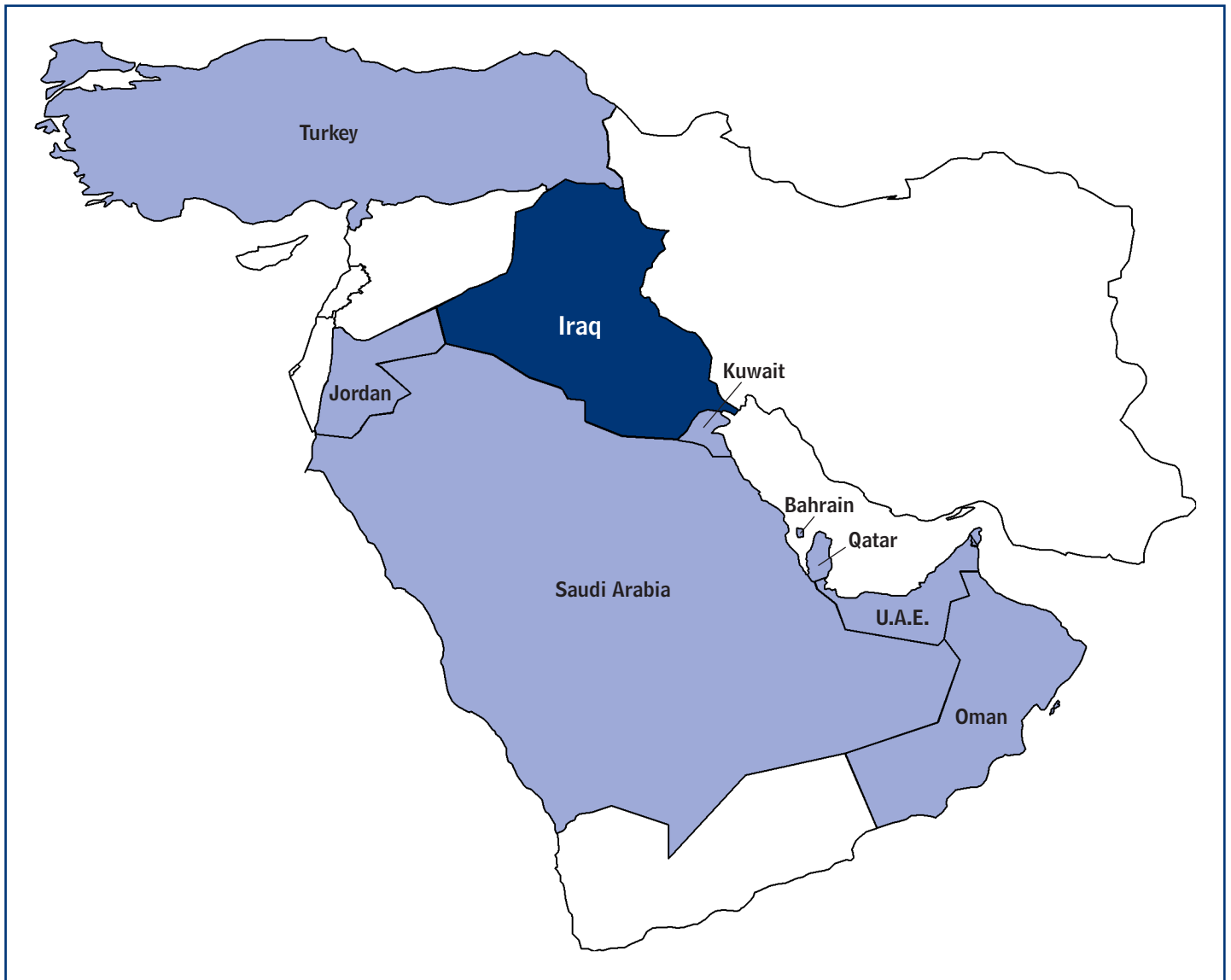


Contractors' Support of U.S. Operations in Iraq



AUGUST 2008

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Contractors' Support of U.S. Operations in Iraq

August 2008

Notes

All dollar amounts are in 2008 dollars.

Unless otherwise indicated, all years referred to in this report are federal fiscal years.

Numbers in the text and tables may not add up to totals because of rounding.

Obligations are a legally binding commitment by the federal government that will result in outlays, immediately or in the future.



Preface

Contractors play a substantial role in supporting the United States' current military, reconstruction, and diplomatic operations in Iraq. That support has raised questions regarding the costs, quantities, functions, and legal status of contractor personnel working in the Iraq theater.

This Congressional Budget Office (CBO) paper, which was prepared at the request of the Senate Committee on the Budget, examines the use of contractors in the Iraq theater from 2003 through 2007. It provides an overview of the federal government's costs of employing contractors in Iraq and in nearby countries, the type of products and services they provide, the number of personnel working on those contracts, comparisons of past and present use of contractors during U.S. military operations, and the use of contractors to provide security. CBO also investigated the command-and-control structure between the U.S. government and contract employees and the legal issues surrounding contractor personnel working in Iraq.

This paper was prepared by Daniel Frisk and R. Derek Trunkey of CBO's National Security Division under the supervision of J. Michael Gilmore and Matthew Goldberg. Adam Talaber contributed to the analysis, and Adebayo Adedeji and Victoria Liu provided additional assistance. Robert Dennis, Theresa Gullo, and Frank Sammartino provided helpful comments. Robert Murphy reviewed the section on legal issues, as did Jennifer Elsea of the Congressional Research Service. Victoria A. Greenfield, a professor at the United States Naval Academy, reviewed the entire study. (The assistance of external reviewers implies no responsibility for the final product, which rests solely with CBO.)

Sherry Snyder edited the study, and Loretta Lettner proofread it. Cindy Cleveland produced drafts of the manuscript. Maureen Costantino prepared the report for publication and designed the cover. Lenny Skutnik printed the initial copies, Linda Schimmel handled the print distribution, and Simone Thomas prepared the electronic version for CBO's Web site (www.cbo.gov).



Peter R. Orszag
Director



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Contractors' Support of U.S. Operations in Iraq

Introduction and Summary

Contractors play a substantial role in supporting the United States' current military, reconstruction, and diplomatic operations in Iraq, accounting for a significant portion of the manpower and spending for those activities. The Congressional Budget Office (CBO), at the request of the Senate Committee on the Budget, has studied the use of contractors in the Iraq theater to support U.S. activities in Iraq.¹

This paper, which covers the period from 2003 through 2007, provides an overview of the federal costs of employing contractors in Iraq and in nearby countries, the type of products and services they provide, the number of personnel working on those contracts, comparisons of past and present use of contractors during U.S. military operations, and the use of contractors to provide security. CBO also examined the command-and-control structure between the U.S. government and contract employees and the legal issues surrounding contractor personnel working in Iraq.

The findings of CBO's study include the following:

- From 2003 through 2007, U.S. agencies awarded \$85 billion in contracts for work to be principally performed in the Iraq theater, accounting for almost 20 percent of funding for operations in Iraq. (Dollar amounts in this paper are in 2008 dollars.) More than 70 percent of those awards were for contracts performed in Iraq itself.
- The Department of Defense (DoD) awarded contracts totaling \$76 billion, of which the Army (including the Joint Contracting Command—Iraq/Afghanistan) obligated 75 percent. The U.S. Agency for International Development and the Department of State obligated roughly \$5 billion and \$4 billion, respectively, over the same period.
- Contractors provide a wide range of products and services in-theater. Most contract obligations over the 2003–2007 period were for logistics support, construction, petroleum products, or food. The contract for the Army's Logistics Civil Augmentation Program (LOGCAP) is the largest one in the Iraq theater, with obligations totaling \$22 billion.
- Although personnel counts are rough approximations, CBO estimates that as of early 2008 at least 190,000 contractor personnel, including subcontractors, were working on U.S.-funded contracts in the Iraq theater. Just under 40 percent of them are citizens of the country where the work is being performed (primarily Iraq); about 20 percent are U.S. citizens.
- The United States has used contractors during previous military operations, although not to the current extent. According to rough historical data, the ratio of about one contractor employee for every member of the U.S. armed forces in the Iraq theater is at least 2.5 times higher than that ratio during any other major U.S. conflict, although it is roughly comparable with the ratio during operations in the Balkans in the 1990s.

1. For this study, the Congressional Budget Office considers the following countries to be part of the Iraq theater: Iraq, Bahrain, Jordan, Kuwait, Oman, Qatar, Saudi Arabia, Turkey, and the United Arab Emirates. CBO found that in-theater contracts to support operations in Iraq were almost entirely performed in those countries, all of which are located within the U.S. Central Command's area of operations.

Private security contractors have been a particular focus of attention. CBO finds that:

- Total spending by the U.S. government and other contractors for security provided by contractors in Iraq from 2003 through 2007 was between \$6 billion and \$10 billion, CBO estimates. As of early 2008, approximately 25,000 to 30,000 employees of private security contractors were operating in Iraq. Those contractors worked for the U.S. government, the Iraqi government, other contractors, and other customers.
- The costs of a private security contract are comparable with those of a U.S. military unit performing similar functions. During peacetime, however, the private security contract would not have to be renewed, whereas the military unit would remain in the force structure.

Regarding the legal issues associated with contractor personnel, CBO finds that:

- Military commanders have less direct authority over the actions of contractor personnel than over their military or civilian government subordinates. Contractors' duties are set out in their contract, which is managed by a government contracting officer, not the military commander.
- The legal status of contractor personnel in Iraq is uncertain, particularly for those who are armed. Contractor personnel are potentially subject to a number of laws and jurisdictions, including the Uniform Code of Military Justice, the Military Extraterritorial Jurisdiction Act of 2000, the Special Maritime and Territorial Jurisdiction Act of the United States, and the USA Patriot Act. However, there have been few tests in courts of how those laws apply to contractors.

Costs, Functions, and Numbers of Contractor Personnel in the Iraq Theater

Using available data, CBO assessed the costs of in-theater contractor support for operations in Iraq and summarized the primary types of products and services they provide. CBO estimated the number of contractor personnel working for the United States in the Iraq theater and compared the current ratio of contractor to military personnel with that of previous conflicts. CBO also esti-

mated the costs and numbers of contractor personnel providing security, including those working as subcontractors. Such personnel are referred to in this paper as private security contractors (PSCs).

The U.S. Government's Obligations for Contracts Principally Performed in the Iraq Theater

From 2003 through 2007, U.S. government agencies obligated a total of \$85 billion for contracts principally performed in the Iraq theater, CBO estimates.² In-theater support for operations in Iraq occurred in multiple countries, including \$63 billion of obligations for contracts principally performed in Iraq, \$14 billion for contracts principally performed in Kuwait, and \$8 billion for contracts principally performed in other nearby countries (see the top panel of Figure 1). New obligations for contracts performed in the Iraq theater have totaled about \$17 billion to \$21 billion annually since 2004.³

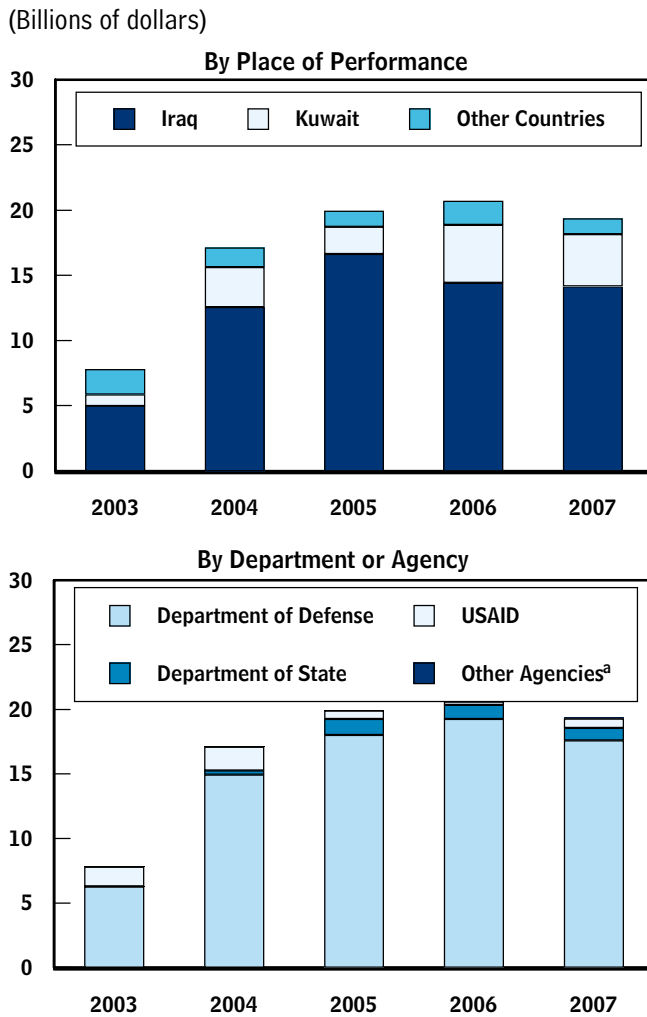
The \$85 billion in obligations for contracts performed in the Iraq theater accounts for almost 20 percent of the \$446 billion of U.S. appropriations for activities in Iraq from 2003 through 2007 (CBO 2008, p. 7, converted to 2008 dollars). However, the \$85 billion estimate does not capture the total share of U.S. spending on Iraq that goes to contractors. CBO's estimate excludes the costs of contracts supporting operations in Iraq that are performed in countries outside the Iraq theater, including the United States (such as the manufacture of mine-resistant ambush-protected vehicles, or MRAPs, and any of the other military equipment used in the Iraq theater).

