

Testimony Before the United States Senate Committee on
Homeland Security and Governmental Affairs

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Thank you for the opportunity to address you here today on this important topic. As members of this Committee are no doubt aware, both our military and our foreign policy agencies are now employing private contractors to an unprecedented degree. For example, current estimates suggest that there are almost as many contractors as troops in Iraq.¹ These contractors are serving meals, building facilities, transporting goods, and providing a broad range of logistical support to troops. They are training Iraqi police and performing other tasks to help build democracy in Iraq. And, in some cases, they are interrogating detainees and providing security to governmental officials, sites, and convoys. We don't know precisely how many security contractors are operating in Iraq, though estimates suggest there may be as many as 30,000.² Indeed, we are forced to rely

¹ See, e.g., Statement of Gordon England, Deputy Secretary of Defense, before the House Budget Committee, July 31, 2007 (citing the results of the U.S. Central Command CENTCOM Contractor Census, which counted about 129,000 contractor in Iraq as of April 2007, but did not include contractors from the U.S. Department of State or the U.S. Agency for International Development (USAID)); see also T. Christian Miller, *Contractors Outnumber Troops in Iraq*, L.A. TIMES, July 4, 2007, at 1. USAID estimated that 53,300 contractors worked for the agency in Iraq, with more than 53,000 of them Iraqis, and the State Department could not estimate the number of contractors. See Miller, *supra*. A more recent news article suggests that during the last quarter of 2007, there were 150,000 defense department contractors in Iraq, compared to 155,000 troops. See David Ivanovich, *Contractor Deaths up 17 Percent in Iraq in 2007*, HOUSTON CHRON., Feb. 10, 2008, at A1.

² This figure is the industry estimate. See *id.* Gary Motsek, Assistant Deputy Undersecretary of Defense for Program Support, who serves as the principal advisor to the Office of the Secretary of Defense leadership on policy and program support, see Dep't of Defense, Program Support, at <http://www.acq.osd.mil/log/PS/bio.htm>, estimates that the number of Defense Department Security contractors totaled only 6,000 as of July 2007, but others have put the figure closer to 10,000. Miller, *supra* note 1. A memorandum from the House Committee on Government Oversight and Reform indicated that the 2006 agreement between the State Department and Blackwater provided for 1,020 Blackwater employees to operate in Iraq, but this figure does not include the numbers of employees for Triple Canopy and Dyncorp, the other companies that have entered into security contracts with the State Department.

on rough estimates because neither the State Department nor the Department of Defense, nor any other arm of government, keeps sufficient track.³ And some reports suggest that even on-the-ground military commanders in Iraq may not know whether private security contractors are operating in their territory.⁴

While most contractors have performed admirably and filled vital roles—and more than 1,100 contractors have died in Iraq while doing so⁵—some have committed serious abuses without being held accountable. Perhaps the most notable recent case is the incident from September 16 of last year, when Blackwater security guards employed by the Department of State fired into a crowd in Baghdad’s Nisour Square, killing seventeen people.⁶ Subsequent reports by the Department of Justice and the military have concluded that at least 14, and possibly all, of the killings were unprovoked.⁷ Yet no one has yet been indicted for the killings. In a similarly high-profile incident, contract interrogators and translators joined troops in sexually humiliating and brutally abusing detainees at the Abu Ghraib Prison in Iraq in 2003. Indeed, General Fay reported that the contractors, many of whom lacked training, were actually supervising uniformed military personnel at the prison.⁸ Yet while twelve uniformed soldiers have faced punishment for

House Comm. on Gov’t Oversight and Reform, Memorandum, *Additional Information about Blackwater USA*, Oct. 1, 2007, at 4.

³ In the 2007 Supplemental Appropriations Act, Congress required the Department of Defense to count the number of Defense Department Contractors in Iraq. U.S. Troop Readiness, Veterans’ Care, Katrina Recovery, and Iraq Accountability Appropriations Act, 2007, Pub. L. 110-28 (May 5, 2007), § 3305. The Department gathers this information from the U.S. Central Command (CENTCOM) Contractor Census. Statement of Gordon England, Deputy Secretary of Defense, before the House Budget Committee, July 31, 2007. But this tally does not include contractors from the U.S. Department of State or USAID. *See* Miller, *supra* note 1.

