SECRETARY OF DEFENSE
1000 DEFENSE PENTAGON
WASHINGTON, DC 20301-1000

MAR 10 2008

MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS
CHAIRMAN OF THE JOINT CHIEFS OF STAFF
UNDER SECRETARIES OF DEFENSE
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

References:
(a) Section 552 of the John Warner National Defense Authorization Act for Fiscal Year 2007 (Public Law 109-364, October 17, 2006)
(b) Uniform Code of Military Justice (Chapter 47 of title 10, United States Code)
(c) Manual for Courts-Martial, United States (Executive Order 12473, July 13, 1984, as amended)
(d) Military Extraterritorial Jurisdiction Act (MEJA), Chapter 212 of title 18, United States Code
(e) Department of Defense 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

Military operations in support of the Global War on Terrorism (GWOT) increasingly require U.S. military forces to operate alongside DoD civilian employees and DoD contractor personnel who serve with or accompany our armed forces as integral parts of that unified effort. This memorandum provides additional guidance to commanders on the exercise of their UCMJ authority during contingency operations, including those supporting the GWOT.

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. Commanders possess significant authority to act whenever criminal activity may relate to or affect the commander's responsibilities, including situations in

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which the alleged offender's precise identity or actual affiliation is to that point undetermined. Attachment 1, "Command Law Enforcement Authority," summarizes the broad scope of this command authority. I expect commanders and their law enforcement authorities to act accordingly.

On October 17, 2006, the Uniform Code of Military Justice (UCMJ) was amended to extend UCMJ jurisdiction over persons serving with or accompanying U.S. armed forces in the field in times of declared war or a contingency operation (references (a) and (b)). Since then, commanders have had available this additional UCMJ disciplinary authority.

The unique nature of this extended UCMJ jurisdiction over civilians requires sound management over when, where, and by whom such jurisdiction is exercised. There is a particular need for clarity regarding the legal framework that should govern a command response to any illegal activities by Department of Defense civilian employees and DoD contractor personnel overseas with our Armed Forces. Accordingly, pursuant to my authority under Article 22, UCMJ (reference (b)), and Rules for Courts-Martial 401 and 601 of the Manual for Courts-Martial (reference (c)), the requirements of Attachment 2, "Article 2(a)(10), UCMJ, Authority Over Persons Serving With or Accompanying the Armed Forces," apply to all disciplinary actions under this UCMJ amendment.

When offenses alleged to have been committed by civilians violate U.S. federal criminal laws, the Department shall notify responsible Department of Justice (DoJ) authorities, and afford DoJ the opportunity to pursue its prosecution of the case in federal district court (references (d) and (e)). To expedite that process, the notification requirements and procedures of attachment 3 shall apply in all cases.

While the DoJ notification and decision process is pending, commanders and military criminal investigators should continue to address the alleged crime. Commanders should ensure that any preliminary military justice procedures that would be required in support of the exercise of UCMJ jurisdiction over civilians continue to be accomplished during the concurrent DoJ notification process. Commanders should be prepared to act, as appropriate, should possible U.S. federal criminal jurisdiction prove to be unavailable to address the alleged criminal behavior.

DoD regulations and other guidance, the regulations and other guidance of the Secretaries of the Military Departments (including the U.S. Coast Guard when it is operating as a Service in the Navy), publications and other guidance of the Joint Chiefs of Staff, and, by agreement, regulations and other guidance of the Department of

Homeland Security for the U.S. Coast Guard, when it is not operating as a Service in the Navy, shall incorporate the guidance provided by this memorandum and its attachments. The General Counsel of the Department of Defense is authorized to issue additional guidance implementing this memorandum.

Attachments:
As Stated.

Copy to:

Secretary of State
Attorney General of the United States
Secretary of Homeland Security
General Counsel of the Department of Defense
Assistant Secretary of Defense (Legislative Affairs)
Assistant Secretary of Defense (Public Affairs)
Assistant Secretary of Defense (NII)
DOD Inspector General

Command Law Enforcement Authority

The following summarizes some of the commander's authority and the military law enforcement authority available when a crime is committed within that commander's geographic area of responsibility outside the United States.

