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Private Security Contractors in Iraq: Background, Legal Status, and Other Issues

Jennifer Elsea, American Law Division; Moshe Schwartz and Kennon H. Nakamura, Foreign Affairs, Defense, and Trade Division

September 29, 2008

Abstract. This report summarizes what is currently known publicly about companies that provide personnel for security missions in Iraq and some sources of controversy surrounding them. A treatment of legal status and authorities follows, including an overview of relevant international law as well as Iraqi law, which currently consists primarily of Coalition Provisional Authority (CPA) orders that remain in effect until superceded. The various possible means for prosecuting contractors under U.S. law in civilian or military courts are detailed, followed by a discussion of possible issues for Congress, including whether protective services are inherently governmental functions. The report also summarizes pertinent legislative proposals.

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CRS Report for Congress

Private Security Contractors in Iraq: Background, Legal Status, and Other Issues

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Prepared for Members and
Committees of Congress

Private Security Contractors in Iraq: Background, Legal Status, and Other Issues

Summary

The United States is relying heavily on private firms to supply a wide variety of services in Iraq, including security. From publicly available information, this is apparently the first time that the United States has depended so extensively on contractors to provide security in a hostile environment, although it has previously contracted for more limited security services in Afghanistan, Bosnia, and elsewhere. In Iraq, private firms known as Private Security Contractors (PSCs) serve to protect individuals, transport convoys, forward operating bases, buildings, and other economic infrastructure, and are training Iraqi police and military personnel.

By providing security for reconstruction and stabilization efforts, many analysts and policymakers say, private contractors contribute an essential service to U.S. and international efforts to bring peace to Iraq. Nonetheless, the use of armed contractors raises several concerns, including transparency and accountability. The lack of public information on the terms of the contracts, including their costs and the standards governing hiring and performance, make evaluating their efficiency difficult. The apparent lack of a practical means to hold contractors accountable under U.S. law for abuses and other transgressions, and the possibility that they could be prosecuted by foreign courts, is also a source of concern.

Contractors working with the Department of State or the U.S. military (or with any of the coalition forces) in Iraq are non-combatants who have no combat immunity under international law if they engage in hostilities, and whose conduct may be attributable to the United States. Section 552 of the John Warner National Defense Authorization Act for FY2007 (P.L. 109-364) makes military contractors supporting the Armed Forces in Iraq subject to court-martial, but due to constitutional concerns, it seems more likely that contractors who commit crimes in Iraq would be prosecuted under criminal statutes that apply extraterritorially or within the special maritime and territorial jurisdiction of the United States, or by means of the Military Extraterritorial Jurisdiction Act (MEJA). Generally, Iraqi courts do not have jurisdiction to prosecute contractors without the permission of the relevant member country of the Multi-National Forces in Iraq. Some contractors, including those with the State Department, may remain outside the jurisdiction of U.S. courts, civil or military, for improper conduct in Iraq.

This report summarizes what is currently known publicly about companies that provide personnel for security missions in Iraq and some sources of controversy surrounding them. A treatment of legal status and authorities follows, including an overview of relevant international law as well as Iraqi law, which currently consists primarily of Coalition Provisional Authority (CPA) orders that remain in effect until superceded. The various possible means for prosecuting contractors under U.S. law in civilian or military courts are detailed, followed by a discussion of possible issues for Congress, including whether protective services are inherently governmental functions. The report also summarizes pertinent legislative proposals. This report will be updated as events warrant.

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Private Security Contractors in Iraq: Background, Legal Status, and Other Issues

Introduction

The 110th Congress is grappling with a broad range of issues regarding the use of private contractors to provide security for people and property in Iraq and elsewhere. The United States has gradually increased the types of tasks and roles for which it contracts private companies in military operations. Congress has generally accepted the concept of using unarmed private contractors to carry out support functions in military operations, such as providing food and laundry services, although not without concerns regarding the costs of contracts and alleged favoritism in issuing them. But for the Department of State and the military, Iraq is, in some ways, an atypical situation. There, the United States is relying heavily, apparently for the first time in an unstable environment, on private firms to supply a wide variety of security services.¹ Especially given a shortage of Diplomatic Security agents and U.S. troops, private security contractors are widely viewed as vital to U.S. efforts to protect many Iraqi and U.S. government officials, general contractors working to stabilize and reconstruct Iraq, and government facilities. Nevertheless, many Members are concerned about transparency, accountability, and legal and symbolic issues raised by the use of armed civilians to perform security tasks formerly performed by the military and federal employees, as well as possible long-term effects on these organizations.

This report first summarizes available information on the private contractors providing security services under U.S. government contracts in Iraq.² It then

¹ Iraq appears to be the first case where the U.S. government has used private contractors extensively for protecting persons and property in potentially hostile or hostile situations where host country security forces are absent or deficient, but it is not the first time private contractors have been used for such purposes. In Afghanistan, there appears to be some contracting for protecting Afghan government officials and the DOD is using contractors to provide security for forward operating bases. The U.S. Government Accountability Office (GAO) reported that contractors have provided security guards in the Balkans and Southwest Asia, noting that in Bosnia “the Army replaced soldiers at the gate and base perimeter with contracted security guards.” *Military Operations: Contractors Provide Vital Services to Deployed Forces but Are Not Adequately Addressed in DOD Plans*. GAO-03-695, June 2003, p 8. The United States also uses private contractors (U.S. and foreign citizens) for guard duty at U.S. military installations and U.S. embassies and consulates in a number of countries where stability generally is not an issue.

² This report does not deal with private contractors whose function is to gather intelligence from prisoners, even though reports indicate that they may be armed. For information on such contractors, see CRS Report RL32395, *U.S. Treatment of Prisoners in Iraq: Selected* (continued...)

provides information on relevant U.S., international, and Iraqi law, and legal issues involved in the use of armed contractors. It concludes with a discussion of issues involving the need for and suitability of private contractors, costs, oversight, and control, as well as potential foreign policy implications.

Background

The United States is just one of many entities — including other governments, international organizations, and private industry — that employ private security contractors in Iraq. In recent years, the United States and many other nations and organizations, including the United Nations, have increasingly turned to private contractors to provide security, as well as a variety of other functions in support of stabilization and reconstruction efforts.³ This increased reliance on contractors has fueled the growth of the private security industry.

Services Provided by Private Security Contractors

There is some debate as to what constitutes a private security contractor. Some commentators define private security as any activity directly related to protecting a person, place, or thing.⁴ Others may use a broader definition that includes such activities as providing intelligence analysis, operational coordination, or security training. The National Defense Authorization Act for Fiscal Year 2008 (P.L. 110-181 Sec. 864) defines private security functions as the guarding of personnel, facilities, or properties, and any other activity for which personnel are required to be armed. In addition to armed security, many private security contractors also offer a variety of unarmed services, which in a number of cases may represent 50% or more

² (...continued)

Legal Issues, by Jennifer K. Elsea.

³ According to one publication, “Not since the 17th century has there been such a reliance on private military actors to accomplish tasks directly affecting the success of military engagements. Private contractors are now so firmly embedded in intervention, peacekeeping, and occupation that this trend has arguably reached the point of no return.” Fred Schreier and Marina Caparini. *Privatising Security: Law, Practice and Governance of Private Military and Security Companies*. Geneva, Switzerland: Geneva Centre for the Democratic Control of Armed Forces, March 2005. p. 1. For discussions on the growth of private companies providing security and other support to military efforts worldwide, see, for example: Deborah D. Avant. *The Market for Force: The Consequences of Privatizing Security*. Cambridge, UK; New York: Cambridge University Press, 2005; Simon Chesterman and Chia Lehnardt. *From Mercenaries to Market: The Rise and Regulation of Private Military Companies*. Oxford, UK; New York: Oxford University Press, 2007; and Singer, Peter W. *Corporate Warriors: The Rise of the Privatized Military Industry*. Ithaca, NY: Cornell University Press, 2003. For a discussion of United Nations use of such contractors, see William J. Durch and Tobias C. Berkman. *Who Should Keep the Peace? Providing Security for the Twenty-First-Century Peace Operations*. Washington, D.C.: The Henry L. Stimson Center, September 2006. pp. 83-84.

⁴ Doug Brooks, President of the International Peace Operations Association, an industry trade group, defines private security as any activity directly related to protecting a “noun.”

of the company's revenues. As such, the services provided by private security companies operating in Iraq can be divided into two major categories: armed services and unarmed services. Armed services include

- static security — protecting fixed or static sites, such as housing areas, reconstruction work sites, or government buildings;
- convoy security — protecting convoys traveling in Iraq;
- security escorts — protecting individuals traveling in unsecured areas in Iraq; and
- personal security details — providing protective security to high-ranking individuals.

Unarmed security services include⁵

- operational coordination — establishing and managing command, control, and communications operations centers;
- intelligence analysis — gathering information and developing threat analysis; and
- security training — providing training to Iraqi security forces.

Number of Private Security Companies Operating in Iraq

It is estimated that some 50 private security contractors employing more than 30,000 employees are working in Iraq for an array of clients, including governments, private industry, and international organizations such as the United Nations.⁶ Peter Singer of the Brookings Institution estimates that citizens of some 30 countries are employed by private security companies in Iraq.⁷ Many PSC employees are security professionals from western countries — such as the United States or British Commonwealth countries — with experience in the military or law enforcement.⁸ Others are third-country nationals, coming from such countries as Chile, Fiji, Nepal, and Nigeria. A third category of PSC employees consists of local Iraqis. Most of those working in Iraq as private security contractors are Iraqi, according to Doug Brooks of the International Peace Operations Association (IPOA), an industry group.⁹ Some of the third-country nationals and local Iraqis working for PSCs have extensive military training and experience.

⁵ Contractors providing training that includes the use of weapons may be armed. However, the use of weapons for training purposes is being categorized as an unarmed service because the weapons are used as training tools and not to provide armed security.

⁶ The estimate does not include Iraqi PSCs and their employees working for the Iraqi government or Iraqi private industry. Estimated based on an Email correspondence with Lawrence Peter, Director, Private Security Companies Association in Iraq, June 14, 2008.

⁷ Conversation with Peter Singer, Brookings Institution, June 13, 2007.

⁸ Some Americans are working for foreign PSCs and are providing security services to foreign clients.

⁹ E-mail correspondence from Doug Brooks, President, International Peace Operations Association, July 2, 2007.

Private Security Companies Working for the U.S. Government

Some 20 different PSCs, employing 10,000 people, are working directly for the U.S. government, primarily for DOD and the Department of State.¹⁰ These security contractors are providing an array of armed and unarmed security services, including static security, personal security details, intelligence analysis, and operational coordination. The United States also has an indirect contractual relationship with many PSCs. For example, reconstruction contractors working for the United States Agency for International Development (USAID) have in turn subcontracted with PSCs to acquire security services.

The total direct cost to the U.S. government for acquiring security services in Iraq is not known. The U.S. Congressional Budget Office (CBO) recently estimated that between 2003-2007 the U.S. government obligated between \$3 billion and \$4 billion to PSCs to acquire security services.¹¹ In 2005, the U.S. Government Accountability Office (GAO) reported that as of December 31, 2004, U.S. agencies had already obligated over \$450 million to acquire security.¹² CBO has estimated that starting in 2005, agencies have spent between \$500 million and \$1.2 billion annually on security services.¹³

The total cost to the U.S. government for private security services acquired by government contractors in Iraq is also unknown. CBO recently estimated that between 2003-2007, U.S.-funded contractors spent between \$3 billion and \$6 billion to acquire security services.¹⁴ In 2007, House Oversight and Government Reform Committee Chairman Henry Waxman stated at the committee's February hearings on Iraq reconstruction that almost \$4 billion "has been paid for private security services in the reconstruction effort alone."¹⁵ The amount of money spent by government contractors on security represents a significant portion of available reconstruction funds. In 2005, a GAO report surveying 15 U.S. government reconstruction contracts found that on more than half of the contracts security costs exceeded 15% of total billings; on four of the contracts security costs exceeded 25%

¹⁰ This report only discusses PSCs working for the Department of Defense and the Department of State.

¹¹ U.S. Congressional Budget Office, *Contractor's Support of U.S. Operations in Iraq*, August 2008, p. 13. Due to data limitations and data reliability concerns, CBO's estimate is a range.

¹² U.S. Government Accountability Office. *Rebuilding Iraq: Actions Needed to Improve Use of Private Security Providers*, GAO-05-737, July 28, 2005, p. 13.

¹³ CBO. *Contractor's Support of U.S. Operations in Iraq*, *op. cit.*, p.14

¹⁴ *Ibid.*

¹⁵ CQ Transcriptions. House Oversight and Government Reform Committee Holds Hearings on Waste, Fraud and Abuse in Iraq Reconstruction, Part 2. February 7, 2007. This is about a fifth of the \$20 billion in spending through FY2007 from the Iraq Relief and Reconstruction Fund and over a tenth of the \$35 billion in total U.S. Reconstruction Assistance, as computed in CRS Report RL31833, p. 3.

of total billings.¹⁶ A 2006 report by the Special Inspector General for Iraq Reconstruction (SIGIR) surveying nine major U.S. contractors found costs to range from a low of 7.6% to a high of 16.7%, whereas the State Department in 2005 estimated such security costs as 16%-22%.¹⁷

There has been much debate as to whether the use of private security contractors by the U.S. government is cost-effective. According to the CBO, the costs associated with using private security contractors in Iraq “did not differ greatly from the costs of having a comparable military unit performing similar functions. During peacetime, however, the military unit would remain in the force structure and continue to accrue costs at a peacetime rate, whereas the private security contract would not have to be renewed.”¹⁸ Agencies generally have not conducted comprehensive cost-benefit analyses comparing the costs of using private security companies with the costs of using in-house security resources.

Pay Scales for PSC Employees. Pay scales for these contractors reportedly vary depending on their experience, their nationality, and the U.S. government’s perceptions of danger involved. When the hiring of such contractors first became controversial, the news media reported (in April 2004) a pay range of \$500 to \$1,500 per day.¹⁹ Since the earlier days of the conflict, experts suggest that the pay scale has decreased and is on average lower globally as the supply of those desiring such work has risen.²⁰ The highest amounts are paid to highly trained and experienced former military personnel from the United States and British Commonwealth, with lower amounts paid to personnel from developing countries such as Chile and Nepal, and the lowest amounts going to locally hired Iraqis.

Dangers Faced by PSC Employees. Like soldiers, private security contractors incur the risk of death and injury from insurgents in Iraq. For example, all three contractors working for the Department of State under the Worldwide Personal Protective Services contract have had employees killed and wounded while providing security services.²¹ According to the private security contractor Blackwater Worldwide, 32 employees have been killed and more than 46 wounded while providing security in Iraq since March 1, 2004.²² Convoy-related deaths appear to be a significant portion of total private contractor deaths. U.S. Army Corps of Engineers data reportedly show that registered supply convoys have come under

¹⁶ *Rebuilding Iraq: Actions Needed to Improve Use of Private Security Providers*, p. 32.

¹⁷ As cited in CRS Report RL31833, *Iraq Reconstruction Assistance*, by Curt Tarnoff. April 6, 2007, p. 25.

¹⁸ CBO. *Contractor’s Support of U.S. Operations in Iraq*, *op. cit.*, p.14

¹⁹ David Barstow, “Security Companies: Shadow Soldiers in Iraq,” *New York Times*, April 19, 2004.

²⁰ Interview with Doug Brooks, December 13, 2006 and subsequent discussions with officials from PSCs currently operating in Iraq.

²¹ Based on data provided by Blackwater Worldwide, DynCorp International LLC, and Triple Canopy, Inc.

²² Data provided by Blackwater Worldwide, as of June 2008.

frequent attack.²³ Of those involved in the 12,860 Corps-registered convoys that transported supplies in Iraq from August 2004 through May 10, 2007, some 132 “security employees and drivers” were killed and 416 were wounded, according to a report on that data.²⁴ Recent reports indicate that violence in Iraq has significantly diminished. For example, according to media reports, the rate of attacks on convoys has dropped markedly: only about 1.5% of convoys were attacked in the first six months of 2008 compared with about 20% being attacked in late 2006 and early 2007.²⁵ While attacks on convoys and other targets have been on the decline, private security contractors remain at risk of being killed or wounded.

State Department and DOD Private Security Contracts

In the first years of Operation Iraqi Freedom, little information was available on State Department and DOD contracts for private security services in Iraq. The State Department and DOD have since made available the names of the companies holding its primary contracts for security services and the numbers of security personnel serving directly and indirectly under those contracts. Within the Department of Defense, the office of the Assistant Deputy Undersecretary of Defense (Program Support) is responsible for all contractor oversight, including private security contractors, in forward areas of operation. The office was established in response to section 854 of the National Defense Authorization Act of 2007 (H.R. 5122/P.L. 109-364).

State Department Private Security Contracts. Nearly 1,500 special agents of the State Department’s Bureau of Diplomatic Security (DS) serve in the United States at 285 U.S. offices, and overseas posts and missions. DS special agents are law enforcement officers involved in deterring visa and passport fraud, overseeing worldwide training and assistance programs in anti-terrorism, providing a courier service for the Department, and providing a wide range of protective services for the Secretary of State, the U.S. Ambassador to the United Nations, and foreign dignitaries visiting the United States. DS is also responsible for the security of U.S. embassies and consulates around the world, the personnel and the homes of those who staff those facilities, and the U.S. dignitaries who visit those countries.

The State Department has increasingly employed private security contractors for more than 20 years to provide protection to both overseas posts and missions and the personnel and their families who staff them in an increasingly dangerous world. Starting in 1983 after the U.S. embassy bombing in Beirut, Lebanon, the State

²³ Steve Fainaru. “Iraq Contractors Face Growing Parallel War,” *Washington Post*, June 16, 2007, p. A12. According to the article, registered convoys were attacked 5.5% in 2005 and 14.7% in early 2007 (from January 1- May 10).

²⁴ *Ibid.* The cause of death and injury was not reported, however, and may include accidents as well as shooting deaths. In addition, the totals for all convoys may well be higher as there are likely deaths and injuries associated with convoys that are not registered with the Corps’ Reconstruction Logistics Directorate.

²⁵ Peter Eisler, “Attacks on U.S. Convoys Plummet; Shipments Crucial to Rebuilding Iraq,” *USA Today*, July 22, 2008, p. A1; August Cole, “U.S. Tightens Rules for Security Contractors,” *The Wall Street Journal*, August 19, 2008, p. A14.

Department resorted to using contractors to provide perimeter security to U.S. diplomatic and consular posts around the world. The State Department's Bureau of Diplomatic Security first used PSCs in 1994 when MVM, Inc. was hired to help protect Haitian President Jean-Bertrand Aristide as he returned to Haiti. This was followed with the use of PSCs in Bosnia, Israel, Afghanistan, and most recently, Iraq.

In 2004, when the United States opened its embassy in Baghdad, DS took over the responsibility from the military of providing security for what was fast becoming the U.S.'s largest embassy. It became clear, however, that DS did not have sufficient personnel to take on this responsibility while continuing to accomplish its other duties around the world. To meet the shortfall, DS signed Blackwater USA (now Blackwater Worldwide), to a one-year sole-source contract to provide security services for the new Baghdad embassy and its staff. The State Department said it chose Blackwater because the company was already in-country, having operated there under a previous DOD contract to provide security for the Coalition Provisional Authority (CPA).

