

Private Military Firms and Responses to Their Accountability Gap

John S. Kemp*

INTRODUCTION

On September 16, 2007, a bomb exploded near Nisour Square in Baghdad, Iraq.¹ The United States responded by sending Blackwater—a private military firm (“PMF”) contracted to work for the United States—to the square.² Shortly thereafter, Ahmed Haithem Ahmed, an Iraqi citizen, approached the area in his car with his mother.³ He did not know that a bomb had been detonated nearby earlier in the day; his destination was the hospital, where his father worked.⁴

A convoy of four Blackwater security vans approached the street where Ahmed and his mother were driving. A Blackwater employee fired a shot at Ahmed’s car, striking him in the head and killing him instantly.⁵ He slumped onto the steering wheel, his foot still on the pedal.⁶ As his car continued to approach the security vans, the Blackwater convoy opened automatic fire at the car and civilians standing nearby.⁷

* J.D. (2010), Washington University School of Law; B.A., History (2007), University of Nebraska–Lincoln.

1. James Glanz & Alissa J. Rubin, *From Errand to Fatal Shot To Hail of Fire to 17 Deaths*, N.Y. TIMES, Oct. 3, 2007, at A1.

2. *Id.* Blackwater changed its company name to “Xe” in early 2009. Because most of the events described in this Note concern the period during which the company was known by “Blackwater,” I refer to it as such. Upon the change in names, the company stated it would begin to focus primarily on training instead of security services. Associated Press, *Blackwater Changes Its Name to Xe*, N.Y. TIMES, Feb. 14, 2009, at A10.

3. Glanz & Rubin, *supra* note 1, at A1.

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

When the shooting stopped, Ahmed and his mother, along with fifteen other Iraqis, were dead.⁸ According to the subsequent FBI investigation, “at least 14 of the shootings were unjustified.”⁹

The Iraqis were outraged.¹⁰ The United States Congress likewise reacted with indignation.¹¹ David Price, a Democratic representative from North Carolina, sponsored the MEJA Expansion and Enforcement Act of 2007 (H.R. 2740), which the House passed on October 4, 2007.¹² The bill was intended to update the Military Extraterritorial Jurisdiction Act of 2000 (“MEJA”).¹³ H.R. 2740 proposed adding language to MEJA to clarify that the United States has jurisdiction to hold contractors liable under American criminal law for prohibited conduct committed in regions where the Armed Forces are engaged in contingency operations.¹⁴

8. *Id.* See also Walter Pincus, *Private Iraq Investigators out: Agency Cancels Contract after Senator Raises Questions*, WASH. POST, Oct. 22, 2008, at A17.

9. David Johnston & John M. Broder, *F.B.I. Says Guards Killed 14 Iraqis without Cause*, N.Y. TIMES, Nov. 14, 2007, at A1. Early FBI findings indicated that Blackwater employees “recklessly used lethal force.” *Id.* Blackwater initially responded to the incident by arguing that the convoy’s actions were both justified and lawful because they had been attacked. However, Iraqi investigators found no evidence of any such attack. James Glanz & Alissa J. Rubin, *Blackwater Shootings ‘Deliberate Murder,’ Iraq Says*, N.Y. TIMES, Oct. 8, 2007, at A6. Additionally, a “separate military review of the Sept. 16 shootings concluded that all of the killings were unjustified and potentially criminal.” Johnston & Broder, *supra*, at A12; see also Glanz & Rubin, *supra* note 1, at A1.

10. Prime Minister Nuri Kamal al-Maliki said: “The Iraqi government is responsible for its citizens, and it cannot be accepted for a security company to carry out a killing. There are serious challenges to the sovereignty of Iraq.” Alissa J. Rubin & Andrew E. Kramer, *Iraqi Premier Says Blackwater Shootings Challenge His Nation’s Sovereignty*, N.Y. TIMES, Sept. 24, 2007, at A6. See also Glanz & Rubin, *supra* note 9, at A6 (noting that the Iraqi prime minister’s office described the shootings as “deliberate murder” and called for the case to be tried in court).

11. See, e.g., 153 CONG. REC. H11,214-15 (daily ed. Oct. 3, 2007) (statement of Rep. Conyers) (calling for regulation of contractors after the September shootings).

12. MEJA Expansion and Enforcement Act of 2007, H.R. 2740, 110th Cong. (2007).

13. 18 U.S.C. §§ 3261–3267 (2006).

14. See H.R. 2740. The main purpose of the Act is “to require accountability for contractors and contract personnel under Federal contracts” 153 CONG. REC. H11,214 (daily ed. Oct. 3, 2007). The Blackwater shooting was the impetus for bringing House Bill 2740 before the House. See *id.* There were other reasons as well. First, no clear legal mechanisms existed to adequately prosecute contractors for criminal actions while working abroad. See *infra* Part III. MEJA seems like a logical statutory choice for charging contractors for their criminal behavior, but it has several notable limitations. For one, it contains no procedural framework for the investigation and prosecution of alleged misconduct by contractors. See 18 U.S.C. § 3261–3267 (2006). Moreover, its jurisdictional reach is short: for proscribed conduct to match the statute’s requirements, the offense had to have occurred “within the special maritime and

Congress proposed H.R. 2740 at a time when the United States had between 20,000 and 30,000 PMF contractors in Iraq alone.¹⁵ The number is astonishing considering that, at the end of the Cold War, PMFs in their modern corporate form were just beginning to emerge in large numbers.¹⁶ This widespread use of private contractors

territorial jurisdiction of the United States.” *Id.* § 3261(a). *See also* 153 CONG. REC. H11,214-26 (daily ed. Oct. 3, 2007). Third, MEJA applied to contractors employed by the Department of Defense, but not all contractors working for the United States government have been contracted by that department. *See* 153 CONG. REC. H11,214 (daily ed. Oct. 3, 2007) (statement of Rep. Conyers) (“MEJA currently only extends U.S. Federal criminal jurisdiction to felony crimes committed overseas by contractors working on behalf of the Defense Department.”). Finally, PMFs are a relatively new phenomenon with troubling analogous predecessors. *See* P. W. SINGER, *Outsourcing War*, 84 FOREIGN AFF. 119, 120 (2005) (describing PMFs as the “corporate evolution” of mercenaries). The demand for privatized military and security options in international zones of conflict has grown since the end of the Cold War. *See* E. L. Gaston, Note, *Mercenarism 2.0? The Rise of the Modern Private Security Industry and its Implications for International Humanitarian Law Enforcement*, 49 HARV. INT’L L.J. 221, 224 (2008). In light of these issues, a clearer, more definite structure for legal accountability is needed.

15. Gaston, *supra* note 14, at 223 (estimating there are between 20,000 and 30,000 private contractors in Iraq and 10,000 in Afghanistan). *See also* James Glanz, *Report on Iraq Security Lists 310 Contracts, from U.S. to Uganda*, N.Y. TIMES, Oct. 29, 2008, at A5.

16. *See* Winston P. Nagan & Craig Hammer, *The Rise of Outsourcing in Modern Warfare: Sovereign Power, Private Military Actors, and the Constitutive Process*, 60 ME. L. REV. 429, 435–36 (2008). Indeed, the very idea of “private military firms” has raised eyebrows. *See* P. W. SINGER, CORPORATE WARRIORS: THE RISE OF THE PRIVATIZED MILITARY INDUSTRY 216–21 (2003); Christopher J. Mandernach, *Warriors without Law: Embracing a Spectrum of Status for Military Actors*, 7 APPALACHIAN J.L. 137, 154 (2007); Jon D. Michaels, *Beyond Accountability: The Constitutional, Democratic, and Strategic Problems with Privatizing War*, 82 WASH. U. L.Q. 1001 (2004); Michael J. Trebilcock & Edward M. Iacobucci, *Privatization and Accountability*, 116 HARV. L. REV. 1422, 1444 (2003); Tyler Cowan, *To Know Contractors, Know Government*, N.Y. TIMES, Oct. 27, 2007, at BU6. The provision of security through the use of violence in war typically had been monopolized by the state since the start of the twentieth century. SINGER, *supra*, at 17–18. But private military firms have been involved in scores of high risk and, at times, deadly military missions since the early 1990s. *Id.* at 3–6, 10–11. Indeed, states themselves have been a major source of work for private military firms. *See, e.g., id.* at 15 (noting that between 1994 and 2002 the Department of Defense entered into more than 3,000 contracts with PMFs worth more than \$300 billion).