⁴ *See, e.g.*, PATRICK KENNEDY ET AL., REPORT OF THE SECRETARY OF STATE’S PANEL ON PERSONAL PROTECTIVE SERVICES IN IRAQ, at 6 (Oct. 2007) [hereinafter “Kennedy Report”].

⁵ Ivanovich, *supra* note 1 (reporting that 1,123 contractors have died in Iraq since 2003).

⁶ David Johnston & John M. Broder, *FBI Says Guards killed 14 without cause*, N.Y. TIMES, Nov. 14, 2007.

⁷ Johnson & Broder, *supra* note 6.

⁸ Maj. Gen. George R. Fay, AR-15-6 INVESTIGATION OF THE ABU GHRAIB DETENTION FACILITY AND 205TH MILITARY INTELLIGENCE BRIGADE (2004), at 51-52 *available at*

their role in the abuse,⁹ no contractors have been charged. A recent report from Human Rights First suggest that these incidents are just the tip of the iceberg and that there are many more cases in which security contractors or contract interrogators may have used excessive force.¹⁰ In fact, CIA director Michael Hayden has testified that he believes that CIA contract interrogators have engaged in waterboarding.¹¹ But again there has been so far only one instance—the case of the CIA contract interrogator David Passaro—in which U.S. authorities have criminally prosecuted a contractor for such crimes.¹²

Thus, we are left with the unmistakable conclusion that the use of private security contractors and interrogators potentially threatens core values embodied in our legal system, including (1) respect for human dignity and limits on the use of force and (2) a commitment to transparency and accountability.

How should Congress respond to the problems posed by private security contractors and interrogators? One possibility is to take steps to discourage or ban the outsourcing of at least some military, security, and intelligence functions. Certainly, the risks are greatest when contractors are authorized to use force, as in the case of security contractors or interrogators. Accordingly, we should be particularly cautious about outsourcing such functions and consider whether they may be inherently governmental.

<http://news.findlaw.com/hdocs/docs/dod/fay82504rpt.pdf> [hereinafter Fay Report].

⁹ Julian Barnes, *CIA Contractor Guilty in Beating of Detainee*, L.A. TIMES, Aug. 18, 2006, at 18. The cases include those of Sabrina Harman, Santos A. Cardona, Shawn Martin, Megan Ambuhl, Ivan Frederick, Roman Krol, Javal Davis, Armin Cruz, Jeremy Sivitz, Charles Graner, Lynndie England, and Michael Smith. See also Laura A. Dickinson, Abu Ghraib, *The Battle Over Institutional Culture and Respect for International Law within the U.S. Military*, in INTERNATIONAL LAW STORIES, at 405, 417 (2007).

¹⁰ Human Rights First, PRIVATE SECURITY CONTRACTORS AT WAR, ENDING THE CULTURE OF IMPUNITY (2008), available at <http://www.humanrightsfirst.info/pdf/08115-usls-psc-final.pdf>.

¹¹ See Siobhan Gorman, *CIA Likely Let Contractors Perform Waterboarding*, WALL ST. J., Feb. 8, 2008 (reporting that, when asked whether CIA contractors engaged in waterboarding: “I’m not sure of the specifics . . . I’ll give you a tentative answer: I believe so.”).

¹² See Scott Shane, *C.I.A. Contractor Guilty in Beating of Afghan Who Later Died*, N.Y. TIMES, Aug. 18, 2006, at A8.

Alternatively, Congress might consider designating such functions as “core” rather than inherently governmental, which would permit outsourcing but at the same time impose limits on the percentage of positions that may be turned over to contractors, while mandating higher standards of oversight regarding these positions. The State Department should not find itself in the position—as Patrick Kennedy’s report on the September 16 Blackwater incident concluded—that it does not have enough Diplomatic Security Agents to even monitor the actions of contractor security guards, let alone protect government officials themselves.¹³

Nevertheless, although efforts to declare certain activities to be inherent or core governmental functions are important, I also think that the incentives to use contractors will persist, and may even expand, particularly once the inevitable draw-down of uniformed military personnel begins. Therefore, it may be difficult (and perhaps even unwise) to limit significantly the use of private security contractors.