1. Commanders have authority to cause an inquiry or investigation to be conducted of any crime allegedly committed by persons subject to Uniform Code of Military Justice (UCMJ) jurisdiction, as well as a person subject to Military Extraterritorial Jurisdiction Act (MEJA) jurisdiction until such time as civilian law enforcement officials have assumed sole investigative responsibility. (References: Rule for Courts-Martial 303, Manual for Courts-Martial; DoD Instruction 5525.11; DoD Instruction 5525.07).

2. Military law enforcement officers and military criminal investigators are authorized to apprehend persons subject to UCMJ jurisdiction, and arrest and temporarily detain persons subject to MEJA jurisdiction, when there is probable cause that an offense has been committed and that the person committed it. (References: Rules for Courts-Martial 301-305, Manual for Courts-Martial; 10 U.S.C. §§ 807-814, 1585a, 4027, 7480, 9027; 18 U.S.C. § 3262; Paragraph 6.2, DoD Instruction 5525.11; DoD Instruction 5525.07).

3. All commissioned, warrant, petty, and noncommissioned officers on active duty may apprehend offenders subject to UCMJ jurisdiction. (References: 10 U.S.C. § 807; Rule for Courts-Martial 302, Manual for Courts-Martial).

4. Any person authorized to make an apprehension may use such force and means as are reasonable under the circumstances to accomplish the apprehension. (References: 10 U.S.C. § 807; Rule for Courts-Martial 302, Manual for Courts-Martial).

5. Federal law enforcement officials have independent authority to apprehend persons, whether or not subject to trial by court-martial, to the extent their authority is permitted by applicable statutes and other law. (References: 10 U.S.C. § 807; Rule for Courts-Martial 302, Manual for Courts-Martial; DOD Instruction 5525.07).

Attachment 1

Article 2(a)(10), UCMJ, Authority
Over Persons Serving With or Accompanying the Armed Forces

1. Within the Department of Defense, only the Secretary of Defense shall possess authority to exercise court-martial convening authority and impose nonjudicial punishment over persons subject to Article 2(a)(10), Uniform Code of Military Justice (UCMJ), jurisdiction with respect to:

a. Offenses committed within the "United States", meaning the several States of the United States, the District of Columbia, and the commonwealths, territories, and possessions of the United States;

b. Persons who were not at all times during the alleged misconduct located outside the "United States", as defined above; and

c. Persons who are, at the time court-martial charges are initiated (preferred) or notice of Article 15, UCMJ proceedings is given, located within the "United States", as defined above.

2. Subject to the above, the commanders of geographic combatant commands, and 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 Article 2(a)(10), UCMJ, jurisdiction with respect to offenses committed outside the "United States," as defined above. The commander of the combatant command may further withhold such authority within the combatant command.

3. Authority to initiate (prefer) court-martial charges and nonjudicial punishment is withheld until the required notification requirements established in attachment 3 are accomplished for Article 2(a)(10), UCMJ, cases. Law enforcement, criminal investigations, and other military justice procedures that precede the initiation (preferral) of court-martial charges should continue, as applicable, during this notification process.

4. Authority to initiate (prefer) court-martial charges and nonjudicial punishment over an offense pursuant to this UCMJ authority is withheld whenever the Department of Justice (DoJ) provides notice to the Department of Defense that it intends to pursue U.S. federal criminal prosecution for what is substantially the same offense or a related offense, and such withholding shall remain in effect while DoJ is pursuing its federal prosecution of the case, and until such prosecution is completed or terminated prior to its completion.

Article 2(a)(10), UCMJ, Notification Requirements and Procedures

Because of the unique nature of this Uniform Code of Military Justice (UCMJ) jurisdiction over civilians, it is important that the exercise of this jurisdiction be based on military necessity to support an effective fighting force and be called for by circumstances that meet the interests of justice, such as:

- When U.S. federal criminal jurisdiction otherwise does not apply or federal prosecution is not pursued, and/or

- When the person's conduct is adverse to a significant military interest of the United States (e.g., alleged misconduct that may jeopardize good order and discipline or discredit the armed forces and thereby have a potential adverse effect on military operations).

