Reining in Rambo: Prosecuting Crimes Committed by American Military Contractors in Iraq

Christopher D. Belen
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I. INTRODUCTION

On September 16, 2007, American civilians shot and killed seventeen Iraqi civilians on a Baghdad street.¹ The heavily armed Americans were not tourists or ordinary criminals; they were employed by Blackwater USA, a State Department contractor, and paid to protect the United States Embassy and diplomatic corps in Baghdad.² Although the reports and investigations consistently concluded the shooting was at least excessive,³ the possible criminal liability of the individual shooters

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³ See Johnston & Broder, supra note 2; Sudarsan Raghavan, Joshua Partlow & Karen DeYoung, Blackwater Faulted in Military Reports From Shooting Scene, WASH.
was less than certain because of the foreign location and the unique relationship between the State Department contractors and the U.S. military mission in Iraq. The Military Extraterritorial Jurisdiction Act ("MEJA"), authorizes criminal charges in the United States for certain foreign conduct by civilians. This statute, however, does not necessarily apply to an entity operating under a contract with a federal agency other than the Department of Defense ("DoD"). Even if a federal court theoretically could exercise jurisdiction over the conduct, some of the likely defendants were granted a form of immunity during the investigation that would present another significant obstacle to a successful prosecution.

If criminal prosecution in a United States District Court is unlikely, the other options—court-martial or prosecution in an Iraqi court—suffer from their own flaws. The Supreme Court historically has expressed concern over subjecting civilians to the military justice system and, if faced with this issue, the Court may strike down Congress’s recent grant of court-martial jurisdiction over most private military contractors. The Iraqi legal system likely is not available because the transitional government granted immunity to private contractors and the successive

4. See generally John M. Broder & James Risen, Armed Guards In Iraq Occupy a Legal Limbo, N.Y. TIMES, Sept. 19, 2007, at A1, available at 2007 WLNR 18400367. By mid-November, the F.B.I. had concluded an investigation into the shooting. See Johnston & Broder, supra note 2. Reports also indicate a grand jury had convened. See David Johnston & David M. Broder, U.S. Prosecutors Subpoena Blackwater Employees, N.Y. TIMES, Nov. 20, 2007, at A10, available at 2007 WLNR 22942576. According to at least one report, the Department of Justice has acknowledged the "major legal obstacles" outlined in this Comment but, in spite of these difficulties, the Department believes the obstacles are "not insurmountable." See James Risen & David Johnston, Justice Department Briefed Congress on Legal Obstacles in Blackwater Case, N.Y. TIMES, Jan. 16, 2008, at A10, available at 2008 WLNR 844931.


6. See infra Part III.A.1-2 (discussing origins and purpose of the MEJA).

7. See Broder & Risen, supra note 4; All Things Considered: Questions Swirl Around Blackwater Shooting (NPR radio broadcast Sept. 18, 2007) [hereinafter Silliman interview] (interviewing Scott Silliman, Executive Director of Duke Law School’s Center on Law, Ethics, and National Security).


9. See infra Parts III.B, IV (describing options for court-martial jurisdiction and recourse to the Iraqi legal system); infra Part V.A.1 (discussing contractors’ immunity from the Iraqi legal process); infra Part V.A.3 (discussing merits of applying court-martial jurisdiction to private military contractors).

10. See infra Part III.B.2.
Iraqi government did not repeal the measure. It may be of little comfort to the victims, but if the Blackwater shooters avoid criminal prosecution, they will likely be the last proverbial horses that escape through the legal barn door. After the tragedy in Nisour Square, the United States House of Representatives passed legislation that could clarify the scope of the MEJA’s application to private contractors, and the Iraqi government approved a draft law that would repeal the primary obstacle to hailing a wrongdoer into an Iraqi court.

Part II of this Comment describes the Nisour Square incident, Blackwater’s role in Iraq, and the jurisdictional gap that may allow the shooters to escape criminal liability. Part III reviews the various options for prosecuting the shooters under U.S. law. Part IV describes the source of possible immunity from Iraqi law. Part V analyzes the implications of the ambiguities in U.S. law, the likelihood of immunity from liability in the Iraqi legal system, and the future impact of recent developments. Ultimately, this Comment concludes that the ambiguous legal foundation for prosecution of private security contractors could allow for prosecution of the shooters but would require an expansive interpretation of U.S. law.

12. See Frederick A. Stein, Have We Closed the Barn Door Yet? A Look At the Current Loopholes In the Military Extraterritorial Jurisdiction Act, 27 Hous. J. Intr’l L. 579 (2005) (employing the “barn door” metaphor).
13. See Matt Kelley, House Tries to Clarify Contracting Rules Under Bill, Guards Could Be Subject to Prosecution, USA TODAY, Oct. 5, 2007, at 6A, available at 2007 WLNR 19506479; see also infra Part V.C.
15. This Comment evaluates the options for criminal prosecution of the Blackwater shooters but it does not address the civil liability of the shooters or their employer. The victims of the Blackwater incident discussed in this Comment will likely pursue civil claims against the corporation and individual actors. Indeed, one survivor and several family members of the victims filed such a civil suit in the United States District Court for the District of Columbia less than one month after the shooting. See Press Release, Center for Constitutional Rights, Blackwater USA Sued For Firing On Iraqi Civilians, According to Legal Team for Injured Survivor and Families of Three Killed (Oct. 11, 2007), available at http://ccrjustice.org (search “Search this site” for “blackwater atban”). For a discussion of civil liability of private security contractors, see, for example, Kateryna L. Rakowsky, Military Contractors and Civil Liability: Use of the Government Contractor Defense to Escape Allegations of Misconduct in Iraq and Afghanistan, 2 STAN. J. CIV. RTS. & CIV. LIB. 365 (2006); Valerie C. Charles, Note, Hired Guns and Higher Law: A Tortured Expansion of the Military Contractor Defense, 14 CARDOZO J. INT’L & COMP. L. 593 (2006) (analyzing civil claims against contractors involved in the interrogation of detainees at Abu Ghraib prison); Posting of Laura Dickinson to Balkinization, http://balkin.blogspot.com (Oct. 7, 2007, 21:44 EDT).
II. BACKGROUND

A. September 16, 2007

Just after noon,\textsuperscript{16} shots rang out in Nisour\textsuperscript{17} Square.\textsuperscript{18} Gunfire sprayed in all directions after a caravan of black SUVs barreled into the traffic circle at the center of this western Baghdad neighborhood.\textsuperscript{19} The SUVs' occupants were employees of Blackwater USA, a private military contractor.\textsuperscript{20} Reports described the chaotic scene and the indiscriminate\textsuperscript{21} and excessive\textsuperscript{22} shooting that resulted in the deaths of seventeen Iraqi civilians.\textsuperscript{23}

\textsuperscript{16} See James Glanz & Sabrina Tavernise, Blackwater Role in Shooting Said To Include Chaos, N.Y. TIMES, Sept. 28, 2007, at A1, available at 2007 WLNR 18998874 (reporting the shooting in Nisour Square began at 12:08 p.m.).

\textsuperscript{17} As is often the case with words translated from Arabic to English, there are alternative spellings of the location of the incident. E.g., Stefanie Balogh, Hired Guns Help Wage War In Iraq, ADVERTISER (Aus.), Oct. 6, 2007, at 72, available at 2007 WLNR 19550560 (naming location as “Nissor Square”); Posting of Scott Horton to Balkinization, http://balkin.blogspot.com (Dec. 19, 2007, 15:42 EST) (using “Nisoor Square”). Following the lead of the New York Times, this Comment uses “Nisour Square.” E.g., Glanz & Rubin, supra note 1 (spelling location “Nisour Square”).

\textsuperscript{18} See id.

\textsuperscript{19} See id.

\textsuperscript{20} See id.

\textsuperscript{21} See id. (reporting more than 40 bullet holes found in one car). Early reports mentioned a mother shot while cradling her infant son. See, e.g., Sabrina Tavernise & James Glanz, Iraqi Report Says Blackwater Guards Fired First, N.Y. TIMES, Sept. 18, 2007, at A12, available at 2007 WLNR 18318204. Subsequent reporting, however, clarified the woman's son was an adult named Ahmed Haithem Ahmed. See Glanz & Rubin, supra note 1. The confusion may be blamed on the charred remains of Mr. Ahmed's body, burned after a Blackwater guard allegedly fired a grenade into the lurching car. See id.

\textsuperscript{22} See Johnston & Broder, supra note 2 (quoting anonymous official’s statement, “I wouldn’t call it a massacre, but to say it was unwarranted is an understatement”); Raghavan & White, supra note 3 (quoting Army eyewitnesses describing the conduct of Blackwater guards as “excessive shooting”).

At least one report claims the incident escalated when a motorist was shot fatally in the head, slumped forward, and was unable to stop his car. As the car rolled toward the Blackwater convoy, the guards opened fire. Blackwater guards claimed they acted in self-defense, firing only after they were fired upon. The resulting investigations, however, concluded no shots were fired at the convoy.

B. Blackwater's Security Services Contract In Iraq

At the time of the Nisour Square incident, Blackwater operated in Iraq under a “personal protective services” contract with the U.S. Department of State. The State Department, for the purpose of personal protection of high-level officials, contracted with three private security contractors under a Worldwide Personal Protective Services contract (“WPPS II”). At the end of September 2007, 1433 people worked under the WPPS II contract worldwide; of those, 1261—or 88 percent—worked in Iraq. In 2007, the total annual costs for the
WPPS II contract worldwide were $570,882,962 of which $472,705,651—or 83 percent—is allocated to Blackwater.33

C. The Loophole Revealed

Commentators describe the legal status or posture of private military contractors as a jurisdictional "no man's land," gap, or loophole.34 After the Nisour Square incident, Secretary of State Condoleezza Rice acknowledged the "hole" in U.S. law, and urged Congress to act.35 This opinion reflects a belief that even the statute intended to prevent this loophole—the MEJA36—is not up to the task because it suffers from ambiguous and outdated definitions of the persons covered by the Act.37 The MEJA extended federal court jurisdiction to include U.S. civilians who commit felonies while employed by or accompanying the military overseas.38 The MEJA, therefore, may not cover the Blackwater shooters because their State Department contract39 did not explicitly relate to ongoing military operations in Iraq.40 The prospect of the MEJA’s inapplicability leads to consideration of other avenues of criminal liability: court-martial jurisdiction or criminal charges in Iraq.41 Either option, however, includes obstacles.

33. Id.
36. See, e.g., Stein, supra note 12.
41. See Griffin, supra note 31 (describing the responsibilities of the WPPS II contractors).
42. The MEJA covers non-DoD contractors to the extent that their work supports the mission of the military overseas. See 18 U.S.C. § 3267(1); see also infra Part III.A.3 (discussing this expanded version of the MEJA); infra Part V.A.2 (applying the MEJA to the Blackwater shooters involved in the Nisour Square incident).
43. Some observers have advocated other options as preferable to the MEJA. See infra note 50 (explaining this Comment’s focus on the MEJA and mentioning two other avenues). Professor Jordan Paust, for example, concluded prosecution under the MEJA was too problematic and, instead, advocated prosecuting the Blackwater shooters under
First, courts have not yet reviewed the recent legislation authorizing courts-martial for civilian contractors associated with military operations and, considering the U.S. Supreme Court's precedent, the measure's constitutionality is questionable.\textsuperscript{44} The second option, criminal charges under Iraqi law, is likely precluded because the Coalition Provisional Authority ("CPA") granted immunity to contractors; the successive Iraqi government did not repeal the grant of immunity.\textsuperscript{45} Unless the United States waives Blackwater's immunity under this order,\textsuperscript{46} the Iraqi legal system is likely unavailable.\textsuperscript{47} Therefore, the best starting point is to review the possible applicability of U.S. law to the Blackwater shooters involved in the Nisour Square incident.

III. PROSECUTION UNDER U.S LAW

There are two primary options for prosecuting the Blackwater shooters under U.S. law: criminal prosecution under the MEJA\textsuperscript{48} or court-martial under the Uniform Code of Military Justice ("UCMJ").\textsuperscript{49} But Blackwater's status as a private military contractor with the State Department may preclude either option.

\begin{itemize}
\item \textsuperscript{44} See generally Jackson, supra note 34 (reviewing the Supreme Court's previous treatment of civilian court-martial in light of the recent legislation expanding court-martial jurisdiction during a "contingency operation" by the military).
\item \textsuperscript{45} See infra Part IV.C (discussing the source of potential immunity); infra Part V.A.1 (analyzing the application of the immunity to the Blackwater shooters involved in the Nisour Square incident).
\item \textsuperscript{46} See infra Part IV.C.4 (describing the Sending States' right to waive immunity).
\item \textsuperscript{47} See discussion infra Part V.A.1.
\item \textsuperscript{49} 10 U.S.C. §§ 801-946 (2000).
\end{itemize}
A. Military Extraterritorial Jurisdiction Act

The MEJA is the primary statutory vehicle for criminal prosecution of private military contractors.\(^5\) When the MEJA was originally passed in 2000, Congress believed it closed an accountability gap, authorizing prosecution of Americans who commit serious crimes while overseas.\(^5\) What emerged, however, was a well-intended law too ambiguous to apply to those who contracted with non-DoD agencies.\(^5\)

1. Original Passage

Almost forty years after the United States Supreme Court struck down court-martial jurisdiction over civilians, even if the defendant was a DoD employee or the dependent of a deployed service member,\(^5\) Congress acted\(^5\) to fill the gaping jurisdictional hole, which allowed

\(^{50}\) 18 U.S.C. §§ 3261-3267. Although other statutes such as the Special Maritime and Territorial Jurisdiction Act ("SMTJ"), 18 U.S.C. § 7 (2000), and the WCA, 18 U.S.C. § 2441 (2000), are arguably available for similar conduct, the narrow focus and specific intent of the MEJA to apply criminal jurisdiction to foreign conduct by private contractors warrants the special attention given by this Comment. For a discussion of the applicability of these other statutes to a scenario similar to the Nisour Square incident, see William C. Peters, On Law, Wars, and Mercenaries: The Case for Courts-Martial Jurisdiction over Civilian Contractor Misconduct in Iraq, 2006 BYU L. REV. 367 (2006) (using a hypothetical involving a detainee who dies while held captive by civilian contractors assigned to interrogate the detainee); Giardino, supra note 43 (comparing the relative merits of the SMTJ, WCA, and MEJA).