Accordingly, Congress will undoubtedly need to institute more effective measures to punish contractors if they commit abuses. The Military Extraterritorial Jurisdiction Act (MEJA) Expansion and Enforcement Act of 2007,¹⁴ which has already passed in the House of Representatives and which is pending in the Senate, would close important loopholes in the federal courts’ jurisdiction over contractors who commit crimes overseas. Most notably, the Act would clarify ambiguity over whether U.S. federal courts would have jurisdiction to try contractors who are not employed by the Department of Defense, extending jurisdiction to all contractors and not merely those, as

¹³ See Kennedy Report, *supra* note 4, at 6 (“There are an insufficient number of Diplomatic Security Service Special Agents assigned to the Embassy [in Iraq] to provide the appropriate level of oversight to ensure adherence to the rules and procedures already in place”).

¹⁴ MEJA Expansion and Enforcement Act of 2007, H.R. 2740, Passed in the House, Oct. 4, 2007.

current law provides, whose work relates to “supporting the mission of the Department of Defense overseas.”¹⁵

I suspect, however, that those types of back-end enforcement measures, while important, will be insufficient. The focus of this Committee on front-end measures to improve oversight and control is therefore critical. Moreover, in devising a better oversight regime, Congress may be able to take some guidance from the domestic context, where we have outsourced functions such as health care and prison management for decades. An analysis of what we might learn from the domestic setting has been the focus of some of my recent scholarly research.¹⁶ In addition to this research, I have helped to organize a series of meetings sponsored by Princeton University’s Program in Law and Public Affairs, which have included governmental officials, contractors, uniformed military personnel, NGO representatives, and academics.¹⁷ These experts have reached a surprising degree of consensus on some of these issues. I have also participated in a Swiss government initiative to improve government contracting standards.¹⁸ Thus, drawing both on my own research, and on some of the suggestions from the Princeton meetings and Swiss initiative, I propose five steps Congress can take to improve contracting practices, oversight, and monitoring so as to better prevent abuses *before* they occur.

¹⁵ 18 U.S.C. 3267.

¹⁶ Laura A. Dickinson, *Public Law Values in a Privatized World*, 31 YALE J. INT’L L. 383 (2006).

¹⁷ See *Summary of Meeting*, PRINCETON PROBLEM-SOLVING WORKSHOP SERIES IN LAW AND SECURITY: A NEW LEGAL FRAMEWORK FOR MILITARY CONTRACTORS (Jan. 8 2007) [hereinafter Princeton Report], available at http://lapa.princeton.edu/conferences/military07/MilCon_Workshop_Summary.pdf.

¹⁸ See International Committee of the Red Cross, *Privatisation of War: The Growing Use of Private Military and Security Companies*, available at <http://www.icrc.org/web/eng/siteeng0.nsf/html/privatisation-war>.

1) Establish Minimum Standards for Contractual Terms.

Every one of the private security contractors operating on our behalf overseas is there because the company entered into a contract with the federal government. The existence of such contracts gives the federal government significant power to dictate the terms under which contractors operate, if only such power were actually exercised. Thus, I recommend that Congress establish a set of minimum standards to guide the drafting of private security contracts. These minimum standards would explicitly make contractors subject to clear, consistent rules regarding the use of force, and establish specific requirements for training and recruitment.

For example, the terms of each private security agreement could provide that private contractors must abide by relevant human rights and humanitarian law rules applicable to governmental actors and lay out specific rules regarding the use of force. While such provisions are commonplace in the domestic setting,¹⁹ the US government's security and other contracts remain inadequate.²⁰ To be sure, a 2005 Department of Defense (DOD) document providing general instructions regarding contracting practices does state that contractors "shall abide by applicable laws, regulations, DOD policy, and international agreements."²¹ Yet, while this is a significant advance, the language is vague, and does not spell out precisely what rules and standards the contractors must obey.