This release of monopolized state violence makes private military firms extraordinary phenomena with important consequences for warfare in the twenty-first century. Furthermore, the lack of specific American legislation to hold contractors accountable for their criminal behavior can be attributed partly to the rapid rise in influence of PMFs. Current legislation that could prosecute employees of PMFs, however, has not been widely used. *See infra* note 117 and accompanying text; *see also* Kateryna L. Rakowsky, Note, *Military Contractors and Civil Liability: Use of the Government Contractor Defense to Escape Allegations of Misconduct in Iraq and Afghanistan*, 2 STAN. J. C.R. & C.L. 365, 374–75 (2006); Editorial, *Prosecuting Blackwater*, N.Y. TIMES, Nov. 16, 2007, at A32 (noting that “not one contractor has been prosecuted for crimes against an Iraqi”).

requires an examination of their origin and an understanding of their work with the United States and other countries. Accordingly, the history of PMFs is discussed in Part I of this Note. Part II explores the controversial nature of PMFs and the consequences of inadequate regulation of the industry.¹⁷ Part III discusses court cases addressing civilian criminal liability abroad. It examines statutes that attempt, rather unsuccessfully, to regulate contractors while they accompany our Armed Forces. An exploration of the narrow reach of the current law in Part IV, however, will highlight the goals of H.R. 2740, explain the necessity of revisiting the bill,¹⁸ and propose changes that will make the law governing private contractors' overseas behavior more comprehensive and effective.¹⁹

17. While the September 16 Blackwater shootings in Baghdad precipitated a demand for discipline and regulation, the episode was one of several that underscore the need for more definite legal accountability. Alleged human rights abuses by PMF employees in Bosnia and Iraq are discussed in Part II of this Note. *See infra* notes 78–82 and accompanying text.

18. While H.R. 2740 passed by a large margin in the House, it stalled in the Senate after being placed on the calendar. History of Bills Online: H.R. 2740, <http://frwebgate6.access.gpo.gov/cgi-bin/TEXTgate.cgi?WAISdocID=782256499719+0+1+0&WALSAction=retrieve> (last visited Apr. 19, 2010). Even if the Senate had passed the bill, the Bush administration publicly expressed its opposition to it. OFFICE OF MGMT. & BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, STATEMENT OF ADMINISTRATION POLICY: H.R. 2740—MEJA EXPANSION AND ENFORCEMENT ACT OF 2007 (2007). The Bush administration's position highlights several defects in H.R. 2740 as passed by the House. *See id.* Since a new administration is now in the White House, the issue of criminal liability for PMF employees may receive new attention, and H.R. 2740 may serve as a model for any future legislation that attempts to tackle the liability problem.

Meanwhile, PMFs continue to receive billions of dollars in contracts from the United States in the Middle East. *See* Bill Buzenberg, Windfalls of War II: Baghdad Bonanza, <http://projects.publicintegrity.org/WOWII/default.aspx> (last visited Apr. 19, 2010) (monitoring the top 100 highest-paid PMFs in Iraq and Afghanistan and the amount of money their contracts are worth); *see also* John M. Broder & David Rohde, *State Dept. Use of Contractors Leaps in 4 Years*, N.Y. TIMES, Oct. 24, 2007, at A1. Future scandals similar to the September 16 shootings are still a risk, particularly given the lack of oversight of contractor behavior by the government. *See* Broder & Rohde, *supra* at A1 (noting that State Department supervision of contractors has not kept up with the pace at which contracts are awarded). Were another major altercation to occur, it is likely that a bill similar to H.R. 2740 would move through Congress and reach the President quickly.

The United States terminated its security relationship with Blackwater in early 2009 when Iraq refused to renew Blackwater's operating license. Rod Nordland, *After Blackwater Loses Security Deal, Many Ex-Workers Will Return to Iraq Jobs*, N.Y. TIMES, Apr. 4, 2009, at A4. However, the United States filled the security gap by contracting with the PMF Triple Canopy. *Id.* Many of the guards at Triple Canopy previously worked for Blackwater. *Id.*

19. Changes are necessary to prosecute crimes properly and to enhance the United States' reputation in a region where a good reputation is of strategic importance.

I. THE HISTORY OF PRIVATE MILITARY FIRMS

Mercenaries are, in many ways, the forerunners of modern PMFs.²⁰ PMFs resemble mercenaries in that both the modern PMF employee and the classic mercenary profit from conflict.²¹ Some scholars characterize PMFs as mercenaries of old,²² but PMFs are notably different for their diverse, globalized, and corporate structure.²³ Accordingly, PMFs are able to offer a variety of services, and the industry is recognized for its specialization.²⁴ In particular,

20. SINGER, *supra* note 16, at 45 (describing PMFs as the “next evolution in the provision of military services by private actors”). *See also id.* at 13–39 (detailing the history of the private military market).

21. However, while both PMFs and mercenaries are profit-driven, mercenaries operate in less-structured environments without formal employment contracts and, as a result, tend only to trust cash payments. *See SINGER, supra* note 16, at 42–46. PMFs, on the other hand, are corporate entities that utilize formal hierarchies and contract law, so employees are less concerned about whether they will be paid. *See id.*

22. *See, e.g.,* Montgomery Sapone, *Have Rifle with Scope, Will Travel: The Global Economy of Mercenary Violence*, 30 CAL. W. INT’L L.J. 1 (1999) (arguing that PMFs are simply modern mercenaries and should be illegal).

23. *See SINGER, supra* note 16, at 44–48; Gaston, *supra* note 14, at 228. PMFs draft contracts and negotiate within the boundaries of modern finance. SINGER, *supra* note 16, at 46. Employees operate within hierarchical, formalized business structures where directors and managers are stockholders in the company. *Id.* at 45. Further, PMFs compete on the global market, and they “are diversified enough to work for multiple (and a wider variety of) clients, in multiple theatres at once.” *Id.* at 46. Additionally, PMFs are visible businesses, running websites and advertising to the public. *Id.* Mercenaries, on the other hand, operate outside the reach of the open, competitive world of structured business. *Id.*

24. *See id.* at 88–95 (discussing different types of military actors and their areas of expertise). It is important to distinguish contractors like Kellogg, Brown & Root, which provides mainly support services to military clients, from contractors like DynCorp, which offers security and strategic defense services. *See Rakowsky, supra* note 16, at 369–70 (distinguishing the roles of military support firms and military provider firms). Of the many different types of contractors hired by the United States in the Middle East, all likely would fall within the definition of contractor proposed by H.R. 2740. *See MEJA Expansion and Enforcement Act of 2007*, H.R. 2740, 110th Cong. § 4 (2007). It reads: “The term ‘contractor’ means an entity performing a covered contract.” H.R. 2740 § 4(4). Covered contracts include any “prime contract awarded by an agency,” any subcontract awarded under a prime contract, or any “task order issued under a task or delivery order contract” where the work awarded is to be performed outside the United States and in a region where the “Armed Forces are conducting a contingency operation.” H.R. 2740 § 4(1).

Cities began the privatization trend by awarding contracts for sanitation work, and eventually privatization spread to encompass other traditional government services. Michaels, *supra* note 16, at 1004. The privatization of such services now seems rather conventional, and efficiency serves as the main argument for maintaining a privatized system. *Id.* at 1007. Likewise, “contracts to rebuild roads and schools in failed states and to manufacture new weapons do not compel us to rethink our basic understandings of American privatization.” *Id.*

firms “specialize in the provision of military skills, including combat operations, strategic planning, intelligence, risk assessment, operational support, training, and technical skills.”²⁵

PMFs are divided into three major categories: military provider firms, military support firms, and military consulting firms.²⁶ Provider firms “are defined by their focus on the tactical environment.”²⁷ They carry out highly coordinated battlefield maneuvers, utilizing weaponry and vehicles to assist in or accomplish military objectives.²⁸ Support firms, however, provide “supplementary military services,” such as “nonlethal aid and assistance, including logistics, intelligence, technical support, supply, and transportation.”²⁹ Consulting firms typically train and advise countries’ burgeoning police and military forces in the use of weapons and tactics.³⁰

The number of PMF contractors working in Iraq and Afghanistan has increased significantly in recent years.³¹ While PMFs did not

H.R. 2740 is not directed at these mainstays of military assistance; it is targeted at contractors like Blackwater and MPRI that deal in the business of violence. *See* H.R. REP. NO. 110-352, at 3–5 (2007).