In the Summer of 2005, the State Department opened the Worldwide Personal Protective Services II (WPPS II) contract for bids.²⁶ The WPPS II contract for Iraq is a five-year (one-year base and four optional years) \$1.2 billion "Indefinite Delivery-Indefinite Quantity" (ID/IQ)²⁷ contract with task orders to be competed on a firm fixed-price basis. The contract was awarded on a best value basis, meaning its award was based on what was most advantageous to the federal government. The WPPS II considered technical merit more important than cost.²⁸

WPPS II contracts are used to provide bodyguards and static guards (i.e., guards for buildings and other infrastructure) in Baghdad and other areas throughout Iraq. Three private security companies were eventually hired under the WPPS-II umbrella contract. These companies were Blackwater Worldwide, DynCorp, International, LLC, and Triple Canopy, Inc. Triple Canopy also holds a separate State Department contract to provide local guard services for the U.S. Embassy and other sites in the Baghdad Green Zone, which are under Chief of Mission control.

Blackwater Worldwide, founded in 1997 as Blackwater USA and headquartered in Moyock, North Carolina, has provided a variety of protective services in Iraq. It was one of the original companies providing protection for CPA chief Paul Bremer

²⁶ The WPPS contracts are used to provide security services not only in Iraq, but also in Afghanistan, Bosnia, and Israel.

²⁷ Indefinite Delivery/Indefinite Quantity contracts policies are discussed in the Federal Acquisition Regulations (FAR) at 48 CFR Part 16.500 et seq., and provide for the acquisition of supplies and/or services when the exact times and/or exact quantities, above a specified minimum, of future deliveries during the contract period are not known at the time of contract award. ID/IQ contracts are used when a recurring need is anticipated, and the procurement process is somewhat streamlined because negotiations for the goods and services can be made only with the selected ID/IQ contractor [http://www.acqnet.gov/far/current/html/Subpart%2016_5.html].

²⁸ Worldwide Personal Protective Services Contract Solicitation SAQMPD04R1016, Office of Acquisition Management, Department of State, Washington, August 8, 2004, p. 218.

as well as other CPA employees and visiting dignitaries. The Blackwater staff includes former military, intelligence, and law enforcement personnel. According to news reports and its website, Blackwater, founded by former Navy SEAL Erik Prince, has the largest private training center in the United States. The center consists of various training ranges including those that simulate urban combat; the country's largest, multi-surface, multi-level tactical driving track; and an artificial lake built for conducting simulations of boarding a hostile ship. The company also has extensive technology design and manufacturing capabilities that have produced remotely piloted airships and IED-safe armored personnel carriers.²⁹ Under the WPPS contract, Blackwater's primary area of operation is the Baghdad area.

On April 5, 2008, the Department of State renewed Blackwater's WPPS contract for a fifth year. The Department explained that the FBI investigation into the September 16, 2007, Nisoor Square shooting in which Blackwater employees protecting a diplomatic convoy fired upon and killed 17 Iraqis, is ongoing, and the current contract was to expire in May 2008. After the conclusion of the FBI investigation, the Department is to examine the FBI findings to determine whether the Blackwater contract should continue.³⁰

DynCorp International LLC, based in Falls Church, Virginia, evolved, according to its website, from a company formed in 1946 that provided support and services to U.S. military aircraft and weapons systems under Air Force contracts. Named DynCorp since 1987, it was acquired in 2003 by Computer Sciences Corporation (CSC) and now has nearly 14,000 employees in 30 countries.³¹ Under the WPPS contract, DynCorp operates primarily in the northern Kurdish area of Iraq. Besides the WPPS contract, DynCorp also holds another State Department contract, under the Bureau of International Narcotics and Law Enforcement, to provide police training and related services in Iraq.

Triple Canopy, Inc., founded in September 2003 and based in Herndon, Virginia, bills its operational leadership as "comprised of former operators from tier-one special operations units...." Its two founders and co-chairs both served with the

²⁹ Blackwater Worldwide Website, "Company Profile," [http://www.blackwaterusa.com/company_profile/comp_history.html].

³⁰ Dana Hedgpeth, "State Department to Renew Deal with Blackwater for Iraq Security," *Washington Post*, April 5, 2008, pg. D02.

³¹ Information on the company's history and size from its website at [<http://www.dyncorpinternational.com>]. DynCorp's performance under the State Department's Bureau of International Narcotics and Law Enforcement Affairs (INL) contract was reviewed by the Office of the Special Inspector General for Iraq Reconstruction (SIGIR). Review of DynCorp International, LLC, Contract Number S-LMAQM-04-C-0030, Task Order 0338, for the Iraqi Police Training Program Support. SIGIR-06-029. DoS-OIG-AUD/IQO-07-20, January 30, 2007. According to this report, the contract was awarded in February 2004, for a base year and four renewable one-year options. Its potential value is \$1.8 billion.

U.S. Army Special Forces, one with Special Forces's Delta Force.³² Under the WPPS contract, Triple Canopy operates primarily in southern Iraq.

Table 1. Department of State Security Contractors in Iraq WPPS (As of May 29, 2008)

Company	Worldwide WPPS Numbers	WPPS in Iraq (Includes both support and PSS)	WPPS in Iraq — PSS (U.S. nationals)
Blackwater	1,090	968	601
DynCorp	156	153	78
Triple Canopy	328	279	80
Total	1,574	1,400	641

Source: Department of State.

Notes: The numbers provided on May 29, 2008, are only the State Department's prime contractors performing either personal protective services (PSS) or support functions. The United States Agency for International Development (USAID) also receives its protection under the State Department contracts. These numbers do not include private security personnel who have been hired by State Department or USAID contractor companies to provide other services, for instance, a company that has a contract to provide engineers. The State Department notes that the actual numbers of employees working in Iraq vary widely on a daily basis due to personnel rotations, medical evacuations, and R&R travel.

DOD Private Security Contracts. PSCs provide a wide variety of security services to the Department of Defense. For example, one company, EOD Technologies, Inc., provides static perimeter and internal security throughout Victory Base Complex in Baghdad. Another company, Aegis Defence Services Limited, coordinates the movement of all DOD, Department of State, and other participating PSCs throughout Iraq. The company also continuously gathers, interprets, and disseminates information on the security situation throughout Iraq. Other companies provide security for convoys or officials traveling throughout Iraq. DOD uses both American and foreign PSCs. For example, Aegis Defence Services Limited, Erinys International, and ArmorGroup Services Ltd. are British companies.

The number of PSC employees working for DOD fluctuates significantly, depending on a variety of factors, including troop strength and operational need. For example, as of December 31, 2007, DOD had contracts with 32 different PSCs employing almost 10,000 individuals to provide security services to the government.³³ By contrast, as of March 31, 2008, DOD had contracts with 18 different PSCs employing more than 7,000 individuals to provide security services

³² From the company's history posted on the Triple Canopy website at [<http://www.triplecanopy.com>].

³³ According to DOD, there were 9,952 security contractors working for the Department, of whom 6,467 were armed.

to the government (see **Table 2**).³⁴ DOD officials have stated that they anticipate the number of PSC employees operating in Iraq to increase again in the near future to support military efforts.³⁵ Some government officials and industry experts also attribute part of the drop in the number of PSC employees working in Iraq to DOD's improved ability to accurately track PSCs.³⁶ Generally, private security contractors constitute a relatively small portion — approximately 4-6% — of the over 160,000 strong contractor workforce working for DOD in Iraq.³⁷ DOD was unable to provide data on how much was being spent on PSCs in Iraq.

Aegis Defence Services Limited, founded in 2002 and based in London, is a privately owned company with offices in Afghanistan, Bahrain, Iraq, and the United States. It bills itself as a security and risk management company. The company's founder and CEO, Tim Spicer, is a retired British lieutenant colonel.³⁸ The company won an initial \$293 million contract with the U.S. Army in 2004 and was subsequently awarded a \$475 million contract, the largest PSC contract in Iraq awarded by DOD as of the date of the award. The contract award came under significant criticism as a result of the alleged role that founder Tim Spicer played in the late 1990s putting down a rebellion in Papua New Guinea and selling weapons to Sierra Leone in violation of a U.N. arms embargo.³⁹

ArmorGroup International plc, founded in 1981 and based in London, has approximately 8,500 employees worldwide, with 38 offices in 27 countries. The company bills itself as offering five security-related services: protective security; risk

³⁴ The PSCs are Aegis Defense Services Limited [<http://www.aegisworld.com/>]; ArmorGroup International plc [<http://www.armorgroup.com/>]; CSS GLOBAL [<http://www.gocssglobal.com/>]; EOD Technology, Inc. [<http://www.eodt.com/>]; Erinys Iraq [<http://www.erinysinternational.com/>]; Falcon Security Ltd. [<http://www.falconiraq.com/security.html>]; Global Strategies Group [<http://www.globalsecuritygroup.com/>]; Hart Security Limited [<http://www.hartsecurity.com/>]; Olive Group FZ-LLC [<http://www.olivegroup.com/index.htm>]; Pesh - Kurdistan Army; PWC Logistics [<http://www.pwclogistics.com/>]; Sabre International Security [<http://www.securitybysabre.com/>]; SAL Risk Group [<http://www.salriskgroup.com/>]; Securiforce International Ltd.; SOC-SMG, Inc.; Total Defense Logistics Ltd.; Triple Canopy, Inc. [<http://www.triplecanopy.com/triplecanopy/en/home/>]; and Universal Security LLC.

³⁵ Based on discussions with DOD officials in Iraq and the United States that took place between April - June 2008.

³⁶ Earlier in DOD's effort to track PSCs, some companies hired to provide ammunition and security-related items were included in the tally of PSCs. Such firms have since been excluded from the count.

³⁷ Percentage calculated based on data provided by DOD for Q1 and Q2 of fiscal year 2008.

³⁸ Data provided by company's website [<http://www.aegisworld.com/>]. Last visited July 9, 2008.

³⁹ See *Vanity Fair*, "The Business of War: Iraq's Mercenary King," April 2007. For Aegis' and Mr. Spicer's response to the *Vanity Fair* article, see [<http://www.aegisworld.com/index.php/news/8/58>]. Last visited, July 10, 2008. See also: *The Boston Globe*, "Security Firm's \$293m Deal Under Scrutiny," June 22, 2004; *Washington Post Foreign Service*, "In Iraq, a Private Realm of Intelligence-Gathering," July 1, 2007.

management consultancy; security training; development, humanitarian, and construction support; and weapons reduction and mine action services. ArmorGroup provides security training to more than 5,000 security professionals, government officials, and corporate executives and their families worldwide.⁴⁰

EOD Technologies, Inc., founded in 1987 and based in Lenoir City, Tennessee, is an employee-owned firm with offices in the United States, Afghanistan, Iraq, and Kuwait. The company bills itself as having three principal business units: munitions response, security services, and critical mission support. Its security services include armed security, guard force and reaction force training, surveillance and surveillance detection, counter IED response services, and security consulting.⁴¹

Table 2. Department of Defense Security Contractors in Iraq (As of March 31, 2008)

Company	Number of Americans	Number of Iraqis	Number of Third-Country Nationals	Total
Armed PSCs in Iraq	367	849	4,396	5,613
Unarmed PSCs in Iraq	148	834	665	1,646
Total	515	1,683	5,061	7,259

Source: Department of Defense.

Notes: Data provided in June 2008 from data collected March 2008. Actual numbers of employees working in Iraq vary widely on a daily basis due to personnel rotations, medical evacuations, and R&R travel.

Sources of Controversy

Public awareness of the extent to which private contractors were being used for security purposes was highlighted by the deaths of four Blackwater guards in Fallujah on March 31, 2004. The guards were three former Army Rangers and a former Navy SEAL. They were killed while escorting trucks carrying supplies for a private company that provided food services to U.S. military dining facilities in Iraq, and their bodies were then dragged through the streets and hung for display. Days later, Blackwater personnel again hit the news as they reportedly fought a prolonged gun battle in Najaf on April 4, 2004, allegedly defending the U.S. government headquarters there. These events sparked congressional debate over the role of private contractors in U.S. military operations, the desirability of using such contractors, and the appropriate legal and contractual framework to control them.

Congress has taken a renewed interest in questions about management, accountability, and transparency of PSCs. In November 2006, news reports about a lawsuit filed in Fairfax County [VA] Circuit Court brought to light allegations that

⁴⁰ Data provided by company's website [<http://www.armorgroup.com/>]. Last visited July 10, 2008.

⁴¹ Data provided by company's website [<http://www.eodt.com/>]. Last visited, July 10, 2008.

a Triple Canopy employee in Iraq twice had wantonly fired at Iraqi civilians in the summer of 2005 and possibly killed one person. The two Triple Canopy employees filing the lawsuit state that they were fired for reporting that their supervisor had committed the act. The Company stated that while it does not have any evidence that any persons were harmed as a result of the alleged weapons firing incidents, the employees were terminated a result of their failure to immediately report the weapons firings incidents.⁴² According to a news report, the Triple Canopy employee was operating at the time under a KBR subcontract when the shootings occurred.⁴³

More recently, Blackwater has been in the news because of its involvement in several shooting incidents in which Iraqi civilians were wounded or killed. On September 16, 2007, Blackwater guards, escorting a U.S. diplomatic convoy, wounded or killed 17 Iraqi civilians at a Baghdad traffic circle in Nisoor Square. According to news reports, the Blackwater guards felt threatened by an oncoming car that did not stop as the convoy was going through the circle. Blackwater officials insisted that the guards were ambushed but many witnesses state that Blackwater's actions were unprovoked. Many military officials reportedly also expressed concerns that the security contractors were trigger happy and "out-of-control cowboys who alienated the same Iraqis the military is trying to cultivate."⁴⁴ Defense Secretary Gates said that the contractors were at "cross purposes" with the military goals, and he suggested they be put under his authority.⁴⁵

News reporting on these incidents also raised concerns regarding charges of cultural insensitivity, Blackwater's sense of impunity in dealing with Iraqis, and whether the company was appropriately following the Department of State's guidelines for PSCs on the use of force. A Majority Staff hearing memorandum prepared for the October 2, 2007, House Committee on Oversight and Government Reform hearing regarding Blackwater and its involvement in shooting incidents in Iraq, describes Blackwater's record on the use of force to be "frequent and extensive resulting in significant casualties and property damage." The report states that between January 1, 2005, through September 12, 2007, Blackwater employees were involved in 195 incidents of firearms discharges. In 32 incidents, Blackwater

⁴² According to a news report, the jury ruled that the company did not wrongfully terminate the two employees. However, according to the report, the jury wrote that "Although we find for [Triple Canopy], we strongly feel that its poor conduct, lack of standard reporting procedures, bad investigation methods and unfair double standards amongst employees should not be condoned." Tom Jackman, "Security Contractor Cleared in Two Firings", *Washington Post*, August 2, 2007. p. A-15.

⁴³ Tom Jackman. "U.S. Contractor Fired on Iraqi Vehicles for Sport, Suit Alleges," *Washington Post*, November 17, 2006, p. A-20.

⁴⁴ Sudarsan Raghavan and Thomas E. Ricks, "Private Security Puts Diplomats, Military at Odds," *Washington Post*, September 26, 2007, p. A-01.

⁴⁵ Karen DeYoung, "State Department Struggles to Oversee private Army," *Washington Post*, October 21, 2007, p. A01.

personnel returned fire after an attack, while on 163 occasions, Blackwater fired first, according to the Majority Staff memorandum.⁴⁶

Members of Congress have also raised questions about the State Department's oversight of its protective service contractors' activities in Iraq. They accuse the State Department of not only failing to supervise contractor performance adequately but also of failing to properly investigate alleged killings by PSCs.⁴⁷

PSCs' use of deadly force, the actual and alleged killing of innocent Iraqi civilians by PSC employees, and the State Department's alleged lack of concern about accountability, many believe, have undermined U.S. foreign policy and specifically U.S. standing in Iraq. Many in the military reportedly expressed concerns that Blackwater's actions that day and over time could alter and degrade relationships that the military is seeking to build with Iraqis.⁴⁸ Speaking prior to the September 16 killings, an Iraqi Interior Ministry official discussing Blackwater's actions in previous deadly fire incidents and the company's attitude in ignoring Iraqi law and customs, explained that Blackwater and its actions are part of the reason for the hatred of Americans. "Iraqis do not know them as Blackwater or other PSCs but only as Americans."⁴⁹

In a broader foreign policy context, the State Department's alleged protection of Blackwater as its employees act as if they are above Iraqi law and kill Iraqis with impunity makes it difficult to advocate for such issues as the importance of the rule of law and human rights as U.S. foreign policy objectives. Advances in worldwide communications make it possible for allegations of human rights violations by those associated with the United States to be spread worldwide almost instantaneously, and may affect both the perception of the United States as a country respectful of human rights as well as the international environment in which the United States works to advance its foreign policy objectives.⁵⁰ Representative Tom Davis, concerned over the actions of PSCs, said:

Iraqis understandably resent our preaching about the rule of law when so visible an element of the U.S. presence there appears to be above the law. That is why

⁴⁶ Majority Staff Hearing Memorandum, "Additional Information about Blackwater USA," House Committee on Oversight and Government Reform, October 1, 2007, pg. 6.

⁴⁷ Opening Statement of Chairman Henry A. Waxman, in US Congress, House Oversight and Government Reform Committee, *Hearing on Private Security Contracting in Iraq and Afghanistan*, hearings, 110th Cong., 2nd sess., October 2, 2007.

⁴⁸ Sudarsan Reghavan and Thomas E. Ricks, "Private Security Puts Diplomats, Military at Odds; Contractors in Iraq Fuel Debate," op cit.

⁴⁹ Steve Fainaru, "Where Military Rules Don't Apply; Blackwater's Security Force in Iraq Given Wide Latitude by State Department," *Washington Post*, September 20, 2007, Pg. A1.

⁵⁰ Under Secretary of State for Public Diplomacy and Public Affairs Karen Hughes, speaking before the Council on Foreign Relations, New York City, N.Y., on May 10, 2006, said of the new worldwide information environment that "there is an information explosion and no one is hungry for information. We are now competing for attention and for credibility in a time when rumors can spark riots, and information, whether it's true or false quickly spreads across the world, across the internet, in literally instants."

the events of September 16th sparked such an outcry by the Iraqi government which sees unpunished assaults on civilians as a threat to national sovereignty.

The incident is also being used by those seeking to exploit accumulated resentments and draw attacks on private contractors, a force even the Iraqi government concedes is still a vital layer of security.⁵¹

Along with the very serious issue of killing innocent Iraqis by PSCs and the possible human rights, diplomatic, and military consequences, the Congress also examined cases of alleged sexual harassment and rape of female KBR employees in Iraq by other KBR PSCs, and the seeming lack of any judicial accountability in these cases. The House Judiciary Committee, on December 19, 2007, held a hearing on “Enforcement of Federal Criminal Law to Protect Americans Working for U.S. Contractors in Iraq” — and the Senate Committee on Foreign Relations on April 9, 2008, conducted a hearing on “Closing Legal Loopholes: Prosecuting Sexual Assaults and Other Violent Crimes Committed Overseas by American Civilians in a Combat Environment.” These cases have again raised the question of the legal accountability of PSCs for their actions in Iraq but in a different context.

Legal Status and Authorities

Contractors to the coalition forces in Iraq operate under three levels of legal authority: (1) the international order of the laws and usages of war and resolutions of the United Nations Security Council; (2) U.S. law; and (3) Iraqi law, including orders of the CPA that have not been superceded. Under the authority of international law, contractors and other civilians working with the military are civilian non-combatants whose conduct may be attributable to the United States⁵² or may implicate the duty to promote the welfare and security of the Iraqi people.⁵³

⁵¹ Opening Statement of Ranking Member, Representative Thomas Davis, “A Hearing of House Committee on Oversight and Government Reform: Blackwater USA: Private Security Contracting in Iraq and Afghanistan,” *Federal News Service Transcript*, Washington, D.C., October 2, 2007.

