

COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY

**“Enforcement of Federal Criminal Law to
Protect Americans Working for U.S. Contractors in Iraq”
Hearing on December 19, 2007**

PREPARED REMARKS OF SCOTT HORTON

Is America establishing a culture of impunity among its contractors operating in areas of armed conflict? This is the question which a proliferation of reports out of Iraq invites. When I addressed this committee on June 25, I noted that there was a troubling potential that certain categories of contractors would escape accountability altogether because of some issues that exist with the Military Extraterritorial Jurisdiction Act. I also noted concern that the Department of Justice might not be giving sufficient resources and priority to its enforcement responsibilities over contractors in Iraq and Afghanistan. Unfortunately all those concerns have been borne out.

America's objectives in Iraq and Afghanistan, as articulated by the President, the Secretary of Defense and the Secretary of State, include helping to create a new democratic society which values the rule of law. But the contractor community that America has fielded to pursue this objective operates in an environment that looks increasingly like Texas West of the Pecos in 1890—without even a Judge Roy Bean to keep things in order. This obviously undermines the mission's credibility. But it also creates an environment which is dangerous to all involved—contractors, the military and other U.S. Government personnel, and the host community in which they operate.

Since June, we have witnessed a parade of further headlines which demonstrate precisely the shortcomings that were identified and addressed in Congressman Price's legislation, H.R. 2740. And while that legislation overwhelmingly cleared the House—in a 389 to 30 vote—the Senate has not yet acted on a parallel measure. This legislation is urgently needed and should be enacted and signed into law in the near future.

This committee should focus on two questions. *First*, is there a question relating to appropriations or to legislation which has contributed to the problem which the public now so clearly sees? *Second*, has the executive branch done what it can and should do to enforce the law?

The horrible rape incident involving Ms. Jennifer Leigh Jones is sickening to hear recounted. It also provides an opportunity to consider exactly how the Government has responded to crimes committed by and among contractors. We have a community of 180,000 contractors in Iraq. Crimes do occur, and this is and must be considered a politically neutral fact. It does not suggest that the reliance upon contractors is mistaken. The decision to rely much more heavily on contractors was not a partisan decision. This community consists entirely neither of angels or devils, but of ordinary human beings, most of whom undoubtedly try to act honorably in fulfilling their duties. You won't find a community of this size in the United States, or anywhere else in the world, that doesn't experience serious violent crimes—hundreds of times in the course of a year. Add to that the fact that high pressure circumstances—such as life in a war zone in which shootings and bombings are common—frequently lead to higher than normal rates of violent crime.

Human experience also teaches—since the first formation of human communities—that when the state fails to enforce order, to identify crimes as crimes and to punish them swiftly and certainly, crimes proliferate. The Government has a duty to the citizens of the

United States, and also to the employees of the contractor community, to vigorously uphold the law. Indeed, this is one of the most fundamental duties of any Government. If the executive branch felt it needed new tools to do the job, or more money, it had a duty to come to Congress and regulate these questions. I have a lot of difficulty seeing how the executive branch has met this responsibility in the context of the United States presence in Iraq.

I have not independently investigated the facts of the Jones case, though I personally find her account painful and compelling. But if I consider the facts that Ms. Jones has described, taking only those which have not been disputed by Kellogg Brown & Root, then I see no impediment to the exercise of the criminal law jurisdiction of the United States by the Department of Justice. As alleged the crimes occurred among employees of contractors involved in a contingency operation, on installations or facilities maintained by the United States abroad, and involve U.S. citizens as perpetrators and victims. These facts would provide multiple bases for the Department of Justice to exercise its jurisdiction. The crimes which have been alleged—rape, assault and false imprisonment among them—would come under at least two different grants of jurisdiction to U.S. federal courts, namely the Military Extraterritorial Jurisdiction Act, as amended in 2004, and the special maritime and territorial jurisdiction, as expanded by the USA PATRIOT Act. Of course, depending on the identity of the perpetrators, and potentially also the contracts which brought the personnel to Iraq, there might be some legal issues. This would have to be developed by investigation.

