



PRIV-WAR Report – The United States of America

National Reports Series 02/08

The American Way: Private Military Contractors & U.S. Law After 9/11

Kristine A. Huskey & Scott M. Sullivan, the University of Texas School of Law
30 April 2009

PRIV-WAR

Regulating privatisation of “war”: the role of the EU in assuring the compliance
with international humanitarian law and human rights

The PRIV-WAR project is supported within the 7th Framework Research Programme by the
European Commission DG Research

PRIV-WAR Report – The United States of America

National Reports Series 02/08

The American Way: Private Military Contractors & U.S. Law After 9/11

INTRODUCTION*

Upon his appointment as Secretary of Defense, following President Bush's electoral victory in 2000, Donald Rumsfeld began a process he called "Transforming the Military" in an article he later authored in *Foreign Affairs* magazine.¹ Instituted prior to the terrorist attacks of September 11th, the premise of his movement to "transform" the military centered on downsizing the number of active military personnel and accelerating the military's movement to the utilization of high technology. The goal of the plan was to create a smaller, more nimble fighting force less concerned with the ability to fight a two-front war against a Soviet-esque threat, and more capable of handling low-intensity conflict for short periods of time.²

By 2004, with the conflict in Iraq causing greater strain on military resources than originally anticipated, the U.S. military realized it had neglected to give proper respect to Carl von Clausewitz's admonition, "not to take the first step without considering the last." With an open-ended commitment unfolding in Iraq and substantial and stable military commitment to fighting the Taliban in Afghanistan, the military possessed insufficient forces and resources to sustain and complete the mission. The U.S. government found private military contractors "an attractive answer to many of their problems."³ Responding to the obvious need in Iraq, the private military industry capitalized on this opportunity and the industry quickly entered into a period of exponential growth. It was, as P.W. Singer puts it, as if the private military services industry "was put on steroids."⁴ Not only did this surge of hyper-active growth increase the sheer scale of the private military industry, but also the great need for security and people with specialized technical expertise pushed the private military industry to create, develop and fill new services.

In many ways, the growth of the privatized military industry reflects the demands of U.S. policy, but such policy should not be confused with partisan politics. As mentioned below, the increasing reliance on private contractors began under President Clinton and was previewed in the U.S. military action in Kosovo. This

* Prepared by Kristine A. Huskey, Director and Clinical Professor, University of Texas School of Law National Security Clinic, and Scott M. Sullivan, Assistant Professor, University of Texas School of Law, Emerging Scholars Program, with the assistance of Robert Hamilton, U.S. Army Captain (Ret.).

¹ Donald Rumsfeld, *Transforming the Military*, FOREIGN AFFAIRS, May/June 2002.

² *Id.*

³ P.W. Singer, *CORPORATE WARRIORS (THE RISE OF THE PRIVATIZED MILITARY INDUSTRY)*, Cornell University Press, 2003, at 244.

⁴ Singer (*CORPORATE WARRIORS*) at 243.

preview, however, was insufficient to presage the extrapolation of the Kosovo use of contractors within conflicts of the size and scope of current U.S. conflicts. As the tenure of the Bush Administration comes to a close, and President-elect Obama prepares to take office, many of the current policies and practices over that period are likely to both come under review and receive the natural advantage of incumbency and inertia, thus proving highly influential in the development of U.S. foreign affairs and, indirectly, the contours of international law.

Scope of the Report

This Report provides a comprehensive discussion of the use of private military contractors (firms, companies, etc.) and their personnel (individuals) by the United States since 9/11 and the applicable legal regimes, with particular attention paid to the use of such firms in Afghanistan and Iraq. Section One seeks to describe the incorporation of contractors into the larger coalition military presence. It provides a detailed qualitative and quantitative analysis of the use of contractors, specifically, the number of contractor personnel working overseas, the governmental departments and agencies with which they are involved, the cost of contractor operations, and the various roles played by contractors. Sections Two, Three, and Four unveil the full universe of legal mechanisms that regulate, govern, and hold accountable the private contractor firms and their personnel. Section Two examines the statutes and guidelines that provide for both the process of contracting with the U.S. government and the review and oversight of military contractors. Section Three and Four address the criminal and civil legal regimes that attempt to hold private military firms and their personnel accountable for misdeeds while working overseas in a zone of armed conflict. These sections outline statutes, regulations and all active and concluded litigation. The Report ends with an Appendix, which is a detailed annotation of the civil law cases.

Defined Terms

There are numerous terms and acronyms used by scholars, courts, the government, and the industry itself to refer to the corporate entity that enters into a contract with a government department or agency to provide equipment and/or services for use in zones of armed conflict, and the individual, who has some type of employment or contract relationship with or through the corporate entity. The corporate entity is commonly called a private military company (PMC), private military firm (PMF), or private security company (PSC). Often the terms, contractor, military contractor, private contractor, government contractor, civilian contractor, or some combination thereof, such as private military contractor are used to describe *both* the corporate entity and the individual. The individual is also commonly referred to as contractor personnel. Even when the individual is technically an employee of the corporate entity, the term “contractor,” referring to the individual is still used. On the other hand, even when the individual is technically a contractor, and not an employee, courts tend to refer to such an individual as an employee of the corporate entity.

This Report will use the term “PMC” (private military company) to refer to the corporate entity and “military contractor,” “contractor” or “contractor personnel” to refer to the individual. (Or, in the discussion of civil liability, the Report may refer to the individual as an “employee” when discussing a court’s analysis or holding.).

Allegations Against PMCs/Military Contractors

Given the remarkable number of contractors that are operating in Afghanistan and Iraq in roles that have been traditionally reserved for members of the military, it is of no surprise that such individuals have found themselves in situations which result in allegations of a criminal and/or civil nature against them for their alleged bad conduct. The most infamous contractor-related incidents involve the Blackwater company which had contracted with the Department of State to provide security services to its employees in Iraq. The first, lesser known incident involved four Blackwater contractors who were escorting food supplies to a U.S. army base; they became lost in Fallujah and armed insurgents ambushed the convoy, murdered the contractors, beat the men, burned and dismembered their remains, and hung the bodies of two from a bridge. Blackwater was accused of misleading the contractors and failing to provide the contractors with armored vehicles, weapons, maps and other equipment necessary for the route they were directed to take.

The more well-known incident came three years later when individuals who were employees and subcontractors of Blackwater opened fire in Nisoor Square, Baghdad, leaving 17 people dead and injuring at least 24 others. An Iraqi investigation concluded that the Blackwater convoy fired warning shots, then stun grenades. The report continues by stating that Iraqi police and Army soldiers, mistaking the stun grenades for frag grenades, opened fire at the Blackwater team, to which the Blackwater team responded. According to Iraqi investigators, a Blackwater helicopter present during the attack fired several times from the air. A U.S. State Department report states that eight to ten attackers opened fire "from multiple nearby locations, with some aggressors dressed in civilian apparel and others in Iraqi police uniforms."⁵ The report states that as the convoy tried to leave, its route was blocked by insurgents armed with machine guns. According to the report, "The team returned fire to several identified targets" before leaving the area. *The New York Times* reported that during the incident at Nisoor Square, one member of the Blackwater security team continued to fire on civilians, despite urgent cease-fire calls from colleagues. The incident was resolved after another Blackwater contractor pointed his own weapon at the Blackwater contractor still firing and ordered him to stop. U.S. military reports appear to corroborate the Iraqi government's contention that Blackwater was at fault in the incident.

Another well-known incident involving PMCs arose from the use of linguist/translator and interrogation services provided by Titan and CACI, respectively, under contract with the Department of Defense at the Abu Ghraib prison in Iraq. Numbers of Iraqi nationals accused Titan and CACI contractor personnel of beating them, depriving them of food and water, subjecting them to long periods of excessive noise, forcing them to be naked for prolonged periods, holding a piston to the head of one of them and pulling the trigger, threatening to attack them with dogs, exposing them to cold, urinating on them, depriving them of sleep, making them listen to loud music, photographing them while naked, forcing them to witness the abuse of other prisoners, including rape, sexual abuse, beatings, electrocution, withholding food, forbidding prayer, ridiculing them for their religious beliefs, and other acts. The "Fay Report" (the Army investigation of the Abu Ghraib Detention Facility and the 205th Military Intelligence Brigade) concluded that contractors contributed to the problems at Abu

⁵ Bureau of Diplomatic Security, Department of State, U.S. Embassy Baghdad, September 16, 2007, available at <http://i.a.cnn.net/cnn/2007/images/09/16/17sept07.pdf>.

Ghraib prison: “Several of the alleged perpetrators of the abuse of detainees were employees of government contractors.”⁶

Other allegations against PMCs and their contractor personnel involve conduct that could be considered negligent under U.S. domestic law. For example, several members of the military have been injured in vehicle accidents caused by contractors, or injured in equipment provided by PMCs. Other allegations have been brought by contractors accusing the PMCs for which they were working of fraud and negligence, such as in the first Blackwater incident described above.

These allegations and others and the legal issues implicated will be addressed in more detail below.

I. The Nature of U.S. Privatized Military Contracting in Iraq and Afghanistan

The following section provides both a quantitative and qualitative paradigm through which to view and evaluate the increased presence, cost and roles of military contractors utilized by the United States during pre-conflict, actual conflict, and post-conflict situations. Quantitatively, the breadth and scope in which contractors are used by the U.S. in the Afghanistan and Iraq conflicts is essential to understanding how fundamental and lasting the increased dependence and utilization of private military contractors will be in future conflicts. As a qualitative matter, the roles of contractors in U.S. foreign policy have changed through the performance of tasks once exclusively reserved to the public military. These evolving roles present new options and challenges for any nation states in conflict.

Finally, it is important to note that Iraq will be the focus for two reasons. First, the amount of money and contract personnel committed to operations in Afghanistan is statistically small in comparison with the money and contract personnel committed to Iraq.⁷ This is evidenced by the fact that an overwhelming majority of government reports, investigations and findings regarding government contracts and contract personnel often note that the data does not include information from Afghanistan. Second, for purposes of this discussion, the qualitative changes to the private contractor industry are virtually indistinguishable between Iraq and Afghanistan.

A. Military Contractors by the Numbers

To better understand how integral contractors are to U.S. operations in Iraq and appreciate the legal issues raised, it is important to understand the statistical make-up of contractors on U.S. government contracts in Iraq. This section provides a breakdown of the number of contractor personnel operating in Iraq, the number of contractors killed and wounded in Iraq, and the amount of money obligated by the U.S. government to contractors for work in or related to the Iraq-theater.

⁶ AR 15-6 *Investigation of the Abu Ghraib Detention Facility and 205th Military Intelligence Brigade*, MG George R. Fay, Investigating Officer, at 47-52.

⁷ As will be discussed in the following section, the U.S. Congressional Budget Office (CBO) reports that the U.S. government obligated \$10 billion in contracts to Afghanistan between 2003 - 2007. Whereas, it committed \$85 billion in Iraq over the same time period.

At the outset, it is important to note that, even after five years, all government reports and private research agree, the exact number of contractors working in Iraq, the actual amount of money that has been obligated through contracts, and how many private contractors have even been killed or wounded are all unknown. Still, the following data represents the latest and best estimates by the U.S. government.

According to a U.S. Congressional Budget Office (CBO) report released in August 2008, the estimated the total number of contractors operating in Iraq under a U.S. government funded contract was between 190,000 - 196,000 working for well over 100 private military companies (PMCs).⁸ Thus, there are more contractors working directly or indirectly for the U.S. government in Iraq than the sum total of all other coalition forces deployed to Iraq to date.⁹ Of these contractors, about 38,700 (roughly 20 percent) are U.S. citizens.¹⁰ The remaining approximately 151,000 contractors are comprised by third country nationals and local nationals; roughly 81,000 (≈42% of the total contractor force) and 70,500 (≈36%) respectively.¹¹ The U.S. Department of Defense employs almost 95 percent of all contractors in Iraq, with the U.S. Department of State, the U.S. Agency for International Development and other agencies comprising the remaining 5 percent.¹²

The nature of the increase of contractors in the field goes beyond the expansion of raw numbers. The U.S. deployment in World War I included a contractor to soldier ratio of 1:24, a ratio, which narrowed to 1:7 in World War II, and then to 1:5 in the Vietnam conflict. The current ratio of contractor to military personnel in the Iraq theater is 1:1, more than two times higher than that ratio during any other major U.S. conflict with the exception of the U.S. military action in the Balkans during the 1990s.¹³

Just as it is difficult to accurately estimate the number of contractors working on U.S. government contracts in the Iraq theater, it is equally difficult to estimate the total number of contractors killed or injured. Contractor deaths are not included in the official Iraq Coalition Casualty Count. In April 2008, the Department of Labor estimated that from March 2003 to December 31, 2007, 1,292 contractors have been killed and 9,610 have been wounded.¹⁴ During the same time period the number of U.S. Soldiers killed was 3,954 according to Pentagon records.¹⁵ When compared to U.S. losses, the number of contractors killed in Iraq may seem low given the number contractors in Iraq. However, statistically, contractors have suffered the second most casualties of the Iraq conflict. In other words, contractors have suffered more losses total than all other coalition forces combined and more than any single U.S. Army division.¹⁶ This reality

⁸ U.S. Congressional Budget Office Report, *Contractors' Support of U.S. Operations in Iraq*, August 2008, at 8. ("CBO Report").

⁹ This estimate includes personnel who work directly for the US government's prime contractors, and to the extent possible, subcontractors who work for other contractors. *Id.*

¹⁰ CBO Report at 8.

¹¹ *Id.*

¹² *Id.* at 8-9.

¹³ While the U.S. operation in the Balkans in the 1990s is roughly comparable with the current ratio, it is noteworthy that the Balkans conflict involved no more than 20,000 U.S. military personnel, slightly more than 10% of the current troop deployment in Afghanistan alone. *See* CBO Report at 9.

¹⁴ P.W. Singer, *Outsourcing the Fight*, *Forbes Magazine*, June 5, 2008.

¹⁵ David Ivanovich, *Contractor deaths up 17 percent across Iraq in 2007*, *Houston Chronicle*, Feb. 9, 2008.

¹⁶ Singer (CORPORATE WARRIORS) at 246.

is particularly significant when considering that the vast majority of contractors in the field are operating in functions in the rear (*i.e.* food service and weapons maintenance).

B. Government Spending on Private Military Contracts in Iraq

From 2003 through 2007, U.S. government agencies awarded \$85 billion in contracts for work to be principally performed in the Iraq theater. This amount accounts for almost 20 percent of the \$144 billion in funding for activities in Iraq from 2003 to 2007. Of the \$85 billion awarded in U.S. contracts, 70 percent of those awards were for contracts performed in Iraq itself.¹⁷ The three leading U.S. agencies that made contract awards are the Department of Defense (DoD), the U.S. Agency for International Development (USAID) and the Department of State (DoS). The DoD awarded the majority of contracts totaling \$76 billion, while USAID and DoS obligated \$5 billion and \$4 billion, respectively, over the same period.¹⁸

Given that DoD's contract obligations represent almost 90 percent of all U.S. agency contract dollars awarded in the Iraq theater from 2003 through 2007 it is important to understand where those contracts are fulfilled geographically. Of the \$76 billion U.S. Department of Defense contract awards, \$54 billion was for contracts performed in Iraq.¹⁹ \$14 billion was for contracts performed in Kuwait and \$8 billion was for contracts performed in other nearby countries.²⁰ It is also equally important to understand which U.S. Department of Defense entities are obligating these contracts. The U.S. Department of the Army is the largest contractor in the Iraq theater by funds obligated. From 2003 to 2007, the U.S. Army awarded \$57 billion for contracts or 75 percent of the total money obligated by the U.S. Department of Defense on contracts in the Iraq theater.²¹ The Departments of the Air Force, the Navy (which includes the Marine Corps) and the Defense Logistics Agency awarded the remaining \$19 billion in U.S. Department of Defense contract obligations at \$6 billion, \$1 billion, and \$12 billion respectively.²²

Looking at the numbers alone, it is not easy to understand how significant the amount obligated by the U.S. government to military contractors. However, taking the largest Iraq-war related contract which was awarded to Kellogg Brown and Root (KBR) as an example, this approximately \$22 billion contract which requires KBR to provide for military mission logistics and assist in the restoration of Iraqi oil production is:

“...roughly three times what the U.S. Government paid to fight the entire 1991 Persian Gulf War. When putting other wars into current dollar amounts, the U.S. government paid KBR about \$7 billion more than it cost the U.S. to fight the American

¹⁷ CBO Report at 1.

¹⁸ CBO Report at 3.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.* U.S. agencies other than the U.S. Department of Defense, the U.S. Agency for International Development and the Department of State obligated a total of less than \$300 million. This category includes the Departments of Agriculture, Commerce, Health and Human Services, the Interior, Justice, Transportation, and the Treasury, as well as the Broadcasting Board of Governors and the General Services Administration. CBO Report at 3.

Revolution, the War of 1812, the Mexican-American War, and the Spanish American War combined.”²³

C. Private Military Contractors and Their Expanded Role

While the number, ratio and amount of money obligated to military contractors in Iraq and Afghanistan is an enormous jump from previous conflicts, the evolving role of contractors in pre-conflict, conflict and post-conflict operations has also caused many observers pause. Contractor personnel roles are at the heart of the political and legal challenges facing not only the U.S., but the international community as well. The current expansive roles of contractors by the current world hegemon, will, without doubt, affect the planning and judgment of international legality of using contractors by other states in the future. As a result, examining the nature of the displacement of public soldiers through private means is of great importance. Nowhere is this displacement exposed more in harsh relief than the movement of PMCs beyond their traditional role of logistical support into the realms of security and intelligence.

