

Civilians Accompanying Forces in the Field Now Subject to U.S. Military Justice

A little-noticed, five-word provision in section 552 of the John Warner National Defense Authorization Act for Fiscal Year 2007 ([Pub. L. 109-364](#)) (FY07 NDAA) expanded the jurisdiction of U.S. military law to include persons, including civilian employees, employees of contractors, and private journalists, "accompanying the force" under the [Uniform Code of Military Justice \(UCMJ\)](#). The practical effect of this change is enormous, because persons supporting the armed forces who were not subject to military law during previous military operations (i.e. Vietnam, the first Gulf War and Bosnia) may now be subject to the UCMJ and could be prosecuted by military courts-martial.

Background on the Amendment

This expansion of the jurisdiction of military law comes on the heels of amendments to the Military Extraterritorial Jurisdiction Act (MEJA) in 2004, and to federal Special Maritime and Territorial Jurisdiction (SMTJ) in 2001, which together enlarged federal criminal jurisdiction over broader circumstances in overseas locations where government contractor employees may work. (See [McKenna Long & Aldridge Advisory](#), Nov. 2, 2004.) On January 4, 2007, incoming Senate Judiciary Committee Chairman Patrick Leahy (D-VT) introduced the "War Profiteering Prevention Act of 2007" (S. 119), to criminalize war profiteering and to permit federal prosecutors to pursue companies accused of overcharging the government for war and reconstruction goods and services. Leahy asserted that "[t]here is growing evidence of widespread contractor fraud in Iraq, yet prosecuting criminal cases against these war profiteers is difficult under current law."

Sen. Lindsay Graham (R-SC), a reserve judge advocate (JAG), inserted Section 552 into the FY07 NDAA at the last minute to subject civilian contractors to the same justice system as the soldiers they work alongside. "Right now, you have two different standards for people doing the same job. This will bring uniformity to the commander's ability to control the behavior of people representing our country," Sen. Graham told the [Washington Post](#) in a [Jan. 15 article](#). Now, contractors may be subject to the jurisdiction of the UCMJ, in addition to the host country's criminal laws and federal criminal law under MEJA or SMTJ.

Legal Effects of the New Law

Previously, the UCMJ's jurisdiction covered "[i]n time of war, persons serving with or accompanying an armed force in the field." (See 10 U.S.C. § 802(a)(10) (hereinafter Article 2(a)(10)).) The amendment substituted "declared war or a contingency operation" for "war," thus, expanding UCMJ jurisdiction over civilians to now include any zone designated as "contingency operations," a term of art under federal law. (See 10 U.S.C. § 101(13).) Unlike war, which may only be declared by Congress, a military operation becomes a "contingency operation" either by 1) declaration by the Secretary of Defense or 2) by operation of law. For example, Operation Enduring Freedom became a "contingency operation" by operation of law on September 14, 2001 when the President issued Executive Order 13223 which, among other things, invoked the provisions of 10 U.S.C. § 12302 to authorize the military departments to order members of the Ready Reserve to active duty.

Assuming that a military operation is either a declared war or a contingency operation, determining whether an individual would be subject to the UCMJ involves the interpretation of two key phrases: "accompanying the force" and "in the field." Both phrases are terms of art with specific meaning under

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federal and international law. (See generally, Colonel Lawrence J. Schwarz, The Case for Court-Martial Jurisdiction Over Civilians Under Article 2(a)(10) of the Uniform Code of Military Justice, The Army Lawyer, Oct./Nov. 2002 at 31. See also, DoD Instruction 3020.41, Contractor Personnel Authorized to Accompany the U.S. Armed Forces, October 3, 2005, and DoD Instruction 5525.11, Criminal Jurisdiction Over Civilians Employed By or Accompanying the Armed Forces Outside the United States, Certain Service Members, and Former Service Members, March 3, 2005.) The interpretation of these key phrases is a fact-intensive inquiry which depends greatly on specific details about the contractor, its mission, and the location where the work is performed.