25. SINGER, *supra* note 16, at 8.

26. *Id.* at 91.

27. *Id.* at 92.

28. *See id.* at 92–95. Military provider firms are likely to engage adversaries, with firms such as Executive Outcomes, SCL, and NFD having directed “active combat operations” in several countries. *Id.* at 93. It is also probable that support firms and consulting firms, which are less directly tied to the battlefield, will use force by virtue of their close proximity to danger. Richard Morgan, *Professional Military Firms under International Law*, 9 CHI. J. INT’L L. 213, 216 (2008). *See also* SINGER, *supra* note 16, at 97.

29. *See* SINGER, *supra* note 16, at 97. Examples of support firms include Boeing Services and Holmes. *Id.* at 98. Generally, support firms “are more like traditional multinational corporations” that have expanded over the years to provide services to the military market. *Id.* at 97–98.

30. *Id.* at 95–97. Consulting work is typically more profitable and often involves longer contract terms than other types of private military services. *Id.* at 96.

31. As of 2006, there were only about 30,000 to 40,000 contractors in Iraq and Afghanistan. *See supra* note 15 and accompanying text. However, by 2009 that number was much higher, even though a new administration is in charge:

Right now there are 250 thousand contractors fighting the wars in Iraq and Afghanistan. That’s about 50 percent of the total US fighting force. Which is very similar to what it was under Bush. In Iraq, President Obama has 130 thousand contractors. And we just saw a 23 percent increase in the number of armed contractors in Iraq. In Afghanistan there’s been a 29 percent increase in armed contractors. So the radical privatization of war continues unabated under Barack Obama.

appear overnight, their popularity rose rapidly and largely as a result of political and economic forces unleashed at the end of the Cold War.

The collapse of the Soviet Union shattered the balance of geopolitical power previously divided between the Soviet Union and the United States.³² During the Cold War, that balance kept relative order in areas across the globe, from the Balkans to Africa.³³ Before the end of the Cold War, the United States and the Soviet Union used their power to maintain order throughout the world, encouraging “stability and strictly controll[ing] trouble spots.”³⁴ When the two superpowers shrank to one, countries formerly under scrutiny were left to form new governments and establish order for themselves.³⁵ Many countries relied on the support of the superpowers and, without it, suffered from weak public institutions, a shortage of money, and poor governance.³⁶ The resulting easy access to abandoned weapon stockpiles meant nearly anyone could buy them.³⁷ Scrambles for power ensued; conflicts and lawlessness reigned.³⁸ Not surprisingly, the “incidence of civil wars ha[s] doubled” since the end of the Cold War.³⁹

After the Cold War, the United States cut its staff of army personnel nearly in half, and the active military shrank by 500,000 troops.⁴⁰ Additionally, the United States became hesitant to entangle

Bill Moyers Journal on PBS: The Rise of Private Armies—Mercenaries, Murder and Corruption in Iraq and Afghanistan (PBS television broadcast June 5, 2009) (statement of Jeremy Scahill) (transcript available at http://www.alternet.org/world/140526/bill_moyers:_the_rise_of_private_armies_--_mercenaries,_murder_and_corruption_in_iraq_and_afghanistan/?page=entire).

32. See SINGER, *supra* note 16, at 49; Singer, *supra* note 14, at 120; see also Michaels, *supra* note 16, at 1021 (discussing economic and political changes in the early 1990s that led to the rise of privatized military forces).

33. SINGER, *supra* note 16, at 50. See also Singer, *supra* note 14, at 120.

34. SINGER, *supra* note 16, at 49.

35. *Id.* at 50–51.

36. *Id.*

37. *Id.* at 50–54.

38. *Id.* at 50–51.

39. *Id.* at 50.

40. Michaels, *supra* note 16, at 1020 n.46. As of 2003, the number of soldiers in the United States military was one-third of what it was since the military peaked in size during the Cold War; the British army also reached historic lows. SINGER, *supra* note 16, at 53. Similar cuts occurred in other countries as well, particularly in the former Soviet Bloc. *Id.* This military

itself formally in foreign conflicts and civil wars in which it only needed to be indirectly involved.⁴¹ The world was becoming an increasingly volatile and dangerous place, and the United States government saw no reason to put American soldiers at risk if it could be avoided.⁴²

At the same time, global industry became more market-oriented and privatized.⁴³ The collapse of the Soviet Union increased the number of capitalist countries.⁴⁴ Meanwhile, in Great Britain and the United States, two countries with a long history of capitalism, the wave of privatization reached new heights.⁴⁵ Under Margaret Thatcher's watch, Britain began denationalizing and privatizing state industries, a move that many other nations followed in an effort to revive their struggling economies.⁴⁶ Keynesian economics,⁴⁷ having dominated capitalist governments for decades, lost support in the late twentieth century, replaced by "a belief in the superiority of the marketplace in fulfilling organizational or public needs."⁴⁸

These forces—scrambles for power after the collapse of the Soviet Union, military downsizing worldwide, reluctance by the West to entangle itself in foreign conflicts, and a wide ideological acceptance

downsizing brought a flood of skilled ex-soldiers into the private market. *Id.* See also Gaston, *supra* note 14, at 224.

41. See SINGER, *supra* note 16, at 58. Further, the American public did not support sending troops to places like Somalia or the Balkans where there was no clear case for intervention but did support fighting in Afghanistan as necessary to national security. *Id.* at 50.

42. *Id.* at 58.

43. *Id.* at 66–67.

44. *Id.* at 67. "As the Soviet bloc collapsed, nearly every state in it transitioned to a democratic regime and the accompanying market economy by privatizing its massive state industries." *Id.*

45. *Id.* at 66–67. Prisons in the United States, for example, were considered an area that would not be privatized. *Id.* at 67. But prisons, along with other traditional government services, were privatized in the early 1990s. *Id.* Weaponry and defense technology also were privatized. *Id.*

46. *Id.* In 1995, Vice President Al Gore studied Thatcher's model and its successes to see if similar privatization could help the United States eliminate wasteful spending. Richard W. Stevenson, *Britain Is Streamlining Its Bureaucracy, Partly by Privatizing Some Work*, N.Y. TIMES, Apr. 16, 1995, § 1, at 10.

47. British economist John Maynard Keynes influenced macroeconomic policy following the Great Depression by arguing that recessions and depressions will not likely correct themselves. CAMPBELL R. MCCONNELL & STANLEY L. BRUE, *MACROECONOMICS: PRINCIPLES, PROBLEMS, AND POLICIES* 188 (16th ed. 2005). Keynes "argued that government should play an active role in stabilizing the economy." *Id.*

48. SINGER, *supra* note 16, at 66.

of free markets—created an opening for PMFs to fill the global security gap.⁴⁹ Actors outside what were essentially “stateless zones” turned to privatized security options in hopes of regaining the Cold War-era stability.⁵⁰ Their employees were highly skilled; many were decorated veterans of the most prestigious militaries in the world.⁵¹ They possessed stocks of specialized weapons and knowledge of advanced combat techniques, and they were free to work for any group or government that needed military assistance.⁵² Indeed, by the end of the 1990s, the global PMF industry had participated in conflicts in Colombia, Eritrea, Mozambique, the Democratic Republic of Congo, and Papua New Guinea, among others.⁵³

Given the United States’ reluctance in the aftermath of the Cold War to use American troops in foreign conflict zones, hiring PMFs provided an alternative to complete inaction. In fact, the United States has become the greatest procurer of private military services.⁵⁴ Between 1994 and 2002, “the Defense Department entered into more than 3,000 contracts with U.S.-based firms, estimated at a contract value of more than \$300 billion.”⁵⁵ And since the start of the wars in Afghanistan and Iraq, the United States has paid out more than \$48.7 billion in contracts.⁵⁶

PMF contractors have worked in numerous volatile and controversial combat zones. For example, the United States wanted some level of involvement in Colombia and other countries to clamp down on the drug trade, but Congress was not willing to spend the political or military capital to send American troops.⁵⁷ As a result, the Clinton Administration spent more than \$1.2 billion on private military contracts in an attempt to stop the flow of narcotics coming

49. SINGER, *supra* note 16, at 50–51.

50. *Id.* This was a time of great destabilization and reordering, as evidenced by the rise of “[t]ransnational criminals, economic insurgents, warlords for profit, armies of child soldiers . . . found in these zones of conflict and lawlessness.” *Id.* at 51.