1. Logistics

The historical role of contractors has largely been through the provision of logistical support. The U.S. conflict in Iraq is no exception with over 70 percent of the contractor personnel contracted through the U.S. Department of Defense in Iraq performing traditional support activities such as transportation of supplies, food preparation, laundry service and construction of living, dining and bathing facilities for military personnel. The role of logistical support cannot be dismissed. As U.S. General Omar Bradley said, “Amateurs talk about strategy. Professionals talk about logistics.” This adage still rings true today. Though the roles of military contractors are evolving, the industry’s core base will remain in logistical support. It is the area that the government is least capable of delivering and the area most likely to return the greatest value when subjected to market forces.

2. Security

Similar to the PMCs exponential growth in numbers caused by the provision of logistical support during the build-up and pre-invasion of Iraq, it was the “ensuing occupation period where the companies’ roles expanded.”²⁴ As the occupation period extended into years, violence in Iraq escalated and the U.S. mission grew more challenging. It was during this post-invasion rise in violence where private security contractors (PSCs) “began to be used as a stopgap, in lieu of sending more U.S. troops to fill the lack of significant allied support.”²⁵ Private military contractors began training the Iraqi police force and army, but more importantly, they provided on the ground physical protection—a great sources of controversy. Quickly, military contractors found themselves providing armed convoy escorts, physical protection of military bases and, most notably, personal security to top U.S. and Iraq officials, such as Coalition Provisional Authority leader L. Paul Bremer.

²³ Singer (CORPORATE WARRIORS) at 247.

²⁴ Singer (CORPORATE WARRIORS) at 247.

²⁵ *Id.*

How big and how much of a factor do private security contractors play in Iraq? As of September 26, 2008, the Special Inspector General for Iraq Reconstruction (SIGIR) estimates “there are 310 companies with direct contracts and subcontracts to provide security services to U.S. agencies, contractors supporting the military, or organizations implementing reconstruction programs for these agencies since 2003.”²⁶ The SIGIR further estimates these security related services account for approximately \$6.0 billion of the \$85 billion spent by the U.S. government on contract services.²⁷

Of these 310 companies, 77 are considered true private security contractors.²⁸ While the traditional stereotype is to think of private security firm as a company that provides “bodyguards,” the role of security contractors encompass much more. A private security contractor provides physical security services such as guarding sites, escorting individuals and equipment convoys, and along with security advice and planning. For the purposes of this Report, this discussion will use this definition of private security contractor as these 77 companies account “for almost 90 percent of the obligations.”²⁹ More importantly, the top ten of these 77 private security contractors account for 75 percent of the total obligations and they account for virtually all of the controversial incidents involving private security contract personnel in Iraq.³⁰

The best estimated number of the total private security contract personnel working in Iraq for any nation or company is between 25,000 and 40,000.³¹ Of that total, 30 percent to 40 percent of private security contractor personnel work directly for the U.S. government as prime contractors.³² According to the U.S. Department of Defense’s April 2008 census of contractors, almost 7,300 PSC personnel (including all nationalities) work on U.S. Department of Defense-funded contracts or subcontracts.³³ Nearly 3,000 additional PSC personnel (including all nationalities) work directly for DoS as prime contractors.

Other issues to consider as contractors increasingly play a security role are (1) the amount of monetary compensation private security contractor personnel receive for their work; (2) whether the increased use of private security contractor personnel weakens military readiness by luring away highly trained military personnel like special operations forces; (3) the attrition rate of private security contractors.

First, the amount of compensation. Are private security contractor personnel paid unnecessarily exorbitant salaries? The answer is not clear. Looking strictly at the amount of money paid per day, the amount of compensation paid to a PSC personnel compared to U.S. Army Infantryman performing the same or similar function is grossly high. For example, “In 2007, private security guards working for companies such as Blackwater and DynCorp were earning up to \$1,222 a day or \$445,000 a year. By contrast, an Army sergeant was earning \$140 to \$190 a day in pay and benefits, a total of \$51,100 to \$69,350 a year.”³⁴ However, according to the August 2008 Congressional

²⁶ Office of the Special Inspector General for Iraq Reconstruction, *Agencies Need Improved Financial Data Reporting for Private Security Contractors*, SIGIR-09-005, Oct. 30, 2008, at 3.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ SIGIR-09-005 at 3.

³¹ CBO Report at 15.

³² *Id.*

³³ *Id.*

³⁴ *Id.* at 14.

Budget Report the answer is no. That report found that the costs of a private security contract are comparable with those of a U.S. military unit performing similar functions, particularly when peacetime is factored into the equation.³⁵ During peacetime, the private security contract would not have to be renewed, whereas the military unit would remain in its force structure.³⁶ An excerpt from the CBO Report explains:

“The figure of \$1,222 a day represents the contractor’s billing rate, not the amount paid to the contractor’s employees. The billing rate is greater than an employee’s pay because it includes the contractor’s indirect costs, overhead, and profit.

A better comparison would involve estimating a soldier’s “billing rate”—the total cost to the government of having a soldier fill a deployed security position for one year. Further, contractors generally bid various numbers of personnel in different labor categories, so focusing on a single labor category—such as the security guards—gives an incomplete picture of the total cost of providing security.

A better comparison would also reflect all types of personnel as well as non-labor costs (such as vehicles and other equipment) that a security contractor includes in its bid.”³⁷

A second issue of debate is whether the use of private security contractors depletes the U.S. military by recruiting military personnel with certain skills away from reenlisting in the military. Though a concern, all government and official reports indicate the use of private security contractors in both the Iraq and Afghanistan theaters does not appear to be increasing attrition among military personnel.”³⁸ More recently, DoD officials have said that the hiring of experienced military and civilian government personnel by private firms is not causing significant shortages of certain categories of military personnel at this time.³⁹

The third issue concerns the rate of attrition among contractors, particularly security contractor personnel whose role is physical protection. Again, because of five years of inefficient tracking, there are no conclusive numbers on the attrition rate. However, consider what would happen if several members of the Blackwater security detail assigned to Coalition Provisional Authority head, L. Paul Bremer, arbitrarily decided to return to the United States, or if civilian contractor escorts to munitions convoys failed to show up to work and walked out on the job. Unlike military personnel who have no legal discretion as to whether they stay or leave Iraq, private military contractor personnel have complete freedom to leave whenever they choose, likely risking only a breach of contract under civil law.

This information is telling for several reasons. First, at roughly 10,000, private security contractor personnel comprise roughly 5 percent of the 195,000 estimated contractor personnel working in Iraq on a U.S. contract, but they absorb an overwhelming majority of media coverage and legal discussion on private military contractors. Second, while the actual cost may be comparable to a similar military unit, the easier ability to leave their assigned mission raises serious military operational concerns.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* at 11 (citing United States Government Accountability Office (GAO) Report 2005, at 35).

³⁹ *Id.*

3. Intelligence

The realm of the intelligence community—commonly referred to as the IC⁴⁰ in the industry—is by nature secretive and, therefore, complete and precise information on the number of private contractors engaged or dollar amounts spent on private contractors in U.S. intelligence operations is not readily available. According to a recent report by the Office of the Director of National Intelligence (ODNI), approximately 25-27% of “core” intelligence personnel are contractors.⁴¹ This makes for approximately 37,000 private contractors working alongside the 100,000 government employees performing jobs in the collection and analysis of intelligence, technology, and mission management.⁴² One source indicates that approximately 40% of contract intelligence workforce collect or analyze information, a task traditionally the province of government employees of the CIA or NSA.⁴³ However, Ronald Sanders, head of personnel for the ODNI, gives a higher percentage to that category. Of contractors working in intelligence, Sanders has stated that 27% are involved in intelligence collection and operations and 19% work in analysis (totaling more than 45%), while 22% manage computer networks or perform other information technology functions.⁴⁴

With respect to dollar amounts, several sources indicate that roughly 70% of the \$60 billion spent annually on intelligence (or \$45 billion) goes to private contractors.⁴⁵ A contractor costs on average \$250,000 a year, nearly twice what a government employee costs.⁴⁶

The more significant concern is not necessarily how many contractors work in the IC or how much they cost, though certainly the high numbers could indicate the need for review, but rather, what are the qualitative tasks being performed by private employees whose employment is dictated by a profit-seeking firm. As already mentioned, a substantial number of intelligence collection and analysis is being performed by private contractors. Last year in testimony before Congress, CIA Director Mike Hayden admitted that contractors for the CIA were used to perform “enhanced interrogation,” such as waterboarding, on detainees held at CIA blacksites⁴⁷ and the Fay Report makes clear that contractors were involved in the abuse and torture of prisoners

⁴⁰ Sixteen civilian and military government agencies make up the U.S. IC.

⁴¹ Robert O’Harrow, Jr., *Contractors Augment Intelligence Agencies*, Wash. Post, Aug. 28, 2008, at D01. This figures does not include workers at companies that build spy satellites and computer equipment, cafeteria staffers or security guards (“non-core” functions), which if counted, contractors would comprise about 70% of the U.S. intelligence workforce. Greg Miller, *Contractors Account for a quarter of US spy operations*, L.A. Times, Aug. 28, 2008.

⁴² *Id.*

⁴³ Richard Willing, *Contractors Playing Major Role in U.S. Intelligence*, USA Today.com, April 25, 2007.

⁴⁴ Greg Miller, *Contractors Account for a quarter of US spy operations*, L.A. Times, Aug. 28, 2008.

⁴⁵ Shaun Waterman, *US Intel Budget May Reach 60 Billion Dollars*, Washington (UPI), June 11, 2007; see also Simon Chesterman, *We Can’t Spy if We Can’t Buy*, 19 EJIL 5 (2008); see generally Tim Shorrock, *SPIES FOR HIRE: THE SECRET WORLD OF INTELLIGENCE OUTSOURCING* (2008).

⁴⁶ Chesterman, 19 EJIL 5.

⁴⁷ Richard Esposito and Jason Ryan, *CIA Chief: We Waterboarded*, abcNEWS.com, Feb. 5, 2008.

at Abu Ghraib prison in Iraq.⁴⁸ Private contractors are also substantially involved in the analysis of the intelligence collected. Employees of Lockheed Martin, Booz Allen, and SAIC are thoroughly integrated in analytical divisions throughout the IC, including the ODNI, which produces the President’s Daily Brief.⁴⁹

The increase of publicly available information about the degree of involvement by contractors in the IC, scandals such as those involving Blackwater, CACI and Titan (the Abu Ghraib contractors), and a growing concern by certain members of Congress ultimately led to legislation prohibiting the use of contractors in traditional governmental functions, such as interrogation.⁵⁰ How this very recent legislation will affect the practical use of private contractors in intelligence-related jobs remains to be seen.

II. The Process of Military Contracting in the United States

The contracting process for the spectrum of PMCs and contractor personnel spans several agencies and officials. The most prominent actors in military contracting in the United States, however, fall under the guidance of the Office of Management and Budget (OMB) and procedures outlined under relevant military regulations.

The Office of Management and Budget, primarily through the promulgation and interpretation of OMB Circular A-76, generally sets out the type of governmental functions that may be contracted out by government agencies.⁵¹ Once identified as appropriate for contracting, each relevant agency carries out specific processes to hire a contractor for the specific task to be fulfilled.

Military regulations exist to effectuate, control, and provide guidance to the hiring and use of private military firms and the individual contractors they employ and provide substance to the military contracting surge discussed above. Of these regulations, the program responsible for managing contractors acting in theater is Army Regulation 700–137, specifically the Logistics Civil Augmentation Program (LOGCAP) found therein,⁵² which establishes the basic military practice in processing the augmentation of military forces through civilian contractors during wartime.

A. Process and Parameters of Military Contracting

The procedural requirements of PMCs operating in theater are governed by U.S. policy prohibiting the outsourcing of “inherently governmental” functions and executed

⁴⁸ AR 15-6 *Investigation of the Abu Ghraib Detention Facility and 205th Military Intelligence Brigade*, MG George R. Fay, Investigating Officer, at 47-52.

⁴⁹ R.J. Hillhouse, *Outsourcing Intelligence*, *The Nation*, July 30, 2007. The President’s Daily Brief is an aggregate of the most critical analyses from the sixteen agencies that make up the intelligence community. Staff at the ODNI sift through reports to complete the PDB, which is presented to the President every day as the US government’s most accurate and most current assessment of priority national security issues. *Id.*

⁵⁰ National Defense Authorization Act of 2009, sec. 1036 (PL 110-417).

⁵¹ OMB Circular No. A-76: Performance of Commercial Activities (Revised 1999) (superseded) (White House Office of Management and Budget, Washington, DC, 1999), *available at* <<http://www.whitehouse.gov/omb/circulars/a076/a076.html>>.

⁵² Army Regulation (AR) 700-137 LOGISTICS CIVIL AUGMENTATION PROGRAM (LOGCAP).

by U.S. military regulations setting forth the process by which contractors enter the field.

1. “Inherently Governmental” Functions

National security functions, including those of guarding government officials and military installations have, in theory at least, remained one of the last areas of government perceived as “inherently governmental” and thus unsuitable for privatization or outsourcing. In a world where privatization has prevailed as a matter of practice, concerns of national security are described as “uniquely ill-suited to privatization.” Given the pervasive mistrust toward privatizing national security functions, one would expect that the privatization in defense by the United States would be the exception rather than the rule. That has not been the case.

The Office of Management and Budget Circular A-76 establishes the U.S. government’s policy to proscribe outsourcing activities that are “inherently governmental” in nature. This test has proven hopelessly unhelpful in clarifying how to determine whether a particular governmental function is appropriate for outsourcing.⁵³ Neither the OMB Circular nor accompanying interpretation provides principles useful in illuminating how and why certain functions obtain “inherently governmental” status. As a result, the guiding policy has consistently been one of characterization rather than fact.

The U.S. General Accountability Office (GAO) has provided little guidance to understanding the “inherently governmental” function test in national security, only that it is, clear that government workers need to perform certain warfighting, judicial, enforcement, regulatory, and policy-making functions ... Certain other capabilities, ... such as those directly linked to national security, also must be retained in-house to help ensure effective mission execution.”⁵⁴ This guidance offers very little in the way of specific or concrete rules where national security privatization is concerned. No one doubts that the U.S. government must retain “certain warfighting” functions. Similarly, according to the GAO, capabilities “directly linked to national security” must only be retained if demonstrable that in-house assistance helps “ensure effective mission execution.”⁵⁵ The conceptual ease of such abstract judgments, however, has been offset by the difficulty in assigning detailed meaning to each relevant term.

While the sheer number and ratio of contractors to troops has risen dramatically over recent years, determining the contours of the “inherently governmental” function test has been a consistent challenge. This definitional problem is not limited to the current circumstances in Iraq and Afghanistan.

The National Defense Authorization Act of 2009, passed at the end of 2008, mandates that private security contractors are not authorized to perform “inherently governmental” functions in an area of combat operations, which simply reiterates the OMB Circular policy and provides no more substance to the restriction with respect to security contractors.⁵⁶ Though, as mentioned above, the NDAA 2009 does specifically

⁵³ See e.g., Chesterman, 19 EJIL 5.

⁵⁴ See Commercial Activities Panel: Improving the Sourcing Decisions of the Federal Government (U.S. General Accounting Office (GAO), GAO-02-847T, Washington, DC, 27 September 2002), available at <<http://www.gao.gov/new.items/d02847t.pdf>>, 21.

⁵⁵ *Id.*

⁵⁶ National Defense Authorization Act of 2009, sec. 841 (PL 110-417)

state that interrogation is an inherently governmental function and cannot be appropriately transferred to the private sector.⁵⁷

2. Logistics Civil Augmentation Program (LOGCAP)

In the context of most defense contracting, the contracting process is either guided by Pentagon officials (dependent on the underlying function undertaken by contract) or through LOGCAP, for the purpose of supporting military operations undertaken by U.S. troops.

Under the regulation, the four primary objectives of LOGCAP include:

- (1) Resolve the combat support and combat service support unit shortfalls represented in operation plans.
- (2) Consider conversion of existing support units based on availability of contract support in wartime.
- (3) Provide rapid contracting capability for contingencies not covered by global operation plans.
- (4) Provide for contract augmentation in the continental United States during mobilization.⁵⁸

Although LOGCAP is an Army program, it is also empowered to support the other branches of the U.S. armed forces and support other services in joint operations, as well as federal, and military coalition partners (following the consummation of bilateral agreements).⁵⁹

B. Governmental Oversight and Review of Military Contractors

The section below briefly outlines the statutory and military regulatory framework designed to manage the work (and behavior) of contractors acting under contracts that require deployment in zones of armed conflict.

1. General Substantive Statutory and Regulatory Framework

U.S. government regulation of contractor activity has posed difficulties of basic set standards and disclosures among governmental agencies as well as imposing criminal liability when individual contractors act outside the scope of the law. One of the most common critiques faced by the government is that not only did different agencies with projects in the same theater (*i.e.*, DoD and DoS) not know of the activities of the other, but each individual department did not possess the requisite manpower or regulatory regime to possess a clean view of the activities of contractors for which they are directly responsible. The most recent attempt to standardize U.S. government action

⁵⁷ *Id.* at sec. 1036.

⁵⁸ AR 700-137; Colonel Karen E. LeDoux, LOGCAP 101: An Operational Planner's Guide, Army Logistician, May-June 2005.