¹⁹ As a term in their contracts with privately run prisons, for example, many states require compliance with constitutional, federal, state, and private standards for prison operation and inmates' rights.

²⁰ Nevertheless, of the sixty publicly available Iraq contracts, none contains specific provisions requiring contractors to obey human rights, anticorruption, or transparency norms.

See Center for Public Integrity, Contracts and Reports, *available at* <http://publicintegrity.org/wow/resources.aspx?act=resources> (providing text of contracts).

²¹ US Department of Defense Instruction, No. 3020.41, § 6.1 (2005).

With respect to the use of force in particular, these rules should be both specific and consistent across governmental departments. Indeed, the Department of Defense and the Department of State rules have sometimes differed from each other. For example, according to Patrick Kennedy's report, while the State Department has required its security contractors to fire aimed shots when responding to a threat, the Department of Defense has not.²² In addition, rules have often been vague or non-existent. The eleven work orders for the CACI interrogators did not expressly require that the private contractor interrogators comply with specific international human rights or humanitarian law rules such as those contained in the Torture Convention or the Geneva Conventions.²³ A congressional mandate that contracts should include such provisions is an easy and obvious reform.

Likewise, Congress could mandate that contracts with private security companies explicitly require that, as part of the recruiting process, contractor-employees receive training in the applicable limits on the use of force, including training in international human rights and humanitarian law. Domestic contracts in the United States between state governments and private prison operators regularly include such terms.²⁴ Yet, while the 2005 DOD instructions require documentation of training concerning appropriate use of force,²⁵ the contract training requirements remain vague, and experts have asserted

²² Kennedy Report, *supra* note 413, at 9.

²³ Work Orders Nos. 000035/0004, 000036/0004, 000037/0004, 000038/0004, 000064/0004, 000067/0004, 000070/0004, 000071/0004, 000072/0004, 000073/0004, & 000080/0004, issued under DOI-CACI, available at <http://http://publicintegrity.org/wow/docs/CACI_ordersAll.pdf>.

²⁴ A standard term in state agreements with companies that manage private prisons, for example, requires companies to certify that the training they provide to personnel is comparable to that offered to state employees. See, e.g., Oklahoma Department of Corrections, "Correctional Services Contract" § 6.4, available at <<http://www.doc.state.ok.us/Private%20Prisons/98cnta.pdf>> [hereinafter Oklahoma Contract]; Florida Corrections Privatization Commission, "Correctional Services Contract with Corrections Corporation of America" § 6.5.

²⁵ Dep't of Defense Instruction (footnote 21 above), § 6.3.5.3.4.

that training is insufficient.²⁶ Thus, it is not surprising that an Army Inspector General report on the conditions that led to the Abu Ghraib scandal concluded that 35 percent of CACI's Iraqi interrogators did not even have any "formal training in military interrogation policies and techniques," let alone education in international law norms.²⁷ Nor is it surprising that Patrick Kennedy concluded that the State Department security contractors had not received sufficient guidance in how to apply the rules regarding the use of force, and in particular, the use of deadly force.²⁸

The Defense Department's recently proposed rule, that certain security contractors should receive training by military lawyers, is a strong measure that would be a significant improvement.²⁹ Yet, I would argue that Congress should legislatively require such training, rather than leaving it up to agency discretion, as the agencies have differed in their practices on this question. Moreover, education by the military lawyers in the Judge Advocate Generals (JAG) Corps—the able lawyers who train our troops and advise our commanders in the field—would ensure that the security contractors (and interrogators) are receiving training of the highest caliber. These lawyers have honed their judgment with on-the-ground experience in conflict zones, and understand the

²⁶ Princeton Report, *supra* note 17, at 6-7.

²⁷ US Department of the Army, Inspector General, "Detainee Operations Inspection" (2004), pp. 87-89, *available at* <http://www4.army.mil/ocpa/reports/ArmyIGDetaineeAbuse/DAIG%20Detainee%20Operations%20Inspection%20Report.pdf>. *See also* Fay Report, *supra* note 8, at 19 (noting that that "contractors without training, qualifications, and certification created ineffective interrogation teams and the potential for non-compliance with applicable laws").