51. *See id.* at 76.

52. *See* Zoe Salzman, *Private Military Contractors and the Taint of a Mercenary Reputation*, 40 N.Y.U. J. INT’L L. & POL. 853, 863 (2008).

53. SINGER, *supra* note 16, at 10 fig.1.1 (map showing countries with confirmed PMF activity).

54. *Id.* at 15.

55. *Id.*

56. *See* Rakowsky, *supra* note 16, at 371.

57. *See* Michaels, *supra* note 16, at 1024.

into the United States.⁵⁸ Croatia, struggling during the Balkan wars, hired MPRI, a PMF, for security assistance.⁵⁹ MPRI provided extensive Western-style combat and strategy training to the Croat soldiers who had continually lost battles to the Serbs since the start of the war.⁶⁰ After MPRI stepped in, the Croats launched a surprise counter-offensive against the Serbs, which constituted a major turning point.⁶¹ Within weeks, the war was over.⁶²

Since September 11, 2001, the United States' use of PMFs has continued to grow.⁶³ As of 2006, more than sixty firms operated in Iraq, with more than 20,000 private contractors carrying out military services on the ground.⁶⁴ Contractors have guarded military and government personnel,⁶⁵ protected valuable buildings and installations, escorted convoys, and engaged in sieges and firefights.⁶⁶ Their numbers are at least equal to all the members in the United States' coalition partners combined.⁶⁷

58. *Id.* at 1025. DynCorp and MPRI were the primary contracting corporations, and they provided extensive training and reconnaissance to the Colombian military. *See* SINGER, *supra* note 16, at 207–08. Contractors reportedly took on active combat roles and openly engaged Colombian insurgency groups. *Id.* at 208.

59. *See* SINGER, *supra* note 16, at 5.

60. *See id.* at 4–5.

61. *Id.* at 5.

62. *Id.* At the negotiating table, the Bosnian Muslims conditioned their agreement to the peace terms on receiving military assistance from the same group that was rumored to have given the Croats advice on carrying out their offensive. *See id.*

63. Singer, *supra* note 14, at 122. (“Not only is Iraq now the site of the single largest U.S. military commitment in more than a decade; it is also the marketplace for the largest deployment of PMFs and personnel ever.”).

64. *See* Singer, *supra* note 14, at 122.

65. Michaels, *supra* note 16, at 1029.

66. *See* Daniel Bergner, *The Other Army*, N.Y. TIMES MAG., Aug. 14, 2005, at 33 (describing defense operations and fighting in Najaf against the Mahdi Army).

67. Singer, *supra* note 14, at 122. There are many reasons for the large number of contractors. To some extent, continuing foreign operations depends on the support of the American public, and the public is averse to what it deems the unnecessary deaths of American soldiers. *See generally* SINGER, *supra* note 16, at 58 (discussing the growing unwillingness of outside powers to intervene in foreign conflicts and the factors that are weighed before intervention, including consideration of public support). Given that Armed Forces' casualties are closely monitored, controversy can be minimized by augmenting the military with large numbers of contractors because contractor deaths rarely are reported. *See* John M. Broder & James Risen, *Death Toll for Contractors Reaches New High in Iraq*, N.Y. TIMES, May 19, 2007, at A1 (noting that contractor deaths are “largely hidden casualties of the war” with at least 917 killed and over 12,000 “wounded in battle or injured on the job”). There is a high demand for troops but the public opposes reinstating the draft. *See* Eric Lichtblau, *Flurry of*

II. CONTROVERSY

The legal accountability of PMFs generates great concern, a fact made apparent by H.R. 2740's calls for increased regulation of the industry.⁶⁸ The Blackwater shooting in Nisour Square was not the first troubling incident involving PMFs. Several controversial aspects of PMF structure and behavior preceded—and arguably precipitated—the drafting of H.R. 2740.

One area of particular concern involves the structure and purpose of PMFs.⁶⁹ Above all, they are businesses that strive to make profits. Because their services are only useful during conflict, they arguably profit from conflict.⁷⁰ This is an unsettling idea, and “the firms often provoke a quite hostile reaction and have been viciously attacked in the public arena.”⁷¹

The disconcerting notion of soldiers with a profit motive ties into the idea that the state should have a monopoly over the use of formalized violence. In modern society, security is an essential government function that citizens expect in return for their membership in society.⁷² Membership in a formalized, government-run society is conditioned in many ways upon the guarantee of

Calls about Draft, and a Day of Denials, N.Y. TIMES, Dec. 23, 2006, at A14 (describing the public panic after a news agency reported the Selective Service was preparing for a “mock” draft). Drafts should be avoided, and hiring PMFs is a logical step to take to avoid a draft. Steven Levitt explains that drafts are inefficient because they force otherwise uninterested people to serve in the military even though many of those people have other unrelated productive and marketable skills. See Posting of Steven Levitt to Freakonomics: The Hidden Side of Everything, <http://freakonomics.blogs.nytimes.com/2007/08/14/restore-the-draft-what-a-bad-idea/?scp=2-b&sq=iraq+draft&st=nyt> (Aug. 14, 2007, 09:39 EST).

68. See H.R. REP. NO. 110-352, at 3–5 (2007). During discussion of the bill, Representative John Conyers of Michigan, referring to the Sept. 16th shooting, noted, “This latest incident unfortunately evidences the fact that some of these contractors are abusing their power with impunity, subject to no law whatsoever, domestic or foreign.” 153 CONG. REC. H11,214 (daily ed. Oct. 3, 2007) (statement of Rep. Conyers).

69. Peter Singer describes the prominent ideological objection to PMFs thusly: there exists a “general feeling . . . that those who carry out [the U.S. government’s] core missions should be responsible to the public and not other entities.” SINGER, *supra* note 16, at 226. Singer argues that “[w]hen the government delegates out part of its role in national security through the recruitment and maintenance of armed forces, it is abdicating an essential responsibility.” *Id.*

70. *Id.* at 216.

71. *Id.* at 217.

72. See *id.* at 6–8; see also *id.* at 226.

safety.⁷³ By contracting out this core function, the government risks both its legitimacy and the loyalty of its citizens.⁷⁴

Serious ethical questions are raised when PMFs enter into business relationships that allow them to profit from conflict.⁷⁵ PMFs, unlike the military, are not obligated to act in their home government's interest.⁷⁶ While a PMF may contract with a friendly state, it is free to work with any group no matter the moral or strategic ramifications. The demands of a competitive market should create a disincentive to work for an unpalatable government or organization. PMFs, however, operate, to some degree, outside of regular market forces and with inadequate oversight.⁷⁷ Government actors behave as irrational consumers, hiring PMFs despite serious allegations of abuse of power. During the Balkan Wars, the United States contracted with DynCorp, an American PMF, to assist the U.N. Police Task Force in Bosnia.⁷⁸ Reports emerged that DynCorp employees were buying and trading young women and girls. On June 2, 2000, U.S. military police raided DynCorp's facilities, and the U.S. Army confirmed several of the allegations.⁷⁹ The information was turned over to the Bosnian police, but none of the people involved were charged criminally.⁸⁰ Despite the incident, DynCorp currently operates as a government-contracted PMF in Iraq.⁸¹ PMFs also

73. *See id.* at 226–27.

74. *See id.* at 226.

75. PMFs have been criticized for working with any side of a conflict, no matter the moral dimensions. "Some firms have gone to work for non-state conflict groups, helping them in their quest to gain greater military capabilities. . . . Their state opponents, in turn, have also hired PMFs." *Id.* at 52. PMFs reportedly have worked for rebel groups in countries such as Namibia and Burundi. *Id.* at 11. Similarly, during the Democratic Republic of Congo's civil war, several warring rebel factions employed PMFs against one another. *Id.* at 10–11.

76. Michaels, *supra* note 16, at 1089–91. *See also id.* at 1085–88.

77. *See Rakowsky, supra* note 16, at 377 (describing how basic market forces like supply and demand are ignored in the private military market because governments behave like irrational consumers with a high demand and thus ignore the quality of the supply); *see also* Steven L. Schooner, *Contractor Atrocities at Abu Ghraib: Compromised Accountability in a Streamlined, Outsourced Government*, 16 STAN. L. & POL'Y REV. 549 (2005).

