

The First Prosecution of a Contractor Under the UCMJ: Lessons for Service Contractors

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The first prosecution of a civilian contractor under the Uniform Code of Military Justice (UCMJ) resulted in a guilty plea on June 24, 2008. An Iraqi working as an interpreter for a contractor supporting the U.S. military in Iraq was sentenced to five months of confinement after pleading guilty in connection with a stabbing of a co-worker.

How is the Department of Defense (DoD) implementing this new authority? What are the lessons learned from this case, and what can companies do to prepare if caught in the cross-hairs of the UCMJ?

Background

The UCMJ historically has applied to contractors by covering “persons serving with or accompanying an armed force in the field.”¹ Prior to 2007, however, it applied to contractors only “in time of war.” With the enactment of the John Warner National Defense Authorization Act for Fiscal Year 2007 (2007 NDAA), the UCMJ now applies to contractors during a “declared war or contingency operation.”² This small but significant change has the effect of potentially applying the UCMJ to over 100,000 contractor personnel accompanying armed forces in Iraq and Afghanistan.

Under the extraordinary circumstances associated with a “time of war,” courts have upheld military trial of civilians performing services for the armed forces “in the field.” The phrases “serving with or accompanying an armed force” and “in the field,” when applied to civilians, have been interpreted to require contractor actions “directly connected with or dependent upon, the activities of the armed

forces or their personnel” rather than incidental to such activities.³ “[I]n the field” has been interpreted to mean “an area of actual fighting” where “actual hostilities are under way.”⁴ These limitations have been critical factors in court decisions regarding whether the application of the UCMJ to civilians was a violation of a civilian’s right to trial by a jury of their peers and other constitutional guarantees. Such limitations reflect a deep and long tradition of military subordination to civilian authority. Among the “repeated injuries and usurpations” by the British cited in the Declaration of Independence were “render[ing] the Military independent of and superior to the Civilian Power” and depriving the people of “the benefits of a Trial by Jury.”

The issue of whether the UCMJ violates these constitutional protections was not raised under this first prosecution of a civilian since the expansion of the UCMJ’s application. That issue remains unanswered. Also not challenged during this first prosecution is whether the actions of the contractor’s employee fell within the definitions of the statute. Questions of what types of specific contractor actions are considered to be “directly connected with or dependent upon, the activities of the armed forces or their personnel” rather than incidental to such activities, and whether “actual hostilities are underway” will have to wait for another time.

UCMJ Implementation

Prior to the 2007 NDAA, the DoD already had policies and procedures addressing the military’s coordination with the Department of Justice (DoJ) in the investigation and prosecution of crimes by

civilians accompanying the armed forces outside of the United States.⁵ The 2007 statutory expansion of the UCMJ resulted in DoD issuing a March 2008 memorandum (referred to as “DoD Memo” in this article) by the Deputy Secretary of Defense providing more detail on the department’s implementation.⁶

The DoD Memo, among other things, recognizes the authority of military commanders to investigate, apprehend, arrest, and temporarily detain a person subject to the UCMJ when there is probable cause that the contractor employee subject to the UCMJ has committed a covered offense. It also requires the senior geographic combatant commander to notify DoJ in accordance with pre-existing procedures under DoD Instruction 5525.11, affording DoJ an opportunity to take jurisdiction. Pending a response from DoJ, which normally should occur within 14 calendar days, DoD may continue law enforcement, criminal investigations, and

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¹ 10 U.S.C. §802(a)(10)(2007).

² Id.

³ *United States v. Rubenstein* 22 C.M.R. 313, 317 (1957).

⁴ *Reid v. Covert*, 354 U.S. 1, 34-35 (1957).

⁵ See 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).

⁶ See Secretary of Defense Memorandum, *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* (March 10, 2008) (the “DoD Memo”).

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other military procedures before initiating court-martial charges. If DoJ does not respond within the established review period (with extensions granted by mutual agreement) or DoJ declines to pursue prosecution, DoD can initiate UCMJ proceedings. Additionally, if DoJ later declines or terminates jurisdiction over a matter, the commanders with court-martial convening authority may reestablish their UCMJ authority over the case.

