

THE ECONOMICS OF THE WILL TO FIGHT: PUBLIC CHOICE IN THE USE OF PRIVATE CONTRACTORS IN IRAQ

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INTRODUCTION

Private military contractors (PMCs)—“businesses that provide governments with professional services intricately linked to warfare,”¹—have recently caused much consternation due to ineffective state control over and responsibility for PMC activities. In November 2013, the United Nations Working Group on Use of Mercenaries affirmed that “[p]roviding security is a fundamental human right and a fundamental responsibility of the State” and indicated that governments worldwide must participate in efforts to implement a framework for “robust international regulation of private military and security companies.”² This article concurs with the need for global cooperation and regulation of PMCs for an additional reason—it is vital to preserve democratic public choice over foreign policy.

Weak public support became an acute issue in the U.S. during the Iraq War as military recruitment and reenlistment rates descended. Troops exited the military and accepted less hazardous positions with PMCs for four times more compensation. American public opinion turned firmly against the Iraq War.³ The nine-year U.S. military occupation of Iraq formally ended in December 2011,

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¹ P.W. Singer, *Outsourcing War*, 84 FOREIGN AFF., Mar.–Apr. 2005, at 119, 120.

² United Nations Human Rights, Office of the High Comm’r for Human Rights, *UN Expert Group Calls for Robust International Regulation of Private Military and Security Companies* (Nov. 4, 2013), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13940&LangID=E>.

³ See Robert Bejesky, *Support the Troops: Renewing Angst Over Massachusetts v. Laird and Endowing Service Members with Effectual First and Fifth Amendment Rights* 16–29 (Apr. 2014) (unpublished manuscript) (on file with author); *infra* Part IV.C.

but not without U.S. taxpayers providing \$138 billion for PMC operations.⁴ Likewise, Afghani President Hamid Karzai noted that “U.S. taxpayers were indirectly funding ‘mafia-like groups’ and terrorist activities with the American government’s support of private contractors inside [Afghanistan].”⁵

Part I provides a schematic of the labor market supply and demand for troops to evaluate this potential fissure between democratic public choice and the use of PMCs by the government to execute foreign policy. Part II delineates how the public assent to participation in armed combat might remain relatively higher *ceteris paribus* than acquiescence would be without the use of PMCs, thereby receding the political cost of military conflict. Part III emphasizes that an additional mode of diluting political fallout and increasing PMC labor supply is to refrain from signaling that there are puissant legal restrictions applicable to PMCs, but a plausible downside to this perceived impunity is the contractor’s abated self-interest in being thoroughly conscientious. Part IV addresses the typical justifications for hiring contractors—that they are more efficient and provide a cost savings—and queries whether these rationales are compelling. Part V concludes by emphasizing that a global convention governing the employment of PMCs is imperative for adhering to democratic public choice, for according parameters for the sanctioned use of PMCs, and for prohibiting governments and politicians from dodging responsibility by delegating operations to private entities in a manner that can violate internal and international law responsibilities.

I. SUPPLY OF TROOPS AND DEMAND FOR A WAR POLICY

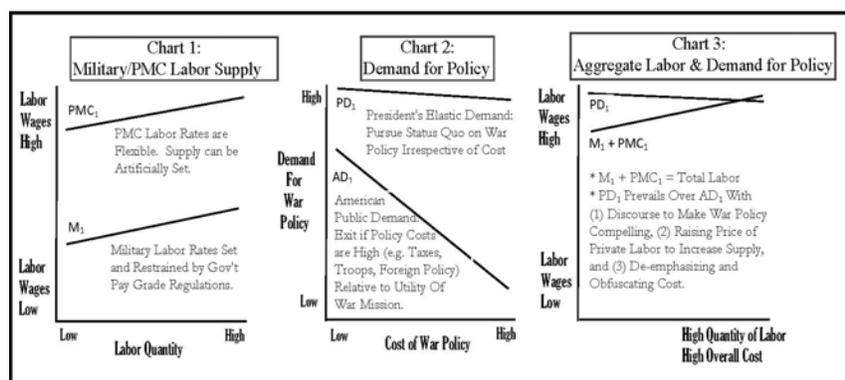
The level of approval for a military mission can be conceptualized as a function of supply and demand. Indications of elevated demand are embodied in variables, such as United Nations Security Council resolutions that specify the existence of collective challenges and dangers to international peace and security,⁶ populace acceptance of a need to use force against a purported security peril, and domestic legislative authorizations that endorse the country’s

⁴ See Anna Fifield, *Contractors Reap \$138B from Iraq War*, CNN (Mar. 19, 2013), <http://edition.cnn.com/2013/03/19/business/iraq-war-contractors/>.

⁵ Sam Stein, *Hamid Karzai: U.S. Taxpayer-Funded Private Contractors Engaging in Terrorist, Mafia-Like Activity*, HUFFINGTON POST, http://www.huffingtonpost.com/2010/08/22/karzai-us-taxpayerfunded_n_690385.html (last updated May 25, 2011, 5:25 PM).

⁶ See Allen S. Weiner, *The Use of Force and Contemporary Security Threats: Old Medicine for New Ills?*, 59 STAN. L. REV. 415, 455 (2006).

use military force. More robust perceptions of threat are apt to motivate more citizens to voluntarily enlist in the military out of moral obligation and devotion to the country. Moreover, exigency combined with insufficient troop supply could prompt political leaders to advance a pronounced national interest and counteract populace reluctance to enlist by utilizing a draft conscript policy.⁷ Alternatively, an executive should be more disinclined to advance the nation into war when populace demand for the foreign policy is not sufficiently high, the rationales for using force are not sufficiently compelling or substantiated, or the populace perceives that conflict could endure or entail deep involvement. The following chart assimilates these premises and represents that labor supply should be positively correlated with the importance of the military mission, willingness of individuals to take risks, and the amount of financial compensation offered, whereas a low value on these factors will have the converse impact:



A compelling mission with a higher economic benefit should increase the national labor supply of military troops. Consider two extreme examples. First, in September 2013, after the Syrian government fired chemical weapons to combat opposition to the regime in its country, President Obama pushed for military strikes.⁸ However, 55% of Americans opposed air strikes even if Congress passed a resolution in support and 72% of Americans believed that air strikes would not achieve significant U.S. goals.⁹ Airstrikes may

⁷ See Scott M. Sullivan, *Private Force/Public Goods*, 42 CONN. L. REV. 853, 882 (2010) (stating that an all-volunteer force will likely have more allegiance and motivation than draft conscripts).

⁸ Remarks by the President in Address to the Nation Syria (Sept. 10, 2013), Office of the Secretary, available at <http://www.whitehouse.gov/the-press-office/2013/09/10/remarks-president-address-nation-syria>.

⁹ CNN/ORC Poll 2-3 (Sept. 9, 2013), <http://i2.cdn.turner.com/cnn/2013/Images/09/09/6a.poll.syria.pdf>; Matt Spetalnick & Alexei Anishchuk, *Obama Rejects G20*

have been even less acceptable because 66% of Americans believed that any military action would eventually become more involved and costly, and 86% opposed deploying U.S. ground troops into Syria.¹⁰ In contrast, Congress passed the Gulf of Tonkin Resolution in 1964 to authorize the use of force in Vietnam,¹¹ but as the protest to the war grew the populace support for the war declined.¹² Congress repealed the Gulf of Tonkin Resolution in 1971.¹³ Yet, during the Vietnam War, Americans were drafted to supply military need.¹⁴ Draftees were obligated to assume life-threatening risks¹⁵ and hundreds of thousands of Americans rejected draft orders.¹⁶ The government accused 209,517 Americans of violating draft laws and continued to prosecute draft evaders even after the Vietnam War ended, but days after entering office, President Carter granted

Pressure to Abandon Syria Air Strike Plan, REUTERS (Sept. 6, 2013, 6:47 PM), <http://www.reuters.com/article/2013/09/06/us-russia-g-idUSBRE98315S20130906> (noting that nine of the twenty nations were willing to sign a statement in support of a strong international response as a condemnation of the use of chemical weapons, but supporters could not be persuaded to accept the use of military strikes).

¹⁰ Sarah Dutton et al., *Poll: Obama Faces Skeptical Public on Syria*, CBS NEWS (Sept. 10, 2013), <http://www.cbsnews.com/news/poll-obama-faces-skeptical-public-on-syria/>. The standoff ended when the Syrian regime agreed to sign the 1997 Chemical Weapons Convention, not to produce or possess chemical weapons, and to permit inspections of chemical weapon facilities. See *Syria: Joint OPCW-UN Chemical Weapons Team Reports Visits to Nearly All Declared Sites*, UN NEWS CENTRE, (Oct. 23, 2013), <http://www.un.org/apps/news/story.asp?NewsID=46318#.VAyrpvldXTA>.

¹¹ Gulf of Tonkin Resolution, Pub. L. No. 88-408, 78 Stat. 384, 384 (1964).

¹² JOHN R. MACARTHUR, *SECOND FRONT: CENSORSHIP AND PROPAGANDA IN THE 1991 GULF WAR* 134–36 (2d ed. 2004); SHELTON RAMPTON & JOHN STAUBER, *WEAPONS OF MASS DECEPTION: THE USES OF PROPAGANDA IN BUSH'S WAR ON IRAQ* 182–83 (2003).

¹³ Foreign Military Sales Act, Pub. L. No. 91-672, 84 Stat. 2053 (1971); Bruce Ackerman & Oona Hathaway, *Limited War and the Constitution: Iraq and the Crisis of Presidential Legality*, 109 MICH. L. REV. 447, 485 (2011). Before Congress, Senator Fulbright stated: “Insofar as the consent of this body is said to derive from the Gulf of Tonkin Resolution, it can only be said that the resolution, like any other contract based on misrepresentation, in my opinion, is null and void.” JOHN HART ELY, *WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH* 19 (1993).

¹⁴ See R. Norman Moody, *After 40 Years, Return of Military Draft Not in Sight*, USA TODAY (July 23, 2013, 3:44 PM), <http://www.usatoday.com/story/news/nation/2013/07/23/return-of-military-draft-not-in-sight/2578847/>.

¹⁵ Jack Shafer, *Spitfire: Vietnam Veterans Were Gobbed on, Insist Angry Readers and Critical Bloggers*, SLATE (Feb. 5, 2007, 6:32 PM), http://www.slate.com/articles/news_and_politics/press_box/2007/02/spitfire.html (citing debate over the extent that veterans returning after the Vietnam War were supported by the public).

¹⁶ See Moody, *supra* note 14.

hundreds of thousands of unconditional pardons to Americans who evaded the draft.¹⁷

Unlike the Vietnam War, there was no draft for the Iraq War.¹⁸ The Iraq War initiated with an invasion that was often referred to as an act by a “coalition of the willing,” but it was in fact a U.S. invasion with Britain, the second most involved country, deploying about 9,000 soldiers.¹⁹ By 2006, 72% of American troops believed that the U.S. should exit Iraq; a majority of Americans opposed the war; and even Iraqis disagreed with the continuing occupation.²⁰ If the demand for the policy attenuates and the military is overextended, then the President could be required to withdrawal from a conflict²¹ or devise alternative strategies to offset failure to realize recruitment and reenlistment goals.

During the Iraq War, the Bush Administration issued stop-loss orders so that currently enlisted troops could be held beyond their specified contract durations.²² The orders also activated and deployed over 450,000 National Guard and Reserve personnel to Iraq and Afghanistan.²³ National Guard operations have typically involved guarding the United States, not deploying units into a foreign war.²⁴ The reduction in National Guard personnel led to

¹⁷ Andrew Glass, *Carter Pardons Draft Dodgers Jan. 21, 1977*, POLITICO (Jan. 21, 2008, 3:56 AM), <http://www.politico.com/news/stories/0108/7974.html> (noting that 360,000 were not formally charged).

¹⁸ Moody, *supra* note 14.

¹⁹ See Virginia Newell & Benedict Sheehy, *Corporate Militaries and States: Actors, Interactions, and Reactions*, 41 TEX. INT’L L.J. 67, 89 (2006); see e.g., 153 CONG. REC. H1492 (daily ed. Feb. 13, 2007) (statement of Rep. Ackerman) (utilizing the term “coalition of the willing” in reference to the Iraq invasion).

²⁰ Robert Bejesky, *Politico-International Law*, 57 LOY. L. REV. 29, 105 (2011) (citing several polls of Iraqis); Bejesky, *supra* note 3, at 16–29; Charles Levinson, *In Iraq, Frontline Patience Wears Thin*, CHRISTIAN SCIENCE MONITOR, March 30, 2006, <http://www.csmonitor.com/2006/0330/p01s04-woiq.html> (citing a Zogby Poll reporting opposition from 72% of U.S. troops).

²¹ Jon D. Michaels, *Beyond Accountability: The Constitutional, Democratic, and Strategic Problems with Privatizing War*, 82 WASH. U. L.Q. 1001, 1063 (2004).