78. Gaston, *supra* note 14, at 229.

79. *See* Robert Capps, *Outside the Law*, SALON.COM, June 26, 2002, <http://dir.salon.com/story/news/feature/2002/06/26/bosnia/index.html>.

80. *Id.*

81. Press Release, DynCorp International, *Dyncorp International Wins \$99 Million Contract to Send Advisors to Iraq* (Nov. 8, 2008), <http://www.dyn-intl.com/news2008/news110508.aspx> (last visited Oct. 26, 2009).

reportedly were involved in the torture scandal at Abu Ghraib prison in 2004, but none involved were disciplined.⁸² Even with serious allegations directed at PMF employees, the United States still employs private contractors overseas.

III. CASES AND LAWS PERTAINING TO PMFS

PMFs' accountability while working outside the United States is unclear. As a result, PMF employees often escape liability for criminal behavior. The Uniform Code of Military Justice ("UCMJ")⁸³ seemingly provided a framework under which contractors could have been held criminally liable while working for the United States abroad.⁸⁴ The UCMJ has two components that appear to criminalize contractors' criminal conduct. First, Article 2(11) extends the jurisdiction of the Code to people serving or accompanying the Armed Forces overseas.⁸⁵ Second, the Code described a system of court martial to try violators of its provisions.⁸⁶ Thus, as enacted, the UCMJ appears to subject contractors to courts martial for the crimes they commit overseas.

However, in *Reid v. Covert*,⁸⁷ the Supreme Court rejected such a broad interpretation of the UCMJ.⁸⁸ The *Covert* defendant was a civilian woman who murdered her husband, an Air Force sergeant, while they were living on a military airbase in England.⁸⁹ After a trial by court martial, she was convicted of murder under Article 118 of the UCMJ.⁹⁰ The Supreme Court reversed Mrs. Covert's conviction

82. Singer, *supra* note 14, at 127–28. Army investigators “found that contractors were involved in 36 percent of the proven incidents and identified 6 employees [of Titan and CACI, two PMFs] as individually culpable.” *Id.* None were punished, and no outside inquiries into corporate culpability were conducted. *Id.* at 128.

83. 10 U.S.C. §§ 801–946 (2006).

84. *See* 10 U.S.C. § 802(11).

85. By its terms, the UCMJ applies to “persons serving with, employed by, or accompanying the armed forces outside the United States. . . .” 10 U.S.C. § 802(11). Contractors who work alongside the United States military abroad appear to fall within the UCMJ's reach.

86. *See* §§ 816–876 for the full statutory framework that governs courts martial.

87. 354 U.S. 1 (1957).

88. *Id.* at 5–6.

89. *Id.* at 3.

90. *Id.* at 3–4. Defense counsel unsuccessfully argued that Mrs. Covert was not guilty by reason of insanity. *Id.* at 4.

and held that courts martial are not an appropriate forum for trying civilians who accompany the Armed Forces overseas in times of peace.⁹¹ The plurality opinion called it unconstitutional to hold trials by court martial under such circumstances. Concurring, Justice Harlan recommended limiting the Court's decision to capital crimes.⁹² Three years later, in *Kinsella v. United States ex rel. Singleton*,⁹³ the Court explicitly rejected the notion that a civilian could face a trial by court martial for a non-capital offense.⁹⁴

In 1970, the Court of Military Appeals considered in *United States v. Averette* whether the UCMJ should apply to civilians.⁹⁵ Raymond Averette, a civilian employee of an Army contractor in Vietnam, was

91. *Id.* at 40–41 (“And under our Constitution courts of law alone are given the power to try civilians for their offenses against the United States.”).

92. “We hold that . . . Mrs. Covert . . . [can]not constitutionally be tried by military authorities.” *Id.* at 5. The Court used sweeping language to acknowledge the significance of the issue before it: “These cases raise basic constitutional issues of the utmost concern. They call into question the role of the military under our system of government.” *Id.* at 3. The plurality further emphasized that the Constitution, particularly the Bill of Rights, protects American citizens even if they “happen[] to be in another land.” *Id.* at 5–6. In his concurrence, Justice Harlan suggested narrower grounds were more appropriate given the cases before the Court. *Id.* at 77–78 (Harlan, J., concurring). Comparing capital offenses to the crime of treason, which must be tried in courts of law, Justice Harlan opined:

I see no reason for not applying the same principle to any case where a civilian dependent stands trial on pain of life itself. The number of such cases would appear to be so negligible that the practical problem of affording the defendant a civilian trial would not present insuperable problems.

Id. He saw no reason to consider non-capital offenses but joined the plurality in reversing the convictions. *Id.*

93. 361 U.S. 234 (1960).

94. Ms. Dial, the wife of a soldier, was tried by a United States court martial in Germany for the unpremeditated murder of her child. *Id.* at 235–36. She and her husband were charged under Article 118(2) of the UCMJ, and both pleaded guilty before the court martial. *Id.* After conviction and transfer to the United States, Dial filed a petition for habeas corpus, claiming that she could only be tried in a trial court that afforded her Fifth and Sixth Amendment protections. *Id.* The Court held that her conviction was unconstitutional and called capital and noncapital offenses “so intertwined that equal treatment . . . would be a palliative to a troubled world.” *Id.* at 249.

The Court's decisions that prevented civilians from being subject to courts martial stemmed from crimes that occurred during times of peace or, at least, during times when war was not formally declared. Similarly, in Iraq and Afghanistan Congress authorized the government to use force but stopped short of declaring war. See generally War Powers Resolution, 50 U.S.C. § 1541 (2006) (containing the Authorization for Use of Military Force in Iraq Resolution of 2002 and the Authorization for Use of Military Force Against September 11 Terrorists).

95. *United States v. Averette*, 41 C.M.R. 363 (1970).

convicted by a court martial of conspiracy to commit larceny and attempted larceny.⁹⁶ The court held that the UCMJ applies only when there is a declared war, which the Vietnam War was not, so Averette was not triable by court martial.⁹⁷ After *Reid*, *Kinsella*, and *Averette*, the UCMJ was mostly ineffective at holding civilians criminally liable while accompanying the Armed Forces overseas.

Congress repeatedly attempted to address the lack of contractor liability, but the sporadic and limited nature of its attempts created the impetus for H.R. 2740.⁹⁸ In 2000, Congress passed the Military Extraterritorial Jurisdiction Act (“MEJA”).⁹⁹ MEJA extended jurisdiction to those “employed by or accompanying the Armed Forces outside the United States.”¹⁰⁰ However, as passed in 2000, MEJA reached only contractors employed by the Department of Defense¹⁰¹ and, therefore, stopped short of comprehensively addressing contractor liability issues.

96. *Id.* at 363.

97. *Id.* at 365. “We conclude that the words ‘in time of war’ mean, for the purposes of Article 2(10), . . . a war formally declared by Congress.” *Id.*

98. In the House debates leading up to the passage of H.R. 2740, Congresswoman Sutton of Ohio remarked that the existing legislation was insufficient: “At present, the Military Extraterritorial Jurisdiction Act, MEJA, leaves felonies committed by contractors working for other Federal Departments [than the Department of Defense] unpunished. This is unfair and unacceptable, and this Congress must act to ensure that justice is not a selective American principle.” 153 CONG. REC. H11,178 (daily ed. Oct. 3, 2007) (statement of Rep. Sutton).

99. Pub. L. No. 106-523, 114 Stat. 2488 (codified as amended at 18 U.S.C. §§ 3261–3267 (2006)).

100. 18 U.S.C. § 3261(a) (2006). When Congress amended MEJA in 2004, *see infra* note 105 and accompanying text, the language of section 3261(a) did not change. *See* Pub. L. No. 108-375, 118 Stat. 1811, 2066–67 (2004) (amending only the definition of “employed as” under MEJA section 3267(1)(A)). Section 3261 states in full:

(a) Whoever engages in conduct outside the United States that would constitute an offense punishable by imprisonment for more than one year if the conduct had been engaged in within the special maritime and territorial jurisdiction of the United States—

(1) while employed by or accompanying the Armed Forces outside the United States; or

(2) while a member of the Armed Forces subject to chapter 47 of title 10 (the Uniform Code of Military Justice), shall be punished as provided for that offense.

§ 3261(a).

101. *See* § 3267(1), 114 Stat. at 2491.

