

**REGULATING THE UNITED STATES PRIVATE ARMY:
MILITARIZING SECURITY CONTRACTORS**

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I. TURRET-GUNNER NUMBER THREE

As his motorcade careened down a dusty Baghdad street, “Paul,” turret-gunner number three, noticed a suspicious white car headed purposefully toward him.¹ Paul waved his hands and signaled for the driver to stop, but the car continued unabated. Believing that the driver was an enemy target, and afraid for his life, Paul opened fire, shooting his high caliber weapon until the threat was eliminated. Swinging the muzzle around 180 degrees, Paul spotted a man in a blue shirt and black pants aiming an AK-47 at the convoy’s rear gunner, so he once again squeezed the trigger, killing the man instantly. When

1. Brian Ross, *Blackwater Turret Gunner ‘Paul’: Why I Opened Fire in Baghdad*, ABC NEWS, Nov. 14, 2007, <http://abcnews.go.com/Blotter/Story?id=3864751&page=2>. The following narrative is from a first-hand account of the incident, given by a Blackwater security guard involved in the September 16, 2007, shootings in Baghdad. *Id.*

Paul's convoy finally rolled out of this area of Baghdad, at least seventeen people were dead.²

Although it is easy to imagine this as a scene from a big-budget summer movie, where a twenty-nine-year-old military hero named Paul saves his convoy from vicious enemy forces, this event was all too real and the people Paul shot were not enemy forces, but Iraqi civilians.³ The man holding the AK-47 was an Iraqi police officer.⁴ And Paul was not a member of the U.S. military, but an employee of a private military firm (PMF) known as Blackwater.⁵

The United States Code of Military Justice (UCMJ) proscribes a set of rules by which soldiers must abide.⁶ Violating these rules can result in reprimand, discharge from the military, or even imprisonment in military jail.⁷ However, PMFs are immune from foreign, domestic, or international law.⁸ As a result, incidents like the one from September 16, 2007, only serve to reinforce Iraqis' negative opinion of American occupation forces and the impotence of Iraq's new government.⁹

Under increasing pressure to "reign in" government contractors, Congress recently introduced legislation purporting to give U.S. civilian courts jurisdiction over all PMFs working abroad.¹⁰ However, the wisdom and adequacy of this legislation is highly questionable; federal district court is not the appropriate place to prosecute PMFs. It would be manifestly unfair to the contractor being prosecuted, ineffective for curing PMF misconduct, and inconsistent with the international law of war.

By using PMFs in security roles, the government exposes contractors to situations where the use of force may be required.¹¹ The

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. 10 U.S.C. §§ 801-941 (2006).

7. *See* 10 U.S.C. § 858(a) (2006).

8. *See infra* Part III.

9. Steve Fainaru, *Warnings Unheeded on Guards in Iraq*, WASH. POST, Dec. 24, 2007, at A1.

10. *Law Protecting Blackwater Under Fire*, CBS NEWS, Oct. 4, 2007, <http://www.CBSNews.com/stories/2007/10/04/iraq/printable3328731.shtml>.

11. *See* Fainaru, *supra* note 9.

duties performed by private security contractors like Paul mirror those performed by the U.S. military. Why then should they not be subject to the same rules of engagement and court-martial jurisdiction as other combat troops?

II. INTRODUCING THE MODERN PRIVATE MILITARY FIRM

Use of civilians in military support roles is not a new concept; civilians have accompanied military forces in nearly every major military action in U.S. history.¹² However, the size, organization, and scope of services offered by modern PMFs like Blackwater are without historical equivalence. In the 1991 Gulf War, for example, there was one contractor for every fifty servicemen; by 2003, that ratio had risen to one contractor for every ten servicemen in Iraq.¹³

There are numerous reasons for the recent proliferation of PMFs. The end of the Cold War brought with it a massive military downsizing: around six million fewer soldiers globally.¹⁴ In fact, between 1990 and 2003, the U.S. government slashed its standing military from 2.1 million to 1.4 million troops.¹⁵ At the same time, the demand for trained security contractors increased dramatically with wars cropping up in Bosnia, Kosovo, Liberia, Afghanistan, and Iraq.¹⁶ This was accompanied by a general shift in thinking that if a task could be accomplished by the private sector, it should be.¹⁷ Defense Secretary Donald Rumsfeld assured the nation that by outsourcing everything except actual battlefield fighting, wars could still be fought, and won, without increasing troop levels.¹⁸ Because of

12. William C. Peters, *On Laws, Wars, and Mercenaries: The Case for Courts-Martial Jurisdiction Over Civilian Contractor Misconduct in Iraq*, 2006 *BYU L. REV.* 367, 377-80 (2006).

13. Robert Marshall, *Militarizing P3s: The State, New Public Management, and Outsourcing War* (2006) (unpublished Ph.D. thesis, York University).

14. Interview by Terry Gross with Peter Singer, *The Iraq War Was the "First Privatized War"* (July 9, 2003), available at <http://globalresearch.ca/articles/SIN307A.html> [hereinafter *Privatized War*].

15. Jim Krane, *Private Firms Do US Military's Work*, ASSOCIATED PRESS, Oct. 29, 2003, available at <http://www.globalpolicy.org/security/peacepg/training/1029private.htm>.

16. *Id.*

17. *Privatized War*, *supra* note 14.

18. Krane, *supra* note 15.

the increased role that technology plays in modern warfare, the military is more reliant than ever before on the commercial sector for weapon systems training and support.¹⁹ As a result, PMFs now provide a variety of services including logistics, supply, weapons disposal, transportation, defensive protection and security, and military training for Iraqi forces.²⁰ Recently, PMFs have assumed increasingly hazardous guard duties previously performed by military personnel, such as protecting oil pipelines, museums, and diplomats.²¹

In previous wars, PMFs were prohibited from engaging in combat operations, but on September 20, 2005, “the military issued an order authorizing contractors to use deadly force to protect people and assets.”²² In the eyes of many, this brought PMFs dangerously close to being mercenary forces,²³ the use of which is prohibited by the United Nations and Geneva Conventions.²⁴ However, Blackwater agents simply do not meet the definition of a mercenary force.

Article 47 of Protocol I of the 1977 Geneva Conventions²⁵ defines a mercenary as an individual who: (1) is specifically recruited to fight in an armed conflict; (2) takes part in direct hostilities; (3) is motivated primarily by the promise of private gain; (4) is neither a national of a party to the conflict nor a resident of a territory controlled by a party to the conflict; (5) is not a member of the armed forces; and (6) has not been sent by a state that is not a party to the conflict.²⁶ PMF contractors do not fit this definition because they are

19. *Privatized War*, *supra* note 14.

20. Doug Brooks, *A New Twist on a Long Military Tradition*, BOSTON GLOBE, Oct. 19, 2003.

21. *See id.*

22. Fainaru, *supra* note 9. *See also Private Security Contracting in Iraq and Afghanistan, Hearings Before the H. Comm. on Oversight and Government Reform*, 110th Cong. 7 (2007) (statement of Richard J. Griffin, Assistant Secretary of State Bureau of Diplomatic Security, Department of State) [hereinafter Griffin].

23. Fainaru *supra* note 9.

24. Peter Warren Singer, *War, Profits, and the Vacuum of Law: Private Military Firms and International Law*, 42 COLUM. J. TRANSNAT'L L. 521, 526-28 (2004) [hereinafter Singer, *Vacuum of Law*].

25. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3, 16 I.L.M. 1391 [hereinafter Protocol I].

26. *Id.*

not primarily recruited to fight,²⁷ their primary motivation is not necessarily private gain (many are former soldiers²⁸ whose thirst for action and sense of patriotic duty should not be discounted), and most are American citizens, and thus a party to the Iraq conflict.²⁹ Because a person must fit all of the criteria, PMF contractors clearly fall outside of the Geneva Conventions' definition of mercenary forces.³⁰

PMFs also differ from mercenary forces in their organizational structure. In general, mercenary forces are comprised of loosely allied individuals that disband when the conflict, and the opportunity to turn a profit, has ended.³¹ PMFs, on the other hand, are highly sophisticated corporate and legal entities; most are publicly traded.³² "They work in more than one conflict at a time . . . in more than one place . . . and they provide more than one service," including running ROTC programs in over 200 American universities.³³

Blackwater, for example, employs over 2000 security contractors in nine corporate divisions that provide government services ranging from weapons development and systems training to security and protection for military and civilian personnel and assets.³⁴ Founded in 1997 by Erik Prince, a former Navy Seal, Blackwater recorded over \$800 million in sales in 2006 and is looking to expand.³⁵ Although Blackwater is one of the larger PMFs, it is not the only government contractor in Iraq.³⁶ Currently an estimated 30,000 security contractors

27. *Privatized War*, *supra* note 14 ("They're often providing very innocuous things like feeding troops or training people on how to use IT systems . . .").

28. *Cf.* Richard Lardner, *Six-Figure Bonuses Retain US Commandos*, WASH. POST, Oct. 11, 2007.

29. However, some U.S. PMFs also hire foreign nationals, such as former KGB agents or apartheid soldiers. *See Privatized War*, *supra* note 14.

30. JOANNA SPEAR, FAFO MARKET FORCES: THE POLITICAL ECONOMY OF PRIVATE MILITARY COMPANIES 47-48 (2006), *available at* <http://www.fafo.no/pub/rappp/531/531.pdf>.

31. *Privatized War*, *supra* note 14.

32. *Id.*

33. *Id.*

34. HOOVER'S IN-DEPTH COMPANY RECORDS, BLACKWATER USA (2007), 2007 WLNR 25030676.

35. *Id.*

36. Peter Warren Singer, *Outsourcing War*, 84 FOREIGN AFF. 119, 222 (2005) [hereinafter Singer, *Outsourcing War*]. "More than 60 firms currently employ more than 20,000 private personnel there to carry out military functions." *Id.*

are operating in Iraq at a total cost of over \$4 billion.³⁷ At least 6000 of these are armed.³⁸

Contrary to popular belief, privatizing the military is expensive. Government contractors are generally paid much more than U.S. special forces.³⁹ Some security contractors make up to \$1500 a day, which is over twenty times more than the \$70 a day infantry soldiers are paid.⁴⁰ However, PMFs' high contract costs are at least partially mitigated by a reduction in the required number of standing military troops, which require food and housing, training, and pensions.⁴¹

A. *The Benefits of PMFs*

Unlike soldiers, civilian contractors can be hired for a specific task and for a specific time, without the need to keep specialists on the payroll any longer than their specialties are required.⁴² The lucrative contracts awarded to PMFs ensure that they do not pull out of dangerous areas, even when their agents are attacked by hostile forces.⁴³ Security contractors are generally retired military and most employers require at least one year of protective experience, which suggests that they are professional, experienced, and well-trained.⁴⁴

PMFs also provide non-economic benefits that make them attractive to the U.S. government as an alternative to increased military deployment. Often, PMFs are able to go where the U.S.

