

Drowning in Blackwater: How Weak Accountability over Private Security Contractors Significantly Undermines Counterinsurgency Efforts

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Blackwater's an extraordinarily professional organization and they were doing exactly what they were tasked to do: protect the principal. The problem is in protecting the principal they had to be very aggressive, and each time they went out they had to offend locals, forcing them to the side of the road, being overpowering and intimidating, at times running vehicles off the road, making enemies each time they went out. So they were actually getting our contract exactly as we asked them to and at the same time hurting our counterinsurgency effort.¹

I. Introduction

On 16 September 2007, a five vehicle convoy transporting American diplomats departed from the Green Zone, the heavily-protected diplomatic area of Baghdad.² On that hot Sunday morning, with temperatures approaching one hundred degrees, the diplomats headed to another area of Baghdad for a meeting with local Iraqis to discuss reconstruction efforts in Iraq.³ The convoy consisted of three black GMC Suburbans, “each fitted with armored plates and bulletproof windows,” and a lead and trail vehicle.⁴ The diplomats rode in the Suburbans, while both end vehicles were gun trucks, known as “Mambas.”⁵ The Mambas carried the security detail and were armed with 7.62mm machine guns mounted on top.⁶

The journey to the meeting was uneventful and the diplomats’ meeting concluded around noon.⁷ On the return trip back to the Green Zone, the convoy’s security team engaged its small arms weapons systems inside the crowded Nisour⁸ Square area of Baghdad.⁹ During that “chaotic half-hour in a busy square,”¹⁰ approximately five members of the security team fired automatic weapons while an American security helicopter was summoned to hover overhead.¹¹ Neither the diplomats nor the security team suffered any casualties, but seventeen Iraqis died as a result of the skirmish.¹² While Iraqi citizens had been killed by American forces before, this incident caused an unusually unified and strong condemnation from the various elements of the Iraqi Government.¹³

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¹ Interview by PBS Frontline with Colonel (Retired) Thomas X. Hammes, USMC (Mar. 21, 2005) (transcript available at <http://www.pbs.org/wgbh/pages/frontline/shows/warriors/interviews/hammes.html>).

² See *Blackwater to Blame for Killings*, STAR-LEDGER (Newark, N.J.), Oct. 9, 2007, at 4.

³ See *id.*; cf. David Johnston & John M. Broder, *F.B.I. Says Guards Killed 14 Iraqis Without Cause*, N.Y. TIMES, Nov. 14, 2007, at A1 (stating that it was a convoy of “four armored vehicles”).

⁴ *Blackwater to Blame for Killings*, *supra* note 2.

⁵ *Id.*

⁶ See *id.*

⁷ See *id.*

⁸ The spelling of the name of the square varies in different media reports. It is listed as “Nisoor” Square in several publications. See, e.g., Christian Berthelsen & Raheem Salman, *Blackwater Case Discussed; Iraqis Interviewed in an FBI Probe Reveal Details of the Shooting and Talk About the Agents’ Focus*, L.A. TIMES, Oct. 31, 2007, at A8.

⁹ See Johnston & Broder, *supra* note 3, at A1.

¹⁰ See *id.*

¹¹ Adam Zagorin & Brian Bennett, *Iraq Limits Blackwater’s Operations*, TIME, Sept. 17, 2007, available at <http://www.time.com/time/world/article/0,8599,1662586,00.html>.

¹² See Johnston & Broder, *supra* note 3.

¹³ See Amit R. Paley, *Iraq Moves to Repeal Immunity for Guards*, WASH. POST, Oct. 31, 2007, at A14.

The unique aspect of this engagement, and the main cause for the fervent criticism, was the direct involvement of an American private security contractor (PSC)¹⁴ firm, Blackwater Worldwide¹⁵ (Blackwater), which had been contracted by the United States to provide security for the American diplomats.¹⁶ A PSC had never directly caused so many innocent Iraqi deaths before this incident.¹⁷ The death of such a large number of Iraqis at the hands of contractors reverberated far beyond the borders of Iraq.¹⁸ It also exposed significant flaws in the United States' policies governing control of PSCs on the battlefield.

The most significant of those exposed flaws was the lack of government control or accountability over these contractors. This flaw stemmed from many factors, including the failure to assign enough "American officials in Iraq to enforce the rules that apply to [PSCs],"¹⁹ and a controversial order from the Coalition Provisional Authority (CPA), CPA Order 17, which gave PSCs immunity from prosecution in Iraqi courts.²⁰ Such faults threaten to significantly undermine the overall mission in Iraq.²¹ These failures are significant and magnified with respect to America's effort in Iraq for two principle reasons: the scope of involvement of contractors in the campaign and the nature of the conflict in Iraq.

First, the United States has relied more upon contractors in Iraq than in previous operations.²² The United States is estimated to have had over 180,000 contractors supporting its operations in Iraq in 2007.²³ Thus, contractors are one of the largest contributors of manpower in the deployed area.²⁴ These contractors have been considered part of the Department of Defense (DOD) "Total Force" since the 2006 Quadrennial Defense Review.²⁵ All these elements of force on the battlefield need to work cohesively.²⁶ However, as witnessed above, oversight of PSCs in Iraq must dramatically improve. Having such a large contractor force on the battlefield without adequate oversight is dangerous and irresponsible.²⁷

¹⁴ The term private security contractor is often also referred to as private security firm, private military company, private military firm, or other descriptive terms. Some commentators have drawn distinctions between the various terms based upon the relevant functions of the organization. This article consistently refers to all contracted groups that provide security of persons, property, installations, or convoys as private security contractors unless otherwise stated.

¹⁵ Blackwater Worldwide was previously known as Blackwater, U.S.A. See August Cole, *Next Test for Blackwater*, WALL ST. J., Nov. 13, 2007, at A6.

¹⁶ See David Johnston & John M. Broder, *U.S. Prosecutors Subpoena Blackwater Employees*, N.Y. TIMES, Nov. 20, 2007, at A10.

¹⁷ See Ginger Thompson, *From Texas to Iraq, and Center of Blackwater Case*, N.Y. TIMES, Jan. 19, 2008, at A4 ("The Sept. 16 shooting in Nisour Square is considered by the F.B.I., the Pentagon and the Iraqi government to be among the most egregious examples of unprovoked violence by private security contractors."). See generally John M. Broder & James Risen, *Blackwater Tops Firms in Iraq in Shooting Rate*, N.Y. TIMES, Sept. 27, 2007, at A1 (detailing other incidents involving private security contractors). There have been other significant engagements involving PSC personnel, such as one in which Blackwater employees killed an estimated twenty to thirty protesters seeking to overrun the Coalition Provisional Authority (CPA) regional headquarters in Najaf on 4 April 2004. See JEREMY SCAHILL, *BLACKWATER: THE RISE OF THE WORLD'S MOST POWERFUL MERCENARY ARMY* 122–29 (2007). The September 2007 incident differed from those earlier engagements in that the majority of deaths in the September 2007 engagement have been deemed unjustified. See generally Assoc. Press, *Report: FBI Finds 14 Blackwater Killings Unjustified*, Nov. 14, 2007, <http://www.cnn.com/2007/US/11/14/iraq.blackwater.ap/index.html> ("[A]t least 14 of the 17 Iraqi civilians shot by Blackwater personnel guarding a U.S. Embassy convoy were unjustified and violated standards in place governing the use of deadly force."). However, as of July 2008, the Justice Department has still not released its final report. In May 2008, a federal grand jury heard evidence to determine "whether the contractors, who are immune from Iraqi law . . . can be charged with any crime in the United States." See Karen DeYoung & Del Quentin Wilber, *Grand Jury Probes Blackwater Shootings*, WASH. POST, 28 May 2008, available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/05/27/AR2008052702637.html?hpid=moreheadlines>.

¹⁸ See generally P.W. Singer, *Can't Win With 'Em, Can't Go to War Without 'Em: Private Military Contractors and Counterinsurgency*, FOREIGN POL'Y AT BROOKINGS, at 10 (2007) (Policy Paper No. 4), available at <http://www.brookings.edu/~media/Files/rc/papers/2007/0927militarycontractors/0927militarycontractors.pdf> (detailing how the incident was covered extensively throughout the Muslim world).

¹⁹ John M. Broder & David Rohde, *State Department Use of Contractors Leaps in 4 Years*, N.Y. TIMES, Oct. 24, 2007, at A1.

²⁰ Signed in June 2004 shortly before the CPA disbanded, CPA Order 17 granted PSCs immunity from "Iraqi legal process with respect to acts performed by them pursuant to the terms and conditions of a contract." See Coalition Provisional Authority, *Coalition Provisional Authority Order Number 17 (Revised), Status of the Coalition Provisional Authority, MNF–Iraq, Certain Missions and Personnel in Iraq*, 27 June 2004 [hereinafter CPA Order 17], available at http://www.cpa-iraq.org/regulations/20040627_CPAORD_17_Status_of_Coalition_Rev_with_Annex_A.pdf.

²¹ See Broder & Rohde, *supra* note 19.

²² See Singer, *supra* note 18, at 2.

²³ See JENNIFER K. ELSEA & NINA M. SERAFINO, CONG. RESEARCH SERV. REPORT, *PRIVATE SECURITY CONTRACTORS IN IRAQ: BACKGROUND, LEGAL STATUS, AND OTHER ISSUES*, RL 32419, at CRS-3 (July 11, 2007), available at <http://www.fas.org/srg/crs/natsec/RL32419.pdf>.

²⁴ See Singer, *supra* note 18, at iii.

²⁵ See U.S. DEP'T OF DEFENSE, *QUADRENNIAL DEFENSE REVIEW REPORT 81* (2006) [hereinafter 2006 QDR]; see also SCAHILL, *supra* note 17, at xvi.

²⁶ See generally U.S. DEP'T OF ARMY, *FIELD MANUAL 3-24, COUNTERINSURGENCY* para. 1-121 (15 Dec. 2006) [hereinafter FM 3-24] ("Unity of effort must be present at every echelon of a [counterinsurgency] operation.")

²⁷ See ELSEA & SERAFINO, *supra* note 23, at CRS-31 ("A lack of strict accountability in case of an abuse by a contractor could severely undermine goodwill toward the United States or incur liability on the part of the United States for a breach of its international obligations."). See generally Singer, *supra* note 18, at 1 (stating that the lack of oversight basically turned contractors' rules for the use of force into "mere guidelines with no actual consequences").

Second, the United States is engaged in a counterinsurgency in Iraq.²⁸ One of the keys to defeating that insurgency is winning the support of the local populace.²⁹ The impact of elements accompanying the force can be just as significant as the impact of the military force itself.³⁰ The incident involving Blackwater clearly serves as a case in point. This deadly exchange had strategic implications which adversely affected the United States' efforts to defeat the insurgency in Iraq.³¹ The local populace often does not distinguish the military from contractors involved in the operations.³² In many Iraqi minds, the perceived failures of Blackwater contractors to safeguard Iraqi lives are attributed simply as American failures.³³

As detrimental and tragic as it has been, the September 2007 Blackwater incident has at least prompted the U.S. Government to conduct a long overdue re-examination of its flawed approach to overseeing PSCs.³⁴ Immediately after the incident, both the DOD and the Department of State (DOS) studied and took steps to improve their supervision of PSCs.³⁵ Congress also implemented several measures to ensure that PSCs can be held more accountable for any misconduct in Iraq.³⁶

Despite these initial changes, more must be done to control PSCs operating on a complex battlefield. Fundamentally, the current use and lack of oversight of PSCs are detrimental to winning a counterinsurgency. If the United States chooses to rely on PSCs in unstable counterinsurgency operations in the future, it must significantly change the manner of control it has over these forces. Some essential improvements include placing accountability for all contractors under one overarching command, implementing stronger screening and training programs, and strengthening the options for investigating and prosecuting contractor misconduct.

Drastic measures need to be taken to improve the overall United States policy for controlling PSCs and holding those contractors accountable for their actions. Part II of this article provides an overview of the history of PSCs on the battlefield and explains how the United States got itself into such a precarious position in Iraq. Part III addresses the law of war implications of using PSCs while comparing the methods and approaches of the various governmental agencies who hired PSCs in Iraq before the September 2007 Blackwater incident. Part IV examines in depth the changes made in the wake of the Blackwater incident to better control PSCs. Finally, Part V proposes the additional accountability measures over PSCs necessary to ensure American success in future counterinsurgency campaigns.

II. History of Private Security Contractors

There is a long tradition of governments hiring outside forces to augment their militaries.³⁷ "Private warriors" have participated in battles from the earliest of times.³⁸ Private firms specializing in providing security first appeared in sixteenth century Italy when "mercantilism meant rival commerce families hired security elements against each other to control their

²⁸ See generally Sean D. Naylor, *Jumping the Fence; Tribal 'Awakening' Brings Troops—and Hurdles*, ARMY TIMES, June 4, 2007, at 14 (discussing splitting the Sunni tribal elements of the insurgency off from al-Qaeda).

²⁹ See generally FM 3-24, *supra* note 26, para. 1-14 ("Victory is achieved when the populace consents to the government's legitimacy and stops actively and passively supporting the insurgency.")

³⁰ See generally *id.* para. 2-14 ("Various agencies acting to reestablish stability may differ in goals and approaches, based on their experience and institutional culture. When their actions are allowed to adversely affect each other, the populace suffers and insurgents identify grievances to exploit.")

³¹ See generally Sudarsan Raghavan & Josh White, *Blackwater Guards Fired at Fleeing Cars, Soldiers Say*, WASH. POST, Oct. 12, 2007, at A1 (quoting Major General (MG) Joseph Fil, Commander of 1st Cavalry Division, as saying, "It's yet another challenge, another setback.")

³² See generally *id.* (quoting MG Joseph Fil as saying in reference to the incidents of PSC misconduct, "In the aftermath of these, everybody looks and says, 'It's the Americans.' And that's us.")

³³ See *id.*

³⁴ See generally, e.g., Peter Spiegel, *Blackwater Founder Defends Role in Iraq*, L.A. TIMES, Oct. 3, 2007, at A1 (discussing congressional hearings into the Department of State's oversight of Blackwater), available at <http://articles.latimes.com/2007/oct/03/nation/na-blackwater3>; John M. Broder & David Johnston, *U.S. Military to Supervise Iraq Security Convoys*, N.Y. TIMES, Oct. 31, 2007, at A1 (discussing meetings between the Secretary of State and the Secretary of Defense regarding oversight of PSCs in Iraq).

³⁵ See *infra* Part IV.A.–C. for an in-depth discussion of these DOD and DOS improvements.

³⁶ See *infra* Part IV.D. for a discussion of congressional action regarding PSCs.

³⁷ See P.W. SINGER, CORPORATE WARRIORS: THE RISE OF THE PRIVATIZED MILITARY INDUSTRY 19 (2003) ("Hiring outsiders to fight your battles is as old as war itself.")

³⁸ *Id.* at 20.

businesses.”³⁹ The practice has evolved greatly from its origins, and most security firms are now “organized along corporate lines.”⁴⁰

The United States has fully participated in this rich tradition of using contractors on the battlefield. In the Revolutionary War, the Continental Army relied on civilians for “transportation, carpentry, engineering, food, and medical services.”⁴¹ The United States continued to use contractors in mainly logistical roles for most of the next two hundred years.⁴² This policy changed significantly, however, during the Vietnam War when the United States began using contractors “side by side with troops.”⁴³ During the Vietnam campaign, contractors were relied upon to support the complex weapons systems regularly being used.⁴⁴

During Operations Desert Storm/Desert Shield, the United States started relying even more extensively on contractors.⁴⁵ The type of assignments handled by contractors became more “critical to the U.S. military’s core missions.”⁴⁶ Contractors started supporting the military in areas such as, “security, military advice, training, . . . policing, technological expertise, and intelligence.”⁴⁷ A number of factors contributed to this change in practice, such as President Ronald Reagan’s emphasis on privatizing many military positions in the 1980s.⁴⁸ This was coupled with a reduction in the size of the military in the 1990s after the collapse of the Soviet Union.⁴⁹ However, the end of the Soviet Union did not end the need for an American military. Instead, the United States found itself with a smaller military and yet engaged in multiple conflicts in Somalia, Haiti, and the Balkans.⁵⁰ To complete those missions, the military relied heavily on contractors to perform assignments that had previously belonged to military members.⁵¹

This trend towards outsourcing assignments to private contractors escalated dramatically with the invasion of Iraq in 2003. The United States’ use of contractors in Iraq is “unprecedented in both its size and scope.”⁵² The exact number of contractors in Iraq is unknown, but estimates indicate that there were more than 180,000 contractors employed by the United States Government in early 2007.⁵³ This marks a momentous increase from the estimated 2,000 that were employed during the Bosnia campaign.⁵⁴ The number of contractors has consistently been even greater than the total number of American

³⁹ Kevin A. O’Brien, *What Should and What Should Not Be Regulated?*, in FROM MERCENARIES TO MARKET: THE RISE AND REGULATION OF PRIVATE MILITARY COMPANIES 29, 37 (Simon Chesterman & Chia Lehnhardt eds., 2007).

