

# PRIVATIZING DEFENSE SUPPORT OPERATIONS: THE NEED TO IMPROVE DOD'S OVERSIGHT AND MANAGEMENT

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## Introduction

The current military operations in Iraq and Afghanistan are unique in the *extent* to which the Department of Defense (DoD) has contracted defense services to private U.S., host nation, and third country firms. Beginning with the First Gulf War in 1990-1991, however, DoD has increasingly relied on contractors to meet many of its logistical and operational support needs during combat operations, peacekeeping missions, and humanitarian assistance missions. These have included Operations Desert Shield and Desert Storm,<sup>2</sup> peacekeeping operations in the Balkans (e.g., Bosnia and Kosovo),<sup>3</sup> and Operations Enduring Freedom and Iraqi Freedom in Afghanistan and Iraq, respectively.<sup>4</sup> Significant factors that have contributed to this increase in outsourcing include an increased number of missions and operations, a reduction in the size of the U.S. military after the breakup of the former Soviet Union, and the increased sophistication of U.S. weapons systems used in these operations.

The DoD contracts awarded in these operations fall into three broad categories: Theater support; external support; and systems support. The Regional Combatant Command in Iraq, for example, U.S. Central Command or one of its service component commands, is responsible for negotiating

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<sup>2</sup> See discussion of these operations in J.P. Terry, *Operation Desert Storm: Stark Contrasts in Compliance With the Rule of Law*, *NAVAL LAW REVIEW*, Winter 1993.

<sup>3</sup> See, e.g., J.P. Terry, *U.N. Peacekeeping and Military Reality*, *BROWN JOURNAL OF WORLD AFFAIRS*, Winter/Spring 1996; J.P. Terry, *Rethinking Humanitarian Intervention After Kosovo*, *THE ARMY LAWYER* (August 2004).

<sup>4</sup> See generally, J.P. Terry, *THE REGULATION OF INTERNATIONAL COERCION*, Chapter VII (2006).

and overseeing theatre support contracts, which are normally for recurring services, to include equipment repair, security, minor construction, and intelligence services. External support contracts, awarded and managed by commands external to the combatant commands involved in the operations, such as the Defense Logistics Agency and the Army Corps of Engineers, negotiate and award contracts for supplies and services, respectively, to forces at their forward deployed location. An example of service contracts includes Brown and Roots' contract to run the mess halls for the Army in Iraq. The third genre of privatized outsourcing, systems support contracts, provide technical and logistics support to maintain weapons and other systems. These contracts are awarded by commands responsible for either building or procuring the system in the United States.

The concerns raised with this process over the years have centered on contract management and oversight. Despite the fact that the Defense Department has continually updated its written guidance to Defense officials charged with oversight of contractor performance,<sup>5</sup> it (DoD) has faced continuing problems related to a lack of visibility over the totality of contractor support at deployed locations; a lack of adequate contract oversight personnel; the failure to collect and share institutional knowledge on the use of contractors at deployed locations; and limited or no training of military personnel on the use of contractors as part of their pre-deployment training or professional military education.<sup>6</sup>

What this review of DoD contractor support reinforces is that where strong oversight and management is provided, contractor-provided services

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<sup>5</sup> See e.g., U.S. Army, *Logistics Civil Augmentation Program*, Department of the Army Regulation 700-137 (Dec. 16, 1985); U.S. Air Force, *Performance Based Service Contracts*, Air Force Inst. 63-124 (Apr. 1, 1999); U.S. Army, *Contractors Accompanying the Force*, Department of the Army Regulation 715-9 (Oct. 29, 1999); U.S. Army, *Logistics Civil Augmentation Program*, Army Material Command Pamphlet 700-30 (Jan. 2002); U.S. Army, *Contractors on the Battlefield*, Department of the Army Field Manual 3-100.21 (Jan. 3, 2003); DoD Inst. 3020.41, *Contractor Personnel Authorized to Accompany the U.S. Armed Forces* (Oct. 3, 2005). DoD Inst. 3020.41 requires the department to maintain by-name accountability of contractors deploying with the force, who are defined as systems support and external support contractors, and associated subcontractors, specifically authorized in their contract to deploy to support U.S. forces.