\(^{52}\) See discussion infra at Part III.A.2-3.

\(^{53}\) See Reid v. Covert, 354 U.S. 1 (1957) (holding no court-martial jurisdiction over civilian family members accompanying servicemembers overseas); United States ex rel. Toth v. Quarles, 351 U.S. 487 (1956) (striking down application of the UCMJ to persons who were no longer members of the military); see also H.R. REP. No. 106-778, at 7 & n.8 (citing Reid as a case that "severely limited the application" of the UCMJ to civilians); Schmitt, supra note 35 (discussing line of cases striking down court-martial jurisdiction over civilians). In addition to the Supreme Court decisions, the United States Court of Military Appeals limited military court-martial jurisdiction in United States v. Averette, 19 C.M.A. 363 (1970), available at 1970 WL 7355. The court in Averette held that court-martial jurisdiction over civilians accompanying the military in a "time of war" was limited to periods of declared war and not a contingency operation. Id. at 365; see also 10 U.S.C. § 802(a)(10) (2000) (authorizing court-martial for some civilians in "time of war").

\(^{54}\) Glenn Schmitt served as counsel to the House Judiciary Committee from 1994 to 2001 and he helped draft the legislation that became the MEJA. See generally Schmitt, supra note 35. Schmitt recounted the history of the MEJA in a comprehensive article written from his behind-the-scenes perspective. See id. In his unique account of the drafting and passage of the MEJA, Schmitt claims Congress tried to pass such a bill for over forty years. See id. at 73-74 & n.135. According to Schmitt, "at least twenty-seven
even serious crimes to go unpunished. The original impetus behind the MEJA was to provide a vehicle for prosecuting crimes against Americans or against American property.

One observer attributes the interest of a primary sponsor of the bill to an enlisted constituent whose daughter was molested by another soldier's son while the families were stationed in Germany. When the victim's father was told no charges could be filed because of the lack of federal jurisdiction for crimes against civilians overseas, the Senator's office became involved and, ultimately, the MEJA was drafted, debated, passed, and signed by President Clinton to ensure that such a crime would be punished.

On its face, the text of the MEJA was simple. The MEJA created a new federal crime for a specific category of conduct, with two different bills were introduced" over this time. Id. at 74 n.135 (identifying a "representative sample" of the bills).

55. In a 1979 report, the General Accounting Office ("GAO"), now the Government Accountability Office, found that host nations prosecuted DoD civilian employees for 200 serious crimes in 1977 but host nations did not prosecute civilians in fifty-nine serious cases. See H.R. REP. No. 106-778, at 8 (citing COMPTROLLER GEN. OF THE U.S., GEN. ACCOUNTING OFFICE, REPORT TO CONGRESS: SOME CRIMINAL OFFENSES COMMITTED OVERSEAS BY DO D CIVILIANS ARE NOT BEING PROSECUTED: LEGISLATION IS NEEDED (1979) [hereinafter GAO REPORT]). According to the GAO report, the serious crimes that slipped through the legal gap included "manslaughter, rape, arson, robbery, and burglary." See Schmitt, supra note 35, at 74 (citing GAO REPORT, supra).

56. See H.R. REP. No. 106-778, at 10 (identifying civilians' connection with military and the need to protect American civilians and American property as justifications for the MEJA); Schmitt, supra note 35, at 55 (recognizing the inability of host nations to prosecute crimes against Americans or against American property).

57. See Schmitt, supra note 35, at 80.

58. See id.

59. See id. at 80-113 (describing in detail the legislative path of the MEJA).

60. The MEJA confers jurisdiction to a United States District Court only if the conduct is not prosecuted by other means. See 18 U.S.C. § 3261 (2000). If, for example, the host nation prosecutes the offense, the MEJA is not applicable unless otherwise authorized by the Attorney General or Deputy Attorney General. See 18 U.S.C. § 3261(b); see also H.R. REP. No. 106-778, at 11; Schmitt, supra note 35, at 116 (discussing this provision). In addition, if the conduct results in court-martial under the UCMJ, the MEJA does not apply to authorize a criminal trial. See 18 U.S.C. § 3261(d); H.R. REP. NO. 106-778, at 11 (explaining the bill that became the MEJA only applies if the perpetrator is "not tried for their crimes under the UCMJ and who later cease to be subject to the UCMJ (e.g., because the case was not solved before they were discharged from the military, or because the person is no longer on active duty)").

61. See H.R. REP. No. 106-778, at 10 (describing the MEJA as creating a new federal crime). According to Glenn Schmitt, there was debate at the time of the bill's consideration whether the MEJA created a new crime or merely extended federal courts' jurisdiction for other federal crimes. See Schmitt, supra note 35, at 114. Although the bill's drafters believed the legislation created a new crime, DoD staff were not initially convinced. See id. Schmitt argued crimes under the MEJA are similar to those "assimilative crimes" under the Federal Assimilative Crimes Act, 18 U.S.C. § 13 (2000), whereby federal prosecutors can incorporate by reference provisions of state criminal
categories of potential perpetrators. Under the MEJA, “conduct outside the United States that would constitute an offense punishable by imprisonment for more than 1 year if the conduct had been engaged in within the special maritime and territorial jurisdiction of the United States” is a federal crime. The civilians covered by the MEJA are those persons who, at the time of the conduct, were either “employed by the Armed Forces outside the United States” or accompanying the Armed Forces. The original MEJA defined “employed by the Armed Forces” to include civilian employees, DoD contractors, or employees of a DoD contractor. The second category of persons who may be covered by the MEJA—persons “accompanying” the military abroad—covered dependents of a service member, civilian DoD employee, or DoD contractor. Notwithstanding this straightforward statutory scheme, the MEJA suffers from ambiguities in the language that defines the Act’s scope.

statutes even where no corresponding federal crime exists. See Schmitt, supra note 35, at 114; see also H.R. REP. NO. 106-778, at 15 (comparing the effect of the MEJA to the Federal Assimilative Crimes Act). Schmitt claims this analogy persuaded the DoD. See Schmitt, supra note 35, at 114. Nonetheless, the issue whether the MEJA is an independent federal crime or merely a jurisdictional provision is yet another soft spot in the MEJA that has not been explored due to the lack of enforcement under the Act. See infra notes 281-83 and accompanying text.

62. 18 U.S.C. § 3261(a) (2000) (limiting scope of the MEJA to those offenses “that would constitute an offense punishable by imprisonment for more than 1 year if the conduct had been engaged in within the special maritime and territorial jurisdiction of the United States”).

63. Id. (applying the MEJA to persons employed by or accompanying the Armed Forces overseas or an enlisted person). The MEJA only applies to enlisted personnel if the person ceases to be subject to the UCMJ due to discharge from the military, see id. § 3261(d)(1), or if the charging instrument alleges the enlisted defendant committed the act with another person who is not subject to the UCMJ, see id. § 3261(d)(2). In this regard, the MEJA attempts to foreclose a scenario where conduct committed while still a member of the Armed Forces does not go unpunished merely because, at the time charges are brought, the defendant is no longer a member of the Armed Forces and not subject to the UCMJ. See H.R. REP. NO. 106-778, at 4-5.

64. 18 U.S.C. § 3261(a).

65. Id. § 3261(a)(1). The MEJA also applies to persons who were enlisted in the Armed Forces at the time of the conduct, but who are no longer enlisted and, therefore, are not subject to court-martial. See supra note 63.

66. 18 U.S.C. § 3267(1)(A) (2000), amended by 18 U.S.C. § 3267(1)(A) (Supp. V 2005). In addition, but not relevant to this Comment, the MEJA’s definition of “employed by the Armed Forces” requires that the person is “present or residing outside the United States in connection with such employment,” 18 U.S.C. § 3267(1)(B) (2000), and is “not a national of or ordinarily resident in the host nation,” id. § 3267(1)(C).

67. 18 U.S.C. § 3267(2)(A) (2000). In addition, the dependent must reside with the DoD employee or contractor, id. § 3267(2)(B), and must not be a national or resident of the host nation, id. § 3267(2)(C).
2. Gaps in the Original Text

Even though the MEJA filled a gap in U.S. law, it was not without its own holes. Although not the only flaw, the primary problem with the MEJA was its inapplicability to persons affiliated with a federal agency other than the DoD. The importance of the problem was recognized long before the Nisour Square incident in September 2007, but the gap grew wider as other federal agencies expanded their use of civilian contractors abroad. Furthermore, the principle at the heart of the MEJA—closing the existing jurisdictional gap for American wrongdoers overseas—was not limited or unique to citizens affiliated with the DoD. One of the MEJA’s drafters, Glenn Schmitt, later explained that Congress “simply never considered” expanding the MEJA’s application beyond DoD-affiliated persons. According to Schmitt, this flaw was raised by the State Department “a few months

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68. See Andrew D. Fallon & Theresa A. Keene, Closing the Legal Loophole? Practical Implications of the Military Extraterritorial Jurisdiction Act of 2000, 51 A.F. L. REV. 271, 275, 283-89 (2001) (discussing practical problems of MEJA’s enforcement and MEJA’s exclusion of persons who are residents or nationals of the host nation and most persons prosecuted by a host nation without regard to the effectiveness or severity of the prosecution); Jackson, supra note 34, at 267 (describing challenges of prosecutorial delegation between DoD and Department of Justice); Glenn R. Schmitt, The Military Extraterritorial Jurisdiction Act: The Continuing Problem of Criminal Jurisdiction Over Civilians Accompanying the Armed Forces Abroad—Problem Solved?, ARMY LAW., Dec. 2000, at 1, 9 (identifying several issues not addressed by the MEJA including the military’s role after arrest, method of selection of U.S. Attorney to handle a case that originates outside all federal judicial districts, method of appointment of federal magistrates for pre-trial proceedings, and venue); Mark J. Yost & Douglas S. Anderson, The Military Extraterritorial Jurisdiction Act of 2000: Closing the Gap, 95 AM. J. INT’L L. 446, 453 (2001) (expressing concern about implementation of the MEJA and acknowledging the MEJA’s effectiveness will depend on the political will of the U.S. government because the MEJA “merely provides a legal basis” for prosecution of limited class of offenses, does not obligate Department of Justice to prosecute, and does not affect prosecutorial discretion). In addition to these problems of application and enforcement, Captain Anthony Giardino identified the MEJA’s gap for assault in the context of prisoner interrogation by private contractors. See Giardino, supra note 43, at 731-34.

69. See discussion infra notes 71-75 and accompanying text.

70. See ELSEA & SERAFINO, supra note 51, at 5-9 (discussing DoD and State Department’s use of private security contractors in Iraq); Jackson, supra note 34, at 258-61 (describing Iraq as the turning point in the growing use of private security contractors); see also Griffin, supra note 31 (explaining the State Department’s personal security contract which totals almost $571 million annually and employs 1261 people in Iraq alone).

71. Indeed, Glenn Schmitt acknowledged that “[a]ll the justifications for enacting the new law with respect to DoD personnel and their family members also apply with respect to State Department personnel and their dependents.” See Schmitt, supra note 35, at 133.

72. See id.
after the Act had been in effect.\textsuperscript{73} Citing the thousands of State Department employees assigned overseas and a concern that unspecified crimes committed by these employees or their dependents would escape prosecution even under the MEJA, representatives of the State Department proposed expanding the MEJA to cover State Department employees and their family members accompanying the employees abroad.\textsuperscript{74} Although the MEJA was not amended at the time,\textsuperscript{75} Congress did expand the definition of "employed by the Armed Forces" in 2004,\textsuperscript{76} attempting to close this pesky jurisdictional gap.

3. 2004 Amendment

Effective October 28, 2004,\textsuperscript{77} the definition of persons covered by the MEJA was expanded to close the most glaring gap in the original text: non-DoD civilians.\textsuperscript{78} Although the 2004 amendment retained the

\textsuperscript{73} See id. In his description of the justification for applying the MEJA's provisions to State Department employees, Schmitt identifies a problem unique to State Department employees: diplomatic immunity. See id. at 134. "Further, because the option of host nation prosecution is entirely prevented as to State Department personnel who are given diplomatic immunity (unless our government chooses to waive it) applying the Act to these persons might even be more important [than for DoD employees]." Id.

\textsuperscript{74} Schmitt, supra note 35, at 133. Notably, according to Schmitt's account, the proposal by State Department representatives would only have extended to these two categories of persons and, apparently, not to State Department contractors and their employees. See id.