⁵⁹ OWNER'S MANUAL FOR THE LOGCAP III CONTRACT: LOGCAP 101: WORKING WITH LOGCAP IN IRAQ, Report Issued by the Joint Munitions Command (2006).

in relationship to contractors is manifested through a December 5, 2007 Memorandum of Agreement (MOA) between the Department of Defense and the State Department.⁶⁰

Under the DoD-DoS MOA, which officially only applies to the Iraq conflict, new procedures have been written to coordinate all U.S. operations in Iraq with all movements by U.S. tied contractors. Significantly, the “core standards” upon which the Departments have agreed to reform include: (1) management of PSC personnel; (2) coordination of PSC operations outside secure base and U.S. diplomatic property; (3) clear legal basis for holding private security contractor employees accountable under U.S. law; (4) recognition of investigative jurisdictions and coordination of joint investigations where conduct of PSC personnel are to be investigated.⁶¹ Similarly, both the DoS and the DoD have appointed additional liaison officers serving in theater to respond to and investigate incidents where contractors have either been accused of engaging in unlawful acts or, more generally, acts considered harmful to the larger military effort of the United States.⁶² Since the MOA, the DoS has developed new investigative procedures and specific guidelines on the use of force, which aim to facilitate the referral of cases to the Department of Justice in circumstances of potential criminal misconduct.

The DoS and DoD have, also under the authority of the MOA, spent recent months developing core policies for vetting, background investigations, training, weapons authorizations, movement coordination, and incident and response procedures and investigations for contractors directly tied to each institution.

Finally, passed in 2007, the National Defense Authorization Act for Fiscal Year 2008 authorizes the DoS and DoD to actively engage in developing formal regulations governing contractors operating in combat zones.⁶³ This information is also designed to act as the foundation of a broader memorandum of understanding among agencies that will address all contractors operating in Iraq and Afghanistan.

2. Operational Military Regulations of Contractors in Theater

U.S. military regulations move the substantive restrictions of state contracting from the abstract realm of “inherently governmental” functions to the “on the ground” issues that surround the regulation of contractors operating in the theater of armed conflict. According to DoD formal instructions, contractors operating in a conflict zone are considered either “external support” or “theater support” dependent on the area in which they were contracted.⁶⁴ This section briefly sets out the major regulatory procedures and restrictions imposed upon PMCs and contractors.

⁶⁰ Memorandum of Agreement (MOA) Between the Department of Defense and the Department of State on USG Private Security Contractors, Washington, D.C. December 5, 2007, *available at* <http://www.defenselink.mil/pubs/pdfs/Signed%20MOA%20Dec%205%202007.pdf>.

⁶¹ MOA.

⁶² *Id.* at 2.

⁶³ National Defense Authorization Act for Fiscal Year 2008, (Public Law 110-181; 122 Stat. 253) codified at 10 U.S.C. 2302 (2007).

⁶⁴ *See* Department of Defense Issuance (DODI) 3020.41, paragraph E2.1.8 (external support); DODI 3020.41, paragraph E2.1.18. (theater support).

a. Logistics / Security Status

Under current regulations, contractors operating in logistics support are authorized to engage in indirect participation (including managing communications, support, transporting supplies) in the theater of armed conflict.⁶⁵ Such personnel are authorized by a military commander to carry a weapon for individual self-defense to be determined on a case-by-case basis.⁶⁶ The carrying of such weapons must also be authorized under the contract between the government and the PMC in question as well as the employment agreement between the PMC and individual contractor.⁶⁷

In contrast, armed contractor personnel are available to support U.S. troops for security purposes when the purpose of the contract is clearly non-combat (and thus not considered an inherently governmental function).⁶⁸

b. Command and Control

When contractors accompany the force in theater, they do not serve directly under the military commander charged with their region of operation. Rather, an Army Procurement Contracting Officer oversees the performance of the contract as well as any amendments to the underlying contract that may be necessary as the contractor's work unfolds.⁶⁹ As such, the command and control structure of contractors is fundamentally different than that of the regular military.⁷⁰ Basic questions of command and control are not resolved ad hoc by the commander in theater but through the terms and conditions of the government contract under which each PMC is operating.⁷¹ This differentiation of command and control is manifest through the regulatory dictate that only the contracting officer communicates the military's requirements and prioritizes PMC responsibilities.⁷² However, during the course of performing their contract, contractors operating in theater are required by law to adhere to all guidance and obey all instructions and general orders that are issued by the theater commander relating to force protection, security, health, safety and relations and interaction with local nationals.⁷³ Contractors are also required by law to comply with U.S., host country and local laws, treaties and international agreements and all applicable Uniform Code of Military Justice provisions.⁷⁴ Moreover, contractors are required to adhere to all guidance and obey all instructions and general orders issued by the combatant commander.⁷⁵ Failure to obey lawful orders of the theater commander may result in

⁶⁵ Army Regulation (AR) 715-9, para. 3-3(d).

⁶⁶ DODI 3020.41, paragraphs 6.3.4.1, 6.3.4.2.

⁶⁷ *Id.*

⁶⁸ DODI 3020.41, paragraph 6.3.5.7040(c).

⁶⁹ MEMORANDUM FOR COMMANDER, U.S. ARMY MATERIEL COMMAND DEPUTY ASST SECRETARY OF THE ARMY FOR POLICY AND PROCUREMENT, Special Inspector General for Iraq Reconstruction, November 23, 2004 (audit prepared by IG office regarding procurement practice in Iraq).

⁷⁰ AR 715-9, Ch. 4; AR 700-137.

⁷¹ AR 715-9, Ch. 2.

⁷² AR 715-9. *See* Federal Acquisition Regulation (FAR) 37.104 outlining command structure for contractors in theater.

⁷³ *See* Defense Federal Acquisition Regulation Supplement (DFARS) 252.225-7040(d); Army Federal Acquisition Regulation Supplement (AFARS) 5152.225-74-9000(a)(3).

⁷⁴ *Id.*

⁷⁵ *See* DFARS 252.225.7040(d); AFARS 5152.225-9000(b).

both individual and company contractor removal from the theater.⁷⁶ Short of removal, commanders can affect individual contractor's status through revocation of clearances and restricting contractors from installations or facilities under their control.⁷⁷

c. Licensing Requirements for Armed Contractors

Under the U.S. 2007 Operational Law Handbook, PMCs contracted to act in a security context, where the use of force is contemplated, are allowed to carry arms only following explicit approval. The application to carry arms must include: (1) a description of where such contract security personnel will operate, the anticipated threat, and what non-military property, or non-military personnel such contractor personnel are intended to protect, if any; (2) a description of how the movement of contractor security personnel will be coordinated through areas of increased risk or planned or ongoing military operations including how the contractor security personnel will be rapidly identified by members of the Armed Forces; (3) a communication plan to include a description of how relevant threat information will be shared between contractor security personnel and U.S. military forces, including how appropriate assistance will be provided to contractor security personnel who become engaged in hostile situations; (4) documentation of individual training covering weapons familiarization, rules for the use of deadly force, limits on the use of force including whether defense of others is consistent with law, the distinction between the rules of engagement applicable to military forces and the prescribed rules for the use of deadly force that control the use of weapons by civilians, and the Law of Armed Conflict; (5) certification that the individual is not prohibited under U.S. law from possessing a weapon or ammunition due to conviction in any court of a crime of domestic violence whether a felony or misdemeanor; (6) written acknowledgement by the defense contractor firm and individual contractor security personnel, after investigation of background and qualifications of contractor security personnel and organizations, certifying such personnel are not prohibited under U.S. law to possess firearms; (7) written acknowledgement by the defense contractor firm and individual contractor security personnel that: (a) potential civil and criminal liability exists under U.S. and HN (host nation) law for the use of weapons, (b) proof of authorization to be armed must be carried; (c) contractor may possess only U.S. Government-issued and/or approved weapons and ammunition for which they have been qualified; (d) contract security personnel were briefed and understand limitations on the use of force; and (e) authorization to possess weapons and ammunition may be revoked for non-compliance with established rules for the use of force.⁷⁸

d. Contractor Reporting Requirements in Theater

Under recent legislation, the DoD is tasked with the development and maintenance of a database holding the names and vital information of all contractors operating in Iraq as well as the nature of the contract entered into. Similarly, PMCs are required to comply with the government's acquisition of the data listed below. Under current DoD instructions: (1) the database must provide by-name accountability of all contractors deployed in Iraq; (2) the database must possess "minimum contract information", including a summary of services or capability to be provided under the contract; and (3) use and maintenance of the database is required throughout all levels

⁷⁶ *Id.*

⁷⁷ See AR 715-9, Ch. 4, Discipline and Commander's Authority.

⁷⁸ See 2007 Operational Law Handbook, Judge Advocate General.

of command where contractors may support contingency operations or other military operations.⁷⁹

III. Criminal Liability for Contractors

The United States government has, to date, not demonstrated a comprehensive capability to hold either private military firms or individual contractors criminally liable for unlawful acts perpetrated abroad. Contractor immunity provisions implemented in both Iraq and Afghanistan have highlighted the need for more expansive and developed statutory regimes that enable federal or military prosecution of contractors. This section briefly examines the provisions of U.S. law relevant for creating criminal liability for contractors acting in Iraq and Afghanistan.

A. Contractor Immunity Provisions

Contractors operating in Iraq and Afghanistan were granted immunity under local law for actions in the scope of their employment relative to their contract with the United States. These immunity provisions caused substantial criticism by public and academic commentators and engendered debate within the domestic political environment of each respective nation. The contours of each immunity grant also created confusion as to what acts are covered and, as a result, the question of where the ultimate responsibility for prosecution lies. For numerous reasons, including the international outrage over the Blackwater/Nisoor Square incident, by the end of 2008, immunity for contractors operating in Iraq came to an end with the approval of a new Status of Force Agreement (SOFA) between Iraq and the U.S. Currently, immunity for contractors in Afghanistan continues in spite of, or perhaps because of, the increased presence of U.S. military forces and civilian support there.

1. Iraq

a. CPA 17

In the United States conflict in Iraq, contractor immunity was established in June 2003 by Coalition Provisional Authority Order No. 17 (CPA 17).⁸⁰ CPA 17 had provided a general grant of immunity to contractors and outlined the basic parameters in which such immunity would not attach or otherwise be made inapplicable. The general grant of immunity provided that:

“Contractors shall be immune from Iraqi legal process with respect to acts performed by them pursuant to the terms and conditions of a Contract or any sub-contract thereto.”⁸¹

While the language of this immunity grant was broad, it also included limiting language, presumably designed to preclude immunity in certain circumstances. Under the term of the immunity grant, immunity was not afforded to contractors for acts which were not performed “pursuant to the terms and conditions” of the contract by which the

⁷⁹ See DODI 3020.41.

⁸⁰ See Coalition Provisional Order 17, §4, as amended June 17, 2004, available at http://www.cpa-iraq.org/regulations/20040627_CPAORD_17_Status_of_Coalition_Rev_with_Annex_A.pdf.

⁸¹ *Id.*

contractor was acting.⁸² In other words, to the extent contractors engaged in behavior not seen to further the terms and conditions of an underlying conduct, immunity would not attach. U.S. court precedent indicates that there is a presumption that contractual provisions should not be read to authorize criminal acts by a contracting party. This presumption is stronger when the criminal acts in question are violent in nature. As such, the “pursuant to the terms and conditions” provision of CPA 17 may, in fact, have excluded prosecution of violent crimes by contractor personnel.

CPA 17 also established a waiver provision, which provided that a grant of general contractor immunity “is not for the individuals concerned” and “may be waived” by the United States, and thus, opened the possibility of a local trial for contractors accused of unlawful activity.⁸³

CPA 17 expired in conjunction with the expiration of the UN mandate established under Security Council Resolution 1511 December 31, 2008 and was replaced by a new status of forces agreement (SOFA) negotiated between the United States and Iraq.

b. The New Status of Force Agreement (SOFA)

Toward the end of 2008, a new SOFA had been agreed upon by the United States and Iraq. On November 27, 2008, the Iraqi Parliament ratified a Status of Force Agreement with the U.S. that calls for the withdrawal of U.S. troops over a three-year period and essentially revokes the blanket immunity for military contractors that CPA 17 had provided. Sources indicate that the U.S. had originally wanted the continued immunity from Iraqi law for both troops and contractors, however, Iraq stood firm with regard to contractors, a position taken, no doubt, on account of the Nisoor Square incident involving contractors of the Blackwater company. A compromise was eventually reached and immunity was retained for U.S. troops *only* for acts performed while on duty.

Article 12 of the new SOFA states, “Iraq shall have primary right to exercise jurisdiction over United States contractors and United States contractor employees,” which are defined as “non-Iraqi persons or legal entities, and their employees, who are citizens of the United States or a third country and who are in Iraq to supply goods, services, and security in Iraq to or on behalf of the United States Forces under a contract or subcontract with or for the United States Forces.”⁸⁴ Excluded are persons or legal entities normally resident in the territory of Iraq. Thus far, no case against U.S. contractors has been brought in Iraqi courts. However, though the application of Iraqi jurisdiction over contractors did not initially begin until January 1, 2009, there has been debate as to whether the Iraqi government could prosecute Blackwater contractors (or any other contractor for that matter) for acts committed during the period of supposed immunity.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ Agreement Between the United States of America and the Republic of Iraq On the Withdrawal of United States Forces from Iraq and the Organization of Their Activities during Their Temporary Presence in Iraq, dated and signed November 17, 2008.

2. Afghanistan

There is no direct corollary to CPA 17 publicly available regarding an immunity grant in Afghanistan. The operative document (essentially acting as a SOFA) outlining the relationship between NATO and Afghanistan, does not break out the jurisdictional question of contractors separate from that of the regular military.⁸⁵ Instead, the agreement asserts the establishment of an accord “regarding issues related to United States military and civilian personnel.”⁸⁶

While the status of contractors is not explicitly addressed within the confines the U.S. – Afghan agreement, the agreement does provide that:

The Government of Afghanistan recognizes the particular importance of disciplinary control by United States military authorities over United States personnel and, therefore, Afghanistan authorizes the United States Government to exercise criminal jurisdiction over United States personnel. The Government of Afghanistan and the Government of the United States of America confirm that such personnel may not be surrendered to, or otherwise transferred to, the custody of an international tribunal or any other entity or state without the express consent of the Government of the United States.⁸⁷

On the one hand, the language does not specifically preclude Afghanistan’s jurisdiction over contractor personnel and appears, in large part, to concern the transfer of U.S. personnel to international tribunals or other states (presumably not the parties to the agreement). However, the unification of military and civilian personnel may indicate the type of general immunity contemplated in CPA 17 which is substantially more expansive than the contractor immunity provided within that same agreement.

Afghanistan has not attempted to exercise jurisdiction over either U.S. military or civilian personnel during the U.S. presence in the country. The contractor presence in Afghanistan has also appeared to cause less agitation than in Iraq. This, in part, might be due to the fact that the majority of contractor personnel present in Afghanistan are Afghani natives. In any event, as movement toward a detailed SOFA has progressed in Iraq, Afghanistan’s president, Harmid Karzai has voiced his belief that a similar governing document is necessary in Afghanistan. There are no indications that a more nuanced SOFA is imminent between NATO forces and the Afghanistan government.

B. Prosecution in Federal Court

To the extent immunity shields contractors from prosecution in Iraq and Afghanistan, two other forums have served as the focal points for the exercise of U.S. jurisdiction over contractor crimes – U.S. federal court and court-martial jurisdiction. The question of the reach and role, of federal and military courts has led to great confusion between the civilian government and military service. Further, jurisdictional holes in both systems, exposed over the course of both of the respective conflicts in Iraq and Afghanistan have led to legal reform through congressional legislation.

⁸⁵ Agreement regarding the status of United States military and civilian personnel of the U.S. Department of Defense present in Afghanistan in connection with cooperative efforts in response to terrorism, humanitarian and civic assistance, military training and exercises, and other activities, 2002 U.S.T. 100.

⁸⁶ *Id.*

⁸⁷ *Id.*

The basic jurisdictional threshold questions are simple for both federal and military courts. U.S. federal courts, as a general rule, do not possess jurisdiction over acts occurring beyond national borders absent an explicit statutory provision to the contrary.

1. Special Maritime Territorial Jurisdiction (SMTJ)

Federal statutes grant U.S. courts “special maritime and territorial jurisdiction” (SMTJ) which enables federal courts to exercise their jurisdiction for acts perpetrated on U.S. military bases.⁸⁸ SMTJ extends jurisdiction over crimes where no other government is able to effectively safeguard American interests. Originally, the SMTJ statutory regime was limited to areas of “special jurisdiction” including the high seas, U.S. vessels on international seas, U.S. aircraft, and certain land utilized by the U.S. government personnel as military bases and embassies. SMTJ jurisdiction is limited to (1) crimes committed by or against U.S. nationals (thus excluding foreign contractors perpetrating crimes against Iraqis); and (2) crimes committed on U.S. military installations.⁸⁹

This jurisdiction was expanded by the U.S.A. PATRIOT Act to explicitly include military bases located abroad “with respect to offenses committed by or against a national of the United States.”⁹⁰ The Act expands SMTJ jurisdiction over any place used by entities of the United States government, which includes property owned by other states but used for governmental purposes by the United States.⁹¹

2. Military Extraterritorial Jurisdiction Act (MEJA)

The primary alternative to SMTJ jurisdiction is the Military Extraterritorial Jurisdiction Act (MEJA).⁹² The purpose of MEJA was to extend federal court jurisdiction over civilians overseas that commit criminal offenses where domestic prosecution in that foreign nation was not feasible. Passed in 2000, it provides for punishment of any conduct that otherwise would be a punishable offense under SMTJ jurisdiction of the United States. This includes aggravated assault, theft, unlawful killing, sexual abuse and other serious crimes. MEJA also provides jurisdiction covering former members of the service whose crimes are not discovered until their separation from service.⁹³

MEJA was amended in 2004 through the Fiscal Year 2005 Department of Defense Authorization Act Congress. The amendments stemmed from the fact that the original MEJA failed to cover contractors beyond those working for the Department of Defense. The 2005 Defense Authorization Act extended the jurisdictional coverage of MEJA to employees and contractors of other federal agencies. The Act also amended MEJA to apply to employees and contractors of “any provisional authority.” In each case, however, the law chose to limit the final jurisdictional coverage only “to the extent such employment relates to supporting the mission of the Department of Defense.”