²² Vincent J. Schodolski, *Pentagon Rule Worries Some: “Stop-loss” Order Keeps Troops in Service After Terms End*, CHICAGO TRIBUNE (Sept. 25, 2004), http://articles.chicagotribune.com/2004-09-25/news/0409250123_1_stop-loss-backdoor-draft-forces.

²³ MICHAEL WATERHOUSE & JOANNE O’BRYANT, CONG. RESEARCH SERV., RS22451, NATIONAL GUARD PERSONNEL AND DEPLOYMENTS: FACT SHEET 5 (2008), *available at* <http://www.fas.org/sgp/crs/natsec/RS22451.pdf>.

²⁴ Laura Smith-Spark, *US National Guard Bears Iraq Burden*, BBC NEWS (Apr. 25, 2007, 8:37 AM), <http://news.bbc.co.uk/2/hi/americas/6585217.stm> (“In the past, they have mostly been deployed to deal with civil emergencies or natural disasters. But since the US-led invasion of Iraq in 2003 all that has changed”); Jim Yardley, *Former Texas Lawmaker Says He Helped Bush Get Into Guard*, N.Y. TIMES, Sept. 27, 1999, <http://www.nytimes.com/1999/09/27/us/former-texas-lawmaker-says-he-he>

complaints that responses to Hurricane Katrina, Kansas tornadoes, and other national disasters were inadequate because personnel and equipment were instead sent to Iraq.²⁵ Pentagon Generals cursorily raised the issue of a draft,²⁶ but supply was instead predominantly filled by the use of PMCs.²⁷

The number of PMC personnel in Iraq steadily appreciated over several years.²⁸ In 2007, PMCs reached 180,000 while at the same time there were 160,000 U.S. troops in Iraq.²⁹ In 2008, the

lped-bush-get-into-guard.html (pointing out that George Bush joined the Texas Air National Guard and avoided the Vietnam War draft).

²⁵ See Dan Froomkin, *Bush's Financial Katrina*, WASH. POST (Mar. 18, 2008, 12:50 PM), <http://www.washingtonpost.com/wp-dyn/content/blog/2008/03/18/BL2008031801445.html> (noting how the wars, natural disasters, and devastated economy led to a succession of scandal for the president); Robert Pear, *Bush Policies Are Weakening National Guard, Governors Say*, N.Y. TIMES, Feb. 27, 2006, <http://www.nytimes.com/2006/02/27/politics/27govs.html> (noting that “[g]overnors of both parties said . . . that Bush administration policies were stripping the National Guard of equipment and personnel needed to respond to hurricanes, floods, tornadoes, forest fires and other emergencies”); John Yaukey, *Katrina Raises Questions About Domestic Use of Troops*, USA TODAY, Sept. 13, 2005, http://usatoday30.usatoday.com/news/washington/2005-09-13-gns-troops_x.htm.

²⁶ See IN THE NAME OF DEMOCRACY: AMERICAN WAR CRIMES IN IRAQ AND BEYOND 278 (Jeremy Brecher, et al. eds., 2005) (stating that the Selective Service System issued a request for volunteers to serve on draft boards and Congress allocated \$28 million for that program); Christian Davenport, *After 30 Years, Draft Fears Rise*, WASH. POST, June 2, 2005, <http://www.washingtonpost.com/wp-dyn/content/article/2005/06/01/AR2005060101654.html> (reporting that shortly after the Iraq War began, citizens developed angst over the possibility of a draft and that the Selective Service System’s mission is to “keep[] the draft machinery ready, without sparking fear that it is coming back”). See also Nina Bernstein, *Fighting for U.S., and for Citizenship*, N.Y. TIMES, Jan. 15, 2005, at B1 (noting that the Bush administration established a fast track to naturalization for 32,000 noncitizens serving in the U.S. military during war).

²⁷ Katherine Jackson, *Not Quite a Civilian, Not Quite a Soldier: How Five Words Could Subject Civilian Contractors in Iraq and Afghanistan to Military Jurisdiction*, 27 J. NAT’L ASS’N ADMIN. L. JUDICIARY 255, 260 (2007) (contending that there is an overreliance on military contractors).

²⁸ For the progression by date see Kenneth Bredemeier, *Thousands of Private Contractors Support U.S. Forces in Persian Gulf*, WASH. POST, Mar. 3, 2003, at E01 (one contractor for every ten military soldiers); David Barstow, *Security Companies: Shadow Soldiers in Iraq*, N.Y. TIMES, Apr. 19, 2004, at A1 (about 20,000 private contractors); Renae Merle, *Census Counts 100,000 Contractors in Iraq*, WASH. POST, at D01, Dec. 5, 2006 (stating there were 100,000 contractors in Iraq); John M. Broder & James Risen, *Contractor Deaths in Iraq Soar to Record*, N.Y. TIMES, May 19, 2007, at A1 (126,000 contractors alongside 150,000 U.S. troops).

²⁹ Sullivan, *supra* note 7, at 855 (stating that estimates of private contractors in Afghanistan were believed to outnumber official military soldiers by a two to one ratio); Jeffrey F. Addicott, *The Political Question Doctrine and Civil Liability for Contracting Companies on the “Battlefield,”* 28 REV. LITIG. 343, 344 n.3 (2008) (noting that a January 2008 estimate placed the number in Iraq at 133,196); *Military-Industrial*

Congressional Budget Office reported that the number of private contractors exceeded 190,000.³⁰ Of the personnel employed by hundreds of PMC firms a significant percentage were retired U.S. military troops and nationals of developing countries,³¹ 130,000 were directly working at U.S. and Iraqi military bases,³² and an estimated 30,000 performed quasi-military roles with weapons.³³ In 2012, U.S. Central Command estimated that of the 137,000 contractors working in the region 40,110 were American citizens, 50,560 were from countries in the region, and 46,231 were not from the U.S. or from the region.³⁴

If an adequate supply of military troops across an American population of 350 million, or from other “coalition of the willing” countries could not be mustered to execute military operations inside a country with a population of 25 million; PMC personnel would not conduct efforts and potentially risk their lives for monetary consideration equivalent to that of enlisted U.S. troops;³⁵ and Pentagon activities could not have continued without PMCs;³⁶ perhaps there is a signal that something is amiss with the war policy. Moreover, it may be reasonable to question the legitimacy of the political process if PMC duties verge on mercenarism, there are

Complexities, THE ECONOMIST (Mar. 27, 2003), <http://www.economist.com/node/1667370/> (calling this the first “privatized war”); T. Christian Miller, *Contractors Outnumber Troops in Iraq*, L.A. TIMES, July 4, 2007, <http://articles.latimes.com/2007/jul/04/nation/na-private4>.

³⁰ CONG. BUDGET OFFICE, 3053, CONTRACTORS’ SUPPORT OF U.S. OPERATIONS IN IRAQ 8 (2008), available at <http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/96xx/doc9688/08-12-iraqcontractors.pdf>; George R. Lucas, Jr., “*This is Not Your Father’s War*,” – *Confronting the Moral Challenges of “Unconventional” War*, 3 J. NAT’L SEC. L. & POL’Y 329, 331 (2009) (estimating 190,000 U.S. funded private contractors in Iraq as of early 2008).

³¹ See Martha Minow, *Outsourcing Power: How Privatizing Military Efforts Challenges Accountability, Professionalism, and Democracy*, 46 B.C. L. REV. 989, 993–96 (2005) (noting that some percentage of the employees working for contractors were subcontracted to nationals of Bangladesh, the Philippines, and other countries).

³² See Miller, *supra* note 29.

³³ Charles Tiefer, *No More Nisour Squares: Legal Control of Private Security Contractors in Iraq and After*, 88 OR. L. REV. 745, 753 (2009).

³⁴ David Isenberg, *Contractors in War Zones: Not Exactly “Contracting.”* TIME (Oct. 9, 2012), <http://nation.time.com/2012/10/09/contractors-in-war-zones-not-exactlycontracting/>.

³⁵ Contractors might not be as motivated to the mission if they could have otherwise chosen to be in the official military. The fact that so many troops departed from the U.S. military to start contracting businesses or to work for higher pay in a PMC may suggest that the motivation is money. See *infra* Part IV.C.

³⁶ P.W. SINGER, CORPORATE WARRIORS: THE RISE OF THE PRIVATIZED MILITARY INDUSTRY 247–48 (updated ed. 2008) (“[T]he Iraq operation could not have been carried out without private military support.”).

deficiencies in the legislative and executive oversight processes,³⁷ the price of privately contracted services must be artificially hoisted to entice individuals to execute the government's mission, or if more taxpayer funds must be expended to persuade additional labor supply. The state should be legally responsible and accountable to public opinion.³⁸ The employment of contractors can subvert democratic processes because private military forces permit war-making without accepting accountability.³⁹ The public sector is designed to fulfill political functions, which would include the American public and elected representatives approving of war policy questions, while private sector entities endeavor to attain profit.⁴⁰

In fact, this muddle can also be an example of the tussle between pluralistic and majoritarian democracy because interest groups may impel government policy-making in opposition to majority will.⁴¹ Commentators maintain that private contractors may influence government processes and foreign policy⁴² in the quest for profits,⁴³ and business interests, rather than domestic or international law⁴⁴ have been governing the use and conduct of PMCs.

³⁷ See *infra* Parts II.A, II.B.

³⁸ Ryan M. Scoville, *Toward an Accountability-Based Definition of "Mercenary,"* 37 GEO. J. INT'L L. 541, 576-77 (2006).

³⁹ See DEBORAH D. AVANT, *THE MARKET FOR FORCE: THE CONSEQUENCES OF PRIVATIZING SECURITY* 21 (2005); Michaels, *supra* note 21, at 1008.

⁴⁰ See Rebecca Weiner, *Private Military Contractors Come with Strings Attached*, BELFER CTR. NEWSLETTER (Belfer Ctr. for Sci. and Int'l Affairs, Harvard Kennedy Sch., Cambridge, Mass.), Winter 2005-06, available at http://belfercenter.hks.harvard.edu/publication/19402/private_military_contractors_come_with_strings_attached.html (noting that the personal interests can be summarized as "[s]oldiers serve their country; contractors serve their managers and shareholders"); Juan Carlos Zarate, *The Emergence of a New Dog of War: Private International Security Companies, International Law, and the New World Disorder*, 34 STAN. J. INT'L L. 75, 147 (1998) (private contractors "obtaining concessions and related contracts for their corporate brethren"). The job of executing a country's act of war should not be delegated, and simply using the label "private military contractor" should not inspire legitimacy when beneficiaries are capitalist corporations and American taxpayers are the fiscal source.

⁴¹ SAMUEL P. HUNTINGTON, *AMERICAN POLITICS: THE PROMISE OF DISHARMONY* 7-8 (1981) (noting that pluralist influences have grown since World War II).

⁴² See Minow, *supra* note 31, at 1022-23; Clifford J. Rosky, *Force, Inc.: The Privatization of Punishment, Policing, and Military Force in Liberal States*, 36 CONN. L. REV. 879, 950-56 (2004).

⁴³ Michaels, *supra* note 21, at 1015 nn.28-30.

⁴⁴ See Simon Chesterman & Chia Lehnardt, *From Mercenaries to Market: The Rise and Regulation of Private Military Companies (Introduction)*, 5 (N.Y. Univ. Sch. of Law Pub. Law & Legal Theory Research Paper Series, Working Paper No. 07-09, 2007), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=985837. While domestic criminal laws could govern the conduct of PMCs, the problem is that they are predominantly employed for transnational operations and the two mer-

PMCs spend millions of dollars on lobbying and campaign contributions,⁴⁵ and PMC heads—who are typically former military officers—are well-connected with Pentagon officials,⁴⁶ including those whom grant lucrative contracts.⁴⁷ Professor Winston Nagan and Craig Hammer, a Governance Consultant at the World Bank, wrote that the military “downsizing has indeed proven lucrative for former government authorities, as well as for former officers in the U.S. military machine.”⁴⁸ The cost to U.S. taxpayers is high, while contractors reduce the political cost to government leaders.

II. SUBDUING THE POLITICAL COST OF MILITARY CONFLICT BY ELUDING RESPONSIBILITY FOR PMCS

A. *Avoiding Responsibility at the Domestic Level*

Apparently believing that the position was sufficiently compelling to be voiced during the 2008 presidential campaign, then-Senator Obama reproached misconduct perpetrated by PMCs⁴⁹ and expressed that “outsourc[ing] critical missions to unaccountable

canary conventions (the United Nations and the Organization of African Unity (OAU)) and the Geneva Conventions have relatively ineffective ambiguous applicability. *See id.*

⁴⁵ *See* SINGER, *supra* note 36, at 243; Mark Calaguas, *Military Privatization: Efficiency or Anarchy?*, 6 CHI.-KENT J. INT’L & COMP. L. 58, 75 (2006) (referencing that of the approximate seventy major PMCs in 2001, just ten firms spent more than \$32 million on lobbying and \$12 million in campaign contributions).