The phrase "serving with or accompanying an armed force" has been construed to require that the civilian's "presence [must be] not merely incidental to, but directly connected with or dependent upon, the activities of the armed forces or their personnel." (See *United States v. Rubenstein*, 22 C.M.R. 313, 317 (1957); *United States v. Burney*, 21 C.M.R. 98 (1956) (concluding that contractor employee's connection with the military was sufficient to constitute "serving with or accompanying" an armed force).) The situation in Iraq adds an additional layer of complexity to this analysis. Many contractors in contingency operation areas today work side-by-side with DoD personnel, but may not be DoD contractors, and may not be performing a DoD mission, such as firms contracted by the State Department with Iraq Relief and Reconstruction Fund money to perform reconstruction work. Therefore, the determination of whether the person's presence is "directly connected with or dependent upon the activities of the armed forces" will depend on the specific facts, including the government policies, of that project.

The phrase "in the field" means serving "in an area of actual fighting . . . at or near the "battlefront" where "actual hostilities are under way." (*Reid v. Covert*, 354 U.S. 1, 35 (1957).) Whether the armed forces are "in the field" is "determined by the activity in which it may be engaged at any particular time, not the locality where it is found." (*Burney*, 21 C.M.R. at 109.) Although most operations in the Iraq and Afghanistan conflicts occur in those countries, missions may occur throughout the world under the auspices of these contingency operations. Certain military personnel assigned to installations within the United States, such as Unmanned Aerial Vehicle pilots who fly their aircraft over Iraq and Afghanistan from their base near Las Vegas, Nevada, are considered to be part of the military operation despite the fact that they live and work in the United States. Additionally, the U.S. government considers countries such as Kuwait and Bahrain to be within the combat zone for income tax purposes, while recognizing that they are not zones of active hostilities for political reasons. Thus, there is considerable uncertainty regarding the meaning of "in the field" under UCMJ jurisdiction.

Another untested area concerns the constitutionality of subjecting civilians accompanying the force to trial by court-martial. In the 1950s and 1960s, the Supreme Court decided a series of cases regarding the constitutionality of prosecutions of civilians under a different jurisdictional section of the UCMJ, Article 2(a)(11), which also addresses the jurisdiction of civilians in overseas locations. (See e.g., *Toth v. Quarles*, 349 U.S. 949, (1955) (holding jurisdiction over a former service member for crimes committed while on active duty was unconstitutional); *Reid v. Covert*, 354 U.S. 1 (1957) (holding unconstitutional the UCMJ's provisions extending court-martial jurisdiction to civilian dependents accompanying their husbands during peacetime); *Grisham v Hagan*, 361 U.S. 278 (1960) (holding that civilian employees of the armed forces are not generally subject to UCMJ jurisdiction while overseas).) In these cases, the Supreme Court decided that Article 2(a)(11) of UCMJ jurisdiction could not apply to civilians during peacetime.

Although the holdings in these opinions did not address the constitutionality of Article 2(a)(10), which covers the military jurisdiction over persons accompanying the force in times of war, the Supreme Court in *Reid* noted in dicta that Article 2(a)(10) "sets forth the maximum historically recognized extent of military jurisdiction over civilians under the concept of 'in the field.'" (*Id.* at FN 60.) Today's Supreme Court may be more willing to apply the UCMJ to civilians, particularly in contingency operations, than the Court was a generation ago. There has been a general trend of convergence between the civilian and military justice systems, recognized by the Supreme Court in recent decisions. (See, e.g., *United States v. Scheffer*, 523 U.S. 303 (1998).) There are also more procedural protections in place today under the UCMJ than there were 40 years ago, most significantly the existence of the Court of Appeals for the Armed Forces, a civilian appellate court which sits atop the services' courts of criminal appeals. Further, the Court signaled in *Reid* (regarded as a seminal case) that it might recognize Congress' authority to apply the UCMJ to civilians in an area of actual combat, in the field with the military, and somehow engaged in military operations pursuant to Congress' powers to regulate the "land and naval forces" under Art. I, Sec. 8 of the Constitution. (See *Reid*, 354 U.S. at 33-34.) And, finally, the current Supreme Court has shown a willingness to embrace the UCMJ in a series of recent terrorism cases, suggesting the Court may also be willing to extend the UCMJ to civilian contractors accompanying the

force in places like Iraq and Afghanistan. (See *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (finding right of U.S. citizen enemy combatant to some procedural protections, citing military justice as a possible source of those rules); *Hamdan v. Rumsfeld*, No. 05-184 (2006) (favorably describing the UCMJ's system of justice and comparing it to the system of military commissions at Guantanamo).)

