions are carefully tailored to ensure the contractor's presence in the forward area of operations or to prevent future misconduct.

## B. Apprehension

Under RCM 302, military law enforcement officers, military criminal investigators, and all commissioned, warrant, petty, and noncommissioned officers on active duty may apprehend a civilian serving with or accompanying the force when there is probable cause to believe the person has committed a felony offense.<sup>46</sup> These individuals are authorized to "use such force and means as may be required to accomplish the apprehension."<sup>47</sup> Meanwhile, the apprehending official should ensure any civilian taken into military custody is provided a UCMJ Article 31 rights advisement regarding compulsory self-incrimination.<sup>48</sup> If an individual requests the presence of legal counsel before law enforcement has questioned the individual, the interview should be terminated until the individual has had the opportunity to consult with either civilian legal counsel retained at personal expense or detailed military defense counsel assigned by the Army's Trial Defense Service (TDS).<sup>49</sup> Judge advocates should advise military law enforcement personnel to treat civilians in the same manner as servicemembers who have been placed under arrest; the same procedural rights and protections extended to military suspects under the UCMJ should also be applied, without exception or variation, to civilian suspects.

Once a person serving with or accompanying the force has been restrained, apprehended, or detained, the contractor's employer or supervisor should be contacted to discover whether the individual will be immediately terminated from employment.<sup>50</sup> Once an employer has been notified of an employee's alleged criminal activities, the employer will usually seek to terminate the employee from further employment. Because the command and a contractor employer have no contractual obligation to continue an individual's employment pending an investigation into alleged misconduct, the employer will often choose to terminate the suspect's employment immediately and stop salary payments to the individual. At this point, if the person under investigation was not already attached to a military command for UCMJ purposes, then the individual should be attached to a command for administrative purposes.<sup>51</sup> Once the person has been attached to a command, which will usually be the FOB where the person was living or working, the designated commander then becomes responsible for providing the individual with food, shelter, and other life support necessary to provide for his welfare until his release or transfer from the deployed area.

## C. Temporary Confinement

The most restrictive form of restraint a commander may impose is temporary confinement in accordance with RCM 305.<sup>52</sup> Commanders should only confine persons subject to UCMJ Article 2(a)(10) when they are suspected to have committed a grave or serious felony offense and temporary confinement would also be warranted under the circumstances. The need to confine a contractor should be rare, but, when military necessity requires pretrial confinement, judge advocates and military law enforcement should understand who has authority to confine the contractor and what procedures must be followed to protect the individual's rights.

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<sup>44</sup> See *id.* R.C.M. 304(c) discussion.

<sup>45</sup> See generally *United States v. Mack*, 65 M.J. 108 (C.A.A.F. 2007) (noting that commanders may order pretrial restrictions to ensure an individual remains within a specific geographic location, to report periodically to a designated official, and to refrain from having contact with other specified persons).

<sup>46</sup> MCM, *supra* note 16, R.C.M. 302(b)(1), (b)(2), (b)(3).

<sup>47</sup> SECDEF 2008 Memorandum, *supra* note 12; see also MCM, *supra* note 16, R.C.M. 302(d)(3).

<sup>48</sup> UCMJ art. 31 (2008); see also MCM, *supra* note 16, MIL. R. EVID. 305.

<sup>49</sup> See DoDI 5525.11, *supra* note 21, paras. 6.3.1, 6.3.2.

<sup>50</sup> Civilian Misconduct Guide, *supra* note 17, at 4.

<sup>51</sup> OPOD 09-01, *supra* note 16 para. 5.d.(3).

<sup>52</sup> MCM, *supra* note 16, R.C.M. 305.

A geographic combatant commander, or an appropriate designee, may order the temporary detention of a person who has been arrested and charged with a felony offense outside the United States.<sup>53</sup> Additionally, military law enforcement officers and military criminal investigators may arrest and temporarily detain a person subject to MEJA jurisdiction when there is probable cause to believe the individual committed an offense.<sup>54</sup> Under RCM 304(b), civilians subject to trial by court-martial may only be placed under pre-trial restraint by a commanding officer exercising authority over the civilian.<sup>55</sup> Therefore, persons subject to MEJA or UCMJ jurisdiction may only be placed in pre-trial confinement by a military commander or a law enforcement official to whom proper authority has been designated by the SECDEF.