\textsuperscript{75} Schmitt states the reason for inaction at the time was a hesitation by legislative staffers to amend the MEJA so soon after its enactment. See id. at 134. Instead, the legislative staffers wanted to wait until the MEJA "had been used on at least a few occasions" and afford an opportunity for constitutional challenges to the Act. Id. Although Schmitt later argued that expanding the MEJA to include "all American government employees stationed abroad and their family members who accompanying [sic]," he believed Congress should do so only at the appropriate time. Id. Notably, Schmitt did not explicitly include non-DoD contractors in the class of persons that should be included in an expanded MEJA. In 2004, Congress passed such an expansion, including in the definition of "employed by the Armed Forces" not only DoD employees and DoD contractors but also employees of all federal contractors if their work "relates to supporting the mission of the Department of Defense overseas." See 18 U.S.C. § 3267(1) (Supp. V 2005); see also infra Part III.B.3 (discussing the amended language).


\textsuperscript{78} Many commentators credit the Abu Ghraib scandal as the impetus behind the 2004 legislation that expanded the MEJA's applicability. See, e.g., Glenn R. Schmitt, Amending the Military Extraterritorial Jurisdiction Act of 2000: Rushing to Close an Unforeseen Loophole, ARMY LAW., June 2005, at 41, 42-43; Stein, supra note 12, at 598-99; Giardino, supra note 43, at 716-17 (noting applicability of the MEJA to non-DoD contractors "received a good deal of scrutiny" during the Abu Ghraib investigation, resulting in the passage of the amendment to the MEJA in 2004). This attribution is due to the fact that some of the personnel accused of mistreating detainees at Abu Ghraib
two categories—persons either employed by or accompanying the military overseas—the definition of “employed by” was expanded to include private contractors who contracted with federal agencies other than the DoD and expressly limited the definition of “accompanying” to dependents of persons affiliated with the DoD. Rather than limiting “employed by the Armed Forces” to persons affiliated with DoD, the new language also extended to civilian employees of federal agencies other than DoD, contractors with “any other Federal agency, or any provisional authority,” and employees of such contractors.

The definition, although expanded, included a new caveat. A person may be subject to the MEJA if they are affiliated with a non-DoD federal agency, but only to the extent their employment with the federal agency “relates to supporting the mission of the Department of

were operating under a contract with the U.S. Department of the Interior and, thus, they were not covered under the original MEJA language that was limited to DoD contractors. See Renae Merle & Ellen McCarthy, 6 Employees From CACI International, Titan Referred for Prosecution, WASH. POST, Aug. 26, 2004, at A18, available at http://www.washingtonpost.com/wp-dyn/articles/A33834-2004Aug25.html; see also discussion supra Part III.A.1-2 (explaining the original MEJA language).

80. See 18 U.S.C. § 3267(2) (2000). This section provides:

The term “accompanying the Armed Forces outside the United States” means—

(A) a dependent of—
   i. a member of the Armed Forces;
   ii. a civilian employee of the Department of Defense (including a nonappropriated fund instrumentality of the Department); or
   iii. a Department of Defense contractor (including a subcontractor at any tier) or an employee of a Department of Defense contractor (including a subcontractor at any tier);

(B) residing with such member, civilian employee, contractor, or contractor employee outside the United States; and

(C) not a national of or ordinarily resident in the host nation.

Id. Therefore, the MEJA’s amended language forecloses an argument a non-DoD contractor or its employee is subject to the MEJA because they were “accompanying the Armed Forces outside the United States.” The only available line of argument is that the non-DoD contractor falls within the MEJA’s expanded definition of “employed by the Armed Forces.” See 18 U.S.C. § 3267(1) (Supp. V 2005); see also infra Part V.A.2 (applying the MEJA to the Blackwater shooters).

82. Id. § 3267(1)(A)(i)(II).
83. Id. § 3267(1)(A)(ii)(II).
84. Id. § 3267(1)(A)(iii)(II).
85. The phrase “affiliated with” is used here to describe the MEJA’s inclusion of employees of such non-DoD federal agencies as well as contractors, subcontractors, and employees of contractors and subcontractors. See 18 U.S.C. § 3267(1)(A).
Defense." Under this definition of persons covered by the MEJA, the Blackwater employees involved in the Nisour Square incident fall within the provisions of the MEJA only if their employment under a State Department contract supports the mission of the DoD.

B. Court-Martial For Civilian Contractors

Even after the passage of the MEJA, the means for accountability over private contractors associated with military operations was less than clear. Scholars suggested the appropriate means to try quasi-military personnel rested with military courts-martial. Critics of this approach argue subjecting American civilians to the military justice system would deprive the civilian defendant of their constitutional rights, improperly shift judicial power from Article III courts to an Article I body, and offend existing Supreme Court jurisprudence. These objections notwithstanding, Senator Lindsey Graham successfully proposed an

86. Id. § 3267(1)(A)(i)(II) (relating to a civilian employee of a non-DoD federal agency); id. § 3267(1)(A)(ii)(II) (relating to a non-DoD federal contractor); id. § 3267(1)(iii)(II) (relating to an employee of a federal contractor).


88. Furthermore, the lack of enforcement under the MEJA was an impetus behind Congress's decision to find another means of prosecution for the narrow group of persons who fit in the jurisdictional gap described herein. See Marcia Coyle, Iraq Contractor Problems Pose Legal Puzzle, LEGAL INTELLIGENCER (Pa.), Oct. 29, 2007, at 4.


90. See Jackson, supra note 34, at 269 (identifying the rights afforded to citizens by the Fifth and Sixth Amendments).

91. See Peters, supra note 50, at 405-06 (briefly discussing the objection to court-martial jurisdiction over civilians on the basis of separation of powers and rebutting this argument).

92. See Jackson, supra note 34, at 269. But see generally Peters, supra note 50, at 398-411 (rebutting many objections to court-martial jurisdiction over private military contractors).

93. Senator Graham is a Republican from South Carolina. "About Senator Graham: Biography," http://lgraham.senate.gov/public/index.cfm?FuseAction=AboutSenatorGraham.Biography (last visited Feb. 8, 2008). In addition, it is relevant and important to note that Senator Graham was previously an active duty Judge Advocate General ("JAG") officer in the United States Air Force and he remains a Reserve JAG officer, the only U.S. Senator currently serving in the Armed Forces. See id.
amendment to a defense appropriations bill for fiscal year 2007⁹⁴ that experts claim allows military panels to hear and decide peacetime claims against civilian contractors.⁹⁵

Application of the UCMJ to civilians is not only a longstanding practice, but is also explicitly authorized by the UCMJ.⁹⁶ The Supreme Court has recognized the practice, but it has consistently limited its application.⁹⁷ More specifically, the statements of the Court on the matter can be best described as skeptical and cautious.⁹⁸ The Court, however, has yet to consider the UCMJ’s applicability to private military contractors.⁹⁹ This portion of the Comment discusses the Graham Amendment and its implications for the Blackwater incident—a factual scenario that would present the Court with the test case needed to clarify the scope and constitutionality of court-martial jurisdiction for civilians employed by private military contractors.

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Id.


⁹⁶. See 10 U.S.C. § 802(a) (2000) (defining “persons” subject to court-martial jurisdiction, of which a subset are enlisted personnel).

⁹⁷. See, e.g., Reid v. Covert, 354 U.S. 1 (1955) (rejecting application of the UCMJ to civilian spouses accompanying a soldier overseas in peacetime, even in capital cases).

⁹⁸. See Jackson, supra note 34, at 257 (describing Court’s treatment as narrow construction).

⁹⁹. See generally Jackson, supra note 34 (analyzing the unique problems the modern “civilian-soldier” poses for application of Supreme Court precedent).

100. Commentators on the subject agree it is difficult to predict the outcome until the Court actually hears and decides a case. See, e.g., ELSEA & SERAFINO, supra note 51, at 19-23; Jackson, supra note 34, at 258. When this Comment was written, however, application of court-martial jurisdiction was not publicly discussed; rather, the F.B.I. was investigating the incident for possible criminal charges in the criminal justice system. See, e.g., sources cited supra note 4. If, however, criminal charges cannot be brought—for example, because of the jurisdictional ambiguities identified and discussed in this Comment—court-martial jurisdiction may be considered and legal scholars and practitioners may receive the desired consideration by the Court.
1. Textual Analysis of the Graham Amendment

In a mere five words, the Graham Amendment expanded the UCMJ to apply court-martial jurisdiction to civilian conduct during a broad range of military conflict. Article 2 of the UCMJ defines the persons covered by the UCMJ's provisions or, described another way, persons subject to court-martial jurisdiction. By its meager terms, the Graham amendment expanded Article 2(a)(10) of the UCMJ, which subjects persons serving with or accompanying an armed force in the field to the provisions of the UCMJ. Previously, the provision only applied to such persons "[i]n time of war." The Graham Amendment applies the UCMJ to such persons in time of "declared war or a contingency operation." Thereby, Congress bypassed a longstanding court decision limiting court-martial jurisdiction for civilians to times of declared war only, drawing within the UCMJ's scope civilians "serving with or accompanying an armed force" during a military operation even if it is not authorized by a formal declaration of war by Congress.

101. This theme—short amendment, significant effects—is reflected in Katherine Jackson's authoritative article on the Graham Amendment. See Jackson, supra note 34.
103. As discussed herein, the amendment effectively overruled the court's holding in United States v. Averette, 19 C.M.A. 363 (1970), available at 1970 WL 7355 (holding UCMJ only applied to civilians in a time of "war" as declared by Congress). See infra notes 109-10 and accompanying text; see also Jackson, supra note 34, at 277-78 (explaining Averette); id. at 279-89 (discussing the effect of the Graham Amendment).
105. See id. § 802(a)(10).
106. See id.
107. See id.
110. See John Warner National Defense Authorization Act § 552 (amending UCMJ to authorize court-martial jurisdiction for civilians during a "war" or "contingency operation"); see also 10 U.S.C. § 101(a)(13) (2000) (defining the term "contingency operation"); infra note 323 (quoting text of § 101(a)(13)). The importance of this change is illustrated by the nature of American military operations since World War II, the last military conflict authorized by a declaration of war by Congress. Although Congress has not declared war, the U.S. military has been engaged in armed conflict during each of the intervening decades. In light of this, any provision conferring court-martial jurisdiction over civilians only in time of declared war would likely be a nullity. The Blackwater incident illustrates this fact because the Iraq "war"—like the operations in Afghanistan after September 11, 2001, the first Gulf "War," the Vietnam "War," Korean "War," Cold "War," and countless other military activities during the 20th century—was not an operation conducted pursuant to a congressional declaration of war. Therefore, without
2. Jurisprudence Disfavoring Military Court Jurisdiction over Civilians

The longstanding precedent rejecting broad application of court-martial jurisdiction to American civilians has been recounted and analyzed by many scholars.\textsuperscript{111} Although it would be nearly impossible to improve upon or match these efforts, a short summary of the two most relevant cases is helpful.

In \textit{United States v. Averette},\textsuperscript{112} the United States Court of Military Appeals ("CMA") addressed the threshold issue common to any criminal prosecution of a U.S. Citizen for unlawful actions in Iraq.\textsuperscript{113} In \textit{Averette}, a civilian contractor was charged for criminal conduct that occurred while he worked on an Army base in South Vietnam.\textsuperscript{114} The CMA dismissed the charges on the grounds that the UCMJ's application to civilians was limited to a "time of war."\textsuperscript{115} The court interpreted that to mean a war as formally declared by Congress\textsuperscript{116} and because the military operations in Vietnam were not pursuant to a congressional declaration of war, the UCMJ was not applicable to Averette, a civilian.\textsuperscript{117} It is this distinction that the Graham Amendment seeks to avoid or overturn by legislative amendment of the UCMJ.\textsuperscript{118}

The distinction between war and peace is also reflected in the Supreme Court's leading case on application of court-martial jurisdiction to civilians. In \textit{Reid v. Covert},\textsuperscript{119} the Court considered the constitutionality of two similar court-martial proceedings where wives of military officers were charged with murdering their enlisted husbands.\textsuperscript{120} Ms. Covert, not a member of any branch of the Armed Forces, was
charged with killing her husband while he was stationed at an airbase in England. 121 The Air Force tried her under the UCMJ before a panel of officers. 122

In holding the proceeding violated Ms. Covert's constitutional rights, the Court recognized a limited power to try civilians in military courts but the Court linked this "war power" to the unique circumstances of the battlefield. 123 If, however, the offense did not occur within the aura of war, the Court indicated that court-martial jurisdiction for civilians would be inappropriate. 124 Foreshadowing or creating the jurisdictional gap addressed by the MEJA, the Court concluded that family members of military personnel stationed abroad were not subject to the UCMJ. 125 The Court reasoned that although Congress may use its regulatory power to infringe on the rights of members of the Armed Forces, that power does not extend easily to other citizens. 126

The Court's opinion in Reid may help determine whether the Blackwater shooters would be appropriate subjects of court-martial jurisdiction, but it also provides persuasive fodder for opponents of court-martial jurisdiction for civilians. 127 The Court's extensive historical analysis and emphatic language are convincing. The opinion, however, leaves the door open to a highly relevant situation where military courts may exert jurisdiction over a civilian: conduct in an area of active hostilities. 128 In spite of the Graham Amendment, the constitutionality of court-martial jurisdiction for a private military

121. See id.
122. See id.
123. See id. at 33 (emphasizing "area where active hostilities were under way at the time" of the conduct). See also Jackson, supra note 34, at 277 (discussing Reid).
124. See Reid, 354 U.S. at 33.
125. See Reid, 354 U.S. 1
126. See id. at 46.
127. See id. at 35 ("The exigencies which have required military rule on the battlefront are not present in areas where no conflict exists. Military trial of civilians 'in the field' is an extraordinary jurisdiction and it should not be expanded at the expense of the Bill of Rights."); id. at 38-39 (describing substantive differences between military law and civilian law); id. at 39-41 (closing with passionate defense of decision, citing danger of incremental encroachment of military influence over civilian life); see also Jackson, supra note 34, at 277 & n.147 (noting that Reid indicated the "military's business is in training soldiers and fighting wars, not prosecuting civilians for criminal offenses" and the court-martial system does not emphasize individual rights); id. at 283-87 (arguing the Graham Amendment extends "too far into the civilian realm" to satisfy the Court's statements on military justice applied to civilians). But see Peters, supra note 50, at 395-96 (noting that Reid did not involve a civilian "in the field" and emphasizing the Court's dicta regarding wartime exception that would allow court-martial jurisdiction over civilians in war zone).
128. See Reid, 354 U.S. at 33-35; see also Peters, supra note 50, at 395-96 (highlighting language in Reid opinion that distinguished civilians operating in a war zone from those not in an area of active hostilities).
contractor in Iraq remains unclear. But, the Graham Amendment’s disregard for longstanding legal doctrine increases the likelihood that a case will find its way onto the Court’s docket at some point, hopefully clarifying the reasoning of *Reid* and the scope of *Averette*.

