

Legal Regulation of PMSCs in the United States: The Gap between Law and Practice

By Kevin Lanigan¹

Introduction

In 1893, during a period of widespread labor unrest in the United States and reacting to the hiring by U.S. government agencies of armed private operatives (from the Pinkerton Detective Agency and other companies) to break strikes, Congress enacted the Anti-Pinkerton Act, prohibiting the U.S. government from employing Pinkerton or similar private companies from performing such policing or other public security functions.² Notwithstanding this early statement of public policy in clear opposition to government's use of private security companies – and while the Anti-Pinkerton Act remains in effect to this day – in the 115 years since adoption of the Anti-Pinkerton Act it has long become accepted that policing, and security, in the United States is clearly *not* the job of only the police. Although private security companies (PSCs) in the United States do not have “police powers,” they long have been considered vital to the maintenance of public order and crime prevention – particularly in private spaces, but increasingly in public spaces as well.

The current prominence of the private military and security company (PMSC) industry in the United States has been propelled by a number of factors, including the U.S. government's – and public's – long-standing acceptance of a substantial private security industry; a trend that emerged during the 1980s at all levels of government to increasingly “privatize” services traditionally performed by government – based on the presumption that private industry is generally both more effective and less expensive than government; the 1990s post-Cold War downsizing and restructuring of the U.S. military that greatly reduced its capacity to perform many of its own support functions, and accentuated a long-standing U.S. government tradition of relying on all sorts of “proxies” – including contractors – in covert intelligence as well as military operations; and the increased focus within the United States on the perceived need for heightened security for private premises as well as public buildings after the al Qaeda attacks of September 11, 2001.

Domestically, these factors have led (among other things) to the accelerating privatization of prisons and other correctional facilities. In the early 1980s there were a negligible number of privately-operated prison and other detention facilities in the United States; by 2007, private companies were operating more than 225 adult and juvenile correctional and (increasingly) immigration detention facilities,³ incarcerating more than 120,000 individuals – including over 4,000 immigration detainees⁴ and fully seven percent of the U.S. prison population.⁵ In 1997 total spending in the

¹ Kevin Lanigan is Director of the Law and Security Program at Human Rights First.

² In its current form the Anti-Pinkerton Act is codified at 5 U.S.C. § 3108, online at www.law.cornell.edu/uscode/html/uscode05/usc_sec_05_00003108---000-.html (accessed May 28, 2008).

³ These figures are estimates generated from data reported on the websites of the three largest US private correctional firms: Correction Corporation of America (www.correctionscorp.com), the GEO Group (www.thegeogroupinc.com), and Cornell Companies (www.cornellcompanies.com).

⁴ M. Kolodner, *Immigration Enforcement Benefits Prison Firms* (New York Times, July 19 2006), online at www.nytimes.com/2006/07/19/business/19detain.html?pagewanted=1&r=1 (accessed June 20, 2008).

⁵ Bureau of Justice Statistics Bulletin: Prison Inmates at Midyear 2007, online at www.ojp.usdoj.gov/bjs/pub/pdf/pim07.pdf (accessed June 20, 2008).

United States on private security exceeded total spending on public policing by 73%; more recently the ratio of private security guards to police throughout the country has been estimated at 3:1.⁶

Internationally, these factors have led to the current situation in Iraq: Estimates of the total number of PMSC personnel supporting the US government mission in Iraq commonly exceed the staggering figure of 180,000 – a figure far above the approximately 168,000 total US military personnel deployed there at the height of the 2007-08 “surge.”⁷ This ratio represents a predominance of private contractors as a proportion of the American efforts in the Iraq war exponentially greater than in prior wars.

Key U.S. Laws Applicable to PMSCs

PMSCs in the United States are generally licensed (as businesses), registered and regulated (in their domestic operations) primarily under state and/or local law rather than federal law.⁸ Overlaying this framework is the potential legal liability – both criminal and civil – of the companies and their employees and contractors for wrongs under state criminal and tort law.