CBO's estimates come with additional qualifications and assumptions. First, the accuracy and completeness of the available data on procurement directly influence the accuracy of CBO's estimates of contract obligations (see Box 1). Second, the Department of Defense is the only U.S. government agency employing significant numbers

2. Principal place of performance is defined as "the location of the principal plant or place of business where the items will be produced, supplied from stock, or where the service will be performed." If more than one location is involved, the principal place of performance is the location where the most dollars are spent. See *FPDS-NG User's Manual*, Version 1.0 (May 2006), p. 23, www.fpds.gov.

3. Because this paper focuses on Iraq, CBO's estimate excludes about \$10 billion in obligations for contracts performed in Afghanistan over the 2003–2007 period.

Figure 1.
The U.S. Government's Obligations for Contracts Performed in the Iraq Theater, 2003 to 2007



Source: Congressional Budget Office based on data from the Federal Procurement Data System—Next Generation and the Joint Contracting Command—Iraq/Afghanistan.

Notes: For this study, the Congressional Budget Office considers the following countries to be part of the Iraq theater: Iraq, Bahrain, Jordan, Kuwait, Oman, Qatar, Saudi Arabia, Turkey, and the United Arab Emirates.

USAID = U.S. Agency for International Development.

a. Includes the Departments of Agriculture, Commerce, Health and Human Services, the Interior, Justice, Transportation, and the Treasury, as well as the Broadcasting Board of Governors and the General Services Administration. Obligations of other agencies totaled \$113 million or less in each year.

of contractor personnel who support operations in Iraq but are located elsewhere in the Iraq theater; CBO's estimates therefore exclude all non-DoD contracts performed outside Iraq. Third, CBO assumed that some of DoD's contract obligations supported programs and facilities located in the Iraq theater that existed before the war, such as the Incirlik Air Base in Turkey. The estimates of obligations to support operations in Iraq exclude that prewar level of contracting effort, about \$1.5 billion annually.⁴ Last, CBO assumed that all of DoD's obligations above prewar amounts for contracts performed in Bahrain, Jordan, Kuwait, Oman, Qatar, Saudi Arabia, Turkey, and the United Arab Emirates were to support operations in Iraq but not those in Afghanistan or elsewhere.

DoD's obligations for contracts performed in the Iraq theater are substantially larger than those made by other agencies (see the bottom panel of Figure 1). DoD's \$76 billion in obligations represents almost 90 percent of all dollars awarded from 2003 through 2007 for such contracts. Of that amount, \$54 billion was for contracts performed in Iraq, \$14 billion was for contracts performed in Kuwait, and \$8 billion was for contracts performed in other nearby countries. The U.S. Agency for International Development (USAID) and the Department of State (DoS) obligated \$5 billion and \$4 billion, respectively, for contracts in Iraq over the same period.⁵ Other U.S. departments and agencies obligated a total of less than \$300 million. That category includes the Departments of Agriculture, Commerce, Health and Human Services, the Interior, Justice, Transportation, and the Treasury, as well as the Broadcasting Board of Governors and the General Services Administration.

Within DoD, the Department of the Army is by far the largest obligator of funds for contracts in the Iraq theater (see Figure 2). The Army awarded \$57 billion for such contracts from 2003 through 2007. The Departments of the Air Force and the Navy (which includes the Marine Corps) awarded \$6 billion and \$1 billion, respectively. Defensewide agencies obligated an additional \$12 billion over that period, primarily for contracts awarded by the Defense Logistics Agency.

4. In Saudi Arabia, average annual contract obligations made before the war were larger than those made after operations in Iraq began. Consequently, CBO's estimates exclude all obligations for contracts performed in Saudi Arabia.

5. USAID is an independent federal agency but reports to the Secretary of State. Part of USAID's budget is managed jointly with the Department of State.

Box 1.**The Federal Procurement Data System—Next Generation**

The Congressional Budget Office's (CBO's) estimates of federal contract obligations are largely based on data collected from the Web-based Federal Procurement Data System—Next Generation (FPDS-NG).¹ It is the only governmentwide system that tracks federal spending on procurement. Federal Acquisition Regulations require executive departments and agencies to report all unclassified procurement data to FPDS-NG shortly after a contract has been awarded. The FPDS-NG database allows queries based on dozens of contract parameters, including the name of the department or agency awarding the contract, the dates on which the contract was signed and completed, a description of the products or services in the contract, the vendor's name, and the principal place where the contract will be performed. FPDS-NG is continually updated; CBO obtained most of the data used in this paper by querying the database in April 2008.

1. The Federal Procurement Data System—Next Generation and its associated documentation are available at www.fpds.gov.

FPDS-NG has some limitations. A number of organizations—including the Government Accountability Office, the RAND Corporation, and the Acquisition Advisory Panel—have issued reports that criticize the accuracy of procurement data contained in FPDS-NG.² Among their concerns were the timeliness of the availability of data, inaccuracies in the data due to human or technological errors, and a lack of detail in how products and services in the contract were classified. Those reports also highlighted difficulties that the Department of Defense (DoD)—the largest contracting entity in the government—was experiencing in attempting to electronically interface with FPDS-NG.

2. Government Accountability Office, *Improvements Needed to the Federal Procurement Data System—Next Generation*, GAO-05-960R (September 27, 2005); Lloyd Dixon and others, *An Assessment of Air Force Data on Contract Expenditures* (Santa Monica, Calif.: RAND Corporation, 2005); Acquisition Advisory Panel, *Report of the Acquisition Advisory Panel to the Office of Federal Procurement Policy and the United States Congress* (January 2007). The panel's report also provides a history of the Federal Procurement Data System.

Continued

The Army's obligations have been much larger than those of the other DoD services for two reasons. Most U.S. military personnel (roughly 125,000 of the 200,000 total military personnel in Iraq as of December 2007) are Army service members. In addition, contracts awarded by the Joint Contracting Command—Iraq/Afghanistan (JCC-I/A) are attributed to the Army because that command operates under the Army's acquisition authority. JCC-I/A, a major subordinate command of Multi-National Force—Iraq, awards in-theater contracts to support coalition military forces as well as reconstruction and economic development in Iraq and Afghanistan. Those contracts typically address immediate needs and rely on the local vendor base.⁶ Created in early fiscal year 2005, JCC-I/A obligated about \$15 billion through 2007 for contracts performed in Iraq. The Department of the Navy's contract obligations have been low relative to its

manpower presence in the Iraq theater, in part because the Marine Corps is receiving some logistics support through the Army's Logistics Civil Augmentation Program. (The Marine Corps reimburses the Army for support received from LOGCAP; FPDS-NG does not capture interagency contract agreements.)

LOGCAP is the Army's primary means of providing support services for military personnel.⁷ Contractor personnel provide a wide range of services under LOGCAP, such

6. JCC-I/A also reviews all contracts for work in Iraq and Afghanistan to ensure that the correct terms and conditions are included in the contract language and that the contracted work is consistent with the plans of the in-country commander.

7. The Army awarded LOGCAP III, contract number DAA09-02-D-0007, to Kellogg Brown and Root, Inc., on December 14, 2001.

Box 1.**Continued****The Federal Procurement Data System—Next Generation**

The General Services Administration (the executive agency responsible for FPDS-NG) and the Office of Management and Budget have recently taken steps to improve the quality of the data in FPDS-NG. Nearly all government offices, including most of those within DoD, now send data to FPDS-NG via a machine-to-machine interface with their systems for writing contracts, reducing the possibility of human error. (That interface does not address any deficiencies with agency-unique databases that feed into FPDS-NG, however.) All agencies are required to certify the data they report in FPDS-NG and to submit plans for improving the quality of their data.³ DoD, the last agency to certify, provided an interim confirmation of its 2007 data in April 2008.

In light of those apparent improvements, and because no other governmentwide procurement databases

3. Office of Management and Budget, "Improving Acquisition Data Quality—FY 2008 FPDS Data" (memorandum from Paul A. Denett, Administrator, Office of Federal Procurement Policy, to chief acquisition officers, senior procurement executives, and small agency council members, May 9, 2008).

exist, CBO determined that FPDS-NG was the most comprehensive and accessible source of data on federal contract obligations in Iraq. Although FPDS-NG may contain some inaccuracies in the details of individual contracts, CBO's analysis is based on aggregated data, so errors should be relatively small in the context of billions of dollars of reported obligations. CBO did not audit the FPDS-NG data used in this report.

One important exception to FPDS-NG's reporting requirements is the Joint Contracting Command—Iraq/Afghanistan (JCC-I/A). In part because of limitations on Internet bandwidth, JCC-I/A currently provides information to FPDS-NG in a bulk fashion, rather than reporting individual contract actions as they occur.⁴ As of June 2008, JCC-I/A had not yet reported all of its 2007 procurement actions to FPDS-NG; CBO collected those data directly from JCC-I/A.

4. JCC-I/A uses its own system, the Joint Contingency Contracting System, to maintain a current record of its contracts. See Joint Contracting Command—Iraq/Afghanistan, *Acquisition Instruction* (December 15, 2007), p. 18.

as operating food service and dining facilities, storing and supplying ammunition, distributing fuel, maintaining equipment, and managing procurement and property. From 2003 through 2007, the Army obligated more than \$22 billion to the LOGCAP contract for services rendered in the Iraq theater. CBO previously conducted a detailed analysis of LOGCAP, including a description of its functions and a comparison of the costs of contractor and military personnel to provide those services (CBO 2005). In that study, CBO determined that Army support units could perform LOGCAP tasks during wartime for virtually the same costs as contractors. During peacetime, however, the costs of contractors would be substantially lower than those of Army units.

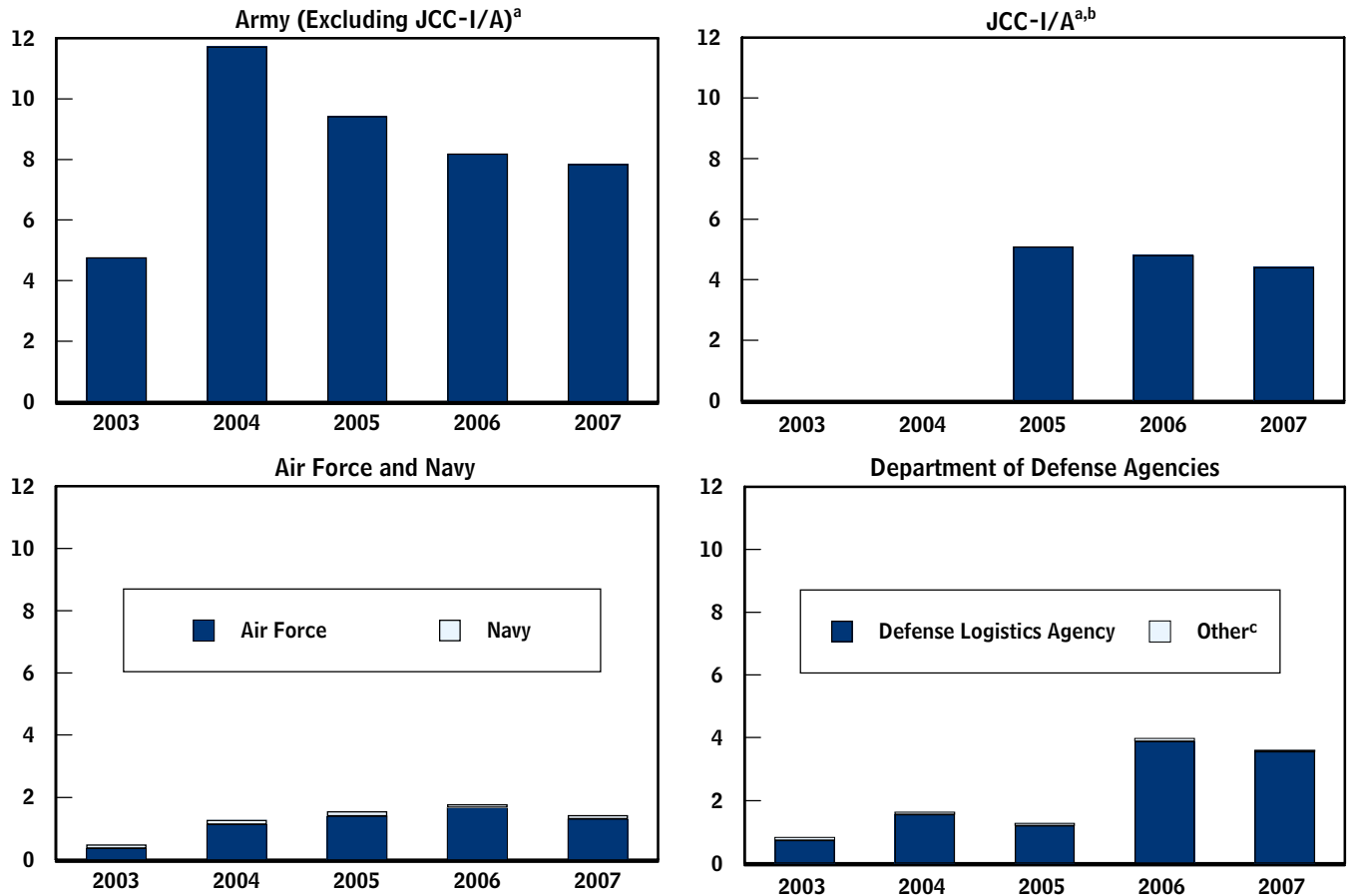
Products and Services Provided by Contractors in the Iraq Theater