This discussion of the applicability of U.S. law to the Blackwater shooters does not foreclose all options for prosecution of those persons involved in the Nisour Square incident. It is also important to determine if Iraqi law affords an avenue to justice for the victims.

IV. PROSECUTION UNDER IRAQI LAW

Beyond the possibility of prosecution in American courts lies the threat that Blackwater employees will be charged with crimes in Iraq. If the prospect of a jury of fellow Americans is disturbing to the suspects, the thought of facing a jury of Iraqis must seem to be a near-certain death sentence. Central to the question of whether Blackwater employees will be subject to Iraqi law is the struggle to determine what law applies in post-Saddam Iraq and whether an order issued by the CPA insulates contractors like Blackwater from liability.

A. Law in Post-Saddam Iraq

To an observer familiar with the American legal system, the Nisour Square incident appears to present a case of homicide: an actor killed another person. But the laws and legal system of Iraq—before, during, or after Saddam Hussein—are not so easily compared to their American counterparts. The more fundamental question remains: what law was in force at the time of the Blackwater shooting on September 16, 2007?

The fall of Saddam’s government in March 2003 created uncertainty and a temporary legal vacuum. The CPA was created to

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129. See sources cited supra note 100 (noting the difficult and complex questions involved make prediction of Court’s treatment hard to ascertain).


131. See discussion infra Part IV.A-B.

132. See infra Parts IV.C, V.A.1 (discussing possible immunity for contractors in Iraq).

133. According to the Model Penal Code ("MPC"), a framework for many of the criminal laws in U.S. jurisdictions, a person commits “criminal homicide if he purposely, knowingly, recklessly or negligently causes the death of another human being.” MODEL PENAL CODE § 210.1(1) (1962). The MPC divides criminal homicide into three categories: murder, manslaughter, and negligent homicide. *Id.* § 210.1(2). The proper classification will depend on the circumstances of the incident and the actor’s state of mind. Compare *id.* § 210.2 (requiring the actor act purposely or knowingly for classification as “murder”), with *id.* § 210.3 (requiring actor act recklessly for “manslaughter”), and *id.* § 210.4 (requiring actor act negligently for “negligent homicide”). For definitions of each state of mind, see *id.* § 2.02.
manage the post-invasion reconstruction efforts and the establishment of an Iraqi government. To accomplish these challenging goals, the CPA had the power to issue new laws and regulations until the Iraqis established a self-sustaining government. According to the CPA’s inaugural regulation,

Unless suspended or replaced by the CPA or superseded by legislation issued by democratic institutions of Iraq, laws in force in Iraq as of April 16, 2003 shall continue to apply in Iraq insofar as the laws do not prevent the CPA from exercising its rights and fulfilling its obligations, or conflict with the present or any other Regulation or Order issued by the CPA.

Therefore, even after the fall of Saddam Hussein’s government, the existing laws remained in effect unless otherwise altered or repealed by the CPA.

B. Iraqi Penal Code

Specifically addressing the question of applicable criminal laws in post-Saddam Iraq, the CPA issued Order No. 7. According to Order No. 7, the provisions of the Iraqi Penal Code of 1969 remained almost fully intact. Order No. 7 “suspended” two provisions of the Penal Code that criminalized dissent or anti-Saddam activities. Although the CPA further amended the Penal Code’s applicability, the Penal Code’s relevant provisions remained in effect at the time of the Blackwater incident and, therefore, would form the basis for any criminal

136. Id. § 2.
137. Id.
140. See CPA Order No. 7, supra note 138, § 2.
141. See id. (striking paragraphs 200 and 225 of the Iraqi Penal Code).
142. See CPA Order No. 31, supra note 138 (modifying the Penal Code sentencing provisions for certain specific offenses—including kidnapping and rape—that posed a significant problem during the reconstruction).
prosecution in an Iraqi court. The question of Blackwater’s criminal liability in Iraq does not merely depend on whether the CPA left the previous Iraqi criminal laws in place, however, because the CPA may have insulated Blackwater and other private contractors in Iraq from any legal liability in the Iraqi courts.

C. Coalition Provisional Authority Order Number 17

In June 2004, the CPA released an Order under the innocuous title “Status of the Coalition Provisional Authority, [Multi-National Force]-Iraq, Certain Missions and Personnel in Iraq.” Although unnoticed at the time, this Order granted immunity from legal liability to a wide swath of contractors operating in Iraq. The Order explicitly sought to “clarify the status” of personnel assisting in the reconstruction of Iraq after the end of the U.S. military offensive. L. Paul Bremer, Administrator of the CPA, issued the Order “under the laws and usages of war, and consistent with relevant U.N. Security Council resolutions.” The Order specifically cited United Nations Security Council Resolutions 1483 (2003), 1501511 (2003), and 1546 (2004).

1. Persons Covered by Order 17

In light of its purpose to clarify the status of personnel associated with the occupation, rebuilding, and transitional period in post-Saddam Iraq, the broad definition of persons covered by the Order is

143. The Iraqi Interior Ministry report on the Blackwater incident specifically stated the Iraqi Penal Code should be applied to the shooters. See Glanz & Rubin, supra note 23; Glanz & Tavemise, supra note 130.
145. See CPA Order No. 17, supra note 144.
146. See id. at 1.
147. For biographical information, see Biographies, http://www.cpa-iraq.org/bios/ (last visited Feb. 9, 2008). Coincidentally, Administrator Bremer’s personal security detail was comprised of Blackwater contractors. See Peter W. Singer, Outsourcing War, FOREIGN AFF., Mar./Apr. 2005, at 119, 127, available at http://www.foreignaffairs.org/20050301faessay84211/p-w-singer/outsourcing-war.html (describing tasks performed by private security contractors in Iraq and indicating parenthetically “Ambassador Paul Bremer, the head of the Coalition Provisional Authority, was protected by a Blackwater team that even had its own armed helicopters.”).
148. See CPA Regulation No. 1, supra note 135, at 1 (describing the powers of CPA and vesting these powers in the CPA Administrator).
149. CPA Order No. 17, supra note 144, at 1.
153. See CPA Order No. 17, supra note 144, at 1.
reasonable. The Order distinguished between the multinational force, multinational force personnel, CPA personnel, contractors, private security company contractors, foreign mission liaison personnel, international consultants, and the Iraqi interim government. Although each category of personnel is defined individually, many of the Order's substantive provisions apply to most or all of these distinct characters involved in the rebuilding of Iraq. Notably, the status of "contractors" warranted its own section of provisions.

2. Scope of Immunity

Section 4 of CPA Order 17 accomplishes three primary goals: providing requirements for registration with a centralized governmental body, establishing particularized choice of law, and granting partial legal immunity to contractors.

The power of section 4 lies in the following language:

Contractors shall be immune from Iraqi legal process with respect to acts performed by them pursuant to the terms and conditions of a Contract or any sub-contract thereto. Nothing in this provision shall prohibit [Multi-National Force] Personnel from preventing acts of serious misconduct by Contractors, or otherwise temporarily detaining any Contractors who pose a risk of injury to themselves or others, pending expeditious turnover to the appropriate authorities of the Sending State. In all such circumstances, the appropriate senior

154. See id. § 1(1).
155. See id. § 1(2).
156. See id. § 1(4).
157. See id. § 1(11)-(13).
158. See CPA Order No. 17, supra note 144, § 1(12)(b), (14).
159. See id. § 1(7).
160. See id. § 1(19).
161. See id. § 1(18).
162. See, e.g., id. § 2(1) (granting immunity from the Iraqi legal process for the Multi-National Force, CPA, Foreign Liaison Mission personnel, and international consultants). "Iraqi legal process" is defined as including "any arrest, detention or legal proceedings in Iraqi courts or other Iraqi bodies, whether criminal, civil, or administrative." See id. § 1(10).
163. See CPA Order No. 17, supra note 144, § 4.
164. See id. § 4(2) (requiring compliance with CPA regulations pertaining to registration of weapons). The registration provisions, although important, are not relevant to this discussion.
165. See id. § 4(1) (announcing contracts shall be awarded in accordance with the law of the Sending State); id. § 4(7) ("[T]hese provisions are without prejudice to the exercise of jurisdiction by the Sending State . . . in accordance with applicable laws."); see also id. § 4(2) (stating contractors are not subject to Iraqi laws regarding contractual agreements).
166. See id. § 4.
representative of the Contractor’s Sending State in Iraq shall be notified.\textsuperscript{167}

This provision effectively grants contractors immunity from prosecution or civil liability under Iraqi law.\textsuperscript{168} Notably, Order 17 defines “Iraqi legal process” very broadly, encompassing any and all legal accountability.\textsuperscript{169} There are several caveats to this immunity that are relevant to the Blackwater incident. First, security contractors must obey all CPA regulations.\textsuperscript{170} The example given in section 4 indicates its minimal scope: contractors must register and license their weapons.\textsuperscript{171} Second, contractors “shall respect relevant Iraqi laws.”\textsuperscript{172} Interestingly, this caveat has its own limitation: it applies “[e]xcept as provided in this Order [17],”\textsuperscript{173} which seems to return jurisdiction—if any—to the Sending State.\textsuperscript{174} Third, the immunity applies to “acts performed . . . pursuant to the terms and conditions of a Contract.”\textsuperscript{175} Fourth, the contractor’s Sending State may waive the immunity.\textsuperscript{176} Fifth and finally, the Order leaves intact the jurisdiction of the courts of the Sending State.\textsuperscript{177}

3. Contractors “shall respect relevant Iraqi laws”

In an interesting choice of language, section 4(4) of Order 17 provides that, “[e]xcept as provided in this Order, all Contractors shall

\begin{itemize}
\item \textsuperscript{167} See id. § 4(3).
\item \textsuperscript{168} See CPA Order No. 17, supra note 144, § 1(10).
\item \textsuperscript{169} See id. (“‘Iraqi legal process’ means any arrest, detention or legal proceedings in Iraqi courts or other Iraqi bodies, whether criminal, civil, or administrative.”).
\item \textsuperscript{170} See id. § 4(2).
\item \textsuperscript{172} See CPA Order No. 17, supra note 144, § 4(4).
\item \textsuperscript{173} See id.
\item \textsuperscript{174} See discussion infra Part IV.C.3 (analyzing the “respect” provision of Order 17).
\item \textsuperscript{176} See CPA Order No. 17, supra note 144, § 5.
\item \textsuperscript{177} See id. § 4(7); see also infra Part V.A.2-3 (analyzing the options for prosecuting the Blackwater shooters under U.S. law).
\end{itemize}
respect relevant Iraqi laws.\textsuperscript{178} At least two elements of this provision are noteworthy. First, the limiting clause “[e]xcept as provided in this Order” all but eviscerates the provision.\textsuperscript{179} If the effect of Order 17 insulates contractors from liability under Iraqi laws,\textsuperscript{180} the “respect” provision could only be a soft request rather than a hard requirement. Although the Order asks contractors to “respect” Iraqi laws, the contractors are immune from liability for violating or otherwise breaking those very same laws.\textsuperscript{181} The provision’s only strength lies in its inclusion of CPA regulations as “Iraqi laws”\textsuperscript{182} which may offer the CPA enforcement power if a contractor failed to “respect” Iraqi laws and, thus, violated Order 17.

The use of the word “respect” is the section’s second noteworthy aspect. Order 17 does not define “respect” and, because Order 17 grants general immunity from Iraqi legal process, we will likely never know how it would have been interpreted.\textsuperscript{183} Any analysis based on plain meaning—or common sense—would conclude that “respect” is distinct from “obey.”\textsuperscript{184} But Order 17 does not explain whether it is possible to “respect” while violating the law or, on the other hand, if a contractor could breach this provision of Order 17 even if the contractor did not break Iraqi law but demonstrated contempt for it. In hindsight, it is apparent that the CPA could have used stronger language than “respect” if it believed the provision would carry any weight. Because the provision begins with a fatal and determinative exception,\textsuperscript{185} the Order implicitly acknowledges the provision’s impotence by choosing the word “respect” over a word with actual legal significance.

\textsuperscript{178} CPA Order No. 17, supra note 144, § 4(4). According to section 4(4), “relevant Iraqi laws” include “the Regulations, Orders, Memoranda and Public Notices issued by the Administrator of the CPA.”\textsuperscript{Id.}

\textsuperscript{179} \textit{Id.}; see also supra notes 164-77 and accompanying text (describing the broad immunity offered to contractors by Order 17).