There is no comprehensive federal-level legal regime for the basic regulation of PMSCs and their activities, although an extensive web of federal statutes, regulations and other federal agency requirements – particularly those developed and promulgated by the Department of Defense (DoD) – does provide complex, although still incomplete, legal structure covering many aspects of PMSC procurement, oversight and accountability. A detailed discussion of all of these laws and other measures is beyond the scope of this article,⁹ but set forth below is a table listing, and noting the significance of, many of the most important provisions:

| Legal Provision | Comment |
|---|---|
| Federal Statutes | |
| Alien Tort Claims Act (ATCA), 28 U.S.C. § 1350, www4.law.cornell.edu/uscode/28/1350.notes.html | Provides federal court jurisdiction over any civil action by an alien for a tort (civil wrong), committed in violation of the “law of nations” or a U.S. treaty. |
| Anti-Torture Act, 18 U.S.C. §§ 2340-2340B, www.law.cornell.edu/uscode/18/usc_sup_01_18_10_I_20_113C.html | Implements the obligation to criminalize torture under Article 5 of the United Nations Convention Against Torture and Cruel, Inhuman and Degrading Treatment, applying only to prohibited acts attempted or committed outside U.S. territory, but applying to U.S. nationals found anywhere in the world, and to anyone found in the United |

⁶ F. Schreier & M. Caparini, *Privatising Security: Law, Practice and Governance of Private Military and Security Companies* (Geneva Centre for the Democratic Control of Armed Forces (DCAF), 2005), p. 26 n.89, online at www.dcaf.ch/docs/op06_privatising-security.pdf (accessed June 4, 2008).

⁷ See data reported by GlobalSecurity.org, online at www.globalsecurity.org/military/ops/iraq_orbat_es.htm (accessed June 17, 2008).

⁸ In the State of California, for example, the Bureau of Security and Investigative Services is the state-level government agency that regulates “proprietary private security officers,” pursuant to a state statutory and regulatory framework requiring (among other things) the licensing and registration of private security companies, the satisfactory completion of a state-mandated firearms training course for armed private security officers, and submission to and compliance with a state-imposed disciplinary code. Private Security Services Act Cal. Bus. & Prof. Code §§ 7580-7588.5 (2008) online at www.leginfo.ca.gov/cgi-bin/calawquery?codesection=bpc&codebody=&hits=20 (accessed June 4, 2008). Many other states provide similar regulatory frameworks.

⁹ <http://www.privatesecurityregulation.net/countries/results/taxonomy%3A236.212>