37. *U.S. Government Investigates Iraq Security Contracting*, INT'L GOV'T CONTRACTOR, Sept. 2007, ¶ 69 [hereinafter *Government Investigates*].

38. Greg Guma, *The Quiet Rise of National Security, Inc.*, TOWARD FREEDOM, June 2004, <http://www.towardfreedom.com/jun04/home/content/view/449/69>.

39. Daniel Burton-Rose & Wayne Madsen, *Corporate Soldiers: The U.S. Government Privatizes the Use of Force*, MULTINATIONAL MONITOR, Mar. 1999, <http://multinationalmonitor.org/mm1999/mm9903.07.html>; Ken Miller, *Outsource This*, CENTER FOR AMERICAN PROGRESS, May 6, 2004, <http://www.americanprogress.org/issues/2004/05/b67759.html>.

40. Burton-Rose & Madsen, *supra* note 39; Miller, *supra* note 39.

41. Nathaniel Stinnett, Note, *Regulating the Privatization of War: How to Stop Private Military Firms From Committing Human Rights Abuses*, 28 B.C. INT'L & COMP. L. REV. 211, 220 (2005).

42. *Id.*

43. Krane, *supra* note 15.

44. *Government Investigates*, *supra* note 37.

military either cannot, or will not.⁴⁵ For example, there are strict regulations limiting the number of U.S. troops, and the scope of their mission in Colombia;⁴⁶ but there are now several PMFs working in the country carrying out duties that U.S. troops cannot, including anti-terrorism operations and high tech aerial reconnaissance.⁴⁷

The death of a PMF agent generally goes unreported⁴⁸ and casualties among government contractors do not have the same emotive impact as the death of a soldier.⁴⁹ This makes their use especially attractive to a government wishing to avoid the political costs of an unpopular war.⁵⁰ As Tim Spicer, CEO of Sandline, a PMF that played a significant role in the civil war in Sierra Leone, points out, “[m]ost of the people watching CNN or Newsnight will have the same reaction [to civil war atrocities]: ‘This is terrible. Something must be done.’ But when they are invited to send their husbands or sons or daughters or pay for the operation . . . things are a little different.”⁵¹ PMFs allow governments to use contractors to carry out public policy through private means, thus avoiding the political costs incurred when national troops are sent.⁵² However, these political benefits come at a price: profits made by PMFs are often hidden behind a corporate shield, making it difficult for the public and Congress to accurately assess the economic feasibility of military privatization.⁵³

45. See, e.g., Singer, *Outsourcing War*, *supra* note 36, at 123.

46. *Privatized War*, *supra* note 14.

47. *Id.*

48. See Krane, *supra* note 15; see also Stinnett, *supra* note 41, at 220. In fact, between the start of the conflict in Iraq and March 2005, an estimated 175 contractors lost their lives and 900 more were wounded. Singer, *Outsourcing War*, *supra* note 36, at 122.

49. Tim Spicer, *Why We Can Help Where Governments Fear to Tread*, May 24, 1998, <http://www.times-archive.co.uk/news/pages/sti/98/05/24/stirevopn01005.html?1621558>.

50. See *id.*

51. *Id.*

52. *Privatized War*, *supra* note 14.

53. Krane, *supra* note 15.

B. The Drawbacks of PMFs

Between January and October 2007, Blackwater agents killed or injured over twenty Iraqi civilians,⁵⁴ including those who died in the aforementioned September 16 incident.⁵⁵ After a 2006 Christmas Eve party in Baghdad, a drunken Blackwater employee fatally shot one of Iraq's Vice-Presidential Guards.⁵⁶ The contractor was fined, fired, and returned home, but no charges were filed.⁵⁷ Six weeks after this incident, in February 2007, "a Blackwater sniper killed three security guards [who worked] for the state-run media network."⁵⁸ On May 24, 2007, Blackwater agents killed a civilian driver outside the gates of the Interior Ministry, which sparked a standoff between the agents and Iraqi Security Officials.⁵⁹

Other PMFs have similar histories of misconduct. DynCorp, one of the Pentagon's largest contractors and a competitor of Blackwater,⁶⁰ has in at least two prior operations stood by as several of its employees were accused of engaging in perverse, illegal, and inhumane behavior including purchasing illegal weapons, women, and forged passports.⁶¹ The site supervisor in Bosnia even videotaped himself as he raped two young women.⁶² However, none of the employees were ever prosecuted criminally.⁶³ In fact, the only court cases that resulted from the incident were two civil actions filed against DynCorp by employees who were fired for blowing the whistle on the illegal activity.⁶⁴ After DynCorp lost the first suit, it

54. Joana Abrisketa, *Blackwater: Mercenaries and International Law*, FRIDE, Oct. 2007, at 1-2, <http://www.fride.org/download/blackwater.english.pdf>.

55. See *supra* pp. 159-60.

56. *Law Protecting Blackwater Under Fire*, *supra* note 10.

57. *Id.*

58. Fainaru, *supra* note 9.

59. *Id.*

60. Burton-Rose & Madsen, *supra* note 39.

61. Singer, *Vacuum of Law*, *supra* note 24, at 525 (quoting John Crewdson, *Sex Scandal Still Haunts DynCorp*, CHI. TRIB., Apr. 19, 2003, at C3).

62. *Id.*

63. *Id.*

64. Ian Traynor, *The Privatisation of War*, THE GUARDIAN, Dec. 10, 2003, <http://www.guardian.co.uk/world/2003/dec/10/politics.iraq/print>.

quickly settled with the second plaintiff.⁶⁵ It is difficult to determine which is more unsettling: the actions of DynCorp's agents in the field, or the corporate response to their misconduct.

In addition to contractor misconduct, the government's reliance on companies motivated by profit, rather than national foreign policy or security interests, raises concerns over possible conflicts of interest.⁶⁶ Between 1999 and 2002, three major government contractors donated a combined \$2.2 million to the Bush campaign and other Republican causes.⁶⁷ In fact, Halliburton won its lucrative contract without a competitive bid,⁶⁸ which begs the question: in light of the political influence wielded by PMFs, is congressional oversight really an effective method of regulation? The potential conflict of interest inherent in this manner of regulation is illustrated by the State Department's investigation of the September 16, 2007, shootings.⁶⁹

As the State Department's Inspector General, Howard Krongard is in charge of investigating allegations of waste, fraud, and abuse, including those relating to the September 16 shootings by Blackwater agents in Baghdad.⁷⁰ His brother and former CIA director, Alvin Krongard, recently accepted a consulting position on Blackwater's advisory board.⁷¹ Not only did Howard fail to disclose his brother's employment, he denied it in front of the House Committee on multiple occasions.⁷² While Howard was investigating Blackwater and Alvin was being paid to sit on its advisory committee, the State Department granted limited immunity to many of the agents who were involved in

65. *Id.*

66. Raenette Taljaard, *Controls Needed to Rein in Private Military Firms*, STRAITS TIMES (Sing.), Jan. 3, 2004, available at http://www.sandline.com/hotlinks/Straits-Times_Controls.html.

67. Krane, *supra* note 15.

68. *Id.*

69. See generally Jeremy Scahill, *The Blackwater Brothers: Conflict of Interest in State Department IG Office*, NATION, Nov. 16, 2007, <http://www.alternet.org/story/68134>.

70. *Id.*

71. *Id.*

72. *Id.*

the September shootings.⁷³ Relying on this immunity, these agents refused to cooperate with the FBI or answer its questions.⁷⁴

Although Howard Krongard has since resigned,⁷⁵ the State Department continues to lead investigations into alleged misconduct of its own contractors,⁷⁶ which is itself a significant conflict of interest and underscores the difficulties in regulating PMFs. The government relies heavily upon private security contractors and therefore has a substantial interest in keeping them in Iraq. It is unrealistic and unwise to expect the same government entity that awarded Blackwater a security contract to conduct an impartial investigation into incidents of misconduct. However, even absent these conflicting interests, it is unlikely that the guards involved in the September 16 shootings would have been prosecuted because they are virtually untouchable by any legal entity under either domestic or international law.

C. Traversing a Legal “Black-Hole”

The day before Paul Bremer ended his tenure as administrator of the U.S. provisional government in Iraq, he signed CPA Order 17, granting U.S. contractors immunity from prosecution under Iraqi law.⁷⁷ As a result, the Iraqi provisional government was completely impotent to prosecute PMFs, like Blackwater, for crimes committed in Iraq.⁷⁸ Now a sovereign nation, Iraq arguably has the authority to prosecute Americans for crimes committed there.⁷⁹ However, given

73. *Id.*

74. *Id.*

75. Letter from Howard Krongard, Inspector Gen., Dep’t of State, to President George W. Bush (Dec. 7, 2007), available at <http://oversight.house.gov/documents/20071207160136.pdf>.

76. Kirit Radia, *Govt. Uses Contractors to Probe Iraq Contractors*, ABC News, Oct. 3, 2008, <http://abcnews.go.com/Politics/story?id=5951683&page=1>.

77. Fainaru, *supra* note 9.

78. *Id.*

79. See, e.g., H.R. REP. NO. 106-788 (I), at 6 (2000). When a service member commits a crime in a foreign country, whether he or she is court-martialed or prosecuted under the laws of the foreign country is determined by the Status of Forces Agreement (SOFA). *Id.* “[T]he typical SOFA gives American military authorities the exclusive right to exercise jurisdiction over acts that violate United States law.” *Id.* However, the United States has yet to establish a SOFA with the new Iraqi government. See, e.g., Charlie Savage, *Gates Seeks to Reassure Senate on*

the instability of the Iraqi government and the potential for human rights violations, it is highly unlikely that the United States would allow an American citizen to be tried under Iraqi law, especially when the accused is an employee of the U.S. government.⁸⁰

The Special Maritime and Territorial Jurisdiction Act (SMTJ)⁸¹ extends the jurisdiction of U.S. federal district courts to areas of the high seas, as well as “[a]ny lands reserved or acquired for the use of the United States.”⁸² While this offers some jurisdictional authority over contractor misconduct,⁸³ it does not adequately create the judicial ability to prosecute misconduct in an occupied foreign state during wartime.⁸⁴ In a 2003 radio address, President Bush stated that the purpose of the United States’ mission in Iraq was “to disarm Iraq of weapons of mass destruction, to end Saddam Hussein’s support for terrorism, and to free the Iraqi people.”⁸⁵ The President’s statement implied that once these goals were achieved, the country of Iraq would be given back to the Iraqi people. With that stated intention, Iraq cannot be accurately described as “lands reserved or acquired for the use of the United States.”⁸⁶ Therefore, under the SMTJ, Paul could not be tried in U.S. district court for his role in the September 16 shootings in Nassor.