\textsuperscript{180} See CPA Order No. 17, supra note 144, § 4(3) (providing “Contractors shall be immune from Iraqi legal process . . . ”); see also supra notes 164-77 (describing immunity under Order 17);\textsuperscript{infra} Part IV.C.4-5 (discussing procedure for resolution of claims against contractors and waiver of immunity).

\textsuperscript{181} See CPA Order No. 17, supra note 144, § 4(3); see also supra notes 164-77 and accompanying text.

\textsuperscript{182} See CPA Order No. 17, supra note 144, § 4(4); see also supra note 178 and accompanying text (indicating that “relevant Iraqi laws” includes CPA regulations).

\textsuperscript{183} This is especially true after the dissolution of the CPA on June 30, 2004. See\textsuperscript{infra} Part V.A.1.b (discussing the dissolution of the CPA and the subsequent effect of its regulations).

\textsuperscript{184} \textit{Compare} WEBSTER’S NEW COLLEGIATE DICTIONARY 978 (1981) (defining “respect” in relevant part as “to consider worthy of high regard[;] . . . esteem”), \textit{with id.} at 787 (defining “obey” as “to follow the commands or guidance of[;] . . . to comply”).

\textsuperscript{185} See supra notes 173, 179-82 and accompanying text (discussing the power of the language “[e]xcept as provided in this Order”).
4. Waiver of Immunity

The broad immunity granted by Order 17 includes a waiver provision. Under section 5, a party or state may request that the contractor’s immunity be waived, thereby removing an obstacle to liability in the Iraqi legal system. This request must be submitted to the contractor’s Sending State for approval and must be related “to the act or acts for which the waiver [of immunity] is sought.”

5. Claims against Contractors

In addition to the broad immunity afforded to contractors in Iraq, Order 17 established the exclusive means of resolving claims against contractors. Under the provisions of Order 17, any claims brought by parties against contractors “or any persons employed by them for activities relating to the performance of their Contracts” will be resolved by the contractor’s Sending State. The party who alleges injury to person or property by a contractor “shall submit” their claim to the Sending State and the Sending State will address the claim “in a manner consistent with the Sending State’s laws, regulations and procedures.” This provision, taken with the Order’s waiver and general bar to liability under Iraqi law, places the burden of accountability on the Sending State.

6. Termination of Order 17

The question whether Order 17 was in force at the time of the Nisour Square incident forms the center of the debate over possible legal liability for the Blackwater employees involved in the September 16th incident. If the Order was in force at the time, the American contractors are likely only exposed to liability in U.S. courts; if, however, the Order had expired or terminated, the Iraqi legal system may be available to private citizens or criminal prosecution regardless of the weight and

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186. CPA Order No. 17, supra note 144, § 5.
187. See id. § 5(2).
188. The term “Sending State” is defined in section 1(5) of Order 17. See id. § 1(5). If the “Sending State” declines to waive a contractor’s Order 17 immunity, the “Sending State” then serves as arbiter of any claims brought against the contractor and also holds the power to review and “deal[] with” any claims brought against a contractor. See id. § 18.
189. Id. § 5(2) (noting if the waiver is granted by the Sending State, the waiver must be “express and in writing”).
190. See id. § 5(3).
191. See CPA Order No. 17, supra note 144, § 18.
192. See id.
193. See id.
The plain language of the Order itself indicates the Order would terminate upon its repeal.\(^{195}\) As discussed \textit{infra}, however, this is contradicted by at least one other source.\(^{196}\) In addition to these other sources,\(^{197}\) recent actions by the Iraqi government indicate that body’s opinion of which interpretation prevails.\(^{198}\)

Section 20 of Order 17 provides:

> [t]his Order shall enter into force on the date of signature . . . [and] shall remain in force for the duration of the mandate authorizing the [Multi-National Force (“MNF”) under U.N. Security Council Resolutions 1511 and 1546 and any subsequent relevant resolutions and shall not terminate until the departure of the final element of the MNF from Iraq, unless rescinded or amended by legislation duly enacted and having the force of law.\(^{199}\)

Under this provision, Order 17 became effective June 27, 2004,\(^{200}\) and would terminate upon either its rescission or the “departure of the final element of the MNF from Iraq.”\(^{201}\) This provision distinguishes Order 17 from other orders issued by the CPA. All other CPA orders included an “entry into force” provision that stated, in full, “[t]his Order shall enter into force on the date of the signature,” but did not provide for the order’s termination.\(^{202}\)

\(^{194}\) See supra Part IV.C.2 (discussing scope of immunity).
\(^{195}\) See CPA Order No. 17, supra note 144, § 20.
\(^{196}\) See \textit{infra} Part V.A.1.b (discussing conflicting sources regarding Order 17’s termination).
\(^{197}\) See \textit{infra} Part V.A.1.
\(^{198}\) See \textit{infra} notes 237-43 and accompanying text (discussing Iraqi Cabinet and Parliament’s belated efforts to rescind Order 17 after the Nisour Square incident).
\(^{199}\) CPA Order No. 17, supra note 144, § 20.
\(^{200}\) CPA Administrator Bremer signed the Order on June 27, 2004. See id. at 13.
\(^{201}\) See id. § 20. At the time of this Comment’s publication, the United States and other members of the “coalition of the willing” are still present in Iraq.
V. ANALYSIS

A. Laws In Force on September 16, 2007

1. Iraq and Immunity

The options for prosecuting the Blackwater shooters in Iraq are limited. Under the broad reach of CPA Order 17, contractors such as Blackwater will escape liability in the Iraqi legal system unless the United States waives the contractor's immunity or the immunity is otherwise inapplicable.

a. Blackwater is a Covered Entity

Blackwater meets the elements set forth in the definitions of "contractor" and "private security companies." Blackwater, a North Carolina corporation, is not normally resident in Iraq and it provides security services to the U.S. Department of State. As such, Blackwater is a "private security company" as defined by Order 17. Under its contract with the U.S. Department of State, Blackwater provides security services to the Department's diplomatic corps or, in the language of Order 17, the U.S. "diplomatic and consular mission." Therefore, Blackwater qualified for the legal protections afforded to "contractors" under section 4 of CPA Order 17.

203. See CPA Order No. 17, supra note 144, § 5; see also supra Part IV.C (discussing immunity under CPA Order 17 and Sending State's power to waive the immunity).

204. For example, Order 17 is of little help to Blackwater if it was not in force on September 16, 2007. See infra Part V.A.1.b-c (concluding Order 17 was in force at the time of the incident and remains in force until rescinded by the Iraqi government). Additionally, some have argued that Order 17's immunity may not insulate Blackwater because the Order only applies to conduct within the terms of the contract and Blackwater's excessive and unprovoked shooting on September 16, 2007 went beyond their contractual responsibilities. See Dickinson, supra note 175; Posting by Laura Dickinson to Balkinization, http://balkin.blogspot.com (Oct. 16, 2007, 1:28 EDT) (describing the discussion about Order 17's immunity as a "red herring").

205. See CPA Order No. 17, supra note 144, § 1(12), (14).


207. See Griffin, supra note 31.

208. CPA Order No. 17, supra note 144, § 1(14).

209. The United States is a "Sending State" under Order 17. See id. § 1(5).

210. See id. § 1(8).
b. Order 17 Was Still in Force

After the Nisour Square incident, many commentators raised the question of Order 17's authority in present-day Iraq. The urgency of this question became more pronounced when the Ministry of Interior released its report on the incident, concluding that Blackwater and its employees should face criminal charges for their conduct. There are at least two sources for determining Order 17's intended termination: the Order itself and the last sentence of the public notice announcing Order 17. Although an apparent contradiction complicates the analysis, there is a clear answer.

(1) Contradiction

As discussed supra, the text of Order 17 indicates that the Order would remain in effect until repealed by the Iraqi government or the departure of the coalition forces from Iraq. The CPA also issued a public notice, however, that indicates that Order 17 would not remain in effect after the dissolution of the CPA.

As was a standard practice for many of its orders, the CPA issued a public notice to announce the issuance of Order 17. The public notice reiterates the basic tenets of Order 17: contractors are not subject


213. See supra notes 194-202 and accompanying text.


215. The CPA issued 12 public notices compared to 12 regulations, 100 orders, and 17 memoranda. See CPA Official Documents, http://www.iraqcoalition.org/regulations/index.html (last visited Feb. 9, 2008). The CPA described public notices as “communicat[ing] the intentions of the Administrator to the public . . . or reinforc[ing] aspects of existing law that the CPA intends to enforce.” See id.

to Iraqi law and they are subject to the exclusive jurisdiction of their
Sending State.\textsuperscript{217}

The notice, however, closes with the following: “the immunity will
only apply to acts or omissions during the authority of the CPA within
Iraq.”\textsuperscript{218} This language is unique: no other public notice included similar
language regarding the limited duration of an order’s effectiveness.\textsuperscript{219}
This may reflect the similarly unique language of Order 17 compared to
all other orders issued by the CPA.\textsuperscript{220} Regardless of its novelty, the
language likely was intended to assure the public that the blanket
immunity granted to contractors would not be limitless in duration.
Given this apparent contradiction, determining which interpretation
should govern requires consideration of three factors: the relative legal
weight afforded a CPA order and its accompanying public notice, the
absence of any limitation on Order 17’s effectiveness in the CPA’s
transfer of power document, and the interpretation adopted by the Iraqi
government after the dissolution of the CPA. All three factors support
the conclusion that Order 17 did not expire upon the dissolution of the
CPA but would terminate only upon rescission by the successive Iraqi
government.

(2) Order v. public notice

Applying the principles of Western jurisprudence, most reasonable
people would conclude that a public notice does not trump the plain
language of the law it announces; our legal system enforces the laws, not
the press release announcing their passage. Furthermore, CPA
statements offer guidance on the issue.

In its Regulation No. 1, the CPA defined and distinguished the
various documents it would issue during its tenure.\textsuperscript{221} “Regulations shall
be those instruments that define the institutions and authorities of the
CPA. Orders are binding instructions issued by the CPA. Regulations
and Orders will remain in force until repealed by the Administrator or
superseded by legislation issued democratic institutions of Iraq.”\textsuperscript{222}
Section 3 further provides, “Regulations and Orders issued by the
Administrator shall take precedence over all other laws and publications

\begin{itemize}
  \item \textsuperscript{217} See id.
  \item \textsuperscript{218} See id.
  \item \textsuperscript{219} The CPA issued twelve public notices. See CPA Official Documents,
  \item \textsuperscript{220} Notwithstanding Order No. 17, all orders issued by the CPA contain an effective
date but do not provide for the order’s termination. See sources cited supra note 202 and
accompanying text.
  \item \textsuperscript{221} See CPA Regulation No. 1, supra note 135, § 3.
  \item \textsuperscript{222} Id.
\end{itemize}
to the extent such other laws and publications are inconsistent."\(^{223}\) In closing, section 3 mentions the "Administrator may also from time to time issue Public Notices."\(^{224}\)

Under this Regulation, to the extent the public notice announcing the issuance of Order 17 contradicts the language of Order 17 itself, the language of the Order prevails.\(^{225}\) Furthermore, section 3 of Regulation 1 announces the default standard for termination of CPA orders: they remain in effect until repealed by the CPA or superseded by legislation enacted by the subsequent Iraqi government.\(^{226}\) Either way, Regulation 1 indicates that the language of Order 17 controls and, therefore, Order 17 would remain in force unless repealed by the CPA or rescinded by an act of Iraq's government.

(3) Dissolution of CPA and Order 100

The CPA transferred authority to the Iraqi government on June 28, 2004.\(^{227}\) On the same day, CPA Administrator Bremer signed Order 100, providing for the effective transfer of power from the CPA to the new Iraqi government.\(^{228}\) Order 100 states that all CPA orders will remain in effect unless and until rescinded by the Iraqi government.\(^{229}\) Order 100 also modifies, amends, and rescinds some CPA orders, memoranda, and regulations to reflect the transfer of power to the Iraqi government.\(^{230}\) Order 17, however, is not rescinded or modified by Order 100.\(^{231}\)

If the CPA or Iraqi government intended that Order 17's grant of immunity would expire upon the dissolution of the CPA, Order 100 was the mechanism to do so.\(^{232}\) Order 100 not only lacks any revision or rescission of Order 17,\(^{233}\) it also expressly provides that Order 17 is unaffected by Order 100.\(^{234}\) Therefore, Order 17 remained in force

\(^{223}\) Id.

\(^{224}\) See id.

\(^{225}\) See id.

\(^{226}\) See CPA Regulation No. 1, supra note 135, § 3.

\(^{227}\) See Filkins, supra note 214.

\(^{228}\) See CPA Order No. 100, supra note 214.

\(^{229}\) See id. at 1 ("Reaffirming that the laws, regulations, orders, memoranda, instructions and directives of the CPA remain in force unless and until rescinded or amended by legislation duly enacted and having the force of law.").

\(^{230}\) See id. §§ 3-6.

\(^{231}\) See id. § 3(8) (providing that Order 100's rescission or modification of prior orders "shall not apply to Order Number 17"); id. § 4 (rescinding other CPA Orders but not including Order 17 in the enumerated list).

\(^{232}\) See CPA Order No. 100, supra note 214, at 1 (establishing the motivation behind Order 100); id. § 1 (describing the purpose of Order No. 100).

\(^{233}\) See supra note 231 and accompanying text.