Contractors provide a wide variety of services and products in support of U.S. government agencies operating in the Iraq theater. Examples of services performed by contractors include logistics, construction, engineering and technical support, linguist services, economic development, humanitarian assistance, and security. Examples of products provided by contractors include food, fuel, vehicles, and communications equipment. Contractor personnel are involved in many aspects of U.S. operations in Iraq, with the notable exception of roles defined as "inherently governmental" or "military essential." Those roles, and the restrictions on services provided by contractors, are described later in this paper.

Figure 2.

The Department of Defense's Obligations for Contracts Performed in the Iraq Theater, by Department or Agency Awarding the Contract, 2003 to 2007

(Billions of dollars)



Source: Congressional Budget Office based on data from the Federal Procurement Data System—Next Generation and the Joint Contracting Command—Iraq/Afghanistan.

Note: For this study, the Congressional Budget Office considers the following countries to be part of the Iraq theater: Iraq, Bahrain, Jordan, Kuwait, Oman, Qatar, Saudi Arabia, Turkey, and the United Arab Emirates.

- a. The Joint Contracting Command—Iraq/Afghanistan (JCC-I/A) operates under the Army's acquisition authority.
- b. The Department of Defense formed JCC-I/A in 2005.
- c. Obligations of other agencies within the Department of Defense totaled \$93 million or less in each year.

The Federal Procurement Data System—Next Generation (FPDS-NG) classifies contract functions using the North American Industrial Classification System (NAICS) and a system of product and service codes. Product and service codes, though still general, are more specific than NAICS in the context of government procurement.⁸ Nonetheless, both systems of classification have weaknesses. Some experts claim that the functional categories lack sufficient specificity and are too broad to allow detailed analyses of procurement spending. In addition,

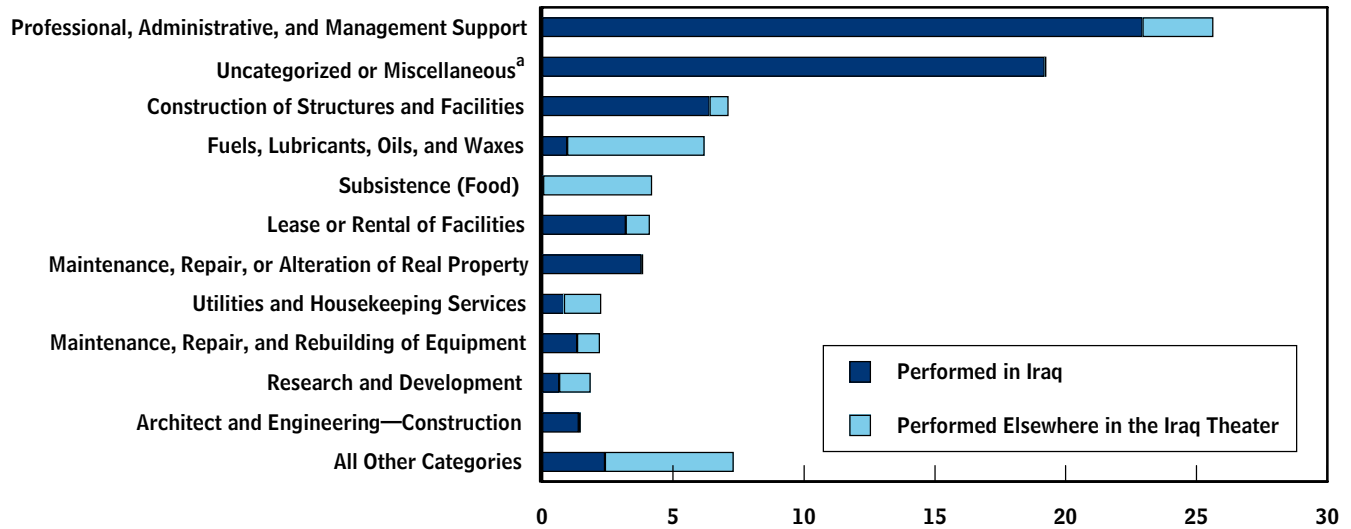
FPDS-NG, which allows only a single product and service code and a single NAICS code for each contract, does not capture the diversity of functions that some

8. The FPDS-NG Web site explains the benefit of having two classification systems: “The NAICS classifies commercial activity into broad service categories, e.g., farming, manufacturer, wholesaler, retail, services. Contracts, on the other hand, generally purchase specific goods (such as cameras or telephones) and services. Therefore, FPDS has a second set of codes called Products and Services Codes.” See Question 16, www.fpdnsg.com/questions.html.

Figure 3.

U.S. Government Contracts Performed in the Iraq Theater, by Product and Service Code, 2003 to 2007

(Billions of dollars)



Source: Congressional Budget Office based on data from the Federal Procurement Data System—Next Generation and the Joint Contracting Command—Iraq/Afghanistan (JCC-I/A).

Note: For this study, the Congressional Budget Office considers the following countries to be part of the Iraq theater: Iraq, Bahrain, Jordan, Kuwait, Oman, Qatar, Saudi Arabia, Turkey, and the United Arab Emirates.

a. Consists mostly of contracts awarded by JCC-I/A.

contracts provide. Large umbrella contracts providing a range of services, such as the Army LOGCAP contract, are particularly affected by that shortcoming. Under a more precise classification system, agencies could select multiple codes to classify a contract. To be most useful, however, such a system would also require assigning a portion of that contract’s obligations to each of its assigned product and service codes.

CBO’s analysis of contractors’ functions in the Iraq theater is also hindered by the fact that data on about \$19 billion in contract obligations have not been categorized by function, have not been entered in the FPDS-NG database, or both. Almost all obligations made by JCC-I/A and entered in FPDS-NG were coded under the nonspecific product and service code “miscellaneous” and the NAICS code “other general government support,” even though those obligations were probably used to procure a wide but identifiable variety of products and services. In addition, contract data provided directly to CBO by JCC-I/A and USAID were neither recorded in FPDS-NG nor classified by function. Consequently,

without investigating each of those uncategorized contract actions, CBO cannot classify the functions provided by about one-fifth of obligations for contracts performed in the Iraq theater over the 2003–2007 period.

Notwithstanding those limitations, grouping contracts by FPDS-NG product and service codes provides some insight into the breadth of work that contractors perform in the Iraq theater, as well as a rough indication of the functions that contractors most often provide (see Figure 3). From 2003 through 2007, U.S. government agencies obligated funds to perform 99 of 102 possible principal product and service codes.⁹ Total obligations for each of those categories ranged from only a few thousand dollars to billions of dollars. CBO estimates that, on the basis of contract classifications in FPDS-NG, nearly 80 percent of categorized U.S. obligations for contractors’ activities in the Iraq theater over that period were for services.

9. For a complete list of product and service codes and their subcategories, refer to General Services Administration (1998).

Eleven product and service codes (excluding the “uncategorized or miscellaneous” category) each received over \$1 billion in contract obligations in the Iraq theater from 2003 through 2007. The category “professional, administrative, and management support” accounted for the largest share—nearly \$26 billion, or about 30 percent of all obligations. Most obligations in that category have been in the subcategory “logistics support services,” which primarily consists of the Army LOGCAP contract. To date, that contract is the largest one performed in Iraq.

Although logistics support is a reasonable, albeit broad, description of the LOGCAP contract, portions of that contract could also be classified under other categories, such as construction, equipment and property maintenance, subsistence (food), and housekeeping services.

Other categorized product and service codes accounted for much smaller shares of obligations. Over \$7 billion was obligated for “construction of structures and facilities,” primarily buildings in Iraq. “Fuels, lubricants, oils, and waxes” received over \$6 billion, about three-quarters of which was used to purchase petroleum-based liquid propellants outside Iraq. Contracts for food; leasing or renting of facilities; and property maintenance, repair, or alteration each totaled nearly \$4 billion. (Private security services, the costs of which have been considerably lower than those of the most heavily contracted functions, are distributed across several product and service codes.)

Counting and Tracking Contractor Personnel in the Iraq Theater

On the basis of data collected from DoD, DoS, and USAID, CBO estimates that at least 190,000 contractor personnel work in the Iraq theater on contracts funded by the United States.¹⁰ The ratio of U.S.-funded contractor employees to members of the U.S. military in the Iraq theater is therefore approximately 1 to 1. The 190,000 estimate includes personnel who work directly for the U.S. government as prime contractors and, to the extent possible, the personnel of subcontractors who work for other contractors. (Only DoD included subcontractor personnel in its data.)

About 20 percent (38,700) of all contractor personnel working in the Iraq theater are U.S. citizens (see Table 1). Local nationals, defined as citizens of the country in

which they are working, and third-country nationals, who are neither U.S. citizens nor local nationals, each account for roughly 40 percent of the theater’s contractor population (70,500 and 81,000, respectively). The majority of contractor personnel—at least 160,000—work in Iraq. DoD is the only U.S. agency employing significant numbers of contractor personnel who support operations in Iraq but are located in countries elsewhere in the Iraq theater, such as Kuwait.

DoD employs the bulk of contractor personnel in the Iraq theater, and its U.S. Central Command (CENTCOM) estimates the number of those personnel by means of a quarterly manual census of contractors. That census is a synthesis of headcounts at project and military sites across the theater. CENTCOM’s census data categorize contractor personnel working in Iraq (but not in other countries within the Iraq theater) according to the service they provide and their nationality (see Figure 4). More than one-half of the estimated 149,000 DoD-funded contractor personnel in Iraq perform base support functions, and 20 percent provide construction services.

The Department of State also provided CBO with a categorization of its contractor personnel in Iraq based on job function (see Figure 5). As of late 2007, about 40 percent of the approximately 6,700 contractor personnel working for DoS in Iraq were providing security.

Counts of contractor personnel in Iraq and nearby countries are only rough approximations. Government agencies indicate that counting contractor personnel in-theater is a difficult task. The contracting effort to support operations in Iraq is extensive, involving hundreds of U.S., Iraqi, and international firms employing tens of thousands of people of various nationalities. Contract work is continuously awarded and completed as requirements dictate; numbers, nationalities, and functions of contractor personnel fluctuate over time. In addition, prime contractors may subcontract portions of their contract to other firms. Subcontracting may run several tiers deep, further decentralizing administration of the workforce and reducing the likelihood of an accurate tally of all contractor personnel. (CBO does not have an estimate of the percentage of federal obligations for contracts in Iraq that have been subcontracted.)

Although U.S. agencies attempt to closely account for contract obligations, their mechanisms for determining the number of nongovernment personnel have not been well established. Headcounts of contractor personnel

10. CBO did not collect data on contractor personnel from other agencies because they represent a very small percentage of total contract obligations for work in the Iraq theater.