Recognizing the need for broader jurisdictional authority over Americans working abroad,⁸⁷ Congress enacted the Military

Iraq Agreement, BOSTON GLOBE, Feb. 7, 2008. Therefore, at least theoretically, U.S. forces in Iraq could be subject to Iraqi jurisdiction. Mayur Patel, *The Legal Status of Coalition Forces in Iraq After the June 30 Handover*, AM. SOC’Y OF INT’L LAW, Mar. 2004, <http://www.asil.org/insights/insigh129.htm>.

80. See Patel, *supra* note 79. In the majority of its SOFAs, the United States retains jurisdiction over crimes committed by employees of the U.S. government during the performance of their official duties (*i.e.*, a soldier who mistakes a civilian for an insurgent). See *id.*

81. 18 U.S.C § 7(1) – (9) (2006).

82. *Id.* § 7(3).

83. Arguably, the SMTJ would allow for prosecution of crimes committed on a military base, embassy, or military vessel. See *generally id.* § 7.

84. Peters, *supra* note 12, at 387.

85. President George W. Bush, *President Discusses Beginning of Operation Iraqi Freedom* (Mar. 22, 2003) (transcript available at <http://www.whitehouse.gov/news/releases/2003/03/20030322.html>).

86. 18 U.S.C § 7(3).

87. See H.R. REP. NO. 106-778 (I), at 4-5 (2000).

Extraterritorial Jurisdiction Act (MEJA) on November 22, 2000.⁸⁸ This act gives the federal district courts jurisdiction to try anyone employed by or accompanying the armed forces outside the United States for any crime that would be punishable by more than one year of imprisonment.⁸⁹ However, the MEJA only applies to government persons under contract with the Department of Defense.⁹⁰ Although it purports to include contractors of any other federal agency, it only does “to the extent such employment relates to supporting the mission of the Department of Defense overseas.”⁹¹ Arguably, Blackwater’s employment does support the war in Iraq.⁹² However, its primary contractual responsibilities are diplomatic security and protection.⁹³ These are clearly State Department functions.⁹⁴

Moreover, because the MEJA limits the scope of its prosecution to crimes punishable by more than one year of imprisonment,⁹⁵ it does not cover many instances of misdemeanor assault and battery, petty theft, or sexual misconduct. Although Congress is currently working to close the loopholes in the MEJA, the proposed legislation is insufficient and will ultimately result in greater confusion regarding the legal status of PMFs working in Iraq.

III. CONGRESS RESPONDS

There are currently several pieces of proposed legislation circulating Congress that address the issue of PMF oversight. Senate

88. Military Extraterritorial Jurisdiction Act, 18 U.S.C. § 3267 (2006). *See also* Peters, *supra* note 12, at 390.

89. Peters, *supra* note 12, at 390.

90. 18 U.S.C. § 3267.

91. *Id.* § 3267(1)(A)(ii)(II).

92. Keeping important diplomats and U.S. officials safe helps the war effort. However, this seems like an overly broad interpretation of section 3267.

93. Blackwater’s “WPPS earnings exceed many estimates of the company’s total government contracts.” Jeremy Scahill, *Mercenary Jackpot*, NATION, Aug. 28, 2006, available at <http://www.thenation.com/doc/20060828/scahill> (posted Aug. 10, 2006) [hereinafter Scahill, *Jackpot*]. A State Department program, the Worldwide Personal Protection Service (WPPS), provides security for U.S. and foreign officials, duties it contracts out to Blackwater. *Id.*

94. *See* Omnibus Diplomatic Security and Antiterrorism Act of 1986, Pub. L. No. 99-399 § 102(a)(3), 100 Stat. 853.

95. 18 U.S.C. § 3261(a) (2006).

Bill 2398⁹⁶ and House Bill 4102⁹⁷ require the government to phase out the use of all security contractors over the next two years.⁹⁸ During that two-year period, the legislation would require PMFs to certify that each agent has undergone a background check, adopt “whistle-blower” protection policies, and submit any contractor accused of a crime on foreign soil to U.S. custody until the matter is fully investigated.⁹⁹ Those opposed to the increasing privatization of the U.S. military believe that the benefits associated with PMFs have been artificially inflated. “[H]iring private employees in Iraq at pay rates several times more than what soldiers make . . . has never been about saving money. It’s more about avoiding tough political choices concerning military needs, reserve call-ups, and the human consequences of war.”¹⁰⁰ Contractors’ lack of legal accountability has also been cited by proponents of the proposed legislation as support for the discontinued use of PMFs.¹⁰¹

However, Congress should not act precipitously with regard to PMFs. Phasing out private security contractors at this stage would have a negative impact on the U.S. military¹⁰² and severely challenge the ability of the United States to provide the level of security in Iraq required by the law of belligerent occupation.¹⁰³ The overthrow of

96. Stop Outsourcing Security Act, S. 2398, 110th Cong. (2007).

97. Stop Outsourcing Security Act, H.R. 4102, 110th Cong. (2007).

98. S. 2398; H.R. 4102.

99. S. 2398; H.R. 4102.

100. Peter W. Singer, *The Contract the Military Needs to Break*, WASH. POST, Sept. 12, 2004, at B3, available at <http://www.washingtonpost.com/ac2/wp-dyn/.A13378-2004Sep11.html>.

101. See, e.g., Rep. Schakowsky Unveils Bill to Phase Out Private Military Contractors, U.S. FED. NEWS, Oct. 2, 2007.

102. Fred W. Baker III, *Gates Addresses Private Security Contractor Issues*, AM. FORCES PRESS SERV., Oct. 3, 2007.

103. Embodied in Hague Convention IV of 1907 and the 1949 Fourth Geneva Conventions, the law of belligerent occupation requires a conquering military force to take all reasonable measures to maintain law and order when the government of the occupied territory is no longer capable of exercising its authority. Michal N. Schmitt, *The Law of Belligerent Occupation*, CRIMES OF WAR PROJECT, Apr. 15, 2003, www.crimesofwar.org/print/onnews/iraq5-print.html. Officially the United States is no longer an occupying force. Patel, *supra* note 79. However, the U.S. Army Field Manual 27-10 also recognizes this duty stating: the occupying force “shall take all the measures in [its] power to restore, and ensure, as far as possible,

Saddam Hussein created a power vacuum, which the fledgling Iraqi government has been thus far unable to fill. The ensuing lawlessness has led to a drastic increase in violent crime.¹⁰⁴ Although the U.S. government has recognized the need for social stability in Iraq, its efforts toward that end have been thwarted by the continuing violence and lack of security.¹⁰⁵

In this type of situation, a “military victory is likely to have little impact on levels of societal violence, social fragmentation, and criminalization of the economy.”¹⁰⁶ Instead, Iraq needs a well-trained, permanent, and professional police force that is capable of maintaining order. Without contractors to provide security and train the Iraqi police force, the responsibility for restoring law and order would fall upon the U.S. military.¹⁰⁷ According to Defense Secretary Robert Gates, this would be “very counterproductive.”¹⁰⁸ After five years of war, the American public is becoming impatient with the ongoing violence.¹⁰⁹ In fact, President-elect Barack Obama has pledged to begin troop withdrawal soon after taking office.¹¹⁰ PMFs provide a solution to this problem. Arguably, PMFs could remain in

public order and safety.” DEP’T OF THE ARMY, DEPARTMENT OF THE ARMY FIELD MANUAL FM 21-10: THE LAW OF LAND WARFARE § II 363 (1956), available at <http://faculty.ed.umuc.edu/~nstanton/Ch6.htm>.

104. In the wake of the 2003 invasion, Iraq’s government was largely dismantled, which has led to an overall increase in sectarian violence as theocratic groups vie for power. See, e.g., Yifat Susskind, *Promising Democracy, Imposing Theocracy: Gender-Based Violence and the U.S. War on Iraq*, MADRE, at 8 (2007), available at <http://www.madre.org/articles/me/iraqreport.pdf>.

105. See U.S. Gen. Acct. Off., *Rebuilding of Iraq: Stabilization, Reconstruction, and Financing Challenges* 1-2 (Feb. 8, 2006) (statement of Joseph A. Christoff, Director, International Affairs and Trade), available at <http://www.gao.gov/new.items/d06428t.pdf>.

106. SPEAR, *supra* note 30, at 39 (quoting Peter Lock, *Military Downsizing and Growth in the Security Industry in Sub-Saharan Africa*, 22 STRATEGIC ANALYSIS, Dec. 1999).

107. See Baker III, *supra* note 102.

108. *Id.*

109. Although support for the Iraq war is currently at its highest point since 2006, nearly fifty percent of the country believes U.S. troops should be brought home “as soon as possible.” David Paul Kuhn, *Support for Iraq Highest Since 2006*, POLITICO, Mar. 13, 2008, available at http://www.politico.com/news/stories/0308/9016_Page2.html.

110. *Id.*

Iraq, performing security and training functions, even after the withdrawal of U.S. troops.