⁵² Conduct that violates international obligations is attributable to a State if it is committed by the government of the State or any of its political subdivisions, or by any official, employee, or agent operating within the scope of authority of any of these governments, or under color of such authority. AMERICAN LAW INSTITUTE, RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, Vol II (1987), § 207. Principles of State responsibility require a State in breach of an obligation to another State or international organization, without justification or excuse under international law, to terminate the violation and provide redress. *Id.* at § 901, comment a.

⁵³ *See, e.g.*, U.N. Security Council Resolution 1483 ¶ 4 (May 22, 2003) (calling upon the Coalition Provisional Authority, “consistent with the Charter of the United Nations and other relevant international law, to promote the welfare of the Iraqi people through the effective administration of the territory, including in particular working towards the restoration of conditions of security and stability and the creation of conditions in which the Iraqi people can freely determine their own political future”); *id.* ¶ 5 (calling upon “all concerned to comply fully with their obligations under international law including in (continued...)”).

Iraqi courts do not currently have jurisdiction to prosecute them for conduct related to their contractual responsibilities without the permission of the Sending State.⁵⁴ Some contractors, particularly U.S. nationals, may be prosecuted in U.S. federal courts or military courts under certain circumstances.

International Law

The international law of armed conflict, particularly those parts relating to belligerent occupation (at least for conduct that occurred prior to the handover of sovereignty on June 28, 2004) and non-international armed conflict, appears to be relevant in Iraq.⁵⁵ The status of armed contract personnel in such circumstances falls

⁵³ (...continued)

particular the Geneva Conventions of 1949 and the Hague Regulations of 1907”) After the handover of sovereignty to the Iraqi government, the Multi-National Forces in Iraq retained the U.N. mandate to contribute to the provision of security and stability necessary for the successful completion of the political process. U.N. Security Council Resolution 1511 ¶ 13 (October 16, 2003) (authorizing “a multinational force under unified command to take all necessary measures to contribute to the maintenance of security and stability in Iraq, including for the purpose of ensuring necessary conditions for the implementation of the timetable and programme as well as to contribute to the security of the United Nations Assistance Mission for Iraq, the Governing Council of Iraq and other institutions of the Iraqi interim administration, and key humanitarian and economic infrastructure”).

⁵⁴ CPA Order 17, Status of the CPA, MNFI, Certain Missions and Personnel in Iraq, June 27, 2004, § 4 (Contractors) *available at* [http://www.cpa-iraq.org/regulations/20040627_CPAORD_17_Status_of_Coalition_Rev_with_Annex_A.pdf] (last visited May 4, 2007). A “Sending State” is defined in § 1(5) of CPA Order 17 to mean “a State providing personnel, International Consultants, services, equipment, provisions, supplies, material, other goods or construction work to: (a) the CPA, (b) the MNF [Multi-National Forces], (c) international humanitarian or reconstruction efforts, [and] (d) Diplomatic or Consular Missions....”

⁵⁵ The relevance of various sources of international law may have fluctuated as the status of the Iraqi government has transformed from an interim government to a permanent government with a permanent Constitution. For a description of law applicable in Iraq after June 28, 2004, see CRS Report RL31339, *Iraq: Post-Saddam Governance and Security*, by Kenneth Katzman. The Multi-National Forces in Iraq (MNF-I) are currently fulfilling a UN mandate established by United Nations Security Council (UNSC) Resolution 1511 (October 16, 2003) and continued by UNSC Resolution 1546 (June 8, 2004), UNSC Resolution 1637 (November 8, 2005), UNSC Resolution 1723 (November 28, 2006), and UNSC Resolution 1790 (December 18, 2007). The resolutions affirm the importance for MNF-I to “act in accordance with international law, including obligations under international humanitarian law...,” but do not clarify what those obligations entail. UNSC Resolution 1770 (August 10, 2007) makes reference to “international humanitarian law, including the Geneva Conventions and the Hague Regulations,” as applying in Iraq, at least in the context of protecting those associated with the UN humanitarian relief effort. Secretary of State Rice assured the Security Council that “[t]he forces that make up MNF will remain committed to acting consistently with their obligations and rights under international law, including the law of armed conflict.” Letter dated 17 November 2006 from the Secretary of State of the United States of America to the President of the Security Council, Annex II to UNSC Resolution 1723. UNSC resolutions are accessible at [<http://www.un.org/Docs/sc/>]
(continued...)

into a grey area.⁵⁶ While civilians accompanying the Armed Forces in the field are generally entitled to treatment as prisoners of war (POW)⁵⁷ if captured by an enemy State during an international armed conflict, they are considered civilians (non-combatants) who are not authorized to take a direct part in hostilities.⁵⁸

Can Contractors Be “Combatants”? A critical question appears to be whether the duties of contractors amount to “taking an active part in hostilities.” In an international armed conflict or occupation,⁵⁹ only members of regular armed forces and paramilitary groups that come under military command and meet certain criteria (carry their weapons openly, distinguish themselves from civilians, and generally obey the laws of war) qualify as combatants.⁶⁰ Because contract employees fall outside the military chain of command,⁶¹ even those who appear to meet the criteria as combatants could be at risk of losing their right to be treated as POWs if captured by the enemy.

⁵⁵ (...continued)
unsc_resolutions.html].

⁵⁶ See Rebecca Rafferty Vernon, *Battlefield Contractors: Facing the Tough Issues*, 33 PUB. CONT. L.J. 369, 401 (2004); P.W. Singer, *War, Profits, and the Vacuum of Law: Privatized Military Firms and International Law*, 42 COLUM. J. TRANSNAT'L L. 521, 525-26 (2004) (arguing that international law applicable to privatized military firms is nonexistent or outdated).

⁵⁷ Geneva Convention Relative to the Treatment of Prisoners of War, 6 U.S.T. 3316 (entered into force October 21, 1950) [hereinafter “GPW”]. GPW art. 4(A)(4) extends POW status to

Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces, provided that they have received authorization from the armed forces which they accompany, who shall provide them for that purpose with an identity card....

⁵⁸ Convention Respecting the Laws and Customs of War on Land, with Annex of Regulations, October 18, 1907, Annex art. 3, 36 Stat. 2277, 2296 (entered into force January 26, 1910) [hereinafter “Hague Regulations”].

⁵⁹ The 1949 Geneva Conventions share several types of common provisions. The first three articles of each Convention are identical. Common Article 2 defines the scope of application of the Geneva Conventions in international armed conflicts as “all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties ... [and] all cases of partial or total occupation of the territory of a High Contracting Party....”

⁶⁰ *Id.* at 4; Department of the Army Field Manual (FM) No. 3-100.21, *Contractors on the Battlefield* ¶ 2-33, January 3, 2003.

⁶¹ See FM 3-100.21, *supra* note 55, ¶ 1-22:

Management of contractor activities is accomplished through the responsible contracting organization, not the chain of command. Commanders do not have direct control over contractors or their employees (contractor employees are not the same as government employees); only contractors manage, supervise, and give directions to their employees.

The Geneva Conventions and other laws of war do not appear to forbid the use of civilian contractors in a civil police role in occupied territory, in which case contractors might be authorized to use force when absolutely necessary to defend persons or property.⁶² Given the fluid nature of the current security situation in Iraq, it may sometimes be difficult to discern whether civilian security guards are performing law-enforcement duties or are engaged in combat. If their activity amounts to combat, they would become lawful targets for enemy forces during the fighting, and, if captured by an enemy government (if one should emerge), could potentially be prosecuted as criminals for their hostile acts.⁶³ Contract personnel who intentionally kill or injure civilians could be liable for such conduct regardless of their combatant status.⁶⁴

On the other hand, if the conflict in Iraq is a non-international armed conflict within the meaning of Common Article 3 of the Geneva Conventions (CA3),⁶⁵ customary international law would no longer distinguish between “unlawful” and “lawful combatants.”⁶⁶ Contractors captured by enemy forces who had engaged in hostilities would be entitled to the minimum set of standards set forth in CA3, but their right to engage in hostilities in the first place would likely be determined in accordance with the prevailing local law. In this case, Iraqi law, including CPA orders that have not been rescinded, apply.⁶⁷

⁶² Army doctrine does not allow civilians to be used in a “force protection” role. *See id.* ¶ 6-3 (“Contractor employees cannot be required to perform force protection functions described [in ¶ 6-2] and cannot take an active role in hostilities but retain the inherent right to self-defense.”). Force protection is defined as “actions taken to prevent or mitigate hostile actions against DOD personnel, resources, facilities and critical information.” *Id.* ¶ 6-1. An Army combatant commander may issue military-specification sidearms to contractor employees for self-defense purposes, if the contractor’s company policy permits employees to use weapons and the employee agrees to carry the weapon. *Id.* ¶ 6-29.

⁶³ The Army discourages the use of contractors in roles that could involve them in actual combat. Major Brian H. Brady, *Notice Provisions for United States Citizen Contractor Employees Serving With the Armed Forces of the United States in the Field: Time to Reflect Their Assimilated Status in Government Contracts?*, 147 MIL. L. REV. 1, 62 (1995) (citing Department of the Army, AR 700-137, Army’s Logistics Civil Augmentation Program (LOGCAP) ¶ 3-2d(5)(1985) “Contractors can be used only in selected combat support and combat service support activities. They may not be used in any role that would jeopardize their role as noncombatants.”)

⁶⁴ Combatants who intentionally harm non-combatants may be liable for violating the law of war, while non-combatants would be liable for violating domestic law.

⁶⁵ Common Article 3, expressly applicable only to conflicts “not of an international nature,” has been described as “a convention within a convention” to provide a general formula covering respect for intrinsic human values that would always be in force, without regard to the characterization the parties to a conflict might give it. *See* JEAN PICTET, HUMANITARIAN LAW AND THE PROTECTION OF WAR VICTIMS 32 (1975).

⁶⁶ Common Article 3 does not provide for POW status. Its protections extend to all persons who are not or are no longer participating in combat. FM 3-100.21, *supra* note 55, does not distinguish between international and non-international armed conflicts.

⁶⁷ *See infra.*

Are They “Mercenaries”? Mercenaries are persons who are not members of the armed forces of a party to the conflict but participate in combat for personal gain. They may be authorized to fight by a party to the conflict, but their allegiance to that party is conditioned on monetary payment rather than obedience and loyalty.⁶⁸ For this reason, mercenaries are sometimes treated as “unlawful combatants” or “unprivileged belligerents,” even though their employment is not strictly prohibited by international law.⁶⁹ As discussed above, they may not qualify for POW treatment under the Geneva Convention Relative to the Treatment of Prisoners of War (GPW), and those meeting the definition of “mercenary” under the 1977 Protocol I to the Geneva Conventions⁷⁰ are explicitly denied combatant status.⁷¹ Because mercenaries are not entitled to combat immunity, they may be tried, and if found guilty, punished for their hostile actions (including by the death penalty), even if such actions would be lawful under the law of war if committed by a soldier. Soldiers with a nationality other than that of the party on whose side they fight are not automatically considered mercenaries.⁷² Article 47 of Protocol I defines a mercenary as follows:

2. A mercenary is any person who:

- (a) Is specially recruited locally or abroad in order to fight in an armed conflict;
- (b) Does, in fact, take a direct part in the hostilities;
- (c) Is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party;
- (d) Is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict;
- (e) Is not a member of the armed forces of a Party to the conflict; and
- (f) Has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces.⁷³

⁶⁸ See Gregory P. Noone, *The History and Evolution of the Law of War Prior to World War II*, 47 NAVAL L. REV. 176, 187 (2000) (recounting origin of prohibition on mercenaries after the Middle Ages).

⁶⁹ See Singer, *supra* note 51, at 534.

⁷⁰ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 47, June 8, 1977, *reprinted in* 16 I.L.M. 1391.

⁷¹ *Id.* art. 43.

⁷² See HILAIRE MCCOUBREY, 2 INTERNATIONAL HUMANITARIAN LAW 145 (1998) (noting that not all foreigners in service of armed forces of other countries should be treated as “mercenaries,” as some may serve with the approval of their home governments or for moral or ideological reasons); HOWARD S. LEVIE, PRISONERS OF WAR IN INTERNATIONAL ARMED CONFLICT 75 (1979) (describing entitlement to POW status of nationals of neutral states or states allied with enemy state as well-settled, while status of an individual who is a national of a capturing state or its allies is subject to dispute).

⁷³ The United States has not ratified Protocol I; however, some of its provisions may be considered binding as customary international law. See Michael J. Matheson, *The United* (continued...)

Under this definition, it appears that contractor personnel who are not U.S. nationals, the nationals of other coalition allies or Iraqi nationals, and who were hired to — and in fact do — take part in hostilities might be considered to be mercenaries, assuming the definition in Protocol I applies as customary international law in the context of the current hostilities in Iraq. On the other hand, it is not altogether clear what constitutes “direct participation in an armed conflict,” and some of the other requirements are inherently difficult to prove, particularly the element of motivation.⁷⁴ There is no distinction based on the offensive or defensive nature of the participation in combat.

Iraqi Law (Including Coalition Provisional Authority Orders)

Contractors to U.S. agencies or any of the multinational forces or diplomatic entities in Iraq operate under the law of the government of Iraq, which includes orders issued by the CPA prior to the hand-over of sovereignty to the Iraqi Interim Government that have not been rescinded or superceded.⁷⁵ Under CPA Order Number 17, as revised June 27, 2004, contractors are exempt from Iraqi laws for acts related to their contracts.⁷⁶ That order provides that “[c]ontractors shall not be subject to Iraqi laws or regulations in matters relating to the terms and conditions of their Contracts...,” but that they are subject to all relevant regulations with respect to any other business they conduct in Iraq (section 4(2)). Contractors are also immune from Iraqi legal processes for acts performed under the contracts (section 4(3)). Iraqi legal processes could commence against contract personnel without the written permission of the Sending State, but that State’s certification as to whether conduct

⁷³ (...continued)

States Position on the Relation of Customary International Law to the 1977 Protocol Additional to the 1949 Geneva Convention, 2 AM. U. J. INT’L L. & POL’Y 419 (1987).

⁷⁴ See Singer, *supra* note 51, at 532 (commenting on similar definition found in the International Convention against the Recruitment, Use, Financing, and Training of Mercenaries, to which the United States is not a party).

⁷⁵ The Coalition Provisional Authority (CPA) dissolved at the end of June, 2004, but certain orders issued by the CPA, as modified by CPA Order 100, were to remain in place unless modified or rescinded by the Iraqi Government. See Law of Administration for the State of Iraq during the Transitional Period Article 26(C) (CPA orders remain in effect until Iraqi legislation rescinds or amends them), available at [<http://www.law.case.edu/saddamtrial/documents/TAL.pdf>]; CRS Report RS21820, *Iraq: June 30, 2004, Transition to Sovereignty*, by Kenneth Katzman and Jennifer K. Elsea.

⁷⁶ Under CPA Order 17, Status of the Coalition, Foreign Liaison Missions, Their Personnel and Contractors, June 23, 2003, Coalition forces were immune from Iraqi legal processes for their conduct during the period the CPA was in power. CPA Order 17 was modified in 2004 to substitute the MNF-I for the CPA and otherwise reflect the new political situation. See CPA Order 17, as amended June 17, 2004, available at [http://www.cpa-iraq.org/regulations/20040627_CPAORD_17_Status_of_Coalition_Rev_with_Annex_A.pdf]. CPA Order 17 remains in force for the duration of the U.N. mandate, which will expire in December, 2008, unless the Security Council acts to revoke it earlier or extend it beyond that date. By its terms, CPA Order 17 expires only after the last elements of the MNF-I have departed from Iraq.

at issue in a legal proceeding was related to the terms and conditions of the relevant contract serves as conclusive evidence of that fact in Iraqi courts (section 4(7)).

CPA Order Number 3, as revised on December 31, 2003,⁷⁷ governs the use of weapons. It restricts the authority to carry weapons to members of Iraqi security forces and Coalition forces, and “groups and individuals who have been authorized to carry weapons in the course of their duties by the CPA or Commander, Coalition Forces or their duly authorized delegates,” (section 3). It further provides that “private security firms may be licensed by the Ministry of the Interior to possess and use licensed Firearms and Military Weapons, excluding Special Category Weapons, in the course of their duties, including in public places.” *Id.* All others must apply to the Iraqi Ministry of the Interior for a license in order to possess a weapon. The unauthorized use or possession of weapons is subject to penalty.

CPA Memorandum Number 17⁷⁸ provides for the registration and regulation of private security companies (PSC) operating in Iraq. Two annexes to the Memorandum provide for binding Rules for the Use of Force (Annex A) and a Code of Conduct (Annex B) that all PSC employees must follow. Section 9 prohibits PSC employees from conducting law enforcement activities; however, section 5 of Annex A permits PSC employees to stop, detain, search, and disarm civilians where the employees’ safety requires it or if such functions are specified in the contract. Section 6 prohibits PSC employees from joining Coalition or Multi-national Forces in “combat operations except in self-defense or in defense of persons as specified in [their] contracts.” Section 9 makes PSC subject to all “applicable criminal, administrative, commercial and civil laws and regulations,” and provides that their “officers and employees may be held liable under applicable criminal and civil legal codes,” except as otherwise provided by law.

U.S. Law

U.S. contractor personnel and other U.S. civilian employees in Iraq may be subject to prosecution in U.S. courts. Additionally, persons who are “employed by or accompanying the armed forces” overseas may be prosecuted under the Military Extraterritorial Jurisdiction Act of 2000 (MEJA)⁷⁹ or, in some cases, the Uniform Code of Military Justice (UCMJ).⁸⁰ However, some contractor personnel who commit crimes might not fall within the statutory definitions described below, and thus might fall outside the jurisdiction of U.S. criminal law, even though the United States is responsible for their conduct as a matter of state responsibility under

⁷⁷ CPA Order 3, Weapons Control December 31, 2003, *available at* [http://www.iraqcoalition.org/regulations/20031231_CPAORD3_REV__AMD_.pdf].

⁷⁸ CPA Memorandum Number 17, Registration Requirements for Private Security Companies (PSC), June 26, 2004, *available at* [http://www.iraqcoalition.org/regulations/20040626_CPAMEMO_17_Registration_Requirements_for_Private_Security_Companies_with_Annexes.pdf].

⁷⁹ P.L. 106-523, 114 Stat. 2488 (2000), *codified at* 18 U.S.C. §§ 3261 -67.

⁸⁰ Chapter 47 of title 10, U.S. Code.

international law⁸¹ and despite that such conduct might interfere with the ability of the Multi-National Forces in Iraq to carry out its U.N. mandate.

Prosecution in U.S. Federal Court. U.S. contractor personnel and other U.S. civilian employees in Iraq are subject to prosecution in U.S. courts under a number of circumstances. Jurisdiction of certain federal statutes extends to U.S. nationals at U.S. facilities overseas that qualify as part of the special maritime and territorial jurisdiction (SMTJ) of the United States.⁸² For crimes involving a U.S. national⁸³ as a perpetrator or a victim, the SMTJ includes:

- (A) the premises of United States diplomatic, consular, military or other United States Government missions or entities in foreign States, including the buildings, parts of buildings, and land appurtenant or ancillary thereto or used for purposes of those missions or entities, irrespective of ownership; and
- (B) residences in foreign States and the land appurtenant or ancillary thereto, irrespective of ownership, used for purposes of those missions or entities or used by United States personnel assigned to those missions or entities.