Nevertheless, before initiating a disciplinary action pursuant to this UCMJ authority, commanders shall comply with the following notification procedures to determine whether U.S. federal criminal jurisdiction under the Military Extraterritorial Jurisdiction Act (MEJA) or other federal laws applies and will be pursued:

1. The notification procedures and information requirements of DoD Instruction 5525.11 shall be followed in all cases intended to be pursued under Article 2(a)(10), UCMJ, jurisdiction, to include providing all reasonably available information regarding the investigation and the location of the alleged offender's last known residence in the United States.

2. Commanders who are not general court-martial convening authorities (GCMCA) have had their UCMJ authority withheld by attachment 2. As such, those commanders shall, before initiating any disposition action under Rules for Courts-Martial 306 - 308 or 401 - 406 of the Manual for Courts-Martial (MCM), forward expeditiously all available information regarding the alleged misconduct that is potentially subject to this jurisdiction to the first GCMCA in the chain of command for that GCMCA's disposition consideration under Rule for Courts-Martial 407, MCM. The notification shall include the reasoning in support of a UCMJ disposition.

3. Combatant Command GCMCA Notification Requirements. All GCMCAs assigned or attached to the geographic combatant commands shall notify in writing (including by email or facsimile) their respective geographic combatant command commander of their intended disposition by court-martial or nonjudicial punishment over persons subject to Article 2(a)(10), UCMJ, jurisdiction. This notification affords the

commander of the geographic combatant command concerned the opportunity to accomplish the following notification requirements, as well as the opportunity to exercise authority under Rule for Courts-Martial 601(f), MCM.

4. Combatant Command Notification Requirements. Before initiating (preferring) court-martial charges and nonjudicial punishment based on Article 2(a)(10), UCMJ, jurisdiction, and regardless of whether the suspected offense may also be an offense under federal criminal laws, reference (e), the geographic combatant commander shall first provide notice of the case in writing (including by email or facsimile), in accordance with the procedures established in DoD Instruction 5525.11. This notification enables the Department of Defense to formally notify the Department of Justice (DoJ) of the case and any potential U.S. federal criminal jurisdiction, and affords DoJ an opportunity to determine if it intends to pursue U.S. federal criminal prosecution and to advise DoD accordingly.

a. Commanders should continue law enforcement, criminal investigations, and other military justice procedures that precede the initiation (preferral) of court-martial charges and nonjudicial punishment during this notification process, as applicable.

b. After DoD's formal notification to DoJ, DoJ shall expeditiously (but in no case longer than 14 calendar days) determine whether it intends to exercise jurisdiction over the case.

(1) If, within that 14-day review period, DoJ determines that extraordinary circumstances warrant additional time to complete its review, the Deputy Attorney General shall communicate that assessment to the Deputy Secretary of Defense and an extension shall be granted as mutually agreed upon.

(2) If, after this review period (to include any extension to which the Deputy Attorney General and Deputy Secretary of Defense agreed upon), DoJ does not advise DoD that it intends to pursue prosecution of the case, DoD may notify DoJ that it intends to authorize the initiation of UCMJ proceedings and may then inform the geographic combatant commander that, as a matter of command discretion, disciplinary action pursuant to Article 2(a)(10), UCMJ, may be initiated.

(3) When notifying the respective GCMCA who intends to take disciplinary action, the combatant commander shall also advise the respective GCMCA whether the combatant commander will, instead, exercise UCMJ authority pursuant to Rule for Courts-Martial 601(f), MCM. Similar procedures shall apply when DoJ advises DoD that the

exercise of U.S. federal criminal jurisdiction is not applicable, or when DoJ indicates it does not intend to pursue prosecution.

c. Even where DoJ intends to pursue prosecution, continued DOD investigative assistance may be necessary. Thus, criminal investigative activity by DOD should continue in coordination with DoJ unless and until civilian law enforcement officials assume sole investigative responsibility for the matter.

d. When DoJ elects to exercise jurisdiction over the case, further action by the combatant command concerned, and all GCMCAs assigned or attached to that combatant command, to convene a court-martial or administer nonjudicial punishment is withheld, as stated in attachment 2.

e. The required notification process does not rescind or negate general court-martial convening authority over cases subject to Article 2(a)(10), UCMJ, jurisdiction and, in the event that U.S. federal criminal jurisdiction of the case is later declined or terminated, GCMCAs may then exercise this authority, as appropriate.