⁴⁰ *Id.* at 38.

⁴¹ Lieutenant Colonel Stephen M. Blizzard, *Increasing Reliance on Contractors on the Battlefield: How Do We Keep From Crossing the Line?*, 28 A.F. J. OF LOGISTICS 1, 6 (Spring 2004).

⁴² *See id.*

⁴³ *Id.*

⁴⁴ *See id.* (citing *Vietnam: How Business Fights the War on Contract*, BUS. WK., Mar. 5, 1965, at 58–62).

⁴⁵ *See* U.S. GOV’T ACCOUNTABILITY OFF., REP. TO THE SUBCOMM. ON READINESS AND MANAGEMENT SUPPORT, COMM. ON ARMED SERVS., U.S. SENATE GAO-03-695: CONTRACTORS PROVIDE VITAL SERVICES TO DEPLOYED FORCES BUT ARE NOT ADEQUATELY ADDRESSED IN DOD PLANS 1 (June 2003) [hereinafter GAO 2003 REPORT], available at <http://www.gao.gov/new.items/d03695.pdf>.

⁴⁶ SINGER, *supra* note 37, at 15.

⁴⁷ *Id.*

⁴⁸ President Reagan formed the Presidential Commission on Privatization in 1987 to determine which functions of the federal government should be performed by contractors. *See* Paul Blustein, *Panel Urges “Privatization” of Many Federal Services*, WASH. POST, Mar. 18, 1988, at A9; *Panel Finishes List of Privatization*, CHI. TRIB., Mar. 19, 1988, at 3. In 1988, the commission recommended seventy-eight areas in which privatization would increase the efficiency of the federal government. Blustein, *supra*; *Panel Finishes List of Privatization*, *supra*. Those initial recommendations included calls to privatize military commissaries and naval oil reserves. Blustein, *supra*; *Panel Finishes List of Privatization*, *supra*.

⁴⁹ The military reduced its workforce by several hundred thousand active-duty members and civilian employees during the 1990s. *See* Michael R. Gordon, *Military Services Proposing Slashes in Existing Forces*, N.Y. TIMES, May 12, 1990, at A1; Patrick E. Tyler, *Military Chiefs Detail Plans to Cut Troops, Weapons*, WASH. POST, May 12, 1990, at A1; Joseph Neff & Jay Price, *A Business Gets a Start*, NEWS & OBSERVER (Raleigh, N.C.), Nov. 28, 2005, at A1.

⁵⁰ *See* Neff & Price, *supra* note 49.

⁵¹ *See id.*

⁵² Singer, *supra* note 18, at 2.

⁵³ *See* ELSEA & SERAFINO, *supra* note 23, at CRS-3.

⁵⁴ *See* Colonel Stephen J. Zamparelli, *Contractors on the Battlefield—What Have We Signed Up For?*, 23 A.F. J. OF LOGISTICS 8, 11 (Dec. 1999), available at <http://www.aflma.hq.af.mil/lgi/cob.pdf>.

uniformed military forces in Iraq.⁵⁵ The amount the government spent for these contractors is also staggering when compared to prior conflicts.⁵⁶ For instance, the government signed a \$20 billion contract for a logistics firm, Kellogg, Brown and Root, to control much of the logistics operations in Iraq.⁵⁷ That contract amount is roughly three times the total amount America spent to win the first Gulf War.⁵⁸

More significant than the sheer size and cost of the increased use of contractors is the breadth of assignments being given to these workers. The United States is tasking its contractors in Iraq in a manner not done in prior conflicts.⁵⁹ The biggest area of change is the reliance on contractors to perform security functions in an “unstable environment.”⁶⁰ Contractors are being used to “protect individuals, buildings and other infrastructure, and transport convoys.”⁶¹ These companies are performing critical functions that closely resemble military missions on the battlefield.⁶² Even though these security roles are not of the type that contractors have traditionally performed, they are now considered “vital” to the operations in Iraq.⁶³

It is unclear why the United States ended up relying on such a large number of PSCs in so many pivotal roles.⁶⁴ Regardless of the reason, it is clear that large numbers of PSCs have been involved since the beginning of the Iraq mission. The CPA, which began operating within weeks after the invasion, relied heavily on these PSCs to perform its duties.⁶⁵ The CPA spent \$27 million to have Blackwater provide protection for CPA chief Paul Bremer and other key CPA officials.⁶⁶ Blackwater may have been the most high profile private security contractor, but it was just one of at least nine firms providing security and protection for the CPA workforce.⁶⁷

After the CPA disbanded in June 2004, the DOS continued this trend of relying on PSCs, when it took over the Blackwater contract and immediately extended it for another year.⁶⁸ The DOS, however, was not alone in its use of PSCs in Iraq. The United States Agency for International Development (USAID) began contracting with various security firms, such

⁵⁵ See John Podhoretz, *Saved by the Surge, But Troop Cuts Look Risky*, N.Y. POST, Oct. 2, 2007, at 23 (establishing the number of troops as a result of the “surge” at 168,000).

⁵⁶ See Singer, *supra* note 18, at 2.

⁵⁷ See *id.*

⁵⁸ See *id.*

⁵⁹ See ELSEA & SERAFINO, *supra* note 23, at CRS-1.

⁶⁰ *Id.*

⁶¹ *Id.* at 2. See generally Singer, *supra* note 18, at 2 (explaining how contractors guarded dining facilities in Kuwait during the initial phases of the Iraq campaign).

⁶² See generally Singer, *supra* note 18, at 3 (explaining that these contractors are engaging in “armed roles within the battle space. . . . They use military training and weaponry, to carry out missions integral to the mission’s success, in the midst of a combat zone”); *infra* Part III.A (discussing how this change of mission for PSCs endangers their status as civilians accompanying the force, under the law of war, and how it risks that they will lose their protections from being targeting).

⁶³ See ELSEA & SERAFINO, *supra* note 23, at CRS-3.

⁶⁴ One theory is that Secretary of Defense Donald Rumsfeld made contracting such security services a priority during the Iraq mission. See generally SCAHILL, *supra* note 17, at xv–xvi (describing the plans for using more private contractors as “The Rumsfeld Doctrine”). Another theory is that after the successful overthrow of the Iraqi regime, rebuilding Iraq in essence became a mission for the DOS. The DOS, in turn, desired and relied heavily upon civilian contractors to provide its protection. See generally Karen DeYoung, *State Department Struggles To Oversee Private Army: The State Department Turned to Contractors Such as Blackwater Amid a Fight with the Pentagon Over Personal Security in Iraq*, WASH. POST, Oct. 21, 2007, at A1 (explaining how the President in January 2004 granted the DOS “authority over all but military operations” and detailing how numerous DOS officials thought civilian contractors were better able and suited to provide protection for their diplomats than military forces would be). Other commentators theorize that contractors were necessary because the size of the military in Iraq was limited to too few service members for political reasons. See generally Singer, *supra* note 18, at 3 (“If a core problem that U.S. forces faced in the operation in Iraq has been an insufficient number of troops, it is not that the U.S. had no other choices, other than to use contractors to solve it. Rather, it is that each of them was considered politically undesirable.”). Yet others contend that the United States simply “underestimated the number of troops that would be required for stability and security operations.” David Isenberg, *A Government in Search of Cover: Private Military Companies in Iraq*, in FROM MERCENARIES TO MARKET: THE RISE AND REGULATION OF PRIVATE MILITARY COMPANIES 82, 83 (Simon Chesterman & Chia Lehnardt eds., 2007).

⁶⁵ See Daniel Bergner, *The Other Army*, N.Y. TIMES MAG., Aug. 14, 2005, at 29.

⁶⁶ See Broder & Rohde, *supra* note 19.

⁶⁷ See ELSEA & SERAFINO, *supra* note 23, at CRS-8.

⁶⁸ The estimated over \$100 million contract with Blackwater, established the company as the primary firm protecting all of the American diplomatic officials in Iraq. See Broder & Rohde, *supra* note 19; DeYoung, *supra* note 64; see also *infra* Part III.C (discussing the DOS’s use of PSCs in Iraq).

as Kroll, Inc. and DynCorp International (DynCorp), from the start of its mission in Iraq.⁶⁹ The DOD also relied extensively on PSCs in Iraq beginning at an early stage of the mission.⁷⁰

The United States integrated the use of PSCs into almost every facet of its operation in Iraq. Not only were these PSCs incorporated into part of its total force,⁷¹ but many commentators have concluded that the Iraq mission “would not be possible without” them.⁷² The problem is that such widespread reliance on a contractor force demands significant accountability over that force. As one can see below, the United States failed to have strict accountability over its PSCs, in part, because it failed to produce a unified approach to dealing with these forces on the battlefield. Instead, the various agencies of government contracting for security had their own unique approaches for holding their contractors accountable, each with a varying degree of success.

III. Comparison of United States Approaches to Private Security Contractors

When America invaded Iraq in early 2003, it did not have a set plan on how to employ and control PSCs on the battlefield.⁷³ The need to plan for controlling such large numbers of PSCs had not been anticipated.⁷⁴ Without prior planning, a patch-like approach to using PSCs was established.⁷⁵ Unfortunately, this divided approach allowed the situation to deteriorate to the point where the Blackwater incident could occur. This approach also potentially endangered the law of war protections of these civilians.

A. Law of War Analysis of Civilian Protections Applied to Private Security Contractors

Before dissecting the various approaches used by the different government agencies employing PSCs in Iraq, it is necessary to first examine the basic role these forces play on the battlefield in the context of the law of war. The law of war essentially divides individuals on the battlefield into one of two categories: combatants or civilians.⁷⁶ While combatants can be lawfully targeted at all times, civilians are expected to be protected from attacks on the battlefield. The danger of using these PSCs in security roles is that they may be subject to losing their protected civilian status.

The notion of exercising distinction and protecting civilians on the battlefield from direct attack has long been a part of the law of war.⁷⁷ Although there had been various efforts to protect civilians throughout history, the international community took a more significant step after World War II with the signing of the Fourth Geneva Convention (GC IV).⁷⁸ The primary

⁶⁹ See, e.g., David DeVoss, *Iraq's 'Dirty Harrys,'* L.A. TIMES, Sept. 23, 2007, at M6; Nicolas Pelham, *Business People 'Essential' in Iraqi Politics: Profile Saad Janabi: The Entrepreneur and Presidential Contender Believes Nobody is Better Placed to Reconstruct the Country,* FIN. TIMES (London), July 13, 2004, at 9; see also *infra* Part III.D (discussing the USAID's use of PSCs in Iraq).

⁷⁰ See Steve Fainaru, *Where Military Rules Don't Apply,* WASH. POST, Sept. 20, 2007, at A1; see also *infra* Part III.B (discussing the DOD's use of PSCs in Iraq).

⁷¹ See 2006 QDR, *supra* note 25; Isenberg, *supra* note 64, at 85.

⁷² See Singer, *supra* note 18, at 3; Neil King Jr. & August Cole, *Few Alternatives to Blackwater,* WALL ST. J., Oct. 17, 2007, at 6.

⁷³ See generally GAO 2003 REPORT, *supra* note 45, at 2.

⁷⁴ See Jeremy Joseph, *Striking the Balance: Domestic Civil Tort Liability for Private Security Contractors,* 5 GEO. J.L. & PUB. POL'Y 691, 697. But see generally GAO 2003 REPORT, *supra* note 45, at 2 (contending that as early as 1998, the DOD knew it had problems with overseeing contractors, but that it did little to correct its failings).

⁷⁵ Agencies have had their own approaches to overseeing PSCs that has resulted in “tension” and a “bureaucratic tug-of-war” between them. Broder & Johnston, *supra* note 34.

⁷⁶ Alexandre Faite, *Involvement of Private Contractors in Armed Conflict: Implications under International Humanitarian Law,* 4 DEFENCE STUDIES 5 (Summer 2004), available at [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/pmc-article-310804/\\$File/PMC-article-A-faite.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/pmc-article-310804/$File/PMC-article-A-faite.pdf). A generally accepted view is that there are two distinct categories of combatants, lawful and unlawful combatants. As will be discussed later in this article, the United States expects its PSCs to be civilians rather than either category of combatant.

⁷⁷ For instance, in 1862, the Union Forces in the Civil War adopted the Lieber Code, which discussed many of these principles regarding protecting civilians. Headquarters, U.S. War Dep't, Gen. Orders No. 100, Instructions for the Government of the Armies of the United States in the Field art. 22 (24 Apr. 1863), available at <http://fletcher.tufts.edu/multi/texts/historical/lieber-code.txt>. In particular, the Lieber Code provided that an “unarmed citizen is to be spared in person, property, and honor as much as the exigencies of war will admit.” *Id.*

⁷⁸ Geneva Convention Relative to the Treatment of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC IV].

purpose of that convention was the protection of civilians during battle.⁷⁹ The convention itself, however, failed to define who should be deemed a civilian.⁸⁰ Without such a definition, many nations thought the convention was not successfully serving its purpose. Thus in 1977, the Additional Protocol I (Protocol I) to the 1949 Geneva Convention was written to help clarify who was entitled to protection as a civilian.⁸¹

Protocol I seeks to define civilians through its Article 50 by specifying who should be excluded from the definition. It clarifies that “members of the armed forces,” “members of . . . militias,” and those who “spontaneously take up arms to resist the invading forces” should not be considered civilians.⁸² Given their nature and role, PSCs would arguably not fit into any of those excluded categories.⁸³ Thus, the Protocol I seems to indicate that PSC employees should be deemed as civilians.⁸⁴ As civilians accompanying the force, employees of PSCs would normally not be considered lawful targets under the law of war.⁸⁵

These PSC employees can, however, lose their civilian protections “for such time as they take a direct part in hostilities.”⁸⁶ An exact definition of what it means to take a direct part in hostilities does not appear in the Geneva Conventions nor in the Protocol I.⁸⁷ Instead, there are two various approaches to determining what constitutes taking a direct part in hostilities. The majority approach, followed by most of the international community,⁸⁸ adopts the notion that taking a direct part is achieved by “acts of war which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces.”⁸⁹ The majority approach distinguishes those actions that cause “actual harm” from actions that merely represent “participation in the war effort,” such as, for instance, the actions of a munitions factory

⁷⁹ See *id.*; REPORT BY THE INT’L COMM. OF THE RED CROSS, MEETING OF EXPERTS, GENEVA: GENERAL PROBLEMS IN IMPLEMENTING THE FOURTH GENEVA CONVENTION, ¶ 1(a), (27–28 Oct. 1998) [hereinafter ICRC Experts Meeting], available at <http://www.icrc.org/Web/Eng/siteeng0.nsf/iwpList74/7E9D0ED1449F156AC1256B66005C349E>.

⁸⁰ See GC IV, *supra* note 78; ICRC Experts Meeting, *supra* note 79; Derek Jinks, *The Declining Significance of POW Status*, 45 HARV. INT’L L.J. 367, 381 (2004) (“[T]he Geneva Conventions do not include an express definition of civilians.”).

⁸¹ See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I]. Although the United States signed Protocol I as a party to the Protocol, the U.S. Senate has not yet ratified it. Some provisions of Protocol I have, however, been accepted by the United States as customary international law. See Michael J. Matheson, *The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. U. J. INT’L L. & POL’Y 419 (1987); INT’L & OPERATIONAL LAW DEP’T, THE JUDGE ADVOCATE GENERAL’S LEGAL CTR. & SCH., U.S. ARMY, LAW OF WAR DOCUMENTARY SUPPLEMENT 396 (2008); Memorandum, W. Hays Park, Chief, Int’l Law Branch et al., to Mr. John H. McNeill, Assistant Gen. Counsel (Int’l), Office of the Sec’y of Defense, subject: 1977 Protocols Additional to the Geneva Conventions: Customary International Law Implications (9 May 1986). Customary international law can be described as rules, often unwritten, that result from a general and consistent practice accepted by states. See STATUTE OF THE INT’L COURT OF JUSTICE art. 38, para. 1(b), 26 June 1945, available at <http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0>.