The USA PATRIOT Act,¹⁰² passed eleven months later, extended the United States' criminal jurisdiction to "the premises of United States diplomatic, consular, military or other United States Government missions or entities in foreign States, including the buildings, parts of buildings, and land appurtenant or ancillary thereto"¹⁰³ Even this jurisdictional extension is restrictive and, as of 2006, had been used only once to charge an overseas contractor with a crime.¹⁰⁴

In 2004, Congress amended MEJA and extended the statute's jurisdictional reach.¹⁰⁵ Even as amended, MEJA still may not comprehensively subject contractors to American criminal law, as it remains unclear whether it applies to contractors not employed by the Department of Defense.¹⁰⁶ Further, MEJA fails to mandate oversight

102. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism ("USA PATRIOT") Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (codified in scattered sections).

103. 18 U.S.C. § 7(9)(A) (2006).

104. The PATRIOT Act's extension of criminal jurisdiction was used to prosecute David Passaro, a contractor working for the CIA in Afghanistan. Rakowsky, *supra* note 16, at 374–75. Passaro was charged with assault under the Act for allegedly torturing a detainee. *Id.*

105. See Pub. L. 108–375, § 1088, 118 Stat. 1811, 2066–67 (2004) (codified as amended at 18 U.S.C. §§ 3261–3267 (2006)).

106. It is unclear whether MEJA applies to contractors employed by other federal agencies. The definition of "employed by the Armed Forces outside the United States" includes a contractor of the Department of Defense or "any other Federal agency, or any provisional authority, to the extent such employment relates to supporting the mission of the Department of Defense overseas." 18 U.S.C. § 3267(1) (2006). This language certainly suggests that even a PMF employed by the State Department could be subject to liability under MEJA if the PMF's employment related to supporting a Department of Defense mission overseas. However, lawmakers, prosecutors, and legal commentators disagree as to MEJA's reach.

In congressional debates, Representative Betty Sutton of Ohio noted that, "under current law, only contractors working for the Department of Defense can be held responsible for crimes they commit while working in Iraq, Afghanistan and elsewhere throughout the world." 153 CONG. REC. H11,178 (daily ed. Oct. 3, 2007) (statement of Rep. Sutton). Eugene Fidell, President of the National Institute of Military Justice and a lecturer at Yale Law School, also does not "think that the Blackwater people who are involved in the Nasur [sic] square incident fall within MEJA." Daphne Eviatar, *Are Iraq Contractors Subject to U.S. Law?* WASH. INDEP., Dec. 26, 2008, <http://washingtonindependent.com/23037/are-iraq-contractors-subject-to-us-law>. Conversely, the Department of Justice characterizes the indicted PMF employees as "employees and subcontractors of Blackwater Worldwide, a company contracting with the United States Department of State . . . [whose] employment related to supporting the mission of the United States Department of Defense in the Republic of Iraq." Indictment at 2, *United States v. Slough*, No. CR-08-360 (D.C. Dec. 4, 2008). Because the prosecution "is the first under the Military Extraterritorial Jurisdiction Act to be filed against non-Defense Department private contractors," the issue of whether MEJA currently reaches them remains undecided.

and enforcement.¹⁰⁷ Thus, while MEJA does, in theory, expose more contractors to criminal liability, it does not explain how, or by whom, violators should be brought to justice.

In 2006, Congress amended the UCMJ to extend jurisdiction “[i]n time of a declared war or a contingency operation, [to] persons serving with or accompanying an armed force in the field.”¹⁰⁸ The notable change was the addition of the language, “contingency operation.” This amendment could serve to counter the decisions in *Reid*, *Kinsella*, and *Averette*.¹⁰⁹ More importantly, the UCMJ amendment may have repercussions for contractors, as they now appear to be subject to court martial for criminal actions committed during contingency operations abroad.¹¹⁰

Secretary of Defense Robert Gates tried to clarify the meaning of the amendment in March 2008 by issuing a memo outlining the

Mike Scarcella, *Blackwater Lawyers Seek Military Guard to Visit Crime Scene*, NAT'L L.J., Oct. 26, 2009, at 4, available at <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202434897650&slreturn=1&hblogin=1>.

107. Compare 18 U.S.C. §§ 3261–3267 (2006) (detailing arrest and judicial proceedings but not mandating oversight or investigation), with MEJA Expansion and Enforcement Act of 2007, H.R. 2740, 110th Cong. (2007) (detailing enforcement procedures for the FBI and the Attorney General and requiring the Department of Justice to submit a progress report to Congress).

108. 10 U.S.C. § 802(a)(10) (2006).

109. See *supra* notes 86–97 and accompanying text. There is no mention of contingency operations in any of these three cases. See *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234 (1960); *Reid v. Covert*, 354 U.S. 1 (1957); *United States v. Averette*, 41 C.M.R. 363 (1970). What effect, if any, the addition of “contingency operations” could have is unknown. Interestingly, *Averette* was unable to be charged because his actions took place during an undeclared war. See *Averette*, 41 C.M.R. 363. The UCMJ defines a “contingency operation” as one involving the military and “designated by the Secretary of Defense as an operation in which members of the armed forces are or may become involved . . . against an enemy of the United States. . . .” 10 U.S.C. § 101(13)(A) (2006). One could argue that Vietnam was a contingency operation. If it were, *Averette* might have been liable under the amended UCMJ.

110. It is unclear, however, whether Iraq and Afghanistan are contingency operations. In the Justice Department’s indictment against the five Blackwater guards for the September 2007 shooting, there is no mention of Iraq being a contingency operation. See *Indictment*, *supra* note 115. The Department bypassed this new provision altogether, choosing to base jurisdiction upon MEJA. *Id.* at 1–2. However, Defense Secretary Gates drafted a memorandum, discussed *infra* note 111, which refers to Department of Defense (“DoD”) civilian employees and DoD contractors working alongside the military in contingency operations as part of the Global War on Terror. Indeed, the memorandum assumes that civilians and contractors are now subject to the UCMJ. See *infra* note 111. Although neither Iraq nor Afghanistan is mentioned in the document, presumably they are the main theatres in the Global War on Terror and thus may constitute contingency operations.

necessary procedures for bringing civilians who accompany the armed forces before courts martial.¹¹¹ The memo and the UCMJ amendment, however, use different language when describing which civilians are subject to court martial.¹¹² Moreover, the clause “person serving with or accompanying the armed force” in a contingency operation under the 2006 UCMJ amendment is subject to the additional qualification that the armed force is one “in the field.”¹¹³ Interpreting “in the field” presents an additional complication in determining the meaning of the amendment.¹¹⁴

This patchwork of laws—MEJA, the PATRIOT Act, and 10 U.S.C. § 802(a)(10)—currently serves as the tool by which the United States can criminally prosecute a civilian contractor working overseas.¹¹⁵ In Iraq, the laws have been the only tools. Order 17 of the

111. Secretary Gates explained that criminal infractions by employees of the Department of Defense or by civilians accompanying the armed forces shall be reported to the Department of Justice; if the Department of Justice will not proceed with prosecution, certain military commanders with the proper authority can, with exception, refer the civilian to a court martial. See Memorandum from Secretary of Defense Robert Gates for Secretaries of the Military Departments, Chairman of the Joint Chiefs of Staff, Under Secretaries of Defense, and Commanders of the Combatant Commands, (Mar. 10, 2008), <http://www.fas.org/sgp/othergov/dod/gates-ucmj.pdf> [hereinafter Gates Memorandum]; see also Morgan, *supra* note 28, at 230–31 (discussing the Gates memorandum’s procedures).

112. The Gates memorandum appears to assume that only Department of Defense civilian employees and contractors would be liable under the UCMJ. See Gates Memorandum, *supra* note 111, at 2 (“There is a particular need for clarity regarding the legal framework that should govern a command response to any illegal activities by Department of Defense civilian employees and DoD contractor personnel overseas with our Armed Forces.”). The memorandum speaks only of DoD contractors and civilians; it does not describe contractors or civilians in other departments. However, because the memorandum is from the Defense Secretary to parties affiliated with the Defense Department, the omission of non-DoD contractors and civilians may have been intentional. In any event, the UCMJ amendment uses briefer, wider-reaching language, describing “persons” who accompany the Armed Forces in a declared war or contingency operation as being subject to the UCMJ. See 10 U.S.C. § 802(a)(10) (2006).