Senate Bill 674¹¹¹ and its counterpart House Bill 369¹¹² take a more moderate approach, attempting to “fix” the MEJA’s jurisdictional loophole.¹¹³ The bills allow *any* PMF that provides security services to be prosecuted in federal district court¹¹⁴ and require the Joint Chiefs of Staff to issue rules of engagement for PMFs within fifteen days of any new contract.¹¹⁵ Although the bill passed the House of Representatives by a 389-30 vote, Republican Representative Chris Shays accused Democrats of “rushing the bill through Congress in a partisan bid to criticize the Bush [A]dministration’s handling of the war.”¹¹⁶ “[T]he White House said the bill would have ‘unintended and intolerable consequences for crucial and necessary national security activities and operations.’”¹¹⁷

Although Senate Bill 674 and House Bill 369 would fix the jurisdictional loopholes, the MEJA remains an ineffective, impractical, and unfair method for prosecuting security contractor misconduct committed under battlefield conditions. The State Department has already demonstrated its unwillingness to cooperate with the House Committee on Oversight and Government Reform, screening the information Blackwater agents may provide with regard to the September 16 shootings.¹¹⁸ In fact, it was recently uncovered that Blackwater has been involved in over 195 incidents involving the

111. Transparency and Accountability in Military and Security Contracting Act of 2007, S. 674, 110th Cong. (2007).

112. Transparency and Accountability in Military and Security Contracting Act of 2007, H.R. 369, 110th Cong. (2007).

113. The bills would require PMFs to provide information regarding the number and type of duty each agent will perform under the contract, as well as information about their training and the process used to hire them. It also requires the government entity with whom the PMF has contracted to submit a report to Congress detailing the terms of the contracts and a “catalogue of activities.” S. 674; H.R. 369.

114. S. 674; H.R. 369.

115. S. 674; H.R. 369.

116. *Law Protecting Blackwater Under Fire*, *supra* note 10.

117. *Id.*

118. See James Risen, *Blackwater Inquiry Blocked by State Dept., Officials Says*, N.Y. TIMES, Sept. 26, 2007.

use of force since 2005.¹¹⁹ However, many of these were never reported, including several involving the deaths of Iraqi civilians.¹²⁰

Blackwater itself has been less than cooperative. For example, at a hearing before the House Committee on Oversight and Government Reform, Blackwater made repeated claims that it could not produce certain internal documents because they contained “classified information.”¹²¹ Blackwater has also attempted to get the Department of Defense to classify other previously unclassified documents¹²² and is currently being investigated for tax evasion.¹²³ In light of the State Department and Blackwater’s track record of recalcitrance, it is difficult to imagine that the bills’ required “catalogue of activities” will be sufficient to create a meaningful degree of congressional oversight.

The MEJA allows security contractors to be prosecuted in U.S. district court for conduct in foreign counties that would constitute a crime punishable by more than one year of incarceration if committed in the United States.¹²⁴ The wide jurisdictional reach established by the MEJA was recently asserted by the U.S. government in the trial of LaTasha Arnt.¹²⁵ Mrs. Arnt fatally stabbed her husband, Staff Sergeant Matthias Anthony Arnt, during a domestic dispute on an Air Base in Turkey.¹²⁶ She was convicted in U.S. district court of voluntary manslaughter and although the conviction was overturned on appeal,¹²⁷ the court determined that jurisdiction was proper pursuant to the terms of the MEJA.¹²⁸ However, several key

119. *Rep. Woolsey Votes to Hold Military Contractors Accountable*, U.S. FED. NEWS, Oct. 4, 2007.

120. *Id.*

121. COMM. ON OVERSIGHT GOV’T REFORM, 110TH CONG., PRIVATE MILITARY CONTRACTORS IN IRAQ: AN EXAMINATION OF BLACKWATER’S ACTIONS IN FALLUJAH 14-15 (Comm. Print 2007) [hereinafter COMM. ON OVERSIGHT REFORM].

122. *Id.* at 15.

123. *Evidence of Tax Evasion by Blackwater*, U.S. FED. NEWS, Oct. 22, 2007.

124. 18 U.S.C. § 3261(a) (2000).

125. *See United States v. Arnt*, 474 F.3d 1159 (9th Cir. 2007).

126. *Id.* at 1161.

127. *Id.* The trial court committed reversible error by failing to instruct the jury on involuntary manslaughter as a lesser included offense. *See id.* at 1165.

128. *See id.* at 1161-63 (citing 18 U.S.C. § 3267(2)).

differences between military dependants and security contractors render the MEJA's jurisdictional reach inadequate and unjust when applied to alleged contractor misconduct committed on the battlefield.

Assuming Paul, the turret-gunner described in the introduction, fell within the MEJA's jurisdictional reach, he could theoretically be prosecuted for murder in federal district court. However, Paul's conduct presents a much more complex legal issue than that of Mrs. Arnt. Unlike Mrs. Arnt, who fatally stabbed her husband while in her domicile and on a military base, Paul fired his weapon at a number of targets, in a warzone, whom he believed were enemy combatants. Whereas Mrs. Arnt's crime parallels the many homicide cases prosecuted under U.S. law; one would be hard pressed to find a domestic analogue for Paul's misconduct.¹²⁹

Under federal law, "[m]urder is the unlawful killing of a human being with malice aforethought."¹³⁰ Malice aforethought "may be shown by proof that the defendant, without justification or excuse, intended to kill the victim or to do the victim grievous bodily harm."¹³¹ At first blush, this appears substantially similar to the homicide statute contained in the UCMJ, which defines murder as the unlawful killing of a human being, without justification or excuse.¹³² However, the justifications, or excuses, for killing another human contain subtle differences under civilian law as opposed to military law. For example, Paul would likely claim self-defense as an excuse

129. In fact, it is better understood as a violation of the international law of war. *See infra* Part IV.C.

130. 18 U.S.C. § 1111(a) (2006).

131. 40A AM. JUR. 2D *Homicide* § 448 (1999).

132.

Any person subject to this chapter who, without justification or excuse, unlawfully kills a human being, when he—(1) has a premeditated design to kill; (2) intends to kill or inflict great bodily harm; (3) is engaged in an act which is inherently dangerous to another and evinces a wanton disregard of human life; or (4) is engaged in the perpetration or attempted perpetration of burglary, sodomy, rape, rape of a child, aggravated sexual assault, aggravated sexual assault of a child, aggravated sexual contact, aggravated sexual abuse of a child, aggravated sexual contact with a child, robbery, or aggravated arson; is guilty of murder, and shall suffer such punishment as a court-martial may direct

10 U.S.C. § 918 (2006).

for his actions. As a civilian in federal district court, he would thus have to prove that he:

(1) was under the unlawful and present threat of death or serious bodily injury; (2) did not recklessly place himself in a situation where he would be forced to engage in criminal conduct; and (3) had no reasonable legal alternative (to both the criminal act and the avoidance of the threatened harm).¹³³

This is an objective standard,¹³⁴ which means that Paul's mistaken belief that he was under attack by hostile forces is only a defense if a reasonably prudent person, faced with a similar situation, would have reacted in the same manner.

Conversely, under military law, "a mistaken belief as to the identity or status of a target would negate the state of mind required to commit the offense of murder."¹³⁵ Because "[e]very act that a soldier performs in combat is inherently dangerous and calculated to harm the enemy,"¹³⁶ and civilians who engage in hostile military action are lawful targets,¹³⁷ the self-defense requirements are necessarily broader for soldiers than civilians. Therefore, Paul's actions would be excusable under military law if it is determined that he reasonably believed he was firing upon enemy combatants. However, even though the MEJA, vis-à-vis the application of civilian law, arguably establishes stricter requirements for a self-defense excuse, it would not necessarily result in a greater number of convictions.

Because the MEJA would require Paul to be tried in U.S. district court, any evidence or witnesses would have to be transported to the United States. In cases involving military dependants, such as Mrs.

133. *E.g.*, *United States v. Crittendon*, 883 F.2d 326, 330 (4th Cir. 1989).

134. John F. Wagoner Jr., Annotation, *Standard for Determination of Reasonableness of Criminal Defendant's Belief, for Purposes of Self-Defense Claim, That Physical Force Is Necessary—Modern Cases*, 73 A.L.R.4th 993, 997 (1989).

135. James A. Georges, *Mistake of Fact Justifies Death of Civilian by Negating Unlawfulness Required for UCMJ Article 118(3)*, *ARMY LAW.*, Jan. 1995, at 38.

136. *Id.*

137. *E.g.*, Jeffrey F. Addicott, *Proposal for a New Executive Order on Assassination*, 37 U. RICH. L. REV. 751, 783 (2003).

Arnt, this requirement is not overly burdensome.¹³⁸ However, for incidents such as the September 16 shootings in Nasser, the investigation would be more difficult. Even if the FBI was able to locate the Iraqi witnesses, foreign nationals cannot be compelled to testify at trials held in the United States.¹³⁹ Because Paul has a Sixth Amendment right to confront all witnesses against him, if the prosecutor wanted to use eyewitness evidence, she would have to produce the eyewitness.¹⁴⁰ It is very unlikely that an Iraqi civilian, who recently witnessed his family member gunned down by an American, would cooperate with FBI investigators, let alone willingly travel to the United States to serve as a witness.

Assuming the prosecutor was able to produce an eyewitness who testified that no shots were fired at Paul's convoy, the prosecutor would still have to convince a jury of twelve Americans that the Iraqi witness is more credible than Paul. Every American has viewed images in the newspaper or on television of American soldiers who have been slain by Iraqi terrorists. Terrorists do not wear uniforms or carry identification; they look like civilians. Compared to an Iraqi eyewitness, who may not speak English and is apparently indistinguishable from those the media has labeled "terrorists," the jury would likely find Paul very sympathetic.

Because of the problems inherent to the prosecution of security contractors under civilian law and the desirability of continued PMF operation, the MEJA is not the appropriate vehicle to regulate contractors that perform what are essentially combat duties in a warzone.¹⁴¹ Instead, their actions should be evaluated in the context of proper military conduct.

138. Arguably, crimes committed by spouses are likely to occur in relatively secure areas. Evidence is undoubtedly easier to preserve on a military base than in a hostile warzone.

139. Kevan F. Jacobson, Project, *Restoring UCMJ Jurisdiction Over Civilian Employees During Armed Hostilities*, U.S. ARMY WAR COLLEGE, Mar. 15, 2006, at 12.

140. U.S. CONST. amend. VI.

141. Peters, *supra* note 12, at 387.

IV. COURT-MARTIAL JURISDICTION AND CIVILIAN CONTRACTORS

Throughout American history, civilians have accompanied military forces and supported troops in a variety of roles. During the American Revolution, family members and servants, referred to as “retainers,” traveled and camped with the colonial soldiers.¹⁴² Captain Lewis and Lieutenant Clark employed a large number of civilian adventurers on their expedition through the then uncharted wilderness of the western United States.¹⁴³ During the Civil War, thousands of civilian employees were used by Union forces to defend Nashville while General Sherman marched through Georgia.¹⁴⁴ Civilian packers accompanied Army cavalry and infantry units as they prepared to attack Lakota Sioux during the Indian Wars in June of 1876; in fact, the 7th Cavalry Unit routinely used civilian scouts and even employed a civilian surgeon who died alongside General Custer at the infamous Battle of Little Bighorn.¹⁴⁵ In World War I, civilian contractors served as shipmates, cooks, and watchmen on Army transports.¹⁴⁶ Civilian scientists conducted operational studies in hostile territory and civilian engineers were taken prisoner by Japanese forces during World War II.¹⁴⁷ All of these civilian contractors were subject to military jurisdiction pursuant to the evolving body of legislation discussed below.