| | |
|--|---|
| | States. |
| Arms Export Control Act (AECA), 22 U.S.C. § 2778, www.law.cornell.edu/uscode/html/uscode22/usc_sec_22_00002778----000-.html | Controls the export (and import) of certain defense-related articles and services, including PSC services. |
| Federal Activities Inventory Reform (FAIR) Act, Pub. L. 105-270, 112 Stat. 2382 (1998), frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=105_cong_public_laws&docid=f:publ270.105 | Requires identification of federal government functions that are not “inherently governmental” as a predicate for private contracting. |
| Federal Tort Claims Act (FTCA), 28 U.S.C. § 1346(b), www.law.cornell.edu/uscode/html/uscode28/usc_sup_01_28_10_VI_20_171.html | Permits private parties to sue the U.S. government in a federal court for most torts committed by persons acting on behalf of the United States. |
| Foreign Assistance Act (FAA), 22 U.S.C. §§ 2301-2349bb-4, http://www.law.cornell.edu/uscode/html/uscode22/usc_sup_01_22_10_32_20_II.html | Authorizes (with AECA, above) the Foreign Military Sales (FMS) program, which regulates some U.S. PMSC military- and police-training operations abroad. |
| Military Extraterritorial Jurisdiction Act (MEJA), 18 U.S.C. §§ 3261-67, www.law.cornell.edu/uscode/18/usc_sup_01_18_10_I_20_212.html | Permits the prosecution in U.S. federal court of certain persons who commit acts that would be crimes under the SMTJ punishable by imprisonment for more than a year, had the conduct occurred within the United States, including employees and contractors of all US government agencies (excluding citizens and “usual” residents of the territorial state) “to the extent such employment relates to supporting the mission of” DoD. |
| Special Maritime and Territorial Jurisdiction (SMTJ) Act, 18 U.S.C. § 7, www.law.cornell.edu/uscode/18/usc_sec_18_00000007----000-.html | Expands jurisdiction of U.S. courts to cover “buildings, parts of buildings, and land appurtenant or ancillary thereto or used for purposes of [U.S. government] missions or entities, irrespective of ownership” in a foreign state, with respect to certain enumerated offenses committed by or against a US national. |
| Torture Victims Protection Act (TVPA), PL 102-256, 106 Stat. 73 (1992), thomas.loc.gov/cgi-bin/query/D?c102:5:/temp/~c102HPEin0:: | Permits the filing of civil suits in the U.S. courts against individuals who, acting in an official capacity for any foreign nation, committed torture or extrajudicial killing. |
| Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 801-946, www.law.cornell.edu/uscode/10/usc_sup_01_10_10_A_20_II_30_47.html | U.S. criminal law and procedure applicable to the U.S. military; in 2006 Congress amended the UCMJ to expand the U.S. military’s already-existing authority to prosecute crimes committed by civilians “serving with or accompanying” the armed forces to include civilians serving in a “contingency operation,” the current doctrinal term for the sorts of military operation in which the United States is currently engaged in Iraq and Afghanistan. |
| Victims of Trafficking and Violence Protection Act (VTVPA), Pub. L. 106-386, 114 Stat. 1464 (2000), frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=106_cong_public_laws&docid=f:publ386.106 | Requires the inclusion of clauses in federal contracts, grants and cooperative agreements for “major functional project, programs, or activities abroad,” allowing termination if the primary contractor or any subcontractor engage in trafficking, procuring a commercial sex act, or using forced labor. |
| War Crimes Act (WCA), 18 U.S.C. § 2441, www.law.cornell.edu/uscode/18/usc_sec_18_00002441----000-.html | Authorizes the prosecution of war crimes committed anywhere in the world by or against a U.S. national or member of the U.S. armed forces. |
| Federal Regulations | |
| Defense Federal Acquisition Regulation Supplement (DFARS), www.acq.osd.mil/dpap/dars/dfarspgi/current/index.html | Provides additional regulations (beyond the FAR, below, that applies to all federal agencies) that DoD must apply in its PMSC and other contracts. |

| | |
|--|--|
| Federal Acquisition Regulation (FAR), www.arnet.gov/far/loadmainre.html | Provides detailed requirements governing U.S. government agency contracts with PMSCs (and other contractors), spanning the development of requests for contract proposals through termination of contracts. |
| International Traffic in Arms Regulations (ITARs), www.pmddtc.state.gov/official_itar_and_amendments.htm | Requires (under authority of the AECA, above) export licenses for U.S. PMSCs that do business abroad, and in connection with their business wish to ship and use certain weapons, protective equipment or electronics. |
| Federal Agency Instructions, Field Manuals, Circulars & Memoranda | |
| Department of Defense Instruction Number 1100.22, <i>Guidance for Determining Workforce Mix</i> (Sep. 11, 2006; incorporating Change 1, Apr. 6, 2007), www.dtic.mil/whs/directives/corres/pdf/110022p.pdf | DoD's identification of its "inherently governmental" activities (required by OMB Circular No. A-76, below). |
| Department of Defense Instruction Number 3020.41, <i>Contractor Personnel Authorized to Accompany the U.S. Armed Forces</i> (Oct. 3, 2005), www.dtic.mil/whs/directives/corres/pdf/302041p.pdf | Prescribes DoD policies and procedures concerning DoD contractor personnel authorized to accompany the U.S. military. |
| Department of Defense Instruction Number 5525.11, <i>Criminal Jurisdiction Over Civilians Employed By or Accompanying the Armed Forces Outside the United States, Certain Service Members, and Former Service Members</i> (Mar. 3, 2005), www.dtic.mil/whs/directives/corres/pdf/552511p.pdf | Details policies and procedures, and assigns responsibilities, for DoD support to and cooperation with the Department of Justice (DoJ) for MEJA implementation. |
| Department of the Army Field Manual No. 3-100.21, <i>Contractors on the Battlefield</i> (Jan. 3, 2003), www.afsc.army.mil/gc/files/fm3_100x21.pdf | Defines U.S. Army doctrine regarding planning, management, and use of PMSCs in areas of operations. |
| Office of Management and Budget (OMB) Online Circular No. A-76 (Revised) (29 May 2003), www.whitehouse.gov/omb/circulars/a076/a76_incl_te ch_correction.pdf | Requires (under the FAIR Act) U.S. government agencies to use government personnel and not private contractors to perform "inherently governmental" activities. |
| Memorandum from Gordon England, Deputy Secretary of Defense, to Secretaries of the Military Departments, <i>et al.</i> , SUBJECT: <i>Management of DoD Contractors and Contractor Personnel Accompanying US Armed Forces in Contingency Operations Outside the United States</i> (Sep. 25, 2007), acc.dau.mil/CommunityBrowser.aspx?id=171478 | Provides guidance to U.S. military commanders regarding lines of command responsibility for oversight and management of DoD contractors and for discipline of DoD contractor personnel. |
| Memorandum from Robert M. Gates, Secretary of Defense, for Secretaries of the Military Departments, <i>et al.</i> , SUBJECT: <i>UCMJ Jurisdiction over DoD Civilian Employees, DoD Contractor Personnel, and Other Persons Serving with or Accompanying the Armed Forces Overseas During Declared and in Contingency Operations</i> (Mar. 10, 2008), www.fas.org/sgp/othergov/dod/gates-ucmj.pdf | DoD's implementing guidance for UCMJ criminal jurisdiction over certain contractors and other civilians, as expanded by Congress in 2006. |
| Memorandum of Agreement between the Department of Defense and the Department of State on USG Private Security Contractors (Dec. 5, 2007), www.defenselink.mil/pubs/pdfs/Signed%20MOA%20Dec%2005%202007.pdf | Provides some definition over the two agencies' relative areas of authority and responsibility for the accountability and operations of U.S. government PSCs (in Iraq only), and requires establishment of some coordination mechanisms. |