Table 1.**Number of Contractor Personnel Working in the Iraq Theater, by Department or Agency Awarding the Contract**

| | Location | Nationality | | | Total |
|--|--|---------------|-----------------|-------------------------|----------------|
| | | U.S. Citizens | Local Nationals | Third-Country Nationals | |
| Department of Defense ^a | Iraq | 29,400 | 62,800 | 57,300 | 149,400 |
| | Elsewhere in the Iraq Theater ^b | 6,700 | 3,500 | 20,100 | 30,300 |
| Department of State ^c | Iraq | 2,300 | 1,300 | 3,100 | 6,700 |
| U.S. Agency for International Development ^d | Iraq | 200 | 2,900 | 300 | 3,500 |
| Other Agencies ^e | Iraq | 200 | 100 | 200 | 500 |
| Total | Iraq Theater | 38,700 | 70,500 | 81,000 | 190,200 |

Source: Congressional Budget Office based on data from U.S. Central Command, *2nd Quarter Contractor Census Report* (April 30, 2008); Department of State; U.S. Agency for International Development.

Notes: Estimates of numbers of personnel in Iraq and nearby countries are rough approximations; numbers, nationalities, and functions of contractor personnel continually fluctuate. Including subcontractors who work on contracts for the Department of State and the U.S. Agency for International Development would increase the totals.

For this study, the Congressional Budget Office considers the following countries to be part of the Iraq theater: Iraq, Bahrain, Jordan, Kuwait, Oman, Qatar, Saudi Arabia, Turkey, and the United Arab Emirates.

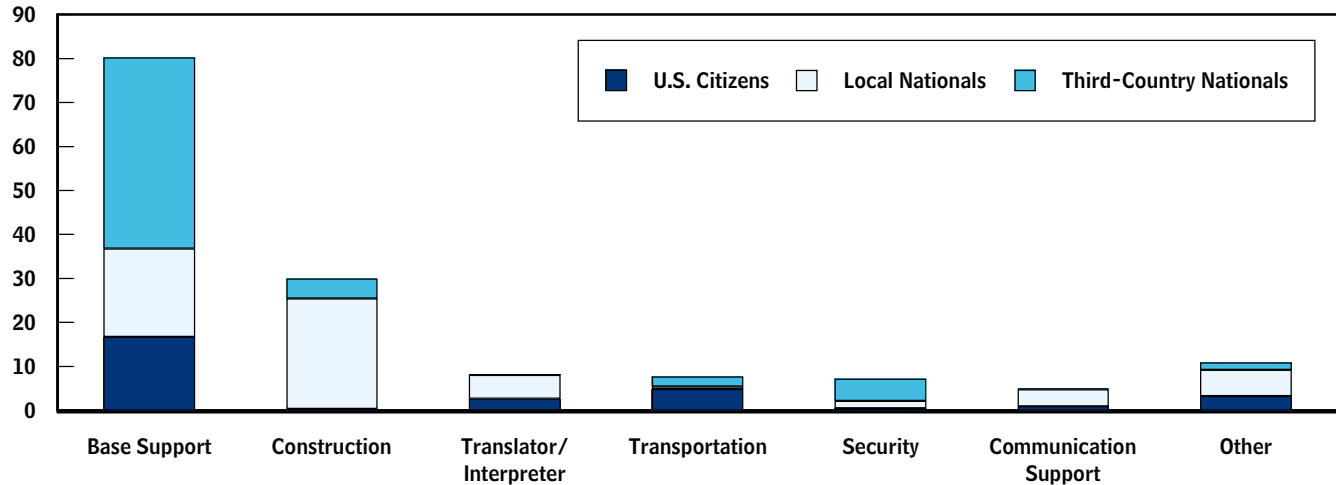
Local nationals are citizens of the country in which they are working. Third-country nationals are neither U.S. citizens nor local nationals.

- Data include both prime contractors and subcontractors; they also include contractors working for the Army Corps of Engineers.
- The Department of Defense is the only government agency with a significant number of contractor personnel who are supporting operations in Iraq but are located in countries elsewhere in the Iraq theater. Although CBO's estimates exclude contractor personnel working in Afghanistan, some personnel located in the Iraq theater may be supporting operations in Afghanistan.
- The Department of State counts only prime contractors and was therefore unable to provide estimates of the number of subcontractors working on its contracts. The department's data do not include contractors working under its Personal Service Agreements (such individuals are treated as employees of the U.S. government).
- The U.S. Agency for International Development (USAID) counts only prime contractors and was therefore unable to provide estimates of the number of subcontractors working on its contracts. Those data, collected in the summer of 2007, also exclude USAID grantees and an estimated 75,000 Iraqis (as of fall 2007) who were working on programs sponsored by USAID in Iraq.
- Includes the Departments of Agriculture, Commerce, Health and Human Services, the Interior, Justice, Transportation, and the Treasury, as well as the Broadcasting Board of Governors and the General Services Administration. Data are CBO estimates using contract obligations from the Federal Procurement Data System—Next Generation.

Figure 4.

Number of Contractor Personnel Working on Contracts in Iraq Funded by the Department of Defense, by Function and Nationality

(Thousands)



Source: Congressional Budget Office based on data from U.S. Central Command, *2nd Quarter Contractor Census Report* (April 30, 2008).

Note: Data include people working for subcontractors.

have typically been the responsibility of their employers. Increased use of performance-based contracting—a procurement model that emphasizes outcomes rather than specification of work processes—has further reduced the government’s ability to know how many people are working on a given contract. (Performance-based contracts are described in Federal Acquisition Regulation (FAR), subpart 37.6.)

As operations in Iraq and elsewhere continue, however, government agencies have strengthened their efforts to account for contractor personnel.¹¹ DoD, for example, believes that the accuracy of the data in CENTCOM’s

quarterly census of contractors has improved since the census’s inception in August 2006.¹² (According to DoD, the counts of contractor personnel are the most accurate for U.S. citizens and the least accurate for Iraqis.) DoD is also working to fully implement a Web-based system for tracking contractor personnel (known as the Synchronized Predeployment and Operational Tracker, or SPOT) before the end of calendar year 2008. A March 2007 update to the Defense Federal Acquisition Regulation Supplement (DFARS) requires contractors to report counts of their personnel into that system.¹³ SPOT currently contains roughly half of the contractor personnel counted in CENTCOM’s manual census, including all personnel of prime contractors employed on DoD’s

11. Legislation has spurred improved tallying and tracking of contractor personnel in Iraq. For example, sections 815 and 854 of the National Defense Authorization Act for Fiscal Year 2007 (Public Law 109-364); section 3305 of the U.S. Troop Readiness, Veterans’ Care, Katrina Recovery, and Iraq Accountability Appropriations Act, 2007 (Public Law 110-28); and section 861 of the National Defense Authorization Act for Fiscal Year 2008 (Public Law 110-181) have each required DoD to issue reports detailing the use of contractors operating in-theater and the policies that govern them.

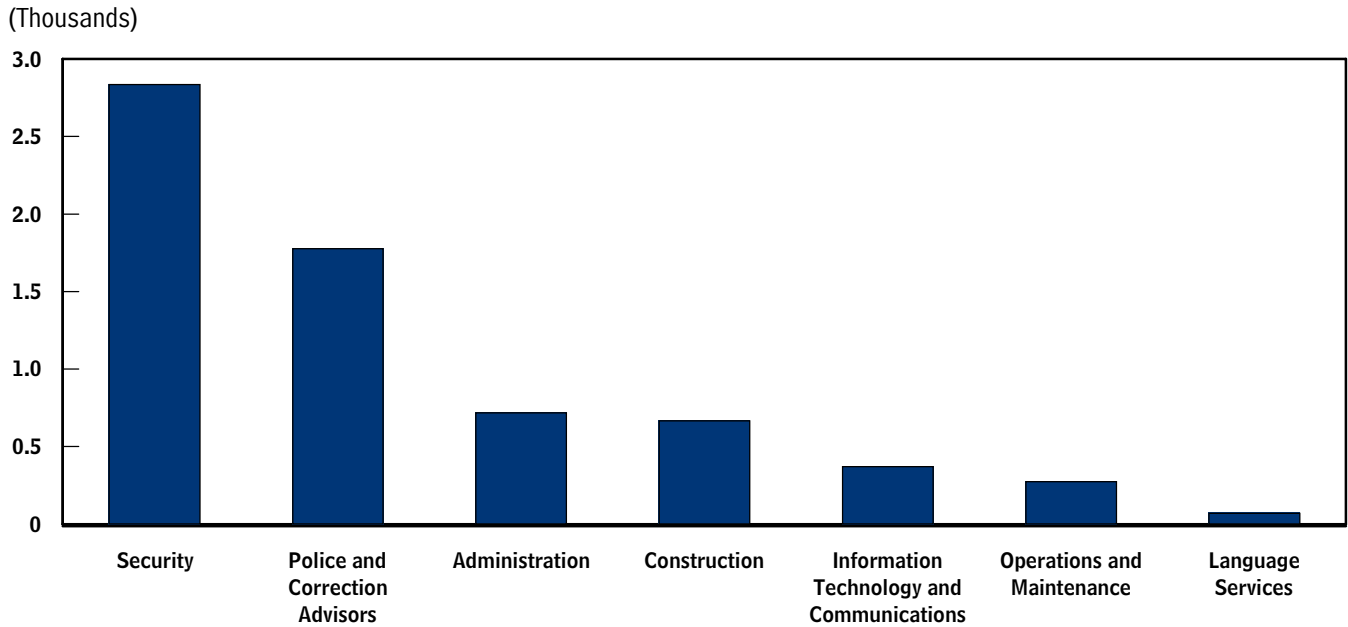
For a detailed description of DoD’s initiatives to improve its management of contractors accompanying the force, refer to Department of Defense (2007b); DoD (2008b).

12. Although CENTCOM had collected six quarters of census data as of April 2008, trends in the number of contractor personnel are not meaningful because of low confidence in the accuracy of the early quarterly counts and inconsistencies in how the data have been collected. An increase in the number of contractors, for example, could be due to actual growth in the number of contract personnel in Iraq, more complete reporting, or a combination of both factors.

13. Refer to DFARS clause 252.225-7040. DFARS is a DoD supplement to the U.S. government’s Federal Acquisition Regulation, which sets the policies and procedures for acquisition by all agencies in the executive branch.

Figure 5.

Number of Contractor Personnel Working on Contracts in Iraq Funded by the Department of State, by Function



Source: Congressional Budget Office based on data from the Department of State.

Note: Data include U.S. citizens, local nationals, and third-country nationals; they exclude people working for subcontractors and people working under the Department of State’s Personal Service Agreements (people in the latter group are treated as employees of the U.S. government).

contracts to provide security, translator, and linguist services in Iraq (DoD 2008c). CENTCOM’s manual counting will continue until SPOT is robust. When fully implemented, SPOT will track all contractor personnel working on both new and existing contracts that are funded by DoD, DoS, and USAID.¹⁴

Some Members of Congress have expressed concern that contractors’ recruitment of government personnel is depleting the supply of specific in-demand skills and experience within the federal workforce (see, for example, House Committee on Armed Services, 2004). In particular, during the first few years of operations in Iraq, private security firms increased their size by drawing on former special operations forces for additional personnel. The Government Accountability Office (GAO) found in 2005, however, that the expanded use of private security

contractors did “not appear to be increasing attrition among military personnel” (GAO 2005, p. 35). More recently, DoD officials have said that the hiring of experienced military and government personnel by contractors is not causing significant shortages of certain categories of military personnel at this time.¹⁵ Because of a lack of data, CBO was unable to determine the number of contractor personnel who are former U.S. military or U.S. government civilians.

Comparing Past and Present Use of Contractors During Military Operations

Throughout the history of U.S. military conflicts, contractor personnel have worked alongside military and government civilian personnel in the theater of opera-

14. Section 861 of the National Defense Authorization Act for Fiscal Year 2008, Public Law 110-181, required DoD, DoS, and USAID to identify a common database for information on contracts and contractor personnel in Iraq and Afghanistan. SPOT has been selected as that database.

15. Interview with officials from the Office of the Assistant Deputy Secretary of Defense (Program Support) and DoD’s Office of the General Counsel, February 21, 2008, and follow-up communications.

tions. The United States has hired contractors to perform noncombat functions beginning with the Revolutionary War and continuing to the present day.¹⁶ Contractors typically provide services judged too menial or too specialized for government personnel to accomplish themselves. Those services generally fall under the following broad categories (Epley 1990):

- Transportation (moving people, supplies, and equipment);
- Engineering and construction (building and repairing bases, bridges, roads, railways, and communications systems);
- Maintenance (providing technical support for increasingly complex equipment);
- Base operations (providing food and housekeeping services on bases); and
- Medical (using civilian surgeons, nurses, and attendants).