⁴⁶ Heather Carney, *Prosecuting the Lawless: Human Rights Abuses and Private Military Firms*, 74 GEO. WASH. L. REV. 317, 326 (2006); Michaels, *supra* note 21, at 1014–15.

⁴⁷ Saad Gul, *The Secretary Will Deny All Knowledge of Your Actions: The Use of Private Military Contractors and the Implications for State and Political Accountability*, 10 LEWIS & CLARK L. REV. 287, 305 (2006). Many former top Pentagon and national security officials are on the boards and are executives for private contractors that receive some of the most lucrative government contracts. *Id.* Of the thirty members on the Pentagon’s Defense Policy Board, nine are directors of “companies that won \$76 billion in defense contracts in 2001 and 2002.” Dan Baum, *Nation Builders for Hire*, N.Y. TIMES, June 22, 2003, § 6 (Magazine), at 34. Firms, such as Blackwater, CACI, DynCorp, and Titan also have many former high-ranking military officers as executives and board members. Michaels, *supra* note 21, at 1023. The contractor MPRI contends that it has “more generals per square foot than the Pentagon.” *Id.* at 1022.

⁴⁸ Winston P. Nagan & Craig Hammer, *The Rise of Outsourcing in Modern Warfare: Sovereign Power, Private Military Actors, and the Constitutive Process*, 60 ME. L. REV. 429, 436 (2008). *See* Kristen McCallion, *War for Sale! Battlefield Contractors in Latin America & the ‘Corporatization’ of America’s War on Drugs*, 36 U. MIAMI INTER-AM. L. REV. 317, 317–19, 326, 331 (2005) (noting that some PMCs are Fortune 500 companies and are politically well-connected).

⁴⁹ Sullivan, *supra* note 7, at 855.

contractors” will not earn laurels from foreign populations.⁵⁰ Emphasizing that outsourcing can abet executive unilateralism in military policymaking, Professor John D. Michaels wrote that privatization “circumvents primary avenues through which the People are informed and blocks off primary channels (namely Congress) through which the People can register their approval or voice their misgivings.”⁵¹ The executive might actually elect to employ contractors with the intent of insulating operations from public and congressional scrutiny.⁵² Private companies, as non-governmental agencies, are not subject to oversight, openness, and notice requirements of the Administrative Procedure Act⁵³ and are exempt from Freedom of Information Act requests.⁵⁴ The Department of Defense “blocks inquiries by invoking its obligation to protect the firms’ ‘proprietary information.’”⁵⁵

When a higher percentage of contractors are employed (relative to the state’s military force) a reduced number of official troops need to be enlisted; a broader international coalition need

⁵⁰ Christine Hauser, *New Rules for Contractors are Urged by 2 Democrats*, N.Y. TIMES (Oct. 4, 2007), <http://www.nytimes.com/2007/10/04/us/politics/04dems.html>.

⁵¹ Michaels, *supra* note 21, at 1078; SINGER, *supra* note 36, at 209–215; Minow, *supra* note 31, at 1023–24.

⁵² See Minow, *supra* note 31, at 1024; Deven R. Desai, *Have Your Cake and Eat it Too: A Proposal for a Layered Approach to Regulating Private Military Companies*, 39 U.S.F. L. REV. 825, 846 (2005) (“[T]here is no government body overseeing [private contractor] actions.”); Robin M. Donnelly, *Civilian Control of the Military: Accountability for Military Contractors Supporting the U.S. Armed Forces Overseas*, 4 GEO. J.L. & PUB. POL’Y 237, 249 (2006); Gul, *supra* note 47, at 287; Jackson Nyamuya Maogoto & Benedict Sheehy, *Private Military Companies & International Law: Building New Ladders of Legal Accountability & Responsibility*, 11 CARDOZO J. CONFLICT RESOL. 99, 100 (2009) (noting that the Executive’s use of PMCs are usually opaque and designed to be hidden from public view); Michaels, *supra* note 21, at 1011 (stating that the Executive could unilaterally choose to hire private contractors specifically to avoid collaborating with the Congress); Steven L. Schooner, *Contractor Atrocities at Abu Ghraib: Compromised Accountability in a Streamlined, Outsourced Government*, 16 STAN. L. & POL’Y REV. 549, 558–59 (2005) (noting that the government lacks adequate personnel on the ground to manage contracts, to audit contracts, and to fulfill competitive contracting requirements); *cf.* FOREIGN AFFAIRS COMM., PRIVATE MILITARY COMPANIES, NINTH REPORT, 2001-2, H.C. 922, at 1222, 2940 (U.K.), *available at* <http://www.publications.parliament.uk/pa/cm200102/cmselect/cmcaff/922/922.pdf> (noting the lack of British regulation over PMCs even before the Iraq War).

⁵³ See Jody Freeman, *Extending Public Law Norms Through Privatization*, 116 HARV. L. REV. 1285, 1302–05 (2003); Michaels, *supra* note 21, at 1037.

⁵⁴ 5 U.S.C. § 551 (1) (2012); Michaels, *supra* note 21, at 1037–38.

⁵⁵ Carney, *supra* note 46, at 324; *see also* McCallion, *supra* note 48, at 340; Minow, *supra* note 31, at 999 (noting that contractors may avert media and congressional investigations by asserting the need to protect proprietary information).

not be cultivated;⁵⁶ an impression may be imparted that the depth of conflict or occupation is pared;⁵⁷ negative perceptions regarding battles and operations might be deflected off of the occupying military and onto PMCs;⁵⁸ political and military leaders can affix blame on PMCs for malfeasance and even criminal acts instead of on military personnel;⁵⁹ and emotive fallout can be mollified from the reports of deaths in battle. Private contractor deaths will generally be unreported, diluting body counts and diminishing the public appreciation and immediate emotive impact of the human costs of the war.⁶⁰ Accordingly, the government may elude the political repercussion and full costs of war.⁶¹ The U.S. Department of Labor indicated that there were 917 deaths and 10,569 wounded private contractors through the first four years of the war.⁶² The number

⁵⁶ Michaels, *supra* note 21, at 1046.

⁵⁷ See Rebecca Ulam Weiner, *Sheep in Wolves' Clothing: Private Military Men Patrol Iraq in Constant Jeopardy of Stepping on Legal Landmines*, LEGAL AFF. (Jan.–Feb. 2006), http://www.legalaffairs.org/issues/January-February-2006/argument_weiner_janf_eb06.msp (noting that using private military contractors may be a mechanism of misrepresenting the size of the military force deployed because private contractors are generally not considered in the numbers of a military force). Secretary of Defense Donald Rumsfeld expressed that he was trying to keep down the number of official U.S. soldiers deployed by hiring contractors. Tiefer, *supra* note 33, at 753.

⁵⁸ See Michaels, *supra* note 21, at 1047–48 (stating that in countries where there have been U.S. military bases, such as Japan, the Philippines, and Saudi Arabia, PMCs may avoid the hostility that has developed in those countries toward U.S. soldiers).

⁵⁹ See Carney, *supra* note 46, at 323. Myles Frechette, former US ambassador to Colombia, explained: “When private contractors are killed, we can just say that they are not part of our military forces. The same could be said if and when they kill.” *Id.* (internal quotation marks omitted); Newell & Sheehy, *supra* note 19, at 88 (stating that omissions, malfeasance, corruption, and even illegalities can be blamed on contractors).

⁶⁰ John D. Michaels, *Privatization's Pretensions*, 77 U. CHI. L. REV. 717, 722 (2010).

⁶¹ Michaels, *supra* note 21, at 1046 (using private contractors does “perhaps lower the likelihood of the unacceptable imagery of American soldiers coming off cargo planes in bodybags”); Sullivan, *supra* note 7, at 878 (noting that contractor deaths are rarely reported, which permits government officials to avoid facing the full costs of war); *Interview: Steven Schooner*, FRONTLINE (May 19, 2005), <http://pbs.org/wgbh/pages/frontline/shows/warriors/interviews/schooner.html> (stating that contractor deaths “artificially deflate[] the human cost of . . . involvement in Iraq”); see also Michael J. Davidson, *Ruck Up: An Introduction to the Legal Issues Associated with Civilian Contractors on the Battlefield*, 29 PUB. CONT. L.J. 233, 263 (2000); Jackson, *supra* note 27, at 260–61; Broder & Risen, *supra* note 28, at A1.

⁶² Laura K. Donohue, *The Shadow of State Secrets*, 159 U. PA. L. REV. 77, 96 (2010) (noting that over 1,000 government contractors were killed in Iraq and Afghanistan July 2007); Bernd Debusmann, *In Outsourced US Wars, Contractor Deaths Top*

of deaths rose to 1,487 through June 2010.⁶³ A family member of a deceased contractor explained: “If anything happens to the military people, you hear about it right away . . . Flags get lowered, they get their respect. You don’t hear anything about the contractors.”⁶⁴ Yet, despite this distinction from actual military members, in terms of PMCs being hired for and contributing to a mission, contractors are ostensibly treated as part of the military.

Professors Simon Chesterman and Chia Lehnardt introduce a provocative point when they explain that the use of privatization to fulfill the supply of military operations is partially due to “the growing reluctance on the part of key states to intervene in conflicts that are not of immediate strategic interest or where domestic support for intervention is lacking.”⁶⁵ This is indeed true, and further illuminates inquiry into from where states would legitimately acquire the authority to approve or carry out these missions, and why reluctant taxpayers should be compelled to directly or indirectly fund such missions. If a circumstance arises such that actors engage in conflict and the executive does not assume effective responsibility, then the mission may be unsound at the international level and also may not represent the state’s foreign policy because armed conflict invokes democratic public choices and the legislative prerogative to oversee government.⁶⁶ Nonetheless, non-state actors can execute a state mission; both the U.S. and UN have assessed liability

1,000, REUTERS (July 3, 2007), <http://www.reuters.com/article/2007/07/03/us-usa-iraq-contractors-idUSN0318650320070703>; Miller, *supra* note 29.

⁶³ Steven L. Schooner & Collin D. Swan, *Contractors and the Ultimate Sacrifice*, SERVICE CONTRACTOR (Prof'l Servs. Council, Arlington, Va.), Sept. 2010, at 16, available at <http://ssrn.com/abstract=1677506>.

⁶⁴ Broder & Risen, *supra* note 28, at A1; see also Michaels, *supra* note 21, at 1008 (stating that the use of contractors helps avoid political backlash).

⁶⁵ Chesterman & Lehnardt, *supra* note 44, at 1; see also *id.* at 12 (further maintaining that PMCs will not be outlawed because precluding the use of military contractors would undermine a state’s foremost interest in controlling its foreign policy). Using PMCs may be an effective mode of achieving foreign policy objectives if that is the populist and legislative will and restrictions on the use of force and mercenarism are not violated.

⁶⁶ For a review of the historical imperative of executive transparency and responsibility, see THE FEDERALIST NO. 70 (Alexander Hamilton) (“[O]ne of the weightiest objections to a plurality in the Executive . . . is[] that it tends to conceal faults and destroy responsibility [T]he multiplication of the Executive adds to the difficulty of detection in either case.”); Robert J. Spitzer, Bush, the Post-Bush Presidency, and the Constitutional Order, Presentation at the Ann. Meeting of the Am. Political Sci. Assoc., Toronto, Can. 9 (Sept. 3, 2009), <http://ssrn.com/abstract=1450695> (addressing the importance of assuring responsibility and noting that “[t]he phrase ‘unitary executive’ was derived from references in the Federalist Papers to ‘unity’ in the executive”).

on states for the actions of non-state actors over which states control.⁶⁷ International tribunals have affirmed that there is state responsibility when non-state actors execute operations for which there is effective state control.⁶⁸

The most convincingly legitimate execution of a state policy involves operations that remain within the military, because the use of force is a public law question buttressed by sovereign prerogatives and restrictions, democratic accountability, and sensible oversight. Alternatively, PMCs are recruited to fulfill demand with more discreet procedures and by multiplying the amount of financial compensation, which may entice military personnel to exit public service and enter PMCs for more compensation. These recruiting measures do not demonstrate meaningful public approval for missions that taxpayers must fund.

B. Procurement of Goods and Non-Inherent Government Services

Privatization is ordinarily sanctioned as a means of saving money through private sector efficiency, competitiveness, and economies of scale. Privatization and outsourcing of government operations to the private sector were assuredly neither designed as a medium for the government to neglect responsibility over contracted services⁶⁹ nor sanctioned as an arrangement to acquire ser-

⁶⁷ See George K. Walker, *The Lawfulness of Operation Enduring Freedom's Self-Defense Responses*, 37 VAL. U. L. REV. 489, 504–05 (2003).