Lessons Learned for Contractors

The Need for Accountability. The accountability of contractors supporting U.S. overseas deployments has received high-profile attention over the last few years. This is not a surprising development given the number of contractors, the scope of such support, and length of the current military engagements in Iraq and Afghanistan. Responsible contractors will embrace such accountability.

Indeed, the first prosecution of a civilian contractor under the UCMJ demonstrates how this new authority was intended to plug gaps in accountability. The contractor employee in this case was a dual citizen of Iraq and Canada, but the Iraqi and Canadian governments declined to prosecute. The DoJ also declined to prosecute the case, probably because the individual was not a U.S. citizen. The new UCMJ provision, however, allowed the U.S. military to plug the hole in the system by ensuring that the perpetrator was held accountable.

The Human Condition. Notwithstanding a contractor's best efforts to screen, vet, train, and supervise overseas personnel, the human condition cannot be ignored. This is true regardless of whether contractor personnel are U.S. citizens or third country nationals, although the latter brings with it different language and cultural challenges. The frailty of the human condition, particularly in extraordinary environments with numerous stressors, often can result in someone engaging in or being perceived to engage in bad behavior. This is a statistical certainty and remains true whether the conduct occurs by civilians or uniformed members of our Armed Forces.

It is doubtful that DoD wanted or remotely expected that this stabbing by a worker with dual Canadian-Iraqi citizenship would be the first test case of the expanded application of the UCMJ to contractor employees supporting a contingency operation. On the other hand, the first prosecution was somewhat of a "softball" case and allowed DoD to exercise its authority without any serious legal challenges. Pleading guilty and receiving five months detention was not a bad outcome for the perpetrator. The lesson is that events in war zones are unpredictable. Companies should prepare for and expect the best of your personnel, but also prepare for the worse case scenario.

Policies and Procedures. Making rush legal decisions on the fly can be dangerous domestically; managing them in a crisis thousands of miles and many time zones away can be even worse. Like military battles themselves, the success of a company's response to the investigation, detention, or arrest of one of its personnel for an alleged crime can be won or lost in advance planning. The list of issues are numerous and grow more complex in proportion to the scope and damage caused by the alleged crime. For example, company advance planning should consider the following:

- Under what circumstances do we pay for legal counsel to represent the individual? Does it depend on the seniority level of the accused, his tenure with the company, or the nature of the alleged offense?
- Should the company conduct an internal investigation or rely on government investigators? Is an internal investigation feasible?
- What are the considerations for conducting an internal investigation in a war zone?
- How will the company handle any press and Congressional inquiries?
- What about issues of company privilege? Should any internal report be prepared under the attorney-client privilege given that Congress does not recognize the privilege? Should an eventual waiver of the privilege dictate the type of investigation or records to be generated?

- What type of support, if any, and lines of communication should the company provide family members of the employee being prosecuted? Those of any alleged victims?
- Should the company proactively respond to a potential suspension and debarment of the company or of senior officials who may have supervised the accused?
- Are company executives prepared to face and deal with a white-hot spot light?

Each one of these issues easily can have their own blurred plot lines. Some of these issues become easier or tougher depending on whether the behavior at issue can be attributable to the company in some way. A prudent contractor must think through these issues, create a game plan, and develop several contingencies to the plan. Companies should establish policies and procedures before events start moving at the speed of fiber optic news.

One smart step is to form a rapid response team of experienced inside and outside specialists who can work together to create an infrastructure and template key documents to permit a response at a moment's notice. The alternative is putting together a team at the last minute when your company is most vulnerable and when there is no time for a meaningful selection process and the vetting of ideas and approaches.

Be aware that some outside investigators may quote mid-six and even seven-figure amounts to investigate alleged crimes in a war zone. Without proper planning, your executives may conclude that the company is one of the victims. Even with advance planning, they could be right, which means companies must also financially plan for such contingencies.

It is often said that the best defense is a good offense. So be proactive and start planning.



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