<sup>6</sup> See discussion in GAO Report 07-145, *Military Operations: High Level DoD Action Needed to Address Long-Standing Problems with Management and Oversight of Contractors Supporting Deployed Forces* (Dec. 2006) at 10. See discussion of Gansler Report therein.

are dispensed in an economical and efficient manner. When the customer (e.g., military unit) commits itself to consistently reviewing the contractor's work for contract compliance, savings are realized, delays in completing critical contract task orders are minimized, and contractor's cost control incentives are preserved.

### **Privatization in Contracting: The Iraqi Model**

The heightened awareness of issues related to privatization in the Global War on Terror (GWOT) was fueled in 2007 by the civilian deaths attributed by Iraqis to improper discipline by the Blackwater security firm. Nor had this been the first incident where the oversight and management of outsourced requirements in Iraq had been questioned. In addressing contracting fraud before the Senate Judiciary Committee in March of 2007, the Acting DoD Inspector General stated:

The presence of the Defense Criminal Investigative Service (DCIS) in the region has led to 83 investigations. Our investigations have focused on matters such as bribery, theft, gratuities, bid rigging, product substitution, and conflicts of interest. These alleged crimes expose U.S. and coalition forces to substandard equipment and services, or shortages that aggravate an already harsh and harmful environment. Currently DCIS is conducting 56 investigations involving war profiteering, contract fraud, and contract corruption in Iraq. . . . The criminal activities being investigated involve members of the U.S. Armed Forces, U.S. contractor personnel, as well as foreign personnel. For example, in January 2004, an investigation was initiated on information from the Defense Contract Audit Agency concerning allegations of kickbacks and gratuities that were solicited and/or received by Kellogg, Brown & Root (KBR) employees. KBR has also been alleged to have been overcharging for food and fuel.<sup>7</sup>

The Army's Logistics Civil Augmentation Program (LOGCAP) Contract has been by far the largest logistics support contract used by DoD in support of our forces in Iraq. Like most other support contracts in Iraq

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<sup>7</sup> Testimony of Thomas F. Gimble, Acting IG, DoD, in *Combating War Profiteering: Are We Doing Enough to Investigate and Prosecute Contracting Fraud in Iraq?*, Hearing before the Committee on the Judiciary, United States Senate, March 20, 2007, at 9.

and Afghanistan, the LOGCAP contract is a cost-plus award fee contract. Cost-plus contracts allow the contractor to be reimbursed for reasonable, allowable, and allocable costs incurred to the extent prescribed in the contract. A cost-plus award fee contract provides financial incentives on the basis of performance. These contracts allow the government to evaluate a contractor's performance according to specified criteria and to grant an award amount within designated parameters. Award fees can serve as a valuable tool to help control program risk and encourage excellence in contract performance. To reap the advantages that cost-plus award fee contracts offer, the government must implement an effective award fee process.

Recurring contractor problems under the LOGCAP contract such as poor cost reporting, difficulties with producing and meeting schedules, and weaknesses in purchasing system controls have made this contract difficult to administer. An element of these concerns may be the sheer size of the contract, as LOGCAP is providing life and logistics support for more than 165,000 soldiers and civilians under difficult circumstances in Iraq. A significant aspect of the problems faced in Iraq has been the lack of clarification (called 'definitizing') of task orders, that is, timely reaching agreement with the contractor on the determination of contract terms, specifications, and cost. Delays in clarifying task orders make cost-control incentives under these award fee contracts less effective. Equally significant, the Army has held few if any award fee boards, although required every six months under the contract, because the customer military units have not evaluated and documented the contractor's performance.<sup>8</sup>

In response to these GAO concerns raised in its 2004 review, the Army issued the first DoD-wide instruction on the use of contractors to support deployed forces in October 2005, which addressed many of the concerns raised above.<sup>9</sup> A subsequent December 2006 review of the implementation of this instruction, however, found that: (1) DoD continued to lack the capability to provide military commanders with information on the totality of contractor support available to their deployed forces in Iraq; (2) too few contract oversight personnel precluded DoD from obtaining

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<sup>8</sup> See discussion of these and other LOGCAP concerns in GAO Report GAO-04-854 *MILITARY OPERATIONS: DOD'S EXTENSIVE USE OF LOGISTICS SUPPORT CONTRACTS REQUIRES STRENGTHENED OVERSIGHT* (July 2004).