⁸⁸ See 18 U.S.C. 7 (2007).

⁸⁹ *Id.*

⁹⁰ See 18 U.S.C. 1029 (2007).

⁹¹ *Id.*

⁹² See Military Extraterritorial Jurisdiction Act (MEJA), 18 U.S.C. § 3261 (2007).

⁹³ *Id.*

The primary relevance of MEJA for contractors, however, is for those individuals “employed by or accompanying the Armed Forces outside the United States.” Under the statute, “employed by” the military encompasses civilian personnel of the Department of Defense. Those “accompanying” the military is defined by the statute to include military and civilian personnel dependents.

MEJA does not create jurisdiction over individuals employed by or accompanying the military who are citizens of the state in which they are operating (who are presumably subject to domestic prosecution). Further, MEJA offers extensive guidance for pre-trial procedures covering arrest and detention, extradition, and the right to counsel, designed to alleviate practical problems of the substantial distance separating the criminal act being prosecuted and the court in which the prosecution will take place.⁹⁴ Overall, the expansion of federal court jurisdiction over acts carried out in a foreign nation and, in certain circumstances, by foreign nationals, represents a broad expansion of federal court power over acts with which it has little connection.

MEJA, as it was originally enacted and in its current form, has been criticized for two primary reasons (1) that it only extends to Department of Defense employees and contractors; and (2) that, while granting U.S courts jurisdiction over extraterritorial acts, it was not accompanied by the necessary grant of resources to enable Department of Justice officials to engage in a meaningful investigation of acts occurring so far from their traditional realm of power and to have whatever evidence is accumulated in such cases be thoroughly investigated and presented in court. Critiques of the first sort have largely been addressed. Congress amended MEJA to include contractors of any federal agency “to the extent such employment relates to supporting the mission of the Department of Defense overseas.” Note that this revision to the law may not cover a significant portion of contractors who engage in personnel security of employees (or companies) that are not associated with the Department of Defense (*i.e.*, Department of State employees or private reconstruction firms) and, arguably as such are not “supporting the mission of the Department of Defense overseas.”

Other potential loopholes in MEJA’s jurisdictional grant have also sparked concern. Specifically, only crimes that carry a punishment over one year fall within MEJA jurisdiction. This penalty calculation would exclude simple assault charges, which would include unlawful acts such as physically assaulting a detainee during an interrogation through striking or slapping as well as other means of mental abuse otherwise prohibited by law and regulation.

Blackwater and the Nisoor Square Incident

Until November 2008, no individual had been held accountable for the “Nisoor Square incident,” which occurred on September 16, 2007 at the Nisoor Square traffic circle in Baghdad, Iraq. As mentioned briefly above, employees and subcontractors of the Blackwater company, which had a contract with the State Department to provide personal security services, were assigned to a convoy of heavily-armored trucks and were armed with, among other weapons, a sniper rifle, machine guns, and grenades. The Blackwater personnel became involved in a firefight in the public square and as a result, 17 people were killed and over 24 others injured, most of which were allegedly unarmed civilians, including women and children.

Until recently, the DoJ had not indicated any inclination toward prosecuting the individuals responsible despite the fact that several official reports indicate that the

⁹⁴ *Id.*

Blackwater personnel had very little, if any, justification for the deaths and injury of civilians. Moreover, immediately after the incident, Iraq revoked the company's license to operate in Iraq. Whether in response to continued pressure from the public, clear dissatisfaction by Congress on the issue of accountability of PMCs, or newly-elected President Barack Obama, who had run his campaign on change, transparency and accountability, five former Blackwater personnel were indicted under MEJA on December 4, 2008. They were charged with deaths of 14 unarmed civilians and the injury of at least 20 civilians (most, if not all, victims were Iraqi citizens), with the specific charges of voluntary manslaughter, attempt to commit manslaughter, using and discharging a firearm during and in relation to a crime of violence, and aiding and abetting the manslaughter. Two weeks earlier, another former Blackwater security guard, Jeremy Ridgeway, had signed a plea agreement, pleading guilty to voluntary manslaughter, attempt to commit manslaughter and aiding and abetting, in exchange for his testimony against his colleagues.

On January 13, 2009, the defendants filed a motion to dismiss all counts for lack of jurisdiction under MEJA and briefing by both parties on the issue concluded in February 2009. The defendants claimed that the federal court had no jurisdiction to try them for crimes committed in Iraq because MEJA only covers employees or contractors of any federal agency whose employment "relates to supporting the mission of the Department of Defense overseas."⁹⁵ Defendants claimed that their company's contract was to provide armed protection to civilian personnel of the State Department whose mission is to "create a more secure, democratic, and prosperous world for the benefit of the American people and the international community," while the mission of DoD is to "provide the military forces needed to deter war and to protect the security of our country."⁹⁶ On February 17, 2009, Judge Urbina of the District Court of the District of Columbia declined to dismiss the charges, stating that the claims regarding the nature of Blackwater's work and the mission of the Defense Department should be heard by a judge or a jury after the prosecution presents its case, though noting that defendants points were strong on the issue. The trial is scheduled to begin in February 2010.

3. War Crimes Act

Contractors could also be charged under the United States War Crimes Act which implements U.S. obligations under the Geneva Conventions. The War Crimes Act criminalizes unlawful killing and other violent crimes that some military contractors (most notably the Blackwater contractors involved in the September 16 killings) have been accused of perpetrating against Iraqi civilians. The use of the War Crimes Act to prosecute military contractors has apparently been ignored for two major reasons. First, the War Crimes Act, while appropriate for the prosecution of war crimes, represents a small percentage (albeit significant in severity if nothing else) of crimes perpetrated by contractors and thus cannot act as a comprehensive regime of accountability for controlling contractors in the field. Second, the prosecution of someone under the War Crimes Act strongly infers that the defendant actually engaged in a war crime. The taint that would thereafter attach would not be limited to the individual contractor or the military contracting firm, but would officially associate the U.S. military with individuals the U.S. government itself believes to be war criminals.

⁹⁵ Defendants' Memorandum of Points and Authorities in Support of Defendants' Motion to Dismiss for Lack of Jurisdiction, (January 13, 2009), *United States of America v. Slough et al.*, 1:08-cr-00360 (2009 WL 192243 (D.D.C. 2009)).

⁹⁶ *Id.*

4. Corporate Criminal Liability

Corporate criminal liability is a criminal law regime designed to hold the corporate entity liable for the actions of its agents.⁹⁷ In most cases, the link between agent and business entity are severed when the agent engages in a criminal act, even if that act was in furtherance of corporate gain. However, under U.S. law, corporate criminal liability may be attached in the United States when the alleged unlawful acts of an employee appear to be part and parcel of the overall mission of the larger corporate actor. In other words, when unlawful acts do appear to be part of the contemplated employment, the corporate entity may face criminal liability even though there is not a direct nexus with the underlying crimes at issue.

The case for corporate criminal liability may also be bolstered through a showing that the corporate entity displayed gross negligence or recklessness in its business practices that might lead to criminal acts. In the context of the private military industry, the rehiring of individuals believed to have engaged in criminal acts in similar circumstances or a systematic lack of training provided to individuals not believed to have received appropriate training through other mechanism might satisfy corporate criminal liability standards.

C. Prosecution in Military Court - Uniform Code of Military Justice (UCMJ)

The Uniform Code of Military Justice represents the statutory regime used to hold criminal trials for members of the U.S. armed forces accused of crimes. The UCMJ is not typically used to prosecute civilians, even civilians performing traditionally military oriented tasks. Jurisdictional holes in using U.S. federal courts outlined above have prompted a recent amendment to U.S. law creating UCMJ jurisdiction over contractor conduct.

1. Constitutional Limitations on Military Jurisdiction

When MEJA was proposed, it was originally accompanied by legislative language that would have extended UCMJ jurisdiction over civilians engaged in contingency operations. It was passed over in part due to concerns over its constitutionality.

The ability of the federal government to expose civilians to criminal jurisdiction within military courts has proven controversial and uncertain. Current U.S. court precedent has argued that exposing civilians to court-martial proceedings may intrinsically violate a civilian defendant's constitutional rights, specifically those of the Fifth and Sixth Amendment of the U.S. Constitution guaranteeing due process and the right to a jury trial respectively. The Supreme Court established the presumption against applying military jurisdiction over civilians in peacetime (defined as a time with no declared war) in *Reid v. Covert*.⁹⁸ This precedent has been reinforced in other cases

⁹⁷ See generally, Rex Jacobson, *Doing Business with the Devil: The Challenges of Prosecuting Corporate Officials Whose Business Transactions Facilitate War Crimes and Crimes Against Humanity*, 56 A.F.L. 167 (2005).

⁹⁸ *Reid v. Covert*, 354 U.S. 1 (1957).

including the Supreme Court's decision of *Solorio v. United States*⁹⁹ in 1987 that ruled that UCMJ jurisdiction was limited to individuals possessing an official military status.

The specific rule underlying such claims is that the procedural rules and composition of court-martial jury would compromise a fair trial of a U.S. civilian.¹⁰⁰ For example, unlike in civilian criminal trials, a U.S. court-martial requires only a majority vote to convict rather than the unanimous verdict generally considered necessary in U.S. civilian court. The more general concern is that the make-up of and practices of a UCMJ trial are specifically designed to ensure justice in the hierarchical and particularities of military life, an aspect to which it is generally considered inappropriate to expose civilians.¹⁰¹

The facts that created this precedent, largely encompassed within the case of *Reid v. Covert*, are much different than that which surrounds the reality of civilian military contractors. The civilian convicted in *Reid* was the wife of a serviceman accused of murdering her husband abroad. While an international agreement conferred jurisdiction of such cases to military tribunals, the Court concluded that the defendant's civilian status precluded prosecution under the processes of military courts.

Further, the question of UCMJ jurisdiction over civilians has more modern analogues within the context of civilians detained at the U.S. Naval Station at Guantanamo Bay, Cuba. In *Hamdan v. Rumsfeld*, the Supreme Court rejected military tribunal jurisdiction over the Guantanamo civilian due to the unilateral nature of the President's tribunal order and the fact that the tribunals in question did not satisfy the "regularly constituted court" requirement set out in Common Article 3 of the Geneva Conventions and incorporated in the Uniform Code of Military Justice.¹⁰²

Several distinctions, of course, arise between the exposure of contractors to military jurisdiction and that of *Reid* and *Hamdan*. Unlike in *Reid*, contractors are often engaged in the same variety of military acts and responsibilities that are undertaken by regular soldiers. As such, the cultural divide between a serviceman's wife and a security contractor are not as stark. Unlike in *Hamdan*, a criminal prosecution under the UCMJ would appear to satisfy the "regularly constituted court" provision of the Geneva Conventions and even the more rigorous procedural protections encompassed in the Third and Fourth Geneva Conventions proper. Similarly, the extension of jurisdiction to contractors was passed through the Congress and, as a result, unilateral executive action is not a concern.

2. The Expansion of UCMJ Jurisdiction to Cover Contractors

In October 2006 the National Defense Authorization Act for Fiscal Year 2007¹⁰³ expanded UCMJ jurisdiction to cover civilians accompanying the military in the context

⁹⁹ *Solorio v. United States*, 483 U.S. 435, 107 S.Ct. 2924, 97 L.Ed.2d 365 (1987).

¹⁰⁰ *See Reid*, 354 U.S. at 3 (plurality opinion) (noting that the case involved "the power of Congress" - rather than the power of the President and Senate by treaty - "to expose civilians to trial by military tribunals, under military regulations and procedures, for offenses against the United States thereby depriving them of trial in civilian courts, under civilian laws and procedures and with all the safeguards of the Bill of Rights").

¹⁰¹ *See, e.g., Toth v. Quarles*, 350 U.S. 11 (1955). (noting "there are dangers lurking in military trials which were sought to be avoided by the Bill of Rights and Article III of our Constitution.").

¹⁰² 548 U.S. 557, 562 (2006).

¹⁰³ National Defense Authorization Act for Fiscal Year 2007 (Pub. L. 109-364).

of “contingency operations,” moving away from the requirement of declared war previously enshrined in the statutory regime. This new power has not been challenged yet, and, like MEJA has thus not yet proved its constitutional mettle. Further, the amendment is likely to exclude contractors not directly employed by the Department of Defense, thus excluding approximately a number of contractors currently employed in the Iraqi theater.

Implementing regulations of the expanded UCMJ jurisdiction over civilians were promulgated by Secretary of Defense Robert Gates and the Department of Defense on March 10, 2008 thus providing insight into how the new jurisdictional grant will be executed in practice.¹⁰⁴ The new regulations provide military commanders with the authority to “respond to an incident, restore safety and order, investigate, apprehend suspected offenders” in circumstances where a criminal act falling under the expanded UCMJ jurisdiction is suspected.¹⁰⁵ To date, few prosecutions have transpired under these new provisions, however, more are expected as the regulations age.¹⁰⁶

A coordinated response by military commanders with the Department of Justice is also explicitly addressed. The regulations require military officers to “notify responsible Department of Justice authorities, and afford DoJ the opportunity to pursue its prosecution of the case in federal district court.”¹⁰⁷ This coordination process is not intended to delay justice as, “[w]hile the DoJ notification and decision process is pending, commanders and military criminal investigators should continue to address the alleged crime” and that “military justice procedures that would be required in support of the exercise of UCMJ jurisdiction over civilians [should] continue to be accomplished during the concurrent DoJ notification process.”¹⁰⁸

Perhaps as a nod to the constitutional concerns enshrined in *Reid* and its progeny, the regulations indicate that “[b]ecause of the unique nature of [UCMJ] jurisdiction over civilians be based on military necessity to support an effective fighting force and be called for by circumstances that meet the interests of justice.”¹⁰⁹ These circumstances include, “when U.S. federal criminal jurisdiction does not apply or federal prosecution is not pursued, and/or when the person’s conduct is adverse to a significant military interest of the United States.”¹¹⁰

This dual consideration, explicitly considering the unwillingness of the Department of Justice to act as a force counseling UCMJ action is double-edged. On the one hand it indicates a limitation on military discretion, but also exposes a civilian to dueling prosecutorial interests that are not typically present for the civilian criminal defendant.

¹⁰⁴ MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS CHAIRMAN OF THE JOINT CHIEFS OF STAFF UNDER SECRETARIES OF DEFENSE COMMANDERS OF THE COMBATANT COMMANDS SUBJECT: UCMJ Jurisdiction Over DoD Civilian Employees, DoD Contractor Personnel, and Other Persons Serving With or Accompanying the Armed Forces Overseas During Declared War and in Contingency Operations, Washington, DC, March 10, 2008 (DoD March 10 Memo).

¹⁰⁵ *Id.* at 1.

¹⁰⁶ In June 2008, Alaa Mohammad Ali, a Canadian-Iraqi translator became the first contractor convicted through a UCMJ prosecution. *See First contractor convicted under US military law in Iraq*, WASH. POST, June 24, 2008.

¹⁰⁷ DoD March 10 Memo at 2.

¹⁰⁸ *Id.*

¹⁰⁹ DoD March 10 Memo, Attachment 3.

¹¹⁰ *Id.*

D. The Problem of the Law in Action

The execution of national regulations designed to provide punitive accountability for misdeeds by PMCs has been undercut by a deep institutional ambivalence as to which legal regime, civilian or military, is appropriate and required to ensure such accountability. The current ambivalence between these systems is fed by a belief that the civilian system is not properly incentivized nor specialized to ensure PMC accountability while the military system is excessively harsh and prejudiced in its judging of civilians straddling the military/private divide.

Civilian prosecutors and civilian judges have routinely demonstrated hesitancy in engaging in actions that could potentially invoke questions of foreign affairs, or worse, military affairs. Several commentators have remarked of this hesitancy in the context of the justiciability questions such as the political question doctrine. The root of the concern is not based in law as much as a deeply held sense that questions invoking foreign affairs lie outside the domain of civilian prosecution. The expansion in the number and roles of military contractors in the Iraq War corresponds with an initiative by the executive branch to lower the size of the active military and part of a larger preference for privatized actors within government. The reliance on contractors plays a significant role in the public's perception of the progress of the war in ways that are not necessarily obvious. The most watched statistics of the war are the number of American troops killed and wounded. Those numbers do not include contractors. Improprieties by military contractors can also largely be quarantined as a concern appropriately targeting the PMC in question rather than of military ethics of capabilities.

Military legal officers do possess a compelling incentive to charge and secure convictions of private contractors who engage in violations of law in theater. The most compelling incentive is that their government brethren bear the burden of the bitter feelings that trigger-happy contractors can engender. The civilian population largely fails to differentiate U.S. troops and U.S. contractors.