113. 10 U.S.C. § 802(a)(10) (2006).

114. Illuminating this additional interpretative complication demonstrates the need for a comprehensive statute addressing overseas contractors like H.R. 2740.

115. Even with several laws addressing civilian liability for crimes committed abroad, few prosecutions actually succeed. In fact, as of October 2009, David Passaro was the “only civilian tried and convicted” of detainee abuse since the Iraq and Afghanistan wars began. *No Safe Haven: Accountability for Human Rights Violators, Part II, Hearing before the Subcomm. on Human Rights and the Law of the S. Comm. on the Judiciary*, 111th Cong. 5 (2009) (Statement of Lanny A. Breuer, Assistant Attorney General, Department of Justice Criminal Division). However, the Justice Department, responding to public and congressional outcry after the September 2007 Blackwater shootings, charged five guards for their involvement in the

Provisional Coalition Authority has immunized contractors from Iraqi law.¹¹⁶

The MEJA Expansion and Enforcement Act of 2007 (H.R. 2740), passed by the House in October 2007, was an attempt to extend criminal culpability to all contractors employed under contracts with U.S. government agencies for infractions committed abroad.¹¹⁷ Specifically, it was a response to the Blackwater shootings, but the House debates indicate that the Act's effects would have been far-reaching.¹¹⁸ Without a coherent law to prosecute the criminal actions

shootings. See Ginger Thompson & James Risen, *5 Guards Face U.S. Charges in Iraq Deaths*, N.Y. TIMES, Dec. 6, 2008, at A1. The Justice Department opted to use MEJA rather than the other applicable statutes to establish jurisdiction over the guards. Indictment at 2, *United States v. Slough*, No. CR-08-360 (D.C. Dec. 4, 2008). The indictment emphasizes that the five men engaged in criminal conduct outside the United States as subcontractors for Blackwater Worldwide, a Department of Defense contractor. *Id.* at 1–2. The men are charged with four violations: voluntary manslaughter; attempt to commit manslaughter; using and discharging a firearm during and in relation to a crime of violence; and aiding and abetting and causing an act to be done. *Id.* at 1. The defendants' attorneys allege that the charges are politically motivated and will be difficult to prove given the unique situation of occupying Iraq. Josh Meyer, *Guards Defied Orders, U.S. Says*, L.A. TIMES, Dec. 9, 2008, at A1.

116. See Coalition Provisional Authority Memorandum Order Number 17 (Revised), http://www.cpa-iraq.org/regulations/20040627_CPAORD_17_Status_of_Coalition_Rev_with_Annex_A.pdf (last visited Nov. 15, 2009). Under the provisions of the Order “[c]ontractors 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.” *Id.* § 4(3). Additionally, the Order specifies: “All MNF, CPA and Foreign Liaison Mission Personnel, and International Consultants shall be subject to the exclusive jurisdiction of their Sending States. They shall be immune from any form of arrest or detention other than by persons acting on behalf of their Sending States. . . .” *Id.* § 2(3). However, contractors no longer are immune from Iraqi liability following the expiration of the U.N. Mandate in December 2008. See Walter Pincus, *Fatal Shootings by Iraq Contractors Drop in 2008*, WASH. POST, Dec. 20, 2008, at A9. Ideally, this will increase accountability for contractors in Iraq.

117. See H.R. REP. NO. 110-352, at 3 (2007). The need for comprehensive legislation, like H.R. 2740 is great given the inconsistent and unclear nature of the existing patchwork of jurisdictional statutes. See *supra* notes 98–114 and accompanying text.

118. See, e.g., 153 CONG. REC. 11,214–15 (daily ed. Oct. 3, 2007) (statement of Rep. Conyers). Representative Conyers opined:

First, it closes the legal gap in current law by making all contractors accountable for their actions. MEJA currently only extends U.S. Federal criminal jurisdiction to felony crimes committed overseas by contractors working on behalf of the Defense Department. . . .

. . . .

Second, this measure requires that the Inspector General of the Justice Department examine and report on the Department's efforts to investigate and prosecute allegations of misconduct committed by contractors overseas.

of contractors, Iraqis' opinion of the United States will continue to dwindle.¹¹⁹ Moreover, Representative Betty Sutton expressed grave concern that under current laws, contractors essentially are subject to no laws at all and are able to do whatever they like with no fear of repercussions.¹²⁰ H.R. 2740, had it become law, would have addressed, and hopefully fixed, this accountability gap.¹²¹ Furthermore, it proposed a systematic approach for the enforcement of American criminal laws by creating FBI criminal investigative units to address allegations of misconduct.¹²² The bill also articulated procedures for referring appropriate cases to the Attorney General and the Department of Justice for prosecution.¹²³

H.R. 2740 would have amended the language of MEJA section 3261(a) and extended liability to persons "employed under a contract (or subcontract at any tier) awarded by any department or agency of the United States"¹²⁴ Additionally, the bill aimed to specify MEJA's reach by subjecting contractors to liability for conduct committed in areas of contingency operations, like the 2006 UCMJ amendment.¹²⁵ Adding the phrase "contingency operation" keeps the statute from falling into the pitfall created by *Reid* and *Averette*, where contractors could not be brought under court martial if war were not declared.¹²⁶ The bill also would have required the Inspector

....

Third, H.R. 2740 establishes ground units of the Federal Bureau of Investigation to investigate allegations of criminal misconduct by contractors.

Id.

119. The House debates reflect a desire to build trust and confidence among the Iraqi public. Representative Sutton expressed such a sentiment: "The truth is, every time we see an incident with an Iraqi civilian being killed and American contractors escaping accountability, our men and women in uniform suffer. They see support from the insurgents rise and they lose the trust of the Iraqi people." 153 CONG. REC. H11,181 (daily ed. Oct. 3, 2007) (statement of Rep. Sutton).

120. *Id.* at H11,178 ("Our current law has given private mercenary armies like Blackwater USA free rein to do as they please without fearing the repercussions.").

121. *See id.* (discussing how H.R. 2740 closes the accountability gap).

122. *See* H.R. 2740 § 3(a).

123. H.R. 2740 §§ 2(b), 3(b).

124. H.R. 2740 § 2(a)(3).

125. A contractor is liable "where the work under such contract is carried out in an area, or in close proximity to an area (as designated by the Department of Defense), where the Armed Forces is conducting a contingency operation." H.R. 2740 § 2(a)(3).

126. *See supra* notes 97, 109 and accompanying text.

General of the Department of Justice to submit a report to Congress within 180 days of the passage of the Act.¹²⁷

One of the important changes proposed by H.R. 2740 was its establishment of the FBI Theater Investigative Unit to conduct inquiries into allegations of criminal conduct.¹²⁸ After conducting an investigation, the unit was to refer any information it gathered to the Attorney General, who would have discretion whether to pursue further action.¹²⁹ Additionally, H.R. 2740 required the director of the FBI to make an annual report to Congress detailing the findings of the unit periodically.¹³⁰

IV. H.R. 2740: ROOM FOR IMPROVEMENT

Effective legislation to ensure contractors are liable for their conduct while abroad is necessary.¹³¹ H.R. 2740's strength is its specificity in describing *who* is liable.¹³² The PATRIOT Act, MEJA, and section 802(a)(10) of the UCMJ are available to prosecutors, but the statutes lack clarity. Unlike the language limiting MEJA's current reach to contractors for any federal agency that acts to support the mission of the Defense Department,¹³³ H.R. 2740 made it clear that contractors of *any* department working abroad to support any agency

127. The report would have detailed the number of complaints received by the Department; the number of investigations and criminal cases opened because of the complaints; and the number and result of criminal cases closed. H.R. 2740 § 2(b). Moreover, the bill stated that the report must contain descriptions of any charges brought against contractors and the legal action the Department of Justice pursued. *Id.*

128. The unit was intended to "investigate reports that raise reasonable suspicion of criminal misconduct by contract personnel" and to "investigate reports of fatalities resulting from the potentially unlawful use of force by contract personnel." *Id.* § 3(b).

129. *Id.* § 3(b)(3).

130. *Id.* § 3(e).

131. Ideally, the new legislation will accomplish several things. First, its provisions should create a disincentive for future criminal behavior. Second, it should provide practical and implementable guidance to law enforcement agencies in the event of a crime. And third, it should act as a message to past victims of criminal PMF behavior and to allies of the United States that legal impunity for PMFs is not tolerated. Additionally, it should offer reparations to those directly affected by PMF abuse.