⁶⁸ Prosecutor v. Tadic, Case No. IT-94-I-A, Judgment, ¶ 144 (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999) (“[P]rivate individuals acting within the framework of, or in connection with, armed forces, or in collusion with State authorities may be regarded as *de facto* State organs” with “acts of such individuals . . . attribut[able] to the State,” including criminal responsibility). The state must wield “effective control” over the paramilitary group to impose liability. *Id.* ¶¶ 115, 131, 137.

In order to attribute the acts of a military or paramilitary group to a State, it must be proved that the State wields overall control over the group, not only by equipping and financing the group, but also by coordinating or helping in the general planning of its military activity. Only then can the State be held internationally accountable for any misconduct of the group. However, it is not necessary that, in addition, the State should also issue, either to the head or to members of the group, instructions for the commission of specific acts contrary to international law.

Id. ¶ 131. See *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14, ¶ 115 (June 27) (holding that liability can be imposed on the state when it has “effective control” over the actor).

⁶⁹ See Jennifer S. Martin, *Adapting U.C.C. § 2-615 Excuse for Civilian-Military Contractors in Wartime*, 61 FLA. L. REV. 99, 144–45 (2009) (noting that government should

vices from the private sector that by law must remain internal. As authorized under federal law, military contractors provide goods and services to the Department of Defense,⁷⁰ with an estimated 57% of Pentagon spending involving services (rather than goods)⁷¹ and 30% of military service functions being handled by contractors.⁷² Such considerable reliance on the private sector does not, in and of itself, evoke objection. However it is the employment of PMCs for services that are equivalent to essential obligations performed by military troops, combined with the toleration of government agencies' evasion of responsibility for the companies' operations and performance that engenders apprehension.⁷³

Under the FAIR Act, Congress promulgated a definition that prohibited the Executive from hiring private contractors for an "inherently governmental function," which is "a function that is so intimately related to the public interest as to require performance by . . . Government employees."⁷⁴ The Pentagon assented to the

retain risks of contractor performance that involve "inherently governmental functions").

⁷⁰ 50 U.S.C. app. § 2152(5) (2012).

⁷¹ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-05-274, CONTRACT MANAGEMENT: OPPORTUNITIES TO IMPROVE SURVEILLANCE ON DEPARTMENT OF DEFENSE SERVICE CONTRACTS 1 (2005), available at <http://www.gao.gov/assets/250/245676.pdf>. Procurement for goods may involve items that cannot be sourced internally. Some goods are private sector oriented or dual-use and others are not available to the private sector, such as certain weapons and equipment.

⁷² Andrew Finkelman, *Suing the Hired Guns: An Analysis of Two Federal Defenses to Tort Lawsuits Against Military Contractors*, 34 BROOK. J. INT'L L. 395, 400 (2009).

⁷³ JEREMY SCAHILL, BLACKWATER: THE RISE OF THE WORLD'S MOST POWERFUL MERCENARY ARMY 23 (2007) (quoting an Army colonel who stated about mercenary forces that "[i]f they push traffic off the roads or if they shoot up a car that looks suspicious, they may be operating within their contract, but it is to the detriment of the mission"); see Carney, *supra* note 46, at 328; Chesterman & Lehnardt, *supra* note 44, at 1-2, 5 (remarking that there is the danger of suboptimal performance and that "PMCs might be used by Western governments to conduct 'foreign policy by proxy'"). The PMC may be facilitating foreign policy, but the conduct of the private firms may not be attributed to the state and even if it is, there may be no clear framework for holding the state responsible, particularly when it can be difficult for international law to punish the most powerful actor(s). See *id.*

⁷⁴ See Federal Activities Inventory Reform Act of 1998 (FAIR Act) § 5(2)(A), Pub. L. No. 105-270, 112 Stat. 2382, 2384 (1998) (codified at 31 U.S.C. § 501 (2012)); Paul R. Verkuil, *Public Law Limitations on Privatization of Government Functions*, 84 N.C.L. REV. 397, 437, 452, 454 (2006) (making arguments under OMB's Circular A-76 and potential restrictions under the Subdelegation Act that government services cannot be outsourced for "inherent" government functions). The Federal Acquisition Regulations govern all federal contractors and the Defense Federal Acquisition Regulation Supplement applies to all Pentagon contracts. See 48 C.F.R. § 1.101 (2013); 48 C.F.R. §§ 201.104 to 201.201(a)(1) (2009).

intrinsic government function standard,⁷⁵ but the Bush Administration pushed the standard in a manner consistent with an ideological predisposition to favor privatization.⁷⁶ As Nobel Laureate Paul Krugman explained, the Bush Administration privatized “everything in sight,” including core and exclusive military functions, the protection of officials, and the interrogations of detainees in Iraqi prisons; but Congress does not exercise oversight over the use of PMCs.⁷⁷

While there may be some discord over the interpretation of an “inherently governmental function,”⁷⁸ some clearly permissible contractual functions include providing food services and accommodations, repairing equipment, and offering other traditionally civilian-related services.⁷⁹ By contrast, national security is unquestionably an essential government function. As with all of the public functions related to war powers, due to risks in handling, and concerns

⁷⁵ U.S. DEP’T OF DEF., DODI 1100.22, GUIDANCE FOR DETERMINING WORKFORCE MIX, § 6.1.2 (2006), available at <http://www.dodea.edu/Offices/CSPO/upload/Guidance-for-Determining-Workforce-Mix.pdf>. It would appear that subcontracting has expanded beyond this standard.

⁷⁶ Finkelman, *supra* note 72, at 402–03.

⁷⁷ Paul Krugman, *Battlefield of Dreams*, N.Y. TIMES, May 4, 2004, at A29; see also J. Ricou Heaton, *Civilians at War: Reexamining the Status of Civilians Accompanying the Armed Forces*, 57 A.F. L. REV. 155, 186 (2005) (stating that in practice private military companies are normally involved in three types of activities—military consulting, military support, and security). Secretary of Defense Rumsfeld announced that the Pentagon should eliminate or shift all activities that are not core defense operations to the private sector. Minow, *supra* note 31, at 1002; see also U.S. DEPT. OF DEF., QUADRENNIAL DEFENSE REVIEW REPORT 4 (Feb. 6, 2006), available at <http://www.defenselink.mil/qdr/report/Report20060203.pdf> (discussing that procurement is a demand-driven choice, and “[t]he Total Force of active and reserve military, civilian, and contractor personnel must continue to develop the best mix of people equipped with the right skills needed by the Combatant Commanders.”); McCallion, *supra* note 48, at 319 (“[C]ontractors perform virtually every function essential to a successful military operation.”). In what could be parsing words, the report continues by noting that the National Security Personnel System “recognizes the importance of defense civilians and the support they provide for contingency operations. It enables civilians to perform inherently governmental functions, freeing military personnel to perform inherently military functions.” U.S. DEPT. OF DEF., *supra*, at 81.

⁷⁸ Minow, *supra* note 31, at 1015.

⁷⁹ See Laura A. Dickinson, *Government for Hire: Privatizing Foreign Affairs and the Problem of Accountability Under International Law*, 47 WM. & MARY L. REV. 135, 148 (2005); Robert W. Wood, *Independent Contractor vs. Employee and Blackwater*, 70 MONT. L. REV. 95, 102 (2009) (noting that a military contractor must also provide housing, food, laundry, transportation, and housekeeping services for its own personnel). See generally Singer, *supra* note 1, at 120–23 (describing the broad spectrum of services provided).

over verifying authenticity, services involving classified information should probably not generally be undertaken in the private sector.⁸⁰ In fact, in 2000, the Army decided “the gathering and analysis’ of tactical intelligence is . . . ‘an inherently governmental function barred from private sector performance.’”⁸¹ Yet, shortly thereafter, under the Bush Administration, PMCs were hired to conduct intelligence operations,⁸² interrogate detainees,⁸³ and maintain targeting and surveillance operations.⁸⁴ CACI and Titan committed abuses at Abu Ghraib prison, and Blackwater was awarded a contract to plan assassinations of al-Qaeda leaders.⁸⁵ Assassinations and abusive interrogations are illegal under international law,⁸⁶ which means that

⁸⁰ Tim Shorrock, *Put the Spies Back Under One Roof*, N.Y. TIMES, June 17, 2013, at A25.

⁸¹ Chris Jenks, *Square Peg in a Round Hole: Government Contractor Battlefield Tort Liability and the Political Question Doctrine*, 28 BERKELEY J. INT’L L. 190 (2010) (quoting Memorandum from Patrick T. Henry, Assistant Secretary of the Army for Manpower and Reserve Affairs, to the Deputy Chief of Staff of the Army for Intelligence (Dec. 26, 2000), available at <http://www.asamra.army.mil/fair/files/25-Prior-Exeptions-Still-in-Effect.pdf>).

⁸² Dickinson, *supra* note 79, at 149; Jackson, *supra* note 27, at 283; Minow, *supra* note 31, at 1003–04; Baum, *supra* note 47, at 32 (quoting a former General who remarked that “[t]here’s very few things in life you can’t outsource”); Victoria Burnett et al., *From Building Camps to Gathering Intelligence*, FIN. TIMES, Aug. 11, 2003, at 13; Ariana Eunjung Cha & Renae Merle, *Line Increasingly Blurred Between Soldiers and Civilian Contractors*, WASH. POST, May 13, 2004, at A1.

⁸³ Nicholas Parrillo, *The De-Privatization of American Warfare: How the U.S. Government Used, Regulated, and Ultimately Abandoned Privateering in the Nineteenth Century*, 19 YALE J.L. & HUMAN. 1, 2 (2007) (discussing contemporary roles for U.S. mercenaries, including the interrogation of detainees at Abu Ghraib); ARTICLE 15-6 INVESTIGATION OF THE 800TH MILITARY POLICE BRIGADE 26 (2004), available at http://www.npr.org/iraq/2004/prison_abuse_report.pdf (noting the lack of supervision of contractors at Abu Ghraib); see also SINGER, *supra* note 36, at 91 (classifying private military contractors into military combat, consultants, and support); Michaels, *supra* note 21, at 1019 (listing interrogator among a plethora of roles for PMCs).

⁸⁴ Martha Minow, *Outsourcing Power: Privatizing Military Efforts and the Risks to Accountability, Professionalism, and Democracy*, in GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY 110, 112 (Jody Freeman & Martha Minow eds., 2009).

⁸⁵ Simon Chesterman, *Lawyers, Guns, and Money: The Governance of Business Activities in Conflict Zones*, 11 CHI. J. INT’L L. 321, 336 (2011); Dion Nissenbaum, *Blackwater’s Founder Blames U.S. for Its Troubles*, WALL ST. J. (Nov. 17, 2013, 8:13 PM), <http://online.wsj.com/news/articles/SB10001424052702304439804579203883470837874> (reporting that Blackwater “secretly armed and maintained drones in Pakistan”).

⁸⁶ See Robert Bejesky, *Pruning Non-Derogative Human Rights Violations into an Ephemeral Shame Sanction*, 58 LOY. L. REV. 821, 829–36 (2012). If contractors engage in spying to obtain information from the enemy, then they are considered criminals

these are not legitimate government functions. Professor Sandeep Gopalan referred to the use of “subcontracting of illegal actions” as a form of avoiding responsibility.⁸⁷

Anything involving combat is a core military function;⁸⁸ but under the Bush Administration, PMCs were tasked with fighting and providing mercenary-like services.⁸⁹ The Government Accountability Office deemed the Iraq War the first time private contractors were used almost in direct replacement for combat troops, including by engaging in hostilities.⁹⁰ Secretary of Defense Rumsfeld espoused that Private Security Companies would “provide only defensive services.”⁹¹ PMCs also denied that they were involved in strategic or offensive military operations, but instead insisted that they offered defensive services “concerned with the protection of people and premises.”⁹² However, in just two years of occupation

without POW status. See *Laws and Customs of War on Land (Hague II)*, ch. 2, July 29, 1899, 32 Stat. 1803, 187 Consol. T.S. 429.

⁸⁷ Sandeep Gopalan, *Alternative Sanctions and Social Norms in International Law: The Case of Abu Ghraib*, 2007 MICH. ST. L. REV. 785, 787–88 (2007). This could also be another breed of plausible deniability. McCallion, *supra* note 48, at 319, 340–41 (The “current status of government accountability [in using contractors] is merely ‘plausible deniability.’”); P.W. Singer, *The Contract the Military Needs to Break*, WASH. POST, Sept. 12, 2004, at B03; Eugenio Cusumano, *Regulating Private Military and Security Companies: A Multifaceted and Multilayered Approach* 18 (Acad. of European Law, EUI Working Paper No. AEL 2009/11), available at http://cadmus.eui.eu/dspace/bitstream/1814/12953/1/AEL_2009_11.pdf (contractors give states a “shield of plausible deniability”).

⁸⁸ Verkuil, *supra* note 74, at 449 (“In the military setting, privatization clearly challenges constitutional limits when inherent government functions (matters involving life and death and the exercise of discretion) are performed by private security firms on the front lines in Iraq and elsewhere . . .”).