IV. Civil Liability for Contractors

Civil law provides another avenue for holding PMCs and their personnel (and PMC subcontractors and their personnel) accountable for their conduct overseas. The following section primarily addresses the numerous potential civil law claims for monetary compensation that can be brought against PMCs and their personnel, followed by a discussion of the potential defenses that can be raised in response to such claims.

This section covers cases where the focus of the law suit addresses the allegedly "bad" behavior, conduct, action, or inaction of PMCs and their personnel overseas in areas of armed conflict or overseas in circumstances involving U.S. military operations. Accordingly, the section includes law suits that are brought by a variety of plaintiffs: third-party bystanders and their survivors, members of the military and their survivors, PMC personnel and their survivors. There have been many more cases brought by the military and PMC personnel and their survivors, than have been brought by individuals who have no affiliation with the PMC or the military. There are very few cases and fewer court decisions involving the type of individuals widely envisioned to be the "victim" of military contractors' misdeeds, such as an Iraqi or Afghan civilian who is an innocent bystander, (*e.g.*, the infamous Blackwater shootout in Nisoor Square where numerous Iraqi civilians were killed). The claims and defenses raised in the former category of cases, however, are often same as those raised in the latter and are

instructive for that reason. Furthermore, any lawsuit against PMCs for monetary damages, regardless of the status of the plaintiff, serves to regulate their behavior directly and/or indirectly. This section will briefly address the claims and defenses. The Appendix to this Report sets forth a detailed annotation of the civil law cases.

Also included is a short discussion of the Foreign Claims Act (FCA), a statute that essentially provides monetary compensation by the federal government for harm suffered by the local civilian population in an area of armed conflict when the harm is caused by U.S. military forces. Though the compensation is paid by the U.S. government and not PMCs, discussion of this statute is informative insofar as FCA claims involving PMCs have been brought.

The Foreign Claims Act

The Foreign Claims Act (“FCA”)¹¹¹ was initially enacted toward the end of World War II as a means of promoting friendly relations between the United States and inhabitants of foreign countries. It has been amended numerous times since then, most recently in 1980. In essence, the FCA allows for the payment of money from U.S. government funds to inhabitants of foreign countries who have been caused injury to their person or property by U.S. armed forces overseas. The claims process is not a court proceeding but rather an administrative proceeding that occurs in the local area where the harm occurred. The claims are heard by a commission (Federal Claims Commission or “FCC”) and are made up of one to three members. Accordingly, the FCA is implemented by U.S. Army Regulations.¹¹² A payable claim under the FCA is “a claim for death, personal injury, or loss of or damage to property . . . if the alleged damage results from noncombat activity or a negligent or wrongful act or omission of Soldiers or civilian employees of the Armed Forces of the United States . . . regardless of whether the act or omission was made within the scope of their employment.”¹¹³ “Employees” includes non-U.S. citizen employees who were recruited elsewhere by employed in a country of which they are not a citizen but excludes non-U.S. citizen employees in the country in which they were recruited unless the act or omission was made in the scope of employment.¹¹⁴

The FCA exempts several types of claims, such as when the injury results from the negligent or wrongful act of the claimant or their agent, but the most significant and widely relied upon exemption covers injuries arising out of combat activities, which is defined as activity resulting directly or indirectly from enemy action, or alternatively as engagement in (or preparation for) armed conflict.¹¹⁵ Another provision used to deny claims with some frequency is that which exempts claims by nationals of the country at war with the U.S. unless the claims commission or local commander determines that the claimant is friendly to U.S. at the time of the incident.¹¹⁶

The monetary payout is somewhat limited—\$2500 per claim, or on rare occasion, \$50,000 if the claim is complex and decided by a 3-member FCC—and acceptance of payment constitutes full and final satisfaction and release of the U.S. and its employees from further liability arising out of incident. While local law is used to

¹¹¹ 10 U.S.C. §2734.

¹¹² Army Regulation (AR) 27-20, Ch. 10, Foreign Claims Act, effective 8 March 2008.

¹¹³ *Id.* at 10-3(a).

¹¹⁴ *Id.*

¹¹⁵ 10 U.S.C. §2734.

¹¹⁶ AR 27-20, 10-4(i).

determine which elements of damage are payable and which individuals are entitled to compensation, U.S. federal law determines whether the actor, who committed the negligent act or failed to act, is an employee of the U.S. Armed Forces for purposes of a payable claim under the FCA.¹¹⁷ “[C]ivilian officials and employees,” “civil service and other full-time employees” of the Department of Defense (DOD) and the Department of the Army (DA) are included, as well as “persons acting in an official capacity for the DOD or DA.”¹¹⁸

Though not explicitly exempted, the acts of employees or contractor personnel of private military companies under contract with the DOD or DA do not appear to be covered under the FCA. Indeed, while the U.S. Army paid out thirty-two million dollars in Iraq and Afghanistan between 2001 and 2007,¹¹⁹ only one case out of hundreds is described as a killing or injury by contractor personnel. The claim was brought by the wife of an Iraqi man who was allegedly shot and killed by a contractor. The claim was denied because “contractors are not governmental employees.”¹²⁰

Thus, the FCA is relevant to the discussion of PMCs to the degree that FCA claims relating to government contractors are of a nature and number that affect how the government ultimately handles its military contractors from both a contract and a regulatory perspective. Currently, the number of contractor-related FCA claims is too low to raise any concerns in this area. Of more significant interest is the position taken by government officials in the FCA claims process regarding the nature of the relationship between the DOD and PMCs and contractor personnel, which is particularly relevant to a PMC’s assertion of defenses in response to civil lawsuits.

A. Claims

There are essentially three categories of civil lawsuits involving PMCs and their personnel’s allegedly wrongful conduct, which occurs overseas: (1) suits brought by third-party civilians or their survivors against the PMC or its personnel; (2) suits brought by members of the military or their survivors against the PMC or its personnel; and (3) suits brought by the PMC employees or their survivors against the PMC. Though the public’s concern has focused primarily on the first category, the latter two categories make up the majority of lawsuits. There are, in fact, only two existing lawsuits that involve nationals of the country in which the PMC and its personnel were operating—the Blackwater “shootout” in Nisoor Square, Baghdad and the Abu Ghraib prison scandal involving private contractor interrogators and translators.

Typically, only the first category of plaintiff has raised an Alien Tort Statute (ATS) claim due to the restriction on who can bring such a claim, while all three categories have raised state common law claims based in tort. This section will address these two types of claims, discussing briefly some of the cases.

¹¹⁷ *Id.* at 2-2(b).

¹¹⁸ *Id.* Civilian employees of a “non-appropriated fund instrumentality” are also covered if the instrumentality is a federal agency. To determine whether an instrumentality is a federal agency, relevant factors are: whether it is an integral part of the Army and what degree of control and supervision DA personnel exercise over it.

¹¹⁹ This figure includes “solatia payments” which are payments in accordance with local custom as an expression of sympathy toward a victim or their family and are made from local operation and maintenance funds, not from the claims expenditure allowance. *Id.* at 10-11.

¹²⁰ See Documents released to American Civil Liberties Union in a Freedom of Information Act (FOIA) request available at www.aclu.org/natsec/foia/log.html.

1. Alien Tort Statute

The Alien Tort Statute has been used by the first category of plaintiffs, that is, non-U.S. citizens who have been injured or killed by the conduct of PMC personnel. The ATS is a federal statute which provides: “[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”¹²¹ In essence, the ATS is used by non-U.S. citizens to obtain monetary compensation for torts based on violations of international law. Though the ATS was enacted in 1789, it has only been widely used since 1980 after the Second Circuit ruled in *Filartiga v. Pena-Irala* that a non-U.S. citizen could sue another non-U.S. citizen in U.S. courts for torts that had occurred outside of the United States.¹²² For the next two decades, the lower courts (federal district and circuit courts) issued various and often contradictory holdings with respect to the ATS; in 2004, the Supreme Court, for the first time, addressed the ATS in *Sosa v. Alvarez-Machain*.¹²³

In *Sosa*, the Court put to rest the debate over whether the ATS is merely a jurisdictional statute or provides a cause of action for any violation of international law, holding that the ATS, though jurisdictional in nature, permits a non-U.S. citizen to bring claims limited to asserting violations which are “specific, universal, and obligatory” norm of international law. The Court found that ATS claims based on the present-day law of nations should “rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms” such as “violation of safe conducts, infringement of the rights of ambassadors, and piracy.” The Court found that the prohibition on arbitrary detention was not clearly defined such that it rose to the level of specificity, universality or obligation required, perhaps signaling a fairly strict standard for what could be construed as a violation of the law of nations. Though not particularly relevant to the case before it, the Court observed that the prohibitions on torture and extrajudicial killing, on the other hand, do meet such a standard and thus were of the type of claims that could be brought under the ATS.

Lower courts continue to grapple with the question of which types of torts fall within the ambit of an international norm violation, using the “specific, universal and obligatory” test as a guideline.¹²⁴ Whether an ATS suit can lie against a private actor or the defendant must have been a government official or agent (a public actor) at the time of the alleged tort is another area of differing opinions between the lower courts,¹²⁵

¹²¹ 28 U.S.C. §1350.

¹²² 630 F.2d 876, 890 (2d Cir. 1980).

¹²³ 124 S. Ct. 2739 (2004).

¹²⁴ *Mora v. New York*, 524 F.3d 183, 208 (2d Cir. 2008) (failure to inform a detained alien of his right to consular access under the Convention on Consular Relations was an arbitrary detention not specific enough to qualify as a violation of customary international law); *Vietnam Ass'n for Victims of Agent Orange v. Dow Chem. Co.*, 517 F.3d 104, 117–23 (2d Cir. 2008) (finding that there was a lack of consensus in the international community as to whether the use of a herbicide that harms humans is a banned poison); *Bigio v. Coca-Cola Co.*, 239 F.3d 440, 448 (2d Cir. 2000) (finding war crimes and genocide of universal concern); *Filartega v. Pena-Irala*, 630 F.2d 876, 880 (2d Cir. 1980) (finding that torture is violation of customary international law).

¹²⁵ *Kadic v. Karadzic*, 70 F.3d 232, 239 (2d Cir. 1995) (finding private actor could be sued under ATS); *Bowoto v. Chevron Corp.*, 557 F. Supp. 2d 1080, 1092 (N.D. Cal. 2008) (citing *Kadic*); *but see Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984) (finding that under D.C. Circuit law, the law of nations does not apply to private actors).

while the Supreme Court has not yet addressed the question. This issue will be discussed in more detail in the Appendix as it relates to ATS claims against PMCs.

It is no surprise then that the plaintiffs in *Saleh v. Titan*, *Ibrahim v. Titan* and *Atban v. Blackwater* brought claims under the ATS against the PMCs and their personnel for torture, extrajudicial killing, war crimes, crimes against humanity, and other international law violations.

The *Saleh* and *Ibrahim* (consolidated as *Ibrahim*) cases were brought by a number of Iraqi nationals, who had been detained and tortured in the Abu Ghraib prison in Iraq, against private civilian companies (Titan and CACI), that had provided linguists/translators and interrogators under contracts with the DOD. The ATS claims in these cases ultimately did not fare well as the D.C. District Court dismissed the ATS claims against both defendants, holding that under D.C. Circuit case precedent, ATS claims against private actors were not actionable.¹²⁶

Plaintiffs in the *Atban* case were Iraqi nationals, (and their survivors), who were injured or killed when employees of Blackwater, a private security company under contract with the Department of State, opened fire in Nisoor Square in Baghdad, Iraq, killing and injuring several bystanders. The Plaintiffs brought several international law claims under the ATS. The case is in its incipient stages and the court has issued no rulings of significance.

2. State Law Torts

Typically, plaintiffs who have alleged torts in violation of international law under the ATS also alleged torts in violation of domestic law based on the same conduct. Accordingly, the plaintiffs in *Ibrahim* and *Atban* brought claims alleging torts in violation of state law (often referred to as “state law tort claims” or “common law tort claims”), including but not limited to: assault and battery, wrongful death, wrongful imprisonment, intentional infliction of emotional distress, and negligence (including negligent infliction of emotional distress and negligent hiring, training and supervision). The state law tort claims have fared better in litigation involving PMCs, at least in the *Ibrahim* case, as the scope of who can be sued under state law tort theories is less restrictive.

The two other categories of plaintiffs mentioned above—(1) members of the military and their survivors and (2) contractor personnel and their survivors—have relied primarily, if not exclusively, upon state law tort claims to sue PMCs and their personnel. Typically, the PMC and contractor personnel are sued for their negligent acts or failure to act, and/or negligence in hiring, training and supervising, as is the case when the PMC is sued by an individual with whom it is not affiliated.

These latter two categories of cases involve members of the military (injured by PMC personnel while deployed in Iraq or Afghanistan), or their survivors (if the service member was killed), who sue the PMC personnel for his own negligent acts and sue the PMCs for negligent hiring, training and supervision of the personnel and for the negligent acts of the personnel under the *respondeat superior* doctrine, which essentially holds an employer liable for the employee’s torts if the act was expressly authorized by the employer or it occurred within the scope of the employee’s

¹²⁶ *Saleh v. Titan*, 436 F Supp2d 55 (D.D.C. 2006) and *Ibrahim v. Titan*, 391 F. Supp.2d 10 (D.D.C. 2005) (relying on *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984)).

employment. These cases also involve PMC personnel (injured while working in Iraq or Afghanistan), who sue their own PMC for fraud, misrepresentation, and negligence; survivors of PMC personnel (killed while working in Iraq or Afghanistan), who sue PMCs for wrongful death and negligence.

B. Defenses

There are a number of defenses a PMC can raise when facing claims under the Alien Tort Statute and state law tort theories. The defenses arise primarily due to the PMC's contractual relationship with the government—a public entity—and the location and circumstances in which that contract is serviced or fulfilled.

First, PMCs and their personnel are typically hired to work overseas in some fashion with or for U.S. military troops in locations where the military is engaged in active combat, in post-conflict military activity or both, such as in Iraq or Afghanistan. This factor raises substantial foreign affairs and military policy concerns, thus giving rise to a number of defenses potentially available to PMCs. Second, PMCs claim that because they are, in essence, effectuating government policies and decisions, or acting for or on behalf of the government, or are performing government-like functions, they should be entitled to the same immunities the government or government employees would be entitled to if sued for the same conduct.

1. The Political Question Doctrine

The political question doctrine is a judicially-created doctrine that prevents a court from taking jurisdiction over a claim because it is a “political question,” which cannot be answered by the judicial branch.¹²⁷ The political question doctrine protects the separation of powers of the three branches of government and prevents federal courts from overstepping their constitutionally defined role.¹²⁸ Political questions are deemed non-justiciable; therefore, a court can consider the merits to the degree necessary to determine whether the matter is inappropriate for judicial resolution.¹²⁹ In cases involving “foreign relations” and “military affairs,” the political question doctrine is almost always raised by the defendant in attempt to have the case dismissed for lack of jurisdiction. And courts can be rather reluctant to intervene in such matters, particularly during wartime.¹³⁰

In recent cases involving PMCs and contractor personnel who are working overseas with the U.S. military in Iraq or Afghanistan, PMCs have raised the political question doctrine as a means of avoiding liability. Indeed, the doctrine has been

¹²⁷ *Marbury v. Madison*, 5 U.S. 137, 170 (1803) (“questions, in their nature political . . . can never be made in this court”).

¹²⁸ *Baker v. Carr*, 369 U.S. 186, 210 (1962) (“The nonjusticiability of a political question is primarily a function of the separation of powers.”)

¹²⁹ *Id.* at 198.

¹³⁰ *See, e.g., Gilligan v. Morgan*, 413 U.S. 1, 10 (1973) (claim regarding acts of Ohio National Guard was political question); *Atkepe v. United States*, 105 F.3d 1400, 1403 (11th Cir. 1997) (claim raising negligence by Navy was political question); *Atkepe v. United States*, 925 F.Supp. 731, 736 (M.D. Fla. 1996) (“generally, all cases involving foreign affairs potentially raise nonjusticiable political questions”); *Occidental of Umn al Qaywaayn, Inc. v. A Certain Cargo of Petroleum*, 577 F.2d 1196, 1203 (5th Cir. 1978) (claim raising foreign relations generally beyond authority of court’s adjudicative powers).

implicated in almost every case surveyed for this Report.¹³¹ In the relevant PMC cases, the preliminary issue of whether the status of defendant as a *private* corporation prevents the defendant from raising the political question doctrine to bar suit has had varied treatment by the courts. Some courts have found that the defendant's status has little relevance to whether a claim raises a political question, noting the Supreme Court's dictate: "[T]he identity of the litigant is immaterial to the presence of [political question] concerns in a particular case."¹³² One court, on the other hand, discussed at length the fact that the defendant PMC was a private defendant, stating that the doctrine "has almost never been applied to suits involving private defendants."¹³³ Another court, in comparing cases dismissed on political question grounds to the one before it in which PMCs were sued for their part in the torture and abuse at Abu Ghraib, noted that those cases involved the United States itself as the defendant, while in the instant case, plaintiffs were suing *private* parties for actions of a type that violate clear United States policy.¹³⁴

In analyzing the issue, courts typically look to the factors set forth by the Supreme Court in *Baker v. Carr*: (1) a textually demonstrable constitutional commitment of the issue to a coordinate political department; or (2) a lack of judicially discoverable and manageable standards for resolving it; or (3) the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or (4) the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or (5) an unusual need for unquestioning adherence to a political decision already made; or (6) the potentiality of embarrassment from multifarious pronouncements by various departments on one question.¹³⁵ Only one of these factors need be "inextricable from the case at bar" to implicate the political question doctrine.