132. See MEJA Expansion and Enforcement Act of 2007, H.R. 2740, 110th Cong. § 2 (2007) (specifying that contractors employed by all departments or agencies of the United States are liable).

133. See 18 U.S.C. § 3267(1) (2006).

are potentially liable.¹³⁴ A law including such clear language is necessary to close the longstanding accountability gap. The framework for conducting investigations is another of the bill's strengths; for decades there has been no legislative guidance as to what should be done in the event of a contractor crime.¹³⁵

While H.R. 2740 is commendable for attempting to take a stance against contractor abuses, there is room for improvement. First, while H.R. 2740 requires the Justice Department to compose a general report that discusses the number of complaints and investigations pursued,¹³⁶ the report acts as little more than a fact-finding exercise. Once completed, the bill does not prescribe that the report be used for anything further.¹³⁷ However, Congress should pass new legislation incorporating the language of H.R. 2740 section 3 while also requiring the Department of Justice to investigate each complaint it receives from the FBI. Given the legal vacuum that has surrounded PMFs for the eight years America has carried out operations in the Middle East, it is strategically important to demonstrate that complaints are taken seriously rather than merely duly noted. Placing American troops and contractors in Iraq and Afghanistan engenders hostility toward the United States;¹³⁸ demonstrating that the United States takes allegations of criminal conduct seriously would be one way to repair the country's damaged reputation abroad, particularly among groups whose support is critical to the success of the United States in both its current and future political and military conflicts.

The United States should not only investigate complaints of contractor abuse, but also should provide reparations to those who already have suffered such abuse. Reparations, rather than criminal prosecutions against the alleged perpetrators, may be appropriate because prosecuting contractors under a law that did not exist when

134. H.R. 2740 § 2(a)(3).

135. *See supra* notes 121–23 and accompanying text.

136. H.R. 2740 § 2(b).

137. *See id.*

138. *See* PROGRAM ON INTERNATIONAL POLICY ATTITUDES, THE IRAQI PUBLIC ON THE US PRESENCE AND THE FUTURE OF IRAQ (2006), http://www.worldpublicopinion.org/pipa/pdf/sep06/Iraq_Sep06_rpt.pdf (discussing how a majority of Iraqis supported attacks on American troops and wanted the United States to withdraw from Iraq by late 2007).

the alleged act occurred raises constitutional questions.¹³⁹ Monetary reparations would be a constitutionally sound method for providing relief to individuals affected by the accountability gap.¹⁴⁰

Reparations do not appear unreasonable, especially given the cost of the wars in the Middle East thus far.¹⁴¹ High cost, however, is not a good reason to spend more money unless such spending is prudent. Providing reparations would be strategically valuable, as it would demonstrate the United States' responsibility for the PMFs it has hired and its concern for PMFs' actions abroad. The benefits are difficult to measure precisely, but, considering the negative opinion of the United States in the region and the resulting political roadblocks,¹⁴² using funds in this way should serve the United States' interests well.

One of the Bush administration's complaints about H.R. 2740 was that such a law, if passed, would place a burden on the FBI and the Department of Defense.¹⁴³ Investigation and prosecution necessarily take both time and resources. Therefore prosecutions of future

139. Punishing a contractor for an act that may not have been a crime when committed could be a violation of the ex post facto clause. *See* U.S. CONST. art. 1, § 9, cl. 3.

140. Investigations of past complaints undoubtedly would be expensive and difficult to complete. Garnering the requisite political capital for this proposed change in the law as it stands now would not be easy. Reparations would be particularly unpopular as they may set a troubling precedent as a way for the government to fix a problem. On the other hand, giving money to those affected may not seem like enough. The injury or death of a loved one is not easily equated with money. Financial recovery for physical or emotional harms is not an uncommon concept, however, in tort law. Indeed, applying such concepts to PMF abuses seems like it may be the only way to provide justice to those affected, especially since criminal prosecutions for actions that were not crimes under the legal code of the time are likely unfeasible.

141. For example, five years after the Iraq war began, the Pentagon estimated that the total cost already stood at \$600 billion. David M. Herszenhorn, *Estimates of Iraq War Cost Were Not Close to Ballpark*, N.Y. TIMES, Mar. 19, 2008, at A9. Estimates of the total long-range costs in Iraq range from one to four trillion dollars. *Id.*

142. *See supra* note 138 and accompanying text. *See generally* PROGRAM ON INTERNATIONAL POLICY ATTITUDES, *supra* note 138.

143. The administration expressed concern that "the bill would place inappropriate and unwarranted burdens on the Department of Defense. In addition to their overriding responsibility to conduct military operations, the Armed Forces would be required to undertake significant duties for the handling and detention of non-DOD contractors covered by the bill." OFFICE OF MGMT. & BUDGET, *supra* note 18, at 1. The Bush administration also argued that H.R. 2740 "would affirmatively mandate that particular investigative activities of the Federal Bureau of Investigation be conducted overseas" rather than allowing FBI experts to use their judgment to allocate "resources to the Nation's greatest needs." *Id.* at 1.

misconduct should occur in the country of the contingency operation in order to reduce the expense of prosecuting in United States courts, which already are burdened with high caseloads. Moreover, prosecution could be done swiftly and effectively with courts martial. This already appears permissible under the 2006 amendment to the UCMJ;¹⁴⁴ however, this provision has not yet been legally tested. Because the lack of clarity in the UCMJ has been a deterrent to PMF prosecutions under current law, it would be wise to add a provision to a law similar to H.R. 2740 that future offenders be tried by courts martial. If subjecting civilians to courts martial proved constitutionally unpalatable, prosecutions should still take place in the country where the contingency operation is, but not under a court martial. This would both accelerate the judicial process and reduce cost.

The third improvement that should be made to a new law similar to H.R. 2740 concerns the issue of territorial reach. The bill as written applies only to contractors who are doing work in an area “or in close proximity to an area . . . where the Armed Forces is conducting a contingency operation.”¹⁴⁵ PMFs, however, have carried out work on behalf of the United States in places like Latin America and Bosnia where no Armed Forces were present.¹⁴⁶ Without the presence of the military, a bill employing the jurisdictional language of H.R. 2740 cannot hold such contractors liable. The jurisdictional reach of American criminal laws should be extended to areas in which the United States contracts with PMFs to participate in a contingency operation, whether or not the Armed Forces are present or in close proximity.¹⁴⁷

144. See *supra* notes 108–09 and accompanying text.

145. MEJA Expansion and Enforcement Act of 2007, H.R. 2740, 110th Cong. § 2(a)(3) (2007).

146. See Michaels, *supra* note 16, at 1024.

147. This is controversial. As discussed above, sending U.S. troops to places like the Balkans and Somalia was not politically feasible. See *supra* notes 41, 57–60 and accompanying text. PMFs provide a deft way to influence regions without spending the requisite political capital. It is difficult to measure what kind of harm would result if certain operations are made public at the time they occur; national security, for example, arguably could be undermined. Therefore, prosecuting PMFs for misdeeds committed in potentially secret operations could damage national security if the prosecutions were public. However, prosecutions do not necessarily have to be public. In fact, if using a court martial is constitutionally permissible, it would not be difficult to prosecute with minimal public scrutiny. Clearly, military secrecy is

CONCLUSION

Since the end of the Cold War, the market of private military services has increased dramatically.¹⁴⁸ The United States military relies on PMFs in ever-increasing numbers to supplement its forces in Iraq and Afghanistan.¹⁴⁹ Since September 2007, it is clear that contractors have largely been operating in a legal vacuum, creating an accountability gap.¹⁵⁰ H.R. 2740 was an attempt to close that gap, but it has several shortcomings. A new law augmenting the language of H.R. 2740 should be passed to provide for retrospective investigation and reparations. Additionally, prosecutions should occur in the same country as the alleged crimes to reduce cost. Finally, the bill should apply in any operations where PMFs are acting unilaterally on behalf of the United States. With these changes, a bill similar to H.R. 2740 will serve as an effective solution to a protracted period of legal confusion.

beyond the scope of this paper. It suffices to say that PMFs should be legally accountable in situations where they act unilaterally, just as are members of the Armed Forces.

148. SINGER, *supra* note 4, at 230.

149. See Gaston, *supra* note 14, at 223.

150. See *supra* notes 114–21 and accompanying text.