⁸² Protocol I, art. 50 defines a civilian in these terms: “A civilian is any person who does not belong to one of the categories of persons referred to in Article 4 (A) (1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol.” Protocol I, *supra* note 81, art. 50. The corresponding articles from the Third Convention referenced in the Protocol I, art. 50, are as follows: art. 4 (A) (1), which describes “Members of the armed forces of a Party to the conflict”; art. 4 (A) (2), which describes “Members of other militias . . . [that] fulfill” several conditions, such as having a responsible commander, wearing a fixed distinctive emblem, carrying weapons openly, and following the law of war; art. 4 (A) (3), which describes “Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power”; and art. 4 (A) (6), which describes “inhabitants of a non-occupied territory, who . . . spontaneously take up arms.” See Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GC III]. The other article referenced in the Protocol I, art. 50, is Protocol I, art. 43, which describes “armed forces.” Protocol I, *supra* note 81, art. 43.

⁸³ PSCs would more likely fit into a category not excluded from the definition of civilian by Protocol I, art. 50, namely: “Persons who accompany the armed forces without actually being members thereof, such as . . . supply contractors . . . provided that they have received authorization from the armed forces which they accompany, who shall provide them for that purpose with an identity card . . .” See GC III, *supra* note 82, art. 4(A)(4). As such, these PSCs would also receive the benefits of being deemed “prisoners of war” should they fall “into the power of the enemy.” *Id.* art. 4 (A).

⁸⁴ Additionally, there is a presumption in favor of deeming an individual a civilian in Protocol I, art. 50: “In case of doubt whether a person is a civilian, that person shall be considered to be a civilian.” Protocol I, *supra* note 81, art. 50(1).

⁸⁵ Civilians “shall not be the object of attack.” *Id.* art. 51(2).

⁸⁶ *Id.* at 51(3).

⁸⁷ See Faite, *supra* note 76, at 7.

⁸⁸ Out of the approximately 194 member states of the United Nations, 167 of them are signatories to the Protocol I. Int’l Comm. of the Red Cross, <http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=470&ps=P> (last visited Aug. 12, 2008).

⁸⁹ COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 619 (Yves Sandoz et al. eds., 1987) [hereinafter PROTOCOL COMMENTARY].

employee.⁹⁰ Thus, the civilian who causes actual harm in a conflict would “become a legitimate target” for such time as they engage in those acts.⁹¹

The second approach, primarily followed by the United States, has a more expansive view of which civilians can be intentionally targeted. This approach focuses instead on the function of a civilian employee participating in the war effort and the “importance of his or her duties.”⁹² Depending on the functions performed by the civilian, he or she may become a lawful target. For example, under this approach, a civilian may be targeted for supporting a highly sensitive or important weapons system, regardless of whether the civilian causes any actual harm.⁹³ The more significant the contributions of the civilian employees are, the greater the likelihood that these employees will be deemed combatants.⁹⁴

Regardless of which of the “direct part in hostilities” approaches is used, there is a significant risk that American government employed PSCs in Iraq may lose their civilian protections and become lawful intentional targets in Iraq.⁹⁵ They might be subject to losing those protections because their missions are so vital or because they cause actual harm while performing those missions.⁹⁶ The United States has consistently maintained that the actions of its PSCs have not amounted to taking a direct part in hostilities, and thus do not warrant the removal of law of war protections as civilians.⁹⁷ However, as will be shown below, as the mission in Iraq has adapted and the roles for PSCs have expanded, this has become a progressively more difficult assertion.

B. Department of Defense Approach in Iraq Before 16 September 2007

At the beginning of the Iraq conflict, the DOD envisioned a limited role for PSCs.⁹⁸ The military did not anticipate there would be concerns over issues, such as whether contractors were taking a direct part in hostilities. However, as security conditions worsened and the use of PSCs became widespread, the DOD quickly realized the need to adjust to operating

⁹⁰ *Id.*

⁹¹ *Id.* There is significant debate regarding Protocol I, art. 44, which some argue allows individuals to switch back and forth between being a combatant and being a civilian. “[C]ombatants are obliged to distinguish themselves from the civilian population . . . Recognizing, however, that there are situations . . . where owing to the nature of hostilities an armed combatant cannot so distinguish himself, he shall retain his status as a combatant . . .” Protocol I, *supra* note 81, art. 44(3). Much of the debate exists with regard to how long of a time period a person must wait to switch and how often a person can lose and regain their protections.

⁹² Memorandum of Law, Dep’t of the Army, Office of the Judge Advocate General, Int’l Law Dep’t, subject: Law of War Status of Civilians Accompanying Military Forces in the Field (6 May 1999) [hereinafter Law of War Memorandum] (on file with author).

⁹³ *See id.*

⁹⁴ *See id.*

⁹⁵ If these PSCs are deemed to be taking a direct part in hostilities, there is also a potential risk that they might be labeled unlawful combatants and prosecuted for their actions. The United States might, in that situation, be liable for a breach of international law. *See* Major J. Ricou Heaton, *Civilians at War: Reexamining the Status of Civilians Accompanying the Armed Forces*, 57 A.F. L. REV. 155, 158 (2005). Of course, the reality in Iraq is that PSCs are often targeted by insurgents, without consideration of their status under the law of war. The most notorious example of the intentional targeting of PSCs occurred in Fallujah on 31 March 2004 when four Blackwater employees were mutilated and then killed by insurgents. *See* Dana Priest & Mary Pat Flaherty, *Slain Workers Were in Iraq Working Security Detail*, WASH. POST, Apr. 2, 2004, at A16.

⁹⁶ There is significant debate about whether the missions PSCs have thus far performed in Iraq constitute taking a direct part in hostilities. Given the significant reliance on PSCs and the importance of their assignments, some might argue that the United States has strained to deny that its use of PSCs has not risen to the level of taking a direct part in hostilities. That discussion is outside the scope of this article. The issue is merely raised here to provide context and to serve as a backdrop for the later analysis of the actions of the DOD and the other agencies in assigning missions for their PSCs. As can be seen below, the United States has found new ways to classify its use of PSCs to claim that the forces are deserving of retaining their protections as civilians. *See infra* Part III.B–D.

⁹⁷ For example, in a January 2006 memorandum, the DOD Deputy General Counsel opined that using armed PSCs to protect military facilities, personnel, property, and convoys in Iraq and authorizing them in certain situations to use deadly force did not constitute “taking a direct part in hostilities.” *See* Memorandum, Office of the General Counsel, U.S. Dep’t of Defense, to Staff Judge Advocate, U.S. Central Command, subject: Request to Contract for Private Security Companies in Iraq (10 Jan. 2006) [hereinafter OGC Memo]; *see also infra* Part III.B–D. That same OGC memorandum also sought to continue to portray the conflict in Iraq as an international armed conflict, under Common Article 2 of the Geneva Conventions. *See* OGC Memo, *supra*. Such a designation would mean that the full body of the law of war, such as all the above described protections, would apply. *Id.* All four Geneva Conventions have the same Article 2, hence the term Common Article 2. *See, e.g.*, GC IV, *supra* note 78, art. 2. Although the United States has maintained that its PSCs have not taken a direct part in hostilities, DOD did, however, adjusted its contracting procedures in 2006 to allow for situations in which PSCs could perform missions that are tantamount to taking a direct part in hostilities. *See infra* Part III.B.2.

⁹⁸ *See* U.S. GOV’T ACCOUNTABILITY OFF., REPORT TO CONGR. COMMITTEES GAO-05-737: REBUILDING IRAQ: ACTIONS NEEDED TO IMPROVE USE OF PRIVATE SECURITY PROVIDERS 4 (July 2005) [hereinafter GAO 2005 REPORT], available at <http://www.gao.gov/new.items/d05737.pdf>.

outside the bounds of existing guidance.⁹⁹ While the DOD's oversight of contractors did improve over time, it continued to be limited by the failure of the United States to set an overall strategy for overseeing PSCs. Although the DOD's approach may not have been ideal,¹⁰⁰ it was more robust than other agencies' approaches.

1. Initial DOD Attempts to Work with Private Security Contractors

The DOD did not significantly plan for the use of PSCs when troops first entered Iraq in March 2003. The government's role had always been to "provide for the common defense."¹⁰¹ Contractors were not expected to perform inherently governmental functions, such as security in a complex battlefield.¹⁰² The then-existing Army guidance on contractors accompanying the force clearly did not anticipate the need for PSCs to accompany the force.¹⁰³ In fact, one of those manuals, Army Field Manual (FM) 3-100.21, even stated, "The general policy of the Army is that contract employees will not be armed."¹⁰⁴

The use of PSCs quickly became a reality in Iraq, however. During these early periods of the mission, the DOD failed to create "standardized rules" for the handling of these PSCs.¹⁰⁵ Deploying units did not receive training on working with PSCs.¹⁰⁶ Those units then received little meaningful guidance once they arrived.¹⁰⁷ Instead, units were left to establish rules themselves in areas such as what rules of engagement (ROE) or rules for the use of force (RUF) would apply to PSCs in their area of responsibility.¹⁰⁸ Routinely, new PSCs would simply read and sign a copy of the combatant commander's ROE.¹⁰⁹ Subsequent changes to the ROE would simply be briefed to the PSCs before missions in an ad hoc fashion.¹¹⁰

Contracting was another area in which the DOD was not fully prepared. There was a significant influx of PSC contracts needed in those early periods. There was also great uncertainty as to what types of security missions PSCs could be assigned, given the existing regulations and the general understanding of the law of war.¹¹¹ Ultimately, the task of writing these

⁹⁹ See generally Isenberg, *supra* note 64, at 88 ("Although the US military had compiled an extensive list of service and departmental regulations, doctrine, and field manuals to govern contractors' behaviour on the battlefield, they were more oriented to those providing logistical services and did not cover the new activities of [PSCs].").

¹⁰⁰ For instance, a DOD Inspector General study revealed that for many of the initial contracts in Iraq, the DOD cannot be assured that it received "fair and reasonable prices for the goods and services, or that the contractors performed the work the contract required." OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF DEFENSE, REPORT, ACQUISITIONS: CONTRACTS AWARDED FOR THE COALITION PROVISIONAL AUTHORITY BY THE DEFENSE CONTRACTING COMMAND-WASHINGTON, REP. NO. D-2004-057, at ii (18 Mar. 2004), available at <http://www.dodig.osd.mil/Audit/reports/fy04/04-057.pdf>.

¹⁰¹ See SINGER, *supra* note 37, at 226.

¹⁰² An inherently governmental function is defined in part as, "Functions inherent to, or necessary for the sustainment of combat operations, that are performed under combat conditions or in otherwise uncontrolled situations, and that require direct control by the military command structure and military training for their proper execution, are considered inherently governmental." See U.S. DEP'T OF ARMY, REG. 715-9, CONTRACTORS ACCOMPANYING THE FORCE 21 (29 Oct. 1999) [hereinafter AR 715-9].

¹⁰³ See generally *id.*; U.S. DEP'T OF ARMY, FIELD MANUAL 3-100.21, CONTRACTORS ON THE BATTLEFIELD (Jan. 2003) [hereinafter FM 3-100.21]; Joseph, *supra* note 74, at 697.

¹⁰⁴ FM 3-100.21, *supra* note 103, para. 6-29. Such long-standing restrictions on the carrying of weapons had helped reduce the risk that contracted employees could be deemed to be taking a direct part in hostilities.

¹⁰⁵ The rules were not even consistent on whether contractors could possess weapons, when weapons became a necessity for contracts. See Isenberg, *supra* note 64, at 88 (citing Jim Wolf, *U.S. Lacks Standardized Rules for Iraq Contractors*, ABC NEWS, June 24, 2004).

¹⁰⁶ See GAO 2005 REPORT, *supra* note 98, at 29.

¹⁰⁷ See generally *id.* (explaining that units such as the 82nd Airborne Division and the 1st Marine Expeditionary Force received "no guidance . . . for dealing with [PSCs]").

¹⁰⁸ Often units did not even develop "any written procedures for dealing with" PSCs. See *id.*

¹⁰⁹ These ROE were often not tailored to PSCs and instead "applied to security contractors and coalition forces military personnel alike." Isenberg, *supra* note 64, at 88-89. As discussed above, the DOD did not want these PSCs to be taking a direct part in hostilities. They should have been issued tailored RUF to ensure that they maintained their protected civilian status. See *supra* Part III.A.

¹¹⁰ See Isenberg, *supra* note 64, at 89. Not until April 2004 was there a concerted effort by the Coalition Joint Task Force-7, the headquarters element for coalition forces in Iraq, to comprehensively address RUF for PSCs. See *If You Must Shoot, Be Polite*, GUARDIAN (London), Apr. 22, 2004, <http://www.guardian.co.uk/theguardian/2004/apr/22/features11.g22>.

¹¹¹ See, e.g., OGC Memo, *supra* note 97 (detailing a response to an inquiry from the U.S. Central Command's Staff Judge Advocate (SJA) regarding appropriate contract assignments for PSCs in Iraq).

contracts and overseeing them fell to contracting officers and their representatives who had only limited supervision.¹¹² Unfortunately, these officials rarely had the capabilities or resources to adequately supervise these PSCs in an unstable environment.¹¹³ Oversight tended to be erratic.¹¹⁴

Military units in Iraq initially had great difficulty tracking PSCs moving through their areas. Lacking any official system or guidance, those units were forced to coordinate with PSCs informally.¹¹⁵ Military commanders consistently complained about the lack of communication and warning over PSC convoys moving within their area of responsibility.¹¹⁶ The communication problems led to confrontations between coalition forces and PSCs, a situation referred to as “blue on white engagements.”¹¹⁷ These engagements had become so common that many PSCs stopped reporting them.¹¹⁸ These continuing and dangerous engagements also served as one of many catalysts for significant change in the DOD’s approach to regulating PSCs.

2. Changes to Provide Better Regulation of Private Security Contractors in a Fluid Environment

The DOD began implementing a series of changes starting in 2004 to better account for PSCs and to provide more accurate guidance to deploying units. These changes were inspired in part by the desire to eliminate blue on white engagements, as discussed above, and in part to provide regulations that more accurately reflected the conditions the units were facing. They were also motivated by the intense scrutiny surrounding the mission of PSCs that followed the brutal killing of four Blackwater employees in Fallujah on 31 March 2004.¹¹⁹ As the world began focusing on PSCs in Iraq, the DOD began taking steps to better regulate its PSCs.¹²⁰

Because of deficiencies in coordinating the movement of PSCs, the DOD worked together with the DOS in May 2004 to create the Reconstruction Operations Center as a central tracking facility for such movement throughout the country.¹²¹ Despite some improvement, problems with coordination remained an issue.¹²² To further reduce the risk of blue on white engagements, the Multi-National Forces in Iraq (MNF-I) commander instituted new procedures detailing how PSCs should

¹¹² There was little external oversight from the “DOD Office of the Inspector General, Defense Contract Management Agency, and the Defense Contract Audit Agency.” See Isenberg, *supra* note 64, at 86–87.

¹¹³ See generally *id.* at 86–87 (explaining that there was a “lack of official government agencies dedicated to the oversight of” PSCs in Iraq). During the Iraq conflict, the workload for Army contracting officials increased by an estimated 600%, but the number of contracting officials has remained fairly static. See COMMISSION ON ARMY ACQUISITION AND PROGRAM MANAGEMENT IN EXPEDITIONARY OPERATIONS, REPORT, URGENT REFORM REQUIRED: ARMY EXPEDITIONARY CONTRACTING 4 (31 Oct. 2007) [hereinafter Gansler Report], available at http://www.army.mil/docs/Gansler_Commission_Report_Final_071031.pdf. Although the Gansler Report specifically avoided examining or discussing PSC contracts, the message from the report that there were too few contracting officials in Iraq is nonetheless applicable. *Id.*

¹¹⁴ See Isenberg, *supra* note 64, at 86–87.

¹¹⁵ Some of these problems stemmed from DOD employed PSCs. However, the most significant source of coordination problems arose from non-DOD PSCs, or subcontracted PSCs, who would travel through an area of responsibility belonging to a unit and not inform the unit. Military units coordinated informally with these forces primarily “based on personal relationships.” Without a command and control relationship over these PSCs, commanders could not mandate being informed of PSC movements throughout their area of responsibility. The informal system varied greatly in its effectiveness. See GAO 2005 REPORT, *supra* note 98, at 22.

¹¹⁶ See Ann Scott Tyson, *Gates Seeks Changes on Iraq Contractors*, WASH. POST, Oct. 19, 2007, at A16; GAO 2005 REPORT, *supra* note 98, at 4.