²⁸ Kennedy Report, *supra* note 4, at 6.

²⁹ Defense Federal Acquisition Regulations Supplement; DOD Law of War Program (DFARS Case 2006-D035), 73 Fed. Reg. 1853 (Jan. 10, 2008), proposed amendment to 48 CFR 252 (proposing requirement that contractor personnel accompanying the Armed Forces outside the United States must receive "basic training" in the law of war at a military-run training center or approved web-based source; and that some contractor personnel must receive "advanced training, commensurate with their duties and responsibilities" to be "conducted by Service Judge Advocates," and which "which will be coordinated with the servicing legal advisor in the operational chain of command, within the appropriate geographic combatant command").

complex, competing values at play. Training by these lawyers could help ensure that the rules are not just paper commands but rather legal commitments with specific meaning.

Congressionally mandated standard contractual terms should also include consistent recruiting and vetting requirements for security contractor (and interrogator) employees. Vetting to ensure that employees have not participated in past abuses remains a critical issue that has not yet been resolved. To give one example of the problems that remain, Blackwater fired an employee working as a security guard under its agreement with the State Department when that employee allegedly shot and killed an Iraqi security guard on December 24, 2006.³⁰ Yet subsequently, a Defense Department contractor hired the man as an employee, and the company was unaware of the prior incident.³¹

Vetting is even more critical—and more difficult—as the number of non-citizen contract employees rises. By some estimates, 80 percent of contract laborers in Iraq are not U.S. citizens.³² And while it is unclear whether the percentage of non-U.S. security contractors and interrogators is that high, there are reports that security contractors have hired third country nationals from South Africa, Colombia, Fiji, and Nepal.³³ In this context, training is not sufficient; vetting is necessary to ensure that the employees have not, for example, participated in human rights abuses as actors within repressive regimes.

Finally, in the increasingly global market for labor, recruiting practices are particularly important. Some reports have surfaced that contract employees have come to

³⁰ *Contractor Involved in Iraq Shooting Got Job In Kuwait*, CNN, Oct. 4, 2007, available at <http://www.cnn.com/2007/POLITICS/10/04/blackwater.contractor/index.html>.

³¹ *Id.*

³² *See, e.g.*, Miller, *supra* note 1.

³³ *See* Paul Salopek, *South Africa's Silent War in Iraq*, CHICAGO TRIB., Oct. 7, 2007, at A1.

Iraq under false pretenses, and that some employers may have withheld passports.³⁴ The Defense Department has improved its standard contractual terms regarding vetting and recruiting. Nonetheless, Congress should mandate terms to insure consistency and a firm minimum standard that would prohibit such practices.

2) **Encourage Inter-Agency Coordination**

Government officials from the multiple agencies that have hired security contractors (and interrogators) do not communicate well with each other in the field or in Washington, contributing to a climate of confusion that can contribute to abuse. As discussed above, some military commanders do not know when security contractors hired by other agencies pass through their area, because there has been no clear system in place to communicate that information to them. And, also as mentioned above, the agencies do not have a unified system even for counting, let alone keeping track of contractors. Furthermore, in investigating abuses, multiple agencies' officials are on the scene, though the precise jurisdiction of each agency is unclear, leading to further confusion. In the case of the Blackwater September 16 incident, for example, in addition to the multiple inquiries that the State Department conducted, the FBI and military authorities also conducted investigations. Indeed, the fact that the State Department officials may have granted immunity to some contractors has complicated the criminal investigations.³⁵

Moreover, in some cases, the lines of authority and communication are so unclear that contractors are actually supervising governmental personnel, instead of the other way around. In addition to the Abu Ghraib case discussed above, an incident from Najaf in

³⁴ See Princeton Report, *supra* note 17, at 13.

³⁵ See Johnston & Broder, *supra* note 6.