Criminal statutes that apply within the SMTJ include maiming,⁸⁴ assault,⁸⁵ kidnapping,⁸⁶ sexual abuse, assault or contact,⁸⁷ murder⁸⁸ and manslaughter.⁸⁹ The

⁸¹ See *supra* note 47.

⁸² 18 U.S.C. § 7(9) (as amended by the § 804 of the USA PATRIOT Act, P.L. 107-56, title VIII, October 26, 2001, 115 Stat. 377) (excluding persons covered by the Military Extraterritorial Jurisdiction Act, 18 U.S.C. § 3261).

⁸³ “U.S. national” is defined by section 101 of the Immigration and Nationality Act (8 U.S.C. § 1101(22)) to mean a citizen of the United States, or a person who, though not a citizen of the United States, owes permanent allegiance to the United States. U.S. servicemembers who are foreign nationals are generally considered U.S. nationals, but foreign nationals employed by the U.S. government abroad are not.

⁸⁴ 18 U.S.C. § 114 punishes any individual who, within the SMTJ and with the intent to torture, maim, or disfigure, “cuts, bites, or slits the nose, ear, or lip, or cuts out or disables the tongue, or puts out or destroys an eye, or cuts off or disables a limb or any member of another person; or ... throws or pours upon another person, any scalding water, corrosive acid, or caustic substance....”

⁸⁵ 18 U.S.C. § 113 (prohibiting assault with intent to commit murder or a felony, assault with a dangerous weapon, assault “by striking, beating, or wounding,” simple assault, and assault resulting in serious or substantial bodily injury).

⁸⁶ 18 U.S.C. § 1201 (punishing “whoever seizes, confines, inveigles, decoys, kidnaps, abducts, or carries away and holds for ransom or reward or otherwise any person, except in the case of a minor by the parent thereof ...”).

⁸⁷ 18 U.S.C. §§ 2241-45, 2248. 18 U.S.C. § 2241 criminalizes aggravated sexual abuse, which includes the use of force or threat of death, serious bodily injury, or kidnapping, or the rendering of a victim unconscious or impaired, to induce another person to engage in a sexual act. 18 U.S.C. § 2242 prohibits sexual abuse using less serious threats or taking advantage of an impairment not of the aggressor’s making. 18 U.S.C. § 2243 applies where the victim is a minor or ward. 18 U.S.C. § 2244 criminalizes sexual contact (other than sexual acts as defined in § 2246) under like conditions. 18 U.S.C. § 2245 provides for (continued...)

Department of Justice (DOJ) is responsible for prosecuting crimes in this category. A CIA contractor was convicted under this provision in 2007 for the assault of a detainee in Afghanistan.⁹⁰

Extraterritorial Jurisdiction. In addition, many federal statutes prescribe criminal sanctions for offenses committed by or against U.S. nationals overseas,⁹¹ including the War Crimes Act of 1996.⁹² The federal prohibition on torture applies to acts outside the United States regardless of the nationality of the perpetrator (non-U.S. nationals need only be “found” in the United States to be prosecuted).⁹³

The War Crimes Act, as amended by the Military Commissions Act of 2006,⁹⁴ prohibits “grave breaches” of Common Article 3,⁹⁵ which are defined to include torture, cruel or inhuman treatment, performing biological experiments, murder of an individual not taking part in hostilities, mutilation or maiming, intentionally causing serious bodily injury, rape, sexual assault or abuse, and taking hostages. Federal jurisdiction is established for these crimes when they are committed by or against U.S. nationals or U.S. servicemembers. It does not appear to cover foreign nationals who commit war crimes in Iraq, even if they are employed by the U.S. government or U.S. government contractors.

Other criminal proscriptions with extraterritorial reach include assaulting, killing or kidnapping an internationally protected person, or threatening to do so.⁹⁶ Jurisdiction exists over these offenses if the victim or offender is a U.S. national, or if the offender is afterwards found in the United States. The federal prohibition on torture applies to acts outside the United States regardless of the nationality of the perpetrator (non-U.S. nationals need only be “found” in the United States to be

⁸⁷ (...continued)

increased punishment if any of these acts results in death. All of these crimes are felonies. Offenders may also be required to pay restitution to victims under 18 U.S.C. § 2248.

⁸⁸ 18 U.S.C. § 1111 (unlawful killing of a human being with malice).

⁸⁹ 18 U.S.C. § 1112 (voluntary or involuntary unlawful killing of a human being without malice).

⁹⁰ Department of Justice Press Release, *David Passaro Sentenced to 100 months imprisonment: First American Civilian Convicted of Detainee Abuse During the Wars in Iraq and Afghanistan*, February 13, 2007, available at [<http://charlotte.fbi.gov/dojpressrel/2007/ce021307.htm>].

⁹¹ See CRS Report 94-166, *Extraterritorial Application of American Criminal Law* by Charles Doyle.

⁹² P.L. 104-192, § 2(a), 110 Stat. 2104 (August 21, 1996), codified as amended at 18 U.S.C. § 2441.

⁹³ 18 U.S.C. § 2340-40B.

⁹⁴ P.L. 109-366 § 6, 120 Stat. 2632 (Oct. 17, 2006).

⁹⁵ 18 U.S.C. § 2441(d).

⁹⁶ 18 U.S.C. § 112 (assault); 18 U.S.C. § 1116 (killing); 18 U.S.C. § 1201 (kidnapping); 18 U.S.C. § 1203 (hostage-taking); 18 U.S.C. § 878 (threats).

prosecuted).⁹⁷ There is extraterritorial jurisdiction over murder where both the perpetrator and victim are U.S. nationals, but prosecution requires that the Attorney General or his designee give approval, which requires that the foreign country where the murder took place has not prosecuted the suspect for the same conduct and that the suspect is no longer present in that country and the country lacks the ability to lawfully secure the person's return.⁹⁸

Extraterritorial jurisdiction may be found to be implied in statute,⁹⁹ especially where the statute's main purpose is to protect federal officers, employees and property, or to prevent the obstruction or corruption of the overseas activities of federal departments and agencies.¹⁰⁰ Some statutes apply to conduct where foreign commerce is affected, although that jurisdictional basis alone may be insufficient to demonstrate that Congress meant to reach conduct overseas.¹⁰¹ Crimes involving only foreign nationals as either perpetrator or victim, even where one or more are employed by the U.S. government or a government contractor, may fall outside the jurisdiction of U.S. courts.

Military Extraterritorial Jurisdiction Act (MEJA). Persons who are “employed by or accompanying the armed forces” overseas may be prosecuted under the Military Extraterritorial Jurisdiction Act (MEJA) of 2000¹⁰² for any offense that would be punishable by imprisonment for more than one year if committed within

⁹⁷ 18 U.S.C. § 2340-40B. Prior to 2004, acts that occurred within the SMTJ were “outside the United States” for the purpose of the statute, precluding prosecution for torture occurring on a U.S. military base overseas. P.L. 108-375, § 1089, 118 Stat. 1811, 2067 (2004).

⁹⁸ 18 U.S.C. § 1119.

⁹⁹ See *United States v. Bowman*, 260 U.S. 94 (1922)(courts examine the nature and purpose of a statute to determine whether Congress intended it to apply outside of the United States); *Ford v. United States*, 273 U.S. 593, 623 (1927)(implied jurisdiction for conduct overseas having domestic effects).

¹⁰⁰ Statutes prohibiting murder or kidnapping of federal officers have been found to apply overseas. *United States v. Felix-Guiterrez*, 940 F.2d 1200, 1204-206 (9th Cir. 1991); *United States v. Benitez*, 741 F.2d 1312 (11th Cir. 1984). A statute prohibiting the murder of Members of Congress was found to apply abroad. *United States v. Layton*, 855 F.2d 1388, 1395-397 (9th Cir. 1988) (interpreting 18 U.S.C. 351(i), which was later amended expressly to apply extraterritorially); *United States v. Walczak*, 783 F.2d 852, 854-55 (9th Cir. 1986) (punishing false statement made by U.S. national abroad); *United States v. Cotten*, 471 F.2d 744, 749 (9th Cir. 1973) (theft of federal property).

¹⁰¹ See *Equal Opportunity Employment Commission v. Arabian American Oil Co.*, 499 U.S. 244, 251 (1991)(“[W]e have repeatedly held that even statutes that contain broad language in their definitions of “commerce” that expressly refer to “foreign commerce” do not apply abroad”). Statutes that apply in circumstances involving foreign commerce include domestic violence and stalking (18 U.S.C. §§ 2261 and 2261(A)); sex trafficking (18 U.S.C. §§ 2241-48); kidnapping (18 U.S.C. § 1201).

¹⁰² Military Extraterritorial Jurisdiction Act of 2000 (MEJA), P.L. 106-523, 114 Stat. 2488 (2000), *codified at* 18 U.S.C. § 3261-67. For information about the legislative history MEJA, see Glenn R. Schmitt, *Closing the Gap in Criminal Jurisdiction over Civilians Accompanying the Armed Forces Abroad — a First Person Account of the Creation of the Military Extraterritorial Jurisdiction Act of 2000*, 51 CATH. U. L. REV. 55 (2001).

the special maritime and territorial jurisdiction of the United States.¹⁰³ Persons “[e]mployed by the armed forces” is defined to include civilian employees of the Department of Defense (DOD) as well as DOD contractors and their employees (including subcontractors at any tier), and, after October 8, 2004, civilian contractors and employees from other federal agencies and “any provisional authority,”¹⁰⁴ to the extent that their employment is related to the support of the DOD mission overseas.¹⁰⁵ Depending on how broadly DOD’s mission is construed, MEJA does not appear to cover civilian and contract employees of agencies engaged in their own operations overseas. It also does not cover nationals of or persons ordinarily residing in the host nation. While it appears to cover other foreign nationals working under covered contracts, it does not appear to extend federal jurisdiction over crimes not expressly defined as covering conduct occurring within the SMTJ. For example, it might not be available as a jurisdictional basis to prosecute non-U.S. national contractors for war crimes under 18 U.S.C. § 2441. However, under DOD’s interpretation of the statute, MEJA is available to prosecute federal crimes that are prohibited everywhere within the United States, including areas that are not part of the SMTJ.¹⁰⁶

DOD issued regulations for implementing MEJA in 2005.¹⁰⁷ DOD Instruction 5525.11, *Criminal Jurisdiction Over Civilians Employed By or Accompanying the Armed Forces Outside the United States, Certain Service Members, and Former*

¹⁰³ 18 U.S.C. § 3261. Crimes that are felonies within the SMTJ include assault, 18 U.S.C. § 113 (but not assault “by striking, beating, or wounding,” or “simple assault,” which is not defined; these are not punishable by imprisonment for more than one year, § 113(3) and (4)); 18 U.S.C. § 114 (torture and maiming); 18 U.S.C. §§ 2241-45 (sexual assault and contact); 18 U.S.C. § 1111 (murder); 18 U.S.C. § 1112 (manslaughter); 18 U.S.C. § 1113 (attempted murder or manslaughter).

¹⁰⁴ “Provisional authority” is not defined. Presumably, “any provisional authority” is meant to cover entities like the CPA; however, because the status of the CPA was never clearly defined, it may prove difficult in future conflicts to determine whether an interim governing body or occupational authority qualifies as a “provisional authority” within the meaning of MEJA. See Glenn R. Schmitt, *Amending the Military Extraterritorial Jurisdiction Act of 2000: Rushing to Close an Unforeseen Loophole*, 2005-JUN ARMY LAW. 41, at 45-46.

¹⁰⁵ 18 U.S.C. § 3267(1)(A), as amended by the Ronald W. Reagan National Defense Authorization Act for FY2005, P.L. 108-375 § 1088, 118 Stat. 2066 (October 28, 2004).

¹⁰⁶ 32 C.F.R. § 153.3 (defining “felony offense” with reference to legislative history). According to the report accompanying H.R. 3380 (106th Cong.), the Military Extraterritorial Jurisdiction Act of 2000,

Although the bill uses the conditional phrase “if committed within the special maritime and territorial jurisdiction of the United States,” acts that would be a Federal crime regardless of where they are committed in the United States, such as the drug crimes in title 21, also fall within the scope of subsection [18 U.S.C. § 3261(a)].

H.Rept. 106-778, at 14 - 15 (2000). The SMTJ of the United States, however, includes some areas that are outside the territory of the United States, and federal criminal statutes that apply generally within U.S. territory do not necessarily apply to such areas.

¹⁰⁷ 71 Fed. Reg. 8,946 (February 22, 2006).

Service Members, March 3, 2005, implements policies and procedures pursuant to MEJA. Under the Instruction, the DOD Inspector General (IG) has the responsibility to inform the Attorney General whenever he or she has reasonable suspicion that a federal crime has been committed.¹⁰⁸ The DOD IG is also responsible for “implementing investigative policies” to carry MEJA into effect. The Instruction notes that the Domestic Security Section of the DOJ Criminal Division has agreed to “provide preliminary liaison” with DOD and other federal entities and to designate the appropriate U.S. Attorney’s Office to handle a case.

The Department of Justice has reported that 12 persons have been charged under MEJA since its passage in 2000, with several investigations underway that may result in charges.¹⁰⁹ Very few successful prosecutions involving DOD contractors in Iraq under MEJA have been reported. A contractor working in Baghdad pleaded guilty to possession of child pornography in February 2007.¹¹⁰ Another contract employee was prosecuted for abusive sexual contact involving a female soldier that occurred at Talil Air Force Base in 2004.¹¹¹ A contract employee was indicted for assaulting another contractor with a knife in 2007.¹¹² In addition, a former U.S. soldier is being prosecuted under MEJA for the rape and murder of an Iraqi girl and the murder of her family while the defendant served on active duty in Iraq.¹¹³

The House of Representatives passed legislation on October 4, 2007, to expand MEJA coverage during contingency operations (H.R. 2740) (for information on H.R. 2740, the Military Extraterritorial Jurisdiction Act (MEJA) Expansion and Enforcement Act of 2007, see section on “Selected Legislation” below).

Uniform Code of Military Justice (UCMJ). Contract personnel may be subject to military prosecution under the Uniform Code of Military Justice (UCMJ) for conduct that takes place during hostilities in Iraq in some circumstances, although any trial of a civilian contractor by court-martial is likely to be challenged on

¹⁰⁸ DoD Instruction 5525.11 § 5.

¹⁰⁹ *Closing Legal Loopholes: Prosecuting Sexual Assaults and Other Violent Crimes Committed Overseas by American Civilians in a Combat Environment*, Hearing Before the Senate Committee on Foreign Relations, 110th Cong. (April 9, 2008) (Statement of Sigal P. Mandelker, Deputy Assistant Attorney General, Criminal Division, Department of Justice).

¹¹⁰ Press Release, U.S. Attorney for the Eastern District of Virginia, Military Contractor Sentenced for Possession of Child Pornography in Baghdad (May 25, 2007), available at [http://www.usdoj.gov/].

¹¹¹ *United States v. Maldonado*, 215 Fed. Appx. 938 (11th Cir. 2007) (unpublished). The opinion does not explain the jurisdictional basis for the prosecution.

¹¹² Press Release, U.S. Attorney for the District of Arizona, Military Man Charged with Assaulting Woman on U.S. Military Base in Iraq, March 1, 2007.

¹¹³ Press Release, Department of Justice, Former Ft. Campbell Soldier Indicted in Iraqi Civilian Deaths (Nov. 2, 2006), available at [http://louisville.fbi.gov/dojpressrel/pressrel06/iraqideaths110206.htm]. The defendant has challenged the court’s jurisdiction under MEJA, arguing that he was never properly discharged from the military and should instead be subject to court-martial. *United States v. Green*, Crim. Action No. 5:06CR-19-R (W.D. Ken.) (motion to dismiss filed 2/15/2008).

constitutional grounds. Article 2(a)(10), UCMJ,¹¹⁴ as amended by § 552 of the John Warner National Defense Authorization Act for Fiscal Year 2007 (P.L. 109-364) (“FY07 NDAA”), extends military jurisdiction in “time of declared war or a contingency operation,”¹¹⁵ to “persons serving with or accompanying an armed force in the field.” There is one reported use of the amendment; an interpreter with dual Canadian-Iraqi citizenship pleaded guilty in connection with the stabbing of another contractor.¹¹⁶ Additionally, if offenses by contract personnel can be characterized as violations of the law of war, the UCMJ may extend jurisdiction to try suspects by court-martial¹¹⁷ or by military commission.¹¹⁸

Prior to the FY2007 NDAA, the UCMJ covered civilians serving with the Armed Forces in the field only in “time of war.” As a reflection of the constitutional issues that arise whenever civilians are tried in military tribunals,¹¹⁹ as reaffirmed by a series of Supreme Court cases beginning in 1957 with *Reid v. Covert*,¹²⁰ courts have

¹¹⁴ 10 U.S.C. § 802(a)(10). For summaries of legislative history and application of the provision (and its predecessors) prior to amendment, see David A. Melson, *Military Jurisdiction over Civilian Contractors: A Historical Overview*, 52 NAVAL L. REV. 277 (2005); Wm. C. Peters, *On Law, Wars, and Mercenaries: The Case for Courts-martial Jurisdiction over Civilian Contractor Misconduct in Iraq*, 2006 B.Y.U. L. REV. 367 (2006).

¹¹⁵ “Contingency operation” is defined under 10 U.S.C. § 101(a)(13) to mean a military operation that —

(A) is designated by the Secretary of Defense as an operation in which members of the armed forces are or may become involved in military actions, operations, or hostilities against an enemy of the United States or against an opposing military force; or

(B) results in the call or order to, or retention on, active duty of members of the uniformed services under section 688, 12301 (a), 12302, 12304, 12305, or 12406 of [title 10], chapter 15 of [title 10], or any other provision of law during a war or during a national emergency declared by the President or Congress.

¹¹⁶ See Press Release, Multi-National Corps — Iraq PAO *Civilian contractor convicted at a court-martial*, June 23, 2008, available online at [http://www.mnf-iraq.com/index.php?option=com_content&task=view&id=20671&Itemid=128]. The defendant was sentenced to five months’ confinement (time served) for wrongful appropriation of a knife, obstruction of justice, and making a false official statement to military investigators.

¹¹⁷ 10 U.S.C. § 818 (providing jurisdiction over “any person who by the law of war is subject to trial by military tribunal”).

¹¹⁸ 10 U.S.C. § 821 (preserving “concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals”); *cf. Ex Parte Quirin*, 317 U.S. 1 (1942).

¹¹⁹ See, e.g., *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2 (1866); *Duncan v. Kahanamoku*, 327 U.S. 304 (1945).