¹¹⁷ GAO 2005 REPORT, *supra* note 98, at 27.

¹¹⁸ See *id.* at 28.

¹¹⁹ See Priest & Flaherty, *supra* note 95, at A16.

¹²⁰ Some changes were forced upon the DOD. In response to Fallujah incident, Congress included several provisions into the Fiscal Year 2005 National Defense Authorization Act, which directed the DOD to improve some of its existing policies on its contractor workforce. It mandated, for instance, that the Secretary of Defense direct each service branch to issue guidance on policies for dealing with contractors in deployed environments. The guidance needed to cover areas such as RUF and how to keep contractors from engaging in inherently governmental functions. See Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, § 1205, 118 Stat. 1811 (2004) [hereinafter NDAA 2005]. This serves as an example of the United States’ attempts to ensure its contractor force would not take a direct part in hostilities.

¹²¹ The Reconstruction Operations Center is actually a series of seven centers that serve as the “interface between the military and contractors” in the various regions of Iraq. See GAO 2005 REPORT, *supra* note 98, at 23. It was intended to improve coordination problems by providing a “common operating picture” for the various elements moving through Iraq. *Id.* The Army began setting up the centers in May 2004 and they were fully operational by October 2004. *Id.*

¹²² The fact that PSCs were not mandated to use the Reconstruction Operations Center contributed somewhat to the continued problems. Military units not following their procedures also contributed. Blue on white engagements continued to be a problem particularly at checkpoint areas. See *id.* at 25–27.

interact with military convoys in a December 2004 order.¹²³ The order reduced the number of such engagements, but the number of such engagements remained significant.¹²⁴ Even with enhanced communication, it was difficult to eliminate these blue on white engagements without having these PSCs under greater DOD command and control.¹²⁵

Another DOD improvement was to revamp the obsolete regulations and guidance that it had on the books for dealing with contractors on the battlefield.¹²⁶ The military released DOD Instruction (DODI) 3020.41 on 3 October 2005.¹²⁷ It was intended to be the “comprehensive source of DoD policy and procedures concerning DoD contractor personnel.”¹²⁸ Unlike earlier guidance, this instruction recognized for the first time that contractors may be employed to provide “security services for other than uniquely military functions.”¹²⁹ The instruction warned that PSCs were to be used “cautiously” and only in combat zone areas like Iraq.¹³⁰ Unfortunately, however, the instruction failed to properly outline what factors constituted a cautious use of the PSC force.

The DOD forces in Iraq quickly sought a clarification of what constituted a cautious use of a PSC.¹³¹ In January 2006, the DOD Office of General Counsel (OGC) attempted to clarify that issue in a memorandum by explaining that PSCs could be used to protect military facilities, personnel, property, and convoys where the “risk of direct contact or confrontation . . . is not probable.”¹³² While the guidance greatly expanded the areas that DOD PSCs could be utilized on the battlefield, it did not completely comport with the reality of operations in Iraq. For example, the OGC memorandum articulated that PSCs should not be used for “convoy security operations where the likelihood of hostile contact is high.”¹³³ Arguably that might preclude their use on any convoy in Iraq. Thus, the guidance still failed to provide complete and meaningful direction.

In September 2006, the DOD further refined its position on the acceptable uses of PSCs with the issuance of DODI 1100.22.¹³⁴ That instruction reinforced the long-standing rule that contractors may only be used when the service being provided is not an inherently governmental function.¹³⁵ In determining if an act is inherently governmental, the instruction relied on a new approach. It resolved that services involving “substantial discretion” are to be treated as inherently

¹²³ The order established rules, such as prohibiting contractor vehicles from passing military convoys and requiring that contractor vehicles not approach within two hundred meters of military convoys. *See id.* at 28.

¹²⁴ *See id.*

¹²⁵ *See infra* Part V.A.

¹²⁶ *See generally* Isenberg, *supra* note 64, at 88–89.

¹²⁷ U.S. DEP’T OF DEFENSE, INSTR. 3020.41, CONTRACTOR PERSONNEL AUTHORIZED TO ACCOMPANY THE U.S. ARMED FORCES (3 Oct. 2005) [hereinafter DODI 3020.41].

¹²⁸ *Id.* para. 1.

¹²⁹ Under the instruction, the PSCs also became responsible for certifying that their employees had been sufficiently trained on weapons and the RUF. *See id.* para. 6.3.5.

¹³⁰ It also specified that contracts should not be issued for guarding “U.S. or coalition military supply routes, military facilities, military personnel, or military property” unless approved by the combatant commander. *Id.* para. 6.3.5.2. The DOD wanted to ensure that PSCs remained as civilians accompanying the force and entitled to protected civilian status. It sought carefully to allow contractors to only indirectly participate in the war effort. *Id.* para. 6.1.1. This demonstrates the continued American attempts to keep PSCs from being classified as taking a direct part in hostilities.

¹³¹ The deteriorating security situation in Iraq led the Central Command SJA to inquire whether and when PSCs could be employed to protect U.S. facilities, personnel, property, and convoys. *See* OGC Memo, *supra* note 97, para. 2.

¹³² *Id.* para. 4(c).

¹³³ *Id.* para. 4(c)(3). The OGC argued that such measures would ensure that PSCs would not be taking a direct part in hostilities. *Id.* para. 4(c)(2). However, it predicated this belief on a novel idea that international armed conflict can be divided into three separate phases. *Id.* para. 4(a)(1). The law of war is somehow applied differently in each phase. *Id.* para. 4(a)(1). The OGC analogized the current situation in Iraq to “stability operations or even law enforcement in foreign internal defense operations.” *Id.* para. 4(a), (c). It is not exactly clear whether or how the three phases analysis will fit within the established law of war doctrine, but it is yet another signal that the United States is committed to having its PSCs retain their civilian protected status.

¹³⁴ The instruction was further refined with Change 1 on 6 April 2007. U.S. DEP’T OF DEFENSE, INSTR. 1100.22, GUIDANCE FOR DETERMINING WORKFORCE MIX (7 Sept. 2006) (C1, 6 Apr. 2007) [hereinafter DODI 1100.22].

¹³⁵ *See id.* para. 6.1.2.

governmental.¹³⁶ Thus, conversely, those services that do not require such substantial discretion are authorized to be contracted in certain situations.¹³⁷

Although DODI 1100.22 proficiently outlines the various categories of services that can be contracted, it is not a panacea on the issue either. The instruction mistakenly relies in part on the notion that services where “there is a potential of binding the United States to a course of action” should be handled by the military rather than by contractors.¹³⁸ This is an admirable goal. However, as can arguably be seen from the fallout of the Blackwater incident, PSCs can quickly bind the United States to certain courses of actions.¹³⁹ Thus, it remains uncertain if this latest guidance is sufficient for the complex situation in Iraq.¹⁴⁰

The DOD also attempted to improve some of its contracting mechanisms. One significant change was the June 2006 amendment to the primary set of contracting rules, the Defense Federal Acquisition Regulation Supplement (DFARS).¹⁴¹ The amendment dramatically adjusted the contracting landscape by, for the first time, allowing defense contracts to stipulate that contractors can use deadly force in certain situations.¹⁴² The amendment allowed any civilian contractor to use deadly force when necessary for self-defense.¹⁴³ Furthermore, it specifically authorized PSCs to use deadly force when necessary not only for self-defense, but also to perform their security missions.¹⁴⁴

This change has given contracting officers more flexibility in preparing contracts. However, it has also somewhat blurred the distinctions between combatants and civilians on the battlefield with regard to PSCs. The DFARS now envisions and seemingly authorizes situations in which civilian contractor personnel might take a direct part in hostilities.¹⁴⁵ The amendment accurately explained that civilians will “lose their law of protection from direct attack” during those time periods in which they take a direct part in hostilities.¹⁴⁶ Yet, the mere inclusion of this language marks a change from past practices.¹⁴⁷ Despite those potential concerns, the amendment at least provided a more accurate reflection of the current security situation in Iraq. Likewise, the DOD’s approach to enforcing these PSC contracts has adapted over time.

¹³⁶ See *id.* para. 6.2.2. For instance, the instruction explains that combat operations cannot be legally contracted because they “involve substantial discretion, and can significantly affect the life, liberty, or property of private persons or international relations.” *Id.* para. E2.1.3.1 It also explained that operations in “unpredictable . . . high threat situations” where “there is a potential of binding the United States to a course of action” should not be contracted. *Id.* para. E2.1.4.1.

¹³⁷ Specifically, in order for the services to be allowed to be contracted, the decisions needing to be made by the contractor’s employees must be ones that can be “limited or guided by existing policies, procedures, directions, orders, or other guidance that identify specific ranges of acceptable decisions or conduct and [must] subject the discretionary authority to final approval or regular oversight by government officials.” *Id.* para. E2.1.4.1.5. The instruction gives an example of one such situation, namely a physical security mission for a building located on a secure compound in a hostile area. *Id.* para. E2.1.4.1.5.1. That type of mission would be appropriate to be contracted. *Id.* The instruction further provides a mechanism for the combatant commander to contract for security services in other than uniquely military functions. *Id.* para. E2.1.4.1.5.2. To take advantage of the mechanism, the combatant commander must articulate clear rules for the use of deadly force, set limits on the use of force, and ensure the contracts describe the threat and describe a plan of how the contractor will get assistance. *Id.*

¹³⁸ *Id.* para. E2.1.4.1.

¹³⁹ Although Blackwater served under a DOS contract and thus did not fall under the restrictions of this instruction, the point that PSC actions can be binding is nevertheless valid.

¹⁴⁰ It is also uncertain how this instruction’s guidance comports with the law of war analysis. The “substantial discretion” test outlined in the instruction seems to directly counter the United States’ previous approach to examining when a civilian has taken a direct part in hostilities. DODI 1100.22, *supra* note 134, para. E2.1.3.1. As described above, the United States has relied upon the function and the importance of a civilian’s duties when determining if she is taking a direct part in hostilities. A person who maintains a high value weapons system was considered to be taking a direct part in hostilities under that analysis. DOD Instruction 1100.22, however, specifically rejects the notion that a civilian providing “technical advice on the operation of [a] weapon system” is taking a direct part in hostilities. *Id.* para. E2.1.3.3.2. This might be perceived as establishing a double standard, particularly given America’s superior abilities to strike far away targets. Regardless, the instruction provides another example of the United States attempting to carefully manage when its civilians can be deemed to be taking a direct part in hostilities.

¹⁴¹ Defense Federal Acquisition Regulation Supplement; Contractor Personnel Authorized to Accompany U.S. Armed Forces, 71 Fed. Reg. 34,826 (June 16, 2006) (to be codified at 48 C.F.R. pts. 212, 225, and 252).

¹⁴² Although there were other substantial changes as part of the amendment, this provision is the most significant and relevant here. Prior to this amendment, the DFARS prohibited contractors from using force and from “directly participating in acts likely to cause actual harm to enemy armed forces.” *Id.*

¹⁴³ *Id.* at 34,829.

¹⁴⁴ *Id.*

¹⁴⁵ “Civilians who accompany the U.S. Armed Forces lose their law of war protection from direct attack if and for such time as they take a direct part in hostilities.” *Id.*

¹⁴⁶ *Id.* at 34,287.

¹⁴⁷ The DFARS amendment did, however, attempt to limit the scenarios in which contractors might be deemed to be taking a direct part in hostilities. It required combatant commanders to prevent the tasking of PSCs for “any inherently Governmental military functions, such as preemptive attacks, or any

3. Department of Defense Enforcement Mechanisms

Traditionally, the DOD's approach to disciplining contractors has been to rely on either the contractor or the commanders' inherent authority. In Iraq, ensuring appropriate discipline of contractors has proven to be a challenge.¹⁴⁸ Some of the enforcement methods that the DOD has at its disposal are discussed below.

a. Inherent Authorities of Commanders

Commanders have the inherent authority to protect the health and safety, welfare, and discipline of their troops and installation.¹⁴⁹ In Iraq, commanders used that authority to establish policies for their Forward Operating Bases (FOBs). Violations of those policies occasionally resulted in discipline, such as the barring of a PSC employee from facilities or from a FOB.¹⁵⁰ Misconduct that occurred off the FOB, however, was not subject to the commander's authority. Thus limited, commanders have left the majority of the discipline decisions in Iraq to the purview of the contractors themselves.¹⁵¹

Additionally, commanders inherently have some ability to shape contracts. In Iraq, commanders used those powers to mandate that all DOD PSC contracts include a requirement for the contractor to register with the Iraqis.¹⁵² As the campaign progressed, commanders were also able to include strengthened RUF provisions into contracts.¹⁵³ However, this control did not extend to the numerous PSCs that were employed under several layers of subcontracts or were not directly controlled by DOD entities.¹⁵⁴

b. Use of Extraterritorial Jurisdiction Crimes

Despite the absence of applicable local host country laws in Iraq, there are several means in which PSC employees are subject to criminal prosecution.¹⁵⁵ The main available method is to prosecute under U.S. extraterritorial jurisdiction acts.¹⁵⁶ One of these acts, the Military Extraterritorial Jurisdiction Act (MEJA), provides for prosecutions of felony offenses committed overseas in certain situations.¹⁵⁷ The MEJA originally only covered persons who were "employed by or accompanying the armed forces outside the United States."¹⁵⁸ Its coverage was extended by a 2005 congressional amendment, which enabled prosecutions of contractors employed by any federal agency to the extent that "such employment

other attacks." *Id.* at 34,826–27. This could be viewed as an attempt by the United States to more narrowly define inherently governmental acts to mean only preemptive or other types of aggressive attacks. Such actions would be more consistent with prior practices.

¹⁴⁸ The ability to enforce discipline was further limited by the lack of local host country laws that could apply. Coalition Provision Authority Order 17 ensured that local host country laws were of no deterrent effect to PSCs who received immunity by virtue of the order. *See* CPA Order 17, *supra* note 20.

¹⁴⁹ *See generally* U.S. DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY paras. 2-1b, 3-8e (7 June 2006) [hereinafter AR 600-20].

¹⁵⁰ For example, an Army official reported that "his unit had barred some private security employees from using the unit's dining facilities because the private security employees insisted on carrying loaded weapons into the dining facility," which was contrary to the commander's policy. *See* GAO 2005 REPORT, *supra* note 98, at 21.

¹⁵¹ In most cases, "disciplining contractor personnel [was] the contractor's responsibility." Isenberg, *supra* note 64, at 86.

¹⁵² *See* Fainaru, *supra* note 70.

¹⁵³ The DOD required its PSCs to register with the Iraqi Ministry of Interior. The Ministry had adopted licensing and registration requirements from the CPA. The CPA had issued CPA Memorandum 17 to correspond with CPA Order 17. It established "some initial minimum standards for regulating [PSCs]." It also contained an annex that addressed the RUF for PSCs. *See generally* Isenberg, *supra* note 64, at 86; Coalition Provisional Authority, *Coalition Provisional Authority Memorandum Number 17, Registration Requirements for Private Security Companies*, 26 June 2004, available at http://www.cpa-iraq.org/regulations/20040626_CPAMEMO_17_Registration_Requirements_for_Private_Security_Companies_with_Annexes.pdf.

¹⁵⁴ *See* GAO 2005 REPORT, *supra* note 98, at 20–21.

¹⁵⁵ *See* ELSEA & SERAFINO, *supra* note 23, at CRS-17 to CRS-19.

¹⁵⁶ Prosecution is possible under the special maritime and territorial jurisdiction, if the offense takes place on a federal facility, or under an extraterritorial jurisdiction act like the War Crimes Act or the Military Extraterritorial Jurisdiction Act (MEJA). *See id.*

¹⁵⁷ The MEJA was originally enacted in 2000. Military Extraterritorial Jurisdiction Act of 2000 (MEJA), Pub. L. No. 106-523, 114 Stat. 2488 (codified at 18 U.S.C. §§ 3261–3267 (2000)) [hereinafter MEJA].