2004 is instructive. Blackwater guards charged with defending a Coalition Provisional Authority site fought alongside a marine who appears to have asked the Blackwater guards for advice about whether or not to fire into a menacing crowd.³⁶

For this reason, one of the clearest and strongest recommendations from the Princeton group was to improve inter-agency coordination of contractors, both on the ground and in Washington.³⁷ The memorandum of understanding between the State Department and the Defense Department to establish better inter-agency control of security contractors is an important step.³⁸ Yet this agreement only addresses two agencies and could go further. I would argue that Congress should encourage the National Security Council or some other entity to establish an inter-agency working group to set common standards for security contractors, to design uniform systems for keeping track of contractors, and for improving communication and clarifying lines of authority.

3. Expand the Contract Monitoring Regime

Even when useful language is written into a contract, enforcement is lax because the agencies have not devoted enough resources to contract monitoring. An effective contractual regime must include sufficient numbers of trained and experienced governmental contract monitors. Recently the government has moved in precisely the wrong direction, however, by dramatically *reducing* its acquisitions workforce.³⁹

³⁶ See *Contractors in Combat: Firefight from a rooftop in Iraq*, VIRGINIAN PILOT, July 25, 2006; JEREMY SCAHILL, BLACKWATER 123 (2007).

³⁷ Princeton Report, *supra* note 17, at 13-15.

³⁸ See Karen DeYoung, *State Department Contractors in Iraq Are Reined In*, WASH. POST, Dec. 6, 2007, at A24.

³⁹ See, e.g., U.S. GOV'T ACCOUNTABILITY OFFICE, DOD NEEDS TO EXERT MANAGEMENT AND OVERSIGHT TO BETTER CONTROL ACQUISITION OF SERVICES (Jan. 17 2007). For a detailed discussion of the depletion

Moreover, even the personnel who are on the payroll do not have adequate incentives to work in Iraq and other conflict zones.⁴⁰ For these reasons, scholars and commentators, including the GAO, have been warning of a contract oversight crisis.

The problems caused by the sheer low numbers of personnel are exacerbated by a lack of expertise in the particular issues raised by security contractors and interrogators. Many of the contract personnel were trained in another era and did not learn how to manage service contracts, let alone service contracts that raise the specific concerns of security and interrogation. Few contract monitors, for example, are trained in international human rights and humanitarian law standards, or in the rules regarding the use of force.

Congress, therefore, should mandate that the agencies increase the number of monitoring and oversight personnel, ensure that they specialize in the types of tasks they are overseeing, and require that they, in turn, receive specific training in rules regarding the use of force and international humanitarian and human rights law. Furthermore, Congress should allocate the funding so that the agencies have sufficient resources to fulfill this mandate.

Thus, Congress must provide more resources for contractor oversight personnel. Moreover, these monitors must be trained not only to root out fraud and corruption, but also to apply rules regarding the use of force and other important human rights and humanitarian law norms. Finally, Government monitors (or even military lawyers from the JAG Corps) should, as much as possible, be embedded with PSC convoys. This would allow some on-the-ground oversight, analogous to the role that JAG Corps lawyers

of the acquisition workforce, see Steven L. Schooner, *Contractor Atrocities at Abu Ghraib: Compromised Accountability in a Streamlined, Outsourced Government*, 16 STAN. L. & POL. REV. 16 (2005).

⁴⁰ See Princeton Report, *supra* note 17, at 16.

play in advising military personnel on legal issues surrounding military operations.

4. Require Regular Reporting to Congress

One of the factors that is creating the oversight challenge is a lack of information, combined with the piecemeal way that much information about contractors comes to Congress (and to the public at large). Agency officials do testify periodically and provide information, but the information (such as details about the number of contractors and their functions) does not flow to Congress in a systematic way. Part of the difficulty stems from the multiplicity of agencies entering into agreements with contractors.

Recent legislation, and bills in the pipeline, would improve the situation, but do not go far enough. Thus, the provision of the MEJA expansion act that would require reporting to Congress on the number of cases investigated is an important step, but it focuses only on the Department of Justice.⁴¹ Similarly, recent provisions in the Defense Authorization Act of 2008 enhance reporting requirements, but are insufficient because they do not require each agency to provide both quantitative and qualitative information about contractor abuses.⁴²

Congress should require each agency to report to Congress quarterly, or every six months. These reports should identify the number of security contractors, the tasks they are performing, and the number of personnel overseeing them. If Congress establishes an inter-agency working group, it could be the task of this group to coordinate and provide the report. Moreover, this report should not only identify the number of contractors and oversight personnel, but it should also provide information about the

⁴¹ H.R. 2740, *supra* note 14, at §2.