In the relevant PMC cases, courts that have dismissed claims on the basis of the political question doctrine have looked to the contract between the PMC and the governmental department or agency (such as DoD) in order to determine whether and to what extent the military was supervising or had control over the actions of the PMC employees. These courts have concluded essentially that taking jurisdiction would have required the court to decide a question that the Constitution intended to be left to the legislative or executive branches, or that the court would have to substitute its judgment for that of the military, and as such would have evinced a lack of respect for the political branches.¹³⁶ Courts that have refused to dismiss claims on the basis of the political question doctrine have largely relied on the first two *Baker* factors, finding that hearing

¹³¹ *Lane v. Halliburton*, 529 F.3d 548 (5th Cir. 2008); *McMahon v. Presidential Airways*, 502 F.3d 1331 (11th Cir. 2007); *Carmichael v. Kellogg Brown & Root*, 564 F.Supp.2d 1363 (N.D. Ga. 2008); *Getz v. Boeing Co.*, 2008 WL 2705099 (N.D. Cal. 2008); *Potts v Dyncorp Int'l LLC*, 465 F.Supp.2d 1245 (M.D. Ala. 2006); *Smith v. Halliburton*, 2006 WL 2521326 (S.D. Tex. 2006); *Whitaker v. Kellogg Brown & Root*, 444 F.Supp.2d 1277 (M.D. Ga. 2006); *Lessin v. Kellogg Brown & Root*, 2006 WL 3940556 (S.D. Tex. 2006); *Ibrahim v. Titan*, 391 F.Supp.2d 10 (D.D.C. 2005).

¹³² *United States v. Munoz-Flores*, 495 U.S. 385, 394 (1990).

¹³³ *McMahon v. Presidential Airways, Inc.*, 460 F.Supp.2d 1315, 1319 (M.D. Fla. 2006), *aff'd*, *McMahon*, 502 F.3d. 1331.

¹³⁴ *Ibrahim*, 391 F.Supp.2d at 16.

¹³⁵ *Baker*, 369 U.S. at 217.

¹³⁶ *Carmichael*, 564 F.Supp.2d at 1372; *Lane v. Halliburton*, 2006 WL 2796249, *1 (S.D. Tex. 2006), *rev'd and remanded*, *Lane v. Halliburton*, 529 F.3d at 563; *Smith*, 2006 WL 2521326 at *6; *Whitaker*, 444 F.Supp.2d at 1281.

the claim would not require judicial examination of military policy or military decision-making and/or finding that there does exist judicially discoverable and manageable standards for resolving such claims, which, in these cases, are governed by simple negligence standards.¹³⁷

2. Defenses Relating to the Federal Tort Claims Act (FTCA)

a. Introduction

As mentioned above, when faced with claims for monetary damages, PMCs have raised defenses that are grounded in their contractual relationship with the government, which is generally immune from suit. Under a judicially-created doctrine, the government is entitled to sovereign immunity, unless specifically waived. Pursuant to the Federal Tort Claims Act (FTCA), the government waives its sovereign immunity for personal injury caused by the negligent acts or omissions of its employees who are acting within the scope of their employment.¹³⁸ There are, however, several exceptions, which, most relevant to the Report, include the “discretionary function,” “combatant activities,” and “foreign country” exceptions.¹³⁹ Additionally, under the Westfall Act, government employees are not liable for torts committed within the scope of their employment, making an FTCA claim against the government the exclusive remedy for such torts, and, therefore, subject to the same exceptions.¹⁴⁰ Thus, a person injured by the negligence of a government employee has a very limited remedy for obtaining compensatory monetary damages and is often barred altogether given the number of exceptions present in the FTCA.

Under the statutory terms of the FTCA, however, government contractors are not considered “government employees” and, therefore, are not statutorily entitled to the same immunities.¹⁴¹ Accordingly, in attempt to limit their liability for the negligence of their employees, PMCs typically raise FTCA-related exceptions not as “government employees” but rather under the same principles of immunity to which the government is entitled with respect to these exceptions. As this Report will demonstrate, case law has developed in such a way as to make FTCA-related exceptions available as affirmative defenses to PMCs.

In many cases involving a FTCA defense, courts seem to resort to utilizing the policy underlying the political question doctrine for analyzing whether FTCA-related defenses bar the claims. In other words, courts have looked at the degree of control the military had over the contractor and whether reviewing the claim would involve passing upon military policy, judgments and decision-making, which is essentially what courts examine in determining whether a claim involves a political question.

¹³⁷ *Halliburton*, 529 F. 3d at 560; *McMahon*, 502 F.3d at 1363-64; Potts, 465 F.Supp.2d at 1249-53; *Lessin*, 2006 WL 3940556 at *3.

¹³⁸ 28 U.S.C. §1346, §2671-2680.

¹³⁹ 28 U.S.C. §2680.

¹⁴⁰ 28 U.S.C. §2679.

¹⁴¹ 28 U.S.C §2671 (“employee of the government” includes persons acting on behalf of any “federal agency,” which includes “corporations primarily acting as instrumentalities or agencies of the United States, but does not include any contractor with the United States.”).

b. The General Contractor Defense (GCD)

i. Introduction

The General Contractor Defense (GCD), sometimes referred to as the Military Contractor Defense (MCD) when DOD contractors are involved, initially arose out of the “discretionary function” exception of the FTCA and, as such, was an unknown and infrequently-used defense. Yet, the marked increase in the use of PMCs in Iraq and Afghanistan has resulted in a growing number of civil lawsuits against PMCs, which has turned the GCD into a frequently-raised defense in PMC litigation and the topic of voluminous scholarship. This has resulted in confusing and sometimes contradictory treatment of the GCD by courts and scholars.

In brief, there are two approaches to the GCD and other FTCA-related defenses. Many scholars, (and some courts), tend to identify almost any PMC-raised defense (excluding the political question doctrine) as a GCD, or as an expansion upon the traditional GCD. Other courts tend to simply analyze each PMC defense on its own terms with little regard to whether it is a traditional GCD or an expansion. Accordingly, this Report will follow the latter approach and provide a brief synopsis of each FTCA-related defense on its own merits.

ii. The GCD (the Boyle Doctrine)

Pursuant to a circuit court split, the General Contractor Defense was crystallized by the Supreme Court in *Boyle v. United Technologies Corp.*¹⁴² *Boyle* was a products liability suit brought by the estate of a Marine helicopter pilot who had drowned when his helicopter crashed and the pilot was unable to escape. The plaintiff, alleging design defects, sued the helicopter’s manufacturer, which had been supplying helicopters and equipment under contract to the government. As a preliminary matter, the Court determined that “uniquely federal interests” were at stake and that application of state law liability theories presented a “significant conflict” with federal policies or interests.¹⁴³ The Supreme Court looked to the “discretionary function” exception in the FTCA, which maintains the government’s sovereign immunity for claims based upon “the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or employee of the Government, whether or not the discretion involved by abused.”¹⁴⁴ The Court reasoned that if the helicopter’s design was a result of discretionary government policy decisions, liability of the private contractor, who was merely executing such decisions, should not be permitted.¹⁴⁵

The Court then went on to state the conditions necessary to preempt state tort law liability claims against government contractors concerning design defects: (1) the United States established, approved, reasonably precise specifications for the allegedly defective military equipment; (2) the equipment conformed to those specifications; and (3) the contractor/supplier warned the United States about the dangers involved in use of equipment that were known to supplier but not to the United States.¹⁴⁶ Thus, under

¹⁴² 487 U.S. 500 (1988).

¹⁴³ *Id.* at 504-13.

¹⁴⁴ 28 U.S.C. §2680(a).

¹⁴⁵ *Boyle*, 487 U.S. at 511-12.

¹⁴⁶ *Id.* at 512.

Boyle, government contractors who *design and manufacture* military equipment are typically not liable to individuals injured by such equipment under the GCD or MCD.¹⁴⁷

It was only recently, in 2003, when the GCD was applied to immunize a government contractor, which was providing a *service*. In *Hudgens v. Bell*, the Eleventh Circuit held that the GCD recognized in *Boyle* was applicable to a government contractor that had maintained helicopters for the Army and who had been sued by individuals injured when the helicopter crashed, claiming the helicopters had been negligently maintained. The plaintiff had argued that the defense applied only to design defects but the court found otherwise.¹⁴⁸ The court, though recognizing that *Boyle* had applied to procurement contracts, looked at the whether subjecting a contractor to liability under state tort law would create a significant conflict with a unique federal interest and finding it so, concluded that the GCD was applicable to the service contract between DynCorp and the government.¹⁴⁹

Hudgens set precedent for the *Boyle* doctrine and its “discretionary function” approach (which was only one part of the analysis) to apply in cases of service contracts, such as those at issue in the cases involving Blackwater (security services contractors), Titan and CACI (interpreter and interrogation services contractors at Abu Ghraib prison), and other contractors providing services to the government in Iraq and Afghanistan.¹⁵⁰ And, indeed, *Hudgens* was relied upon, in part, to dismiss certain claims against Titan.

c. The Combatant Activities Exception

The “combatant activities” (CA) exception under the FTCA allows the government to maintain its sovereign immunity for “any claim arising out of the combatant activities of the military or naval forces, or Coast Guard during time of war.”¹⁵¹ Like the political question doctrine, this exception has been raised as a defense by almost every PMC sued for the negligent acts of its personnel in Iraq and Afghanistan.¹⁵² Because the suit is against the PMC, not the government, and a PMC is not a government employee or entity under the FTCA, nor does the exception apply directly to PMCs, the combatant-activities exception defense, as applied to contractors, is actually one based on the principle of preemption, as was used in *Boyle*.

¹⁴⁷ See, e.g., *Baily v. McDonnell Douglas Corp.*, 989 F.2d 794, 801 (5th Cir. 1993) and failure to warn cases, *in re Joint E&S Dist. NY Asbestos Litig.* 897 F.2d 626 (2d Cir. 1990).

¹⁴⁸ 328 F.3d 1329, 1334 (11th Cir. 2003).

¹⁴⁹ *Id.*

¹⁵⁰ In *McMahon v. Presidential Airways*, a case involving government contractors that provided air transportation and operation support services to DoD in Afghanistan, the GCD under *Boyle* and *Hudgens* was relied upon by the court to extent it was a “colorable defense” for purposes of removal from state to federal court. 410 F.Supp.2d 1189, 1197-98 (M.D. Fla. 2006).

¹⁵¹ 28 U.S.C. §2680(j).

¹⁵² *Fisher v. Halliburton et al.*, 390 F.Supp.2d610 (S.D. Tex. 2005); *Lane v. Halliburton*, 2006 WL 27 96249 (S.D. Tex. 2006); consolidated as *Lane v. Halliburton et al.*, 529 F.3d 548 (5th Cir 2008); *McMahon v. Presidential Airways, Inc.*, 410 F.Supp.2d 1189 (M.D. Fla. 2006); 460 F.Supp.2d 1315 (M.D. Fla. 2006); 502 F.3d 1331 (11th Cir. 2007); *Carmichael v. Kellog Brown & Root Services, Inc.*, 564 F.Supp.2d 1363 (N.D. Ga. 2008); *Saleh v. Titan*, 436 F.Supp.2d 55 (D.D.C. 2006) and *Ibrahim v. Titan*, 391 F.Supp.2d 10 (D.D.C. 2005); consolidated as *Ibrahim v. Titan Corp.*, 556 F.Supp.2d 1 (D.D.C. 2007); *Smith v. Halliburton Co. et al.*, 2006 WL 252 1326 (S.D. Tex. 2006); *Whitaker v. Kellog Brown & Root, Inc.*, 444 F.Supp.2d 1277 (M.D. Ga. 2006); *Lessin v. Kellog Brown & Root*, 2006 3940556 (S.D. Tex. 2006).

Two cases, *Koohi v. United States* and *Bentzlin v. Hughes Aircraft Co.*, set the stage for the frequent use of the CA exception defense in recent PMC litigation. In *Koohi*, the Ninth Circuit examined the applicability of the CA exception in the context of claims against the United States for the negligent operation of a U.S. warship and claims against the weapons manufacturer for design defects.¹⁵³ The plaintiffs were heirs of civilian passengers who died during an accidental shooting of a passenger aircraft during the “tanker war” hostilities between Iran and Iraq in the 1980s. The court found there was no doubt that the “tanker war” constituted a “time of war” for purposes of the CA exception.¹⁵⁴ The court reasoned that the action was preempted by the exception even as to the defense contractors because “one purpose of the combatant activities exception is to recognize that during wartime encounters no duty of reasonable care is owed to those against whom force is directed as a result of authorized military action.”¹⁵⁵

After *Koohi*, it was but a short step to finding that claims against a PMC for manufacturing defective missiles that killed marines during Operation Desert Storm were preempted by the CA exception, as in *Bentzlin*.¹⁵⁶ There, the court relied both on the preemptive principle put forth in *Boyle* and the combatant exception raised in *Koohi* to immunize government contractors from liability: “the federal interest in controlling military policy in war” preempted state law tort claims.¹⁵⁷ Despite the seemingly expansive application to PMCs in *Koohi* and *Bentzlin* and the regularity with which PMC have raised the CA exception in recent litigation, the majority of courts have been reluctant to limit liability against PMCs on the basis of this exception, relying more on the political question doctrine as a basis for limiting liability. The only case, thus far, in which the court dismissed claims against a PMC on the basis of the CA exception is that involving Titan and CACI (the linguist and interrogator contractors at the Abu Ghraib prison).¹⁵⁸

d. The *Feres* Doctrine

The *Feres* Doctrine is a judicially-created exception to the government’s waiver of sovereign immunity under the FTCA for state law torts. The *Feres* Doctrine was created by the Supreme Court and stands for the proposition that members of the armed forces are barred from bringing suit against the government for injuries that “arise out of or are in the course of activity incident to [military] service.”¹⁵⁹ As a result, soldiers may not recover for their service-related injuries in tort suits against the government, even if the tort suit is not barred by an explicit exception to the FTCA. The meaning of “incident to service” has been a matter of much dispute, but it is clear that it operates broadly to bar most tort claims that arise in the course of a soldier’s duties, whether in peacetime or wartime, in combat or on a base.¹⁶⁰ As applicable to PMCs, however, the Supreme Court in *Boyle* rejected the *Feres* Doctrine as a basis for a governmental

¹⁵³ 976 F.2d 1328 (9th Cir. 1992).

¹⁵⁴ *Id.* at 1335.

¹⁵⁵ *Id.* at 1137.

¹⁵⁶ 833 F.Supp. 1486 (C.D. Cal. 1993).

¹⁵⁷ *Id.* at 1493.

¹⁵⁸ *Ibrahim v. Titan Corp.*, 556 F.Supp.2d 1 (D.D.C. 2007).

¹⁵⁹ *Feres v. United States*, 340 U.S. 135, 146 (1950).

¹⁶⁰ *See., e.g., Feres*, 340 U.S. at 137; *Jimenez v. United States*, 158 F.3d 1228, 1229 (11th Cir. 1998).

contractor defense, stating that it would be “in some respects too broad and in some respect too narrow.”¹⁶¹

Only one PMC defendant in recent litigation has raised the *Feres* Doctrine as a defense. In *McMahon v. Presidential Airways, Inc.*, survivors of soldiers who were killed when the airplane they were in crashed in Afghanistan brought suit against the contractors that provided air transportation and operation support services to DOD. Citing *Boyle* and engaging in its own lengthy examination, the Eleventh Circuit held that private contractors for the military are not entitled to immunity under the *Feres* Doctrine.¹⁶²

e. Foreign Country Exception

The FTCA also provides that the government does not waive its sovereign immunity for “[a]ny claim arising in a foreign country.”¹⁶³ The only PMC case to expound upon this exception is *McMahon v. Presidential Airways*, which the court was considering the exception in the context of whether the contractor had a “colorable defense” to support removal from state to federal court.¹⁶⁴ There the court declined to find that the “foreign country” exception was a colorable defense because the purpose of the exception is to protect the government from being subjected to the laws of a foreign jurisdiction.¹⁶⁵ To date, no other PMCs have raised this exception, perhaps due to the clear rationale underlying the exception.

3. The Defense Base Act

The Defense Base Act (DBA) is a federal statute that essentially limits a contractor company’s liability to its employees who are performing work for the military overseas. The DBA provides that the “liability of an employer . . . under this chapter shall be exclusive and in place of all other liability of such employer . . . to his employees (and their dependents) coming within the purview of this chapter . . .”¹⁶⁶ The DBA provides an employee’s exclusive remedy if the employee is engaged in employment outside the United States and under a contract between his employer and the United States for the purpose of engaging in public work, including contracts and project in connection with national defense and war activities where the employee suffered an injury within the course and scope of his employment.¹⁶⁷

In the context of relevant PMC litigation, the DBA is only available as a defense to PMC employers who are sued by their employees for PMC employers’ negligent or fraudulent acts, such as in the case of *Fisher v. Halliburton* and *Nordan v. Blackwater*.¹⁶⁸ A narrow exception to the DBA’s exclusivity provision applies where the employer acts with specific intent to injure the employee. In *Fisher*, the plaintiffs had alleged that the defendants knew and intended that plaintiffs would be attacked by

¹⁶¹ *Boyle*, 487 U.S. at 510.

¹⁶² *McMahon v. Presidential Airways, Inc.*, 502 F.3d 1331, 1356 (11th Cir. 2007).