⁸⁹ See Parrillo, *supra* note 83, at 2; see also Newell & Sheehy, *supra* note 19, at 71 (noting that a mercenary is presumed to be engaged in “combat for sale,” while not all PMCs engage in combat). Such contractors do not always seem to be providing security to US agencies or to Iraqis but can also be focused on providing security to capitalism. See Antonia Juhasz, *It’s Still About Oil in Iraq*, L.A. TIMES, Dec. 8, 2006, at 43 (noting that the Bush Administration’s pre-invasion Iraq Study Group recommendations stated that U.S. troops should remain in Iraq for several years to provide security to Iraq’s oil infrastructure).

⁹⁰ See U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-06-865T, REBUILDING IRAQ: ACTIONS STILL NEEDED TO IMPROVE THE USE OF PRIVATE SECURITY PROVIDERS I, 56 (2006), available at <http://www.gao.gov/assets/120/114004.pdf> (listing the gamut of security services, which by definition required wielding weapons).

⁹¹ Michael N. Schmitt, *War, International Law, and Sovereignty: Reevaluating the Rules of the Game in a New Century: Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees*, 5 CHI. J. INT’L L. 511, 514 (2005).

⁹² Zoe Salzman, *Private Military Contractors and the Taint of a Mercenary Reputation*, 40 N.Y.U. J. INT’L L. & POL. 853, 883 (2008) (many scholars also assert that the vast majority of private contractors do not provide combat services); see also Amanda Tarzwell, Note, *In Search of Accountability: Attributing the Conduct of Private Security*

of Iraq Blackwater was involved in at least 195 firefights, and Blackwater personnel fired first in 84% of instances despite only being allowed to fire in self-defense.⁹³

The Pentagon did not generally recant or question the decision to outsource the services, but officials did state that Blackwater frequently executes contractual obligations aggressively and recklessly.⁹⁴ Rather than deducing that Blackwater personnel are often unduly nervy and brash, perhaps those characteristics can be reasonably expected and are attributable to the position in which the contractors are placed under the terms of the contract; the fact that Blackwater has openly been called a “paramilitary unit” that is “comparable to mercenaries,”⁹⁵ and the fact that PMCs are authorized to use military weapons and lethal force with assault weapons.⁹⁶

Contractors to the United States Under the Doctrine of State Responsibility, 11 OR. REV. INT’L L. 179, 188 (2009) (reporting that contractors can use deadly force only in self-defense, defense of others, and to thwart attacks against civilians).

⁹³ STAFF OF H. COMM. ON OVERSIGHT & GOV’T REFORM, 110TH CONG., MEMORANDUM: ADDITIONAL INFORMATION ABOUT BLACKWATER USA 6 (Oct. 1, 2007), available at <http://www.latimes.com/media/acrobat/2007-10/32930222.pdf>; Laura Dickinson, *Military Lawyers, Private Contractors, and the Problem of International Law Compliance*, 42 N.Y.U. J. INT’L L. & POL. 355, 374 (2010) (quoting a JAG officer who called Blackwater employees “odd because they were like a paramilitary unit”).

⁹⁴ See *Interview: Marine Col. Thomas X. Hammes (Ret.)* FRONTLINE (Mar. 21, 2005), <http://www.pbs.org/wgbh/pages/frontline/shows/warriors/interviews/hammes.html>.

Blackwater’s an extraordinary professional organization, and they were doing exactly what they were tasked to do: protect the principal. The problem is in protecting the principal they had to be very aggressive, and each time they went out they had to offend locals, forcing them to the side of the road, being overpowering and intimidating, at times running vehicles off the road, making enemies each time they went out. So they were actually getting our contract exactly as we asked them to and at the same time hurting our counterinsurgency effort.

Id. In a committee hearing, Representative Henry Waxman stated that Blackwater contractors “often act like cowboys.” *Hearing on Blackwater USA Before the H. Comm. on Oversight and Gov’t Reform*, 110th Cong. 51 (2007). But see Sullivan, *supra* note 7, at 870 (quoting economist Gary Becker, who wrote that “[t]o my knowledge there is no compelling evidence that American private guards in Iraq have been likely to behave irresponsibly, cowardly, or use excessive force” in comparison to a soldier in Iraq).

⁹⁵ Dickinson, *supra* note 93, at 357

⁹⁶ See Frederic J. Frommer & Eric Tucker, *Ex-Blackwater Contractors Face Fresh Charges in Iraq*, ASSOCIATED PRESS, Oct. 17, 2013, available at <http://www.usatoday.com/story/news/nation/2013/10/17/blackwater/3004319/> (reporting that Blackwater personnel were equipped with and fired machine guns and grenades); James Risen, *2005 Use of Gas by Blackwater Leaves Questions*, N.Y. TIMES, Jan. 10, 2008, at A1 (reporting that US military officials asserted that they do not deploy control agents

Lumping lethal force operations inside a combat zone with historical and traditional notions of privatization that facilitated procurement for goods or non-inherent government function services is a species of deceit.⁹⁷ Nonetheless, questionable outsourcing endured due to ductile specifications.

The Department of Defense Federal Acquisitions parameters prohibited private contractors from engaging in offensive combat, but sanctioned PMCs to use deadly force in self-defense or “when necessary to execute their security mission to protect assets/persons, consistent with the mission statement contained in their contract.”⁹⁸ Even though PMCs were legally restricted from engaging in offensive operations, it may be onerous to differentiate between offensive and defensive operations⁹⁹ if the class of tasks that contractors execute is inherently dangerous.¹⁰⁰ Such participation is ostensibly sufficient to be considered a combatant under international law when there is direct participation in hostilities and an intention “to hit specifically the personnel and the materiel of the armed forces of the adverse Party.”¹⁰¹

Another category of PMC undertakings involves accompanying military personnel into hostile zones without necessarily being involved in combat. A British House of Commons report considered

except “under the strictest conditions and with the approval of top military commanders,” while Blackwater dropped riot control agents from a helicopter in Baghdad in 2005). There are restrictions under the chemical weapons convention. Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, art. I, ¶ 5, *opened for signature* Jan. 13, 1992, S. TREATY DOC. No.103-21, 32 I.L.M. 800 (“Each State Party undertakes not to use riot control agents as a method of warfare.”); Steve Fainaru, *Warnings Unheeded on Guards in Iraq*, WASH. POST, Dec. 24, 2007, at A1 (noting that Iraqis exhibited anger over the impunity that Blackwater and other private contractors have been granted after killing and injuring Iraqis).

⁹⁷ American civilians cannot take assault weapons and use lethal force against other people, but a PMC’s use of force derives necessarily from government authority.

⁹⁸ Finkelman, *supra* note 72, at 436–37. See also Chesterman & Lehnardt, *supra* note 44, at 2 (noting that most security firms are only involved in defensive operations and not offensive ones). On September 20, 2005, the U.S. military issued an authorization for “contractors to use deadly force to protect people and assets.” Fainaru, *supra* note 96, at A1. See also *Private Security Contracting in Iraq and Afghanistan: Hearings Before the H. Comm. on Oversight and Gov’t Reform*, 110th Cong. 7 (2007) (Statement of Richard J. Griffin, Assistant Secretary of State Bureau of Diplomatic Security, Dept. of State) (discussing the defensive operations policy).

⁹⁹ Barstow, *supra* note 28, at A1.

¹⁰⁰ Davidson, *supra* note 61, at 265.

¹⁰¹ INT’L COMM. OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS TO THE GENEVA CONVENTIONS, ¶ 1679 (1987), available at <http://www.icrc.org/ihl/COM/470-750053>.

the span of military combat operations broadly: “The distinction between combat and non-combat operations is often artificial. The people who fly soldiers and equipment to the battlefield are as much a part of the military operation as those who do the shooting.”¹⁰² The U.S. military also has encompassing definitions of participation in hostilities, including: engaging in logistics support and intelligence operations, and serving as guards, or serving as surveillants.¹⁰³ Providing logistics support to troops may be viewed as participating in hostilities, but it is combat and security operations that present the strongest possibility of shirking political responsibility.

C. *State Actions and Derivative Responsibilities*

Not only do combat-related PMC obligations present a quagmire for reasonably interpreting inherent government functions, but outsourcing operations in Iraq became even more astonishing amid dizzying and irreconcilable contentions over whether the Pentagon or another U.S. government agency could or could not control or assume responsibility over contractors. There are three predominant issues of effective agency. First, whether a non-military government agency outsources combat-related obligations. Second, whether the military should assume inclusive responsibility and control over contractors. Third, whether general agency principles should apply, depending on the attributes of the outsourced tasks.

First, during the occupation of Iraq, there was the quandary of a U.S. government agency, other than the Department of Defense, contracting for services that might constitute military operations and being ill-equipped to oversee PMCs because the Pentagon was the only U.S. government agency with contemplated rules and policies for employing private security contractors.¹⁰⁴ In what became referred to as the Nisour Square massacre, Blackwater guards

¹⁰² Minow, *supra* note 31, at 1015–16 (quoting FOREIGN & COMMONWEALTH OFFICE, PRIVATE MILITARY COMPANIES: OPTIONS FOR REGULATION, Green 2001-2, H.C. 577, at 8 (U.K.), *available at* https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/228598/0577.pdf (internal quotation marks omitted).

¹⁰³ Michael E. Guillory, *Civilianizing the Force: Is the United States Crossing the Rubicon?*, 51 A.F. L. REV. 111, 117–18 (2001); *see also* Perlstein v. United States, 151 F.2d 167 (3d. Cir. 1945) (stating that contractors are apt to be providing support directly to the military and “accompanying” the forces). Gary Motsek, Assistant Deputy Undersecretary of Defense who oversaw contractors, remarked that PMCs are just there to “support the war fighter” and “they’re supporting the mission as required.” Miller, *supra* note 29 (internal quotation marks omitted).

¹⁰⁴ *See* Jeremy Joseph, *Striking the Balance: Domestic Civil Tort Liability for Private Security Contractors*, 5 GEO. J.L. & PUB. POL’Y 691, 704–06 (2007).

opened fire with machine guns and grenades and killed seventeen civilians while on a diplomatic security mission.¹⁰⁵ Yet, because the President granted the Department of State “authority over all but military operations,” the Department of State’s Bureau of Diplomatic Security was chided for not dispensing adequate oversight of its contractors.¹⁰⁶ A Congressional Research Service report estimated that the State Department employed 2,500 personnel for security,¹⁰⁷ but at the same time as many as 70,000 private contractors had engaged in military operations in Iraq.¹⁰⁸

The State Department had no effective framework to control, supervise, or regulate private security contractors.¹⁰⁹ This is not surprising because security personnel are normally government employees within the U.S. Department of State Bureau of Diplomatic Security, the “security and law enforcement arm of the U.S. Department of State.”¹¹⁰ This fact may evince that security for the U.S. Department of State has been considered an essential government function; although, the State Department’s need for a mind-boggling 2,500 security personnel inside a zone of occupation

¹⁰⁵ Frommer & Tucker, *supra* note 96.

¹⁰⁶ Karen DeYoung, *State Department Struggles To Oversee Private Army*, WASH. POST, Oct. 21, 2007, at A1; *see also* JENNIFER K. ELSEA, MOSHE SCHWARTZ & KENNON H. NAKAMURA, CONG. RESEARCH SERV., RL32419, PRIVATE SECURITY CONTRACTORS IN IRAQ: BACKGROUND, LEGAL STATUS, AND OTHER ISSUES 8, 12, 41 (2008), *available at* <http://www.fas.org/sgp/crs/natsec/RL32419.pdf> (describing that a problem for assessing responsibility is that government agencies do not know which private firms are under their control). The contractors were classified as security forces for the State Department, which meant that under the contractual obligations, the Department of Defense was not the principal and did not have responsibility. *See* Margaret Prystowsky, *The Constitutionality of Court-Martialing Civilian Contractors in Iraq*, 7 CARDOZO PUB. L. POL’Y & ETHICS J. 45, 56–57 (2008).

¹⁰⁷ Stop Outsourcing Security Act, S. 1428, 112th Cong. § 2(4) (2011), *available at* <http://thomas.loc.gov/cgi-bin/query/z?c112:S.1428>: (stating that “[a]s of April 1, 2011, the Department of State had over 2,500 security contractors in Iraq”); CONG. BUDGET OFFICE, *supra* note 30, at 8 (referencing 2007 numbers that recognized that 40% of the 6,700 Dept. of State contracted PMC personnel were providing security).

¹⁰⁸ *See* Geoffrey Corn, *Bringing Discipline to the Civilianization of the Battlefield: A Proposal for a More Legitimate Approach to Resurrecting Military-Criminal Jurisdiction over Civilian Augmentees*, 62 U. MIAMI L. REV. 491, 516 (2008).

