

# U.S. PROGRESS TOWARD PSC REGULATION: PROMISING BUT POTENTIALLY STALLED

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## KEY TAKEAWAYS

- The U.S. made considerable progress toward regulating PSCs when it began to coordinate with other stakeholders and aim for transnational standards, oversight and accountability.
- As congressional attention diminished so did implementation progress. Agencies have yet to meet key congressional requirements and heed advice from the Commission on Wartime Contracting.
- Congress should re-engage to ensure that the U.S. learns lessons from Iraq and Afghanistan and avoids foreseeable future PSC disasters.

## REGULATING PRIVATE SECURITY COMPANIES

Since the 1990s, private security companies (PSCs) have become a common fixture for protecting government entities, citizens, and businesses against violence that threatens security and stability all over the world. Events in Iraq and Afghanistan made clear what many had thought for some time: better U.S. regulation and *transnational collaboration* on regulation of PSCs are critical to U.S. concerns. PSCs working for the U.S. did misbehave and damage U.S. efforts in Iraq and Afghanistan. But U.S. contracts represented only a small percentage of the total PSC activity in those areas. Misconduct on the part of PSCs working for other clients also adversely impacted U.S. goals – both directly (by undermining stability) and indirectly (by undermining the competitiveness of reputable PSCs).

In the last ten years the U.S. has worked, on its own and in collaboration with transnational stakeholders, to promote

standards, oversight and accountability applicable to all PSC clients. Building on a long history, OMB Circular A-76, *Performance of Commercial Activities*, and a variety of Defense Department changes made before 2003, this work has made strides toward a regulatory framework that promises progress toward better behavior by PSCs employed not only by the U.S. but also those employed by other governments and, potentially, non-governmental clients.

However, as the spotlight on PSCs has dimmed, the momentum toward PSC governance has waned. Unless Congress continues its pressure to solidify regulation, we could see future operations encounter avoidable PSC problems that will harm U.S. interests just as incidents like Nisoor Square did in Iraq.

## HIGHLIGHTS OF U.S. REGULATORY STEPS

In response to concerns in Afghanistan and Iraq, the U.S. has made various improvements through provisions of the National Defense Authorization Act and implementation of Federal Acquisition Regulations and Defense supplements to the regulations. Key developments include:

- Operations centers/directorates in Iraq to provide visibility over all PSC movement and activity and ensure PSC movements do not conflict with military operations,
- Processes for PSC arming authorizations and incident reports for U.S. Forces in Afghanistan, and
- The Synchronized Pre-deployment and Operational Tracker (SPOT) system for keeping track of contractors.

## HIGHLIGHTS OF U.S. CONTRIBUTIONS TOWARD TRANSNATIONAL REGULATION

The U.S. Government has also cooperated transnationally with representatives from governments, industry, and civil society to promote common approaches to authority, control, and oversight of PSCs. These approaches support effective controls by governments and can be extended to non-governmental clients. Particularly important are the following:

- Between 2006 and 2008, the United States participated in an initiative by the International Committee of the Red Cross and the Swiss Government to produce *The Montreux Document on Pertinent International Legal Obligations and Good Practices for States related to Operations of Private Military and Security Companies during Armed Conflict*, which enumerates good practices consistent with U.S. policies and international law.
- Since 2009, the Office of the Secretary of Defense has provided ad hoc instructor support to the International Institute of Humanitarian Law to explain U.S. policy and international practice regarding the use of PSCs, with particular emphasis on Rules for the Use of Force.
- From 2009 to 2010, the U.S. Government supported the development of the International Code of Conduct (ICoC) for Private Security Service Providers. The ICoC outlines good practices for PSCs consistent with the Montreux Document and emerging international protocols for business and human rights. Since then, the U.S. Government has also participated in the establishment and operation of a governance structure (the ICoCA) to implement commitments to the ICoC. The State Department requires

membership in the ICoCA for its Worldwide Protective Services (WPS) contracts.

- From 2010-2015, the Defense Department (DoD) worked with the American National Standards Institute and the International Organization of Standardization (ISO) to develop, promulgate, and require conformance with performance standards for private security services consistent with the Montreux Document and the ICoC.
- In 2013, the U.S. Government proposed establishing a Montreux Document Forum, enabling participating governments and international organizations to continue informal discussions and cooperation regarding PSCs.
- Representatives from the DoD and Department of State engage with appropriate agencies of the United Nations to address U.S. and “coalition nations” use of PSCs.

## ONLY CONGRESS CAN ENSURE CONTINUED MOMENTUM

Many of the steps above were enabled by congressional requirements. Farsighted agency reformers cannot push change without congressional pressure and resources. As congressional attention has drifted, though, so has the impetus for implementation and improvement. Agencies have yet to meet all congressional requirements and heed advice from the Commission on Wartime Contracting (CWC), and useful ideas (like operations centers) have fallen by the wayside. It is particularly important that the U.S. harmonize policy among the various agencies that use PSCs because this both increases the coherence of U.S. policy and intensifies U.S. support for existing

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transnational efforts. Also, without attention to coordinating all applicable U.S. law, current legal arrangements supporting transnational best practices may change in ways that undermine this emerging web of governance.

Finally, the U.S. should also coordinate (and fund) U.S. engagement with, and support for, ongoing transnational governance efforts. Key action items include:

1. *Ensuring implementation of the CWC's recommendations for integration of private security providers in contingency planning.*
2. *Ensuring implementation of the CWC's recommendations for operational oversight of private security providers in contingency operations.*
3. *Ensuring that all agencies using PSCs (most prominently DoD and DoS/USAID) have met congressional requirements in a harmonized way.*
4. *Ensuring the congressional requirement to identify common methodologies for the SPOT system across agencies has been met.*
5. *Ensuring the congressional requirement to identify standards in weapons training for private security providers is met.*
6. *Ensuring that all agencies apply PSC requirements to all applicable contracts (including both guards and weapon-carrying contractors).*
7. *Passing the Civilian Extraterritorial Jurisdiction Act (CEJA) to ensure criminal liability for contractors employed by any U.S. Government agency.*
8. *Ensuring that U.S. law and regulations, including International Transfer of Arms Regulations, abide by the best practices outlined by the US in the Montreux Document. (For instance, the ITAR references Wassenaar but not Montreux).*
9. *Ensuring that the U.S. supports and funds transnational efforts and the participation of relevant agency personnel in them.*

## **ABOUT THIS SERIES**

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