Judge advocates should follow the guidelines outlined in RCM 305 to ensure confinement conditions comport with both substantive law and applicable administrative requirements. If appropriate temporary detention facilities are not available in the forward deployed area where the alleged misconduct occurred, judge advocates may have to coordinate on behalf of their commanders to have the confinee transferred to a regional confinement facility. The command's legal advisor should notify the local TDS office whenever a person subject to Article 2(a)(10) has been placed into military confinement. Military defense counsel may be provided to assist civilians in pre-trial confinement during any pre-trial confinement proceedings.<sup>56</sup> Military defense counsel may also represent civilians for the limited purpose of making an initial appearance in federal court for an alleged MEJA violation.<sup>57</sup>

It is, therefore, possible for a person subject to Article (2)(10) to be placed into pre-trial confinement while awaiting an initial appearance for an alleged MEJA violation. In those situations, pretrial confinement may last several weeks as the DoJ makes its initial MEJA referral determination and the initial appearance is scheduled in federal court. Judge advocates should be prepared to assist commanders with planning, including organizing necessary logistical and guard support, when a contractor is detained prior to an initial appearance in federal court or a military court-martial.

### III. Conclusion

Our nation's armed forces will continue to rely on the invaluable skills and support contractors provide during military operations in Afghanistan, Iraq, and other contingency operating areas outside the United States. However, when persons subject to UCMJ Article 2(a)(10) engage in criminal misconduct, commanders have the authority and flexibility to immediately address these incidents in the field. Judge advocates can assist commanders by ensuring proper policies and reporting procedures for contractor misconduct are followed within their immediate chain of command. Additionally, judge advocates fulfill their traditional advisory role by providing commanders with technical legal advice on how to deal with contractor criminal activity when it occurs during a deployment. As this dynamic area of military justice continues to evolve, it is important to remember that our commanders owe a solemn duty to exercise their UCMJ authority wisely to ensure the safety, good order, morale, and discipline for all members of the command—including those persons serving with or accompanying our nation's armed forces in the field during a declared war or contingency operation.

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<sup>53</sup> DoDI 5525.11, *supra* note 21, para. 6.2.5.1.

<sup>54</sup> See SECDEF 2008 Memorandum, *supra* note 12, attachment 1.

<sup>55</sup> MCM, *supra* note 16, R.C.M. 304(b).

<sup>56</sup> *Id.* R.C.M. 305(f).

<sup>57</sup> See, e.g., U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE para. 26-2.a.(2)b (16 Nov. 2005).

## Military Extraterritorial Jurisdiction Act Jurisdiction Determination Checklist

Please provide the following information to assist the Department of Justice in making a determination regarding MEJA jurisdiction  
All MEJA referrals from DoD to DoJ must comply with DoDI 5525.11

DoJ: Domestic Security Section - Phone: (202) 616-5731, E-Mail: [MEJA@usdoj.gov](mailto:MEJA@usdoj.gov)

DoD: General Counsel's Office (Mr. Robert Reed) - Phone: (703) 695-1055, E-Mail: [reedr@dodgc.osd.mil](mailto:reedr@dodgc.osd.mil)

DoS: Diplomatic Security Service (Special Agent Scott Banker) - Phone: (571) 345-2270, E-Mail: [bankers@state.gov](mailto:bankers@state.gov)

**Part I - Investigator's Information** Due to frequent duty station transfers of overseas investigators, please provide complete information. Military investigators may be required to draft and swear to affidavits in front of U.S. based magistrate judges and testify at grand jury proceedings. Due to the overseas location of primary agents in MEJA cases, a U.S. based law enforcement agent should be assigned to assist federal prosecutors in the district with appropriate venue.

Case Agent: _____	Agency: _____
Phone Number: _____	E-Mail Address: _____
Alternate P.O.C.: _____	Agency: _____
Phone Number: _____	E-Mail Address: _____
JAG P.O.C.: _____	Command: _____
Phone Number: _____	E-Mail Address: _____

**Part II - Subject's Information** Venue is established pursuant to 18 USC § 3238. Generally, appropriate venue is the U.S. district of the subject's last known residence. However, in some instances, venue is perfected in the venue where the subject is "first brought" under law enforcement custody. Prior coordination with DoJ is required to determine venue in each MEJA referral.