<sup>9</sup> See DoD Inst. 3020.41, *Contractor Personnel Authorized to Accompany the U.S. Armed Forces* (Oct. 3, 2005).

reasonable assurance that contractors were meeting contract requirements at every location where work was being performed; (3) DoD had made few efforts to leverage its institutional knowledge and experiences using contractors to support deployed forces, despite facing many of the same difficulties managing contractors in Iraq that it faced in prior military operations; (4) lessons learned on the use of contractor support at deployed locations were not routinely gathered and shared; and (5) improvements had not been made to include more information on the use of contractors in pre-deployment training.<sup>10</sup>

In follow-up oversight reporting in January 2008, while acknowledging some improvement, GAO found that, based on the Iraqi experience, several challenges will need to be addressed by DoD to improve the oversight and management of contractors supporting deployed forces in future operations and to ensure those forces receive the support they require in an effective and efficient manner. Those challenges, in their view, include a number of broader issues, to include that: (1) contractors in the future are fully incorporated as part of the total force; (2) the proper balance of contractors and military personnel in future contingencies and operations must be determined; (3) DoD must resolve how it will integrate its effort with other government agencies in future operations; and (4) DoD must address and incorporate the use and role of contractors in its plans to expand and transform the Army and Marine Corps.<sup>11</sup>

It has been in the area of security contracting, however, that DoD has faced its most difficult challenges. In the section that follows, privatized Defense security contracting is reviewed as well as DoD General Counsel actions to ensure contractor personnel comply with not only international law requirements, but also provisions of the Uniform Code of Military Justice (UCMJ).

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<sup>10</sup> See GAO Report GAO-07-145, *Military Operations: High Level DoD Action Needed to Address Long-Standing Problems with Management and Oversight of Contractors Supporting Deployed Forces* (Dec. 2006), at 3-5.

<sup>11</sup> See GAO Report GAO-08-436T, *Military Operations: Implementation of Existing Guidance and Other Actions Needed to Improve DoD's Oversight and Management of Contractors in Future Operations* (Jan. 24, 2008), at 2-3.

## Defense Security Contracting: Enforcing Accountability

Following the end of major combat actions in Iraq at the end of April 2003, coalition forces began employing civilian contractors in a number of ways to contribute to post-conflict security throughout Iraq. During this phase of initial support for the new transition government of Iraq, the U.S. determined that there was no legal prohibition against using contractors where the risk of direct confrontation with a *uniformed enemy* was not probable, and thus their use would not rise to the level of ‘taking a direct part in hostilities.’<sup>12</sup> During this transition phase, the U.S. determined it would be a step backward to prohibit contractor security services from being used to provide security against terrorists or other criminal elements, and that these functions were appropriate for civilian contractors.<sup>13</sup> This was especially important in a time of constrained force structures and exacerbated troop rotation concerns within the Army and Marine Corps.

The U.S. viewed the security operations not only in Iraq but also in Afghanistan to be against remnants of the former regime, local criminal elements, and indigenous and foreign terrorists, thus not controlled by rules applicable when a uniformed armed force of a sovereign nation was engaged. Since the security operations being conducted did not constitute major combat operations, and coalition forces were supporting democratically elected governments there, these operations were considered more analogous to stability operations or operations in support of foreign internal defense. The DoD Deputy General Counsel (International Affairs) has defined the situation in these countries as follows:

Currently, operations both in Iraq and Afghanistan are in the transition, or stability operations, phase of an international armed conflict. (In Iraq, operations may also be characterized as post-occupation.) Application of the law of war in the fact situations presented by current operations should not be viewed as the same as during a period of major combat operations of an international armed conflict. Resolution of the inquiry rests on this and other relevant facts and requires a careful mission

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<sup>12</sup> Prior to January, 2006, the USCENTCOM SJA’s position was that PSCs could only be used for static/perimeter security. That position was enforced with respect to DoD use of PSCs until the ‘direct confrontation with a uniformed enemy’ opinion was issued by DoD GC in January 2006. See note 14, *infra*.