¹⁵⁸ *Id.* § 3261.

relates to supporting the mission of the Department of Defense overseas.”¹⁵⁹ Although enforcement under the MEJA has been an option to the DOD throughout the conflict, its use has remained extremely rare.¹⁶⁰

c. Uniform Code of Military Justice Authority

Another option for the DOD is to prosecute contractor misconduct through Article 2(a) of the Uniform Code of Military Justice (UCMJ). Initially, the UCMJ authority in that provision only allowed prosecutions of contractors in times of “declared war.”¹⁶¹ Recognizing that the authority might not apply in Iraq as it was not a declared war, Congress expanded the authority with the National Defense Authorization Act for Fiscal Year 2007.¹⁶² That act extended coverage to include not only periods of declared war but also “contingency operation[s].”¹⁶³

Several issues exist with the potential use of this authority. First, not all of the services have fully exercised these powers yet. The DOD only published implementing guidance on 10 March 2008.¹⁶⁴ Second, it is unclear whether this authority could be used to cover Blackwater or other DOS contractors that arguably might not be truly “accompanying an armed force in the field.”¹⁶⁵ Lastly, there are significant concerns about whether an act allowing military prosecutions of civilians will prove to be constitutional.¹⁶⁶

Many commentators, though, have criticized the DOD for failing to effectively use its options for prosecuting misconduct.¹⁶⁷ Additionally, the DOD clearly had difficulties adapting to the conditions in Iraq and issuing appropriate guidance. Despite these challenges, the DOD procedures seem to have been more successful than other governmental agencies’ procedures. As seen below, not all the other agencies had as robust guidance for overseeing PSCs as the DOD did, nor did others have as many options for disciplining misconduct.

¹⁵⁹ See NDAA, *supra* note 120, § 1088. This amendment was sought in part because of a perceived loophole in the existing law. See Chia Lehnardt, *Private Military Companies and State Responsibility*, in FROM MERCENARIES TO MARKET: THE RISE AND REGULATION OF PRIVATE MILITARY COMPANIES 139, 141 (Simon Chesterman & Chia Lehnardt eds., 2007). An investigation of a prisoner abuse scandal at the Abu Ghraib detention facility in Iraq in 2004 revealed that some contractors in the facility may have been guilty of misconduct. *Id.* None of those contractors were prosecuted under MEJA. *Id.* There was a concern that MEJA might not apply because the contractors were not hired by the DOD. *Id.* The concern was that they might not technically have fit the definition of being “employed by or accompanying the armed forces.” See *infra* Part IV for a discussion of how MEJA potentially failed to cover all PSCs in Iraq despite this 2005 amendment.

¹⁶⁰ In fact, it appears that these acts have only successfully been used twice for incidents in Iraq or Afghanistan. David A. Passaro, a contractor doing interrogation work for the CIA in Afghanistan, was convicted in August 2006 under the extraterritorial nature of the USA Patriot Act for killing a detainee. See Julie E. Barnes, *CIA Employee Convicted in Afghan Abuse*, CHIC. TRIB., Aug. 18, 2006, at C4. Additionally a DOD contractor was prosecuted for the possession of child pornography in 2007 under the MEJA. See ELSEA & SERAFINO, *supra* note 23, at CRS-19. There are a variety of reasons why MEJA enforcement has been so rare. See *infra* Part V.C. for a discussion of ways to enhance enforcement under MEJA.

¹⁶¹ UCMJ art. 2(a)(10) (2005).

¹⁶² See John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364, § 552, 120 Stat. 2083 (2006) [hereinafter NDAA 2007]; see also ELSEA & SERAFINO, *supra* note 23, at CRS-20 to CRS-21.

¹⁶³ NDAA 2007, *supra* note 161, § 552; UCMJ art. 2(a)(10) (2008).

¹⁶⁴ See Memorandum, Secretary of Defense, to Secretaries of the Military Departments, subject: UCMJ Jurisdiction Over DOD Civilian Employees, DOD Contractor Personnel, and Other Persons Serving with or Accompanying the Armed Forces Overseas During Declared War and in Contingency Operations (10 Mar. 2008) [hereinafter UCMJ Implementing Guidance]. The implementing instructions outline a procedure whereby the DOD must notify the Department of Justice (DOJ) of their intention to prosecute a contractor for misconduct under UCMJ art. 2(a)(10) authority. *Id.* The DOJ then has fourteen days to review the case to determine if they have authority and would prefer to prosecute the case. *Id.* The review period can be extended as necessary. *Id.* Only after the DOJ declines, and the DOD determines that the person’s misconduct was “adverse to a significant military interest of the United States,” can the commander begin UCMJ procedures. *Id.*

¹⁶⁵ The Article 2(a) implementing instructions apply only to DOD civilian and contractor employees and “other persons serving with or accompanying the armed forces overseas.” *Id.* The instructions do not mention DOS PCSs. *Id.* Given that omission and other factors, it seems likely that the Article 2(a) authority would not apply over non-DOD PCSs. The concern is that these forces are employed by DOS. They would be viewed to be accompanying DOS rather than accompanying an armed force. Thus, Article 2(a) most likely does not misconduct by these DOS PCSs, such as Blackwater. See ELSEA & SERAFINO, *supra* note 23, at CRS-20 to CRS-21.

¹⁶⁶ See ELSEA & SERAFINO, *supra* note 23, at CRS-20.

¹⁶⁷ See Isenberg, *supra* note 64, at 88 (“[C]ontractors suspected of reckless behaviour are sent home, sometimes with the knowledge of US officials, raising questions about accountability and stirring fierce resentment among Iraqis.”).

C. Department of State Approach in Iraq Before 16 September 2007

The DOS does not have a rich history of contracting for security.¹⁶⁸ Only after the embassy bombing in Beirut in 1983¹⁶⁹ and the subsequent passage of the Diplomatic Security and Antiterrorism Act of 1986¹⁷⁰ could the DOS even consider hiring contractors for security work.¹⁷¹ Even still, the DOS relied almost exclusively upon Marines for protection of its overseas missions until 1994.¹⁷²

In Iraq, the DOS did not have much involvement with contracting until the CPA shut down in June 2004.¹⁷³ Once the CPA ceased to exist and the Ambassador became the Chief of Mission in Iraq, the DOS basically extended the CPA's contract with Blackwater for one year to provide security for its own diplomatic corps.¹⁷⁴ The sole source contract to Blackwater, justified by "urgent and compelling reasons," was valued at over \$100 million.¹⁷⁵ At the conclusion of that contract, DOS established an umbrella "worldwide personal protective services" contract with three firms, Blackwater, DynCorp, and Triple Canopy.¹⁷⁶ The DOS's approach to managing its PSC contracts varied from the DOD's approach in a few keys areas.

First, the DOS bound its PSCs to less well-defined RUF than the DOD.¹⁷⁷ The DOS allowed PSC vehicle convoys to engage in aggressive driving measures to protect its diplomats. Such measures included convoys driving on the wrong side of the road, driving over medians, and throwing water bottles to warn approaching traffic.¹⁷⁸ Unlike the DOD RUF, the DOS did not specify that PSCs should fire only "aimed shots" while "making every effort to avoid civilian casualties."¹⁷⁹ These unclear rules ultimately led to some DOS employed PSCs engaging in more dangerous behaviors than other agencies' PSCs.¹⁸⁰ These actions have also had the "unintended consequence" of causing great consternation among the Iraqi people and government.¹⁸¹

Second, the methods DOS used to oversee its PSC contracts marks another variation from the DOD's approach. The DOS's Bureau of Diplomatic Security (DS) was tasked with providing guidance and supervising Blackwater and the other DOS PSCs in Iraq.¹⁸² A Regional Security Officer oversaw a team of only three dozen DS officials in Iraq.¹⁸³ Unfortunately, with a force of observers and managers that small, the DS could not accompany all Blackwater convoys, nor could they

¹⁶⁸ See Spiegel, *supra* note 34.

¹⁶⁹ Lou Cannon & Juan Williams, *161 Marines Killed in Beirut: U.S. May Station Many Offshore*, WASH. POST, Oct. 24, 1983.

¹⁷⁰ Omnibus Diplomatic Security and Antiterrorism Act of 1986, 22 U.S.C. § 4806 (2000).

¹⁷¹ *An Uneasy Relationship: U.S. Reliance on Private Security Firms in Overseas Operations: Hearing Before the S. Comm. on Homeland Security and Governmental Affairs*, 110th Cong. 2 (2008) (statement of Patrick F. Kennedy, Under Sec'y for Mgmt., Bureau of Mgmt., DOS), available at http://hsgac.senate.gov/public/_files/022708Kennedy.pdf.

¹⁷² See Spiegel, *supra* note 34.

¹⁷³ See SPECIAL INSPECTOR GENERAL FOR IRAQ RECONSTRUCTION, IRAQ RECONSTRUCTION: LESSONS IN CONTRACTING AND PROCUREMENT 18 (July 2006) [hereinafter SIGIR REPORT], available at http://www.sigir.mil/reports/pdf/Lessons_Learned_July21.pdf.

¹⁷⁴ See Broder & Rohde, *supra* note 19.

¹⁷⁵ See DeYoung, *supra* note 64.

¹⁷⁶ See *id.*

¹⁷⁷ See generally Broder & Rohde, *supra* note 19.

¹⁷⁸ See DeVoss, *supra* note 69.

¹⁷⁹ DEP'T OF STATE, REPORT OF THE SECRETARY OF STATE'S PANEL ON PERSONAL PROTECTIVE SERVICES IN IRAQ 3, Oct. 2007, [hereinafter DOS PANEL REPORT], available at <http://www.state.gov/documents/organization/94122.pdf>. The DOS did however specify clearly that its PSCs were only to use deadly force "if there is no safe alternative and the guards or the people they are protecting face 'imminent and grave danger.'" Steve Fainaru, *How Blackwater Sniper Fire Felled 3 Iraqi Guards*, WASH. POST, Nov. 8, 2007, at A1.

¹⁸⁰ For example, Blackwater security teams have allegedly at times employed uncertified armor piercing munitions and CS gas. Although it must be noted that the DOS apparently never authorized such uses. See SCAHILL, *supra* note 17, at 77-78; James Risen, *2005 Use of Gas by Blackwater Leaves Questions*, N.Y. TIMES, Jan. 10, 2008, at A1.

¹⁸¹ See DeVoss, *supra* note 69.

¹⁸² See DeYoung, *supra* note 64.

¹⁸³ The roughly three dozen DS officials were responsible for supervising the estimated 900 Blackwater employees and accounting for the daily convoys across Iraq. See *id.*

monitor all the of convoys' communications.¹⁸⁴ These same DS officials assessed all escalation of force incidents and conducted investigations when necessary.¹⁸⁵ Many commentators have complained, however, that these investigations were often too cursory.¹⁸⁶ Although the DOD also suffered from a lack of personnel to adequately oversee its contracts, the problems were more pronounced with the DOS.

Third, the DS has fewer enforcement mechanisms at its disposal than do military commanders. The DS lacked the inherent authority powers of military commanders. It is also uncertain whether the MEJA provisions applied to DOS PSCs. There is a potential loophole in that the MEJA only applied to contractors employed in a manner that supports the mission of the DOD overseas.¹⁸⁷ Arguably, the DOS PSCs, such as Blackwater, are supporting the DOS rather than the DOD. Thus, the DOS relied almost exclusively on the contractor to enforce misconduct. There was also a perception that DS officials would support contractor positions almost blindly.¹⁸⁸ For instance, the DOS inexplicably allowed some of its PSCs to operate without Iraqi licenses, even though other agencies, such as the DOD, did not.¹⁸⁹ Other agencies and Iraqi government officials often complained that the DOS's weak oversight made Blackwater almost "untouchable."¹⁹⁰ This undermined efforts to improve the overall coordination between the various security players in Iraq.

D. The United States Agency for International Development Approach in Iraq Before 16 September 2007

The USAID initially contracted with Knoll, Inc. and DynCorp to provide bodyguards for its employees.¹⁹¹ Later its security needs were absorbed under the DOS security contracts.¹⁹² In general, the USAID's handling of its own security contracts did not differ significantly from the DOS methods of oversight discussed above, although the USAID generally had even fewer individuals than the DOS to effectively monitor the PSCs actions.¹⁹³ The bigger issue, and the one that differentiates the USAID's approach from others, is their extensive use of contractors to implement its programs.¹⁹⁴

The USAID provides economic and humanitarian assistance to Iraq, but the majority of the work is done by contractors or contracted agencies. In essence, the USAID develops a plan and contracts with a firm to implement the plan.¹⁹⁵ Many of the workers implementing the plans, and those who need protection as they travel across Iraq, are employed by companies that are contracted by the USAID.¹⁹⁶ The USAID does not provide the security for these workers.¹⁹⁷ Instead, it expects the contractors to hire their own security from PSCs. In fact, the USAID does not even account at all for these PSCs that are travelling through Iraq daily, much less provide oversight.¹⁹⁸

¹⁸⁴ See Broder & Rohde, *supra* note 19. But it should be noted that Blackwater allegedly requested cameras be installed in each security vehicle to allow monitoring and oversight, but the DOS denied their request. See Nicholas Kralew, *Blackwater Call for Cameras Denied*, WASH. TIMES, Oct. 24, 2007, at 1.

¹⁸⁵ See Broder & Risen, *supra* note 17.

¹⁸⁶ See generally DOS PANEL REPORT, *supra* note 179, at 6 (explaining that the "scope of investigations has not been broad"); Fainaru, *supra* note 179.

¹⁸⁷ This reflects the language of the MEJA after the 2005 Amendment. Prior to the amendment, it was an even weaker case for MEJA applying; because the previous language required the contractor to be "employed by or accompanying the armed forces." DOS PSCs clearly were not employed by the DOD and arguably were not accompanying the armed forces in Iraq. See MEJA, *supra* note 157; NDAA 2005, *supra* note 120, § 1088; see also *supra* note 156 and accompanying text.

¹⁸⁸ See Fainaru, *supra* note 70 (quoting H.C. Lawrence Smith, Deputy Director of the Private Security Company Association of Iraq, as saying that Blackwater "has a client who will support them no matter what they do.").

¹⁸⁹ See *id.*

¹⁹⁰ See *id.* (quoting Matthew Degn, former senior advisor to the Iraqi Interior Ministry).

¹⁹¹ See DeVoss, *supra* note 69.

¹⁹² See ELSEA & SERAFINO, *supra* note 23, at CRS-7.

¹⁹³ See generally DeVoss, *supra* note 69.

¹⁹⁴ See generally Steve Fainaru, *Iraqis Detail Shooting by Guard Firm*, WASH. POST, Nov. 26, 2007, at A1.

¹⁹⁵ See generally USAID, OUR COMMITMENT TO IRAQ (Nov. 2005), available at http://www.usaid.gov/iraq/pdf/commitment_iraq.pdf.

¹⁹⁶ See generally Fainaru, *supra* note 179.

¹⁹⁷ See ELSEA & SERAFINO, *supra* note 23, at CRS-7.

¹⁹⁸ See *id.*

When allegations of wrongdoing have been raised about these PSCs, the USAID has taken a hands-off approach.¹⁹⁹ The USAID does not investigate alleged incidents involving PSCs hired by its contractors.²⁰⁰ Such investigations are instead left to the contractor.²⁰¹ Additionally, the USAID expects but does not enforce its contractors' PSCs obtain an Iraqi license or report any escalation of force incidents to the central Reconstruction Operations Center. The USAID's decision to not actively oversee these PSCs has created large "gaps in oversight"²⁰² and has caused significant accountability problems.²⁰³

Overall, while the military may have had a more robust system of oversight, there were significant problems with maintaining and "monitoring contracts" in all facets of the Iraqi campaign.²⁰⁴ Many commentators have complained that none of the American agencies even counted or recorded the number of PSCs it had operating in Iraq for the first few years.²⁰⁵ Lack of a unified oversight system coupled with host nation laws made ineffective by CPA Order 17 has caused numerous problems among the coalition forces and with the Iraqi people. Given such a cloudy PSC oversight system, a serious incident like the one involving Blackwater was inevitable.

IV. Changes After the Blackwater Incident on 16 September 2007

The Blackwater incident greatly affected the landscape of PSCs in Iraq. While this was not the first time that PSCs had caused problems,²⁰⁶ the Iraqi Government chose to use this incident as a catalyst for change.²⁰⁷ In the days after the incident, the Iraqi government prevented Blackwater from leaving the Green Zone, sought to revoke Blackwater's license, and attempted to end its ability to operate in Iraq.²⁰⁸

During this period of uncertainty, the U.S. Embassy in Iraq restricted its diplomats from leaving the Green Zone.²⁰⁹ Astonishingly, the actions of perhaps as few as five Blackwater employees had "handicapped the daily operations of the State Department" in Iraq and effectively put the U.S. Embassy on "lockdown."²¹⁰ Not until five days later, when the Secretary of State called for a "full and complete review" of America's use of PSCs, were diplomats permitted to leave the Green Zone

¹⁹⁹ See Fainaru, *supra* note 179.