¹²⁰ *Reid v. Covert*, 354 U.S. 1 (1957) (plurality opinion overturning two cases involving civilian spouses convicted of capital crimes by courts-martial, pursuant to UCMJ Art. 2(11) as “persons accompanying the armed forces,” for the murders of their military spouses at overseas bases); *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234 (1960) (applying *Reid* to non-capital case involving civilian dependent); *Grisham v. Hagan*, 361 U.S. 278

(continued...)

interpreted the phrase “in time of war” to mean only wars declared by Congress.¹²¹ In *Covert*, a plurality of the Supreme Court rejected the proposition that Congress’s power to regulate the land and naval forces justifies the trial of civilians without according the full panoply of due process standards guaranteed by the Bill of Rights. The Supreme Court has also found that former servicemembers who have severed all ties to the military cannot be tried by court-martial for crimes they committed while on active duty.¹²²

The trial of civilian contractors by courts-martial will likely be subject to challenge on constitutional grounds. Congress’s authority to “make Rules for the Government and Regulation of the land and naval Forces”¹²³ empowers it to prescribe rules for courts-martial that vary from civilian trials and are not restricted by all of the constitutional requirements applicable to Article III courts. In addition to the express exception in the Fifth Amendment regarding the right to presentment and indictment in “cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger,” the Supreme Court has found implicit exceptions to other fundamental rights as they pertain to servicemembers.¹²⁴ Statutes relating to courts-martial have withstood objections based on due process.¹²⁵ While the UCMJ offers soldiers procedural protections similar to and sometimes

¹²⁰ (...continued)

(1960)(extending *Covert* to prohibit court-martial of civilian employee of the Army for a capital offense); *McElroy v. Guagliardo*, 361 U.S. 281 (1960) (same, with respect to non-capital offense). UCMJ art. 2(11) defines as persons subject to the UCMJ those who, “[s]ubject to any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, [are] serving with, employed by, or accompanying the armed forces outside the United States and outside the Commonwealth of Puerto Rico, Guam, and the Virgin Islands.”

¹²¹ See *Robb v. United States*, 456 F.2d 768 (Ct. Cl. 1972); *United States v. Averette*, 41 C.M.R. 363 (1970); *see also Latney v. Ignatious*, 416 F.2d 821 (D.C. Cir. 1969)(finding that even if the Vietnam conflict constituted a “war” within the meaning of the UCMJ, conduct must be intimately connected to military in order for jurisdiction under Art. 2(10) to apply).

¹²² *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955).

¹²³ U.S. CONST., art. I, § 8, cl. 14.

¹²⁴ *See, e.g., Kahn v Anderson*, 255 US 1 (1921)(Sixth Amendment does not require jury in cases subject to military jurisdiction); *Weiss v. United States*, 510 U.S. 163 (1994) (rejecting challenge to the military justice system based on the fact that military judges are not “appointed” by the President within the meaning of Article II of the Constitution, and the judges are not appointed to fixed terms of office); *Parker v. Levy*, 417 U.S. 742, 758 (1974) (stating, in the context of First Amendment protections, that “[t]he fundamental necessity for obedience, and the consequent necessity for imposition of discipline may render permissible within the military that which would be constitutionally impermissible outside it”).

¹²⁵ *See* AM. JUR. 2D Military and Civil Defense § 221.

arguably superior to those in civilian courts,¹²⁶ courts have been reluctant to extend military jurisdiction to civilians.¹²⁷

On the other hand, the *Covert* Court distinguished the peacetime courts-martial of civilian spouses at issue from *Madsen v. Kinsella*,¹²⁸ in which a military spouse was tried by military commission in occupied Europe, on the basis that

[that case] concerned trials in enemy territory which had been conquered and held by force of arms and which was being governed at the time by our military forces. In such areas the Army commander can establish military or civilian commissions as an arm of the occupation to try everyone in the occupied area, whether they are connected with Army or not.¹²⁹

If *Madsen* remains valid, if and for so long as the United States is considered an “occupying power” in Iraq, it may be acceptable under the Constitution to subject DOD contractors there to military jurisdiction.

Further, the *Covert* plurality held open the possibility that civilians who were part of the armed services could be tried by court-martial during wartime.¹³⁰ While the Court has suggested in dicta that courts-martial are never proper for the trial of civilians,¹³¹ it has never expressly stated that the Constitution forbids military jurisdiction over civilians who might properly be said to be “in” the Armed Forces during war.¹³² Lower courts addressed the issue during World War II, and upheld courts-martial of civilian employees of the U.S. Army in Eritrea.¹³³ Merchant seamen were sometimes tried by court-martial by the Navy. One such conviction was overturned by a federal court on habeas corpus review because the offense charged,

¹²⁶ For a comparison of due process rights, see CRS Report RL31262, *Selected Procedural Safeguards in Federal, Military, and International Courts*, by Jennifer K. Elsea.

¹²⁷ *Reid v. Covert*, 354 U.S. 1, 21 (1957) (“Every extension of military jurisdiction is an encroachment on the jurisdiction of the civil courts, and, more important, acts as a deprivation of the right to jury trial and of other treasured constitutional protections.”); *O’Callahan v. Parker*, 395 U.S. 258, 267 (1969) (“[C]ourts-martial have no jurisdiction to try those who are not members of the Armed Forces, no matter how intimate the connection between their offense and the concerns of military discipline.”), *overruled on other grounds by Solorio v. United States*, 483 U.S. 435 (1987) (overturning “service-connection rule” in favor of a rule based strictly on military status).

¹²⁸ 343 U.S. 341 (1952).

¹²⁹ 354 U.S. at 35, & n.10.

¹³⁰ *Id.* at 33-36.

¹³¹ *O’Callahan v. Parker*, 395 U.S. 258 (1969).

¹³² *Covert*, 354 U.S. at 23 (noting “there might be circumstances where a person could be ‘in’ the armed services for purposes of [Congress’s authority to regulate the armed services] even though he had not formally been inducted into the military”).

¹³³ *Perlstein v. United States*, 151 F.2d 167 (3d Cir. 1945) (concluding that accompanying an armed force under “stark war conditions” justified trial by court-martial of a civilian employee for a criminal offense); *In re diBartolo*, 50 F. Supp. 929, 930 (S.D.N.Y. 1943).

striking a superior officer, was essentially a military charge.¹³⁴ However, another court upheld the conviction of a merchant seaman for the military charge of desertion.¹³⁵

Assuming the Constitution permits the trial of civilians accompanying the Armed Forces in wartime, a particular case will also have to satisfy the statutory requirements of the UCMJ. To determine whether a civilian contractor who is suspected of having committed an offense is subject to prosecution under the UCMJ, it will be necessary to determine whether he is “serving with or accompanying an armed force” that is operating “in the field.” The phrase “serving with or accompanying” the forces was historically 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.”¹³⁶ Courts have found that military jurisdiction over a civilian “cannot be claimed merely on the basis of convenience, necessity, or the non-availability of civil courts.”¹³⁷

The phrase “in the field” means serving “in an area of actual fighting” at or near the “battlefront” where “actual hostilities are under way.”¹³⁸ Whether an armed force is “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.”¹³⁹ Therefore, it appears that contractors will not be subject to military jurisdiction merely because of their employment in Iraq. They might, however, be subject to jurisdiction even if the conduct occurs outside of Iraq, so long as it occurs away from a permanent garrison and there is sufficient connection to military operations ongoing in Iraq or elsewhere.¹⁴⁰

¹³⁴ *Hammond v. Squire*, 51 F. Supp. 227 (D. D.C. 1943).

¹³⁵ *McCune v. Kilpatrick*, 53 F. Supp. 80 (E.D. Va. 1943).

¹³⁶ *United States v. Burney*, 21 C.M.R. 98 (1956) (concluding that a contractor’s connection with the military, despite his indirect employment through a private company, was sufficient to constitute “serving with or accompanying” an armed force). Some of the factors leading to the court’s conclusion were that

[T]he accused worked directly for the benefit of the Air Force, he was supervised by Air Force personnel, he was quartered and messed on a military installation by military personnel, and he was accorded privileges normally granted only to military personnel. The operational success of that military command depended upon civilians such as this accused, and each of the services has found it necessary to rely on civilian technicians to repair and maintain the highly specialized signal and radar equipment now being used.

¹³⁷ *In re diBartolo*, 50 F. Supp. 929, 930 (S.D.N.Y. 1943).

¹³⁸ *Reid v. Covert*, 354 U.S. 1, 35 (1957).

¹³⁹ *Burney*, 21 C.M.R. at 109.

¹⁴⁰ *Ex parte Gerlach*, 247 F. 616, 617 (S.D.N.Y. 1917) (stating that “the words ‘in the field’ do not refer to land only, but to any place, whether on land or water, apart from permanent cantonments or fortifications where military operations are being conducted”); *Hines v. Mikell*, 259 F. 28, 34 (4th Cir.), *cert. denied*, 250 U.S. 645 (1919) (upholding court-martial (continued...))

Other likely issues include whether civilian contractors may be prosecuted for military crimes, such as disrespect of an officer or failure to obey a lawful command, or whether non-judicial punishment will be available to discipline contract employees.¹⁴¹ Some of the standard punishments courts-martial ordinarily adjudge would not be available in the case of civilians, such as a dishonorable discharge or reduction in rank, and possibly forfeiture of pay. Appellate review over civilian cases may be effectively restricted by these sentencing consideration.¹⁴² For example, the government may appeal an adverse ruling (not amounting to a finding of not guilty) on an interlocutory basis only in cases in which a punitive discharge may be adjudged.¹⁴³ On the other hand, there does not appear to be a means of compelling continued employment in order for a civilian to undergo court-martial proceedings; if misconduct by a contract employee results in his or her immediate dismissal by the contractor, military jurisdiction may also cease.¹⁴⁴

DOD recently issued guidance for implementing the new law.¹⁴⁵ Secretary Gates, citing “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,” instructed the Secretaries of the Military Departments, the Chairman of the Joint Chiefs of Staff, and the commanders of the regional combatant commands that the exercise of jurisdiction over civilians must be based on military necessity and supported by circumstances that meet the interests of justice.¹⁴⁶ Such circumstances include those where U.S. federal criminal jurisdiction does not otherwise apply or is not being pursued, or where the conduct in question is adverse to a significant military interest of the United States. For conduct that occurs within the United

¹⁴⁰ (...continued)

jurisdiction over a civilian at Camp Jackson, South Carolina, during the First World War by finding that “any portion of the army confined to field training in the United States should be treated as ‘in the field’”).

¹⁴¹ Under 10 U.S.C. § 815, commanding officers may discipline “other personnel” (other than officers) without convening a court-martial, but only members of the armed services are entitled to demand court-martial in lieu of non-judicial punishment.

¹⁴² *See* 10 U.S.C. § 866 (appeal to Court of Criminal Appeals available as of right only where “the sentence, as approved, extends to death, dismissal of a commissioned officer, cadet, or midshipman, dishonorable or bad-conduct discharge, or confinement for one year or more”).

¹⁴³ 10 U.S.C. § 862.

¹⁴⁴ At least one court has concluded otherwise. *See* *Perlstein v. United States*, 151 F.2d 167 (3d Cir. 1945)(military jurisdiction remained valid over fired contract employee so long as he remained in military garrison). However, this conclusion might not be followed today in light of *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955), in which the Court held a serviceman who had been discharged was no longer amenable to court-martial.

¹⁴⁵ 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, *available online* [<http://www.nimj.com/documents/2a10.pdf>].

¹⁴⁶ *Id.* attachment 3.

States, or in cases where the offender was not at all pertinent times outside the United States, the Secretary of Defense is the sole authority for convening a court-martial or initiating non-judicial punishment.¹⁴⁷

For covered civilians outside the United States, commanders of geographic combatant commands may initiate disciplinary proceedings or delegate such authority to subordinate commanders who possess general court-martial convening authority. These convening authorities are required, prior to initiating court-martial or non-judicial proceedings, to follow the notification procedures outlined in DOD Instruction 5525.11 (MEJA implementation) to give the Department of Justice the opportunity to take action. The memorandum gives the Justice Department fourteen calendar days (or longer, if DOJ determines that extraordinary circumstances warrant more time to complete its determination) to advise DOD as to whether it intends to exercise jurisdiction. If the period of review passes without an indication that DOJ intends to exercise jurisdiction, DOD may notify DOJ that it intends to authorize the appropriate commander to initiate disciplinary action, at his or her command discretion. If DOJ elects to exercise jurisdiction, the commanders are not authorized to initiate disciplinary action, unless U.S. federal criminal jurisdiction of the case is later terminated. Military commanders are authorized to investigate and exercise other law enforcement authorities with respect to violations by civilians while DOJ makes its determination in order to be prepared to take appropriate action if DOJ declines jurisdiction.

Issues for Congress

The use of private contractors in personal security and military operations raises many questions regarding the appropriateness and practicality of entrusting private companies with duties that have been traditionally reserved for military and civilian federal personnel. Several issues are particularly sensitive when nations hire private contractors for potentially hostile situations. Some are even more sensitive when State-hired contractors carry arms, even on a strictly defensive basis.¹⁴⁸ These issues, as related to contractors as a whole and to private security contractors in particular, are briefly discussed below.

¹⁴⁷ *Id.* attachment 2.

¹⁴⁸ To some analysts, however, providers of armed protection are not the most worrisome of the gamut of providers of military services, at least as far as those contracted by non-governmental organizations (NGOs) are concerned. “While it is conceivable that some regulation might be useful, in fact, informal voluntary agreements between the NGO community and PSCs mean that such regulation is not critical and may in fact reduce the level of flexibility that makes these agreements possible.” The companies these analysts find of most concern for regulation are the private military companies (PMCs) “that generally work for states and provide military services designed to significantly impact strategic situations....*active* PMCs willing to carry weapons into combat, and *passive* PMCs that focus on training and organizational issues.” *Privatising Security, op. cit.*, p. 36.

“Inherently Governmental Functions” and Other Restrictions on Government Contracts

One question that arises whenever a federal agency hires private persons or entities to perform services is whether the duties to be performed under the contract are “inherently governmental” in nature and therefore ought to be performed by public officials. Congress defined “inherently governmental function” in the Federal Activities Inventory Reform (FAIR) Act of 1998¹⁴⁹ to mean a function that is “so intimately related to the public interest as to require performance by Federal Government employees.”¹⁵⁰ Under the FAIR Act, the term “includes activities that require either the exercise of discretion in applying Federal Government authority or the making of value judgments in making decisions for the Federal Government....” It involves functions that can “determine, protect, and advance United States economic, political, territorial, property, or other interests by military or diplomatic action, civil or criminal justice proceedings,” contract management, and functions that can “significantly affect the life, liberty, or property of private persons....”¹⁵¹ Infrequently, Congress has provided by statute that a function is “inherently governmental.”¹⁵² Congress may also directly forbid or limit the use of contractors for certain functions¹⁵³ or forbid the contracting of certain kinds of employees,¹⁵⁴ where the functions or employment may be considered inherently unsuitable for association with the government.

The Federal Acquisition Regulations (FAR) list examples of inherently governmental functions.¹⁵⁵ The Office of Management and Budget sets forth in Circular A-76 the guidelines and procedures that executive agencies should take into account when determining whether an activity should be performed by government

¹⁴⁹ P.L. 105-270, codified at 31 U.S.C. § 501 note (requiring agencies to inventory civil service functions and to identify jobs as commercial or inherently governmental). The definition is consistent with longstanding executive branch practice.

¹⁵⁰ *Id.* § 5(2)(A).

¹⁵¹ *Id.* § 5(2)(B)(i),(ii),and (iii).

¹⁵² *E.g.* 5 U.S.C. § 306 (drafting of strategic plans); 31 U.S.C. § 1115 (drafting of agency performance plans); 33 U.S.C. § 2321 (certain functions involving the operation and maintenance of hydroelectric power generating facilities at U.S. Army Corps of Engineers water resources projects); 39 U.S.C. §§ 2801-05 (strategic planning and performance management functions for the U.S. Postal Service); *see also* 10 U.S.C. § 2461 (requirements for privatizing civilian positions in the Department of Defense).

¹⁵³ *E.g.* 10 U.S.C. § 2465 (limiting DOD ability to enter into a contract “for the performance of firefighting or security-guard functions at any military installation or facility”).

¹⁵⁴ *E.g.* 5 U.S.C. § 3107 (“Appropriated funds may not be used to pay a publicity expert unless specifically appropriated for that purpose.”); 5 U.S.C. § 3108 (prohibiting government agencies from hiring employees of the “Pinkerton Detective Agency, or similar organization,” which has been interpreted to prohibit the hiring of “quasi-military armed forces” (*see infra* notes 135-39)).

¹⁵⁵ 48 C.F.R. 7.503 (listing as “inherently governmental,” among other things, the command of military forces, the conduct of foreign relations and the determination of foreign policy, and the direction and control of intelligence and counter-intelligence operations).

personnel or can be performed by the private sector. Executive agencies may also take into account legislation when making such a determination.

Circular A-76, as revised in 2003, states that using contractors to provide certain types of protective services — guard services, convoy protection services, plant protection services, pass and identification services, and the operation of prison or detention facilities, all whether performed by unarmed or armed personnel — is not prohibited. Nevertheless, Circular A-76 also stipulates that executive agencies should take into account whether circumstances exist where

the provider’s authority to take action...will significantly and directly affect the life, liberty, or property of individual members of the public, including the likelihood of the provider’s need to resort to force in support of a police or judicial activity; whether the provider is more likely to use force, especially deadly force, and the degree to which force may have to be exercised in public or relatively uncontrolled areas.

DOD implementation of the FAR, known as the Defense Federal Acquisition Regulation Supplement (DFARS),¹⁵⁶ does not prohibit the use of contract personnel for security, but it limits the extent to which contract personnel may be hired to guard military installations¹⁵⁷ and provides mandatory contractual provisions for contractors who are accompanying U.S. Armed Forces deployed overseas.¹⁵⁸ Such contractors are considered civilians accompanying the U.S. Armed Forces during contingency operations and are not authorized to use deadly force against enemy armed forces other than in self-defense. However, in June, 2006, DOD published a rule amending the DFARS to create an exception for private security contractors, who are authorized to use deadly force “only when necessary to execute their security mission to protect assets/persons, consistent with the mission statement contained in their contract.”¹⁵⁹ The rule explained that

it is the responsibility of the combatant commander to ensure that the private security contract mission statements do not authorize the performance of any inherently Governmental military functions, such as preemptive attacks, or any other types of attacks. Otherwise, civilians who accompany the U.S. Armed Forces lose their law of war protections from direct attack if and for such time as they take a direct part in hostilities.¹⁶⁰

Further, the DFARS-mandated clause for contractors accompanying the armed forces limits the provision of military security for DOD contractors providing other services in the theater of operations to cases where, as determined by the Combatant Commander, the contractor cannot obtain effective security services at a reasonable

¹⁵⁶ 48 C.F.R. Parts 201-299.

¹⁵⁷ 48 C.F.R. Part 237.102-70 (implementing 10 U.S.C. § 2465 limitation on private security guards and firefighters, including temporary exceptions pursuant to P.L. 107-56 § 1010 and P.L. 107-314 § 332).

¹⁵⁸ 48 C.F.R. Part` 252.225-7040.

¹⁵⁹ *Id.* para. (b).

¹⁶⁰ 71 Fed. Reg. 34,826-27 (June 16, 2006).

cost or “threat conditions necessitate security through military means.”¹⁶¹ In the event a contractor hires a subcontractor to provide security services for its workers and property, that contract must incorporate the substance of the required clause.¹⁶²

A recent decision by the Comptroller General may shed additional light on the current thinking regarding the nature of private security services. A contractor protested the terms of a pair of solicitations for contracts involving cargo transportation in Iraq on the basis that they included requirements for armed security escorts.¹⁶³ The prospective bidder challenged the security requirements as running afoul of the Anti-Pinkerton Act¹⁶⁴ as well as relevant DOD instructions regarding contractors accompanying the U.S. Armed Forces overseas.¹⁶⁵ Specifically, the protestor contended that the statements of work (SOW) required performance of security services that would constitute the provision of “quasi-military armed forces for hire” and require civilian contractors to engage in combat. The Comptroller General denied the protest, relying on an earlier interpretation that “a company which provides guard or protective services does not thereby become a ‘quasi-military armed force,’ even if the individual guards are armed...”¹⁶⁶ With respect to the charge that the work involved the “uniquely governmental” function of engaging in combat, the decision noted DOD regulations and DFARS provisions that would permit the contracting of armed security services but prohibit such contractors from engaging in direct combat or offensive operations.¹⁶⁷ It appears that neither the Department of Defense nor the Government Accountability Office (GAO) regards the government use of armed security escorts in Iraq as violating any restrictions on government contracting. However, the Anti-Pinkerton Act might be construed to bar the hiring of any particular contractor who is found to operate as a “quasi-military armed force,” at least if it acted as a strikebreaker during a labor dispute.¹⁶⁸

¹⁶¹ *Id.* para. (c).