<sup>13</sup> See discussion in DoD Instr. 3020.41, Oct. 3, 2005, *supra*.

analysis to determine whether the particular task, in the circumstances in which it is likely to be performed, is highly likely to place the contractors in direct contact or confrontation with hostile forces.<sup>14</sup>

The ‘stability’ operations described above are those operations where there is no longer a risk of direct contact with or confrontation with *lawful* hostile forces. While private security contractors are not precluded from participating during combatant operations, their role must be carefully tailored to preclude their use as combatants. In stability operations of the kind currently being undertaken in Iraq, however, where the possibility of traditional military force on force confrontation no longer exists, they, the private security firms, are permitted to participate in a broad range of security activities in support of the coalition forces and the government of Iraq.

The stability operations described above are controlled by the provisions of the October 2005 DoD Instruction signed by the Under Secretary of Defense for Acquisition, Technology, and Logistics.<sup>15</sup> That directive requires that when using contractors for security services, the purpose must be to perform other than uniquely military functions. A specific paragraph of the Instruction provides that whether a particular use of contract security services is permissible is dependent on the facts.<sup>16</sup> As stated in the DoD Deputy General Counsel’s Memorandum, the private security companies in Iraq “are being employed for security missions that would normally be performed by the host government.”<sup>17</sup> This use is entirely consistent with the mandates within the two applicable Security Council Resolutions calling on the Coalition to assist the Iraqis directly in the maintenance of stability and security.<sup>18</sup>

There are distinct limits on how these private security firms can be used, however, even in stability operations of the kind described. As noted in the 2006 DoD General Counsel Memorandum, the private firms should

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<sup>14</sup> DoD Deputy GC (International Affairs) Memo to SJA, USCENTCOM, *Request to Contract for Private Security Companies in Iraq*, Jan. 10, 2006, at 2 (hereinafter DoD Dep GC Memo).

<sup>15</sup> DoD Inst. 3020.41, Oct. 3, 2005.

<sup>16</sup> *Id.* at para. 6.3.5.

<sup>17</sup> DoD Deputy GC Memo, *supra* note 14, at 3.

<sup>18</sup> See UN Security Council Resolutions 1546 and 1637.

not be employed where the likelihood of direct participation in hostilities is high. The Memorandum further indicated that it would be improper to assign the private security company personnel to quick reaction force missions, local patrolling, or military convoy security operations where the likelihood of hostile contact is high.<sup>19</sup> Activities that are authorized under these security contracts were described by the Deputy General Counsel as follows:

Commanders may employ such contractor personnel at military compounds only for individual self-defense, defense of others in the vicinity, and defense of critical military property and supplies. Such use must be consistent with the terms of their contracts.<sup>20</sup>

### **Use of Deadly Force by Contractor Personnel**

As important as determination of the missions these private security companies (PSCs) can be assigned are the circumstances under which the personnel of these PSCs can respond to hostile acts or intent with deadly force. Unlike military personnel who are guided by Rules of Engagement (ROE) which derive from the Law of Armed Conflict, contractor personnel are civilians who are not subject to the military or legal norms reflected in the Geneva Conventions of 1929 and 1949 or the Hague Conventions of 1899 and 1907, in that they are not combatants under the law of war.<sup>21</sup> The Rules on the Use of Force (RUF) for contractor personnel are those set forth in the contracts themselves and in directives issued by each combatant commander.

Clear guidance for contractor personnel and provisions on their conduct that were to be incorporated in contracts signed by private security companies were clearly enunciated for all Central Command contractors and contractor personnel in a December 2005 message by USCENTCOM. As stated in this unclassified message, “[c]ontract security personnel always retain their ability to exercise self-defense against hostile acts or

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<sup>19</sup> DoD Dep GC Memo, *supra* note 14, at 4.