The original Articles of War, enacted by the First Continental Congress in 1775 and 1776, provided for court-martial jurisdiction over “all suttlers and retainers to a camp, and all persons whatsoever serving with the armies of the United States in the field.”¹⁴⁸ Under

142. *Id.* at 376.

143. *See id.* at 377. Nearly one-quarter of Lewis and Clark’s expeditionary force was comprised of civilian contractors. *Id.*

144. *Id.*

145. *See id.* at 377-78.

146. *Id.* at 378.

147. *Id.* at 378-79.

148. Robert Girard, *The Constitution and Court-Martial of Civilians Accompanying the Armed Forces: A Preliminary Analysis*, 13 STAN. L. REV. 461, 482 (1961) (quoting Articles of War (1776) § XIII, art. 23, in 2 WINTHROP, MILITARY LAW AND PRECEDENTS 1478, 1497 (2d ed. 1896)). “Suttlers” is a Civil War era term for camp followers who sold sundries to soldiers. Dan DeWitt,

these provisions, many civilians were tried by military tribunals during the Revolutionary War, primarily in areas where civilian courts were not functioning effectively.¹⁴⁹ These provisions remained essentially unchanged until 1916 when Congress adopted the War Department's revisions to the Articles of War.¹⁵⁰ Article 2(d) of the proposed revision made accompanying civilians subject to court-martial only for crimes committed while stationed outside of the territorial jurisdiction of the United States during peacetime or within the territorial jurisdiction of the United States during wartime.¹⁵¹ The substance of this provision was adopted by the UCMJ, which was enacted by Congress in 1950.¹⁵²

A. Court-Martial During a Time of Peace

The current version of the UCMJ extends court-martial jurisdiction to anyone "serving with, employed by, or accompanying the armed forces outside the United States" during peacetime.¹⁵³ Blackwater agents operating in Iraq could be considered persons serving with and accompanying the armed forces outside the United States and therefore could be subject to military jurisdiction for misconduct while in Iraq; however, judicial precedent suggests otherwise. Despite the seemingly clear language of the UCMJ, a civilian has not been successfully tried by general court-martial since the 1958 trial of George Mountz, a civilian contractor working in Korea at the end of the Korean War.¹⁵⁴

In 1958, Mountz was employed by Vinnell, a defense contractor based in California, which continues to provide goods and security services to the U.S. military in Iraq as a subsidiary of Northrop Grumman.¹⁵⁵ Responsible for maintaining power distribution systems

Getting the Feel of History, ST. PETERSBURG TIMES, Jan 16, 2003, available at http://www.sptimes.com/2003/01/16/Weekend/Getting_the_feel_of_h.shtml.

149. Girard, *supra* note 148, at 483.

150. *Id.* at 492.

151. *Id.*

152. 10 U.S.C. § 802(a)(10)-(11) (2006).

153. *Id.* § 802(a)(11).

154. Roger J. Miner, *The Last Civilian Court-Martial and Its Aftermath*, 67 OHIO ST. L.J. 401, 407 (2006).

155. *Id.* at 406-07.

in Korea, Mountz was also assigned the task of delivering Vinnell payroll checks to the Army Finance Disbursing Office.¹⁵⁶ The Disbursing Office then converted the payroll checks into Korean Hwan,¹⁵⁷ at the official exchange rate of 500 Hwan to 1 U.S. dollar,¹⁵⁸ to pay Vinnell's Korean employees. At that time, Hwan could be purchased on the black market in Seoul at the rate of 1000 Hwan for every dollar.¹⁵⁹ Seeing an opportunity to make quick and easy money, two military officers convinced Mountz to exchange the Vinnell checks for military payment certificates (MPCs), the equivalent of U.S. dollars, rather than Hwan.¹⁶⁰ Mountz then delivered the certificates to the officers who exchanged half of them for Hwan which they purchased on the black market.¹⁶¹ Because the black market exchange rate was double the official rate, Mountz was able to pay Vinnell's Korean employees and the three men were able to pocket the other half of the MPCs as profit.¹⁶²

Military authorities discovered the scheme, arrested Mountz, and confiscated his passport.¹⁶³ Because his actions violated a provision of the UCMJ, Mountz was tried by general court-martial.¹⁶⁴ The trial began on August 6, 1958, and Mountz immediately moved to dismiss the charges, arguing that the military lacked personal jurisdiction over a civilian contractor.¹⁶⁵ Mountz claimed that he did not meet the requirements of a person accompanying the armed forces because he was not employed by the U.S. government, armed conflict had ended before his arrival in Korea, and as a civilian he could not be constitutionally subjected to trial by court-martial.¹⁶⁶ Mountz's

156. *Id.* at 407.

157. "Hwan" was the official currency of Korea during and immediately following the Korean War. It was used until around 1962 when the "won" was reintroduced as a means of controlling inflation. Kurt Schuler, *Tables of Modern Monetary History: Asia* (Feb. 29, 2004), <http://www.dollarization.org/asia.htm>.

158. Miner, *supra* note 154, at 407.

159. *Id.* at 408.

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.* at 409-10.

166. *Id.* at 412.

constitutionality challenge was not without merit; only a few years earlier the U.S. Supreme Court decided the cases of *United States ex rel. Toth v. Quarles*¹⁶⁷ and *Reid v. Covert (Reid II)*,¹⁶⁸ declaring that the court-martial proceedings violated the defendants' constitutional rights.¹⁶⁹

In *Toth v. Quarles*, the Supreme Court held that the Constitution precluded a former serviceman from being court-martialed for offenses committed during his military service but not prosecuted until after he had returned to civilian life.¹⁷⁰ The *Reid II* opinion actually covered two cases: *Reid v. Covert* and *Kinsella v. Krueger*.¹⁷¹ Both of these cases involved military wives who killed their servicemen husbands while living on military bases in foreign countries.¹⁷² Both women were tried in military court, convicted of murder, and filed petitions for writs of habeas corpus challenging court-martial jurisdiction.¹⁷³ In June of 1956, the Court upheld military jurisdiction over the two women, declaring that the prosecutorial protections provided by the U.S. Constitution did not apply to civilians tried by the U.S. government on foreign soil.¹⁷⁴ However, this was not a unanimous decision; Chief Justice Warren and Justices Black and Douglas joined in a brief dissenting opinion, and Justice Frankfurter withheld judgment, stating that the Court did not have adequate time to deliberate since the case was heard so close to the end of the term.¹⁷⁵

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

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

169. Miner, *supra* note 154, at 413; *Toth*, 350 U.S. at 11, 21; *Reid II*, 354 U.S. at 5.

170. Girard, *supra* note 148, at 466.

171. Miner, *supra* note 154, at 413.

172. *See id.*

173. *Id.* at 413-14. Because both cases concerned the constitutionality of court-martial jurisdiction of military dependants, the U.S. Supreme Court consolidated them. *Id.*

174. Girard, *supra* note 148, at 467; Miner, *supra* note 154, at 414. Thus, Congress was free to proscribe any manner of trial it deemed appropriate for offenses committed outside the territorial jurisdiction of the United States, including the court-martial of civilians accompanying the armed forces pursuant to the UCMJ. Girard, *supra* note 148, at 467; *see also* Miner, *supra* note 154, at 413-14.

175. *Kinsella v. Krueger*, 351 U.S. 470, 485 (1956); *see also* Girard, *supra* note 148, at 469.

The following year, the Court granted a rehearing of *Reid II*, and after listening to additional arguments, withdrew its previous decision.¹⁷⁶ This time, with two new justices on the bench, the Court held that the United States is “entirely a creature of the Constitution,” and Congress’ power and authority only exists as far as it is authorized by such.¹⁷⁷ Thus, the Constitution applies equally to trials at home or abroad. Finding nothing within the Constitution that would authorize the court-martial of military dependants, the Court held that “wives, children and other dependants of servicemen . . . do not lose their civilian status and their right to a civilian trial because the Government helps them live as a member of a soldier’s family.”¹⁷⁸

However, the *Reid II* holding was narrowly interpreted by military courts to apply only to dependants of military personnel in capital cases.¹⁷⁹ This was the interpretation applied to the case of George Mountz and, although his conviction was eventually set aside for other reasons, the law officer in charge of the court-martial denied Mountz’s jurisdictional challenge stating that Mountz was “subject to military rules, laws, and . . . regulations.”¹⁸⁰

In 1960, less than two years after the Mountz court-martial had ended, the U.S. Supreme Court ensured that Mountz would be the last U.S. civilian convicted in military court with the opinions of *Kinsella v. United States ex rel. Singleton*¹⁸¹ and *Grisham v. Hagan*.¹⁸² In *Singleton*, the Court extended the holding of *Reid II* to civilian dependants charged with non-capital offenses, overturning the court-martial conviction of a military wife for manslaughter.¹⁸³ In *Grisham*, a civilian employee of the U.S. Army who was stationed at an Army installation in France was tried by general court-martial and found

176. Girard, *supra* note 148, at 467-69.

177. *Id.* at 470.

178. *Reid v. Covert (Reid II)*, 354 U.S. 1, 23-24 (1957); Miner, *supra* note 154, at 414.

179. *See United States v. Wilson*, 25 C.M.R. 322 (1958) (distinguishing between overseas employees and overseas dependants in upholding court-martial jurisdiction).

180. Miner, *supra* note 154, at 418, 422.

181. *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234 (1960).

182. *Grisham v. Hagan*, 361 U.S. 278 (1960).