⁴² National Defense Authorization Act for Fiscal Year 2008, H.R. 4986, passed in the House, Jan. 16, 2008, passed in the Senate, Jan. 22, 2008, signed by the President, Jan. 28, 2008.

number of incidents in which security contractors fire their weapons and qualitative assessments about whether these incidents raised concerns. Furthermore, the reports should provide information about the follow-up: whether there was an investigation, what the conclusion was, and what happened subsequent to the investigation. To be sure, not all weapons discharges are cause for concerns, and companies with higher rates may in fact be serving in more dangerous areas. Thus, the fire rate is not the only critical factor. Nonetheless, the agencies should gather and provide to Congress meaningful reports about these incidents. If the State Department can report annually on the human rights conditions in all of the countries around the world,⁴³ the agencies should be able to provide Congress with minimal information about their own security contractors.

5. Accreditation/Licensing

Finally, Congress should encourage the creation of third-party monitoring, accreditation, and certification entities and then consider requiring such third-party approval as part of the contract. At least one industry organization, the International Peace Operations Association (IPOA), has launched this sort of accreditation system,⁴⁴ and independent organizations without industry ties could establish a rating system as well.

On this score, the domestic context provides a particularly rich set of models as to how an accreditation scheme might work. For example, in the healthcare field, state laws or contractual terms often specify that health maintenance organizations (HMOs) must

⁴³ See, e.g., U.S. DEP'T OF STATE, 2006 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES (2007), available at <http://www.state.gov/g/drl/rls/hrrpt/2006/>.

⁴⁴ See, e.g., International Peace Operations Association Code of Conduct, available at <http://www.ipoaonline.org/conduct/>.

receive accreditation by the National Committee for Quality Assurance (NCQA), an independent, non-profit organization, before receiving public funding.⁴⁵ NCQA rates HMOs along various benchmarks of quality. Until recently, NCQA certification was primarily voluntary, offering HMOs an advantage when competing for contracts.⁴⁶ When states became managed care purchasers, however, they adopted NCQA certification as a requirement for receiving public funding.⁴⁷ Similarly, many contracts with private prison operators require companies to receive accreditation by the American Correctional Association (ACA), although the ACA is an industry organization.⁴⁸ And because private investors come to view accreditation as an indicator of quality, an accreditation requirement creates significant compliance incentives.

Accreditation by an independent organization would be the best approach, but no such organization yet exists. Congress might encourage the creation of such an organization by providing funding. Or, alternatively, Congress might, as it has done in the health care context, give agencies the authority to “deem” ratings by such an independent entity as sufficient to satisfy Congressionally mandated standards.

Conclusion

It is extremely important that Congress move forward with this Committee’s efforts to impose greater contractual standards and monitoring requirements on private security contractors. To that end, in addition to any legislation arising from this

⁴⁵ See, e.g., National Committee for Quality Assurance, *available at* <http://www.ncqa.org/>.

⁴⁶ Although NCQA’s accreditation program is voluntary, almost half the HMOs in the nation, covering three quarters of all HMO enrollees, are currently involved in the NCQA Accreditation process. Significantly, employers increasingly require or request NCQA accreditation of the plans with which they do business. See National Comm. for Quality Assurance, NCQA: Overview, *available at* <http://www.ncqa.org/Communications/Publications/overviewncqa.pdf>.

⁴⁷ For an extended discussion of NCQA, see Dickinson, *supra* note 16.

⁴⁸ See, e.g., Oklahoma Contract, *supra* note 24. Dep’t of Corr., Correctional Services Contract, art. 1.

Committee, the work of the new Commission on Wartime Contracting in Iraq and Afghanistan, established in the Defense Authorization Act,⁴⁹ will provide an important forum for further consideration of these issues. Thank you very much for the opportunity to address these matters with you today.

⁴⁹ See H.R. 4986, *supra* note 42 at § 841.