²⁰⁰ See *id.*

²⁰¹ See *id.*

²⁰² See *id.*

²⁰³ The most "egregious" accountability lapse was the USAID contract with Custer Battles to secure the Baghdad International Airport. Custer Battles employees "chartered a flight to Beirut with \$10 million in dinars in their luggage, set up sham Cayman Islands subsidiaries . . . and regularly overcharged" the government. Laura A. Dickinson, *Contract as a Tool for Regulating Private Military Companies*, in FROM MERCENARIES TO MARKET: THE RISE AND REGULATION OF PRIVATE MILITARY COMPANIES 217, 219 (Simon Chesterman & Chia Lehnardt eds., 2007).

²⁰⁴ See SIGIR REPORT, *supra* note 173, at 95. See generally Isenberg, *supra* note 64, at 85.

²⁰⁵ See Lehnardt, *supra* note 159, at 141.

²⁰⁶ In fact, there had been many prior incidents in which Blackwater employees, and employees of other PSCs, have been accused of using excessive force. See Memorandum from Majority Staff, H. Comm. on Oversight and Government Reform to the Members of the H. Comm. on Oversight and Gov't Reform, subject: Additional Information about Blackwater USA (Oct. 1, 2007), available at <http://oversight.house.gov/documents/20071001121609.pdf>. For instance, the chairman of the House of Representatives Committee on Oversight and Government Reform examined the matter and issued a report on 1 October 2007. *Id.* That report listed nearly two-hundred escalation of force incidents involving Blackwater from the beginning of 2005 through September 2007. *Id.*

²⁰⁷ See Sabrina Tavernise & James Glanz, *Guards' Shots Not Provoked, Iraq Concludes*, N.Y. TIMES, Sept. 21, 2007, at A1 (The Iraqi Ministry of Interior proposed a "radical reshaping of the way American diplomats and contractors . . . are protected."). See generally e.g., Jim Michaels, *Iraq to Take Closer Look at All Foreign Security Contractors*, USA TODAY, Sept. 19, 2007, at 8A; Ned Parker, *U.S. Restricts Movement of its Diplomats in Iraq*, L.A. TIMES, Sept. 19, 2007, at A1; *Iraqis Arrest 43 Over Private Guards Shooting*, AGE (Austl.), Nov. 21, 2007, available at <http://www.theage.com.au/articles/2007/11/20/1195321781729.html> (describing the Iraqi government arrest of PSCs stemming from an unauthorized use of force on an Iraqi civilian women).

²⁰⁸ The Iraqi government ordered Blackwater to remain in the Green Zone. See Sabrina Tavernise, *U.S. Contractor Banned by Iraq Over Shootings*, N.Y. TIMES, Sept. 18, 2007, at A1; Parker, *supra* note 207. Technically, it appears that Blackwater had allowed its license to expire already before the incident. See Parker, *supra* note 207. Additionally, the Iraqi government threatened to overturn CPA Order 17. See Tavernise & Glanz, *supra* note 207. In fact, the Iraqi cabinet did approve "draft legislation" that would repeal CPA Order 17 on 30 October 2007, but its Parliament has not, as of as of July 2008, passed the legislation. See Paley, *supra* note 13. "However, the Iraqi government has continued to demand repealing the immunity for PSCs as part of a Status of Forces agreement being negotiated between the United States and the Iraqi government. It appears the Iraqi efforts might succeed in being a part of the final agreement. Sabrina Tavernise, *U.S. Agrees to Lift Immunity for Contractors in Iraq*, N.Y. TIMES, 2 July 2008, available at <http://www.nytimes.com/2008/07/02/world/middleeast/02iraq.html?ref=world>.

²⁰⁹ See Parker, *supra* note 207.

²¹⁰ Tavernise & Glanz, *supra* note 207.

with their Blackwater security.²¹¹ Subsequently, it did not take long for American officials across a wide spectrum of agencies to begin discussing changes necessary to more effectively control PSCs in the future.

A. Secretary of Defense Tightens Controls Over Private Security Contractors After Blackwater Incident

The DOD took immediate steps to re-examine its accountability and control over PSCs on the battlefield. Within the first few days after the Blackwater incident, Defense Secretary Robert M. Gates sent a “team to Iraq to speak with key players about the U.S. military’s relationship with and oversight of [PSCs].”²¹² This team advised Secretary Gates on prudent steps to ensure that PSCs would not endanger the success of the overall mission.²¹³ The DOD did more than simply listen; it took swift action on many of the recommendations.

1. Combatant Commanders Take Greater Responsibility for Private Security Contractors

On 25 September 2007, less than ten days after the Blackwater incident, the DOD issued a memorandum dealing with the management of its contractor force.²¹⁴ The memorandum, signed by the Deputy Secretary of Defense, Gordon England, addressed perceived oversight failures.²¹⁵ While the memorandum advised commanders to rely on the guidance from DOD Instruction 3020.41, it also outlined new responsibilities for the geographic combatant commanders.²¹⁶

The memorandum introduced some groundbreaking expectations on disciplining PSCs. While Secretary England reinforced the idea that commanders should work with the Department of Justice (DOJ) towards punishing individuals under the MEJA, he also sought to have commanders exercise their new UCMJ authority over these PSCs.²¹⁷ Secretary England directed his commanders to fully exercise their UCMJ authority²¹⁸ over “DOD contractor personnel (regardless of their nationality).”²¹⁹ The memorandum authorized commanders to “disarm, apprehend, and detain DOD contractors suspected of having committed a felony offense in violation of the [rules for the use of force] . . . and to conduct the basic UCMJ pretrial process and trial procedures currently applicable to the courts-martial of military service members.”²²⁰

This memorandum represents a clear intent on the part of the DOD to immediately use its congressionally authorized powers to control PSCs. Commanders in Iraq have only just begun exercising these new powers,²²¹ and it remains to be seen

²¹¹ *Travel with Blackwater Convoys Resumes in Iraq*, DETROIT FREE PRESS, Sept. 22, 2007, at 7.

²¹² Sharon Behn, *Pentagon Hints Contractors Can be Tried in Military Courts*, WASH. TIMES, Sept. 27, 2007, at 1.

²¹³ See generally Eric Schmitt & Thom Shanker, *Pentagon Sees One Authority Over Contractors*, N.Y. TIMES, Oct. 17, 2007, at A1 (“Mr. Gates has been told by senior American commanders in Iraq that there must be a single chain of command overseeing the private security contractors working for a variety of United States government agencies in the war zone.”).

²¹⁴ See August Cole, *Private Security Providers Become a Pentagon Focus*, WALL ST. J., Sept. 27, 2007, at 9. See generally Memorandum, Deputy Sec’y of Defense, to Secretaries of the Military Departments, subject: Management of DoD Contractors and Contractor Personnel Accompanying U.S. Armed Forces in Contingency Operations Outside the United States (25 Sept. 2007) [hereinafter Deputy Sec. Def. Memo].

²¹⁵ See generally Deputy Secretary of Defense Memo, *supra* note 214 (explaining that the Blackwater incident “identified a need to better ensure that relevant DoD policies and processes are being followed”).

²¹⁶ Per the memorandum, those commanders became “responsible . . . for oversight and management of DoD contractors . . .” *Id.* Secretary England expected his commanders to ensure that PSCs properly license and train their employees. *Id.* The commanders must periodically review their RUF to “minimize the risk of innocent civilian casualties . . .” *Id.* Secretary England specifically demanded that commanders “prevent contractor personnel who are suspected of [wrongdoing] . . . from being allowed to leave the country” until an investigation is finalized. *Id.* The memorandum even empowered commanders to punish PSC officials who arrange for employees to leave the country early. *Id.*

²¹⁷ See *id.*; *supra* Part III.B.3.c.

²¹⁸ UCMJ art. 2(a)(10) (2008).

²¹⁹ See Deputy Sec. Def. Memo, *supra* note 214.

²²⁰ See *id.*

²²¹ To date in Iraq, only one civilian contractor has been convicted under the UCMJ. Alaa “Alex” Mohammad Ali, a translator working for the U.S. Army, was charged with assault with a dangerous weapon. Jane’s Tri-Service News, *Civilian Contractor Faces US Court Martial in Test Case*, May 21, 2008, http://www.janes.com/news/defence/triservice/jdw/jdw080520_1_n.shtml. He allegedly stabbed another contractor in February 2008 at a forward operating base in the Anbar province of Iraq. *Id.* His case was referred to a general court-martial. *Id.* In June 2008, he was convicted of “wrongfully taking a soldier’s knife, obstructing justice by disposing of it after the incident and lying to investigators.” Alexandra Zavis, *Army Interpreter Sentenced at Court-Martial*, L.A. TIMES, June 24, 2008, available at <http://www.latimes.com/news/nationworld/world/la-fg-interpreter24-2008jun24,0,2444605.story>. He was sentenced to five months in confinement. *Id.*

how often and how effectively commanders will exercise this authority.²²² The DOD's desire to implement change is nevertheless extremely evident.

2. Contract Improvements Enable Better Oversight of Private Security Contractors

After the Blackwater incident, the DOD also sought to improve the actual terms of these PSC contracts. The military attempted to exercise contractual controls by changing the DFARS and by including more specific language about ROE and RUF directly into its contracts.

In January 2008, the DOD amended the DFARS to further ensure that PSCs are not violating the law of war.²²³ These changes place a heavier emphasis on having the contractor comply with the law of war.²²⁴ Not only does the change add a definition for the law of war that was not present before,²²⁵ it also mandates a two-tiered training program in the law of war for PSCs.²²⁶ At a minimum, all PSCs deploying with the force will be required to attend a basic law of war training program run by the military.²²⁷ Depending on the nature of the assignment, some PSCs must also attend an advanced training session conducted by the judge advocate in the area of responsibility.²²⁸ The fallout from the unlawful use of force incidents, such as the Blackwater one, is almost assuredly the impetus for these new training requirements.

Beyond simply requiring training, the changes to the DFARS impose more stringent obligations on PSC officials to report any abuses they observe and to follow the orders of the combatant commander.²²⁹ With this change, PSCs have an affirmative duty to report to the commander any credible "suspected or alleged conduct" which violates the law of war.²³⁰ This responsibility was likely added to prevent reoccurrences of PSCs trying to fix situations involving unjustified uses of force simply by paying the injured party and removing the offending employee from the area in lieu of reporting the incident.²³¹ The rule also mandates that all DOD PSCs will comply with the combatant commander's "orders, directives, and instructions."²³² The DFARS amendments will give military commanders on the ground significantly more control over DOD PSCs in Iraq.

The DOD also began strengthening the terms of its contracts to ensure better accountability over PSCs. For example, in October 2007, a few weeks after the Blackwater incident, the Joint Contracting Command-Iraq issued a solicitation for a contract to secure "trucking and shipping services."²³³ The solicitation had the unusual feature of specifying "the rules under which weapons can be used" in the contract terms.²³⁴ It explained distinctly that the PSC would not be using the ROE under

²²² The author contends that commanders and their Judge Advocates will recommend exercising these powers only sparingly; in part, because the procedures require the DOD to wait for the DOJ to decide about a case before authorizing a commander to take action. Commanders, who may be used to quickly administering UCMJ discipline, will likely not want to wait the amount of time it might take for a DOJ case review. *See* UCMJ Implementing Guidance, *supra* note 164.

²²³ *See* Defense Federal Acquisition Regulation Supplement; DOD Law of War Program, 73 Fed. Reg. 1853 (proposed Jan. 10, 2008) (to be codified at 48 C.F.R. pt. 252) ("DOD is proposing to amend the [DFARS] to address requirements for DOD contractors to institute effective programs to prevent violations of law of war by contractor personnel authorized to accompany U.S. Armed Forces deployed outside the United States.").

²²⁴ *See id.* This also showcases the continued emphasis of the DOD to keep its PSCs from being deemed to be taking a direct part in hostilities.

²²⁵ The proposed rule defines the law of war as the element of "international law that regulates the conduct of armed hostilities. The law of war encompasses all international law for the conduct of hostilities binding on the United States . . . including treaties and international agreements to which the United States is a party, and applicable customary international law." *Id.*

²²⁶ *See id.*

²²⁷ *See id.* The provision does allow this basic training to be web-based training in certain situations with the approval of the contracting officer. *See id.*

²²⁸ *See id.*

²²⁹ *See id.*

²³⁰ *Id.*

²³¹ *See generally* Ned Parker, *The Conflict in Iraq: Security Contractor Criticized*, L.A. TIMES, Sept. 18, 2007, at A1 ("Past private security misdeeds had been swept under the rug."); Brian Bennett, *America's Other Army*, TIME, Oct. 18, 2007, at 18 (describing Blackwater paying \$20,000 to a victim's family).

²³² *See* Defense Federal Acquisition Regulation Supplement; DOD Law of War Program, 73 Fed. Reg. at 1853; *see also infra* Part V.A. for a discussion about how this authority has unfortunately not been extended to mandate that all PSCs in Iraq must follow the combatant commander's orders.

²³³ Walter Pincus, *Contract Tightens Rules of Engagement*, WASH. POST, Oct. 22, 2007, at A21.

²³⁴ *Id.*

which the military forces operate.²³⁵ Instead, it specified that the contractor may only fire a weapon in self-defense or to “prevent life threatening offenses against civilians.”²³⁶ By including such strict requirements as those seen above into the actual contracts, the DOD expects to better control the PSCs in its employment.

B. State Department Moves Quickly to Better Account for Private Security Contractors

As the agency that had hired Blackwater, the DOS faced perhaps the greatest scrutiny of its oversight procedures and the greatest urgency to correct flaws in those procedures. Immediately after the incident, the Secretary of the DOS, Secretary Rice, telephoned Iraqi Prime Minister Nouri Maliki to express her regrets.²³⁷ Secretary Rice pledged to quickly reform DOS procedures to prevent such acts from reoccurring.²³⁸ Within days, the DOS agreed with the Maliki government to cooperate in a joint commission to review the PSC industry.²³⁹ Secretary Rice’s initial steps persuaded the Iraqi government to once again allow Blackwater to escort American diplomatic convoys.²⁴⁰ Those preliminary actions, however, were merely the first of many sweeping changes to the DOS’s procedures for overseeing PSCs.

Secretary Rice appointed a high-level review panel to examine the department’s oversight procedures.²⁴¹ On 5 October 2007, Secretary Rice subsequently took swift action on many of their recommendations.²⁴² Some of the key adjustments to the DOS’s practices included the requirement to use audio and video recording devices in each convoy and having a DS agent accompany every convoy.²⁴³ Secretary Rice essentially committed the DOS to dramatically increasing the number of DS officials assigned to Iraq in order to supervise all of these convoy missions.

Secretary Rice also enacted recommendations dealing with the RUF that should apply to these contractors. The DOS panel realized it needed to mirror its rules more closely with the military’s rules for its PSCs.²⁴⁴ Specifically, Secretary Rice directed that its PSCs only fire aimed shots, that they be made to exercise “due regard for the safety of innocent bystanders,” and that they minimize civilian injuries.²⁴⁵ These adjustments should help the DOS better control its PSCs.

Coordination between the DOS and the MNF-I command was also an area needing to be strengthened.²⁴⁶ The DOS implemented changes to ensure that its offices in Iraq more liberally exchanged information with MNF-I and coordinated convoy routes with them before the vehicles left the diplomatic areas.²⁴⁷ This action was intended to appease military commanders who had often complained about being unaware of DOS convoys traversing their area of responsibility.²⁴⁸ This synchronization of efforts should help minimize those issues in the future.

Investigations are the last major area in which the DOS tried to improve its procedures. The DOS sought to enhance the abilities of its investigative forces and improve the likelihood of successful investigations in the future.²⁴⁹ To that end, the

²³⁵ See *id.*

²³⁶ *Id.*

²³⁷ See Parker, *supra* note 231.

²³⁸ See Tavernise, *supra* note 208.

²³⁹ See Fainaru, *supra* note 70.

²⁴⁰ See Ned Parker, *Blackwater Gets OK to Resume Escorts*, L.A. TIMES, Sept. 22, 2007, at A8.

²⁴¹ See Assoc. Press, *Rice Orders Training, Oversight for Guards*, WASH. TIMES, Oct. 24, 2007, at 1. The panel identified areas in which the DOS needed to “strengthen [its] coordination, oversight, and accountability aspects” of its use of PSCs. DOS PANEL REPORT, *supra* note 179, at 3.

²⁴² See Assoc. Press, *supra* note 241.

²⁴³ See DOS PANEL REPORT, *supra* note 179, at 9.