The astonishing failure in this case is the failure of an appropriate law enforcement authority to conduct a prompt and timely investigation of the allegations while Ms. Jones was still in theater. It does appear that the matter was reported to the Justice Department early on, and Ms. Jones recalls meeting with a special agent of the FBI from the Baghdad Embassy. But the investigation was conducted by the State Department, and it does not appear to have been an investigation designed to support a decision to take criminal action, including potential prosecution. In a case of this sort, having a timely, professional investigation conducted that secures forensic evidence in a form which is admissible in subsequent criminal proceedings is critical. This does not appear to have occurred. This will make prosecution by the Department of Justice incalculably more difficult. It may lead a prosecutor to conclude that even though a serious crime likely occurred, it will be too difficult to develop the evidence necessary to prosecute it.

In fact the way the medical examination and resulting evidence was handled was truly shocking.

These factual allegations from the Jones case strike me as significant and revealing of structural flaws in the way contractor-related crimes are being handled in Iraq and Afghanistan:

(1) The Justice Department is effectively not present on the scene, does not have personnel deployed charged with conducting investigations, collecting evidence and making preliminary decisions as to whether incidents are suitable for prosecution. This would require a team of FBI agents with appropriate training, including access to forensic labs and personnel.

(2) The case when first alleged seems to have been treated as an issue related to administration of a contract, rather than a criminal justice matter, triggering only a State Department investigation. But the State Department does not have authority to conduct criminal inquiries or to bring charges.

(3) The Department of Defense was called upon to provide medical expertise, which was a reasonable step. But no guidelines appear to have been available as to how this was done. The alleged surrender of the rape kit by military medical personnel to Kellogg Brown & Root was grossly improper, producing a serious lapse in the chain of custody—and in this case, loss of evidence which cannot be reproduced. It reflects an attitude which I hear constantly when interviewing State Department and Defense Department personnel—namely, that the problem is the contractor's. Of course, the contractor has an interest in performing its contract and maintaining a good relationship with the contracting agency. The contractor does not have any interest per se in law enforcement. It might well decide to terminate employees it believes are involved in a crime, but beyond that the contractor will, very appropriately, believe that the responsibility for law enforcement lies with law enforcement agencies.

On December 5, the Department of State and the Department of Defense, represented through the able Deputy Secretaries Negroponte and Gordon, entered into a Memorandum of Agreement which sets out guidelines for cooperation in some investigations. When I first received and examined this document, I was convinced I must have been missing several pages. The most extraordinary thing about it is in fact what it does *not* cover. Remember, this process started in the wake of the Nisoor Square incident on September 16, in which private security contractors working for Blackwater Worldwide opened fire in the Nisoor Square neighborhood of Baghdad, leaving 17 civilians dead and severely wounding 24 more. The confusion, defensiveness, multiplicity of uncoordinated, *ad hoc* investigations, and inter-agency finger-pointing that characterized the U.S. government response to the shootings highlight the fact that the U.S. Government at this late date still had no plan or procedure for investigating allegations of serious violent crime involving private contractors fielded by the U.S. government in Iraq.

The Defense Department and the State Department got into a bit of a squabble over these investigations, a turf battle if you will. The Memorandum of Agreement was supposed to work out procedures for reconciling their differences. It actually contains a number of important advances. But there is one agency with clear primary responsibility for the investigation of criminal conduct and action thereon, and that agency—the Department of Justice—is nowhere to be found. It's not a party to the Agreement. In fact, while there is a fairly vague reference to "appropriate" law enforcement agencies, the Justice Department isn't even mentioned.

With respect to the Nisoor Square incident itself, the first Justice Department investigators appeared two weeks after it was first reported, published above the fold in newspapers around the United States. It made its appearance only after a public spotlight was fo-

cused on it, and demands were made by editorial boards and members of Congress for it to account for its inaction.