¹⁶² *Id.* para. (q).

¹⁶³ Brian X. Scott, Comp. Gen. B-298370, Aug. 18, 2006, 2006 CPD ¶ 125, available online at 2006 WL 2390513 (Comp.Gen.).

¹⁶⁴ 5 U.S.C. § 3108; 48 C.F.R. 37.109 (interpreting Anti-Pinkerton Act (see *supra* note 148 for text), in accordance with United States *ex rel.* Weinberger v. Equifax, 557 F.2d 456 (5th Cir. 1977), *cert. denied*, 434 U.S. 1035 (1978)) to prohibit “contracts with organizations that offer quasi-military armed forces for hire, or with their employees, regardless of the contract’s character”). The Anti-Pinkerton Act was enacted in 1892 in response to reports that businesses had employed armed individuals and groups, including the Pinkerton Detective Agency, as strikebreakers during labor disputes in the 1880s and early 1890s. See Letter to John C. Stennis, United States Senate, B-139965, Mar. 6, 1980, available online at 1980 WL 16981 (Comp.Gen.).

¹⁶⁵ DoD Instruction (DoDI) No. 3020.41, “Contractor Personnel Authorized to Accompany the U.S. Armed Forces.”

¹⁶⁶ *Brian X. Scott* at 3 (citing Letter To The Heads of Federal Departments and Agencies, B-139965, June 7, 1978, 57 Comp. Gen. 524).

¹⁶⁷ *Id.* at 4-6.

¹⁶⁸ *Id.* at 3 (“The plain meaning and legislative history of the [Anti-Pinkerton] Act, as (continued...)”)

Neither the State Department acquisition regulations¹⁶⁹ nor the U.S. Agency for International Development regulations¹⁷⁰ specifically addresses contractors overseas during war or contingency operations. However, a recent amendment to the FAR imposes new requirements for government contracts that entail contractor personnel working in designated operation areas or at certain diplomatic or consular missions outside the United States for agencies other than the Department of Defense.¹⁷¹

Need for and Suitability of Private Contractors¹⁷²

Over the past two decades, the State Department and the Department of Defense have increasingly turned to private security contractors to provide protective and other services for the two departments. Both State and DOD report significant benefits from the use of private security contractors. For the State Department, the use of PSCs in Iraq offers a surge capability to meet an extraordinary but time-limited need. For the U.S. military, contractors are considered part of the total force and private security contractors contribute a small, but significant portion of the force multiplier effect of using private contractors to achieve mission success.¹⁷³ Analysts, however, also note drawbacks in the use of private contractors.

Flexibility Considerations for the State Department. To meet various surge requirements, the Department of State argues that PSCs allow Diplomatic Security (DS) to rapidly expand its capability to meet security needs without a delay in recruiting and training direct-hire DS personnel. DS has stated that contractors can

¹⁶⁸ (...continued)

interpreted by the courts and [the Government Accountability Office (GAO)], point to a strict reading of the statutory language to prohibit contracts with the Pinkerton Detective Agency and other entities offering quasi-military forces as strikebreakers.”). Earlier in the opinion, however, the Comptroller General suggested a broader interpretation. *Id.* at 3 (“The purpose of the Act and the legislative history reveal that an organization was ‘similar’ to the Pinkerton Detective Agency only if it offered for hire mercenary, quasi-military forces as strikebreakers and armed guards.”). The FAR does not limit the prohibition to companies involved in strike-breaking. 48 C.F.R. Part 37.109 (2006).

¹⁶⁹ Department of State Acquisition Regulation (DOSAR), 48 C.F.R. Parts 601-653.

¹⁷⁰ 48 C.F.R. Parts 700-753.

¹⁷¹ Federal Acquisition Regulation 52.225-19, Contractor Personnel in a Designated Operational Area or Supporting a Diplomatic or Consular Mission Outside the United States (Mar. 2008). Such personnel are authorized to use deadly force in self defense or, where applicable, “when use of such force reasonably appears necessary to execute their security mission to protect assets/persons, consistent with the terms and conditions contained in the contract or with their job description and terms of employment.” *Id.*

¹⁷² This section and the following section draw on the section on commercial contractors in CRS Report 97-454 F, *Peacekeeping Options: Considerations for U.S. Policymakers and the Congress*, by Marjorie Ann Browne, Ellen Collier (Consultant), and Nina Serafino.

¹⁷³ According to the Department of Defense, “the Department’s Total Force — its active and reserve military components, its civil servants, and its contractors — constitutes its war-fighting capability and capacity” Department of Defense, *Quadrennial Defense Review Report*, February 6, 2006, p. 75.

be recruited, vetted, hired, trained, and deployed in 90 to 120 days. DS special agents, on the other hand, are college-educated law enforcement officers, trained in the full range of the work of DS agents, including personal security. DS states that it takes two years to recruit, hire, and train a DS agent. DS also states that the use of PSCs allows the fielding of an already trained, experienced cadre of security professionals whose required skills can be designated in the contract. When the surge need is gone, just as the State Department could rapidly expand its force, it can also reduce its security force when requirements change.¹⁷⁴

Even if one considers the current demands for PSCs an anomaly because of Iraq, it appears to be the intention of the State Department to continue to use PSCs in meeting future personnel and perimeter security requirements.¹⁷⁵ It is for policy makers to determine whether this flexibility is an appropriate long-term position for the use of PSCs, better suited as a short-term response to current needs, or whether the State Department should increase the number of full-time DS agents and security specialists and provide sufficient appropriations to do so instead of relying on PSCs.

Military Requirements and Private Contractors. Many defense analysts view private contractors as an indispensable force multiplier, especially needed over the past decade to ease the strain on a downsized military.¹⁷⁶ By supplementing overstretched active duty personnel, beginning in the early 1990s, with contractors for jobs that do not require military expertise such as feeding, housing, and otherwise caring for soldiers' basic needs, policy makers hoped to meet the demands on the force while minimizing an increase in the number of military personnel and repeated call-ups of reserve units. The U.S. government's subsequent turn to private contractors for assistance with a wide variety of security needs served the same purposes. In Iraq, particularly, the use of private contractors may serve a variety of other interests. As Iraqis constitute a significant percentage of private security contractors, the use of private contractors provides a cultural and linguistic advantage over the use of U.S. soldiers and ameliorates much potential friction with the local populations, according to one expert. They may also forestall possible criticism from U.S. taxpayers for using U.S. soldiers to protect the profit-making companies that carry out U.S. reconstruction efforts.¹⁷⁷

Without private contractors, the U.S. military would not have sufficient capabilities to carry out an operation of the scale of Iraq, according to many analysts.

¹⁷⁴ Testimony of Ambassador Richard J. Griffin, Assistant Secretary of State for Diplomatic Security regarding "Private Security Contracting in Iraq and Afghanistan," before the House Committee on Oversight and Government Reform, Washington, October 2, 2007.

¹⁷⁵ Discussion with Ms. Charlene R. Lamb, Assistant Director for International Programs, Bureau of Diplomatic Security, Department of State, June 24, 2008.

¹⁷⁶ For instance, in a 2005 study, the Defense Science Board referred to the private sector as the "fifth force provider" in stability operations, i.e., in addition to the four branches of the armed services, and recommended that a new institution be established to "effectively exploit" the private sector. Office of the Under Secretary of Defense for Acquisition, Technology, and Logistics. *Institutionalizing Stability Operations Within DoD*. September 2005. p. 38.

¹⁷⁷ E-mail correspondence from Doug Brooks, July 9, 2007.

If the United States wishes to engage in and contribute to sizable stabilization and reconstruction operations without contractor support to the U.S. military, policy makers would probably need to contemplate increasing the number of U.S. troops, perhaps also increasing incentives to attract volunteers or re-instituting the draft. On the other hand, some analysts point out that private security contractors are but a small part of the contractor workforce supporting the military in Iraq. Some analysts also question whether the use of private security providers in Iraq and elsewhere is beneficial to the U.S. military in the long run. Although contracting private sector firms for guard duties may help alleviate the current shortage of military personnel, analysts point to potential downsides to the force multiplier argument. One important area of concern is whether the use of PSCs is detrimental to military force structure; has a deleterious potential effect on the military mission, is flexible, and are of an appropriate quality for personnel.

Effects on the U.S. Military Force Structure. Analysts for the 1995 Commission on Roles and Missions (CORM) found that reliance on contractors could prove detrimental to military capabilities in a number of ways, the first of which was that it could keep the United States “from building and maintaining capacity needed for strategic or other important missions.”¹⁷⁸ Anecdotal reports that private security firms have been hiring away military personnel, particularly special forces personnel, with high salaries seem to illustrate the possibility that a competing private sector could deplete the military of highly trained personnel in needed specialties.

Proponents of the use of private sector security providers discount such concerns, stating that the numbers employed by private security companies are too low to have a significant effect on U.S. capabilities. Quantifiable evidence of a detrimental effect is lacking. A 2005 GAO analysis shows that the average attrition rates for military occupational specialties preferred by private security providers were lower in FY2004 (when demand for such providers in Iraq was high) than in fiscal years 2000 and 2001. (These specialties were Army and Navy enlisted and officer special operations forces, Army infantry, and military police from all four services.) In the *particular* case of Army Special Forces enlisted personnel, however, attrition was somewhat higher in 2004 than in 2000 and 2001. The GAO pointed out that a variety of factors could play into an individual’s decision to leave the armed services.¹⁷⁹

¹⁷⁸ The other two ways in which they judged the use of contractors could adversely affect military capabilities were by limiting training opportunities in some military specialties (which has occurred in some cases with non-security contractors: see GAO Report GAO-03-695, *op.cit.* p. 9) and result in inadequate stocks of equipment needed to perform certain tasks. Christine Cervenak and George T. Raach. “Contracting and Privatization in Peace Operations,” in *Peace Operations: Developing An American Strategy*, edited by Antonia Handler Chayes and George T. Raach. Washington, D.C.: National Defense University Press, 1995, pp. 137-151. Although possible equipment needs have not been raised as an issue, it is conceivable that if the U.S. military were to deploy to an operation where it was providing more security, it might find itself with a shortage of the types of armored vehicles now brought to Iraq by private security firms.

¹⁷⁹ U.S. Government Accountability Office. *Rebuilding Iraq: Actions Needed to Improve* (continued...)

Effects on the U.S. Military Mission in Iraq. Recent reports also point to possible complications for military commanders with the use of private security guards. Many analysts point out that the primary mission of private security personnel is to ensure the security of the individuals, the transport convoys, and the property they are hired to protect. News reports from Iraq indicate that this may have led in some cases to a disregard of the sensitivities of and consequences for the Iraqi public.¹⁸⁰ For a U.S. commander in Iraq whose mission may well include winning “hearts and minds,” such a disregard is problematic, some analysts argue. These reports, however, generally discuss incidents involving contractors who are American, not Iraqi or other foreign nationals; as noted above, proponents argue that a sizable presence of Iraqis among those providing security under U.S. contracts overall reduces the possible friction that the use of U.S. soldiers in these positions would entail.

Concerns Regarding Flexibility. Some analysts also contend that military forces have additional benefits in hostile situations. Although some state that private contractors can be deployed more quickly than military forces, others argue that military commanders can respond more quickly to changing situations when military forces rather than contractors are used. Commanders do not exercise command and control over private contractors, nor do they have the authority to amend contracts in the midst of an operation to reallocate contract employees to perform necessary tasks that fall outside the terms of the contract.¹⁸¹ Proponents of the use of private security contractors discount such concerns, however, arguing that they are not employed on the battlefield, where such flexibility is a needed.

Concerns About Reliability and Quality of PSC Personnel in Iraq. The larger companies, particularly, have reputations for supplying high-quality personnel. Some have wondered, however, if these companies can maintain that standard as demand for their services increases.

¹⁷⁹ (...continued)

Use of Private Security Providers. GAO-05-737. July 2005. p. 43. “While available data indicate that attrition, in almost all of the military specialties favored by private security providers, has returned to pre-September 11, 2001 levels, the data do not indicate why personnel are leaving the military and what they are doing after they leave....Officials at the Army Human Resources Command told us that after September 11, 2001, the opportunities for employment in the security field became more widespread as government agencies as well as private companies and organizations recognized the need to improve their security. These officials as well as officials from the Special Operations Command noted that they are losing personnel not only to private security firms operating in Iraq but also to security management companies operating in the United States, and security operations in other government agencies. Service officials at these commands also attributed the attrition rates to other factors, such as the attraction of a strong civilian economy, high operational tempo, and concerns about various quality of life conditions.”

¹⁸⁰ For example, see *Washington Post*, November 17, 2006, *op.cit.*

¹⁸¹ GAO-05-737, *op.cit.*, p. 20, and DOD Report to Congressional Defense Committees, as required by Section 1206 of the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005 (P.L. 108-375), October 28, 2004. p. 6, hereafter referred to as the Section 1206 Report.

Although U.S. companies have generally hired former U.S. professional military personnel with established careers, who may still possess the discipline, professionalism, and *esprit de corps* that the U.S. Armed Forces seeks to instill in its soldiers, the increasing use of private personnel may reduce the quality of contractor recruits. On the other hand, some analysts point out that private companies can maintain top quality people in the field indefinitely, whereas the military is required to rotate soldiers regularly. Those who favor the use of such contractors also contend that private companies can maintain standards because they can draw from a larger and more competitive pool of personnel than the U.S. military does, including former military personnel from elite forces of other countries and former police personnel.

Some critics are also concerned about the high number of non-U.S. citizens hired under U.S. government contracts, especially third-country nationals from lesser-developed countries who might be more difficult to screen. A GAO official noted in June 2006 testimony that (1) private security companies and DOD “have difficulty completing comprehensive criminal background screenings for U.S. and foreign nationals when data are missing or inaccessible,” and (2) “[n]o U.S. or international standards exist for establishing private security providers and employee qualifications.”¹⁸²

Industry Controls. Companies engaged in the private security business have incentives and opportunities to control quality, proponents say. Companies employing individual contractors have opportunities to observe their behavior and performance during training sessions and, according to analysts, can screen out potential misfits at that stage. U.S. government agencies establish baseline standards in contracts, by specifying performance standards, experience requirements, and/or precise qualifications to be met. U.S. government agencies have mandated changes — under threat of penalties — when contracted personnel are perceived as not up to standard, according to Doug Brooks, President of the International Peace Operations Association (IPOA). In addition, according to Brooks, there are many examples of companies that act proactively to address client complaints.¹⁸³ For example, an industry association has instituted a system to review complaints concerning its members and to sanction those found to have violated the Association’s Code of Conduct.¹⁸⁴ IPOA members include some of companies listed above (i.e., ArmorGroup, DynCorp International, Erinys International, and EOD Technologies, Inc.). In addition, PSC officials have stated that they fire or discipline employees for an array of inappropriate behavior, including insubordination and drinking alcohol in violation of established policy.¹⁸⁵

¹⁸² GAO Report GAO-06-865T, op. cit.

¹⁸³ E-mail correspondence from Doug Brooks, July 9, 2007.

¹⁸⁴ Information on the IPOA Code of Conduct and enforcement mechanisms can be accessed through the IPOA website at [<http://www.ipoaonline.org>].

¹⁸⁵ At a congressional hearing on October 2, 2007, Committee Chairman Henry A. Waxman stated that 122 Blackwater employees had been terminated for improper conduct. See Opening Statement of Chairman Henry A. Waxman, in US Congress, House Oversight and Government Reform Committee, *Hearing on Private Security Contracting in Iraq and* (continued...)

State Department PSC Employee Standards and Training. In testimony before the House Committee on Oversight and Government Reform, Ambassador David Satterfield stated, “Insofar as the State Department’s security contractors in Iraq are concerned, we demand high standards and professionalism. Those standards include relevant prior experience, strict vetting, specified pre-deployment training, and in-country supervision.”¹⁸⁶ Possible employees of PSCs undergo an initial screening process by their employer/contractor before the PSC employer submits the application of the proposed employees to the State Department. The Department performs a background check on American citizen applicants who must qualify for an appropriate level of a security clearance. A similar process for foreign national is also required and they must also qualify to receive an appropriate level of clearance. All applicants must have at least one year of experience in protective security assignments, law enforcement, or military service. After being approved by the Department for employment, before the PSC employee is deployed, he or she receives 164 hours of DS-approved training.¹⁸⁷

Supporters of the use of private security contractors point out that while objectionable contractor actions in Iraq have been highlighted recently, the employees themselves and their work should be kept in perspective. They point out that from January 1 to September 18, 2007, PSC contractors conducted 3,073 missions in which American diplomats or visitors were escorted outside of the secured Green Zone in Baghdad. Of those missions, there were 77 incidents involving PSC personnel using weapons.¹⁸⁸ While over 30 Blackwater employees have been killed while performing their security duties, supporters state that no American diplomat or visitor has been killed or seriously injured while being escorted by Blackwater. Ambassador David M. Satterfield, former Deputy Chief of Mission at the U.S. Embassy in Baghdad from May 2005 to July 2006, said that he had “personally benefitted from Blackwater and other private security details ... and witnessed first hand their professionalism.”¹⁸⁹

If PSCs continue to be used in the long term, the adequacy of the selection and vetting process and the training received should be a matter of continual review. For

¹⁸⁵ (...continued)

Afghanistan, hearings, 110th Cong., 2nd sess., October 2, 2007.

¹⁸⁶ Prepared testimony of Ambassador David M. Satterfield, Senior Advisor to the Secretary and Coordinator for Iraq, regarding “Private Security Contracting in Iraq and Afghanistan,” before the House Committee on Oversight and Government Reform, Washington, October 2, 2007.

¹⁸⁷ Testimony of Ambassador Richard J. Griffin, *op. cit.*

¹⁸⁸ Testimony of Ambassador Richard J. Griffin, *op. cit.* However, a Committee majority Staff Hearing Memorandum reported that from January 1, 2005 through September 12, 2007, Blackwater employees were involved in 195 incidents in which firearms were discharged. Of these 195 incidents, 32 involved Blackwater returning fire after they were attacked, and 163 incidents, or 84%, occurred with Blackwater firing first (Pg. 6, of an October 1, 2007, House Committee on Oversight and Government Reform Majority Staff Memorandum.

¹⁸⁹ Testimony of Ambassador David M. Satterfield, *op cit.*

instance, it has only been since the end of October 2007, following the September 16 Blackwater firing incident at Nisoor Square in Baghdad that human rights and cultural sensitivity training has become a part of the pre-deployment training for PSC employees along with the more standard Terrorist Operations, Organization of a Protective Detail, Protective Services Formation and Standard Operating Procedures, and Defensive Driver Training. A former Blackwater employee expressed his belief that training such as in cultural sensitivity was not necessary in that Blackwater's mission was different from the military and the State Department. He said, "We're not paid to go out and find and eliminate the insurgents. Our job is to keep people alive and safe, and do what we need to do."¹⁹⁰

Military Considerations. Proponents of the use of private security contractors argue that they are as responsible as serving military personnel because many are former soldiers or individuals equally dedicated to the national mission. Skeptics voice concerns that individual contractors may be less reliable in some situations as they probably bear lesser costs than military personnel if they refuse to perform a particular task. According to a 2003 GAO report, The DOD recognized the risk that contractors might not be available in crisis or hostile situations.¹⁹¹ Nevertheless, proponents argue that private security contractors working for the U.S. government, as well as other contractors, have been "remarkably robust in terms of reliability."¹⁹² There is little evidence to the contrary.¹⁹³

Oversight and Control/Coordination Issues

Many analysts claim that the U.S. government is unable to adequately oversee and control or coordinate the performance of military contractors in general and private security contractors in particular. Members are concerned with transparency issues that impede oversight by Congress, as well as control and coordination in the field.