Contractors continue to provide most of those services in-theater today, with the exception of medical support, almost all of which is now provided by military personnel. Contractors also perform some functions, such as security, that traditionally have been reserved for the military.

Although the use of contractors during military operations is well established, most experts agree that the scale of the deployment of contractor personnel in the Iraq theater (relative to the number of military personnel in the country) is unprecedented in U.S. history. Historical data on numbers of contractor personnel in-theater, though sparse and inexact, support that conclusion.¹⁷ The current ratio of contractor to military personnel in the Iraq theater is 1 to 1—higher than it has been during any other major U.S. military operation (see Table 2). In

16. For a more detailed discussion of the support that contractors have provided during past contingency operations, see CBO (2005), Chapter 1. For the historical use of armed contractors, see Parks (2005) and Tabarrok (2007).

17. CBO does not have historical data on numbers of contractor personnel used by DoS during earlier contingency operations. Other U.S. agencies, such as USAID, do not have a history of working in-theater until after military operations have ended.

the 1990s, however, U.S. operations in the Balkans illustrated the potential extent of the use of contractors during future conflicts. The ratio of contract to military personnel in the Balkans was also about 1 to 1, but those operations involved no more than 20,000 U.S. military personnel at any time, about one-tenth of the total in the Iraq theater as of December 2007. The Army used the LOGCAP contract in the Balkans, and logistics support was also provided through the Balkans Support Contract.

The historically high ratio of contractor personnel to military personnel in the Iraq theater is the result of several factors. In response to reductions in the size of the post-Cold War military, DoD has augmented its force structure by relying more heavily on contractors for support functions, for example, through LOGCAP (CBO 2005, pp. 16–21). Those contractors perform functions in-theater that would otherwise require the deployment of additional military personnel. The extent of DoD's contracting is particularly evident during prolonged, large-scale operations—like those in Iraq—where there may not be enough military personnel available to provide logistics support.

More generally, the U.S. government has placed greater emphasis in recent decades on outsourcing activities to the private sector that are not inherently governmental. The government's policy is to subject services identified as commercial to the forces of competition.¹⁸ In addition, the ratio of contractor personnel to military personnel reflects the United States' attempt to reconstruct Iraq while military activities are under way, rather than delaying rebuilding until hostilities have ended. As a result, that ratio includes thousands of contractor personnel associated with Iraq's reconstruction, not with military operations.

Private Security Contractors

Providing security for all personnel, including contractors, is an inescapable aspect of U.S. operations in Iraq because of the instability and violence in that country. Under current DoD policy in Iraq, the military provides security to contractors and government civilians only if

18. See Office of Management and Budget (2003) for federal policy on determining whether services should be provided by government or commercial sources.

Table 2.

Presence of Contractor Personnel During U.S. Military Operations

| Conflict | Estimated Personnel (Thousands) | | Estimated Ratio of Contractor to Military Personnel ^a |
|--|---------------------------------|----------|--|
| | Contractor ^a | Military | |
| Revolutionary War | 2 | 9 | 1 to 6 |
| War of 1812 | n.a. | 38 | n.a. |
| Mexican-American War | 6 | 33 | 1 to 6 |
| Civil War | 200 | 1,000 | 1 to 5 |
| Spanish-American War | n.a. | 35 | n.a. |
| World War I | 85 | 2,000 | 1 to 24 |
| World War II | 734 | 5,400 | 1 to 7 |
| Korea | 156 | 393 | 1 to 2.5 |
| Vietnam | 70 | 359 | 1 to 5 |
| Gulf War | 9 ^b | 500 | 1 to 55 ^b |
| Balkans | 20 | 20 | 1 to 1 |
| Iraq Theater as of Early 2008 ^c | 190 | 200 | 1 to 1 |

Source: Congressional Budget Office based on data from William W. Epley, "Civilian Support of Field Armies," *Army Logistician*, vol. 22 (November/December 1990), pp. 30–35; Steven J. Zamparelli, "Contractors on the Battlefield: What Have We Signed Up For?" *Air Force Journal of Logistics*, vol. 23, no. 3 (Fall 1999), pp. 10–19; Department of Defense, *Report on DoD Program for Planning, Managing, and Accounting for Contractor Services and Contractor Personnel During Contingency Operations* (October 2007), p. 12.

Note: n.a. = not available.

- a. For some conflicts, the estimated number of contractor personnel includes civilians employed by the U.S. government. However, because most civilians present during military operations are contractor personnel, the inclusion of government civilians should not significantly affect the calculated ratio of contractor personnel to military personnel.
- b. The government of Saudi Arabia provided significant amounts of products and services during Operations Desert Shield and Desert Storm. Personnel associated with those provisions are not included in the data or the ratio.
- c. For this study, the Congressional Budget Office considers the following countries to be part of the Iraq theater: Iraq, Bahrain, Jordan, Kuwait, Oman, Qatar, Saudi Arabia, Turkey, and the United Arab Emirates.

they deploy with the combat force or directly support the military’s mission (GAO 2005, p. 10).¹⁹ Unless special arrangements are made, U.S. government agencies and contractors, such as reconstruction contractors, that do not meet that requirement must provide their own security. As a result, the use of contractors to provide security has increased—a well-publicized and controversial aspect of contractor support in Iraq.

Private security contractors, or PSCs (also referred to as private security companies), protect people and property in Iraq for U.S. agencies, the Iraqi government, and private businesses, namely, other contractors working in Iraq. Virtually all PSCs in the Iraq theater work in Iraq. They provide personal security details for high-ranking

officials, security escorts for government and contractor personnel, security for convoys and at fixed sites, and advice and planning related to security (GAO 2005, p. 9).

Costs for Private Security Contractors and Subcontractors

CBO estimates that total spending by U.S. agencies and U.S.-funded contractors for private security services ranged between \$6 billion and \$10 billion over the 2003–2007 period. Between \$3 billion and \$4 billion of that spending was for obligations made directly by the U.S. government for private security services in Iraq.²⁰ The government’s obligations for those services have

19. DFARS Procedures, Guidance, and Information, PGI 225.7402. The Army provides security for LOGCAP contractor personnel under that policy. The LOGCAP contract does not permit the hiring of subcontractors to provide security.

20. CBO’s estimate, based on data from FPDS-NG and JCC-I/A, is a range because some obligations that may be for security contracts are not clearly categorized or described. Security services are distributed across several categories of product and service codes.

amounted to roughly between \$500 million and \$1.2 billion annually since 2005. DoD, DoS, and USAID have awarded all of the U.S. government contracts for security services in Iraq. Since Iraq's transition to sovereignty, DoS's security contracts have also protected USAID employees, so USAID is not obligating new funds for PSCs in Iraq.

Contractors hired by the U.S. government that are not protected by the U.S. military generally hire PSCs as subcontractors to provide security. Neither FPDS-NG nor U.S. agencies explicitly track the costs of those subcontracts because those costs are not direct government obligations. Consequently, estimating the costs associated with subcontracts for security services in Iraq generates a wide range of values.

CBO estimates that U.S.-funded contractors spent \$3 billion to \$6 billion for subcontractors to provide security services over the 2003–2007 period. That spending makes up the balance of CBO's \$6 billion to \$10 billion estimate of total spending for those services. CBO calculated that range by first estimating the value of the government's service contracts performed in Iraq that required nonmilitary security. That estimate—\$32 billion—is based on the assumptions that the military provides security for the LOGCAP contract, that contracts for products do not have significant security costs, and that JCC-I/A contracted for products or services at a ratio similar to that for all other in-theater contracts supporting operations in Iraq. CBO then determined that contractors spend between 10 percent and 20 percent of that \$32 billion on security subcontracts.²¹

Costs for PSC Personnel Compared with a Military Alternative

A widely reported aspect of private security contractors is the perception that PSC personnel cost significantly more than equivalent military personnel. For example, in Joseph Stiglitz and Linda Bilmes's estimates of the overall cost of the war in Iraq, they state that "In 2007, private security guards working for companies such as Blackwater and DynCorp were earning up to \$1,222 a day; this amounts to \$445,000 a year. By contrast, an Army ser-

geant was earning \$140 to \$190 a day in pay and benefits, a total of \$51,100 to \$69,350 a year."²²

Those figures, however, are not appropriate for comparing the cost-effectiveness of contracting the security function or performing it using military personnel. The figure of \$1,222 a day represents the contractor's billing rate, not the amount paid to the contractor's employees. The billing rate is greater than an employee's pay because it includes the contractor's indirect costs, overhead, and profit. A better comparison would involve estimating a soldier's "billing rate"—the total cost to the government of having a soldier fill a deployed security position for one year. Further, contractors generally bid various numbers of personnel in different labor categories, so focusing on a single labor category—such as the security guards—gives an incomplete picture of the total cost of providing security. A better comparison would also reflect all types of personnel as well as nonlabor costs (such as vehicles and other equipment) that a security contractor includes in its bid.

CBO performed such an analysis, comparing the costs of a private security contractor with those of a military alternative. That analysis indicates that the costs of the private contractor did not differ greatly from the costs of having a comparable military unit performing similar functions. During peacetime, however, the military unit would remain in the force structure and continue to accrue costs at a peacetime rate, whereas the private security contract would not have to be renewed (see Box 2).

Number of PSC Personnel in Iraq

Reported tallies of the total number of PSC personnel in Iraq vary. In 2005, DoD estimated that at least 60 private security providers were operating in Iraq, with as many as 25,000 employees working for the U.S., Iraqi, and coali-

21. For example, a \$100 million contract would allocate between \$10 million and \$20 million for security. That range is based on information from Department of State (2006); GAO (2006); and discussions with officials of the Army Corps of Engineers.

22. See Stiglitz and Bilmes (2008), p. 12. Their figures appear to come from a memorandum to members of the House Committee on Oversight and Government Reform, *Additional Information About Blackwater USA* (October 1, 2007), <http://oversight.house.gov/documents/20071001121609.pdf>. The committee's report sources the contractors' figures to invoices from a particular contract that Blackwater had with the Department of State; the committee posted that information on its Web site (<http://oversight.house.gov/story.asp?ID=1509>, accessed June 20, 2008). The report sources the military's figures to an online compensation calculator of the Department of Defense (subsequently moved to www.defenselink.mil/militarypay/pay/calc, accessed June 20, 2008).

tion governments, businesses, and other customers (GAO 2005, p. 8). The Private Security Company Association of Iraq (PSCAI), an industry association with 40 member companies, puts that number at about 30,000 in 2008. That estimate, which excludes some Kurdish areas where PSCAI has no presence, includes approximately 5,000 U.S. citizens, 15,000 Iraqis, and 10,000 third-country nationals.²³

Approximately 30 percent to 40 percent of PSC personnel work directly for the U.S. government as prime contractors. That share assumes that estimates of the total number of PSC personnel (25,000 to 30,000) are accurate. According to CENTCOM's April 2008 census of contractors, almost 7,300 PSC personnel (including all nationalities) work on DoD-funded contracts or subcontracts. Nearly 3,000 additional PSC personnel (including all nationalities) work directly for DoS as prime contractors.²⁴ The remaining 15,000 to 20,000 work for the Iraqi government, other coalition governments such as Great Britain, or private companies. (CBO does not have estimates of how many PSC personnel work for each of those customers.) Among some of the larger non-U.S. employers are Baghdad International Airport, which employs approximately 1,000 PSC personnel, and the 43 diplomatic missions in Iraq (most of which hire private security contractors).

PSC Personnel Who Are Armed

Given the nature of their work, many PSC personnel are armed. CENTCOM's census reports that about three-quarters of the 7,300 PSC personnel working for DoD in Iraq carry weapons. A similar proportion of armed personnel probably holds for all other PSCs in Iraq.

The presence of armed contractor personnel—hired by various governments, agencies, and businesses—has created significant challenges for the United States in overseeing contractors and managing the combat zone in Iraq (GAO 2006). As events in that country have shown, the presence of armed contractors introduces the possibility of shooting incidents between contractor personnel and military or local civilian personnel. In response to those issues and to requirements instituted by the National Defense Authorization Act for Fiscal Year 2008, DoD and DoS signed a memorandum of agreement in December 2007 to jointly develop policies and procedures for vetting, training, and using PSC personnel.²⁵ Under that agreement, PSCs working for the U.S. government will follow common principles regarding the use of force, and details of all of their movements will be provided in advance to the appropriate military commander. The role of private security contractors in Iraq, including their possession and use of weaponry, has also generated questions about their legal status, as described in the next section.