Name: \_\_\_\_\_ Status: (at time of offense) \_\_\_\_\_

Date of Birth: \_\_\_\_\_ SSN: \_\_\_\_\_ Citizenship: \_\_\_\_\_

Last Known U.S. Residence: \_\_\_\_\_

How was last known address obtained? (provide a copy of source document) \_\_\_\_\_

**If Active Duty Military:**

Branch: \_\_\_\_\_ Command/Unit: \_\_\_\_\_

Rank/Rate: \_\_\_\_\_ Command/Unit Phone Number: \_\_\_\_\_

**If Contractor or U.S. Government Civilian Employee:** (provide copy of employment contract and termination paperwork, if applicable)

Employer: \_\_\_\_\_ Position: \_\_\_\_\_

Dates of Employment: \_\_\_\_\_ Supervisor's Name: \_\_\_\_\_ Supervisor's Phone: \_\_\_\_\_

**If Dependent:**

Sponsor's Name: \_\_\_\_\_ Sponsor's Unit/P.O.C.: \_\_\_\_\_

**Part III - Host Nation Information**

Status of host nation investigation/prosecution: \_\_\_\_\_

## Military Extraterritorial Jurisdiction Act Jurisdiction Determination Checklist

Name of U.S. official coordinating with host nation: \_\_\_\_\_ Phone: \_\_\_\_\_

Name of host nation official involved in coordination: \_\_\_\_\_ Phone: \_\_\_\_\_

**Part IV - MEJA / UCMJ Matters** Matters subject to both federal statute and UCMJ Art. 2 must be processed pursuant to DOD Memorandum (March 2008)

If the offense is subject to MEJA and UCMJ Article 2(a), does the appropriate command seek alternative UCMJ authority?

Describe the subject's current arrest/detention/restriction status or current location: \_\_\_\_\_

Location of Arrest: \_\_\_\_\_ Date of Arrest: \_\_\_\_\_

If the subject is being removed from the foreign country to the U.S. for prosecution pursuant to MEJA removal procedures (18 USC §§ 3142, 3264-3265), has the subject been medically cleared to travel? (If yes, attach copy of clearance)

Provide subject's travel itinerary: (if applicable) \_\_\_\_\_

**Part V - Documents Enclosed** Department of Defense Instruction 5525.11 provides guidance on the investigative material required to be provided to DoJ during the MEJA referral process. Required documents and investigative materials can be submitted via email.

- All documents requested in Parts I-IV (as applicable)
- Preliminary reports of investigation (including a copy of any military police blotter)
- Witness statements (including biographical and current CONUS and OCONUS contact information for each witness)
- Statement(s) of the accused and rights advisal form(s) (if available)
- Photographs taken of injuries/crime scene
- Crime scene sketch/evaluations
- Description of physical evidence obtained, current location of all evidence, and contact information for laboratory/storage facilities where evidence was submitted
- Itemized chain of custody documentation regarding all physical evidence
- Medical records (with appropriate release documentation for the medical records)
- Addendum listing all law enforcement personnel involved and current CONUS and OCONUS contact information

DRAFT, UNSIGNED affidavit or declaration, prepared by the investigating agent, setting forth the probable cause basis for believing that a violation of MEJA occurred and that the person identified has committed the violation (per DoDI 5525.11, paragraph 6.2.2)

Upon completion of this form:

- E-mail this form and all applicable documents to: [MEJA@usdoj.gov](mailto:MEJA@usdoj.gov), or
- Print and mail this form and all documents to: U.S. Department of Justice, Criminal Division - Domestic Security Section, Attn: MEJA Coordinator, 950 Pennsylvania Ave. NW, Washington, DC 20530

Note: Unless a civilian law enforcement agency formally assumes sole investigative authority regarding an overseas investigation, military investigative agencies are required to continue to investigate and assist DoJ prosecutors with the investigation and prosecution of MEJA referrals.

Signature: \_\_\_\_\_ Date: \_\_\_\_\_