<sup>20</sup> *Id.*

<sup>21</sup> See discussion of ROE applicable to U.S. and coalition military personnel in Iraq and Afghanistan in J. P. Terry, *Rules of Engagement in the Terrorism Arena: “Operationalizing” Legal Requirements for Unconventional Warfare*, JOINT FORCE QUARTERLY, October 2008 (in press).

demonstrated hostile intent, but are not authorize to take a direct part in offensive operations.”<sup>22</sup> The message further stated: “Notwithstanding any Iraqi regulations relating to private security company use of deadly force solely to protect property of any type, DoD contract security can be specifically authorized to protect designated mission essential and U.S. national security equipment/property with force, including deadly force.”<sup>23</sup>

All guidance changed in Baghdad following the Blackwater incident on September 6, 2007. In that incident, Blackwater employees fired on Iraqi civilians that contract security personnel claimed had committed a premeditated attack on their convoy. The Iraqi citizens involved, and subsequently the Iraqi Government, alleged but never established that Blackwater security employees wantonly fired on unarmed civilians. The Deputy Secretary of Defense, in a September 25, 2007 Memorandum, held all combatant commanders responsible in their areas of responsibility for oversight and management of DoD contractors and for discipline of DoD contractor personnel when appropriate.<sup>24</sup>

This Memorandum, directed to the Secretaries of the military departments, combatant commanders, directors of defense agencies, and directors of DoD field activities, required a complete review of the management of DoD contractors.<sup>25</sup> A key element of this Memorandum was the emphasis that DoD contractor personnel, regardless of nationality, accompanying U.S. armed forces, are currently subject to UCMJ jurisdiction.<sup>26</sup> The Memorandum further stated:

Commanders have UCMJ authority to disarm, apprehend, and detain DoD contractors suspected of having committed a felony offense in violation of the Rules on the Use of Force (RUF), or

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<sup>22</sup> CENTCOM Dec 05, Subj: (U) *USCENTCOM Policy Relating to Possession and Use of Arms by All DoD Civilian Personnel and All DoD Contractors and Their Employees Present Within Iraq and Afghanistan*, para. 2.C.2.B.

<sup>23</sup> *Id.*, para. 4.D.2.

<sup>24</sup> DepSecDef Memorandum of 25 Sept. 2007, Subj: (U) *Management of DoD Contractors and Contractor Personnel Accompanying U.S. Armed Forces in Contingency Operations Outside the United States*, at 1.

<sup>25</sup> *Id.*, at 2.

<sup>26</sup> Also see MILITARY EXTRATERRITORIAL JURISDICTION ACT OF 2000, sec. 3261, Pub. L. 106-523, Nov. 22, 2000. This provision of the Act established the right to try contractor employees for felony offenses.

outside the scope of their authorized mission, and to conduct the basic UCMJ pretrial process and trial procedures currently applicable to the courts-martial of military service members. Commanders also have available to them contract and administrative remedies, and other remedies, including discipline and possible criminal prosecution.<sup>27</sup>

Just as significant as the Deputy Secretary's Memorandum in detailing the authority enjoyed by the combatant commanders, the Military Extraterritorial Jurisdiction Act (MEJA) of 2000<sup>28</sup> provides federal jurisdiction over felony offenses committed outside the United States by contractor personnel of any federal agency or provisional authority whose employment relates to supporting the DoD mission. Implementing guidance under this Act is provided through DoD Instruction,<sup>29</sup> and military department regulations. This DoD Instruction requires Defense Department coordination with the Department of Justice for the return to the U.S. of contractor personnel subject to MEJA for prosecution.

Further, under the Deputy Secretary's Memorandum described above, combatant commanders and all other addressees are required to ensure that: (1) all required clauses are included in DoD contracts when contract performance requires contractors and contractor personnel to accompany U.S. forces; (2) contractor personnel who are suspected of committing a felony are prevented from leaving the country until approved by the senior commander in country; (3) RUF are reviewed periodically and changed accordingly to ensure the risk of innocent civilian casualties is minimized; and (4) combatant commanders are directed to require contractors to provide copies of their Standard Operating Procedures and guidance to their employees on escalation of the use of force, the use of deadly force, and the rules for interaction with host country nationals.<sup>30</sup> Compliance with these dictates over the past year, just as in all other areas where oversight and management of defense outsourcing has been enhanced, has greatly

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<sup>27</sup> DepSecDef Memo, *supra* note 24, at 2.

<sup>28</sup> *Supra* note 26. Unfortunately, to date, the COCOMS have not issued any implementing guidance.