U.S. Legal Regulation of PMSCs in Practice

Notwithstanding this rather extensive and sophisticated legal framework within which PMSCs must operate, in important respects this legal framework does not work well. In late 2007, a U.S. Army-

appointed commission found that in recent years the U.S. Army (one of the largest US government agency “consumers” of PMSC services) actually has experienced a *declining* capability to timely and efficiently contract for materiel, supplies and services in support of expeditionary operations, and to effectively manage those contracts.¹⁰ Current criminal accountability mechanisms appear even more problematic: In September 2007 U.S.-based PSC Blackwater Worldwide was running an armed convoy through the Nisoor Square neighborhood of Baghdad, Iraq, when convoy guards started firing on civilian vehicles in the square. The Blackwater contractors killed 17 civilians and wounded 24 others; Iraqi government and U.S. military officials charge that these shootings were unjustified. Although, at this writing (nearly a year after the event), a U.S. federal grand jury reportedly is investigating the matter, as yet no criminal charges have been filed in the case. In fact, there has yet to be a completed U.S. government criminal prosecution against any PMSC contractor in Iraq for any violent crime against a local national.

In this respect it is useful to consider the extent to which extensive U.S. legal regulation of PMSCs reflects actual “law in action” as opposed to merely “law in the books.” Some particular areas highlighting this gulf between law and practice are described below:

Rules for the Use of Force

While US government justifications for its increasing reliance on PSCs commonly focus on the need to protect Department of State (DoS) and other *civilian* personnel and missions in conflict zones such as Iraq, both the substance and structure of the December 2007 DoD-DoS agreement’s rules for the use of force by PSCs closely track military rules of engagement, with PSCs empowered under the agreement to use deadly force to protect *military* facilities, property and personnel from even non-imminent “threats.” Such use of PSCs erodes critical differences between civilians and combatants under the law of war. In 2006 the DFARS was amended to require DoD PMSC contracts to incorporate substantive requirements of DoD Instruction No. 3020.41 (noted above), which, authorizes PSC personnel to use deadly force *beyond* self-defense when necessary to execute their contract security missions.