Implications for Civilians on the Battlefield

The implications of this change for contractors and other civilians accompanying the force are far reaching:

1) **Military Offenses.** Civilians in contingency operations may now be subject to unique military offenses in addition to crimes such as murder and larceny. For example, any person subject to the UCMJ may be prosecuted under Article 88, Disrespect Toward a Superior Officer; Article 92, Failure to Obey Order or Regulation; Article 103, Capture or Abandoned Property; Article 115, Malingering; Article 117, Provoking Speeches or Gestures; and Article 134, General Article. Contractor employees may also face the restraints on free speech imposed on members of the armed force, such as the law prohibiting disrespect toward a superior officer, but it is not clear how a court will apply existing First Amendment jurisprudence regarding the military to civilians on the battlefield. (See *Goldman v. Weinberger*, 475 U.S. 503 (1986) (allowing the discipline of an Air Force officer for his religious observances, holding that the First Amendment applies differently to military personnel than to civilians); *Parker v. Levy*, 417 U.S. 733 (1974) (affirming conviction of Air Force officer for improper speech).)

2) **Contractual Issues.** Contractors will now face issues arising from the interplay between the UCMJ and their contracts, including defining the authority and responsibilities of contracting officers, military officers, and commanders (a term of art for an officer with lawful command authority over a unit, installation or activity). Now that a contractor employee may be subject to the UCMJ, he may also be subject to one or more military chains of command and be required to obey orders given by military personnel. However, the application of military chain of command to traditional contracting procedures will likely result in confusion, contractual disputes, and possibly criminal exposure.

The role of a commander under military law is not generally compatible with established acquisition procedures. Principally, a commander may issue an order that must be obeyed by all military personnel within the chain of command as long as the order is lawful. However, a commander may not unilaterally direct a contractor to perform some action if that action is outside the scope of the contract requirements. Instead, the commander must direct the contracting officer to modify the contract, and, if necessary, obtain additional funds to implement the change. Saving any discussions of fiscal law for another article, DoD could include a clause empowering commanders or specific military officers to order such modifications, subjecting this new contractual authority to the UCMJ.

Moreover, it is impossible to predict how DoD will inform contractor personnel of the chain of command that provides the foundation for the UCMJ. The establishment of the chain of command, including the designation of the court-martial convening authority, is vital aspect of the implementation of the UCMJ. Although any military officer may issue an order, only court-martial convening authorities have the power within the military to refer charges to a court-martial. For military members, the designation of the chain of command is inherent in the written orders assigning military personnel to a new assignment. Such a designation is not currently a part of the contracting process. Indeed, it is common in Iraq today for companies to work for one agency's contracting officer, live with another unit on a forward operating base, and answer to a third unit for their operational responsibilities or performance. The Byzantine nature of military command and contracting officer structures makes it difficult for contractor employees to know the identity of the military officers that they must obey. Additionally, the definition of "superior officer", which is inherent in the military rank structure, is not easily applied to civilians. For example, would a warrant officer or captain be a "superior officer" to a mid-level manager for a contractor, or would only commanders enjoy such "superior officer" status?

This lack of clarity is important when considering whether an officer, not just a commander, may issue an order that constructively modifies the contract. Even assuming the contractor can determine whether the specific commander or other military officer may require the contractor to perform the work, the contractor faces the dilemma of assuming the risk of either not being compensated for the work associated with the modification or criminal prosecution of its employees. Many contractors in Iraq and Afghanistan work under the "direct supervision" of these commanders and military officers because the contracting officers are generally not located in the same unit and are often not even in the country.

Currently, commanders and other officers frequently give contractors *guidance* on methods of performing the contract requirements, such as the number of vehicles to include within a convoy and the best routes of travel. Although the *guidance* may have been optional for contractors, that guidance may now be considered to be a lawful order that must be obeyed by the contractor employees under the UCMJ but not an authorized modification under the contract. In this type of situation, the contractor faces four possibilities: 1) follow the order and request a ratification and equitable adjustment from the contracting officer; 2) follow the guidance and incur the additional costs without seeking a ratification; 3) attempt to resolve the conflict through discussions with the commander and the contracting officer; and 4) ignore the guidance and risk a decision by the commander to prosecute the employee(s) for failure to obey an order.