\(^{234}\) See CPA Order No. 100, supra note 214, § 3(8).
beyond the CPA dissolution and, according to its terms, is enforceable until rescinded or superseded by the Iraqi government which assumed responsibility for all powers held by the CPA.

(4) Repeal by Iraq

The Iraqi government—arguably the entity most interested in Order 17's inapplicability to the Blackwater incident—has the authority to repeal the CPA Order. Prior to the incident on September 16, 2007, the Iraqi government did not repeal Order 17 and their subsequent attempt to rescind Order 17 demonstrates a reluctant belief that the immunity was in force on September 16, 2007.

Although the Iraqi Cabinet approved draft legislation in late October 2007, the Iraqi Parliament has not taken action on the measure. In early January 2008, an international human rights organization renewed its public pressure on the Iraqi government to pass the legislation. Although it is not clear if such a repeal would apply to previous misconduct, the failure to repeal, revise, or modify the Order

235. See supra Part IV.C.6 (discussing Order 17's provision for termination).
236. See supra note 229 and accompanying text (quoting CPA Order No. 100); see also CPA Order 100, supra note 214, at 1 ("Recognizing that the Government of Iraq will be responsible for interpreting and implementing these laws, regulations, orders, memoranda, instructions and directives following the transfer of full governing authority on 30 June 2004."); CPA Order No. 17, supra note 144, § 20 (extending Order 17 until its rescission or amendment by subsequent legislation).
237. See Glanz & Tavernise, supra note 130; Rubin & Kramer, supra note 23; Tavernise & Glanz, supra note 21 (reporting Iraqi government sought review of guards' alleged immunity in an attempt to bring criminal charges).
238. See sources cited supra note 236.
240. See supra note 239.
242. Although Western observers familiar with proscription against passage of ex post facto laws would assume any such law would only apply prospectively, this presupposes the infant Iraqi legal system subscribes to the same legal principles as the West. But see IRAQI CONSTITUTION art. 19, cls. 2, 9-10, available at http://www.uniraq.org/documents/iraqi_constitution.pdf (prohibiting retroactive application of the criminal laws).
17 immunity before the Blackwater incident likely places the burden on the U.S. government to waive the immunity.\textsuperscript{243}

c. Waiver by the United States

As described \textit{supra},\textsuperscript{244} Order 17 includes a provision whereby a contractor's Sending State can waive the contractor's immunity, allowing recourse to the Iraqi legal system.\textsuperscript{245} A person seeking this waiver of immunity from the Sending State must submit a claim to the Sending State.\textsuperscript{246} This provision complements Order 17's grant of immunity from liability under Iraqi law.\textsuperscript{247} Although the contractor is immune from prosecution under Iraqi law for its wrongful acts, an aggrieved party can submit their claim to the contractor's home state for resolution of the claim. As described by the Order's accompanying public notice, the blanket immunity does not allow the contractor to escape liability; rather, the Order protects contractors from liability under Iraqi law or in the Iraqi justice system, shifting the burden of prosecution to the Sending State.\textsuperscript{248}

In the case of the Nisour Square incident, Order 17 would prevent the Iraqi government from prosecuting or private Iraqi civilians from asserting claims for damages against Blackwater in an Iraqi court, but the Order arguably would not insulate Blackwater from liability under the laws of its Sending State. Section 4 insulates contractors such as Blackwater from liability under Iraqi law and section 18 effectively limits recourse to submitting a claim to the United States, as Blackwater's Sending State, for resolution of the claim in accordance with United States law. Order 17—in force unless waived by the U.S.—returns the focus to the existing U.S. law regarding jurisdiction and criminal liability of Blackwater.

2. MEJA as Amended

The MEJA could support criminal charges against Blackwater personnel, but any attempt to bring charges under the MEJA would be

\textsuperscript{243} \textit{See U.N. ASSISTANCE MISSION FOR IRAQ, HUMAN RIGHTS OFFICE, HUMAN RIGHTS REPORT 1 APRIL - 30 JUNE 2007} §§ 22-23 (urging U.S. government to take steps to ensure prosecution of private contractors who commit crimes but who cannot be prosecuted in Iraq under CPA Order No. 17).

\textsuperscript{244} \textit{See supra} notes 186-90 (discussing Order 17's waiver provision).

\textsuperscript{245} \textit{See CPA} Order No. 17, \textit{supra} note 144, § 5.

\textsuperscript{246} \textit{See id.; see also id.} § 18 (describing process for resolution of claims if Sending State does not waive the contractor's immunity under section 5 of Order 17).

\textsuperscript{247} \textit{See id.} § 4; \textit{see discussion supra} Part IV.C.2-5.

\textsuperscript{248} \textit{See CPA Public Notice, supra} note 216.
fraught with difficulty.\textsuperscript{249} The fundamental obstacle lies in the necessary legal argument that the Blackwater contractors acted while "supporting the mission" of the Armed Forces.\textsuperscript{250} Resting the shooters' accountability on this argument is only possible under the amended language of the MEJA.\textsuperscript{251} Prior to the 2004 amendment,\textsuperscript{252} prosecution of Blackwater employees—State Department contractors—would have been unthinkable.\textsuperscript{253} But, the expansion of the definition of "employed by the Armed Forces"\textsuperscript{254} to include non-DoD contractors\textsuperscript{255} removes a prohibitive barrier and replaces it with a high hurdle.\textsuperscript{256}

Blackwater personnel operated under a contract with the Department of State to provide security for the diplomatic corps and the United States Embassy in Baghdad.\textsuperscript{257} Under their contract, Blackwater provided similar services in other countries.\textsuperscript{258} Although their mode of operations may resemble military activity, their contracted responsibilities were distinct from the ongoing military mission in Iraq.\textsuperscript{259} Blackwater guards did not perform law enforcement tasks.\textsuperscript{260} Blackwater's operations did not require or authorize them to track terrorists or engage in the reconstruction of Iraq.\textsuperscript{261} Their contractual obligation and, therefore, the outer limit of the extent of their employment was the personal protection of Department of State personnel who were in Iraq "engaged in their own operations overseas."\textsuperscript{262} Rather than acting in support of the mission of the military,
Blackwater’s role was explicitly limited to supporting the mission of the diplomatic corps and within that mission Blackwater’s support was limited to providing personal protection services.\footnote{263}{See id.}

The counter-argument in favor of application of the MEJA to Blackwater must rely on the situation in Iraq during the fall of 2007. Perhaps the only link between Blackwater’s contract and the military mission in Iraq arises from the often-lawless nature of the environment. The daily violence and the nature of counter-insurgency conflict blurred the traditional lines between military, law enforcement, and the defense-oriented protection services provided by contractors like Blackwater. Blackwater, therefore, arguably supports the military mission in Iraq by protecting key American personnel from harm and, when effective in repelling an attack, Blackwater’s guards deprive anti-American insurgents an opportunity to claim victory over the American occupiers. Taking this reasoning one step further, without Blackwater’s protective services, American military personnel would have to protect the Embassy and diplomatic corps; this alleviation of responsibility is a form of “support” for the military mission. But in the lawless environment of Iraq where armed American sympathizers are a form of “support” for the U.S. military mission, the MEJA’s grant of special extraterritorial jurisdiction for persons affiliated with our military quickly becomes too broad for its own purpose.

The Blackwater incident illustrates in vivid detail the ambiguities of the MEJA. After the 2004 amendment, the test for MEJA’s applicability to an individual non-DoD contractor—whether their work is performed in support of the mission of the military overseas\footnote{264}{See 18 U.S.C. § 3267(1) (Supp. V 2005).}—assumes precise categorization of tasks. In spite of its shortsightedness, the original language of the MEJA reflected a more effective separation between DoD and non-DoD operations, explicitly limiting the outer boundaries of extraterritorial jurisdiction to DoD affiliated persons.\footnote{265}{See 18 U.S.C. § 3267(1) (2000), amended by 18 U.S.C. § 3267(1) (Supp. V 2005); see also supra Part III.A.1 (discussing the original language of the MEJA).} The application of the MEJA to Blackwater, however, is especially problematic because the nature of their contractual services provided bears little relation to the military conflict in Iraq. Blackwater could be awarded the same contract in any country, including a country without an active U.S. military presence. At its essence, therefore, an argument in favor of applicability must rest on, first, the heightened violence in Iraq as justification for Blackwater’s contract and, second, a link between the military mission in Iraq and that heightened violence. But for the U.S. military presence in
Iraq, there would not be heightened violence directed at the United States Embassy and American diplomats in Baghdad. Both the Embassy and diplomats are needed if the military mission is to succeed. Therefore, the Blackwater guards are arguably a necessary mechanism of support for the military mission.

3. Court-Martial

It is unlikely court-martial jurisdiction will be exercised to resolve the Blackwater incident. This is unfortunate because this incident would present the courts with a long-needed opportunity to address the constitutionality of military justice as applied to civilians. As Professor William Peters argued, the precedent relied upon by critics of court-martial jurisdiction is weak. The Supreme Court has left open the question of court-martial applicability to civilian contractors and has never been faced with modern private military contractors. Furthermore, the prosecution of this type of incident—involving acts of violence in a quasi-war-zone, perpetrated by heavily-armed and highly-trained paramilitary personnel, charged with the unenviable task of split-second threat assessments where non-combatants and enemies are often indistinguishable—may be most “fair” when tried within the military justice system.

In spite of the strong arguments on both sides, the most convincing argument in favor of court-martial jurisdiction focuses on the need for a competent trier of fact, prepared and capable to handle the unique case

266. See, e.g., Jackson, supra note 34, at 258 ("Without the factual scenario of a challenge to this provision [authorizing court-martial jurisdiction over civilians accompanying the armed forces], it is difficult to know how the court might rule."). In April 2008, the U.S. military charged a civilian under the court-martial system with aggravated assault. See Michael R. Gordon, U.S. Charges Contractor At Iraq Post In Stabbing, N.Y. TIMES, Apr. 5, 2008, at A6, available at 2008 WLNR 6409685. The contractor, who holds both Iraqi and Canadian citizenship, allegedly stabbed another civilian contractor on a U.S. military base in Iraq. See id. This case may shed light on how a court will rule on the application of court-martial jurisdiction over a civilian. But it may not raise the key question for purposes of analyzing the Blackwater shooters’ liability: whether an American civilian would be subjected to the military justice system.

267. See Peters, supra note 50, at 399-405 (providing comprehensive analysis of and rebuttal to Averette).

268. See Jackson, supra note 34, at 283-84 (acknowledging the “evolution of contractor roles” may impact the Court’s evaluation of UCMJ applicability); Peters, supra note 50, at 412-14 (emphasizing the modern use of private military contractors requires an appropriate adjustment of jurisprudence to allow for equitable treatment). But see Jackson, supra note 34, at 282 (“It does not seem likely that the Supreme Court will see the imposition of military jurisdiction as less of a threat to individual rights enumerated in the Constitution than it did almost half a century ago.”).

269. See Peters, supra note 50, at 411 (describing unique circumstances of war zone as important consideration in determining contractor’s “peers”).
posed by a private military contractor’s conduct in a destabilized state.\textsuperscript{270} Much of the criticism of application of military justice to civilians focuses on the alleged lack of protections for the important principles embodied in the Fifth and Sixth Amendment’s rights to due process and fair trial.\textsuperscript{271} As the Nisour Square incident illustrates, however, the court-martial system arguably affords private military contractors a system of adjudication more fair than that offered by a civilian court.

It is indisputable that the Nisour Square incident occurred under circumstances foreign to a civilian judge or jury.\textsuperscript{272} One element of this distinct set of circumstances is the fact the crimes themselves are distinguishable from their equivalent in the civilian criminal justice system. If the Blackwater shooters are charged in the deaths of the Iraqi bystanders in Nisour Square, they will likely face charges of homicide.\textsuperscript{273} Any comparison of the circumstances of the September 16, 2007, incident and the facts of a typical murder trial in a U.S. District Court would illustrate the unique character of the former,\textsuperscript{274} a character that may place the matter beyond the competence of the civilian trier of fact and, thus, would infringe on the defendant’s right to due process and a fair trial. A jury of military officers,\textsuperscript{275} on the other hand, may be far more capable to comprehend the complexities and incomparable circumstances of the Nisour Square shooting.\textsuperscript{276} In this way, a military

\textsuperscript{270} See Peters, supra note 50, at 380 (concluding if the Red Cross and journalists accompanying the military into war zone would be covered by the UCMJ, “paid contractors performing military missions and engaging enemy combatants would be” appropriately covered); id. at 372 (stating the “pragmatic realities of our contractor-heavy Iraqi campaign... weigh[s] in favor of using courts-martial jurisdiction.”); id. at 396 (quoting Reid v. Covert, 354 U.S. 1, 3 (1955)) (“From a time prior to the adoption of the Constitution the extraordinary circumstances present in the area of actual fighting have been considered sufficient to permit punishment of some civilians in that area but military courts under military rules.”); id. at 412-14 (concluding fairness to service members requires comparable accountability for private military contractors).

\textsuperscript{271} See, e.g., Peters, supra note 50, at 405-11 (describing and rebutting constitutional arguments against court-martial jurisdiction); Jackson, supra note 34, at 269, 282 (reviewing the constitutional protections absent from the UCMJ).

\textsuperscript{272} See Peters, supra note 50, at 411 (mentioning the “unique context” and “surreal quality” of life in a zone of active combat as a consideration in debate over contractor-defendant’s right to fair trial).