Transparency and Congressional Oversight. Some Members have been concerned with the dearth of information made available to Congress by the Administration and to the public on U.S. government contracts with contractors in general and private security contractors in particular. As oversight hearings have

¹⁹⁰ *Ibid.*

¹⁹¹ See GAO Report GAO-03-695, *op.cit.* The GAO noted that despite this determination, it "found little in the way of backup plans to replace mission essential contractor services during crises if necessary." p 16.

¹⁹² E-mail correspondence from Doug Brooks, July 9, 2007.

¹⁹³ A recent news report from a Santiago, Chile newspaper reported that in 2005 "the Your Solutions security firm sent 147 Chileans into conflict zones in Iraq; 28 of the recruits broke their contracts and returned home early, claiming they received inadequate training and poor equipment." The article implies that these Chileans were contracted on behalf of a U.S. company, but does not state that directly nor name a U.S. firm. Mike Hager. *The Santiago Times*. "Chile's Iraq Mercenaries Under Investigation by U.N. Group." July 9, 2007, as posted online by Wordpress.org at [<http://www.worldpress.org/Americas/2853.cfm>].

demonstrated,¹⁹⁴ the executive branch either has not kept sufficient records to produce or has been unwilling to present basic, accurate information on the companies employed under U.S. government contracts and subcontracts in Iraq. The lack of contracting personnel, discussed below, may be responsible at least in part for this problem. In response to calls for greater transparency, DOD and the State Department have been providing additional information to Congress. For example, DOD now submits a quarterly report that includes information on the number of active PSC contracts, the number of employees working under these contracts, and an analysis of the contractor workforce (i.e., number of contractors that are armed versus unarmed, number of contracts that are American, Iraqi, or third-country nationals).

Military Oversight in the Field. One industry professional described the oversight situation in the early years of Operation Iraqi Freedom as “a nightmare” and stated that the better companies would prefer closer oversight.¹⁹⁵ Some U.S. government officials believed that U.S. agencies did not adequately supervise contracts. At the field level, the problem is often attributed by many, including U.S. government personnel, to a lack of qualified contracting oversight personnel, including contracting officer’s representatives (CORs),¹⁹⁶ who are responsible for supervising the contracted work. Arguing for an increase in such personnel, they state that over the years, the number of such representatives has been cut sharply in the Departments of Defense and State, while the number of contractors has escalated.

According to officials at the Department of Defense, the Blackwater shooting incident that took place at Nisoor Square on September 16, 2007, was a watershed event that highlighted the need for improved management and oversight of all U.S. government private security contractors operating in Iraq. According to these officials, DOD initiated a number of steps to improve contractor oversight, including establishing an Armed Contractor Oversight Division and significantly increasing the number of Defense Contracting Management Agency personnel performing contractor oversight in Iraq. In addition, MNC-I has consolidated the rules and regulations regarding private security companies and issued mandatory guidance on the management and oversight of PSCs.¹⁹⁷

¹⁹⁴ For examples of hearing citations, see footnotes 13 and 41.

¹⁹⁵ Interview with Doug Brooks, *op.cit.*

¹⁹⁶ A COR “is an individual appointed in writing by a contracting officer to act as the eyes and ears of the contracting officer,” according to Army doctrine. “This individual is not normally a member of the Army’s contracting organizations ... but most often comes from the requiring unit or activity.” U.S. Army. Headquarters. *Contractors on the Battlefield*. Field Manual No. 3-100.21. January 2003. p. 4. According to the same source, a contracting officer is “the official with the legal authority to enter into, administer and/or terminate contracts.”

¹⁹⁷ For a more detailed discussion on DOD efforts to manage PSCs, see U.S. Government Accountability Office. *Rebuilding Iraq: DOD and State Department Have Improved Oversight and Coordination of Private Security Contractors in Iraq, but Further Actions are Needed to Sustain Improvements*. GAO-08-966. July 2008. pp. 9-16.

Many observers of developments in Iraq point to the important role that CORs can play and the possible results when contracting agencies have insufficient or the wrong staff to do this important work. Recognizing the important role of CORs in managing PSCs, DOD recently issues an order which states that contracting office representatives should be appointed who possess the appropriate rank given the contract oversight responsibilities, and that oversight should be the primary — and not an ancillary — responsibility of the COR.¹⁹⁸ It is for Congress, in the end, to determine whether sufficient staff has been requested by the Administration, and if the Administration fills the slots provided in the various contracting bureaus of the government. Further, through the power of the purse, Congress could make sure that the government's CORs have sufficient resources and training to do their work.

State Department Oversight in the Field. In its formal structure, the DS Regional Security Officer (RSO) at post provides general oversight and manages the operation of security contractors. The DS High Threat Protection Program personnel in Washington meets weekly with contractor management and conducts periodic program management/contract compliance reviews of task order operations at posts. The WPPS II base contracts require that PSCs follow the mission firearms policy of the post to which they are assigned. In the case of the U.S. Embassy in Baghdad, the mission firearms policy is defensive in nature and utilizes a seven-step escalation of force continuum that ends with the use of deadly force when no safe alternative is available to protect the diplomat or dignitary being guarded. There are levels of incident reporting requirements to the RSO when weapons are discharged, or there are attacks, serious injury or death. Contractors are also required to report any incident that would reflect negatively on the United States, the Department, the Embassy, or the contractor.¹⁹⁹

While oversight and management of PSC procedures seem to be in place in Iraq, many news reports relate embassy officials rebuffing Iraqi complaints about Blackwater employees' alleged involvement in Iraqi deaths or firing on Iraqi civilians, actions by PSC employees as being arrogant, and the State Department allowing Blackwater to ignore Iraqi law such as operating without an Interior Ministry license, even after the requirement became a standard part of Defense Department requirements for its security contractors. Many in Iraq have come to see Blackwater as untouchable because they have a sponsor, the State Department, who would defend the company at every turn regardless of what the company does.²⁰⁰

Tighter State Department Oversight. After the September 16, 2007, shooting in Baghdad's Nisoor Square, several studies were conducted to investigate the shooting and the embassy's actions. Among these, Secretary of State Rice formed a review panel led by Ambassador Patrick Kennedy to examine the shooting incident in terms of management and policy. The Federal Bureau of Investigation sent a separate team to investigate the shootings and, in particular, Blackwater's compliance with U.S. policy. Through an October 4 Interim Report and an October

¹⁹⁸ *Ibid*, p. 14.

¹⁹⁹ Testimony of Ambassador Richard J. Griffin, October 2, 2007, *op. cit.*

²⁰⁰ Steven Fainaru, *Washington Post*, September 20, 2007, *op. cit.*

23, 2007 Final Report, Ambassador Kennedy's panel made 19 recommendations. Among its findings, the panel stated the following:²⁰¹

- The Department's security operations in Iraq have been highly effective in ensuring the safety of mission personnel.
- Improvements are necessary to address shortcomings in coordination and oversight that have undermined confidence in the operation of the security program on the part of the U.S. military command and the Iraqi government and public.
- The U.S. military in Iraq does not consider it feasible or desirable under existing conditions in Iraq for the Department of Defense to take on responsibility for provision of Personal Protective Service support to the Embassy.
- The drawdown of the U.S. military in Iraq is likely to create increased requirements for personal protective services.
- The Diplomatic Security Service does not have sufficient special agents worldwide to take on all personal service operations in Iraq and meet requirements in other countries.

Following Ambassador Kennedy's reports and recommendations, the Secretary ordered new measures to increase State Department oversight of contractors' activities in Baghdad. From among the recommendations made by the Kennedy panel, Secretary Rice ordered the following:²⁰²

- DS Special Agents, serving as the Officer in Charge, accompany all State Department personal security details leaving the Green Zone in Baghdad for other parts of the city. Additional agents from other DS posts were ordered to Baghdad to assure sufficient personnel to cover all of the Blackwater convoys.
- DS mount video cameras on security vehicles and begin taking and archiving electronic video information regarding reported incidents.
- DS monitor and record radio transmissions of PSCs while they are operating outside the Green Zone to increase the Department's capability to review material after an incident.
- State amend the WPPS II contracts to require (1) contractors to employ a limited number of Arabic language staff for convoy movements; (2) PSC employees to take predeployment training in cultural awareness and sensitivity, and the diplomatic and military environment in which they will be operating; (3) tightening of the rules on the use of deadly force to ensure greater parallelism with USCENTCOM rules; and (4) revision of the embassy's U.S. Mission Firearms Policy to specify that if an authorized employee must fire his/her weapon, he/she must fire only aimed shots; fire with due regard to the safety of innocent bystanders, and make every effort to avoid civilian casualties.

²⁰¹ Ambassador Patrick J. Kennedy, et al., "Findings," *Report of the Secretary of State's Panel on Personal Protective Services in Iraq*, Department of State, October, 2007, pg. 5.

²⁰² Ibid, "Recommendations," pp. 5-12.

- A “Go Team” of embassy security officials be established to quickly proceed to the scene of any weapons discharge involving State Department PSCs to gather information and material and provide an analysis of what happened, why, and report on the incident.
- An Embassy Joint Incident Review Board be established, made up of embassy diplomatic and security officials, a U.S. military officer, and another U.S. government official other than State or Justice, to review all incidents involving contractor use of deadly force, and recommend to the ambassador whether the use of force was justified, and if not, whether the case should be referred to the Department of Justice.
- A permanent working group be established between the Regional Security Office and Multi- National Force-Iraq to develop commonly agreed operational procedures, establish a robust liaison element, exchange information ensure optimal situational awareness, and ensure that any issues are discussed and quickly resolved.

State Department/DOD Memorandum of Agreement. To address the growing concerns in both the executive and legislative branches regarding perceived insufficient management of PSCs in Iraq and the negative impact their actions can have on U.S. efforts in the region, Deputy Secretary of State John Negroponte and Deputy Secretary of Defense Gordon England signed a Memorandum of Agreement (MOA) for their departments on December 5, 2007, regarding PSCs. The MOA defined the authority and the responsibility for accountability and operations of U.S. PSCs in Iraq. Under the categories of responsibilities and standards,²⁰³ the Departments agreed on the following:

- The Secretary of Defense and the Combatant Commanders (COCOM) are responsible for the security of all DOD elements and personnel under operational control of COCOM.
- The Secretary of State is responsible for the security of U.S. government personnel on official duty in Iraq, other than those under the command of an area military commander.
- The Secretary of State and the Secretary of Defense will jointly develop, implement, and follow core standards, policies, and procedures for the accountability, oversight, and discipline of PSCs.
- The core standards would, at a minimum, include
 - (1) management of PSC personnel;
 - (2) coordination of PSC operations outside secure base and U.S. diplomatic property;
 - (3) clear legal basis for holding private security contractor employees accountable under U.S. law;
 - (4) recognition of investigative jurisdictions and coordination of joint investigations where conduct of PSC personnel are to be investigated.

²⁰³ *Memorandum of Agreement (MOA) Between the Department of Defense and the Department of State on USG Private Security Contractors*, Washington, D.C. December 5, 2007, pg. 1

[<http://www.defenselink.mil/pubs/pdfs/Signed%20MOA%20Dec%205%202007.pdf>].

- The Chief of Mission and the COCOM would make every effort to consult and coordinate responses to common threats.

The MOA also outlines a process for dispute resolution between the two departments, and a requirement for the two secretaries to designate their Washington representatives regarding the MOA to meet as frequently as necessary but not less than every quarter.²⁰⁴

Further, the departments agreed to an ANNEX A: Deliverables As Part of the MOA. The annex, to be jointly completed by the U.S. Embassy in Baghdad and the Multi-National Force — Iraq (MNF-I), stated the details of how the MOA would actually operate on the ground. Other elements to be included in the Annex were still to be developed, such as a common graduated warning system for PSCs to use when they felt threatened so that the threatening individual/force could withdraw. Some of the elements of the MOA/Deliverables are as follows:²⁰⁵

- Common definitions for Defense of Self or Others, Imminent Threat, Hostile Act, Hostile Intent.
- The Use of Deadly Force.
- The authority to possess and carry firearms and the minimum requirements that must be met for a person to have such authority.
- The coordination and control of PSC details outside of secure areas, which include advance notification to MNC-I of time, route, destination, and convoy composition outside the Green Zone or a military base, and the right of MNC-I to recommend that the route or time be altered or PSC mission be cancelled.
- The steps to be taken by the embassy and MNF-I as an immediate response to any serious incident involving PSCs. The steps include securing the area for investigation of the incident, determining who has jurisdiction to conduct the investigation, notifying the Government of Iraq, and providing condolence payments to Iraqi families.
- An agreement for State and DOD to work together to develop a common database for the purpose of increasing PSC accountability and visibility.

Control and Coordination in the Field. The GAO has issued several reports regarding DOD contracting in Iraq that address issues regarding the use of private security contractors, several of which mention control and coordination issues. As pointed out above, military commanders do not have a command and control relationship with contractors, and thus must know how to secure cooperation

²⁰⁴ Ibid, pg. 2.

²⁰⁵ “Annex A: Deliverables,” *Memorandum of Agreement (MOA) Between the Department of Defense and the Department of State on USG Private Security Contractors*, Washington, D.C. December 5, 2007, p. 1
[\[http://www.defenselink.mil/pubs/pdfs/Signed%20MOA%20Dec%205%202007.pdf\]](http://www.defenselink.mil/pubs/pdfs/Signed%20MOA%20Dec%205%202007.pdf).

from contractors to promote order in the theater of operations.²⁰⁶ In June 2006 testimony before Congress, a GAO official cited two major related problems: (1) that private security providers did not coordinate with the U.S. military when they entered the “battle space” in Iraq and (2) that military units were not trained prior to deployment on (a) private security provider operating procedures and (b) the role of the Reconstruction Operations Center (ROC)²⁰⁷ (The ROC was charged with coordination between military and private security personnel. Coordination is now managed by Contractor Operations Cells, as discussed below). In March 2007, DOD set forth a new requirement that companies enter data on their personnel, before deployment, into a new “Synchronized Predeployment and Operational Tracker” (SPOT).²⁰⁸ In April 2007, testimony the Comptroller General stated that GAO continued “to find little evidence that DOD has improved training for military personnel on the use of contractors prior to deployment.”²⁰⁹

As a result of the December 5, 2007, Memorandum of Agreement between DOD and the Department of State, the agencies have worked to coordinate the movement of PSCs throughout Iraq, taking such steps as giving advance notification to MNC-I of time, routes, destination, and convoy composition of PSC details operating outside the Green Zone or a military base, and the right of MNC-I to recommend that the route or time be altered or PSC mission be cancelled. In addition, the State Department and USAID now require their contractors to coordinate PSC movements with MNC-I. MNC-I manages and coordinates the movement of PSCs in Iraq through Contractor Operations Cells that are co-located with the tactical operations centers of MNC-I’s five division operating in Iraq.

²⁰⁶ According to the Section 1206 Report, *op.cit.*, however, the terms and conditions of contracts with private security (and other) companies largely set the parameters for military-contractor relationships. “The interaction between U.S. military forces and security contractors in Iraq is one of coordination rather than control because private security contractors have no direct contractual relationship with the commander. If a Federal agency or a reconstruction contractor issued a contract that required the private security firm to coordinate with military units ... such a contract would need to contain clauses ... giving the Commander coordination authority over private security contractors.” Nevertheless, according to the document, Commanders can, to a certain extent, “influence the discipline of contractor employees [by] working with the contracting officer to pursue contract remedies. Commanders can also limit or revoke any benefits or special status of a contractor employee accompanying the force, if the contractor employee violates the Commander’s instructions or directives.” p. 6. For the full report, see [<http://www.fas.org/irp/agency/dod/1206report.pdf>].

²⁰⁷ GAO Report GAO-06-865T. *op.cit.*

²⁰⁸ Office of the Under Secretary of Defense, Acquisition, Technology, and Logistics. Memorandum for Directors of Defense Agencies, et.al. Class Deviation — Synchronized Predeployment and Operational Tracker, March 19, 2007. Accessed July 11, 2007, [<http://www.acq.osd.mil/dpap/policy/policyvault/2007-0605-DPAP.pdf>].

²⁰⁹ U.S. Government Accountability Office. *Stabilizing and Rebuilding Iraq: Conditions in Iraq are Conducive to Fraud, Waste, and Abuse*. Statement of David M. Walker, Comptroller General of the United States, before the Subcommittee on Defense, House Committee on Appropriations, GAO-07-525T. April 23, 2007.

Effect of DOD and Department of State Efforts to Improve PSC Management and Coordination. Since the institution of measures to manage PSCs better, the Department of Defense reports that incidences where weapons were fired by PSCs have decreased by about 67%.²¹⁰ DOD and Department of State officials have stated that while they believe their efforts to improve management have contributed to the improved performance of PSCs, they cannot determine to what degree the reduction in shooting incidents is the result of their efforts, the general decrease in violence in Iraq, or the military surge.²¹¹

A recent report issued by the Government Accountability Office found that since the September 16, Nisoor Square Blackwater incident, both DOD and the State Department have taken steps to increase staffing, oversight, and coordination over PSC, and that these steps may help reduce the number of PSC incidents in Iraq.²¹² The report also stated that DOD and the State Department have improved coordination related to PSCs in Iraq and points to several steps taken as an illustration of the point.²¹³ Further the report states that the State Department and DOD have improved their coordination with the Government of Iraq.²¹⁴ However, the report expressed concerns regarding DOD's ability to sustain its staffing and training efforts in managing its PSCs in Iraq, as well as pointing to steps that the State Department still has to take in implementing the Kennedy Group recommendation.

Through its oversight responsibilities, Congress might use a variety of measures to determine whether the management and coordination taken by the State Department and DOD are adequate in controlling the actions of PSCs in Iraq or whether additional steps are still needed. Changes in the number of weapons discharge by PSCs may serve as an indicator that the issue of PSC oversight and management may need to be revisited. Another measure may be the number and veracity of complaints lodged by the Iraqi people, Iraqi government, or U.S. government personnel against PSCs. Also, if PSCs continue to play an important role in the protection of U.S. personnel and dignitaries abroad, which seems likely, will agencies take the lessons learned in Iraq and apply those lessons to other locations where the U.S. government will call upon PSCs to provide security.

Cost Issues

CRS is unaware of comprehensive agency-conducted analyses comparing the use of private security companies, U.S. servicemembers, and State Department

²¹⁰ Based on data provided by the DOD on June 24, 2008.

²¹¹ Ms. Charlene R. Lamb, Assistant Director for International Programs, Bureau of Diplomatic Security, discussion, June 24, 2008, op cit., and discussions with DOD officials.

²¹² See U.S. Government Accountability Office. *Rebuilding Iraq: DOD and State Department Have Improved Oversight and Coordination of Private Security Contractors in Iraq, but Further Actions are Needed to Sustain Improvements*, General Accountability Office. GAO-08-966. July 2008. p. 30.

²¹³ Ibid., pp. 19-20.