183. Miner, *supra* note 154, at 425-26.

guilty of murder.¹⁸⁴ Grisham petitioned for a writ of habeas corpus, claiming that Congress lacked the power to deprive him of a civil trial under the Constitution.¹⁸⁵ Applying *Reid II*, the Court stated that there was no difference between a civilian dependant and a civilian employee; the court-martial of any civilian accompanying the armed forces outside of the United States, during peacetime, is unconstitutional.¹⁸⁶

Article I of the U.S. Constitution authorizes Congress to “make rules for the government and regulation of the land and naval forces,”¹⁸⁷ which arguably includes the power to court-martial civilians for conduct that relates to the armed forces.¹⁸⁸ However, in *Reid II*, and by extension, *Singleton* and *Grisham*, the Court found that the broad powers conferred upon Congress by Article I were incongruent with Article III and the Fifth and Sixth Amendments of the U.S. Constitution.

Article III states that “[t]he [t]rial of all [c]rimes . . . shall be by [j]ury.”¹⁸⁹ Court-martial trials are similar to civilian criminal trials in some respects: a judge presides over the trial, the accused is entitled to appointed counsel or may hire a civilian court-martial defense attorney at his or her own expense, and the prosecutor must prove the allegations beyond a reasonable doubt.¹⁹⁰ However, there are key differences. Notably, a military defendant is not entitled to a “jury” trial.¹⁹¹ Rather the accused must choose between trial by judge or military panel.¹⁹² Unlike a civilian jury, a military panel is comprised of officers and enlisted personnel from the same command as, but of higher rank than, the accused.¹⁹³ The panel is selected by the

184. *Id.* at 427.

185. *Id.*

186. *Id.*

187. U.S. CONST. art. I, § 8, cl. 14.

188. In order to properly regulate the armed forces, Congress must be able to control the actions of civilians accompanying the armed forces.

189. U.S. CONST, art. III, § 2.

190. *E.g.*, Michael Waddington, *Court Martial: Process and Procedure*, July 20, 2007, <http://ucmjdefense.blogspot.com/2007/07/courts-martial-process-and-procedure.html>.

191. *Id.*

192. *Id.*

193. *Id.*

convening authority and although both the prosecution and defense are permitted to voir dire the panel members, each side may only preemptively strike one panel member.¹⁹⁴

The Fifth Amendment gives an accused the right to a grand jury indictment in capital cases and guarantees that a criminal defendant will not be deprived of “life, liberty, or property, without due process of law.”¹⁹⁵ Grand juries do not exist in military courts.¹⁹⁶ Rather, when the military suspects that a crime has been committed, a military officer conducts a pre-trial investigation pursuant to Article 32 of the UCMJ.¹⁹⁷ If the investigating officer’s suspicion is confirmed, he may recommend that the convening authority initiate court-martial proceedings.¹⁹⁸

In a civilian trial, the jury must make a unanimous decision to convict or acquit. When a jury cannot agree on a verdict, a mistrial results and the prosecution must decide whether to try the case in front of a new jury or dismiss the charges. However, “hung juries” do not exist in military court.¹⁹⁹ With the exception of death penalty cases, the prosecutor will obtain a conviction if only two-thirds of the military panel find the defendant guilty.²⁰⁰

Unlike a civilian jury, a military panel is not only responsible for determining guilt; it also decides what sentence to impose and may even ask questions of witnesses.²⁰¹ However, because the accused is entitled to representation during the investigation, can interview and cross-examine witnesses, and is able to review all evidence compiled against him, the abridgment of a civilian’s right to grand jury indictment is one of form rather than substance.²⁰² Similarly, in a military trial, if the trial does result in a conviction, the defendant is entitled to an extensive process of appellate review, ensuring adequate

194. *Id.* As opposed to three in a civilian trial. The Free Dictionary, <http://legal-dictionary.thefreedictionary.com/Preemptory+challenge>.

195. U.S. CONST. amend. V.

196. *See* Waddington, *supra* note 190.

197. *Id.*

198. *See id.*

199. *Id.*

200. *Id.*

201. *Id.*

202. Peters, *supra* note 12, at 409.

due process protections.²⁰³ The UCMJ also provides protections against self-incrimination that mirror the rights contained in the Fifth Amendment.²⁰⁴

The Sixth Amendment gives a defendant in a criminal prosecution the right to “a speedy and public trial, by an impartial jury of the State and district wherein the crime [was] committed.”²⁰⁵ Although military trials are generally open to the public, the military judge may close the proceedings when dealing with sensitive or classified material.²⁰⁶ The accused is entitled to an impartial court-martial panel,²⁰⁷ but in situations like *Reid v. Covert*, where a civilian is accused of murdering a service member, it is easy to see where any panel comprised of military officials may harbor bias.

However, even in *Reid II*, the Court recognized that this constitutional analysis changes during a time of war, stating that “[i]n the face of an actively hostile enemy, military commanders necessarily have broad power over persons on the battlefield.”²⁰⁸ Moreover, the Court explicitly recognized that there may be “circumstances where a person could be ‘in’ the armed services . . . even though he had not formally been inducted into the military.”²⁰⁹ The *Reid II* holding did not extend to these situations, which suggests that the Court would not find the UCMJ provision extending military jurisdiction to civilians accompanying the military in the field during “a time of war” unconstitutional. However, the military has had an equally difficult time prosecuting civilians during war time as it has during a time of peace because of the way the phrase “in a time of war”²¹⁰ in section 802a(a)(10) has been interpreted.

203. *Id.*

204. 10 U.S.C. § 831(a) (2006). “No person subject to this chapter may compel any person to incriminate himself or to answer any question the answer to which may tend to incriminate him.” *Id.*

205. U.S. CONST. amend. VI.

206. Waddington, *supra* note 190.

207. *Id.*

208. *Reid v. Covert (Reid II)*, 354 U.S. 1, 33 (1957).

209. *Id.* at 22-23.

210. 10 U.S.C. § 802(a)(10) (the 2005 version stated: “[i]n time of war, persons serving with or accompanying an armed force in the field”). See John

B. Court-Martial During a Time of War

In 1969, Raymond Averette, a civilian contractor working at Camp Davis in South Vietnam, was arrested for conspiring to steal 36,000 batteries from the U.S. government.²¹¹ Relying on section 802(a)(10) of the UCMJ, Averette was tried and convicted in military court.²¹² However, the U.S. Court of Military Appeals overturned his conviction, construing the language “in a time of war” to mean “a war formally declared by Congress.”²¹³ Because Congress never declared war against North Vietnam, the court found that the military lacked jurisdiction over Averette under section 802(a)(10), and the case was dismissed.²¹⁴

The current conflict in Iraq has many parallels to the Vietnam War, including the fact that war was never formally declared against Iraq.²¹⁵ Even if it had been, President Bush announced that the combat mission in Iraq was over in 2003.²¹⁶ Therefore, pursuant to *U.S. v. Averette*, it seems unlikely that court-martial jurisdiction could be extended to cover Blackwater security agents working in Iraq. However, the uncertainty over what Congress intended by the phrase “in a time of war” was partially resolved by a 2006 amendment to the UCMJ which changed section 802(a)(10) to read “[in a] time of declared war or a contingency operation.”²¹⁷

Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364, § 552, 120 Stat. 2083, 2217 (2006).

211. Peters, *supra* note 12, at 394.

212. *Id.*

213. *Id.* at 395 (quoting *United States v. Averette*, 41 C.M.R. 363, 365 (1970)).

214. *United States v. Averette*, 41 C.M.R. 363, 365-66 (1970).

215. Michael C. Dorf, *Why Congressional Power to Declare War Does Not Provide an Effective Check on the President*, Mar. 6, 2003, <http://writ.news.findlaw.com/dorf/20020306.html>.

216. President George W. Bush, *President Declares End to Major Combat in Iraq* (May 1, 2003), *available at* <http://www.cbsnews.com/stories/2003/05/01/iraq/main551946.shtml> [hereinafter *President Declares End to Major Combat in Iraq*].

217. 10 U.S.C. § 802(a)(10) (2006). A “contingency operation” is defined as any military action “designated by the Secretary of Defense as an operation in which members of the armed forces are or may become involved in military actions.” *Id.* § 101(a)(13)(A).

Although the situation in Iraq would clearly qualify as a contingency operation, it is still not certain that this revision is sufficient to allow the military to court-martial Blackwater contractors. Despite the favorable dicta in *Reid II*, the Supreme Court has not ruled on the constitutionality of civilian court-martials during a time of war and it may view the 2006 revision as an unconstitutional expansion of military jurisdiction.²¹⁸ Moreover, President Bush's 2003 statement that combat operations in Iraq were over²¹⁹ could preclude the current occupation from section 802(a)(10)'s definition of wartime, even with the 2006 amendment.

The other problem with applying section 802(a)(10) to Blackwater contractors is that it only applies to persons "serving with or accompanying an armed force in the field."²²⁰ Unlike civilian contractors in prior wars who either traveled on military vessels, with military escorts, or were stationed on military bases,²²¹ Blackwater security contractors often operate independently of the U.S. military. For example, in April of 2004, eight Blackwater agents, without the help of the U.S. military, successfully repelled an attack on the Coalition Provisional Authority office in Najaf that was launched by heavily armed followers of Moqtada Sadr, a radical Shiite cleric.²²² Prior to the September 16, 2007, incident, the military was not apprised of Blackwater's activities or locations within Iraq, did not accompany security contractors on their missions, nor did it restrict their use of force.²²³ Moreover, Blackwater's contract is with the State Department, not the Department of Defense, and Blackwater is not assigned to a specific military installation.²²⁴ Thus, it is questionable whether Blackwater really accompanies "an armed force in the field."

218. Anthony E. Giardino, *Using Extraterritorial Jurisdiction to Prosecute Violations of the Law of War: Looking Beyond the War Crimes Act*, 48 B.C. L. REV. 699, 719 (2007).

219. President Declares End to Major Combat in Iraq, *supra* note 216.

220. 10 U.S.C. § 802(a)(10).

221. *See supra* pp. 216-28.

222. Marshall, *supra* note 13, at 2.

223. Peter Grier, *More Curbs on Private Iraq Guards: The Pentagon and State Department Agree on More Military Oversight*, CHRISTIAN SCI. MONITOR, Nov. 11, 2007, available at www.cwmonitor.com/2007/1101/p01s02-usfp.html?page=2.

224. *See, e.g., Government Investigates, supra* note 37.