\textsuperscript{273} If it is difficult to assess what charges, if any, will apply to the Blackwater shooters, it is more difficult to evaluate the actionable evidence gathered by investigators that will determine what degree of homicide—murder, manslaughter, negligent homicide—will be charged. See supra note 133 (discussing the Model Penal Code’s categories of homicide).

\textsuperscript{274} See supra notes 16-27 and accompanying text (providing a brief summary of the reported chronology of events on September 16, 2007).

\textsuperscript{275} See 10 U.S.C. § 825 (2000) (defining who may serve on courts-martial); id. § 826 (describing the qualifications of the military judge presiding over a court-martial).

\textsuperscript{276} Peter W. Singer, an expert on private military contractors generally and, more specifically, their role in Iraq, argues the court-martial model may be an appropriate
court-martial may offer a private military contractor charged for conduct during security operations in Iraq a competent fact finder.\textsuperscript{277} Competency, however, cannot be mistaken for sympathy.

If tried before a military tribunal, Blackwater guards face the possibility the officers will have less tolerance for various arguments raised by the defense—unbearable pressure, difficulty distinguishing between friend and foe, and long tours in hostile territory. In addition, the lack of adequate legal accountability for civilian contractors may be a sore subject for many enlisted personnel.\textsuperscript{278} While courts-martial have convened to try servicemen and women for misconduct in Iraq,\textsuperscript{279} no civilians have been charged for misconduct in Iraq related to the military

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means for adjudicating misconduct by private contractors in the area of military operations. See Amy Klamper, \textit{Hold Them Accountable}, \textit{SeaPower}, July 2007, at 14, 17, available at 2007 WLNR 13543508 (quoting Singer, "[I]f a contractor shoots an Iraqi civilian or violates the rules of engagement, [the military] want[s] something to happen, and the military is in the best position to adjudicate it because they are familiar with the context of a war zone."). In addition, Professor Peters cites the dual needs of maintaining discipline and fostering a unified—uniformed and contractor—fighting morale as partial justification for court-martial jurisdiction. See Peters, supra note 50, at 373. Comparisons of enlisted and contractor personnel in areas of active hostilities generally conclude that the modern U.S. military delegates traditionally military tasks to private contractors and, from the other perspective, private contractors often complete similar or identical operations as active duty servicemembers but for exponentially more pay. See, e.g., Singer, supra note 147 (describing private contractors, some of whom are earning $1000 per day, as "play[ing] military roles" and "encroach[ing]" on the traditional role and professional identity of the enlisted military); Matt Heibel, Comment, \textit{Military Inc.: Regulating and Protecting the "A-Team[s]" of the Post-Modern Era}, 18 \textit{PACE INT’L L. REV.} 531, 535-41 (2006); Walter Pincus, \textit{U.S. Pays Steep Price for Private Security in Iraq}, \textit{Wash. Post}, Oct. 1, 2007, at A17, available at http://www.washingtonpost.com/wp-dyn/content/article/2007/09/30/AR2007093001352.html (analyzing pay received by Blackwater security contractors for each day of work under contract with Regency Hotel and Hospital of Kuwait, compared to per-day pay received by American soldiers). Although this Comment does not address the equality of pay or other comparisons of these roles, the similarity of environment and tasks should inform any analysis of the merits of separate adjudication.

\textsuperscript{277} Cf. Peters, supra note 50, at 411 (commenting on who would comprise a "peer" for a contractor on trial for conduct in a zone of active combat and concluding a contractor may prefer the military tribunal).


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conflict and only one civilian contractor has faced charges for misconduct in Afghanistan. This disparity led one commentator to observe—sarcastically and correctly—that either civilian contractors are more conscientious and law-abiding than their uniformed peers or the legal system is ineffective for failing to enforce the law. In this context, there is no justification for treating active duty personnel and private military contractors differently. Parity of treatment between civilian and military is one concern but so, too, is the procedural fairness that leads to the verdict.

If Blackwater guards are tried in the civilian criminal justice system, the trier of fact’s inability to adequately understand the facts may not lead necessarily to an unconstitutionally high likelihood of a guilty verdict. But it is also possible that a civilian trier of fact—especially a jury—may acquit a military contractor either because they fail to understand the unique circumstances or, alternatively and unlike a trained military officer, they fail to understand the need for restraint and obedience to rules of engagement. A military panel is more likely to understand the unique circumstances—perhaps, personally—and weigh

280. See Jackson, supra note 34, at 260-61, 264 (citation omitted) (observing no civilians have been prosecuted under the MEJA for conduct in Iraq). But see Elsea & Serafino, supra note 51, at 18 (citing a DOJ press release announcing the 2007 guilty plea of a DoD civilian contractor accused of possessing child pornography while in Iraq).


282. See, e.g., Jackson, supra note 34, at 264-65 (citing Peter W. Singer, Warriors for Hire in Iraq, SALON.COM, Apr. 15, 2004, http://www.brookings.edu/articles/2004/0415defenseindustry_singer.aspx; Peters, supra note 50, at 367, 412 (crediting Peter Singer, supra note 147, with the observation “[e]ither every [contractor] happens to be a model citizen, or there are serious shortcomings in the legal system that governs them.”).

283. See Peters, supra note 50, at 412, 413.

284. This likelihood arises not only out of the difficulty associated with the unique facts of the incident and the incalculable pressures faced by the would-be defendants, but also the general political malaise about the U.S. presence in Iraq. A civilian jury—or a judge, for that matter—may be susceptible to the social desire to exact some measure of control or express an opinion about the ongoing conflict in Iraq. Cf. Peters, supra note 50, at 411 (observing a lack of support for the “goals of the underlying military campaign” as one problematic characteristic of a likely civilian juror). This susceptibility is less likely to arise among military officers who (a) would have a greater understanding of the distinct role of private contractors and (b) are, on the whole, more immune to the shifting political winds than the general civilian population. See 10 U.S.C. § 825 (2000) (defining the composition of courts-martial).

285. Peter Singer cited additional problems for a U.S. Attorney trying to “sell” the case to a civilian jury: average Americans “can’t find Iraq on a map or just think any dead Iraqi is a good one.” See Singer, supra note 39.
the individual contractor's conduct against the appropriate standards of conduct in this environment. In this way, the private military contractor would be measured against the ethic required of their uniformed counterparts. This reflects the fundamental principle of due process and it may be absent in a civilian setting.

B. A Practical Obstacle: Garrity Immunity

Beyond the fundamental question whether the Justice Department could bring charges against the Blackwater shooters is the greater question of whether it should. The public pressure—domestically and internationally—has been great. In addition to considering whether the statute authorizes charges, the Justice Department will also consider the likelihood of a successful prosecution. If the Justice Department concludes federal law applies to the Blackwater shooters, the next significant obstacle likely will be the limited immunity given to some of the shooters during the F.B.I. investigation of the shooting.

According to several reports, some Blackwater employees were given a form of limited immunity in exchange for their accounts of the incident. The State Department attempted to quell the resulting storm

286. See discussion supra Part V.A.2 (discussing the MEJA's applicability to the Blackwater shooters involved in the Nisour Square incident).


289. See Risen & Johnston, supra note 4 (acknowledging the dual obstacles of whether federal law applies to Blackwater and whether sufficient evidence could be presented to prove the charges).

290. See discussion supra Part V.A.2 (applying the MEJA's provisions to the Nisour Square incident).

291. See infra notes 292-308 and accompanying text.


293. See sources cited supra note 292.
of questions, explaining the so-called immunity did not limit prosecutors’ ability to levy criminal charges.294 Although this is likely true,295 the effect of the limited immunity may still prevent a successful prosecution.296

As explained by law professor Byron Warnken,297 the form of immunity given to the Blackwater witnesses—Garrity immunity298—is not a “free pass,” insulating the informant from prosecution.299 Rather, Garrity immunity is a tool for the prosecutors evaluating whether to prosecute and who to prosecute.300 Also known as “use immunity,” this protection prevents the government from using the information gained from the informant or evidence gathered as a result thereof.301 In exchange for this limited immunity, a Blackwater employee can be compelled to answer questions narrowly related to performance under their government contract.302 Therefore, even if federal law applies to the Blackwater shooters, the Justice Department faces the difficult scenario where the only evidence or the best evidence is off limits because of the Garrity immunity granted during the preliminary investigation.303 Any charges brought against Blackwater will require


296. See James Risen & David Johnston, Justice Department Briefed Congress on Legal Obstacles in Blackwater Case, N.Y. TIMES, Jan. 16, 2008, at A10, available at 2008 WLNR 844931 (acknowledging that Garrity immunity poses an additional problem for prosecution of Blackwater shooters because prosecutors must find evidence independent of guards’ immunized statements and prove that any evidence gathered by investigators “did not stem from statements made by the guards after they were promised limited immunity”); Warnken, supra note 295 (indicating grant of Garrity immunity will not prevent prosecution but prosecutors will only be able to use evidence “independent” of the statements made under immunity).

297. Byron L. Warnken is an Assistant Professor of Law at the University of Baltimore School of Law. See University of Baltimore School of Law—Byron L. Warnken, http://law.ubalt.edu/template.cfm?page=678 (last visited Feb. 8, 2008).

298. Professor Warnken provides a succinct description and history of this form of immunity that bears the name of a Supreme Court case, Garrity v. New Jersey, 385 U.S. 493 (1967). See Warnken, supra note 295.

299. See Warnken, supra note 295.

300. See id.

301. See id.

302. See id. Under the Garrity immunity doctrine, a government employee or contractor may be compelled to speak without implicating their Fifth Amendment privilege against self-incrimination. See id.

303. See Risen & Johnston, supra note 4.
evidence independent of the statements by those who received the immunity, adding increased demand for already scant evidence.

This obstacle is especially problematic for incidents where, as here, the statements of the immune employees would likely be the key evidence in any criminal trial. As reported by the New York Times, this concern is one consideration bearing on the Justice Department's decision whether to bring criminal charges against the Blackwater shooters. Ultimately, only the Justice Department can evaluate the options in light of political pressures to act. As Professor Warnken argues, there may be "bigger fish" or, alternatively, political benefits in a sure—albeit lesser—victory rather than risking political backlash after an acquittal. Legislative efforts to close the current jurisdictional gaps after the Nisour Square incident will not affect the Blackwater shooters, but passage of effective legislation may provide political cover to an outgoing administration and may prevent future frustration or injustice. That, of course, assumes that the recent legislative proposals achieve the effective closure of the proverbial "barn door."

304. If criminal charges are brought, the practical problems of trying a case in the United States will be amplified by the location of evidence and witnesses in Iraq. Some commentators have linked the lack of previous MEJA prosecutions with this very problem. See, e.g., Singer, supra note 39 (describing the MEJA system as "hoping to apply extraterritorial civilian law to a military setting 9000 miles away" and discussing practical difficulties associated with U.S. Attorneys investigating and preparing to try a criminal case arising out of conduct in Iraq). For this reason, the State Department's grant of immunity may reflect the government's desire to achieve some measure of success—the firing of Blackwater employees involved in the incident and termination of Blackwater's contracts—rather than hoping for a favorable verdict in a criminal trial and failing. See Warnken, supra note 295; see also David Johnston, Letter Tells of Difficulties in Prosecuting Detainee Abuse, N.Y. Times, Jan. 17, 2007, at A17, available at 2007 WLNR 902834 (discussing prohibitive problems the Justice Department faced trying to bring criminal charges against private contractors suspected of abusing detainees in Iraq and Afghanistan).

305. See Risen & Johnston, supra note 4. See Warnken, supra note 295.

306. The current debate has spilled over into a new calendar year—2008—that also happens to be a presidential election year. The impact of this timing either will hinder progress—as legislation stalls during the campaign season and as a result of election year posturing—or the timing could serve to highlight the problem—offering the administration's opponents yet another Iraq-related issue as election-year ammunition. In this context, it must be noted that the sponsor of two Senate bills, each of which would clarify the MEJA's definition of persons covered and enhance the enforcement mechanisms, is Illinois Senator Barack Obama. See infra note 310.

308. See supra note 12 (crediting Fredrick Stein's effective use of the "barn door" metaphor).
C. Recent Developments

In response to the Nisour Square incident, the U.S. House of Representatives passed the MEJA Expansion and Enforcement Act of 2007. As its title suggests, the bill’s language amends the MEJA to expressly include all private contractors as a category of persons covered by the MEJA, attempting to remove the lingering doubts regarding the MEJA’s applicability to non-DoD contractors. As discussed infra, however, it is not clear that the legislation will succeed in eliminating this ambiguity.