Contracting

However much specificity U.S. law provides regarding PMSC contractual requirements, adequate provisions addressing aspects of training, vetting, treatment and oversight of PMSC personnel are lacking, and the FAR does not ensure uniformity in U.S. government contracting for PMSC services across agencies. Indeed, although each part of statutory/regulatory framework noted above broadly prohibits the contracting of “inherently governmental” functions, there remain inconsistencies in the definition and application of the term, and these provisions have not posed significant impediments to the rapid and substantial expansion in recent years of PMSCs into areas of traditional government operation, either domestically or internationally – including into the sphere of security operations that without doubt “significantly affect the life, liberty, or property of private persons” as well as U.S. interests, in apparent violation of the terms of the FAIR Act.¹¹

¹⁰ Commission on Army Acquisition and Program Management in Expeditionary Operations (“Gansler Commission”), *Urgent Reform Required: Army Expeditionary Contracting* (Oct. 31, 2007), online at www.army.mil/docs/Gansler_Commission_Report_Final_071031.pdf (accessed June 6, 2008).

¹¹ US courts have been deferential to agency classifications and generally unwilling to confer standing on individuals to challenge the legality of agency outsourcing contracts under this “inherently governmental” framework. See *Nat’l Fed’n of Fed. Employees v. Cheney*, 883 F.2d 1038 (D.C. Cir. 1989) (establishing oft-cited

Criminal Accountability

When the US (or any) government fields and directs forces (especially armed forces) abroad to implement national policy, it is responsible for the conduct of those forces – even if they are PMSCs rather than traditional military forces.¹² When those forces commit offenses that amount to serious violations of the law of armed conflict or human rights law, the state likewise is responsible to ensure the availability of *effective* mechanisms to investigate and prosecute offenders and compensate victims.¹³ PMSC personnel working domestically within the United States, regardless of their nationality, are subject to U.S. federal and state criminal law and thus to criminal prosecution in U.S. federal and state courts.

Generally, PMSC personnel fielded abroad by the U.S. government are subject – at least in theory – to the criminal laws of the territorial state. In conflict and post-conflict environments, however, territorial state institutions may not be developed or resourced sufficiently to enforce local law. And in Iraq in 2004 the U.S. government-led Coalition Provisional Authority (CPA) promulgated CPA Order No. 17, conferring presumptive immunity from Iraqi legal jurisdiction upon international (non-Iraqi) contractors who work in Iraq for Coalition governments or international organizations, an immunity that at this writing remains Iraqi law.¹⁴ While the U.S. government has taken steps to expand legal accountability under U.S. law for PMCS personnel it fields abroad by giving extraterritorial effect to certain U.S. statutes, gaps remain and enforcement has been very limited.

In the table above there are several substantive and jurisdictional criminal statutes that provide theoretical bases for prosecuting serious contractor crime. Importantly, all have been crafted to

precedent of denying standing under A-76). *But see Nat'l Air Traffic Controllers Ass'n v. Pena*, No. 95-3016, 1996 WL 102421 (6th Cir. Mar. 7, 1996) (the single case granting standing to plaintiff challenging classification of function as “commercial,” but in later proceedings the court made clear it would defer to the agency classification so long as appropriate procedures were followed).

¹² State responsibility is an accepted principle of international law. *See* International Law Commission (ILC), *Responsibility of States for Internationally Wrongful Acts* (Annexed to U.N. GA Res. 56/83 of 12 December 2001), art. 8 (conduct under direction or control of state is considered an act of the state) and art 5 (conduct of a person empowered to exercise governmental authority is an act of state, even if person exceeds authority or contravenes instructions), online at untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_6_2001.pdf (accessed June 12, 2008). The Commentary on the ILC Articles on State Responsibility cites the example of private security firms that run prisons and thus, have powers of detention or discipline. ILC, *Report on the Work of Its 53d Session* [2001], Ch. IV, U.N. Doc. A/56/10, Supp. 10, p. 92.

¹³ *See, e.g.*, Common Article 1 of the Geneva Conventions (GCs) (responsibility to respect and ensure respect); GC III, art. 12(1) (“[p]risoners of war are in the hands of the enemy Power, but not of the individuals or military units who have captured them. Irrespective of the individual responsibilities that may exist, the Detaining Power is responsible for the treatment given them.”); GC III, arts. 39 & 127 (re training for persons responsible for PoWs); GC IV, arts. 99 & 144 (re training for persons responsible for protected civilians); GC III, art. 129 (requiring states to search for and bring before their courts persons who have committed grave breaches against PoWs); GC IV, art. 146 (requiring states to search for and bring before their courts persons who have committed grave breaches against protected civilians). All four of the Geneva Conventions and their three Additional Protocols are available online at www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/genevaconventions (accessed June 12, 2008). *See also* J.-M. Henckaerts, *Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict* (ICRC Mar. 2005), Rule 139 (“Each party to the conflict must respect and ensure respect for international humanitarian law by its armed forces and other persons or groups acting in fact on its instructions, or under its direction or control.”), online at [www.icrc.org/Web/eng/siteeng0.nsf/htmlall/review-857-p175/\\$File/irrc_857_Henckaerts.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/review-857-p175/$File/irrc_857_Henckaerts.pdf) (accessed June 12, 2008).