²⁴⁴ See *id.*

²⁴⁵ See *id.*

²⁴⁶ See *id.* at 10.

²⁴⁷ See *id.* (“The Regional Security Office and MNF-I should establish a permanent working group 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.”). In essence, these measures are intended to strengthen the Reconstruction Operations Center and its capabilities to effectively coordinate PSC movements across Iraq.

²⁴⁸ See Schmitt & Shanker, *supra* note 213.

²⁴⁹ See DOS PANEL REPORT, *supra* note 179, at 9.

panel suggested the creation of a “Go Team” that would be prepared to quickly proceed to the scene of any escalation of force incident which causes serious injury or death.²⁵⁰ The team would gather the preliminary statements and evidence and prepare an initial report.²⁵¹ The DOS anticipated that these procedures would aid in what are often the most complex and difficult situations in which to conduct investigations.

C. Interagency Work to Provide Better Accountability

Although both the DOS and the DOD separately made adjustments in the manner in which they control PSCs, the most lasting and meaningful changes will likely stem from the dramatic interagency actions that took place after the incident. The most significant of these interagency improvements occurred on 5 December 2007 when the deputy secretaries from the DOS and DOD signed a historic memorandum of agreement (MOA) concerning the handling of PSCs.²⁵²

The MOA was signed after a series of high level meetings held in the wake of the Blackwater incident.²⁵³ The MOA is intended to “clearly define the authority and responsibility for the accountability and operations” of PSCs in Iraq.²⁵⁴ The MOA has many strengths. Under the agreement, all PSCs operating in Iraq are bound by a specific RUF.²⁵⁵ The extensive rules cover procedures for the use of non-deadly and deadly force and for the de-escalation of force.²⁵⁶ The RUF require contractors to fire only “well-aimed shots with due regard for the safety of innocent bystander[s].”²⁵⁷ While the rules are fairly similar to the proposed adjustments contemplated by the DOS,²⁵⁸ they are significant in that this is the first effort to articulate a single standard for both agencies’ PSCs.

The MOA also outlines a significant shift in the area of movement coordination and control. The DOD identified this change as the most important element to the agreement.²⁵⁹ The DOS is now required to give the military in Iraq advance notice of movement of all its PSC protected convoys.²⁶⁰ The notice is expected to be provided twenty-four hours in advance unless a short notice mission is required.²⁶¹ If the military determines that the chosen route is too dangerous, the DOS must comply with the military’s recommendations to “alter or abort” the mission.²⁶² The agreement provides for close coordination not only before movement but also in the event of a serious incident.²⁶³ This coordination will better allow the military to secure the scene and safely extract the PSCs.²⁶⁴ These new policies should help diminish the likelihood of future blue on white incidents.

²⁵⁰ *See id.* The panel put a premium on the speedy arrival of such investigative teams. The DOS learned from the investigation of the September 2007 Blackwater incident how difficult an investigation can be if the investigators do not arrive at an early stage. *See* Lara Jakes Jordan & Matt Apuzzo, *FBI Finds Blackwater Trucks Patched*, B. GLOBE, Jan. 13, 2008, at A1; *infra* Part V.C.

²⁵¹ *See* DOS PANEL REPORT, *supra* note 179, at 9.

²⁵² Memorandum of Agreement Between the Department of Defense and the Department of State on USG Private Security Contractors (5 Dec. 2007) [hereinafter MOA Between DOD and DOS], *available at* [http://www.defenselink.mil/pubs/pdfs/Signed MOA Dec 5 2007.pdf](http://www.defenselink.mil/pubs/pdfs/Signed%20MOA%20Dec%205%202007.pdf).

²⁵³ The impetus for the MOA was Secretary Gates’ declaration in lieu of the Blackwater incident that all PSCs in Iraq should come under a single command, presumably the DOD. *See* Schmitt & Shanker, *supra* note 213. Gates harshly criticized the mission of PSCs as being “in conflict” with the main objective of defeating an insurgency in Iraq. Tyson, *supra* note 116. The DOS did not agree to turn over total control of its PSCs, instead contending that its internal changes would adequately improve the oversight of its PSCs. *See* Schmitt & Shanker, *supra* note 213. The MOA was essentially a compromise between the two agencies on how best to strengthen oversight of PSCs. Karen DeYoung, *State Dept. Contractors in Iraq Are Reined In*, WASH. POST, Dec. 6, 2007, at A24.

²⁵⁴ MOA Between DOD and DOS, *supra* note 252.

²⁵⁵ *See id.* annex A, para. IV.

²⁵⁶ *See id.*

²⁵⁷ *See id.*

²⁵⁸ *See supra* Part IV.B.

²⁵⁹ Press Conference, U.S. Dep’t of Defense, Remarks by Geoff Morrell, Pentagon Press Secretary (Oct. 30, 2007) (transcript available at <http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=4075>).

²⁶⁰ *See* MOA Between DOD and DOS, *supra* note 252, annex A, para. VI.

²⁶¹ *See id.*

²⁶² *See id.*

²⁶³ *See id.* annex A, para. VII.

²⁶⁴ *See id.*

The MOA falls short, however, of providing one overarching command for all PSCs.²⁶⁵ Even though the MOA is a vast improvement over the status of PSC accountability as it stood on 16 September 2007, the agencies missed their opportunity to provide more concrete, structural changes to protect against future incidents in Iraq and elsewhere.²⁶⁶

D. Congressional Action

Much like the DOS and the DOD, Congress took substantial steps towards providing better accountability of PSCs in the wake of the Blackwater incident. Congress had long taken an interest in the administration's heavy reliance on PSCs on the battlefield in Iraq.²⁶⁷ After the September 2007 incident, the House of Representatives quickly held committee hearings to address perceived failures of the DOS to properly control Blackwater and other contractors.²⁶⁸ The House and Senate also passed reform legislation which placed additional oversight responsibilities on the administration.

1. Congressional Hearings Highlight Oversight Responsibilities

Less than three weeks after the Blackwater incident, several key DOS officials were called to testify before the House Oversight and Government Reform Committee.²⁶⁹ The hearing drew intense interest from the media and the public.²⁷⁰ Under forceful questioning by committee members, DOS officials conceded that they "could not say with certainty whether any Blackwater guard could be prosecuted under U.S. law."²⁷¹ The discovery of such "murky"²⁷² legal issues surrounding PSCs drew harsh criticism²⁷³ and likely influenced many members of Congress to support reform legislation.²⁷⁴

2. MEJA Expansion and Enforcement Act of 2007

The first piece of such reform-oriented legislation in response to the Blackwater incident came in the form of a House resolution introduced by Representative David Price of North Carolina.²⁷⁵ The legislation, entitled the "MEJA Expansion and Enforcement Act of 2007," was passed overwhelmingly by the House of Representatives the day following the Oversight

²⁶⁵ William H. McMichael, *DOD, State Sign Pact on Contractors in Iraq*, NAVY TIMES, Dec. 6, 2007, available at http://www.armytimes.com/news/2007/12/military_contractors_071205w/.

²⁶⁶ See *infra* Part V.A. for a discussion on why the agencies should have settled on a plan closer to Secretary Gates' initial proposals calling for a unified command structure.

²⁶⁷ For instance, Congress held hearings in February 2007 investigating the death of the four Blackwater employees in Fallujah in 2004. *Iraqi Reconstruction: Reliance on Private Military Contractors and Status Report: Hearing Before the H. Comm. on Oversight and Gov't Reform*, 110th Cong. 1-3 (2007), available at <http://oversight.house.gov/documents/20071113181443.pdf>.

²⁶⁸ See *Hearing on Blackwater USA: Hearing Before the H. Comm. on Oversight and Gov't Reform*, 110th Cong. 5-9 (2007) (preliminary transcript available at <http://oversight.house.gov/documents/20071127131151.pdf>); Warren P. Strobel, *Blackwater Chief Answers Critics; Blackwater's Founder Defends His Private Security Firm Against Congressional Critics Who Questioned the Killing of Civilians in Baghdad*, MIAMI HERALD, Oct. 3, 2007, at A3.

²⁶⁹ See Strobel, *supra* note 268; Bryan Bender, *US Control Over Guards in Iraq Urged*, B. GLOBE, Oct. 3, 2007, at A1.

²⁷⁰ See generally Spiegel, *supra* note 34 ("The high-profile inquiry, held in a packed hearing room in which spectators had waited hours to get seats . . .") Much of the attention was directed toward Blackwater founder Erik Prince. See *id.* He testified about Blackwater's techniques for disciplining saying, in part, "If there is any sort of discipline problem . . . we fire him." *Id.*

²⁷¹ See *id.*

²⁷² See *id.* (quoting Richard J. Griffin, Assistant Sec'y of the DOS's DS, as he described the nature of the legal questions concerning PSCs).

²⁷³ For instance, during the hearing Representative Carolyn Maloney fiercely argued that if one of the Blackwater guards who had allegedly committed misconduct had lived in the United States at the time of the misconduct, "he would have been arrested, and he would be facing criminal charges. If he was a member of our military, he would be under a court martial. But it appears to [her] that Blackwater has special rules." See *Hearing on Blackwater USA: Hearing Before the H. Comm. on Oversight and Gov't Reform*, 110th Cong. 60 (2007) (statement of Rep. Carolyn Maloney, Member, H. Comm. on Oversight and Gov't Reform) (preliminary transcript available at <http://oversight.house.gov/documents/20071127131151.pdf>); Strobel, *supra* note 268, at A3.

²⁷⁴ See generally Aamer Madhani, *No Pass for Contractors*, CHI. TRIB., Oct. 5, 2007, at C1 (explaining that the MEJA Expansion and Enforcement Act of 2007 "was introduced last January but languished until the recent high-profile event").

²⁷⁵ See MEJA Expansion and Enforcement Act of 2007, H.R. 2740, 110th Cong.; *U.S. Embassy Security Practices in Iraq Overhauled*, NAT'L PUB. RADIO, Oct. 5, 2007, available at <http://npr.org/templates/story/story.php?storyID=15043814&sc=emaf>. Many other measures have been introduced in Congress dealing with PSCs, such as the Stop Outsourcing Security Act. Stop Outsourcing Security Act, H.R. 4102, 110th Cong. (2007) The act calls for the end of the use of PSCs in deployed environments. *Id.* None of these other significant reform bills has yet to pass either house of Congress.

Committee's hearing.²⁷⁶ The legislation was intended to close the potential loophole in which Blackwater and other PSCs working under non-DOD contracts might not fall within the jurisdiction of MEJA.²⁷⁷ The act would extend MEJA coverage to include any contractor working "in close proximity to an area (as designated by the Department of Defense), where the Armed Forces is conducting a contingency operation."²⁷⁸

The bill, which would also require the formation of a new FBI unit to conduct investigations of PSC misconduct overseas,²⁷⁹ was subsequently introduced in the Senate by Senator Barack Obama of Illinois.²⁸⁰ Facing opposition from the executive branch, the Senate has yet to enact the legislation.²⁸¹ Although the MEJA Expansion and Enforcement Act did not pass in 2007, several provisions of the National Defense Authorization Act for Fiscal Year 2008 (NDAA FY 2008) dealt with the controlling of and reporting on PSCs.²⁸²

3. National Defense Authorization Act for Fiscal Year 2008

As part of the NDAA FY 2008, Congress required the DOS, the DOD, and the USAID to enter into a memorandum of understanding, similar to the MOA that the DOS and the DOD signed on 5 December 2007, to cover operations in Iraq and in Afghanistan.²⁸³ The NDAA FY 2008 also required that the DOS and the DOD jointly issue regulations outlining the "selection, training, equipping, and conduct of" PSCs in combat operations areas.²⁸⁴ Lastly, the NDAA FY 2008 added a reporting requirement, directing the Government Accountability Office (GAO) to issue an annual update on the number of contracts, the number of PSCs, and the number of casualties being suffered by these contractors.²⁸⁵ While the NDAA FY 2008 and the other measures taken by Congress will greatly improve the oversight of PSCs, there are more measures that are required to prevent future incidents like the one involving Blackwater.

V. Additional Changes that Need to be Made

The landscape of PSC oversight has changed rapidly since the Blackwater incident caused such a worldwide uproar, but many improvements are still required. Counterinsurgencies depend on a cohesive team effort.²⁸⁶ The United States needs to be certain that its contracted forces are not undermining the overall efforts of the mission.²⁸⁷ Future changes should be seen as systemic changes to be applied worldwide in all overseas operations, instead of as simple patches for problems that have arisen in Iraq. To prevent PSCs from undermining such future counterinsurgency efforts, the United States must do the following: convert to a system of having all PSCs in a combat zone more firmly placed under the authority of a single chain of command, likely the combatant commander; revamp the vetting and training programs for PSCs; and improve the options for investigating and disciplining PSC misconduct. Finally, the United States should reconsider its use of PSCs altogether as it moves forward from the Iraq conflict.

²⁷⁶ See Madhani, *supra* note 274.

²⁷⁷ See *id.*; *supra* Part III.C.

²⁷⁸ H.R. 2740, § 2.

²⁷⁹ The bill calls for the creation of Theater Investigative Units of the FBI to respond and quickly begin investigations of serious incidents. See *id.* § 3; Josh Meyer & Julian E. Barnes, *Congress Moves to Rein in Private Contractors*, L.A. TIMES, Oct. 4, 2007, at A6.

²⁸⁰ See Meyer & Barnes, *supra* note 279.

²⁸¹ See *id.*

²⁸² See National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, 122 Stat. 3.

²⁸³ The memorandum must cover items such as identifying responsibilities for each agency with regard to contracting, procedures for contractor movement, identifying common databases for the sharing of contractor information, and establishing procedures for using the UCMJ to prosecute contractor misconduct. See *id.* § 861.

²⁸⁴ The DOD will need to make the regulations available via a single website that it must maintain. See *id.* § 862.

²⁸⁵ See *id.* § 863.

²⁸⁶ See FM 3-24, *supra* note 26, at 1-121.

²⁸⁷ See *id.* at 2-14.

A. Place All Private Security Contractors Under One Chain of Command

While the MOA between the DOS and the DOD does an outstanding job of ensuring coordination between the military and the DOS PSCs, it falls short of placing all PSCs under one chain of command.²⁸⁸ This leaves future counterinsurgency operations vulnerable to being undermined by PSCs. Secretary of Defense Gates explained that it was vital that the military had the “means and the mechanisms” to understand all actions transpiring in its areas.²⁸⁹ Commanders need to be able to tightly control their areas of responsibility. The current system fails to require all PSCs follow military commanders’ orders and fails to provide those commanders with a means to discipline contractors who violate the rules.

The change to the DFARS, as discussed previously, requires all DOD PSCs comply with the combatant commander’s orders.²⁹⁰ Unfortunately, there is currently no similar provision with regard to DOS or other agency employed PSCs. Such a provision needs to be mandated for all PSCs in all combat zones. The DOD needs to have their orders respected by the PSCs in order to spearhead a unified counterinsurgency effort.²⁹¹ Otherwise, the DOD will have a difficult time influencing the actions of these PSCs and preventing them from engaging in acts that are harmful to the counterinsurgency mission.

Equally important is the ability to discipline PSCs. The current interagency arrangement fails to provide the military the ability to discipline non-DOD PSCs who violate orders or regulations.²⁹² Without such authority and control over PSCs, the DOD will not likely be able to ensure these firms actually follow the rules. A member of the Reconstruction Operations Center explained the difficulties in trying to influence PSCs that did not fall under the DOD saying, “I’m not gonna go chasing after non-DOD organizations, going, ‘Uh, you didn’t submit an incident report for this.’”²⁹³ The DOD, without this power, would constantly have to struggle to get the DOS or other agency to take sufficient disciplinary action. The most efficient system would be to instead place these armed PSCs under the control of one authority, presumably the military.²⁹⁴

B. Revamp the Vetting and Training of Private Security Contractors

The United States needs to recalibrate how it vets and trains its PSCs.²⁹⁵ Although the MOA between the DOD and the DOS requires specific training requirements for its PSCs, it relies too heavily on the individual contractors to regulate themselves.²⁹⁶ Many PSCs want more regulation, as a way to “distinguish themselves from . . . rogue outfits that give the

²⁸⁸ The MOA does provide that all DOS employed PSCs must coordinate their movements with and get approval from MNF-I. *See* MOA Between DOD and DOS, *supra* note 252. It does not, however, place those contractors under the control of military. *Id.* The MOA also does not apply to PSCs from other agencies either. *Id.* The NDAA FY 2008 makes the USAID sign a memorandum of understanding with the DOD and the DOS that would allow greater coordination between the PSCs of those agencies in Iraq and Afghanistan, but it does not require placing those forces under the control of one element. *See* National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, 122 Stat. 3 (2008). Nor does the NDAA FY 2008 make such cooperation a permanent fixture of future counterinsurgency operations. *Id.*

²⁸⁹ Tyson, *supra* note 116.