²¹⁴ Ibid., pp. 5-6.

Diplomatic Security Agents. Both proponents and opponents of the use of contractors have made cost comparisons but usually have not elaborated on what factors were involved in the assumptions underlying the cost comparisons, and whether those factors were comparable. The relative direct cost advantage of contractors can vary, and may diminish or disappear altogether, depending on the circumstances and contract conditions. Apart from the direct cost of salaries, which will vary according to the mix of countries of origin of employed personnel offered, the costs to the U.S. government of private security contracts can depend on any benefits provided and the terms negotiated in a contract or a subcontract. For instance, the U.S. government does not pay for benefits such as health insurance or incur long-term liabilities such as disability compensation and pensions when private security contractors are employed. On the other hand, some analysts contend that the total costs of private security contracts have been underestimated because they do not include the subsidy that the U.S. government in effect provides contracting companies, including when former U.S. soldiers, trained at taxpayer expense, are employed.

Proponents of the use of private security contractors have said that private security contractors are less expensive than using U.S. military forces because private companies can employ locals and third-country nationals whose earnings are a fraction of U.S. servicemembers. Private contractors can incur much lower costs by using local hires extensively, as they do not have to transport them, house or feed them, and can pay wages that are relatively low compared to those paid to U.S. servicemembers. Private security contractors in Iraq keep total costs low by employing many Iraqis, according to proponents.

One recent congressional analysis, however, found that in the case of personnel provided by one company (i.e., Blackwater Worldwide), the total cost of private security personnel was “significantly higher than the direct costs that would-be incurred by the [U.S.] military” because of markups and other costs charged the U.S. government.²¹⁵

From a State Department perspective, in testimony before the House Committee on Oversight and Government Reform, Deputy Assistant Secretary of State for Logistics Management testified that considering a fully loaded cost analysis, it costs around \$400,000 for an American diplomat or a DS agent to serve in a regular

²¹⁵ A February 7, 2007, Memorandum to Members of the Committee on Oversight and Government Reform, written by the Committee’s Majority Staff and posted on the Committee’s website, states that the “security services provided by Blackwater would typically be performed by an Army Sergeant, whose salary, housing, and subsistence pay range from approximately \$140 to \$190 per day, depending on rank and years of service. These equate to an annual salary ranging from approximately \$51,100 to \$69,350 per year.” According to the memo, Blackwater was providing those services in conjunction with a Kuwaiti company, Regency Hotel & Hospital Company, to ESS Support Services Worldwide “which in turn was providing dining services and construction for other contractors such as KBR and Fluor Corporation.” Taking markups and other costs into account, the memo concluded that the “Blackwater costs are four to tens time higher” than the costs of a U.S. soldier. (Memo last accessed June 19, 2007, through [http://oversight.house.gov], pp. 4-5.)

mission around the world. To have an American diplomat or a DS agent serve in Iraq, by comparison, costs around \$1 million. Part of that amount, such as transportation and shipping of goods, does not appear in the employee's salary.²¹⁶

In August, 2008, CBO issued a report that compared the costs of a particular security contract between Blackwater and the State Department to the cost of an equivalent U.S. military force. The report estimated that the costs of PSCs did not differ significantly from the costs of a comparable military unit. The report pointed out that in peacetime there would be carrying costs for maintaining the military unit whereas a contract with a PSC could be terminated.²¹⁷

Perception of State Authority and Commitment

The desire to entrust the capability to use force legally on behalf of the United States to private companies, including those employing non-U.S. citizens has foreign policy implications for the United States. Although many analysts perceive the officially sanctioned private use of force as significantly eroding the modern state's monopoly on the use of force, whether this erosion is beneficial or detrimental to U.S. foreign policy and to the international order is a matter of dispute.²¹⁸ To the extent that private companies are perceived as participating in combat operations, it may be difficult for the United States to persuade other states to recognize contractors' rights to protection under the Geneva Conventions. On a symbolic level, the use of private companies may be perceived by some observers as signaling a lesser U.S. commitment than would the use of national military forces.

Selected Legislation in the 110th Congress

H.R. 4986 (Skelton) — National Defense Authorization Act for FY2008 (P.L. 110-181)

Subtitles D and F of P.L. 110-181 address contracting in Iraq and Afghanistan. Subtitle A, which addresses acquisition of services, also contains provisions that may affect private security contracts. Section 808, for example, requires an independent management review of contracts for services, including an assessment of their use to contract for services related to inherently governmental functions.

²¹⁶ Testimony of William Moser, Deputy Assistant Secretary of State for Logistics Management, regarding "Private Security Contracting for Iraq and Afghanistan," Before the House Committee on Oversight and Government Reform, Washington, October 2, 2007.

²¹⁷ CBO. *Contractor's Support of U.S. Operations in Iraq*, p.14, 16-17.

²¹⁸ For an examination of a variety of related issues and perspectives, see, among others: Deborah Avant, "The Privatization of Security and Change in the Control of Force," *International Studies Perspectives*, Vol. 5, Issue 2, May 2004; David Shearer, "Outsourcing War," *Foreign Policy Magazine*, Fall 1998; and P.W. Singer, *Corporate Warriors: The Rise of the Privatized Military Industry*, Ithaca and London: Cornell University Press, 2003.

Section 841 of P.L. 110-181 provides for the establishment of a special Commission on Wartime Contracting to investigate and report to Congress on federal agency contracting for the reconstruction of Iraq and Afghanistan, the logistical support of coalition forces and the performance of security and intelligence functions in Operation Iraqi Freedom and Operation Enduring Freedom. It requires the Commission to assess the extent and impact of reliance on contractors, the extent of waste, fraud, abuse, or mismanagement under such contracts, and the appropriateness of the organizational structure, policies, and practices of the Departments of Defense and State for handling contingency contract management and support. An interim report from the Commission is due March 1, 2009, and a final report is due no later than two years after the date of appointment of all Commission members. Section 862 requires the Secretary of Defense to prescribe, within 120 days of enactment, regulations on the selection, training, equipping, and conduct of personnel performing private security functions under a covered contract or covered subcontract in a combat area. These include processes for (1) registering, processing, and accounting for such personnel; (2) authorizing and accounting for their weapons; (3) investigating the death and injury of such personnel and their discharge of weapons; (4) investigating the injury, death, or damage of property caused by the actions of such personnel; and (5) incidents of alleged misconduct. The regulations also provide guidance to commanders of combatant commands on orders, directives, and instructions to contractors and subcontractors performing private security functions relating to force protection, security, health, safety, relations and interaction with locals, and rules of engagement. Section 861 requires the Secretary of Defense, the Secretary of State, and the Administrator of USAID to enter into a memorandum of understanding (MOU) no later than July 1, 2008, regarding contracting in Iraq and Afghanistan, including matters related to authorizing the carrying of weapons, establishing minimum qualifications for personnel carrying weapons, and setting rules regarding the use of deadly force. The MOU is to delineate responsibilities for investigating and referring possible violations of MEJA by contractor personnel. The MOU is also to identify a common database to house information on all contracts in Iraq and Afghanistan.²¹⁹ Section 862 calls for the revision of relevant Federal Acquisition Regulations to require all contracts and subcontracts for such personnel to conform with these regulations.

Vetoed forerunner to H.R. 4986 is H.R. 1585, which was introduced March 20, 2007. H.R. 1585 was referred to the House Armed Services Committee. Referred to HASC subcommittees April 10, 2007. Subcommittee mark-ups were held May 2-8, 2007. Committee consideration and mark-up was held May 9, 2007. Reported (amended) May 11, 2007 (H.Rept. 110-146). A supplemental report was filed May 14, 2007 (H.Rept. 110-146, part 2). The House passed a substitute amendment *in lieu* on May 17, 2007. H.R. 1585, as passed by the House, was placed on Senate calendar, June 5, 2007; laid before the Senate by unanimous consent, June 28, 2007. H.R. 185 was passed by the Senate with amendments, October 1, 2007. The

²¹⁹ On July 10, 2008, DOD, the State Department, and USAID signed an MOU identifying each agency's roles and responsibilities relating to coordinating the movement of contractors in Iraq, maintaining a common database to house information on contracts in Iraq, and tracking cases of criminal acts committed by contractors.

Conference Report filed December 6, 2007 (H.Rept. 110-47). The Conference recommendations were agreed to in the House on December 12, 2007, and in the Senate on December 14, 2007. President Bush vetoed H.R. 1585, as agreed to by the House and Senate, on December 28, 2007, based on objections to provisions not germane to this report. A modified H.R. 1585 was reintroduced as H.R. 4986 and passed by the House on January 16, 2008, and by Senate January 22, 2008. President Bush signed H.R. 4985 on January 28, 2008, as P.L. 110-181.²²⁰

Section 864 defines private security functions as guarding personnel, facilities, or property, or any other activity that requires contractors to be armed to perform their duties.

H.R. 3222 (Murtha) — Department of Defense Appropriations Act, 2008 (P.L. 110-116)

While not addressed in law, the joint explanatory statement of the managers of the conference version (H.Rept. 110-434) of H.R. 3222 states that the DOD “lacks accountability and management of its contracted services.” It states that additional funding totaling \$48 million has been provided to the Defense Contract Audit Agency (\$10 million), the Defense Contract Management Agency (\$14 million), and the Defense Inspector General (\$24 million) “to provide more robust staffing of contractor management and oversight personnel. It calls on the DOD to improve its management of contract services “by instituting clear accountability mechanisms; instituting unambiguous and short chains of command to the most-senior decision makers; and improving the tracking and reporting of contract service costs and management of contract service performance.” The conferees directed the Secretary of Defense to develop, within 90 days of enactment, uniform minimum personnel standards for contracted personnel and a compliance mechanism that specifies penalties for noncompliance with personnel standards “including fines, denial of contractual obligations or contract rescission.” The Secretary is also directed to establish “a clear set of rules of engagement for all contracted security personnel operating in the Iraq and Afghanistan theaters of operations.”

House Committee on Appropriations introduced an original measures, H.R. 3222, on July 230, 2007 with an accompanying Committee Report, H.Rept. 110-279. H.R. 3222 was passed by the House August 5, 2007, and by the Senate October 3, 2007. The House and Senate approved the conference report (H.Rept. 110-434) on

²²⁰ The President issued a signing statement objecting to sections 841 (Commission on Wartime Contracting) and 846 (whistle blower protection for contract employees) on the basis that they:

purport to impose requirements that could inhibit the President’s ability to carry out his constitutional obligations to take care that the laws be faithfully executed, to protect national security, to supervise the executive branch, and to execute his authority as Commander in Chief.

See 44 WEEKLY COMP. PRES. DOC. 115 (Feb. 4, 2008). The President further indicated that the “executive branch shall construe such provisions in a manner consistent with the constitutional authority of the President.” *Id.*

November 8, 2007. President Bush signed the legislation and it was enacted as P.L. 110-116.

H.R. 5658 (Skelton) — Duncan Hunter National Defense Authorization Act for FY2009

Section 322 of H.R. 5658 would mandate that development of a single government-wide definition for “inherently governmental functions.” Section 824 would bar the Department of Defense from allowing contractors to perform inherently governmental functions in a combat area. The section would also require the Secretary of Defense to list those functions that should not be performed by private security contractors. Section 847 would require PSCs working for the U.S. government in a combat area to report whenever a weapon is discharged against a private security contractor, and whenever a private security contractor takes active, non-lethal countermeasures.

On May 22, 2008, the House passed the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 (H.R. 5658).

S. 3001 (Levin) — National Defense Authorization Act for FY2009

Section 841 of S. 3001 would mandate that private security contractors not be authorized to perform inherently governmental functions in an area of combat operations. The section defines “inherently governmental” as protecting people, information, equipment, and supplies in non-permissive environments where deadly force is likely to be initiated by security personnel in public places or where security personnel are expected to make real-time decisions that could affect the private individuals or U.S. interests. Section 842 would require the establishment of mechanisms to ensure that contractors are required to report specified offenses that are alleged to have been committed by or against contractor personnel. Section 1036 would require that the Federal Acquisition Regulations to prohibit contractors from interrogating prisoners during or after the cessation of hostilities.

On August 1, 2008, with a Cloture motion failing to receive sufficient votes, the Senate proceeded to consider S. 3001 on the Floor.

S. 2147 (Obama) — Security Contractor Accountability Act of 2007

S. 2147 would expand the coverage of the Military Extraterritorial Jurisdiction Act (MEJA) to include all persons “while employed under a contract (or subcontract at any tier) awarded by any department or agency of the United States, where the work under such contract is carried out in a region outside the United States in which the Armed Forces are conducting a contingency operation.” The bill would mandate that the Federal Bureau of Investigation (FBI) establish a “Theater Investigative Unit” for each contingency operation in which contract personnel are working to investigate suspected misconduct. The FBI and other agencies or departments affected by the bill would have 90 days to implement to the provision, and the

Department of Justice Inspector General would be required to report to Congress within 30 days of enactment on the investigation of abuses alleged to have been committed by contract personnel.

Introduced October 4, 2007. (Similar to H.R. 2740). Referred to the Committee on the Judiciary.

H.R. 2740 (Price) — MEJA Expansion and Enforcement Act of 2007

H.R. 2740, passed as amended by the House of Representatives, would extend the coverage of the Military Extraterritorial Jurisdiction Act (MEJA) to include all persons “while employed under a contract (or subcontract at any tier) awarded by any department or agency of the United States, where the work under such contract is carried out in a region outside the United States in which the Armed Forces are conducting a contingency operation.” Currently, MEJA covers contractors only if employed by “the Armed Forces outside the United States,” or if employed by other federal agencies or “provisional authority,” to the extent their employment is related to the support of the DOD mission overseas. The bill would mandate that the Federal Bureau of Investigation (FBI) establish a “Theater Investigative Unit” for each contingency operation in which covered contract personnel are working to investigate suspected misconduct. It would also require that the Department of Justice Inspector General report to Congress within 30 days of enactment on the investigation of abuses alleged to have been committed by contract personnel.

Introduced June 15, 2007. Referred to the House Judiciary Committee. Referred to the Subcommittee on Crime, Terrorism, and Homeland Security. Full Committee consideration and mark-up, July 24, 2007. Ordered to be reported August 2, 2007. Reported (amended) September 27, 2007, H.Rept. 110-352. House passed an amendment in the nature of a substitute, October 4, 2007, 389-30. The amended version includes a new section, which provides that “[n]othing in this Act shall be construed to affect intelligence activities that are otherwise permissible prior to the enactment of this Act.” (Sec. 6). Section 6 was added in response to the Administration’s concerns that the bill “would have unintended and intolerable consequences for crucial and necessary national security activities and operations.”²²¹ Ordered placed on the Senate Legislative Calendar under General Orders October 5, 2007.

²²¹ See Letter, Executive Office of the President, Statement of Administration Policy, H.R. 2740 — MEJA Expansion and Enforcement Act of 2007 (Oct. 3, 2007), *available at* [<http://www.whitehouse.gov/omb/legislative/sap/110-1/hr2740sap-h.pdf>]. The Administration also opposes the bill on the basis of its concern that the bill’s vagueness will “give rise to extensive litigation on jurisdictional issues,” that the bill “would place inappropriate and unwarranted burdens on the Department of Defense,” and that it interferes with the prosecutorial discretion of the executive branch.

S. 674 (Obama) — Transparency and Accountability in Military and Security Contracting Act of 2007

S. 674 would require the Secretaries of Defense, State, and the Interior; the Administrator of the U.S. Agency for International Development; and the Director of National Intelligence to provide information to the Congress within 90 days of enactment on U.S. government contractors and subcontractors working in Afghanistan and Iraq, with particularly detailed requirements for information on private security contractors. This information would include the number of persons performing work in Iraq and Afghanistan under contracts and subcontracts; the companies awarded such contracts and subcontracts; the total cost of these contracts; and a method for tracking the number of persons killed and wounded while serving under such contracts. Also contains provisions intended to improve coordination between the U.S. Armed Forces and contractors performing private security functions, and to clarify the legal status of contract personnel by expanding MEJA (similar to H.R. 369, H.R. 2740 and S. 2147).

Introduced February 16, 2007. Referred to the Senate Armed Services Committee.

H.R. 369 (Price) — Transparency and Accountability in Military and Security Contracting Act of 2007

H.R. 369 would require the Secretaries of Defense and State and the Administrator of the U.S. Agency for International Development to prescribe minimum hiring standards and issue equipment guidance for contracts regarding private security contractors and would require contractors to provide specified information on costs and personnel and update it during the period of contract performance. Also contains provisions intended to improve coordination between the U.S. Armed Forces and contractors performing private security functions, and to clarify and extend the Military Extraterritorial Jurisdiction Act (MEJA). Would extend MEJA to cover contractors “while employed under a contract (or subcontract at any tier) awarded by any department or agency of the United States, where the work under such contract is carried out in a region outside the United States in which the Armed Forces are conducting a contingency operation.” MEJA covers contractors only if employed by “the Armed Forces outside the United States,” or if employed by other federal agencies or provisional authority, to the extent their employment is related to the support of the DOD mission overseas. (This last provision is also included in H.R. 2740, below.)

Introduced January 10, 2007. (Similar to S. 674.) Referred to the House Armed Services Committee (HAS) and the Judiciary Committee. Referred to the HAS Subcommittee on Readiness, February 1, 2007. Referred to the Judiciary Committee’s Subcommittee on Crime, Terrorism, and Homeland Security, February 2, 2007. The subcommittee held hearings on June 19, 2007.

H.R. 3695 (Hall) — Freeze Private Contractors in Iraq Act

H.R. 3695 would prohibit the DOD and the Department of State from increasing the number of private security contractors it uses to perform security functions in Iraq.

Introduced September 27, 2007. Referred to the Committees on Foreign Affairs and Armed Services.

H.R. 4102 (Schakowsky) and S. 2398 (Sanders) — Stop Outsourcing Security Act

H.R. 4102 and S. 2398 would require that only U.S. federal government personnel provide security to all personnel at any U.S. diplomatic or consular mission in Iraq within six months after enactment. It also would require that the President report to specified congressional committees on “the status of planning for the transition away from the use of private contractors for mission critical or emergency essential functions by January 1, 2009, in all conflict zones in which Congress has authorized the use of force.” Contracts with the federal government requiring personnel to perform mission critical or emergency essential functions may be renewed after that date only if the President reports to those committees that the relevant agency does not have adequate personnel to perform the duties stipulated in the contract. The President must also certify that all contract employees meet set standards, including having undergone background checks to ensure they do not have criminal records and have not been accused of human rights abuses, and that they would remain in the custody of the United States if they are accused of crimes by the host country. It also would provide for Congressional access to contracts under certain conditions and reports to Congress on Iraq and Afghanistan contracts.

H.R. 4102 was introduced on November 7, 2007. It was referred to the Committees on Foreign Affairs, Armed Services, and Intelligence. S. 2398 was introduced on November 16, 2007, and was referred to the Committee on Homeland Security and Governmental Affairs.

H.Res. 97 (Murphy, Patrick) — Providing for Operation Iraqi Freedom Cost Accountability

H.Res. 97 would resolve that the Department of Defense Inspector General and the Special Inspector General for Iraq Reconstruction should report to Congress on the expenditure of military and reconstruction funds in Iraq and on the types and terms of U.S. contracts there. It would resolve that Congress should create a “Truman Commission” to conduct an ongoing investigation of the award and implementation of U.S. contracts with regard to Operation Iraqi Freedom.

Introduced January 24, 2007. Referred to the House Armed Services and Foreign Affairs Committees. House Foreign Affairs Committee hearing held March 20, 2007.