¹⁴ Coalition Provisional Authority Order Number 17 (Revised), *Status of the Coalition Provisional Authority, MNF – Iraq, Certain Missions and Personnel in Iraq* (June 27, 2004), online at www.cpa-iraq.org/regulations/20040627_CPAORD_17_Status_of_Coalition_Rev_with_Annex_A.pdf (accessed May 28, 2008).

provide some measure of extraterritorial jurisdiction. The Military Extraterritorial Jurisdiction Act (MEJA), noted above, has become the U.S. government's primary civilian court jurisdictional vehicle for prosecuting contractor crime abroad. However, in reality there have been only a handful of completed prosecutions in recent years, almost none involving contractor crimes of violence against local nationals, notwithstanding numerous allegations of unlawful use of force and violent criminal conduct by U.S. government PMSCs abroad. For several years the Department of Justice's (DoJ's) prosecutorial inaction has rendered meaningful accountability under the statutes largely theoretical.

In contrast, after Congress moved in 2006 to expand DoD's criminal jurisdiction over civilian contractors, the DoD eventually developed guidance for military commanders to exercise its new authority. In June 2008 the U.S. Army completed its first court-martial of a civilian – a dual Canadian-Iraq citizen employed in Iraq as a PMSC interpreter on a DoD contract, charged with the stabbing of a fellow contractor at a remote US military base in Iraq – since the war in Vietnam. Notwithstanding the importance of holding contractors accountable, military prosecutions of civilians raise numerous serious human rights concerns, and DoD has addressed few if any of these concerns in its new implementing guidance. Moreover, it is unclear whether DoD will apply its expanded court-martial jurisdiction to apply to PMSC contractors (or subcontractors) of US government *civilian* agencies.

Civil remedies

In the case of the civil liability statutes noted above, difficulties in gaining effective access to victims, witnesses and evidence render both criminal prosecutions and civil litigation in US courts challenging. Moreover, the availability of various judicially-crafted defenses to liability pose unique and substantial obstacles to victims seeking to obtain compensation through their own civil actions. Defenses to civil liability typically advanced by PMSC defendants in these cases include the “government contractor” defense¹⁵; derivative immunity under the “combatant activities” exception to the FTCA¹⁶; dismissal under the “state secrets”¹⁷ or “political question”¹⁸ doctrines; and – in the case of suits by PMSC personnel or their survivors against their own companies for injury or death – the “exclusive liability” provision of the workmen's compensation-type insurance program provided in the Defense Base Act, first enacted in 1941, for US government contractors fielded abroad.¹⁹ These defenses are not the product of positive law expressed through the US Constitution or statutes enacted by Congress, but instead have been developed and applied by the courts through the interpretation of certain constitutional, statutory and public policy principles. These limitations raise important questions regarding the current *practical* effectiveness of civil remedies under US law to victims of contractor violations of the law of armed conflict or human rights law abroad.

¹⁵ See, e.g., *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988), online at supreme.justia.com/us/487/500/case.html (accessed June 4, 2008).

¹⁶ See, e.g., *Koohi v. United States*, 976 F.2d 1328 (9th Cir. 1992), online at bulk.resource.org/courts.gov/c/F2/976/976.F2d.1328.90-16159.90-16107.html (accessed June 4, 2008).

¹⁷ See, e.g., *Bareford v. Gen. Dynamics Corp.*, 973 F.2d 1138 (5th Cir. 1992), online at bulk.resource.org/courts.gov/c/F2/973/973.F2d.1138.91-2432.html (accessed June 4, 2008).