Legal Issues Associated with Contractor Personnel Supporting U.S. Operations

The restrictions on how contractor personnel are used and the mechanisms by which they are controlled are different from the corresponding restrictions and mechanisms for uniformed military personnel or civilian government employees. Contractor personnel have a different legal status than government employees and are subject to different regulations and laws (both U.S. and international). Those differences have led some Members of Congress to express concern about using contractors as part of military operations—concerns that date back to the use of contractors in the Revolutionary War (Cahlink 2002; Continental Congress 1781, p. 591; GAO 2008b; Pincus 2008; Senate Committee on Armed Services 2007; Shrader 1999; Zamparelli 1999).

23. CBO phone interview with PSCAI in February 2008. Although PSCAI does not maintain a formal database of contractors, the association has frequent contact with its members and the Iraqi and coalition governments. One of PSCAI's functions is to help PSCs register with the Iraqi Minister of Interior and to verify that registry with U.S. contracting authorities. See PSCAI, www.psc.ai.org/moikrgreg.html, accessed February 26, 2008.

24. Meeting with DoS officials, November 2007. About 1,700 contractor personnel provide local guard services for DoS in Iraq. An additional 1,150 contractor personnel in Iraq work as bodyguards and provide security for fixed sites under DoS's Worldwide Personal Protective Services umbrella contract.

25. Memorandum of Agreement (MOA) between the Department of Defense and the Department of State on USG [U.S. Government] Private Security Contractors (December 5, 2007), as required by section 862 of the 2008 defense authorization act. Section 861 of that act further requires DoD, DoS, and USAID to enter into a memorandum of understanding (MOU) by July 2008 that establishes policy, guidance, and regulations covering all contracts and contractor personnel in Iraq and Afghanistan.

Box 2.**Costs of a Private Security Contract and a U.S. Military Alternative**

The Congressional Budget Office (CBO) analyzed available information on a security contract between Blackwater and the Department of State for the one-year period beginning June 11, 2004. Because the terms of security contracts vary in the work to be performed and the qualifications of contractor personnel, the Blackwater contract is not necessarily representative of other security contracts.

Private Security Contractor Personnel

Nearly 80 percent of personnel on the Blackwater contract were bid as “protective security specialists” (PSS) and billed at \$1,222 per day, or \$1,325 in 2008 dollars. The contract included other types of personnel—those who supervise the PSS (such as project managers and detail leaders) and those who support their activities (such as administrative personnel and emergency medical technicians). Blackwater bid 314 operational positions and 7 positions in project management and administration but did not propose to fill every position every day; the contract would deliver 189 full-time equivalent (FTE) operational personnel. The contract also included about \$1.7 million to lease nine personnel carriers (vehicles) and provide spare parts. Other equipment costs were not shown explicitly but were presumably rolled into the labor rates.¹ Finally, the contract included about \$2.1 million for insurance, yielding a total cost of \$99 million for the 189 FTEs for one year (in 2008 dollars, and excluding aviation support, which CBO did not analyze).

Military Personnel

To compare the costs of private security contractor personnel (PSCs) and military personnel, CBO assumed that an equivalent U.S. military force would be composed of units of light infantry (units not equipped with heavy armored vehicles). Using infantry as a substitute for PSCs is supported by the fact that U.S. Marines have traditionally provided infantry personnel to guard U.S. missions overseas; since 1986, however, private companies have also been allowed to compete for security contracts.² The dif-

ferences between Marine and Army infantry units would not be relevant for performing a security mission; CBO assumed that the Army, because of its greater size, would be more likely to provide units to replace PSCs.

Typically, an Army unit would not be organized in the same way as a contractor’s workforce. To calibrate the two, CBO identified a hypothetical Army unit that could deliver roughly the same 189 FTEs as Blackwater. The precise mix of personnel in the two workforces would differ because Army doctrine implies support elements in different proportions than those observed in Blackwater’s contract. Delivering 189 FTEs would require about one-third of an Army light infantry battalion—a rifle company plus one-third of the battalion’s headquarters company.³ The headquarters company would include not only command elements but also medics, scouts, snipers, and others who functionally correspond to some of Blackwater’s specialized personnel.⁴

Costs Included in the Analysis

CBO included three types of costs in its analysis: military personnel costs, operating costs, and equipment costs. The military pay rates (\$140 to \$190 a day) correspond to cash pay (basic pay, subsistence and housing allowances, plus a federal tax advantage because those allowances are not taxed) but exclude noncash benefits, such as free health care for military families back home, and deferred benefits, such as pay and health care for those who receive military retirement benefits. Cash pay accounts for about half of total peacetime compensation for typical enlisted personnel.⁵ CBO therefore roughly doubled cash pay when estimating annual personnel costs for the Army to perform

1. Testimony of Erik D. Prince, chairman and CEO of Blackwater USA, before the House Committee on Oversight and Government Reform (October 2, 2007). Prince said, “They [the contractor personnel] need uniforms, equipment, body armor, boots, everything you wear from head to toe, their training, their travel, their insurance, [and] sometimes their food.” See the preliminary transcript, p. 128, <http://oversight.house.gov/story.asp?ID=1509>.

2. Omnibus Diplomatic Security and Antiterrorism Act of 1986, Public Law 99-399.

3. Such a battalion also has a weapons company, but security personnel would probably not need the additional heavy machine guns, grenade launchers, and antitank missiles that a weapons company provides.

4. The typical soldier would be a corporal (pay grade E-4); virtually all soldiers of that rank have served for at least three years. All PSS contractor personnel have at least one year’s experience in protective security work, which may have been gained in the Army or Marine Corps infantry or, alternatively, in other federal agencies such as the Federal Bureau of Investigation, Secret Service, or the Department of State (see statement of Richard J. Griffin, Assistant Secretary of State, Bureau of Diplomatic Security, before the House Committee on Oversight and Government Reform, October 2, 2007). Army infantry personnel would have much of the training required to perform the PSS function, except possibly in skills such as motorcade operations and evasive driving.

5. Congressional Budget Office, *Evaluating Military Compensation* (June 2007), Table 2.

Continued

Box 2.

Continued

Costs of a Private Security Contract and a U.S. Military Alternative

| Type of Cost | Cost of Army Infantry Units (Millions of 2008 dollars) | | | | | Blackwater's Costs (Millions of 2008 dollars) |
|--------------------|--|-----------------------------------|-------------|-----------------------------------|--------------|---|
| | Deployed Units | Case 1—1.2 Units in Rotation Base | | Case 2—2.0 Units in Rotation Base | | |
| | | Rotational Units | Total Cost | Rotational Units | Total Cost | |
| Military Personnel | 21.8 | 24.9 | 46.6 | 41.5 | 63.2 | |
| Operations | 33.2 | 7.4 | 40.6 | 12.4 | 45.6 | |
| Equipment | 0.4 | 0.5 | 0.9 | 0.8 | 1.2 | |
| Total Costs | 55.4 | 32.8 | 88.2 | 54.6 | 110.1 | 98.5 |

Source: Congressional Budget Office based on Blackwater's invoice for contract S-AQMPD-04-D-0061.

functions in Iraq and then added the costs of providing special pays to deployed soldiers.⁶

The Army's goal is to have two units at home station (that is, in the rotation base) for each unit deployed overseas.⁷ The time at home lets units recuperate from their deployment, reconstitute personnel and equipment, and train for their next deployment.⁸ The Army, however, has not been achieving its rotation goal. CBO previously estimated that the ratio of units at home station to units deployed was 1.2 as of April 2007 (just before the "surge" in U.S. forces in Iraq), and the ratio has averaged about that value as far back as 2004.⁹ To capture the costs of maintaining a rotation base for infantry units assigned to provide security in Iraq, CBO analyzed two cases: Case 1 adds the cost of 1.2 soldiers at home for each soldier deployed; Case 2 adds the cost of 2.0 soldiers at home. CBO included only peacetime costs for soldiers at home station, not wartime special pays.

Operating costs would be paid out of the Army's operations and maintenance (O&M) appropriation. CBO estimated O&M costs separately for the deployed unit and for the 1.2 or 2.0 units at home station. Finally, CBO assumed that equipment for the deployed unit, and its counterparts at home station, would have a useful life of 20 years. Thus, CBO amortized one-twentieth of the total equipment cost for a single year's operations.¹⁰

Comparison of the Estimated Costs

CBO estimated the Army's total costs at \$88 million to maintain 1.2 units at home station and \$110 million to have 2.0 units at home station for each deployed unit (see the table above). Those costs bracket Blackwater's total cost of \$99 million to perform the same security function.

The costs of the two organizations would be different in peacetime. The Blackwater contract would not have to be renewed once the Iraq conflict ends, except possibly for a small retainer to allow Blackwater to maintain a capability to meet the demands for security in a future conflict. The Army units would stay in the force structure, although they would accrue costs at a peacetime rate without the wartime special pays or the elevated rate of O&M spending. CBO estimates the Army's annual peacetime cost at \$60 million to maintain 2.2 units (where "unit" again represents about one-third of an Army light infantry battalion) and \$82 million to maintain 3.0 units. During peacetime, however, the Army units need not devote themselves to security missions that parallel Blackwater's contract. Army infantry units can serve many other functions in peacetime or in other conflicts.

6. Those special pays are Hostile Fire and Imminent Danger Pay, \$225 a month; Hardship Duty Pay, \$100 a month; and, for soldiers who have dependents and are away from their family for at least 30 consecutive days, Family Separation Pay, \$250 a month.

7. Statement of Richard Cody, Vice-Chief of Staff, U.S. Army, before the Subcommittee on Military Personnel of the House Committee on Armed Services (February 2, 2005). www.army.mil/leaders/leaders/vcsa/testimony/20050202.html.

8. Blackwater deploys its security personnel to Iraq for at most 90 days, then flies them back to the United States; they must wait another 90 days before Blackwater will redeploy them. Blackwater does not pay its personnel during their 90-day layovers and therefore, unlike the Army, does not have an explicit rotation base. However, Blackwater implicitly maintains its workforce by paying its employees enough during their 90-day deployment that they can afford the layover. Those costs are captured by the in-theater billing rates in Blackwater's contract.

9. Congressional Budget Office, *Some Implications of Increasing U.S. Forces in Iraq* (April 2007), Figure 1 and Table 1.

10. If the Army added infantry units to its force structure, and particularly if this analysis was scaled to replace more than a single private security contract with infantry units, a large up-front outlay would have to be made to initially equip those units. CBO reports instead the recurring annual amortization to equip the units.

The legal issues regarding the government's use of contractors to support military operations are encapsulated in the following four questions:

- What restrictions are placed on the use of contractors?
- What authority does the U.S. military have over the actions of contractor personnel?
- What is the legal status of contractor personnel supporting military operations such as those in Iraq?
- What laws govern the actions of contractor personnel?

The Congress and the President have enacted legislation and DoD has changed its policies in response to problems and concerns that have arisen in recent military operations overseas, and that process is ongoing. This section discusses in greater detail several of the legal issues that have come to light under the framework of those four questions. The new laws and policies, and assertions of jurisdiction related to them, may be challenged in U.S. and international courts. Because of those potential challenges, CBO's assessment provides only tentative answers to some of the questions posed above.

Restrictions on the Use and Arming of Contractor Personnel

The federal government uses several approaches to identify which functions should be performed only by government personnel and which others may be contracted to the private sector.²⁶ The Federal Activities Inventory Reform Act of 1998 (FAIR) and guidance provided by the Office of Management and Budget require functions classified as "inherently governmental" to be performed by government personnel. Inherently governmental functions are those that are "so intimately related to the public interest" as to mandate performance by government personnel; such activities generally require either exercising sovereign government authority or establishing procedures and processes related to the oversight of monetary transactions (Office of Management and Budget 2003, p. A-2).²⁷ Applying those constraints, the Department of

Defense characterizes some functions—those directly linked to the military's warfighting mission or requiring personnel who have recent hands-on experience in a military position—as "core" or "military essential" and may also reserve them for government personnel.²⁸

DoD's core or military essential functions can be defined narrowly as those associated directly with the use of physical force (and thereby also meet the definition of inherently governmental as an exercise of sovereign government authority). However, the term "core" is sometimes used more broadly and subjectively to include functions less directly related to warfighting, such as those defined as "core business missions" of the Defense Business Transformation Agency (DoD 2008a) and "core depot maintenance" for weapon systems (DoD 2007a).²⁹ Those designations are sometimes applied to commercial-type functions that are required by law or policy to be performed by government employees. For example, federal law requires that DoD perform at least half its annual volume of depot maintenance activities at in-house facilities.³⁰ The difference between the two interpretations of core functions leaves ambiguous the classification of particular support functions, such as maintenance, and whether or to what extent having contractors perform such support functions is appropriate (CBO 1995, p. xi; GAO 2003, pp. 3, 11).