¹⁶³ 28 U.S.C. § 2680(k).

¹⁶⁴ 410 F. Supp.2d 1189, 1199 (M.D. Fla. 2006).

¹⁶⁵ *Id.*

¹⁶⁶ 42 U.S.C. § 1651(c).

¹⁶⁷ *Fisher v. Halliburton*, 390 F.Supp.2d 610, 613 (S.D. Tex. 2005).

¹⁶⁸ *Id.*; 382 F.Supp.2d 801 (E.D.N.C. 2005).

enemy insurgents and the basis of such allegations, the court refused to dismiss the Halliburton's claims on the basis of the DBA.¹⁶⁹

CONCLUSION

The growth of the private military industry in the United States was sparked, in part, by unanticipated military needs in Iraq and subsequently met by a civilian and military legal regime that itself was underdeveloped in its specificity. The necessity to create a more robust accountability regime has, in turn, given birth to a host of alterations to applicable civil and criminal liability laws that have yet to be fully tested.

The course of the U.S. regulatory regime over the use of PMCs and contractor personnel appears far from complete. Despite the internal effort by agencies like the Department of Defense and Department of State discussed above to remedy perceived problems with the use and oversight of military contractors, several legislative initiatives are currently percolating that could further affect the operation of contractors in the field in the very near future.

Legislation introduced in the U.S. Senate in August 2008 entitled the "Restoring America's Integrity Act" (RAIA) prohibits contractors from engaging in interrogation. Announcing the legislation, Senator Diane Feinstein stated that, "I also believe that the use of contractors leads to more brutal interrogations than if they were done by Government employees."¹⁷⁰ Senator Hillary Clinton has attempted to draw the regulatory circle closer by proposing, through legislation, that contractors that had violated criminal laws would be barred from obtaining federal contracts.¹⁷¹

On the House of Representatives side, Congressman Jan Schakowsky recently introduced legislation designed to eliminate the use of contractors considered particularly problematic over the course of the Iraq War, in particular, Blackwater.¹⁷²

The final push for additional legislation affecting contractor accountability and regulation may also get a push following the inauguration of President-elect Obama in January 2009. As a Senator, Obama introduced legislation, the Security Contractor Accountability Act of 2007, which would grant U.S. federal courts jurisdiction to prosecute contractors of all U.S. agencies operating near a conflict area.¹⁷³ The legislation would also establish a special unit from the DOJ to investigate allegations of the use of unlawful force by contractors and create new reporting requirements on the DOJ providing disclosure as to how such allegations are being disposed of.

The ultimate passage of these different legislative initiatives is unclear. Regardless of the disposition of any particular piece of legislation, the final contours of the regulation of contractors remain an open question.

¹⁶⁹ *Fisher*, 390 F.Supp.2d at 613-14.

¹⁷⁰ Congressional Record: August 1, 2008 (Senate), Statements on Introduced Bills and Joint Resolutions, p. S8044-S8045.

¹⁷¹ U.S. Federal News, "Senator Clinton Presses for Greater Accountability, Oversight for Iraq Reconstruction Contracts," July 16, 2008.

¹⁷² Philip Ewing, *Blackwater plans private navy*, NAVY TIMES, July 21, 2008, p. 10.

¹⁷³ Security Contractor Accountability Act of 2007 (S. 2147) (2007).

APPENDIX

This Appendix contains a comprehensive list of cases with annotations, which are civil suits for monetary damages against PMCs and their contractor personnel for injury or death caused by the negligence of the personnel, the PMC in hiring the personnel, or in some cases, fraud on the part of the PMC. This Appendix is organized by types of claims brought by plaintiffs, which is further subdivided into categories of plaintiffs, and types of defenses raised by PMCs.

I. CLAIMS

A. Alien Tort Statute

Saleh v. Titan, 436 F.Supp.2d 55 (D.D.C. 2006) and *Ibrahim v. Titan*, 391 F.Supp.2d 10 (D.D.C. 2005); consolidated as *Ibrahim v. Titan Corp.*, 556 F.Supp.2d 1 (D.D.C. 2007).

Plaintiffs were Iraqi nationals who were detained in Abu Ghraib prison and the spouses of deceased Abu Ghraib detainees. They brought claims against PMCs who provided interpreters (Titan) and interrogators (CACI). Plaintiffs asserted that the defendants and/or their agents tortured them by beating them, depriving them of food and water, subjecting them to long periods of excessive noise, forcing them to be naked for prolonged periods, holding a piston to the head of one of them and pulling the trigger, threatening to attack them with dogs, exposing them to cold, urinating on them, depriving them of sleep, making them listen to loud music, photographing them while naked, forcing them to witness the abuse of other prisoners, including rape, sexual abuse, beatings, electrocution, withholding food, forbidding prayer, ridiculing them for their religious beliefs, and other acts.

On the basis of such facts, the plaintiffs alleged several violations of the law of nations under the ATS (torture, summary execution, cruel, inhuman, and degrading treatment, enforced disappearance, arbitrary detention, war crimes, crimes against humanity), and state law tort claims (assault and battery, wrongful death and survival, intentional infliction of emotional distress, negligence, false imprisonment and conversion).¹⁷⁴ Judge Robertson dismissed the ATS claims against both Titan and CACI finding that the law of nations does not apply to private actors.¹⁷⁵

Atban, et al. v. Blackwater Lodge and Training Center, Inc., et al. (1:07-cv-1831 (RBW))

This case was brought by Iraqi nationals, who were injured, and families of Iraqi nationals who were killed, when heavily armed employees of Blackwater opened fire in Nisoor Square, Baghdad, Iraq on September 16, 2007, killing 17 civilians and injuring at least 24 others. The plaintiffs brought claims under the ATS (war crimes) and state law tort claims (assault and battery, wrongful death, intentional infliction of emotional distress, negligent infliction of emotional distress, and negligent hiring, training and supervision). The case is currently before Judge Walton in the D.C. District Court. Plaintiffs have lodged a second amended complaint and a motion to file a third amended complaint is pending.

¹⁷⁴ Plaintiffs also brought claims under the Racketeer Influenced and Corrupt Organizations Act but these claims were dismissed out of hand on the basis of plaintiffs' lack of standing. No other PMC case has raised a RICO claim.

¹⁷⁵ 436 F.Supp.2d 55, 57-58 (D.D.C. 2006); 391 F.Supp.2d 10, 13-14 (D.D.C. 2005).

B. State Law Torts

Every case brought against a PMC regardless of the status of the plaintiff alleges state law tort claims, which carry fewer restrictions on who can sue and who can be sued. Claims brought by third-party bystanders, such as in the two cases above, include: assault and battery, wrongful death, wrongful imprisonment, conversion, intentional infliction of emotional distress, and negligence (including negligent infliction of emotional distress and negligent hiring, training, and supervision). Claims brought by members of the military or their survivors are similar and include: wrongful death and negligence (hiring, training, and supervision). Claims brought by PMC employees against their PMC employers include similar wrongful death and negligence claims with additional claims of fraud and misrepresentation.

Though every state law varies to some degree with respect to required elements, the relevant tort claims are generally defined as follows:

Assault: Acting intentionally and voluntarily to cause the reasonable apprehension of an immediate harmful or offensive contact.

Battery: Acting intentionally and voluntarily to bring about an unconsented harmful or offensive contact with a person or to something closely associated with them (e.g. a hat, a purse). It is a form of trespass to the person and unlike assault, battery requires an actual contact.

Wrongful death: A death caused in whole or in part by defendant's conduct, though defendant did not intend to kill the victim. Defendant must have been negligent or strictly liable for victim's death and deceased has family members who have suffered on account of death.

Wrongful (or false) imprisonment: The wrongful physical confinement of an individual. This is not restricted to physical confinement but includes any limitation of another's freedom of movement without legal justification. Actual physical contact is not necessary; a show of authority or a threat of force is sufficient.

Conversion: An intentional tort to personal property where defendant's unjustified willful interference with the property deprives plaintiff of possession of such property. Plaintiff must have actual possession or an immediate right to possession at the time of the wrong.

Intentional infliction of emotional distress: Intentional conduct that results in extreme emotional distress. The defendant acted intentionally or recklessly, the conduct was extreme and outrageous, the act caused distress, and plaintiff suffered severe emotional distress as a result of defendant's conduct.

Negligence: Liability for conduct that falls short of what a reasonable person would do to protect another from foreseeable harm. The plaintiff must prove that defendant owed the plaintiff a duty of care, that the duty was breached, that the plaintiff suffered an injury and the injury resulted from the breach. In order for the duty to exist, the injury to the plaintiff must be foreseeable.

Negligent hiring, training and supervision: Employer is held liable for negligence of an employee because that employer negligently provided the employee with the ability to engage in an act, and an injury resulted because of the employee's act. The plaintiff must prove that the employer owed a duty of care to the plaintiff; that this duty was breached; that the plaintiff suffered an injury; and that the injury resulted from the breach. In order for a duty to exist, the injury to the plaintiff must be foreseeable,

meaning that the type of employment must be one where an unfit employee can cause harm, and that the plaintiff is the type of party to whom such harm might be caused.

Fraud and misrepresentation: Deception for personal gain or profit. A statement of fact made by one party to another party, which has the effect of inducing that party into the contract.

1. State law tort claims brought by third-party bystanders

Saleh v. Titan, 436 F.Supp.2d 55 (D.D.C. 2006) and *Ibrahim v. Titan*, 391 F.Supp.2d 10 (D.D.C. 2005); consolidated as *Ibrahim v. Titan Corp.*, 556 F.Supp.2d 1 (D.D.C. 2007).

See above for full description of case. Judge Robertson dismissed the tort claims for false imprisonment and conversion, finding that plaintiffs' allegations did not support such claims against defendant government contractors, rather those allegations implicated the U.S. military. The claims for assault and battery, wrongful death and survival, intentional infliction of emotional distress, and all of the negligence claims ultimately survived against CACI, but not Titan, against whom all tort claims were dismissed on the basis of defenses raised, which will be discussed below.

Atban, et al. v. Blackwater Lodge and Training Center, Inc., et al. (1:07-cv-1831 (RBW))

See above for full description of case.

Potts v. Dyncorp International LLC, 465 F.Supp.2d 1245 (M.D. Ala. 2006)

Plaintiff was an employee of the PMC, Worldwide Network Service, and was a passenger in a convoy coordinated and directed by another PMC, Dyncorp, under its contract with the CPA (Coalition Provisional Authority).¹⁷⁶ An employee of Dyncorp was driving the truck, in which plaintiff rode, at high speeds. The truck overturned, seriously injuring plaintiff, who sued Dyncorp for negligence and wantonness, including negligent hiring, training and/or supervision of its employee. The court denied defendant Dyncorp's motion to dismiss on the basis of the political question doctrine.

2. State law tort claims brought by members of the military or their survivors

McMahon v. Presidential Airways, Inc., 410 F.Supp.2d 1189 (M.D. Fla. 2006); 460 F.Supp.2d 1315 (M.D. Fla. 2006); 502 F.3d 1331 (11th Cir. 2007)

Plaintiffs were survivors of three U.S. soldiers who died when the airplane that was transporting them crashed into side of mountain in Afghanistan. The plane was owned and operated by defendant Presidential Airways who had a contract with DoD to provide air transportation and other support services in aid of the military mission. Under the contract, Presidential Airways would furnish the aircraft, personnel, maintenance and supervision necessary to perform short take off and landing passenger, cargo, or passenger and cargo air transportation services between various locations in Afghanistan, Uzbekistan, and Pakistan. DoD would direct what missions would be flown, when they would be flown and what passengers and cargo would be carried. Plaintiffs brought a wrongful death claim and negligence claims, *i.e.* that Presidential

¹⁷⁶ The contract—to provide security services for civilians in rebuilding of Iraq—was later transferred from the CPA to the U.S. Project and Contracting Office operated by DoD and under authority of the Department of State.

negligently hired and trained the flight crew, negligently assigned the flight crew, negligently planned the route, negligently equipped the aircraft and otherwise negligently operated the aircraft. Plaintiffs did not allege that combat activities in Afghanistan had anything to do with the plane crash. Defendant Presidential asserted that the political question doctrine barred the suit, that it was entitled to immunity under the *Feres* Doctrine, and that plaintiffs' claims were preempted by the Combatant Activities exception. The district court denied Presidential's motion to dismiss on all three grounds and the Eleventh Circuit affirmed.

Carmichael v. Kellogg Brown & Root Services, Inc., 564 F.Supp.2d 1363 (N.D. Ga. 2008)

Plaintiff was the wife of a soldier who was serving as a military escort for a convoy of trucks operated by KBR and Halliburton in Iraq. The soldier was a passenger in a tractor-trailer driven by an employee of both PMC defendants. The PMC employee lost control of truck which overturned, severely injuring the soldier. Plaintiff sued the PMC employee for his negligence in operating the tractor-trailer and failing to properly inspect the equipment. Plaintiff also sued the PMCs under *respondeat superior* for the negligence of their employee and for their own negligence in hiring, training and supervising their employee. The district court dismissed the claims on grounds of the political questions doctrine.

Getz v. Boeing Co., 2008 WL 2705099 (N.D. Cal. 2008)

Plaintiffs were members of the military members and survivors of military who were on a helicopter that crashed in the Zabul Province in Afghanistan. All individuals aboard the helicopter were service personnel and were returning from a cancelled mission to drop off personnel to "capture/kill someone in the al-Qaeda network." The helicopters were designed, assembled, manufactured, inspected, tested, marketed and sold the helicopter, its component parts and related software and hardware to the U.S. government. Plaintiffs brought claims of wrongful death, negligence, breach of express and implied warranty and strict product liability claims. The court denied defendant PMCs' motion to dismiss on grounds of the political question doctrine.

Smith v. Halliburton Co. et al., 2006 WL 252 1326 (S.D. Tex. 2006)

Plaintiffs were survivors of members of the military who were killed when a suicide bomber entered a dining facility that was operated by PMCs—Halliburton and KBR. Defendants were operating in Iraq pursuant to a LOGCAP contract under which they providing food services to the military. Plaintiffs brought negligence claims, *i.e.*, that the PMCs were negligent in failing to properly secure and monitor the dining facility, *etc.* The court had previously declined to dismiss based on defendant PMCs' previous motion asserting immunity under the Combatant Activities exception and non-justiciability under the political question doctrine. On defendants' new motion to dismiss, the court dismissed the claims under the political question doctrine.

Whitaker v. Kellogg Brown & Root, Inc., 444 F.Supp.2d 1277 (M.D. Ga. 2006)

Plaintiffs were survivors of a soldier who served in Iraq as a member of a Supply and Transport Troop that provided armed escorts for military supply convoys operated by KBR. When one of the KBR employees hit the guard rail of a bridge, the soldier pulled over in attempt to assist the KBR employee. The soldier's vehicle was struck from behind by another KBR employee and the soldier fell off the bridge and drowned. Plaintiffs sued KBR for wrongful death and negligence in hiring, training and

supervising its employee and under *respondeat superior* for the negligence of its employee. The court dismissed the claims under the political question doctrine.

Lessin v. Kellogg Brown & Root, 2006 3940556 (S.D. Tex. 2006)

Plaintiff was a member of the military who was providing a military escort for a commercial truck convoy owned, operated and controlled by the defendant PMC. While on route to Kuwait, Plaintiff was severely injured when one of the trucks had an equipment malfunction and a ramp assist arm for the truck struck Plaintiff's head. Plaintiff alleged that KBR was negligent in inspecting, maintaining and repairing the truck that injured him and negligent in supervising its employee—the driver. Plaintiff also brought claims against KBR for the negligence of its employee under *respondeat superior*. The defendant PMC moved to dismiss on political questions doctrine and the Combatant Activities exception but the court denied on both grounds.

3. State law tort claims brought by military contractors against their PMC

Fisher v. Halliburton et al., 390 F.Supp.2d610 (S.D. Tex. 2005); *Lane v. Halliburton*, 2006 WL 27 96249 (S.D. Tex. 2006); consolidated as *Lane v. Halliburton et al.*, 529 F.3d 548 (5th Cir 2008)

Plaintiffs were civilian truck drivers and their survivors who were in Iraq working for the defendant PMCs directly or for a subcontractor of the defendants pursuant to a LOGCAP contract between the defendant PMCs and the U.S. military. Plaintiffs were transporting fuel when their convoys, which were directed, authorized and operated by defendant PMCs, came under attack by anti-American insurgents. The contractors were injured, killed, missing and presumed dead. Plaintiffs claimed that their PMC employer had recruited them to drive trucks in Iraq, promising a safe work environment and that despite the PMCs' knowledge that the route was unsafe, sent their employees out without armored trucks and proper defenses. Plaintiffs brought claims of fraud (fraud and deceit, fraud in the inducement, intentional concealment of material facts, intentional misrepresentation); negligence (negligence, gross negligence, and intentional infliction of emotion distress, negligence; and wrongful death. The district court had dismissed on the basis of the political question doctrine. The Fifth Circuit determined that more factual development was necessary before the court could determine whether the political question doctrine would prevent the court from inquiring into the claims, and reversed and remanded the case.