¹⁰⁹ Karen DeYoung, *On Hill, Rice Talks About Blackwater*, WASH. POST, Oct. 26, 2007, at A8 (reporting that during Congressional hearings, Secretary of State Condoleezza Rice regretted that the State Department did not have a framework to supervise security contractors).

¹¹⁰ U.S. DEPT. OF STATE, BUREAU OF DIPLOMATIC SECURITY, <http://www.state.gov/m/ds/> (last visited Oct. 1, 2014). *But see* ELSEA, SCHWARTZ & NAKAMURA, *supra* note 106, at 7 (stating that the Bureau of Diplomatic Security did first use PSCs in 1994 for an operation in Haiti and then later used them for operations in Bosnia, Israel, and Afghanistan).

might connote that the security personnel should have been optimally assigned to U.S. military operations. The House Oversight and Government Reform Committee held hearings over the discomfiting circumstances, and Department of State officials stated that they “could not say with certainty whether any Blackwater guard could be prosecuted under U.S. law.”¹¹¹ The FBI investigated and found that at least fourteen of the seventeen killings in Nisour Square were without cause, but the U.S. government still struggled with the decision to bring charges.¹¹² Five Blackwater employees were indicted for involuntary manslaughter charges in the D.C. District Court in December 2008,¹¹³ only to have the court dismiss the case and have prosecutors bring new charges in October 2013, which did result in a federal jury rendering a verdict of first-degree murder against one defendant and multiple counts of voluntary manslaughter against three other defendants.¹¹⁴

Second, when the Pentagon did contract with PMCs, it was not manifest to what extent the military assumed control or responsibility over PMC operations. Retired Colonel Thomas Hammes explained: “I still think, from a pure counterinsurgency standpoint, armed contractors are an inherently bad idea, because you cannot control the quality, you cannot control the action on the ground, but you’re held responsible for everything they do.”¹¹⁵ It is a bad idea to outsource services for armed contractors and it may be taxing to control quality.¹¹⁶ However, if the Pentagon is willing to con-

¹¹¹ Peter Spiegel, *Guards’ Actions Defended*, L.A. TIMES (Oct. 3, 2007), <http://articles.latimes.com/2007/oct/03/nation/na-blackwater3>.

¹¹² Surabhi Ranganathan, *Between Complicity and Irrelevance? Industry Associations and the Challenge of Regulating Private Security Contractors*, 41 GEO. J. INT’L L. 303, 352 (2010).

¹¹³ *United States v. Slough*, No. CR-08-360 (D.D.C. filed Dec. 4, 2008), available at <http://news.findlaw.com/cnn/docs/iraq/blackwater-indictment1208ind.html>; see also *U.S. Congress and Administration Consider Responses to Excessive Uses of Force by U.S. Security Firms*, 102 AM. J. INT’L L. 161, 162 (John R. Crook ed., 2008) [hereinafter *Responses to Excessive Uses of Force*] (stating that the U.S. Department of Justice is seeking possible criminal prosecution for the killings); James Risen, *Guards Plead Not Guilty in ‘07 Killings in Baghdad*, N.Y. TIMES, Jan. 7, 2009, at A1 (stating that the five indicted guards plead not guilty to the charges).

¹¹⁴ See Frommer & Tucker, *supra* note 96; Elliot C. McLaughlin, *Jury: Ex-Blackwater Contractors Guilty in ‘Outrageous’ Nisour Square Shooting*, CNN, Oct. 23, 2014, <http://www.cnn.com/2014/10/22/justice/blackwater-iraq-guilty-verdicts/>.

¹¹⁵ Fainaru, *supra* note 96, at A1.

¹¹⁶ Dickinson, *supra* note 93, at 373–74, 376–77, 382–83 (stating that contractors are frequently involved in using arms, but it is not clear that contractors even receive training on the rules for the use of force or for specific combat scenarios). “Blackwater CEO Erik Prince appeared to have at best a murky understanding of the precise legal rules and regulations that governed his employees’ use of force

summate agreements with PMCs for operations that expressly or impliedly presume that contractors will be armed with military equipment, then the Pentagon should be capable of effectively imposing contractual responsibilities and restrictions, assuming control and oversight, mandating punishment for wrongdoing,¹¹⁷ and firing contractors for ineffective performance.¹¹⁸ Nonetheless, contractors often evade oversight.¹¹⁹ This may be attributable to the puzzling inconsistencies between a government agency not being willing to exert control over contractors simply because of the practical and jurisprudential premises attached to distinctions between contractors and employees¹²⁰ and the assumption that PMC tasks

and available accountability mechanisms for the misuse of that force.” *Id.* at 380–81.

¹¹⁷ See Tiefer, *supra* note 33, at 749–50, 763–64.

¹¹⁸ See *id.*; United States v. Orleans, 425 U.S. 807, 815–16 (1976) (addressing government contractors generally when explaining that “[Contractors] are responsible to the United States for compliance with the specifications of a contract or grant, but they are largely free to select the means of its implementation Similarly, by contract, the Government may fix specific and precise conditions to implement federal objectives [However, they may not be] federal governmental acts.”); Verkuil, *supra* note 74, at 465 (“Government officials often feel that they have more control over private contractors than they do over their own employees due to restrictions on hiring or firing permanent employees.”).

¹¹⁹ See M. Cherif Bassiouni, *The New Wars and the Crisis of Compliance with the Law of Armed Conflict by Non-State Actors*, 98 J. CRIM. L. & CRIMINOLOGY 711, 715 (2008) (“non-state actors have no expectation of accountability for their non-compliance” with laws of war); Verkuil, *supra* note 74, at 439 (emphasizing the general problem of exercising government oversight over contractors); Minow, *supra* note 31, at 995 (“[M]ilitary contractors often evade the oversight intended to determine contract performance and also often bypass private market competition through sole-source bids and other waivers of marketplace practices.”); Singer, *supra* note 1, at 126 (contractors are not held accountable, including when actions were derived from U.S. government missions and orders).

¹²⁰ OFFICE OF THE GENERAL COUNSEL, U.S. AIR FORCE, DEPLOYING WITH CONTRACTORS: CONTRACT CONSIDERATIONS 5 n.13 (2003) (stating that a military officer “cannot exercise authority over contractor employees because these persons are not assigned to the military organization”); Karen L. Douglas, *Contractors Accompanying the Force: Empowering Commanders with Emergency Change Authority*, 55 A.F. L. REV. 127, 135 (2004) (“Commanders cannot order contractors to do anything, even the services they contracted for.”); see also Lisa L. Turner & Lynn G. Norton, *Civilians at the Tip of the Spear*, 51 A.F. L. REV. 1, 36 (2001) (stating that exercising authority over specific tasks dictated from a contract sometimes also conflicts with American jurisprudential foundations that disfavor imposing coercion). See generally Robert Bejesky, *The Evolution in and International Convergence of the Doctrine of Specific Performance in Three Types of States*, 13 IND. INT’L & COMP. L. REV. 353, 392 (2003) (common law jurisdictions have historically been hesitant to compel specific performance of contracts).

are sufficiently autonomous or only tangentially derive their obligations from the Pentagon's more inclusive plan of operations.¹²¹

The third inquiry is whether there was an intention to adhere to general standards for independent contractors that would otherwise reduce the government's responsibility¹²² and whether those general agency principles can be consistent with outsourcing essential government functions. Perhaps the more a contracted service resembles an essential government function, the more that the service in question should either not be subcontracted or should obligate government authorities to assume elevated authority to meet democratic standards of accountability.¹²³ It does appear that Pentagon officials appreciated the gravity of explicitly tightening con-

¹²¹ In some cases, PMC services are interrelated with detailed military needs and operations. *Whitaker v. Kellogg Brown & Root, Inc.*, 444 F. Supp. 2d 1277, 1279 (M.D. Ga. 2006) (noting that Army's LOGCAP troop support contract in 2002 stated that private contractors were expected to adhere to military orders and that LOGCAP permits contractors to be used for military transport "when contractor support is determined to be the most effective, expeditious, or cost effective"). The Logistics Civil Augmentation Program [LOGCAP] gives the military substantial control over hiring, training, and equipping private contract employees and military officers have functional control over contract employees during operations. Kristen L. Richer, Note, *The Functional Political Question Doctrine and the Justifiability of Employee Tort Suits Against Military Service Contractors*, 85 N.Y.U. L. REV. 1694, 1720–21 (2010).

¹²² There are several potential statutory tests to distinguish between employees and contractors. Wood, *supra* note 79, at 117 ("[T]here is no single statutory test for determining whether a person is an employee or an independent contractor."). Generally, a principal with greater control over an agent's actions should impose more responsibility on the principal. See RESTATEMENT (SECOND) OF THE LAW OF AGENCY § 219 (1958). Unless there is a waiver, civil service laws prohibit contractor employees from being treated as government employees. See 5 U.S.C. § 3109(b) (2012); FAR 37.104 (2013). The Federal Acquisition Regulations govern all federal contractors and the Defense Federal Acquisition Regulation Supplement applies to all Pentagon contracts. FAR 1.101 (2013); DFARS 201.104 (2013).

¹²³ Accountability is a core principle of legitimate government-populace relations in a democracy. Accountability means to be "answerable to authority that can mandate desirable conduct and sanction conduct that breaches identified obligations." Martha Minow, *Public and Private Partnerships: Accounting for the New Religion*, 116 HARV. L. REV. 1229, 1260 (2003). If unacceptable actions are transgressed, legal accountability or disciplinary measures should be imposed. See generally Robert O. Keohane, *The Concept of Accountability in World Politics and the Use of Force*, 24 MICH. J. INT'L L. 1121, 1131–32 (2003) (describing the American tradition of legal accountability based on formal rules and judicial review). The American populace may have an interest in assuring that essential government functions are not subcontracted because of the difficulty of parameterizing responsibility and the danger that contractors will not adhere to fiduciary responsibilities on behalf of the ultimate principal. Perhaps there should be no logical or practical gap between the government agency's core missions and control over agents who execute those missions. If there is a gap, the obligations should not have been outsourced.

trol relations after the Nisour Square massacre, because the Pentagon reportedly inserted contractual provisions so that PMCs were required to explicitly follow military orders when obligations involved military operations.¹²⁴ Earlier contracts ostensibly operated on the inference that contractor-employees were required to affirmatively apprise the military of misconduct,¹²⁵ but the military could not discipline PMC employees.¹²⁶

Yet, practice suggests that assessment of responsibility should have been more consistent with the dual servant doctrine, which makes two employers jointly liable for the acts of an employee when they both control the employee.¹²⁷ For example, Blackwater

¹²⁴ See Jeffrey S. Thurnher, *Drowning in Blackwater: How Weak Accountability over Private Security Contractors Significantly Undermines Counterinsurgency Efforts*, ARMY LAW., July 2008, at 64, 82–83.

¹²⁵ Charles T. Kirchmaier, *Command Authority over Contractors Serving with or Accompanying the Force*, ARMY LAW., Dec. 2009, at 35, 36 (noting that contractors must report suspected misconduct of other contractors and stating that military regulations require commanders to publicize how the military chain of command must be apprised of contractor malfeasance).

¹²⁶ *Reid v. Covert*, 354 U.S. 1, 19–20 (1957) (under the Constitution, civilians are not part of the military); DEP'T OF THE ARMY, FM 3-100.21, CONTRACTORS ON THE BATTLEFIELD § 4-12, 4-45, 4-47 (2003) (disciplining “contractor employees is the responsibility of the contractor’s management structure, not the military chain of command”); U.S. DEP'T OF DEF., DODI 3020.41, CONTRACTOR PERSONNEL AUTHORIZED TO ACCOMPANY THE U.S. ARMED FORCES § 6.3.3 (2005), available at https://www.fas.org/irp/doddir/dod/i3020_4_1.pdf (“Defense contractors are responsible for ensuring employees perform under the terms of the contract; comply with theater orders, and applicable directives, laws, and regulations Commanders have limited authority to take disciplinary action against contingency contractor personnel.”); Davidson, *supra* note 61, at 265–67. Likewise, the Department of Defense FAR Supplement affirms that the contractor “accepts the risks associated with required contract performance in such operations” when deploying into a combat zone. DFARS 252.225-7040(b)(2) (2013).

Thus, there was an obligation for the military chain of command to know of PMC employee malfeasance, but to not discipline or control, which might logically result in ratifying the acts of *effective* agents. If an agent acts beyond the scope of a principal’s authority, the principal knows of the agent’s acts, and the principal acts in a manner that apparently consents to the agent’s performance, then the principal may have ratified the agent’s acts. RESTATEMENT (THIRD) OF AGENCY § 4.01 (2006). For example, if PMCs commit human rights abuses, use lethal force and commit crimes while executing Pentagon contracts, then perhaps there should be heightened knowledge of inappropriate outsourcing. If a state is not diligent in preventing a harm that is caused by its private actors, liability could also be imposed. See *Velasquez Rodriguez Case*, 1988 Inter-Am. Ct. H.R. (ser. C), No. 4, ¶¶ 171, 172 at 153–54 (July 29, 1988).