3) **Investigative Jurisdiction.** Military investigative agencies like the Army's Criminal Investigative Division and Navy's Criminal Investigative Service have the power to conduct law enforcement investigations on military bases, in contingency operation zones, or involving personnel subject to the UCMJ. The investigatory power over civilians has greatly expanded from actions on military bases to violations of the UCMJ regardless of location.

Further, this statutory change may subject contractors to the military's administrative investigation processes, such as the Army's commander's inquiry process under Army Regulation 15-6, Procedures for Investigating Officers and Boards of Officers, November 2, 2006. Commanders have the inherent authority to conduct investigations for issues arising within their command, including but not limited to losses of government equipment, personal misconduct, and suspected violations of the Rules of Engagement. The commander's inquiry is an administrative action, not a criminal matter. However, the requirement to conduct a commander's inquiry is an order and the failure to comply with any order could lead to criminal prosecution under the UCMJ. Contractors have always been subject to these inquiries, but now they may also be subject to the compulsory aspect of these proceedings, and they may face criminal liability for failure to comply. Some procedural protections do exist in these proceedings, such as the Art. 31 protections against self-incrimination and the right to counsel, but contractor personnel should seek counsel to understand those rights and how they work in this context.

4) **Rights of Defendants.** Generally, the rights of defendants under the UCMJ mirror those in the federal criminal justice system. A few key differences involve the equivalent procedures for the *Miranda* rights, right to counsel, and grand jury proceedings. Under the UCMJ, persons are entitled to the military's equivalent of *Miranda* rights, found in Article 31 of the UCMJ. Article 31 rights contain all of the same substantive protections, but are triggered earlier in an investigative or administrative process than *Miranda* rights. All defendants are entitled to a military defense counsel even if the defendant opts to hire a civilian defense counsel at his/her own expense. The procedures for an Article 32 hearing, roughly analogous to a civilian grand jury proceeding, also differ in that the defendant is entitled to be present and has the right to question witnesses.

5) **Summary Proceedings.** Under the UCMJ, serious crimes are adjudicated by "general courts-martial," convened by specifically-designated commanders usually in the rank of two-star general or above. These proceedings resemble civilian criminal trials, and have many similar procedural protections for defendants. However, many smaller offenses are heard through summary proceedings such as special courts-martial and "non-judicial punishment" under Article 15 of the UCMJ. These proceedings are designed to mete out quick justice at the local level, and are frequently used by mid-level and junior commanders for offenses in contingency operations areas. The punishments under these proceedings are capped depending on the type of offense. However, defendants do not enjoy the same procedural rights during the non-judicial punishment, such as a limited right to counsel, no right to a jury trial and the inapplicability of the Military Rules of Evidence; defendants can elect to refuse an Article 15 proceeding in favor of a court-martial.

DoD Implementation of Section 552 of the FY07 NDAA

The DoD Joint Service Committee for Military Justice is reviewing the UCMJ, the Manual for Courts-Martial (MCM), and the individual service regulations to determine whether changes need to be made to implement the expanded jurisdiction. Any changes to the MCM are subject to public notice and review. (DoD Directive 5500.17, *Role and Responsibilities of the Joint Service Committee (JSC) on Military Justice*, May 3, 2003.)

Given the increased responsibilities, close proximity, shared risk, and working relationships of the many contractors with their supported units in Iraq and Afghanistan, courts may consider the contractor

employees to be "persons serving with or accompanying an armed force in the field" and, thereby, subject to the jurisdiction of the UCMJ. However, any prosecution of a civilian under this law will almost surely generate a Constitutional challenge.

Contractors should inform all employees who may be subject to the UCMJ that they may potentially face prosecution for offenses under the UCMJ. In the short-term, contractors should work with their government contracting officers and the commanders to determine the roles and responsibilities of all parties, and enhance communications to reduce the need for contractors to be placed in this dilemma. As part of the long-term strategy, industry may want to propose regulatory changes to address these uncertain variables, or consider engaging DoD officials regarding the development of policy guidance for commanders and JAGs in the field who will implement this new law.

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