Nordan v. Blackwater Security Consulting LLC, et al., 382 F.Supp.2d 801 (E.D.N.C. 2005); *In re Blackwater Security Consulting LLC*, 460 F.3d 576 (4th Cir. 2006); *cert. denied*, 127 S. Ct. 1381 (2007)

Plaintiff was the administrator of the estates of four contractors working for defendant Blackwater in Iraq. The contractors were assigned to provide security to another PMC, which had an agreement to provide catering, build and design support to KBR, which, in turn, had arranged with the U.S. Armed Forces to provide services in support of its operations in Iraq. Plaintiff alleges that Blackwater represented that certain precautionary measures would be taken with respect to the performance of the contractors' security functions but that Blackwater failed to provide the contractors with armored vehicles, weapons, maps and other information and equipment. When the contractors were escorting food supplies to a U.S. army base, they became lost in Fallujah and armed insurgents ambushed the convoy, murdered the contractors, beat and

burned and dismembered their remains and hung the bodies of two from a bridge. Plaintiff brought wrongful death and fraud claims against Blackwater in state court.

Defendant attempted to remove the case to federal court claiming that the Defense Base Act was the exclusive remedy available to contractors with whom it had an employment relationship. The court determined that the DBA did not present complete preemption against the state law claims.¹⁷⁷ The case stayed in state court; there is no further information available.

II. DEFENSES

A. Political Question Doctrine

Fisher v. Halliburton et al., 390 F.Supp.2d610 (S.D. Tex. 2005); *Lane v. Halliburton*, 2006 WL 27 96249 (S.D. Tex. 2006); consolidated as *Lane v. Halliburton et al.*, 529 F.3d 548 (5th Cir 2008)

Plaintiffs were civilian truck drivers and their survivors who were in Iraq working for PMCs pursuant to a LOGCAP contract with the U.S. military. Plaintiffs were transporting fuel when their convoys, which were directed, authorized and operated by defendant PMCs, came under attack by anti-American insurgents. The district court had dismissed on the basis of the political question doctrine. The Fifth Circuit reversed and remanded, finding that while *Baker* was concerned with challenges to actions taken by a coordinate branch of the federal government, KBR was not part of a coordinate branch of the government, and questioned whether the claims against KBR would require reexamination of a decision by the military. The court also found that reviewing the claims would not require the court to announce its opposition to Executive or Congressional policy. The court ultimately determined that more factual development was necessary before the court could determine whether the political question doctrine would prevent the court from inquiring into the claims, and reversed and remanded the case.

McMahon v. Presidential Airways, Inc., 410 F.Supp.2d 1189 (M.D. Fla. 2006); 460 F.Supp.2d 1315 (M.D. Fla. 2006); 502 F.3d 1331 (11th Cir. 2007)

Plaintiffs were survivors of three U.S. soldiers who died when the airplane that was transporting them crashed into side of mountain in Afghanistan. The plane was owned and operated by defendant Presidential Airways who had a contract with DoD to provide air transportation and other support services in aid of the military mission. Defendant Presidential asserted that the Political question doctrine, among other defenses, barred the suit. The district court denied Presidential's motion to dismiss and the Eleventh Circuit affirmed. The Circuit Court first found that Presidential was not a coordinate branch of the government, or, like the military, part of one. In reviewing the contract between the PMC and the government and finding that it gave Presidential general supervisory responsibilities over the flights, the court then found that examining the claims would not require a reexamination of military decisions, or implicate any military judgments. As to the second *Baker* factor—judicially discoverable and manageable standards—the court concluded that the flexible standards of negligence

¹⁷⁷ Complete preemption is doctrine whereby a federal statute preempts a state law claim when it provides the exclusive cause of action for the claim asserted. Under the doctrine, the court determines whether the lawsuit is really a creature of federal law and transforms the state claim into one arising under federal law thus creating the federal question jurisdiction requisite to require removal to federal court.

law were well-equipped to handle varying fact situations and that a standard of care could be applied.

Carmichael v. Kellog Brown & Root Services, Inc., 564 F.Supp.2d 1363 (N.D. Ga. 2008)

Plaintiff was the wife of a soldier who was serving as a military escort for a convoy of trucks operated by KBR and Halliburton in Iraq. The soldier was a passenger in a tractor-trailer driven by an employee of for both PMC defendants. The district court, finding that the army did control every aspect of the organization, planning and execution of the convoy in question and that the KBR drivers were trained according to military standards, concluded that the case would require an examination of military decisions. The court also found that looking at the standard of care required in those circumstances would have required questioning the military's decisions and dismissed the claims on grounds of the political questions doctrine.

Getz v. Boeing Co., 2008 WL 2705099 (N.D. Cal. 2008)

Plaintiffs were members of the military members and survivors of military who were on a helicopter that crashed in the Zabul Province in Afghanistan. The helicopters were designed, assembled, manufactured, inspected, tested, marketed and sold the helicopter, its component parts and related software and hardware to the U.S. government. The court denied defendant PMCs' motion to dismiss on grounds of the political question doctrine, finding that it would not have to consider the wisdom of military operations and decision-making, but only the PMC's performance.

Saleh v. Titan, 436 F.Supp.2d 55 (D.D.C. 2006) and *Ibrahim v. Titan*, 391 F.Supp.2d 10 (D.D.C. 2005); consolidated as *Ibrahim v. Titan Corp.*, 556 F.Supp.2d 1 (D.D.C. 2007).

Plaintiffs were Iraqi nationals who were detained in Abu Ghraib prison and the spouses of deceased Abu Ghraib detainees. They brought claims against PMCs who provided interpreters (Titan) and interrogators (CACI). The court rejected the defendants' assertion that plaintiffs' claims were non-justiciable because they implicated political questions. The court found that the Constitution's allocation of war powers to the President and Congress does not exclude from the courts every dispute that can arguably be connected to "combat"; that an action for damages arising from the acts of private contractors does not involve the courts in overseeing the conduct of foreign policy or the disposition of military power; and that plaintiffs were suing private parties for actions of a type that violate clear United States policy. The court declined to dismiss, at that stage, on the basis of the political question doctrine.

Potts v. Dyncorp International LLC, 465 F.Supp.2d 1245 (M.D. Ala. 2006)

Plaintiff was an employee of a PMC and was a passenger in a convoy coordinated and directed by another PMC, Dyncorp. A contractor for Dyncorp was driving the truck, which overturned, seriously injuring plaintiff. The court denied defendant's motion to dismiss on the basis of the political question doctrine, finding that the case would require an assessment of Dyncorp's own policies, that the contract was a civilian contract to provide non-military security services to non-military personnel for the purpose of delivering non-military supplies, that Dyncorp was not acting subject to military regulations and orders, and that further evidence demonstrated that U.S. military forces in Iraq generally did not have a command and control relationship with private security providers or their employees.

Smith v. Halliburton Co. et al., 2006 WL 252 1326 (S.D. Tex. 2006)

Plaintiffs were survivors of members of the military who were killed when a suicide bomber entered a dining facility that was operated by PMCs—Halliburton and KBR. Defendants were operating in Iraq pursuant to a LOGCAP contract under which they providing food services to the military. The court reviewed the LOGCAP contract and determined that the responsibility for force protection was assigned to the military, not to civilian contractors and that defendants were required to adhere to military guidance, instructions and general orders issued by the theater commander. The court also found that while the contract allowed contractors to carry government-issued firearms for purposes of self-defense pursuant to the commander’s discretion, no such authorization was given to the PMC. The court ultimately found that, while employers are generally responsible for safety in the workplace, it would have to substitute its judgment for that of the military on the issue of whether adequate force protection measures were in place and dismissed the claims under the political question doctrine.

Whitaker v. Kellog Brown & Root, Inc., 444 F.Supp.2d 1277 (M.D. Ga. 2006)

Plaintiffs were survivors of a soldier who served in Iraq as a member of a Supply and Transport Troop that provided armed escorts for military supply convoys operated by KBR. The soldier was killed when his vehicle was struck from behind by a KBR contractor when the soldier had pulled over in attempt to help another KBR contractor. The court dismissed the claims under the political question doctrine, finding that the soldier was working in cooperation with government contractor employees to achieve military objectives in a wartime convoy operation that had been planned and executed by the military; that he was killed due to the negligence of the contractor’s employees which were performing their duties subject to the military’s planning, orders, and regulations; and that a soldier injured at the hands of a contractor which is performing military functions subject to military orders raises a political questions.

Lessin v. Kellog Brown & Root, 2006 3940556 (S.D. Tex. 2006)

Plaintiff was a serviceman who was providing a military escort for a commercial truck convoy owned, operated and controlled by the defendant PMC. Plaintiff was injured when a ramp assist arm for the truck struck Plaintiff’s head. The court denied defendant’s motion to dismiss on the political questions doctrine, finding that the incident at issue was essentially a traffic accident, involving a commercial truck alleged to have been negligently maintained as well as a civilian truck driver who was allegedly negligent in operating the truck and that military strategy, decision-making and orders were not implicated.

B. General Contractor Defense

McMahon v. Presidential Airways, Inc., 410 F.Supp.2d 1189 (M.D. Fla. 2006); 460 F.Supp.2d 1315 (M.D. Fla. 2006); 502 F.3d 1331 (11th Cir. 2007)

Defendant raised during removal proceeding and court found it was a “colorable defense” for purposes of removal of case from state to federal court.

C. Combatant Activities Exception

Fisher v. Halliburton et al., 390 F.Supp.2d610 (S.D. Tex. 2005); *Lane v. Halliburton*, 2006 WL 27 96249 (S.D. Tex. 2006); consolidated as *Lane v. Halliburton et al.*, 529 F.3d 548 (5th Cir 2008)

In *Fisher v. Halliburton et al.*, 390 F.Supp.2d610 (S.D. Tex. 2005), defendants relied on *Koohi v United States*, 976 F.2d 1328 (9th Cir. 1992) to assert that the claims against them (PMCs) were barred because they arose out of “combatant activities of the military during a time of war.” The district court noted that the Supreme Court had stated in *Boyle* that although private parties are not entitled to sovereign immunity, uniquely federal interests may produce a preemption of state claims. The court, however, determined that both *Koohi* and *Boyle* had preempted claims against a defense contractor that had supplied equipment to the U.S. for military use and those cases involved complex equipment implicating nuanced discretion and sophisticated judgments by military experts. Here, the case involved civilian truck drivers who were transporting fuel when their convoys, which were directed, authorized and operated by defendant PMCs, came under attack. The court rejected defendants’ motion to dismiss the case as barred by the FTCA Combatant Activities exception.

McMahon v. Presidential Airways, Inc., 410 F.Supp.2d 1189 (M.D. Fla. 2006); 460 F.Supp.2d 1315 (M.D. Fla. 2006); 502 F.3d 1331 (11th Cir. 2007)

Defendants argued that they were entitled to immunity under the “combatant activities” exception to the FTCA because, although they are not governmental entities, the CA exception provides the basis for federal preemption of plaintiffs’ state law tort claims. (Plaintiffs were survivors of soldiers riding in airplane, owned and operated by defendant PMC, which crashed into side of mountain in Afghanistan during a non-combat flight). The district court, (460 F.Supp.2d 1315 (M.D. Fla. 2006), found that the preemption shields contractors only in military equipment procurement contracts and only when the government dictates design specifications, citing *Boyle*. The court found that the combatant activities exception is not one of preemption but rather, when the claims arise out of combatant activities. It declined to dismiss on the CA exception merely because defendant PMCs were operating in a combat zone.

Carmichael v. Kellogg Brown & Root Services, Inc., 564 F.Supp.2d 1363 (N.D. Ga. 2008)

Defendants raised the CA exception in their first motion to dismiss but declined to do so in their renewed motion to dismiss.

Saleh v. Titan, 436 F.Supp.2d 55 (D.D.C. 2006) and *Ibrahim v. Titan*, 391 F.Supp.2d 10 (D.D.C. 2005); consolidated as *Ibrahim v. Titan Corp.*, 556 F.Supp.2d 1 (D.D.C. 2007)

In the case involving PMCs who provided translator and interrogation services at Abu Ghraib prison to the U.S. government, defendants raised, among other defenses, the CA exception. The court noted that the oft-cited cases relying on the CA exception to preempt state law tort claims (*Koohi* and *Bentzlin*) involved product liability issues and that there were no cases applying the combatant activities exception to tortious acts of contractors in the course of rendering services during wartime encounters. Despite that, the court allowed for discovery and briefing in order to determine whether the defendants’ employees functioned as soldiers in all but name. It then went on to require the defendants to show as a threshold matter that that they had been engaged in activities necessary and in direct connection with actual hostilities, stating if that was the case, the combatant activities exception would preempt state law only when defendants’ employees were acting under the direct command and exclusive operation control of the military chain of command. The court explained that the policy underlying the FTCA’s CA exception is that the military should be free from the burden of a damages suit based on its conduct in the battlefield and that preemption ensures that where contractors are functionally serving as soldiers, they need not weigh the

consequences of obeying military orders against the possibility of exposure to state law liability. State law tort claims against private contractors, therefore, should be preempted to the extent necessary to insulate military decisions from state law regulation.

First, the court found that both defendants (Titan, which provided translators/linguists and CACI, which provided interrogators) met the threshold in that both functions were activities that had a direct connection with actual hostilities. As to Titan, the court dismissed the claim on the basis of the CA exception because it concluded that the PMC linguists were fully integrated into the military units to which they were assigned and that they performed their duties under the direct command and exclusive operation control of military personnel. As to CACI, the court declined to dismiss the claim because it concluded that the PMC site manager co-managed the contract interrogators, giving them advice and feedback on the performance of their duties, that the responsibilities, supervision, and reporting requirements of the CACI interrogators were not identical to those of their military counterparts, that the interrogators had a requirement to report abuse not only up the military chain of command but also to the PMC, and that the PMC site manager had the authority to direct the interrogators not to carry out an interrogation that was inconsistent with company policy.

Smith v. Halliburton Co. et al., 2006 WL 252 1326 (S.D. Tex. 2006)

On defendants' initial motion to dismiss the claims, (which were based on contract between defendant PMC and government to run dining facility which was subject to a suicide bomber), the court declined to dismiss the case, concluding that the CA exception to the FTCA does not preempt the state tort law action.

Whitaker v. Kellog Brown & Root, Inc., 444 F.Supp.2d 1277 (M.D. Ga. 2006)

Defendants raised the CA exception but the court did not consider the defense because it dismissed on the basis of the political question doctrine.

Lessin v. Kellog Brown & Root, 2006 3940556 (S.D. Tex. 2006)

Defendants raised CA exception, recognizing that the exception does not apply directly to government contractors but that it had been extended to government contractors in two previous cases (*Koohi* and *Bentzlin*). The court found that those cases involved government contractors that provided the military with supplies, as opposed to a government contractor that provides the military with services. (Defendants were PMCs that owned, operated and controlled a truck convoy which plaintiff, a serviceman, was escorting). The court also noted that the previous cases arose from the U.S.'s use of weapons during combat and thus involved complex equipment acquired by the government which implicated nuanced discretion and sophisticated judgments by military experts, while the case before it did not implicate military decision-making. The court denied defendants' motion to dismiss on CA exception grounds.

D. The *Feres* Doctrine

McMahon v. Presidential Airways, Inc., 410 F.Supp.2d 1189 (M.D. Fla. 2006); 460 F.Supp.2d 1315 (M.D. Fla. 2006); 502 F.3d 1331 (11th Cir. 2007)

The Eleventh Circuit provided an extensive discussion of the *Feres* Doctrine in response to defendant’s motion to dismiss the claims on such basis. First, the court found that as a preliminary matter, the availability of such an immunity for private contractors would be under a theory of “derivative sovereign immunity,” whereby the contractor acts as a common law agent of the government. The court then considered whether the policies underlying *Feres*—uniformity with respect to injuries incurred by soldiers, a liability cap, and protection against interference with military discipline and sensitive military judgments—should apply to private contractors. Lastly, the court considered whether the “incident to service test” under *Feres*, even where sensitive military judgments are being performed by contractors, is the proper way to protect private contractor agents performing military functions. Ultimately, the court concluded that the *Feres* Doctrine was an inappropriate vehicle for providing immunity to private military contractors.

E. Foreign Country Exception

McMahon v. Presidential Airways, Inc., 410 F.Supp.2d 1189 (M.D. Fla. 2006); 460 F.Supp.2d 1315 (M.D. Fla. 2006); 502 F.3d 1331 (11th Cir. 2007)

Defendant raised in removal proceedings and court found it was a “colorable defense” to the extent it supported removal.

F. The Defense Base Act

Nordan v. Blackwater Security Consulting LLC, et al., 382 F.Supp.2d 801 (E.D.N.C. 2005); *In re Blackwater Security Consulting LLC*, 460 F.3d 576 (4th Cir. 2006); *cert. denied*, 127 S. Ct. 1381 (2007)

Defendants attempted to remove the case to federal court claiming that the Defense Base Act (DBA) was the exclusive remedy available to contractors with whom it had an employment relationship. The court found that the hallmark of complete preemption is the ability to bring the same state law claim in federal district court but that DBA scheme has no provision for bringing a federal cause of action in district court, concluding in the case before it that the DBA did not present complete preemption against the state law claims. The court found it lacked authority to consider plaintiff’s claims in federal court and remanded the case back to state court.

Fisher v. Halliburton et al., 390 F.Supp.2d610 (S.D. Tex. 2005)

Defendants moved to dismiss case, asserting that it was barred by the DBA. The court concluded that the very narrow exception to the DBA’s exclusive liability applies where the employer acted with the specific intent to injure the employee. The plaintiffs had alleged that defendants knew and intended that plaintiff truck drivers’ convoy would be attacked by anti-American insurgents. The court, accepting plaintiffs’ allegations as true under the motion to dismiss standard, declined to dismiss the claims on the basis of the DBA.