¹²⁷ See RESTATEMENT (THIRD) OF AGENCY § 7.03 cmt. d(2) (2006) (“Liability should be allocated to the employer in the better position to take measures to prevent the injury suffered by the third party.”). “Some cases allocate liability to both general and special employer on the basis that both exercised control over the employee

declared during Congressional investigations that military contractors were required to adhere to the “control, supervision, standards, and protocols of the U.S. government”¹²⁸ and to take orders from Blackwater representatives or the “Customer.”¹²⁹ Whether or not there was an attempt to further truncate the command structure between Pentagon orders and PMC employee execution, Blackwater also required security personnel to sign an agreement that deemed personnel an “independent contractor” while also “report[ing] directly to Blackwater supervisors, leaders, or the ‘Customer,’ and perform[ing] duties in accordance with Blackwater’s rules and regulations.”¹³⁰

There may be legitimate private delegations of government functions to a bona fide independent contractor with some magnitude of process protections attached to ensure accountability and oversight over contractors;¹³¹ but if the government cannot hold the contractor accountable for activity which public interest mandates oversight, then the activity should not be outsourced.¹³² This posture seems particularly apropos because “but for” military security operations in Iraq, funded by congressional allocations, contractors could not have an independent mission apart from the presence of the U.S. military.¹³³ PMC security contractors, armed with weapons, must have been incorporated into the military’s broader mission in exchange for multimillion-dollar contracts.¹³⁴

and both benefited to some degree from the employee’s work.” *Id.*; see also *Kelley v. S. Pac. Co.*, 419 U.S. 318, 324 (1974) (noting that an employee could be “acting for two masters simultaneously” under the Federal Employers Liability Act). There could also be a special employer relationship. *Nepstad v. Lambert*, 50 N.W.2d 614, 621–22 (Minn. 1951) (“right to control the particular act [of the employee] giving rise to the injury” is referred to as the control test).

¹²⁸ *Blackwater Details Arguments Against Waxman Evasion Allegations*, Doc 2007-26545, 2007 TNT 233-26 (Dec. 4, 2007).

¹²⁹ Wood, *supra* note 79, at 110.

¹³⁰ *Id.* at 102; see also ELSEA, SCHWARTZ & NAKAMURA, *supra* note 106, at 42 (for private contractors, there is generally a lack of oversight from “a contracting officer’s representatives”). For purposes of the tax structure, the IRS applied its twenty-factor test and called Blackwater’s “independent contractor” classification “without merit.” Wood, *supra* note 79, at 103, 105–06, 112 (noting that Blackwater considered the ruling an anomaly, filled “with ‘legal factual errors,’” and continued to stand behind its classification system).

¹³¹ See Verkuil, *supra* note 74, at 424.

¹³² See Chesterman, *supra* note 85, at 336–37.

¹³³ See SINGER, *supra* note 36, at 236 (“A key realization of contracting is that a firm becomes an extension of government policy and . . . [T]he firm’s reputation can . . . implicate the government as well.”)

¹³⁴ PMC personnel who wield weapons are not carrying out typical private-sector market procurement efforts by supplying goods and equipment or services that involve providing accounting, accommodations for troops, or another civilian

It is a travesty that it required the egregious event of the Nisour Square massacre to fix scrupulous attention on the plain meaning of the law. Congressional parameters and Pentagon directives specified that inherently governmental functions could not be outsourced,¹³⁵ but some PMCs were hired for specific tasks involving combat that would otherwise be fulfilled by military personnel.¹³⁶ The next section examines otherwise potentially-applicable but confoundingly ineffective jurisdictional reach over PMC performance.

III. IMMUNITY FOR CONTRACTORS

A. *Controversy and Potential Bases of Applicable Law*

Even though there is a lack of government oversight and control over PMC activities, effective legal restrictions may still reduce the incidence of inadequate performance of procured services. Unfortunately, no such availing deterrent existed for several years of U.S. military subcontracting in Iraq, and PMCs operated within an arrangement of jurisdictional loopholes in legal codes and virtual immunities under criminal and civil law.¹³⁷ Contractors were immune not only because of ineffective and obscure regulatory

mission. In the past, questions of assuming responsibility over military contractors were not a pressing issue because outsourcing predominantly involved supply contracts and PMCs were not executing military-combat operations.

¹³⁵ Federal Activities Inventory Reform Act of 1998 (FAIR Act) § 5(2)(A), Pub. L. No. 105-270, 112 Stat. 2382, 2384 (1998) (codified at 31 U.S.C. § 501 (2012)).

¹³⁶ See David Isenberg, *Contractors in War Zones: Not Exactly "Contracting,"* TIME, Oct. 9, 2012, available at <http://nation.time.com/2012/10/09/contractors-in-war-zones-not-exactly-contracting/>.

¹³⁷ *Military Extraterritorial Jurisdiction Act of 1999: Hearing on H.R. 3380 Before the Subcomm. on Crime of the H. Comm. on the Judiciary*, 106th Cong. 14 (2000) (statement of Robert Reed, Deputy Gen. Counsel, Dep't of Def.) ("[The DoD's Overseas Jurisdiction Advisory] Committee conducted extensive research and concluded that there existed significant jurisdictional voids with regard to civilians accompanying the Armed Forces overseas."). See generally Katherin J. Chapman, Note, *The Untouchables: Private Military Contractors' Criminal Accountability under the UCMJ*, 63 VAND. L. REV. 1047, 1048 (2010) (describing the lack of criminal accountability for Blackwater gunmen who slaughtered seventeen Iraqi civilians and wounded twenty-seven others); K. Elizabeth Waits, *Avoiding the "Legal Bermuda Triangle": The Military Extraterritorial Jurisdiction Act's Unprecedented Expansion of U.S. Criminal Jurisdiction over Foreign Nations*, 23 ARIZ. J. INT'L & COMP. L. 493, 513 (2006) ("[C]riminal activity [by contractors] goes unpunished."); Singer, *supra* note 1, at 199, 126 (stating that the actions of private contractors "tend to fall through the cracks of current legal codes").

authority,¹³⁸ but also because the Bush Administration exhibited reluctance to prosecute PMCs for apparent criminal acts.¹³⁹

The scandal with PMCs in Iraq and the absence of effective laws were not unprecedented or unforeseeable. In a 1979 report to Congress, *Some Criminal Offenses Committed Overseas by DoD Civilians are Not Being Prosecuted: Legislation is Needed*, the U.S. Comptroller General found that the U.S. military stationed approximately 343,000 civilian employees abroad, but lacked authority to prosecute those civilians when they committed crimes.¹⁴⁰ Some legislators even forewarned the Bush Administration that PMCs should be restricted from participating in certain activities because contractors have a higher propensity to contravene laws of war.¹⁴¹

Over three years into the occupation of Iraq and in the midst of scandal over the use of PMCs, a university student asked President Bush, “The Uniform Code of Military Justice does not apply to these contractors in Iraq. I asked your secretary of defense a couple months ago what law governs their actions.”¹⁴² The President responded, “I was going to ask him.”¹⁴³ The questioner persisted, “I was hoping your answer might be a little more specific. Mr. Rumsfeld answered that Iraq has its own domestic laws which he assumed applied to those private military contractors.”¹⁴⁴ The President replied, “I wasn’t kidding. . . . I’ll pick up the phone and say, ‘Mr. Secretary, I’ve got an interesting question.’”¹⁴⁵ The answer the President may have received is that there are three possible sources

¹³⁸ 153 CONG. REC. H11,178 (daily ed. Oct. 3, 2007) (statement of Rep. Betty Sutton) (“Our current law has given private mercenary armies like Blackwater USA free rein to do as they please without fearing the repercussions. And as we have seen, that unbridled freedom from any accountability has resulted in sometimes egregious criminal behavior.”); Cusumano, *supra* note 87, at 7–8 (accentuating that the dearth of regulatory authority and effective oversight operations made PMC operations prone to impropriety).

¹³⁹ See generally Adam Liptak, *Who Would Try Civilians of U.S.? No One in Iraq* (May 26, 2004), available at <http://www.nytimes.com/2004/05/26/international/middleeast/26PROS.html> (discussing laws applicable to contractors operating abroad).

¹⁴⁰ COMPTROLLER GEN., U.S. GEN. ACCOUNTING OFFICE, FPCD-79-45, *SOME CRIMINAL OFFENSES COMMITTED OVERSEAS BY DOD CIVILIANS ARE NOT BEING PROSECUTED: LEGISLATION IS NEEDED* 5 (1979), available at <http://archive.gao.gov/f0302/110369.pdf>.

¹⁴¹ See Sullivan, *supra* note 7, at 875, 875 n.103.

¹⁴² President George W. Bush, Address at Johns Hopkins University School of Advanced International Studies, (Apr. 10, 2006) (transcript available at <http://transcripts.cnn.com/TRANSCRIPTS/0604/10/lt.02.html>).

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

of jurisdiction that could be applicable to PMCs: (1) U.S. federal courts, (2) U.S. military courts, and (3) host country courts.¹⁴⁶

B. U.S. Courts

U.S. federal courts are not an entirely effective forum for holding PMCs civilly or criminally liable.¹⁴⁷ U.S. courts will normally exercise criminal jurisdiction over crimes committed within U.S. territory.¹⁴⁸ A U.S. prosecutor would also need to be willing to initiate charges against contractors for acts transpiring in foreign jurisdictions, which can be challenging to gather evidence and conduct investigations in foreign countries.¹⁴⁹ Also, if criminal liability is imposed on the PMC personnel who execute Pentagon contracts, then disrepute and political fallout over the failure to control their procured services¹⁵⁰ could abridge the motivation to initiate prosecutions.

In civil cases brought against contractors performing contracts in Iraq, PMCs sought and lower federal courts provided a government-contractor federal common law defense,¹⁵¹ which is consistent with precedent that originated over seventy years ago. In *Yearsley v. W.A. Ross Construction Co.*, the United States Supreme Court held that a government contractor, acting pursuant to an agency relationship, could be immune from liability if the government would be immune,¹⁵² which is a derivative sovereign immunity.¹⁵³ Thus,

¹⁴⁶ See Chapman, *supra* note 139, at 1048.

¹⁴⁷ See Finkelman, *supra* note 72, at 434 (noting that criminal laws that are potentially applicable to contractors have rarely been enforced).

¹⁴⁸ 18 U.S.C. § 7 (2012).

¹⁴⁹ Anthony E. Giardino, *Using Extraterritorial Jurisdiction to Prosecute Violations of the Law of War: Looking Beyond the War Crimes Act*, 48 B.C. L. REV. 699, 731 (2007) (“[A]ny prosecution for an extraterritorial war crime must deal with the issues of the remoteness of the crime scene; issues arising out of combat operations in finding witnesses, victims, and evidence; and cultural prohibitions on autopsies.”); Bruce A. Green, *Prosecutorial Ethics as Usual*, 2003 U. ILL. L. REV. 1573, 1589 (2003) (stating that prosecutors should only bring charges against an accused when “there is legally sufficient evidence for a jury to convict the accused of the crimes charged”).

¹⁵⁰ See P.W. Singer, *War, Profits, and the Vacuum of Law: Privatized Military Firms and International Law*, 42 COLUM. J. TRANSNAT’L L. 521, 539, 544 (2004) (noting that a State Department official remarked that “[o]ur job is to protect Americans, not investigate Americans”) (alteration in original) (citation omitted)).

¹⁵¹ Finkelman, *supra* note 72, at 398, 415; John L. Watts, *Differences Without Distinctions: Boyle’s Government Contractor Defense Fails to Recognize the Critical Differences Between Civilian and Military Plaintiffs and Between Military and Non-Military Procurement*, 60 OKLA. L. REV. 647, 649 (2007).

¹⁵² *Yearsley v. W.A. Ross Const. Co.*, 309 U.S. 18, 19–22 (1940); see also *Boyle v. United Techs. Corp.*, 487 U.S. 500, 512 (1988) (absolving a private military con-

when plaintiffs filed claims, PMCs defended by contending that they were acting at the direction of a federal agency in carrying out the action in question.¹⁵⁴ The Federal Tort Claims Act (FTCA) is inapplicable to waiving sovereign immunity for torts occurring in foreign countries;¹⁵⁵ and if the action is filed in state court, the federal removal statute could be invoked to prevent state courts from meddling with the execution of federal law.¹⁵⁶ Thus, PMCs entered into contracts with the Pentagon to provide service and support¹⁵⁷ and were not in the chain of command,¹⁵⁸ but maintained immunity because there was a quasi-agency relationship between the Pentagon and PMCs because contractors carried out the directives of federal officers.¹⁵⁹

The contractor defense was invoked in federal in the Abu Ghraib detainees' suits against PMCs for interrogation abuses. In dismissing the Alien Tort Claims Act¹⁶⁰ claim in *Ibrahim v. Titan Corp.*, the court ruled that the preemption defense could overcome state law claims because Titan contractors were "under the direct

tractor of state product design liability because to hold otherwise would significantly conflict with federal policy); *Carley v. Wheeled Coach*, 991 F.2d 1117, 1123 (3d Cir. 1993); Charles E. Cantu & Randy W. Young, *The Government Contractor Defense: Breaking the Boyle Barrier*, 62 ALB. L. REV. 403, 407-09 (1998).