²⁹⁰ *See* Defense Federal Acquisition Regulation Supplement; DOD Law of War Program, 73 Fed. Reg. 1853 (proposed Jan. 10, 2008) (to be codified at 48 C.F.R. pt. 252); *supra* Part IV.A.

²⁹¹ Such an arrangement is not without faults. It would clearly hamper the DOS’ ability to move its workers around the battlefield. This potentially restricted movement might slow the DOS response time to various diplomatic crises. Having the DOS movement essentially controlled by the military would also prove to be a substantial culture shock for the DOS. These agencies would likely face disagreements over resources and the willingness to support certain missions. While some may perceive the placing of all PSCs under the DOD’s control as naïve or unworkable, it is difficult to dispute that having a single unified command would enable a better understanding of which forces are moving across the battlefield.

²⁹² Secretary England’s September 2007 memorandum reinforces that military commanders should exercise UCMJ authority to discipline DOD employed contractors. *See* Deputy Sec. Def. Memo, *supra* note 214. The DOD has not received similar authority over non-DOD employed contractors, however.

²⁹³ *See* Fainaru, *supra* note 70.

²⁹⁴ This is not meant to understate the added burden that would be placed on the military to monitor all these extra contracts. It is meant to address the problem purely from a leadership prospective. A unity of command approach provides the strongest method of ensuring all elements on the battlefield are working together. Clearly, adding these responsibilities to military commanders would increase the workload of the units. The military would certainly need additional manpower to perform these monitoring missions. However, any increases in work would be offset to some extent by the elimination of the work the units currently have to do to identify which agency’s PSC committed misconduct in their sector and to convince that agency to appropriately discipline the PSC. Such military manpower discussions are outside the bounds of this article. As are discussions of who might settle potential complaints from other agencies if they contended the military was not attending to their needs as quickly as they desired.

²⁹⁵ Thus far in the Iraqi campaign, America has failed to ensure that its PSCs are properly qualified and trained for their assignments. For instance, despite a mandate in DOD Instruction 3020.41 that all contractor employees must receive training in human rights and humanitarian law, none “of the sixty publicly available Iraq contracts” in 2007 contained such a provision. *See* Dickinson, *supra* note 203, at 221.

²⁹⁶ The MOA between DOD and DOS requires PSCs to conduct their own training and to maintain their own training records. There is no set standard for the quality of the training. *See* MOA Between DOD and DOS, *supra* note 252, annex A, para. V. Such self-regulation was particularly dangerous in the

industry as a whole a bad name.”²⁹⁷ The United States should therefore push for an independent and international accreditation or licensing program that would set uniform standards in terms of training and screening of PSCs.

The United States should require its PSCs to be independently accredited or licensed.²⁹⁸ A likely source of this independent accreditation would be one of the several existing PSC trade associations. In fact, some of the associations have already begun limited regulatory and accrediting mechanisms.²⁹⁹

However, thus far the United States has not required any of its PSCs in Iraq to receive these accreditations as part of a contract.³⁰⁰ Licensing or accrediting would help “ensure transparency of the company and the contract.”³⁰¹ While the United States has attempted some licensing for firms that are headquartered in the United States itself, it has failed to “adequately monitor” these firms once the “license is issued.”³⁰² Plus, many of the firms operating in Iraq are from outside the United States, and the firms “recruit globally.”³⁰³ Only an international accreditation system is likely to succeed in providing quality, trained PSCs to perform the security missions.³⁰⁴ Thus, the United States should make a concerted effort to encourage the use of these independent, international systems by utilizing them routinely as part of their contracts.

While the industry may not have been mature enough at the onset of the Iraq invasion to provide such a scheme of vetting of PSCs, that can no longer be an excuse. Additionally, while the costs of vetting and monitoring PSCs in Iraq may be expensive,³⁰⁵ “poor monitoring and oversight lead to corruption and waste that is itself quite expensive.”³⁰⁶ The time is right for the industry to develop a program to accredit PSCs and provide at least minimum guarantees that they meet appropriate standards. As the largest user of these forces, the United States should pioneer the way by requiring independent, international accreditations in its PSC contracts.

C. Improve Investigations and Discipline Options

The United States also needs to improve how it investigates and disciplines PSC misconduct. Many Iraqis and much of the international community and American public share a very troubling perception that Blackwater and other PSCs are above the law.³⁰⁷ Given the extremely rare occurrences of any contractor being disciplined, it is easy to see why this complaint exists. The United States needs to take firm action to ensure that offending PSC employees can be held accountable for misconduct.

early stages of the Iraq mission when many of the firms bidding on contracts had never actually engaged in private security work before. *See generally* Bergner, *supra* note 65, at 32 (describing the origins of the PSC, Triple Canopy).

²⁹⁷ Dickinson, *supra* note 203, at 230. *See generally* *An Uneasy Relationship: U.S. Reliance on Private Security Firms in Overseas Operations: Hearing Before the S. Comm. on Homeland Security and Governmental Affairs*, 110th Cong. 5 (Feb. 27, 2008) (statement of James D. Schmitt, Senior Vice President, ArmorGroup North America, Inc.), available at http://hsgac.senate.gov/_files/022708Schmitt.pdf [hereinafter Schmitt Testimony] (“[PSCs] will gladly follow the U.S. government regulatory requirements provided to them. In essence it is what the industry has requested for some time.”).

²⁹⁸ Similar accreditation requirement provisions exist extensively already in the United States “domestic context[s]” of private prison industries and health maintenance organizations (HMOs). *See* Dickinson, *supra* note 203, at 223.

²⁹⁹ The International Peace Operations Association for instance has established a code of conduct and even initiated an effort to establish a rating system for PSCs whereby PSCs are compared against standards. *See* International Peace Operations Association Home Page, <http://ipoaworld.org/eng/> (last visited Aug. 14, 2008); James Cockayne, *Make or Buy? Principal-Agent Theory and the Regulation of Private Military Companies*, in *FROM MERCENARIES TO MARKET: THE RISE AND REGULATION OF PRIVATE MILITARY COMPANIES* 196, 202 (Simon Chesterman & Chia Lehnardt eds., 2007).

³⁰⁰ *See* Dickinson, *supra* note 203, at 223.

³⁰¹ O’Brien, *supra* note 39, at 44.

³⁰² Lehnardt, *supra* note 159, at 150.

³⁰³ Anna Leander, *Regulating the Role of Private Military Companies in Shaping Security and Politics*, in *FROM MERCENARIES TO MARKET: THE RISE AND REGULATION OF PRIVATE MILITARY COMPANIES* 49, 61 (Simon Chesterman & Chia Lehnardt eds., 2007).

³⁰⁴ *See generally* O’Brien, *supra* note 39, at 47.

³⁰⁵ *See* Cockayne, *supra* note 299, at 206.

³⁰⁶ Dickinson, *supra* note 203, at 226.

³⁰⁷ *See* Behn, *supra* note 212, at 1.

To this end, the United States needs to swiftly improve its ability to investigate potential misconduct. The MOA between the DOD and the DOS does significantly improve coordination and cooperation in investigations.³⁰⁸ However, passage of the MEJA Expansion and Enforcement Act of 2007³⁰⁹ or something equivalent is necessary. The United States needs an organized and dedicated team of investigators, that includes agents such as the Federal Bureau of Investigation (FBI),³¹⁰ designated and available within a short notice time period for serious incidents in combat areas.³¹¹

If trained investigators do not begin working a situation and arrive on the scene quickly, the investigation is substantially less likely to succeed. The investigators involved in the review of the Blackwater incident did not arrive until two weeks after the incident.³¹² By that point, some of the Blackwater employees involved in the incident had been given apparent immunity and repairs had already been made to the vehicles involved in the incident.³¹³ Unfortunately, that investigation will likely be severely hampered by those miscues stemming from the late arrival of the investigating team. Having a dedicated team of professional investigators available for these types of investigations will help prevent having such problems in the future and will strengthen potential prosecutions.³¹⁴

The United States should similarly have a dedicated team of prosecutors available to try these complex cases. Given the complexity and cost of trying these cases, U.S. Attorneys are hesitant to prosecute PSCs.³¹⁵ One alternative is to have a specialized group of Assistant U.S. Attorneys or section of DOJ handle all of these complex cases.³¹⁶ These attorneys can gain valuable experience as they work through a repetition of these cases. The other players, such as the FBI investigations teams, the DOD, and the DOS officials, will also benefit by only having one system with which they have to work to help prepare for prosecutions.

America also needs to be able to better prosecute those who commit offenses while operating as part of these governmental PSCs overseas. Although the recent expansions of UCMJ authority will help protect America's interests in combat zones, the MEJA still represents one of the best methods for prosecuting misconduct.³¹⁷ The MEJA needs to be expanded to cover all PSCs operating in Iraq and in combat areas. The United States needs to pass the relevant provisions of the MEJA Expansion and Enforcement Act of 2007 or something equivalent to ensure that future misconduct is covered under U.S. law.³¹⁸

³⁰⁸ The MOA outlines plans for the DOD and the DOS to “closely coordinate the immediate response.” The two agencies agree to share information and to assist one another in conducting the investigation when necessary. See MOA Between DOD and DOS, *supra* note 252, annex A, para. VII.

³⁰⁹ See MEJA Expansion and Enforcement Act 2007, H.R. 2740, 110th Cong.

³¹⁰ Use of the FBI for investigations in Iraq has been done in the past. The DOS requested their expert assistance from the DOJ after the September 2007 Blackwater incident. See Jordan & Apuzzo, *supra* note 250. The author contends that the FBI is the best suited for this mission given their experience and close relationship with U.S. attorneys. However, any dedicated and trained team of federal investigators would suffice.

³¹¹ This is different than the recommended “Go Teams” by the DOS panel. That panel envisioned that the DOS would internally create a team under its Regional Security Office in Baghdad to quickly gather information. See DOS PANEL REPORT, *supra* note 179, at 9.

³¹² Karen DeYoung, *Immunity Jeopardizes Iraq Probe; Guards' Statements Cannot Be Used in Blackwater Case*, WASH. POST, 30 Oct. 2007, at A1.

³¹³ Initial DOS teams offered immunity to Blackwater employees to get the employees to give statements. FBI agents are now precluded from using those statements. Also, repairs made to the Blackwater vehicles after the incident have made it impossible for FBI investigation teams to verify if damage to those vehicles had been caused by hostile insurgent actions. See Jordan & Apuzzo, *supra* note 250.

³¹⁴ This approach can be compared to the use of dedicated safety inspection teams from the United States Army Combat Readiness/Safety Center at Fort Rucker, Alabama. A centrally located team is deployed to various locations around the world to investigate vehicle accidents and other serious incidents. These teams create a precedent for the successful use of dedicated investigation teams. See US Army Combat Readiness/Safety Center, <https://cra.army.mil/home/> (last visited Aug. 14, 2008).

³¹⁵ P.W. Singer, *The Law Catches Up to Private Militaries, Embeds*, DEFENSETECH.ORG (Jan. 3, 2007), <http://www.defensetech.org/archives/003123.html> (“The reality is that no US Attorney likes to waste limited budgets on such messy, complex cases 9,000 miles outside their district, even if they were fortunate enough to have the evidence at hand.”).

³¹⁶ A similar idea was recommended by a panel of experts which including senior military officials, contractors, congressional staffers, DOD and intelligence community officials, NGO representatives, and academics who met informal for an “off-the-record workshop” at Princeton University in June 2007. Princeton University Program in Law and Public Affairs, *Princeton Problem-Solving Workshop Series in Law and Security: A New Legal Framework for Military Contractors* (June 8, 2007), available at http://lapa.princeton.edu/conferences/military07/MilCon_Workshop_Summary.pdf.

³¹⁷ See generally SINGER, *supra* note 37, at 240.

³¹⁸ See MEJA Expansion and Enforcement Act 2007, H.R. 2740, 110th Cong.

D. Reduce the Reliance on Private Security Contractors

Although not an improvement to the current system, one idea that should be given greater consideration is a rethinking of the entire notion of using PSCs on the battlefield. The practice of contracting out security functions has dangerous overtones, especially when the government and PSCs have different goals.³¹⁹ Ultimately, these differences could lead to a dire situation than the one involving Blackwater. Even though it seems an unlikely move given the current desire and willingness of the administration to privatize such functions,³²⁰ the United States' abilities to win counterinsurgencies would improve if it scaled back on its use of PSCs.

There is a concern among many commentators that the United States' use of PSCs is an abdication of "an essential responsibility."³²¹ The fear is that when a government "delegate[s] out part of its role in national security" it will be not be as responsible or accountable to the people.³²² The country might be willing to more readily use force when PSCs are a percentage of those that will be fighting or dying. One Pentagon official reportedly explained the phenomenon in these terms, "The American public doesn't get quite as concerned when contractors are killed."³²³ This seemingly callous approach to using force is not in the long-term best interests of the United States.

Moreover, the widespread use of PSCs in vital missions in Iraq has blurred the distinction between civilians and combatants on the battlefield. The U.S. practices in Iraq have cast doubt on long standing principles of the law of war. U.S.-employed PSCs now risk losing their protections as civilians based on the missions expected of them.

Finally, there is a limit as to how reliant a country should become on PSCs,³²⁴ and America may have already reached that limit. The DOS essentially admitted it could not operate without Blackwater's assistance after the September 2007 incident.³²⁵ The fear is that the government cannot "quickly replace an outsourced service if the [PSC] fails"³²⁶ The United States must ensure that it does not again find its options so limited.

VI. Conclusion

Colonel (Retired) Thomas X. Hammes makes a sound point when he says, "I still think, from a pure counterinsurgency standpoint, armed contractors are an inherently bad idea, because you cannot control the quality, you cannot control the action on the ground, but you're held responsible for everything they do."³²⁷ The United States has seen first hand in Iraq that failing to monitor PSCs can significantly affect counterinsurgency operations. American forces in Iraq have taken significant steps in the aftermath of the Blackwater incident to improve its oversight of PSCs, but major steps remain. While it is essential not to handcuff PSCs to the point that they are no longer effective, the United States must take prudent steps to strengthen its oversight of PSCs if it wants to succeed in future counterinsurgency operations around the world.

³¹⁹ "Even if they claim to be acting in the public good . . . , the mechanisms by which [PSCs] are held accountable as well as who they are accountable to (stock holders or boards of trustees, for example) may hold them to very different standards than state entities and through different processes." Deborah Avant, *The Emerging Market for Private Military Services and the Problems of Regulations*, in FROM MERCENARIES TO MARKET: THE RISE AND REGULATION OF PRIVATE MILITARY COMPANIES 181, 186 (Simon Chesterman & Chia Lehnardt eds., 2007); see also Tyson, *supra* note 116 (detailing how Secretary Gates believes that the mission of PSCs in Iraq are "fundamentally at odds with the broader U.S. military objective of stabilizing Iraq").

³²⁰ "[PSCs] will continue to play a significant and increasing role in international security in the next decades." See SINGER, *supra* note 37, at 214.

³²¹ See *id.* at 226.

³²² See *id.* Conversely, other commentators contend that the use of PSCs benefits the United States by shielding it from potential claims and liability. Although those benefits may be tangible, the United States would be setting a poor example to the international community if it was intentionally attempting to shirk responsibility by the use of such contractors.

³²³ Cockayne, *supra* note 299, at 212 (quoting Michael Duffy, *When Private Armies Take to the Front Lines*, TIME, Apr. 12, 2004, at 32). It is not exactly clear why such a perception exists. One of the reasons may be that generally the U.S. Government allows the PSCs to report the deaths. Another reason is that the media has with few exceptions generally taken less of an interest in contractor deaths than it has service member deaths. The public may be largely unaware of the numbers of contractors who have been injured and killed.

³²⁴ See SINGER, *supra* note 37, at 158.

³²⁵ See generally King & Cole, *supra* note 72, at 6.

³²⁶ See SINGER, *supra* note 37, at 159.

³²⁷ Steve Fainaru, *Warnings Unheeded on Guards in Iraq*, WASH. POST, Dec. 24, 2007, at A1 (quoting Colonel (Retired) Thomas X. Hammes, Retired, U.S. Marines).