In instances in which the classification is ambiguous, additional factors must be considered to determine whether a particular function can or should be performed by contractors. Those factors include cost, risk, flexibility, the government's ability to draft an enforceable contract, and the availability of government employees (for example, in cases like Iraq, in which there may not be enough military personnel to perform logistics support) (Camm and Greenfield 2005, p. 56; CBO 2005, p. 32). In practice, most classifications based on the above criteria exclude certain functions that involve making financial or policy decisions, overseeing contractors, conducting offensive military operations, and performing police

26. This section focuses on the types of functions that must be performed by government employees rather than on the broader question of which functions should be paid for by government funds. For example, building and repairing roads is a function often paid for by public funds but performed by private companies.

27. Federal Activities Inventory Reform Act of 1998 § 5, 31 U.S.C. § 501 note.

28. For one definition of "core," see DoD (2001), p. 53; for other definitions, see GAO (2003), p. 1. "Military essential" is defined in Camm and Greenfield (2005), p. 179.

29. 10 U.S.C. § 2464.

30. 10 U.S.C. § 2466.

functions. Contractors, however, sometimes provide support to government personnel who perform those functions (GAO 2008a, p. 8).

The U.S. government often reserves certain functions, such as those involving a high risk of physical harm or the likely application of physical force, for uniformed law enforcement agencies (for example, federal marshals or customs agents) or for the military. There are many exceptions, however, including contractor personnel who accompany military forces, private bounty hunters, and security guards (Drimmer 2006, p. 734; Industrial College of the Armed Forces 2006, p. 2; Sklansky 1999, p. 1175). In a military operation like the current one in Iraq, contractor personnel performing logistics functions, such as driving trucks, may encounter enemy forces and be at risk of physical harm above and beyond what they would face in most domestic occupations (Debusmann 2007, p. 13).³¹

When DoD contractor personnel are at risk of physical harm, the Combatant Commander may authorize contractor personnel to be armed for self-defense (DoD 2005, sections 6.3.4 and 6.3.5).³² The Combatant Commander must determine on an individual basis whether military forces can adequately protect contractor personnel, whether military protection is inadequate and contractor personnel need to be armed to provide for their safety, or whether the function is so dangerous that it should instead be performed only by military personnel. A condition for arming contractor personnel is that they must be eligible to possess weapons under U.S. laws or under the laws of their home nation. Eligibility mainly requires the lack of any felony convictions. Armed contractor personnel must also be trained in the proper use of weapons and must voluntarily accept weapons for self-defense. With the exception of contractor personnel performing certain security functions discussed in the next paragraph, DoD policy limits contractor employees to carrying a sidearm (a pistol). As of February 28, 2008, 638 contractor employees in Iraq and Afghanistan were armed in that manner for self-defense. About 200 DoD civilians have also been armed for self-defense.³³

31. For a comparison of fatality rates for people in dangerous domestic occupations with rates for military personnel and logistics contractors in Iraq, see CBO (2005), p. 13.

32. That policy applies to defense contractors, their employees, and subcontractors at all tiers who are authorized to accompany the U.S. armed forces.

Additional issues arise for some types of contractor personnel, such as private security contractors, who perform functions that are similar to those of military combat forces (Northam 2007). When contractor personnel perform security functions, they may use small arms (with a caliber of 7.62 mm or smaller) similar to those used by infantry soldiers, but the contractors are subject to “rules of the use of force” that are more restrictive than the “rules of engagement” governing military forces.³⁴ Specifically, PSCs are not allowed to engage in any offensive military operations.³⁵ As of April 2008, 5,613 of DoD’s 7,259 security contractor personnel in Iraq were authorized to be armed (U.S. Central Command 2008).

Under DoD policy, contractors may provide security for fixed-perimeter defenses and private convoys as well as perform some police functions.³⁶ Thus, PSCs are sometimes positioned in a defensive posture adjacent to military forces, and those contractors—as well as contractor personnel performing other support functions—may drive armored vehicles into areas subject to attack. DoD recognizes the potential for problems to arise when placing contractor personnel in a position in which they are likely to be physically harmed or need to employ force, but DoD relies on the discretion of commanders rather than a clear policy rule to guide the use of contractors in such cases. “Contracts [for security services] shall be issued cautiously in contingency operations where major combat operations are ongoing or imminent,” and the security contractor personnel are not to guard military personnel or property unless authorized specifically by

33. Interview with officials from the Office of the Assistant Deputy Under Secretary of Defense (Program Support) and DoD’s Office of the General Counsel, February 21, 2008, and follow-up communications.

34. *Ibid.* For other statutory restrictions on using contractors to perform security functions, see 10 U.S.C. § 2465. Additional policy guidance in implementing those restrictions is found in Army Materiel Command (2000), p. 40-1; DoD (2006b); Office of Management and Budget (2003), p. A-3.

35. DoD policy also prohibits using contractors as mercenaries. See Army Materiel Command (2000), p. 40-2; 73 Fed. Reg. 16764–16765 (2008). Security contractor personnel are not generally considered mercenaries because their mission is to protect property and personnel, not to overthrow governments or undermine the order of the state. See De Wolf (2006), p. 323.

36. Interview with officials from the Office of the Assistant Deputy Under Secretary of Defense (Program Support) and DoD’s Office of the General Counsel, February 21, 2008, and follow-up communications; DoD (2006b); Elsea and Serafino (2007), p. 12.

the Combatant Commander, an authority that cannot be delegated (DoD 2005, section 6.3.5). A local commander may also restrict the movement of security contractor personnel according to the threat level.

Military Authority Over Contractor Personnel

Although military commanders can directly control the actions of military personnel and government civilians, their control over individual contractor personnel is less direct. Military personnel are subject to criminal punishment if they fail to obey a lawful order from their military commanders (Turner and Norton 2001, p. 35).³⁷ Government civilians may fall under the control of military commanders either permanently or temporarily during a conflict, but only under extraordinary circumstances would they be subject to administrative actions, such as suspension or termination, if they failed to obey an order (Turner and Norton 2001, p. 35). Military commanders may change the daily tasks and duties of military and civilian DoD employees within the usual military chain of command, subject broadly to the laws and regulations of the United States.³⁸ In practice, that authority enables the military commander to allocate the personnel under his or her command among any number of tasks those personnel are able and trained to do. The military commander may also request that additional personnel be reassigned from other parts of the government if necessary.

By contrast, the duties of contractor personnel are set out in a fixed written contract (DoD 2005, section 6.1.4; Vernon 2004, p. 369).³⁹ The military commander generally lacks the authority either to increase the scope (dollar value) of the contract or to change the contractor's duties except in ways anticipated in the contract language. However, using a task-order arrangement may enhance the flexibility of a contract by enabling the military com-

mander to add new tasks, sometimes quickly, to an existing contract within overall resource bounds (Army Regulation 700-137, "Logistics Civil Augmentation Program (LOGCAP)," December 16, 1985; CBO 2005, p. 25; Wilkinson 2007, p. 259). Task orders are particularly useful if the types of functions can be anticipated but not their timing or precise quantity. The LOGCAP contract is a task-order contract.

The contracting officer is the official designee of the head of the agency for binding the government on matters related to a particular contract (DoD 2005, section 6.3.3).⁴⁰ Typically a civilian, the contracting officer is not always colocated with the military commander or the contractor personnel and may not even be within the theater of operations (Douglas 2004, p. 139). The contracting officer may not have access to the place of performance if that place is remote or dangerous or if it covers a large geographic area (GAO 2007). Instead, he or she may rely on a technical representative, usually a military officer on the staff of the military unit being supported and colocated with the contractor. The technical representative interacts frequently, sometimes daily, with the contractor about details of performance but not about the scope or size of the contract.⁴¹ In one example that a security contractor provided to CBO, the technical representative often directed the location to which contractor personnel were assigned but did not determine the number of such personnel.

The military commander has less direct authority over the actions of contractor employees than over military or government civilian subordinates. The contractor, not the commander, is responsible for ensuring that employees comply with laws, regulations, and military orders issued in the theater of operations. Short of criminal behavior by contractor personnel, the military commander has limited authority for taking disciplinary action (DoD 2005, section 6.3.3).

37. Applying the Uniform Code of Military Justice to contractor personnel could mean criminal prosecution for disobeying an order, but that would be an unusual case. (Interview with officials from the Office of the Assistant Deputy Under Secretary of Defense (Program Support) and DoD's Office of the General Counsel, February 21, 2008, and follow-up communications.)

38. The commander can only give orders that are consistent with the laws and regulations of the United States (*Manual for Courts, United States*, 2008 ed., www.usapa.army.mil/pdffiles/mcm.pdf, p. iv-24). The commander and employees may also be subject to local laws, depending on the content of treaties and status-of-forces agreements.

39. Contracts are also governed by the Federal Acquisition Regulation and the Defense FAR Supplement. The regulations governing contractor personnel authorized to accompany U.S. armed forces under contracts performed outside the United States were recently revised along with the standard contract provisions. See 73 Fed. Reg. 10943-10959 (2008) and 73 Fed. Reg. 16764-16777 (2008).

40. FAR, 48 C.F.R. 1.602 (1995).

41. DFARS, 48 C.F.R. 201.602 (1991).

Legal Status of Contractor Personnel

The Laws of Armed Conflict (LOAC), primarily as embodied in the Third and Fourth Geneva Conventions, govern the status and treatment of people who come under the control of enemy forces engaged in a declared war or other armed conflict.⁴² U.S. policy is to follow those laws even in cases in which they may not apply, but enemy forces, such as the insurgency forces in Iraq, might not follow them (DoD 2006a).⁴³ Thus, even if DoD contractor personnel in Iraq qualified for protection under the LOAC, they might not receive it. The nature of the hostilities in Iraq may change, however, and enemies in future conflicts may recognize the LOAC. Therefore, the distinctions in legal status under the LOAC are still an important consideration in using contractor and government civilian personnel in positions in which they are subject to risk of capture. This section looks at distinctions in legal status and how that status changes when contractor and government civilian personnel are armed.

General Distinctions in Legal Status. The legal status of contractor personnel is not only different from that of military or government civilian personnel but is also subject to less agreement among legal scholars (CBO 2005, p. 12). It also depends on many factors such as their nationality, the phase of military operations, where they work, and what type of work they do (Davidson 2000; Elsea 2007, p. 7; Parks 2005; Rivkin and Casey 2008; Turner and Norton 2001, p. 24; Vernon 2004).

Under the LOAC, legal status determines whether personnel in a particular group can be targeted legitimately by enemy forces; how they should be treated if captured by enemy forces; and who would have the legal jurisdiction to punish their behavior if they committed offenses against the laws, regulations, or policies of the United States, the country where the work was performed, or international agreements (Vernon 2004). DoD has issued policies regarding the legal rights and responsibilities of contractor personnel, but some experts believe those poli-

cies are likely to face court challenges when DoD implements them (Elsea and Serafino 2007, p. 21).

Prisoner-of-War Status. Under the Laws of Armed Conflict, primarily as embodied in the Third Geneva Convention, the highest level of protection given to people who come under the control of enemy forces while engaged in a declared war or other armed conflict is called prisoner-of-war (POW) status. Uniformed military personnel, government civilians, and contractor personnel can all qualify for POW status under some conditions.⁴⁴ Most military personnel qualify if they meet the criteria for being a lawful combatant, but contractor and government civilian personnel generally have to remain non-combatants and carry appropriate identification cards (Army Materiel Command 2000, p. 11-2; Elsea 2007, p. 5; Turner and Norton 2001, pp. 25, 35). Under the LOAC, POW status affords protections such as humane treatment, the right to communications, and a safe return at the end of hostilities (Turner and Norton 2001, p. 66; Vernon 2004). Even when POW status does not apply, other provisions of the Geneva Conventions still call for some protections, such as humane treatment (Elsea and Serafino 2007).

Lawful Combatants. Lawful combatants are identified primarily by four criteria: clearly wearing particular types of uniforms or other distinguishing markings, carrying their weapons openly, operating under a clear command structure, and obeying the Geneva Conventions or other Laws of Armed Conflict. Military personnel, except for medical personnel and chaplains, usually qualify as lawful combatants under the Geneva Conventions, meaning that they are legitimate military targets of enemy forces.⁴⁵ They also obtain some immunity from prosecution for hostile actions taken during combat and receive POW

42. Third Geneva Convention Relative to the Treatment of Prisoners of War, August 12, 1949, 6 U.S.T. 3316; Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War, August 12, 1949, 6 U.S.T. 3516.