I wish this had been a unique course of events. But it seemed to me completely typical. We should also look back to the first reports out of Abu Ghraib. Remember that the Report authored by Generals Kern, Jones and Fay identified six contractors, and General Taguba linked two of them to the most serious abuses that occurred at Abu Ghraib. These matters were referred to the Department of Justice, and on to the Eastern District of Virginia in 2004. At the point of referral they had been fully investigated by the Army's Criminal Investigations Department, with a full dossier supporting prosecution. That same set of investigations fueled more than a dozen courts-martial and even more nonjudicial punishments. On the military side, the process may be subject to some criticisms, but at least there *was* a process that moved forward and resulted in criminal prosecutions and serious sanctions.

And what about the Abu Ghraib cases involving contractors that were passed to the Department of Justice? Though there is a single newspaper report of a grand jury meeting at which questions were asked about these cases, there is no sign of *any* meaningful prosecutorial action—not even of efforts to interview victims and key witnesses. The Eastern District of Virginia has a reputation for acting quickly and skillfully. It has in the past years handled some of the highest profile cases in the country. The contrast between those cases and its handling of the cases from Abu Ghraib is nothing short of stunning. And the explanations that have been offered simply do not hold water.

There has not been a single completed prosecution of a crime involving a contractor implicated in violent crime coming out of Iraq, although the reported incidents which would have merited investigation are legion. Again, it is simply impossible to believe that in a community with a peak population of 180,000 people – with many more people than that actually cycling in and out of these jobs, tens of thousands of them Americans – over a period of approaching five years there has been no violent crime. The facts point to something else: an attitude of official indifference within the Department of Justice, or at least a decision to accord these crimes a very low priority and no or very little resources.

Looking back quickly to the two questions I started with:

The developments at Nisoor Square and the tragedy experienced by Ms. Jones show that the legislation that Congressman Price proposed is badly needed. Congressman Price's bill, as enacted by the House, requires the Justice Department to allocate the personnel and resources needed to address criminal allegations involving contractors. These cases reveal that as an urgent necessity. The Price bill also strengthens the Justice Department's jurisdictional basis for action which would help avoid unproductive litigation over the scope of the Congressional grant of jurisdiction.

The Jones case, and the Nisoor Square case point to a failure by the Justice Department to provide appropriate resources to address law enforcement within the contractor

community in Iraq. There is an urgent need to have investigators, prosecutors and trained support personnel on the ground in Iraq. Back in Washington there should be a staff of experienced trial attorneys with depth in relevant criminal law and the law of armed conflict who can support prosecutions. The Criminal Division needs to be given an explicit *mandate* to cover this area, and dedicated funding, resources and personnel to do so. The fact that such resources are missing has clearly contributed to the failure to act in a timely and appropriate manner in the Nisoor Square event, in the case that Ms. Jones has described, and in many other incidents as well. It has damaged our nation's reputation for doing justice.

I look forward to your questions.

SCOTT HORTON

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SHORT BIOGRAPHY

Scott Horton is an adjunct professor at Columbia Law School where he teaches law of armed conflict and commercial law courses. He is also chair of the Committee on International Law at the Association of the Bar of the City of New York (“Association”). Since February of this year he has managed the Project on Accountability of Private Military Contractors at Human Rights First. Human Rights First will publish a detailed report on this subject early next year. This testimony is based on information gathered in connection with that report.

Prof. Horton is the son of an Air Force colonel who spent half of his life growing up on U.S. military installations overseas. He has worked for over twenty years on international humanitarian law matters, and previously served as a monitor in conflicts in the Caucasus, Central Asia and West Africa. He has also been active in human rights matters, serving as counsel to Andrei Sakharov, Elena Bonner and other leaders of the Russian human rights and democracy movements. He is a founder and trustee of the American University in Central Asia, a former officer and director of the American Branch of the International Law Association, a member of the Council on Foreign Relations, chair of the advisory board of the EurasiaGroup and a member of the advisory board of the National Institute of Military Justice.

In 2003, he organized and led an Association study and report on interrogation techniques in use in the war on terror. In 2004, he managed an Association study and report on the practice of extraordinary renditions. In 2006, he was admitted to the Iraqi Bar Association as a corresponding member and he managed a case before the Central Criminal Court of Iraq in Baghdad that spring. He is the author of more than a hundred publications dealing with issues of international public and private law, including law of war questions, and he is currently working on a book on legal policy issues relating to private military contractors.