Even if section 802(a)(10) was sufficient to prosecute Blackwater security contractors currently operating in Iraq, it does not adequately solve the problem from a long-term perspective. As previously mentioned, PMFs can be very useful as peacekeeping and reconstruction forces. Because it is unlikely that the Iraqi government will be able to provide adequate security and police forces without external support, PMFs will continue to play an important role in Iraq after U.S. troops have been withdrawn. Therefore, Congress must find a way to ensure the military retains jurisdiction of security contractors beyond “a time of declared war or contingency operation.”²²⁵ Although the Supreme Court found the court-martial of civilians during peacetime unconstitutional, the court-martial of Blackwater security contractors would not be inconsistent with the holding in *Reid II*; Blackwater agents may not be part of the U.S. military, but they are not “civilians” either.

C. *The International Law of War*

Throughout history, warring nations have distinguished between appropriate and inappropriate military targets, generally concluding that attacks on non-combatants are inappropriate.²²⁶ The international law of war embodied in the 1977 Additional Protocol I to the 1949 Geneva Conventions (Protocol I)²²⁷ embraces the distinction between combatants and non-combatants, defining the former as “[m]embers of the armed forces of a Party to [the] conflict.”²²⁸ Non-military personnel are thus considered non-combatants. As such, they are protected from attack but are also precluded from directly participating in hostilities.²²⁹ Although the United States is not a party to Protocol I,²³⁰ the UCMJ makes similar distinctions between military forces and civilians.²³¹ Blackwater security contractors do not fit

225. 10 U.S.C. § 802(a)(10).

226. A.P.V. Rogers, *LAW ON THE BATTLEFIELD* 8 (Dominic McGoldrick ed., 2d ed. 2004).

227. Protocol I, *supra* note 25.

228. *Id.* at art. 43.

229. *Id.*

230. A list of countries that signed Protocol I is available at <http://www.icrc.org/ihl.nsf/websign?readform&id=470&ps=P>.

231. 10 U.S.C. § 101(a)(4) (2006) (defining armed forces).

nically into either of these categories. They are not a part of the U.S. military, so they do not meet the definition of “combatant,” but they are heavily armed and authorized to use force in carrying out their missions so they cannot accurately be described as “non-combatants” either. Protocol I does not clearly define what constitutes “direct participation in hostilities,” but the U.S. military does, and it includes gathering intelligence and serving as a lookout or guard in its definition of “direct participation.”²³² Applying this standard to Blackwater leads to bizarre and troubling results: officially, security contractors are considered “civilians,” yet the guard duties performed by Blackwater agents would fall within the military’s definition of “direct participation in hostilities.” This makes them “unlawful combatants,” which strips them of the benefits provided by the Geneva Conventions and exposes them to possible prosecution as war criminals.²³³

The 1949 Geneva Conventions establish conditions for fair treatment of prisoners of war and provide combatants special protection and treatment, including immunity from prosecution for normal acts of warfare.²³⁴ A combatant’s use of deadly force against an enemy is considered a legitimate State action,²³⁵ for which he cannot be criminally prosecuted.²³⁶ However, the same privileges do not extend to non-combatants.²³⁷ Therefore, if Blackwater agents are truly “civilians,” their use of deadly force can only be justified upon a theory of self-defense. This places the contractor in a precarious situation: if he is too slow to fire upon a perceived threat, the safety of his convoy is placed into jeopardy, but if he fires before the threat evolves to a point that necessitates the use of deadly force, the

232. Micheal E. Guillory, *Civilianizing the Force: Is the United States Crossing the Rubicon?*, 51 A.F. L. REV. 111, 117-18 (2001).

233. J. Riccou Heaton, *Civilians at War: Re-Examining the Status of Civilians Accompanying the Armed Forces*, 57 A.F. L. REV. 155, 195 (2005); Guillory, *supra* note 232, at 114; *see also* NURENBERG MILITARY TRIBUNALS, TRIALS OF WAR CRIMINALS BEFORE THE NURENBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL NO. 10, at 1244 (1950) (“[A] civilian who aids, abets or participates in the fighting is liable to punishment as a war criminal under the law of war.”).

234. Singer, *Vacuum of Law*, *supra* note 24, at 526-27.

235. *See generally* Marshall, *supra* note 13, at 8-9.

236. Singer, *Vacuum of Law*, *supra* note 24, at 526-27.

237. Heaton, *supra* note 233, at 195.

contractor could be held criminally liable for the injuries he inflicts. Thus, bringing PMFs under military regulation not only serves the interests of justice in prosecuting contractor misconduct, it protects security contractors by legitimizing their use of force under the law of war.

As previously noted, there are substantial constitutional obstacles to court-martialing civilian contractors under section 802(a)(10) and 802(a)(11) of the UCMJ. However these constitutional issues can be avoided by giving the President the power to transfer members of the State Department's diplomatic security service to the armed forces.

V. ARMY, NAVY, AIR FORCE, MARINES, AND . . . BLACKWATER?

In 1987, the Supreme Court held that court-martial jurisdiction rests solely upon a person's status as a member of the armed forces.²³⁸ Thus, to ensure that court-martial jurisdiction can be constitutionally applied to security contractors, their official status must be changed from "civilian" to "military." Congress' recent attempts to cure the defect in section 802(a)(10) of the UCMJ demonstrates its intent to extend court-martial jurisdiction to security contractors operating in Iraq.²³⁹ In fact, Pentagon Spokesman Geoff Morrell, President George W. Bush, the Chairman of the Joint Chiefs of Staff General Peter Pace, and Blackwater founder Erik Prince have all expressed a desire to integrate private security contractors into the armed forces.²⁴⁰

A. *The Many Proponents of Military Integration*

In response to the September 16 shootings, the Pentagon and State Department announced plans to increase the level of military oversight over Blackwater employees operating in Iraq.²⁴¹ Pentagon spokesman, Geoff Morrell, stated that the military would begin to oversee contractor training, implement more restrictive rules of engagement, and control the movements of Blackwater agents in Iraq.²⁴² President George W. Bush took the concept of military

238. *Solorio v. United States*, 483 U.S. 435, 439 (1987).

239. *See supra* p. 28 and note 217.

240. *See infra* Part V.A.

241. Grier, *supra* note 223.

242. *Id.*

oversight one step further, announcing plans to develop a “civilian reserve corps” in his 2007 State of the Union address.²⁴³ The President explained that the “corps would function much like [the] military Reserve. It would ease the burden on the armed forces by allowing [the government] to hire civilians with critical skills to serve on missions abroad when America needs them.”²⁴⁴ General Peter Pace, chairman of the Joint Chiefs of Staff, echoed the President’s optimism, saying he was “enthusiastic about the opportunity that this concept of a civilian reserve corps presents for the nation.”²⁴⁵ This concept also appeared in Defense Secretary Donald Rumsfeld’s 2006 Quadrennial Defense Review.²⁴⁶ In assessing the current and future strength of the U.S. war-making machine, he concluded that the United States’ “Total Force” consisted of four elements: active troops, reserve troops, contractors, and civilians.²⁴⁷ Arguably, this not only demonstrates that the Department of Defense views contractors as a part of the total military force, but that it also draws a distinction between contractors and civilians.

Even Blackwater’s founder, Erik Prince, favors military integration. At a military conference in 2005 he proposed the idea of establishing a “contractor brigade” comprised of Blackwater contractors.²⁴⁸ With a fleet of over twenty aircraft and 20,000 trained soldiers, Prince suggested that Blackwater is not only ready to deploy, but could do so for less than the \$3.6 billion it would cost the Pentagon to add the same number of troops to the standing military.²⁴⁹

243. Yusuf Alabarda & Rafal Lisowiec, *The Private Military Firms—Historical Evolution and Industry Analysis*, June 2007, at 49 (M.B.A. dissertation, Naval Postgraduate School), available at <http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA473255&Location=U2&doc=GetTRDoc.pdf>.

244. Jeremy Scahill, *Bush’s Rent-an-Army*, L.A. TIMES, Jan. 25, 2007, at A23, available at <http://articles.latimes.com/2007/jan/25/opinion/oe-scahill25> [hereinafter *Rent-an-Army*].

245. Linda D. Kozaryn, *Chairman Fields Troops’ Questions*, AM. FORCES PRESS SERV., Feb. 26, 2007, available at <http://www.defenselink.mil/news/NewsArticle.aspx?ID=3182>.

246. U.S. DEP’T OF DEF., QUADRENNIAL DEFENSE REVIEW REPORT (2006), at 75, available at <http://www.globalsecurity.org/military/library/policy/dod/qdr-2006-report.htm>.

247. *Id.*

248. Alabarda & Lisowiec, *supra* note 243, at 49.

249. *Rent-an-Army*, *supra* note 244.

Although Prince's proposal for an entire brigade of private soldiers is a bit more ambitious than the President's "civilian reserve corps,"²⁵⁰ it demonstrates that the White House, the Pentagon, and Blackwater not only recognize the necessity of military/contractor integration, they also believe it will be mutually beneficial.

B. Using the Existing Framework of the UCMJ

Currently, Blackwater's \$320 million contract is paid under the State Department's Worldwide Personal Protective Service (WPPS) program.²⁵¹ The WPPS was created by the Omnibus Diplomatic Security and Antiterrorism Act of 1986,²⁵² which increased the funding available to the State Department to "counter acts of terrorism and protect and secure United States Government personnel and missions abroad."²⁵³ Under this program, the State Department is authorized to employ "special agents" to protect "official representatives of the United States government, in the United States or abroad."²⁵⁴ The need for the services of the WPPS has increased dramatically over the past decade, especially in recent years because of the conflict in Iraq and Afghanistan.²⁵⁵ As a result, the State Department said it is "unable to provide protective services on a long-term basis from its pool of special agents," opting instead to contract with PMFs like Blackwater to fulfill its security obligations.²⁵⁶ These agents are authorized to use deadly force in executing their contract²⁵⁷

250. Erik Prince envisions a brigade of battle-ready soldiers while President Bush's plan would use the civilian corps for rebuilding foreign infrastructure. *Id.*; see also Kozaryn, *supra* note 245.

251. Scahill, *Jackpot*, *supra* note 93.

252. Omnibus Diplomatic Security and Antiterrorism Act of 1986, Pub. L. No. 99-399 §§ 201-03, 100 Stat. 853.

253. *Id.* § 102(a)(3).

254. 22 U.S.C. § 2709 (2006).

255. See Fred Burton & Scott Stewart, *Security Contractors in Iraq: Tactical and Practical Considerations*, STRATFOR, Oct. 10, 2007, http://www.stratfor.com/weekly/security_contractors_iraq_tactical_and_practical_considerations.