43. For U.S. citizens who are captured and taken hostage, U.S. government policy is to "use every appropriate resource to gain" their safe return but will "make no concessions to individuals or groups" holding the hostages (Department of State 2002).

44. The details of those conditions are complex and often in dispute, and they do not have equal authority and effect. One important determination is the current state of hostilities and the nature of the parties (such as international war, civil war, or occupation). This discussion does not attempt to comprehensively address the subject, but it does point out some differences in the treatment of military, government civilian, and contractor personnel. For more information, see Adedeji and Rosen (2000); Army Sustainment Command, www.aschq.army.mil/gc/battle2.asp; Davidson (2000); Elsea (2007); Parks (2005); Rivkin and Casey (2008); Rosky (2004); Turner and Norton (2001).

45. Medical personnel and chaplains have separate protections. See the Geneva Convention Relative to the Treatment of Prisoners of War, August 12, 1949, 6 U.S.T. 3317, art. 33.

status (Elsea 2007, p. 6). Contractor personnel are not classified as lawful combatants because they do not wear military uniforms and are not in the military chain of command.

Noncombatants. If contractor personnel take “no active part in hostilities,” they probably qualify as noncombatants (Guillory 2001, p. 115). As such, they would not be legitimate military targets of enemy forces, although they might be injured or killed during a military action against a legitimate target.

Illegal Combatants and Uncertain Status. The legal status of government civilians and contractor personnel performing functions closely linked to military operations—such as analyzing intelligence data, maintaining weapon systems, and resupplying forward-based forces—is less certain than that of contractor personnel performing purely commercial functions such as laundry or food services (Guillory 2001, pp. 134–136). Many contractor personnel deploy as systems technicians, helping to maintain, repair, and operate weapon systems. Others operate unmanned aerial vehicles that can provide reconnaissance or even fire weapons. Still others analyze intelligence data, which they may transmit in the form of targeting coordinates to unmanned aerial vehicles or other manned or unmanned platforms that fire weapons. Government civilians and contractor personnel performing such functions could be deemed to have taken an active part in hostilities, in which case they would no longer qualify as noncombatants. But they also do not meet the definition of a lawful combatant, and some experts argue that those personnel could be classified as illegal combatants and could be criminally prosecuted for actions taken during a conflict (Adedeji and Rosen 2000; Guillory 2001, pp. 134–136; Zamparelli 1999).⁴⁶ Illegal combatants are entitled to humane treatment, but they may be subject to more intensive interrogation than a POW and may not be entitled to be released after hostilities have ceased (Elsea 2007, pp. 19–43).

DoD’s position is that most of its contractor personnel in Iraq are neither combatants nor noncombatants and that they fall into a special category called “civilians authorized to accompany the force” (DoD 2000, p. V-6; DoD 2005, section 6.1.1).⁴⁷ DoD’s interpretation of the LOAC is that the combatant and noncombatant classifi-

cations apply only to military forces, but some experts disagree (Turner and Norton 2001, p. 30). According to DoD, civilians accompanying the force are entitled to some, but not all, protections afforded to noncombatants in addition to some protections afforded to combatants (McCullough and Edmonds 2004). For example, they qualify for humane treatment (and possibly POW status) yet may be subject to criminal prosecution under local laws for actions taken during the conflict (Davidson 2000, p. 245). Those contractor personnel are not legitimate targets of enemy forces, but the functions they perform are (Fortner 2000). For example, the equipment the personnel are using may be targeted, but not the personnel themselves.

The distinctions among combatant, noncombatant, civilian, and illegal combatant classifications for personnel working for the U.S. military may not have practical significance for a conflict like the current operation in Iraq. Insurgency forces have not been following the Laws of Armed Conflict; for example, they have detonated explosives in public areas that are as likely to result in the death of noncombatants (including Iraqi civilians) as well as combatants. The issues raised in this section involving the status of contractors who are captured will matter only when the United States faces an enemy that recognizes the LOAC. Even if that occurs, many related issues are subject to different interpretations that will take time to resolve.

Distinctions in Legal Status When Armed. The legal status of government civilians and contractor personnel becomes even less certain when they are armed. The in-theater military commander may authorize them to be armed for their own protection or to use arms in security guard functions (DoD 2005, sections 6.3.4 and 6.3.5).⁴⁸ Even if those personnel shot at enemy forces in self-defense, their noncombatant status could be open to challenge (Guillory 2001; Turner and Norton 2001, p. 27). The distinction between performing security functions and taking “no active part in hostilities” may be ambiguous in an atmosphere of frequent attacks (Elsea and Serafino 2007, p. 13).

47. Interview with officials from the Office of the Assistant Deputy Under Secretary of Defense (Program Support) and DoD’s Office of the General Counsel, February 21, 2008, and follow-up communications.

48. DFARS, 48 C.F.R. 252.225-7040 (2005).

46. *Ex parte Quirin*, 317 U.S. 1, 31 (1942).

Laws Governing the Conduct of Contractor Personnel Supporting Military Operations

Contractor personnel are potentially subject to a number of sources of law and jurisdiction.⁴⁹ Determining which laws govern contractor personnel depends on a variety of factors, including citizenship, location, and the particular laws they may have broken. Recent changes to U.S. law may make it easier to apply U.S. jurisdiction to contractor personnel in Iraq, but attempts to apply that jurisdiction could lead to challenges in court (Elsea and Serafino 2007, p. 21; GAO 2008b, p. 28).⁵⁰

Also, criminal jurisdiction is not exclusive to one country. In general, the concept of “dual sovereigns” means that in cases in which one sovereign (a foreign government, the U.S. government, or state government) has asserted jurisdiction, other sovereigns are not precluded from also attempting to assert jurisdiction.⁵¹ However, because assertions of jurisdiction have thus far been rare, dual sovereignty has been only a theoretical consideration to date.

Iraqi and International Law. Contractor personnel who commit crimes in Iraq could be tried in local Iraqi courts or International Criminal Courts except for the immunity agreement that the United States obtained from the Coalition Provisional Authority (CPA) and the U.N. Security Council (Garcia 2008, p. 5).⁵² The United States can waive that immunity but has chosen not to do so in any case thus far. The immunity, which also applies to contractors of other coalition partners, is set to expire in December 2008; the United States is negotiating to extend it (Byrne and McNett 2008).

Uniform Code of Military Justice. One type of jurisdiction that could be applied to contractor personnel is the Uniform Code of Military Justice (UCMJ), which outlines procedures for prosecuting members of the military

who commit crimes in the United States or abroad.⁵³ Traditionally, DoD civilian and contractor personnel have been subject to the UCMJ only when they participate in a declared war or are “retired members of a regular component of the armed forces who are entitled to pay.” Thus, retired service members serving as contractors or as government civilians may be subject to the UCMJ and could be court-martialed for criminal violations (Ives and Davidson 2003).

In 2006, Congress expanded the jurisdiction of the UCMJ over “persons serving with or accompanying an armed force in the field” to include times of a contingency operation.⁵⁴ Thus, the UCMJ may cover DoD contractor personnel in Iraq (Elsea and Serafino 2007, p. 20).⁵⁵ On March 27, 2008, DoD used that expanded jurisdiction to bring charges against a contractor employee accused of assault with a dangerous weapon against another contractor employee. The employee pleaded guilty to lesser charges at a court-martial on June 22, 2008. A military judge sentenced him to five months of confinement. That was the first conviction of a civilian under the UCMJ during the current operation in Iraq (Multi-National Corps—Iraq 2008). Using the UCMJ to prosecute civilians, even during a war, may generate constitutional challenges based on the standards of due process applicable to military courts.⁵⁶

In addition to the offenses specified in the punitive articles of the UCMJ (articles 77 through 134) that apply to “any person” (not just military members), the UCMJ also incorporates the LOAC by reference.⁵⁷ Thus, civilians (including contractor personnel) subject to the UCMJ are also subject to the LOAC. Before the 2006 expansion of the UCMJ jurisdiction, however, the military lacked a general mechanism for trying DoD civilians or contractor personnel who were not retired service members for crimes committed during contingency operations.

49. This section does not address civil cases, such as contract cases against U.S. companies that may apply to contractors in Iraq.

50. Even in the recent changes, jurisdictional holes remain for some types of crimes and some types of contractors—notably, DoD contractors who are working outside U.S. territory and not during a war or contingency operation. Contractors working for agencies other than DoD who do not provide support to DoD’s mission would also not fall under U.S. jurisdiction.

51. *United States v. Wheeler*, 435 U.S. 313, 317 (1978).

52. All CPA orders remain in effect until amended or rescinded by the Iraqi government. See De Wolf (2006), p. 349, note 118.

53. 10 U.S.C. ch. 47.

54. Section 552 of the John Warner National Defense Authorization Act for Fiscal Year 2007, Public Law 109-364.

55. However, not all portions of the UCMJ apply to civilians. Some portions apply only to military personnel, such as the provisions covering desertion and absence without leave.

56. On initial guidance, see DoD (2008c). On potential challenges, see Baker (2008); Elsea and Serafino (2007), p. 21; Gensheimer (2008).

57. 10 U.S.C. § 818.

Military Extraterritorial Jurisdiction Act of 2000. The Military Extraterritorial Jurisdiction Act of 2000 (MEJA) extended jurisdiction of the U.S. courts to DoD civilians or contractor personnel supporting DoD missions who commit a felony (an offense punishable by more than one year in prison) outside sovereign U.S. territory while accompanying U.S. forces (Elsea and Serafino 2007; GAO 2008b).⁵⁸ The defendants may be tried in federal court after being brought to the United States. MEJA jurisdiction applies only if civilians (including contractor personnel) have not been prosecuted by the host nation's legal system or under the UCMJ. It does not apply to civilians working for foreign governments or for federal departments or agencies other than DoD; it also does not apply to nationals of the host country (in this case, Iraq). For example, employees of security contractors working for the Department of State would not be subject to MEJA.

The statute has been used infrequently. Since enactment of MEJA in 2000 and through March 2008, DoD has referred 58 cases to the Department of Justice, 12 of which have been charged in federal court and one in state court (Department of Justice 2008; Singer 2004, p. 537).⁵⁹ Of those, 8 resulted in a conviction and 5 await trial.

Special Maritime and Territorial Jurisdiction of the United States. Certain federal criminal statutes govern actions in U.S. facilities overseas, including the premises of the U.S. military in foreign states that qualify as part of the special maritime and territorial jurisdiction (SMTJ) of the United States (Elsea and Serafino 2007, pp. 17–18). Examples of such statutes include those addressing

murder, torture, and assault committed by or against U.S. nationals. The United States has also asserted jurisdiction over crimes committed against U.S. government property or personnel, regardless of where the crimes occur (Doyle 2007). The Department of Justice is responsible for prosecuting such crimes in U.S. courts. That jurisdiction has been used sparingly, but it was used recently to convict a Central Intelligence Agency contractor who assaulted a detainee in Afghanistan (Elsea and Serafino 2007, p. 18).

Other Statutes. Two recent statutes prescribing sanctions for offenses committed outside U.S. territory may also apply to civilians accompanying U.S. forces. The USA Patriot Act expanded extraterritorial jurisdiction in two ways.⁶⁰ First, it augmented the list of federal statutes that apply federal extraterritorial criminal jurisdiction, adding some computer-related crimes and the transportation of illegal drugs and explosives related to terrorism. Second, the act expanded the coverage of SMTJ to include the “premises of the United States diplomatic, consular, military, or other United States government missions or entities in foreign States” with respect to offenses committed by or against a citizen of the United States.

Another statute covering actions overseas is the War Crimes Act of 1996, as amended by the Military Commissions Act of 2006. That act provides that “whoever, whether inside or outside the United States, commits a war crime . . . shall be fined under this title or imprisoned for life or any term of years, or both, and if death results to the victim, shall also be subject to the penalty of death.”⁶¹ The law applies to members of the U.S. armed forces as well as to any U.S. citizen, regardless of his or her employment. It would not apply to contractor personnel who are not U.S. citizens.

58. 18 U.S.C. §§ 3261–3267.

59. Interview with officials from the Office of the Assistant Deputy Under Secretary of Defense (Program Support) and DoD's Office of the General Counsel, February 21, 2008, and follow-up communications.

60. Pub. L. 107-56, 115 Stat. 272 (2001), codified in various sections of 18 U.S.C.

61. 18 U.S.C. § 2441.



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