<sup>29</sup> DoD Inst. 5525.11, *Criminal Jurisdiction Over Civilians Employed by or Accompanying the Armed Forces Outside the United States, Certain Service Members, and Former Service Members*, March 3, 2005.

<sup>30</sup> DepSecDef Memo, *supra* note 24, at 2.

improved relations with Iraqi civilian leadership and with Iraqi citizens in areas in which U.S. forces are operating.<sup>31</sup>

## **Observations and Conclusions**

Statistics alone don't begin to show the degree to which privatization has penetrated the assignment of requirements within the Department of Defense in Operations Iraqi Freedom and Enduring Freedom. Many tasks and services once reserved exclusively for government employees are being handled by civilian contractor employees. For example, private contractors provide security, perform equipment repair, do minor construction and provide intelligence services. At forward deployed locations, they are providing laundry and food services, as well as systems support, and technical and logistics support to maintain weapons and other systems.

Contractors currently write reports analyzing intelligence data that are passed up the line to on-scene commanders, as well as supply and maintain software programs that integrate data used to track terrorist suspects and determine what targets to eliminate in critical areas of Iraq and Afghanistan. Contractors also provide sophisticated tools to help individual agencies communicate with each other, and they supply security elements to protect critical networks from outside tampering. These functions encompass vital support to our military forces engaged in combat operations in Iraq and Afghanistan to include security for convoys, sites, personnel and the like.

The numbers employed under government contracts in Iraq alone for functions once carried out by the U.S. military can only be estimated. As GAO has noted, it has been reported that as of March 2006, there were a total of 181 private security companies with just over 48,000 employees working in Iraq.<sup>32</sup> Private security contractors constitute a small but significant portion of the many thousands of individuals employed under U.S. government contracts to perform the spectrum of functions once carried out by U.S. military personnel. According to a July 2007 news report, some

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<sup>31</sup> The same result has been reported from Kabul.

<sup>32</sup> See testimony of William Solis, Director, Defense Capabilities and Management, before the Subcommittee on National Security, Emerging Threats, and International Relations, Committee on Government Reform in GAO Report, *Rebuilding Iraq: Actions Still Needed to Improve the Use of Private Security Providers*, GAO-06-86T, June 13, 2006.

182,000 were employed under U.S. government contracts in Iraq at that time.<sup>33</sup>

This emphasis on contracting out has led to allegations of fraud and other misconduct, to include kickbacks, bid rigging, embezzlement, and fraudulent overbilling. While IG and Defense and Service Criminal Investigative Service investigations have uncovered much of this misconduct, the cost has been high. Equally significant, contracts for security services have engendered more visible concerns where host nation civilians have been killed by security personnel.

This has led to a re-emphasis on oversight and management on the part of the Congress, the various Departments and the combatant commands. The DoD has been highly visible in this effort to correct deficiencies in the contracting process. Through top-down guidance, as in the 2007 Deputy Secretary's Memorandum, and through carefully drafted DoD instructions, this Department has responded to these concerns with an effort to ensure that contracts clearly and accurately specify the terms and conditions under which the contractor is to perform, describe the specific support relationship between the contractor and the Department, and contain standardized clauses to ensure adequate visibility of contractor personnel. More significantly, additional resources have been committed to ensuring effective oversight and management of the contracts' terms.

With respect to contracts for security services, DoD has instituted precise requirements for the use of force by contractor personnel, the training required to develop accountability and maintain weapons proficiency, and has developed clear requirements for the continuing review of security contractors' standard operating procedures. The extension of U.S. jurisdiction for criminal misconduct on the part of contractor personnel will likewise ensure accountability for all personnel supporting the force in theatre.

The proliferation of contractor support personnel in Operations Iraqi Freedom and Enduring Freedom is unlike anything the U.S. has been tasked with coordinating since the occupation following the Second World War. The efforts undertaken, largely by DoD, since the clear evidence of the level

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<sup>33</sup> See T. Christian Miller, *Private Contractors Outnumber U.S. Troops in Iraq*, L.A. TIMES, July 4, 2007, at A-2.

of overreaching on the part of contractor personnel became evident in early 2005, will provide an effective roadmap for future operations of this scale.