256. Scahill, *Jackpot*, *supra* note 93.

257. Griffin, *supra* note 22, at 7.

[The] policy utilizes a seven-step process . . . (1) English/Arabic visual warning signs on vehicles; (2) hand/verbal warning signs; (3) use of bright lights; (4) use of Pen flares; (5) weapon pointed at offending vehicle; (6)

but are not under the command or control of the U.S. military.²⁵⁸ Understandably, this can cause confusion on the battlefield. Security contractors are often mistakenly fired upon by American military forces that were unaware the contractors were operating in the area.²⁵⁹ By coordinating the movements of Blackwater guards with military commanders, these types of “blue on white”²⁶⁰ incidents could arguably be avoided.

The current lack of coordination between security contractors and the military also has indirect, though no less significant, effects on military troops. On March 31, 2004, four Blackwater guards were escorting a convoy of kitchen equipment when they were ambushed and killed in Fallujah.²⁶¹ A few days later, the Marines were sent into Fallujah to find the insurgents who had killed the Blackwater guards.²⁶² The Marines had planned to deal with the ongoing violence in Fallujah through diplomatic action, establishing trust with local residents by rebuilding infrastructure, but unfortunately this ambush dictated a forceful Marine response.²⁶³ As a result, not only were the lives of these Marines placed in danger, but the image of American troops in general was significantly tarnished. As Marine Colonel John Toolan explained, “we were going in as [Fallujah residents’] worst enemy, and it’s tough to come back from that.”²⁶⁴

It is important to note that security contractors are often dressed in camouflaged uniforms with American flags sewn onto the shoulders,

shots fired into engine block of vehicle; and (7) shots fired into windshield of vehicle. It should be noted that deadly force can be immediately applied provided that it is necessary under the specific situation’s circumstances.

Id. at 7-8.

258. Bobby A. Towery, Research Paper, *Phasing Out Private Security Contractors in Iraq*, U.S. ARMY WAR COLLEGE (Mar. 15, 2006).

259. Alabarda & Lisowiec, *supra* note 243, at 41.

260. *Id.*

261. COMM. ON OVERSIGHT REFORM, *supra* note 121, at 2. See also *Frontline: Private Warriors* (PBS television broadcast June 21, 2005), transcript available at <http://www.pbs.org/wgbh/pages/frontline/shows/warriors/etc/script.html> [hereinafter *Frontline: Private Warriors*].

262. *Frontline: Private Warriors*, *supra* note 261.

263. *Id.*

264. *Id.*

nearly identical to those worn by U.S. soldiers.²⁶⁵ This makes it difficult for Iraqi civilians to distinguish between Blackwater contractors and U.S. soldiers.²⁶⁶ Thus, incidents of contractor misconduct not only reflect poorly upon contractors but on American forces in general. Arguably, the establishment of a stable government in Iraq requires the cooperation of the Iraqi people. This means that the U.S. government should have a strong desire to control the actions of Blackwater contractors if for no other reason than to improve America's image in Iraq.

Section 802(a)(8) of the UCMJ confers military jurisdiction over “[m]embers of the National Oceanic and Atmospheric Administration, Public Health Service, and other organizations, when assigned to and serving with the armed forces.”²⁶⁷ One of the main purposes of the military justice system is to maintain “the good order and discipline of the military unit.”²⁶⁸ Therefore it is not surprising that members of the National Oceanic and Atmospheric Administration (NOAA) would be subject to military authority when “assigned to and serving with the armed forces”;²⁶⁹ their physical proximity to and reliance upon military troops could impact the maintenance of order and discipline of the unit to which they are assigned.²⁷⁰ Although Blackwater agents do not necessarily work in close proximity with military forces, as

265. *Privatized War*, *supra* note 14.

266. *Id.*

267. 10 U.S.C. § 802(a)(8) (2006).

268. Geoffrey S. Corn, *Bringing Discipline to the Civilianization of the Battlefield: A Proposal for a More Legitimate Approach to Resurrecting Military-Criminal Jurisdiction Over Civilian Augmentees*, 62 U. MIAMI L. REV. 491, 493 (2008).

269. 10 U.S.C. § 802(a)(8).

270. *See* Corn, *supra* note 268, at 519 (“[T]he military-justice system is intended to serve two distinct yet hopefully complementary functions: achieving justice while contributing to the good order and discipline of the military unit.”). “It is DoD policy that the requirement for order and discipline of the Armed Forces outside the United States extends to civilians employed by or accompanying the Armed Forces. . . .” DEP’T OF DEF., INSTRUCTION NO. 5525.11, CRIMINAL JURISDICTION OVER CIVILIANS EMPLOYED BY OR ACCOMPANYING THE ARMED FORCES OUTSIDE THE UNITED STATES, CERTAIN SERVICE MEMBERS, AND FORMER SERVICE MEMBERS 3 (2005), available at <http://www.dtic.mil/whs/directives/corres/pdf.552511p.pdf>.

previously noted, the ramifications of their conduct significantly impacts the effectiveness of the armed forces.

The President has the authority to “transfer to the service and jurisdiction of a military department . . . officers of the [National Oceanic and Atmospheric] Administration as the President considers to be in the best interest of the country.”²⁷¹ The exercise of this power triggers the jurisdictional guarantees of section 802(a)(8)²⁷² and brings the NOAA within the purview of military authority.²⁷³ Congress should give the President similar power over special agents working for the State Department’s WPPS program by passing legislation worded as follows: “[t]he President may, during a time of war, contingency operation, or national emergency, transfer to the service and jurisdiction of a military department, persons employed by or contracting with the State Department for the provision of diplomatic security services in an area designated as a combat zone.”²⁷⁴

This provision is intentionally narrow and would only apply to security contractors performing diplomatic protection duties during military deployment and in the zone of combat. It would thus eliminate the coordination and jurisdictional issues with regard to contractors who perform military functions in Iraq, without subjecting other government contractors, who do not perform military functions, to court-martial jurisdiction.²⁷⁵ Blackwater would clearly be covered by this provision: (1) the conflict in Iraq qualifies as a time of war, a contingency operation, or a national emergency; (2) Blackwater is

271. 33 U.S.C. § 3061 (2006).

272. 10 U.S.C. § 802(a)(8) requires the NOAA personnel to not only be “serving with” but also “assigned to” the armed forces.

273. *See id.* § 802(a)(10).

274. Proposed legislative solution is modeled on the language of 33 U.S.C. § 3061 (2002).

275. The MEJA and the UCMJ have concurrent jurisdiction over civilian contractors. *See* 18 U.S.C. § 3261(c) (“Nothing in this chapter may be construed to deprive a court-martial, military commission, provost court, or other military tribunal of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by a court-martial . . .”). Thus, contractors who do not perform combat function under the diplomatic protection program would be governed by the MEJA. Because these contractors are more easily identified as civilians, and their misconduct more closely related to violations of U.S. law rather than the international law of war, prosecution in federal district court would be appropriate.

under contract with the State Department to provide diplomatic security and protection in Iraq; and (3) Iraq is currently designated as a combat zone.²⁷⁶ Thus, this provision would be sufficient to vest in the President the power to assign Blackwater security contractors to military authority pursuant to section 802(a)(8).

Even though section 802(a)(8) already applies to “other organizations,”²⁷⁷ to eliminate any chance of confusion, it should be revised so as to explicitly apply to the State Department’s diplomatic security program. Thus, section 802(a)(8) would read: “Members of the National Oceanic and Atmospheric Administration, Public Health Service, *the State Department’s Diplomatic Security Service*, and other organizations, when assigned to and serving with the armed forces.”

In addition to being assigned to the military, section 802(a)(8) also requires that the members be “serving with the armed forces.”²⁷⁸ Whether a person is “serving with the military” depends upon the existence of a close relationship to the armed forces “that is more direct than simply accompanying the armed forces in the field.”²⁷⁹ Although Blackwater would not fit this definition as civilians under section 802(a)(10) or (11),²⁸⁰ transferring its service from the State Department to the military would arguably establish a sufficiently close relationship for the purposes of section 802(a)(8).

VI. CONCLUSION

Because Blackwater contractors would now have military status,²⁸¹ they would fit the *Reid II* Court’s characterization of a

276. DEP’T OF DEF., DEPARTMENT OF DEFENSE FINANCIAL REGULATION MANAGEMENT, Vol. 7A, Ch. 10, § 1001(01) (2008), *available at* <http://www.marquette.edu/sla/documents/hostilefire.pdf>.

277. 10 U.S.C. § 802(a)(8).

278. *Id.* § 802(c).

279. *United States v. Phillips*, 58 M.J. 217, 220 (2003); *see, e.g., United States v. Garcia*, 17 C.M.R. 88 (1954); *United States v. Schultz*, 4 C.M.R. 104 (1952).

280. *See supra* Part IV.B.

281. *See* 10 U.S.C. § 101(a)(13)(A) (2006). Uniformed service means “(A) the armed forces; (B) the commissioned corps of the National Oceanic and Atmospheric Administration; and (C) the commissioned corps of the Public Health Service.” *Id.* at § 101(a)(5). As a member of WPPS, under the proposed legislative solution Blackwater would stand in a similar position to NOAA and PHS and should

person who is “‘in’ the armed services . . . even though he had not formally been inducted into the military.”²⁸² Thus, any jurisdictional or constitutional concerns would be alleviated.²⁸³ Giving Blackwater security contractors military status would also solve the international concerns regarding their mission in Iraq. As members of the armed forces, the security guards would be considered lawful combatants and would be entitled to the same prisoner of war and use of force protections as regular military troops. The contractors would also have clearly delineated rules of engagement, which would decrease the likelihood that another incident like the shootings on September 16 would occur.

With no end to the Iraq conflict in sight, security contractors like Paul and his Blackwater brethren will continue to play an important role in carrying out U.S. foreign policy. Although the desirability of this arrangement remains debatable, a comprehensive system of regulation and control will go a long way toward appeasing Blackwater opponents. Although the MEJA provides a suitable framework for the regulation of contractors who perform civilian functions, for the reasons previously enumerated, the UCMJ provides a more effective and fair system for regulating Blackwater and other contractors that provide diplomatic security for the Department of State.

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arguably be considered part of the “uniformed service.” At the very least, its civilian status would be lost upon presidential transfer to military authority.

282. *Reid v. Covert (Reid II)*, 354 U.S. 1, 22-23 (1957).

283. *Solorio v. United States*, 483 U.S. 435, 439 (1987).

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