¹⁸ See, e.g., *Bentzlin v. Hughes Aircraft Co.*, 833 F. Supp. 1486 (C.D. Cal. 1993); *Whitaker v. Kellogg Brown & Root*, 2006 WL 1876922 (M.D. Ga. 2006).

¹⁹ In its current form the DBA is codified at 42 U.S.C. § 1651, online at www.law.cornell.edu/uscode/html/uscode42/usc_sec_42_00001651----000-.html (accessed June 18, 2008).

Current Reform Efforts

Since 2007 allegations of violent criminal conduct (against both local nationals and each other) by PMSC personnel working on U.S. government contracts in Iraq, and other controversies involving PMSCs, have heightened congressional interest in PMSC legal reform. These controversies have made clear only that there remain important gaps in U.S. law, but that existing U.S. laws simply are not having their intended effect.

As a result, in January 2008 Congress enacted the 2008 National Defense Authorization Act (NDAA), through which Congress undertook the most wide-ranging lawmaking on PMSC issues it ever has attempted in a single piece of legislation. The 2008 NDAA, among other things: (a) requires DoD, in coordination with DoS, to prescribe regulations on the selection, training, equipping, and conduct of personnel performing private security functions under a covered contract in an area of combat operations; (b) requires DoD, DoS and USAID to negotiate a Memorandum of Understanding (MoU) regarding a variety of matters relating to PMSC contracting in Iraq and Afghanistan; (c) requires an independent “Commission on Wartime Contracting” to be established for a two-year period to study US government PMSC contracting (for logistics support, reconstruction and security functions) in Iraq and Afghanistan, and to assess which functions (expressly including providing security in an areas of combat operations) may be “inherently governmental” and thus inappropriate for performance by PMSCs; (d) requires the GAO to submit annual reports to Congress on PMSC contracting in Iraq and Afghanistan, beginning in October 2008; (e) expands the jurisdiction of the existing Special Inspector General for Iraq Reconstruction (SIGIR), and defines the jurisdiction of a newly-created Special Inspector General for Afghanistan Reconstruction (SIGAR), to include investigation of waste, fraud and abuse in security contracting; and (f) strengthens “whistleblower” protections for PMSC personnel, to better protect from retaliation those who report abusive or corrupt practices by PMSC companies.²⁰

As this menu of recent action by Congress shows, as of 2008 a serious policy debate has emerged in the United States regarding the roles and regulation of PSCs and other elements of the PMSC industry. Additional major PMSC legal reform proposals pending in the US Congress – some of which overlap, or even conflict – include the following:

- **Criminal accountability.** In the sphere of criminal accountability for PMSC personnel accused of committing serious crime abroad, pending bills in both houses of Congress propose to, among other things:
 - Clarify the scope of MEJA jurisdiction over PMSC personnel; and
 - Require DoJ’s Federal Bureau of Investigation to field standing investigative teams in Iraq and Afghanistan, in order to be able to conduct timely investigations of allegations of serious criminal offenses by US government civilian agency and PMSC personnel.
- **Regulatory.** Other pending bills in Congress propose, among other things:

²⁰ Pub. L. 110-181, 122 Stat. 3 (2008), online at frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_public_laws&docid=f:publ181.110 (accessed May 28, 2008).

- Prescribing a variety of additional measures to enhance oversight and transparency regarding PMSC reconstruction contracts in Iraq;
- Alternatively: prohibiting PMSC personnel from participating in interrogations of detainees in the custody of the US intelligence community or in the custody of DoD; prohibiting (without further definition) PMCS personnel from performing “inherently governmental functions in an area of combat operations” or “inherently governmental functions, emergency essential activities, or mission critical activities”; or requiring OMB to develop a single US government-wide definition of “inherently governmental” functions; and
- Requiring the phased withdrawal of all US government PSC contractors from Iraq.

With the attention of Congress and the American people now focused on the November 2008 elections – an election that will sweep into office in January 2009 both a new President and a new Congress – it is unlikely that additional serious PMSC legal reform will take place before next year. But with a new President and new Congress, 2009 is likely to see substantial new lawmaking – both legislation and through administrative action – designed to both add more content to the current U.S. legal framework regulating PMSCs and to begin to close the gap in PMSC regulation in the United States between “law in the books” and “law in action.”