1. Another Expansion of “Persons Covered”

The current language of the MEJA only extends jurisdiction to persons directly associated with the Armed Forces or non-DoD contractors “supporting the mission of the Department of Defense

310. H.R. 2740, 110th Cong. (2007). The bill passed by a vote of 389 to 30. See House Passes Rep. Price Contractor Bill, U.S. FED. NEWS, Oct. 4, 2007, available at 2007 WLNR 19504249. The passage of the House bill shifted focus to the Senate where a similar bill awaits passage. See S. 2147, 110th Cong. (2007) (referred to S. Comm. on the Judiciary, Oct. 4, 2007). The Senate version, sponsored by Senator Barack Obama, is substantively the same as the House bill for purposes of this Comment: both bills change the test for determining whether a non-DoD contractor is subject to the MEJA. Compare H.R. 2740 § 2, with S. 2147 § 2. Senator Obama introduced a similar measure earlier in 2007. See Transparency and Accountability in Military and Security Contracting Act, S. 674, 110th Cong. (2007). The first bill, Senate Bill 674, had “more teeth.” See Klamer, supra note 277, at 16 (quoting Peter W. Singer). Senate Bill 674 enhances the enforcement and accountability mechanisms available to the government. See S. 674 §§ 3-5 (imposing reporting requirements on federal agencies and contractors); id. § 6 (requiring federal agencies issue specific regulations and guidance on rules of engagement, hiring and training standards, and cooperative communication between private military contractors and the armed forces); id. § 7 (defining legal status of contractors); id. § 8 (establishing special unit within F.B.I. for investigations in area of contingency operations). The second bill, Senate Bill 2147, however, does not include all of these provisions. Compare S. 674, with S. 2147 (modifying the definition of persons covered by the MEJA and establishing a special investigation unit within the F.B.I. for extraterritorial crimes).
311. See H.R. 2740 § 2(a).
312. See, e.g., Broder & Risen, supra note 4; Coyle, supra note 88; Silliman interview, supra note 7.
313. The current enactment of the MEJA reflects the 2004 amendment. See 18 U.S.C. 3267(1) (Supp. V 2005); see also discussion supra Part III.A.3 (describing the 2004 amendments to the MEJA).
overseas.”

This requirement that non-DoD contractors are only covered to the extent their work supports DoD’s mission adds a wrinkle to the application of the MEJA to Blackwater and their peers. But if the existing MEJA language does not confer jurisdiction over private military contractors operating overseas, the pending legislation attempts to remove all doubt. Unfortunately, the new language may only create a new grey area.

The bill passed by the House on October 4, 2007, would add another category of persons covered by the MEJA. The legislation provides:

(a) Clarification of the Military Extraterritorial Jurisdiction Act—

(1) INCLUSION OF CONTRACTORS—Subsection (a) of section 3261 of title 18, United States Code, is amended—

(A) by striking ‘or’ at the end of paragraph (1);

(B) by striking the comma at the end of paragraph (2) and inserting ‘; or’; and

(C) by inserting after paragraph (2) the following:

‘(3) while employed under a contract (or subcontract at any tier) awarded by any department or agency of the United States, 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 Armed Forces is conducting a contingency operation,‘.

(2) DEFINITION—Section 3267 of title 18, United States Code, is amended by adding at the end the following:

‘(5) The term ‘contingency operation’ has the meaning given such term in section 101(a)(13) of title 10.’


316. See discussion supra Part V.A.2 (describing the analysis necessary to apply the MEJA as in force at time of Nisour Square incident).

317. See H.R. 2740, 110th Cong. § 2(a)(1)(C) (2007) (extending jurisdiction to the criminal conduct of a person “employed under a contract (or subcontract at any tier) awarded by any department or agency of the United States,” so long as the work was performed near military operations (emphasis added)).


319. H.R. 2740 § 2(a).
The new language replaces the current test—"supporting the mission of the Department of Defense overseas"—with a test that emphasizes the location of the conduct relative to military operations. Although the language proposed by the MEJA Expansion and Enforcement Act serves to clarify this critical aspect of the MEJA—namely, who is covered—even the new language is vulnerable to similar ambiguity.

The new language would define the outer bounds of extraterritorial jurisdiction through reference to the location of the work performed rather than the identity of the contracting parties. Although the new legislation expands the population covered by the MEJA, the new scope of jurisdiction is still limited. The proposed legislation would confer jurisdiction over those contractors whose "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." What this legislation will mean in practical application is far from clear due to the blurred line between

320. 18 U.S.C. § 3267(1) (Supp. V 2005). Some continue to discuss this question in terms of whether the private military contractors were "accompanying" the Armed Forces. See, e.g., Paust, supra note 43; Silliman interview, supra note 7. This, however, ignores the effect of the 2004 amendments. See discussion supra notes 317-23 and accompanying text. The 2004 amendments incorporated contractors—all DoD and some non-DoD—into the definition of "employed by the Armed Forces" and limited the definition of "accompanying" to DoD-affiliated dependents. See § 3267(1); 18 U.S.C. § 3267(2) (2000); see also supra notes 80, 87 and accompanying text. The effect of the 2004 amendments to the MEJA, therefore, was to exclude non-DoD contractors from the latter category. See supra note 80 and accompanying text. With the new framework came a new analysis: the key consideration is not the application of the term "accompanying" but, rather, the phrase "supporting the mission" of the military overseas. See supra notes 79-86; discussion infra notes 321-32 and accompanying text; see also Silliman interview, supra note 7 (quoting Silliman's use of the correct test).

321. H.R. 2740 § 2(a)(1). The section defines the location by reference to the DoD's definition of a "contingency operation" as that term is defined elsewhere in the United States Code. Id. § 2(a)(1)(C). "Contingency operation," therefore, is defined as a military operation that—

(A) is designated by the Secretary of Defense as an operation in which members of the armed forces are or may be become involved in military actions, operations, or hostilities against an enemy of the United States or against an opposing military force; or
(B) results in the call or order to, or retention on, active duty of members of the uniformed services under section 688, 12301(a), 12303, 12304, 12305, or 12406 of this title, chapter 15 of this title, or any other provision of law during a war or during a national emergency declared by the President or Congress.


322. H.R. 2740.

323. See id. § 2(a)(1).

324. See supra notes 317-23 and accompanying text.

325. H.R. 2740 § 2(a)(1)(C). As mentioned supra, the definition of "contingency operation" can be found at 10 U.S.C. § 101(a)(13). See supra note 321.
formal military operations and related activities such as counterinsurgency operations, reconstruction, and training of local police and military forces.

2. Applying the Proposed Language to Nisour Square

As illustrated by the Blackwater incident, the situation in Iraq may not be easily or obviously defined. In the context of Blackwater’s role in Iraq, the issue is whether a contractor whose role is limited to providing security for the United States Embassy and the American diplomatic corps would fall within the scope of § 101(a)(13)’s definition of “contingency operation.” The answer is likely “yes” under the proposed clarification and expansion of the MEJA because the key factor delineating contractors subject to domestic criminal jurisdiction from those not subject to such jurisdiction is the location of work performed and not the nature of the contract.

Unlike the likely outcome under the current MEJA language, the Blackwater employees were operating in Baghdad at the time of the incident but they were away from the Embassy. Under the proposed test, the Secretary of Defense could define the geographical area of the military’s “contingency operation” to include all of Baghdad or even so broadly as to encompass the entire country of Iraq. But this shift in statutory focus may not eliminate the “grey area” inhabited by private contractors like Blackwater. The next incident may raise new questions of whether the conduct occurred “in an area, or in close proximity to” the military operations instead of the current debate over whether Blackwater’s conduct occurred while “supporting the mission” of the

326. Although traditionally the fall of Saddam Hussein’s regime would signal the end of the military campaign and the beginning of a separate reconstruction effort, the current conflict against insurgent combatants in Iraq—defined as part of the broader and amorphous “Global War On Terror”—may be viewed as a “contingency operation” under the expansive and discretionary definition in 10 U.S.C. § 101(a)(13). See supra note 321.

327. See supra notes 317-23 and accompanying text. Compare 18 U.S.C. § 3261(a)(1) (2000) (limiting jurisdiction to a person’s conduct “while employed by or accompanying the Armed Forces outside the United States”), with H.R. 2740 § 2(a) (conferring jurisdiction over conduct “while employed under a contract . . . awarded by any department or agency of the United States, 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 Armed Forces is conducting a contingency operation.”).

328. See discussion supra Part V.A.2 (applying “supporting the mission” test to Blackwater).

329. See sources cited supra notes 16-27.

330. Indeed, under the rubric of a “Global War on Terror,” it is possible the geographic scope of the military’s “contingency operations” would encompass the entire world.

military overseas.\(^{332}\) On the other hand, enabling the DoD to define the geographic area returns a measure of control to the enlisted forces and any progress in that direction will likely increase accountability, structure, and certainty. Therefore, if the DoD defined the geographic area broadly—for example, Iraq as a whole—Blackwater contractors operating therein would be covered by the MEJA as amended by the proposed language. In this sense, a criminal prosecution under the MEJA would be easier in the case of a future incident similar to the events in Nisour Square than under the current MEJA language.

VI. CONCLUSION

The tragedy of Nisour Square has spread to Constitution Avenue in Washington, D.C., as Justice Department officials begin to acknowledge the significant obstacles to justice for the seventeen Iraqis shot in September 2007.\(^{333}\) The contractors are immune from legal liability—criminal or civil\(^{334}\)—in Iraq unless the U.S. government waives their immunity.\(^{335}\) The search for a remedy by those interested in charging the shooters for their excessive shooting\(^{336}\) must turn to the U.S. legal system.

The relevant federal criminal statute—the MEJA—arguably does not apply to the Blackwater employees because their State Department contract is not carried out in support of the DoD mission overseas.\(^{337}\) Even this standard, already eased once,\(^{338}\) cannot extend jurisdiction to the heavily armed paramilitary contractors who act under contracts with non-DoD agencies. Under their contract with the State Department, Blackwater employees perform functions limited to the State Department mission in Iraq: they provide personal protection services to American diplomats.\(^{339}\) Their performance under this contract does not depend upon the concurrent DoD effort in Iraq\(^{340}\) and, indeed, their contract extends beyond Iraq.\(^{341}\)

\(^{333}\) See Risen & Johnston, supra note 4.
\(^{334}\) See supra Part IV.C.2 (explaining Order 17's broad grant of immunity from the Iraqi legal process).
\(^{335}\) See supra notes 186-90 and accompanying text (discussing Sending State's power to waive a contractor's immunity).
\(^{336}\) See sources cited supra notes 2-3.
\(^{337}\) See supra Parts III.A.3, V.A.2 (describing the MEJA's scope and applying it to the Nisour Square incident).
\(^{338}\) See supra Part III.A.3 (describing the 2004 amendment to the MEJA).
\(^{339}\) See supra notes 28-33 and accompanying text (describing the State Department WPSS contract).
\(^{340}\) See supra Part V.A.2.
\(^{341}\) See supra notes 28-33 and accompanying text.
Even the newest round of amendments to the MEJA's definition of covered persons—passed by one house of Congress after the Nisour Square incident—may not completely foreclose future disputes. The proposal passed in the House and awaiting action in the Senate merely changes the test—again. The new test is an improvement: it defines the MEJA's application to non-DoD civilian contractors in geographic terms and not based on type of activities performed by the individual contractors. Furthermore, the proposed language would link the geographic scope to the DoD's specific definition of the area. This degree of precision is absent in the current enactment and, although there is still a possibility for ambiguity, the new proposal is yet another improvement on a well-intended law.

Alternatively, the Blackwater shooters could be subject to court-martial jurisdiction. This possibility is unlikely, which is unfortunate because it provides a set of facts that would present the courts with an opportunity to decisively announce the constitutionality of court-martial jurisdiction over private military contractors. This clarity is needed, as illustrated by the blurred line between the work performed by enlisted soldiers and civilian security contractors. Although predicting a future holding is impossible, there is a strong argument in favor of assigning cases like the Nisour Square tragedy to the purview of military courts.

First, military court review would provide a much-needed parity of treatment between persons who effectively perform the same tasks in similar environments. As illustrated by the logical stretch needed to

342. See supra notes 318-25 and accompanying text.
343. See supra notes 310-12 and accompanying text.
344. See supra Part V.C (analyzing the proposed legislation to expand the MEJA’s scope).
345. See supra note 310 (discussing the Senate versions of the bill passed by the House).
346. See supra Part V.C.1.
347. See supra Part V.C.1.
348. See supra notes 325, 330, 331 and accompanying text.
349. See supra notes Part V.C (analyzing proposed legislation and identifying lack of clarity).
350. See supra Parts III.B, V.A.3.
351. See supra note 4 and accompanying text (summarizing the progress of the criminal investigation by Justice Department in lieu of convening a court-martial).
352. See supra Parts III.B, V.A.3 (identifying and discussing the need for clarification of constitutionality of court-martial jurisdiction, as illustrated by the Nisour Square incident).
353. See generally Peters, supra note 50; Singer, supra note 39; Singer, supra note 147.
354. See supra Part V.A.3.
355. See supra note 270 and accompanying text.
impose criminal justice on the Blackwater shooters, these private military contractors have escaped accountability and legal liability thus far while their underpaid enlisted counterparts are court-martialed and discharged from their chosen career.

Second, although court-martial procedures are different than those in the criminal justice system in ways that implicate important constitutional rights, a court-martial setting would protect the defendant's right to a fair trial even more adequately than a civilian setting. The unique pressures and conditions facing the Blackwater shooters in Iraq may be beyond the competence of a civilian jury. A panel of military officers is better-equipped to understand the circumstances of armed conflict, apply the appropriate standard of conduct under the circumstances, and render a solemn verdict.

Regardless of which—if any—of these options are used to prosecute the contractors responsible for the Nisour Square incident, the recent attention paid to the state of the law may prove to prevent future problems. It may be thin, but this is a silver lining nonetheless.

356. See discussion supra Part V.A.2.
357. See supra notes 279-80 and accompanying text.
358. See supra Parts III.B.2, V.A.3 (discussing debate over constitutionality of court-martial jurisdiction over civilians).
359. See discussion supra Part V.A.3.
360. See discussion supra Part V.A.3.
361. See discussion supra Part V.A.3.
362. It also illustrates the thoughts of one expert: Blackwater may escape criminal liability not because the legal framework is lacking, but because the political will to enforce the existing laws is not strong enough. See Posting of Laura Dickinson to Balkinization, http://balkin.blogspot.com (Oct. 1, 2007, 9:34 EDT).