¹⁵³ *Butters v. Vance Int'l, Inc.*, 225 F.3d 462, 466 (4th Cir. 2000) (citing *Yearsley*, 309 U.S. at 21-22) ("[C]ontractors and common law agents acting within the scope of their employment for the United States have derivative sovereign immunity."); see also *Mangold v. Analytic Servs., Inc.*, 77 F.3d 1442, 1446-47 (4th Cir. 1996) ("Even though private persons under contract with the government act only partly in the public sphere, the public interest may demand that immunity protect them to the same extent that it protects government employees.").

¹⁵⁴ See, e.g., *Finkelman*, *supra* note 72, at 398, 415; *Logue v. United States*, 412 U.S. 521, 526-28 (1973) (the predominant factor to determine if there is an independent contractor or employee relationship is whether the government can "control the detailed physical performance of the contractor").

¹⁵⁵ 28 U.S.C. § 2680(k) (2012).

¹⁵⁶ See *In re Agent Orange Prod. Liab. Litig.*, 304 F. Supp. 2d 442, 445-46 (E.D.N.Y. 2004).

¹⁵⁷ See *Prystowsky*, *supra* note 106, at 48.

¹⁵⁸ *McMahon v. Presidential Airways, Inc.*, 502 F.3d 1331, 1348 (11th Cir. 2007).

¹⁵⁹ See *id.*

¹⁶⁰ The Alien Tort Claims Act can be used by an alien to sue for violations of the law of nations when acts are "committed by state officials or under color of law," or possibly when private individuals committed war crimes in conjunction with state officials. *Kadic v. Karadzic*, 70 F.3d 232, 243-44 (2d Cir. 1995). To be perceived as carrying out a public function, private individuals contracting with the government must be executing activities that are sufficiently state actions. See *West v. Atkins*, 487 U.S. 42, 56 n.15 (1988); *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974). If there is a close nexus between the PMC and the government, there might be state action. See *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 723-25 (1961).

command and exclusive operational control of the military chain of command,” and CACI employees “were subject to a dual chain of command.”¹⁶¹ Similarly, in the next case, *Saleh v. Titan Corp.*, the D.C. Circuit Court chose to grant government contractor immunity to PMCs that were “integrated into combatant activities over which the military retains command authority.”¹⁶² The litigation involving Titan Corp. was ultimately consolidated into the L-3 Services case, and the contractors did offer a settlement in 2013.¹⁶³ This might be a testament to the need to reach the correct result while navigating inconsistencies in legislative standards, procurement policies, and international law obligations.¹⁶⁴

There was also PMC immunity for civil actions brought by U.S. troops. *Boyle v. United Techs. Corp.* is the origin of the government contractor defense for both supply and performance contracts.¹⁶⁵

¹⁶¹ *Ibrahim v. Titan Corp. (Ibrahim III)*, 556 F. Supp. 2d 1, 4, 10 (D.D.C. 2007), *aff'd in part, rev'd in part sub nom. Saleh v. Titan Corp. (Saleh II)*, 580 F.3d 1, 1 (D.C. Cir. 2009).

¹⁶² *Saleh II*, 580 F.3d at 9.

¹⁶³ Pete Yost, *APNewsBreak: \$5m Paid to Iraqis over Abu Ghraib*, ASSOCIATED PRESS (Jan. 8, 2013, 6:02 PM), <http://bigstory.ap.org/article/apnewsbreak-5m-paid-iraqis-over-abu-ghraib-abuse> (settling with seventy-one former detainee-plaintiffs by paying \$5.28 million).

¹⁶⁴ *See id.* The defendants explaining to the federal court that “[n]o court in the United States has allowed aliens—detained on the battlefield or in the course of postwar occupation and military operations by the U.S. military—to seek damages for their detention.” *Id.* The U.N. Committee on the Elimination of Discrimination Against Women wrote, “Under general international law and specific human rights covenants, States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation.” Comm. on the Elimination of Discrimination Against Women, Rep. on its 11th Sess., Jan. 20–Jan. 30, 1992, ¶9, U.N. Doc A/47/38 (Feb. 1, 1992); *see also* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 (1987). To be held responsible under international law, the private person or organization must be carrying out government functions with authority, but the state still can be held responsible even if the contractor was acting beyond the scope of the authority. Rep. of the Int’l Law Comm’n, 53d Sess., Apr. 23–June 1, July 2–Aug. 10, 2001, at 92, 99, U.N. Doc. A/56/10; GAOR, 56th Sess., Supp. No. 10 (2001). *See generally* Chesterman, *supra* note 85, at 323–24 (noting the proliferation of legal scholarship and advocacy emphasizing the connection between business practices and human rights standards, but also the lack of coherent and clear political and legal standards, uncertainty over the applicable legal regime, and questions over whether a government entity is responsible).

¹⁶⁵ *See Boyle v. United Techs. Corp.*, 487 U.S. 500, 512 (1988); *Hudgens v. Bell Helicopters/Textron*, 328 F.3d 1329, 1334 (11th Cir. 2003); *In re Hawaii Fed. Asbestos Cases*, 960 F.2d 806, 811 (9th Cir. 1992); *Fisher v. Halliburton*, 390 F. Supp. 2d 610, 616 (S.D. Tex. 2005); *Richard-Lexington Airport Dist. v. Atlas Props., Inc.*, 854 F. Supp. 400, 422–23 (D.S.C. 1994); Watts, *supra* note 151, at 672–74 (discuss-

Lieutenant Boyle was killed in a crash of a helicopter manufactured by the defendant.¹⁶⁶ In denying relief to his relatives, the Court explained that “[i]t makes little sense to insulate the Government against financial liability for the judgment that a particular feature of military equipment is necessary when the Government produces the equipment itself, but not when it contracts for the production.”¹⁶⁷ Therefore, contractors supplying goods or performance for the Government are granted the U.S. Government’s sovereign immunity under *Boyle*.¹⁶⁸ The discretionary function exception to the FTCA can preempt state law claims¹⁶⁹ and bar troop claims against the U.S. Government during wartime.¹⁷⁰ Additionally, *Feres v. United States* granted immunity to the U.S. Government for actions filed by active members of the military service for injuries sustained while in government service,¹⁷¹ which is an exceptionally

ing analyses used by courts to determine whether the government exercised discretion to determine if immunity should be granted).

¹⁶⁶ *Boyle*, 487 U.S. at 502.

¹⁶⁷ *Id.* at 512.

¹⁶⁸ *Id.* at 501. *Boyle* noted that a derivative sovereign immunity exists when the government: “(a) approve[s] [in its discretion] reasonably precise specifications; (b) the equipment conformed to those specifications; and (c) the [contractor] warned the United States about dangers in the use of the equipment known to the supplier but not to the United States.” *Id.*

¹⁶⁹ *Watts*, *supra* note 151, at 662 (stating that there were “uniquely federal interests” when the military approves the design of equipment that were “sufficient to justify the exclusive application of federal common law”); *see also id.* at 664 (noting that the federal preemption was not based on applying *Feres* but by holding that the discretionary function exception to the FTCA was met and that federal interests prevailed over state tort law); *Avery v. United States*, 434 F. Supp. 937, 943 n.7 (D. Conn. 1977) (discretionary functions maintain sovereign immunity under the FTCA). For the contractor to meet the government contractor defense, it must prove that (1) the contracting involved a unique federal interest that supplants state law, and (2) either that state law would undermine the federal legislation or that there is a significant conflict between the unique federal interest and state law. *Boyle*, 487 U.S. at 507, 505–09; *Ibrahim v. Titan Corp. (Ibrahim I)*, 391 F. Supp. 2d 10, 17 (D.D.C. 2005).

¹⁷⁰ *Finkelman*, *supra* note 72, at 425, 441 (noting that it is not clear that Congress intended for the combat activities exception to apply to the U.S. military).

¹⁷¹ *Feres v. United States*, 340 U.S. 135, 146 (1950); *United States v. Johnson*, 481 U.S. 681, 690–91 (1987) (affirming the defense for the government in an action brought by a Coast Guard pilot and emphasizing another reason for the defense: “[M]ilitary discipline involves not only obedience to orders, but more generally duty and loyalty to one’s service and to one’s country. Suits brought by service members against the Government for service-related injuries could undermine the commitment essential to effective service and thus have the potential to disrupt military discipline in the broadest sense of the word.”).

broad immunity.¹⁷² Likewise, third-party indemnity claims are generally precluded against the U.S. Government if the original claim would be precluded under *Feres*.¹⁷³

Another justification for denying relief against PMCs is based on separation of powers in that courts reviewing actions of PMCs could imprudently become involved in military affairs¹⁷⁴ or political questions.¹⁷⁵ Courts may bar legal actions under the political question doctrine when “military decision-making or policy would be a necessary inquiry, inseparable from the claims asserted.”¹⁷⁶ Several circuits rejected the applicability of the political question doctrine,¹⁷⁷ while others accepted it.¹⁷⁸ Despite the division in the

¹⁷² *United States v. Stanley*, 483 U.S. 669, 671, 681–84 (1987) (denying a suit by a member of the military against the Army for giving LSD to Stanley without his knowledge as part of an experiment).

¹⁷³ *Stencel Aero Eng'g Corp. v. United States*, 431 U.S. 666, 674 (1977). The Anti-Deficiency Act predominantly restricts indemnification agreements from being used in government contracts of private contractors, but there is an exception that does provide compensation to a contractor when the contractual duties involve “unusually hazardous” risks. Chad C. Carter, *Halliburton Hears a Who? Political Question Doctrine Developments in the Global War on Terror and Their Impact on Government Contracting*, 201 MIL. L. REV. 86, 123–24 (2009).

¹⁷⁴ See *McKay v. Rockwell Int'l Corp.*, 704 F.2d 444, 449 (9th Cir. 1983) (“[T]o hold military suppliers liable for defective designs where the United States set or approved the design specifications would thrust the judiciary into the making of military decisions.”); *Boyle*, 487 U.S. at 511–12 (also shielding contractors from liability from design defects based on the discretionary function exception under the FTCA).

¹⁷⁵ This justification materializes as a separate defense as PMCs have asked courts to dismiss cases based on the political question doctrine. Federal Circuit Courts have permitted U.S. civilians and military soldiers to bring tort cases based on injuries incurred in Iraq and Afghanistan. *Lane v. Halliburton*, 529 F.3d 548, 557, 568 (5th Cir. 2008); *McMahon v. Presidential Airways, Inc.*, 502 F.3d 1331, 1357, 1365 (11th Cir. 2007); *Ibrahim III*, 556 F. Supp. 2d 1, 10 (D.D.C. 2007); Richer, *supra* note 121, at 1698 (stating that the Supreme Court’s functional political question doctrine test considers whether there is a legal void to fill and “whether the judiciary is institutionally capable of filling it”).

¹⁷⁶ *Carmichael v. Kellogg Brown & Root Servs., Inc.*, 450 F. Supp. 2d 1373, 1375 (N.D. Ga. 2006).

¹⁷⁷ Richer, *supra* note 121, at 1710–11.

¹⁷⁸ *Whitaker v. Kellogg Brown & Root, Inc.*, 444 F. Supp. 2d 1277, 1281 (M.D. Ga. 2006) (dismissing a case where KBR driver killed a U.S. soldier and the soldier’s family sued, but the court dismissed because “a soldier injured at the hands of a contractor which is performing military functions subject to the military’s orders and regulations also raises the same political questions” as in the case of government as defendant). In *Lane v. Halliburton*, which involved surviving relative plaintiffs suing KBR for allegedly unsafely operating convoys that permitted an ambush, the Fifth Circuit reversed three cases decided by the U.S. District Court for the Southern District of Texas that decided to bar the claims on the political question doctrine. *Lane*, 529 F.3d at 554–55 (remanding case to district court); *Lane v.*

courts, in cases against PMCs operating in Iraq and Afghanistan where the Government was not a party to the suit and the political question doctrine was raised, the Government did not submit an amicus curiae brief on a single occasion.¹⁷⁹ This indifference might relay a significant message about the executive's degree of willingness to defend the private entity as part of the Government's foreign policy.

While the PMC defense was originally applicable to contractors who manufacture or provide equipment at the Government's specifications, this was not the type of contractor assistance that garnered so much attention in Iraq.¹⁸⁰ The debated issue was the expansion of immunity to service contracts.¹⁸¹ A broad expansion of this legal protection may be controversial because goods procurement has become a necessity as governments generally do not own factories or manufacture goods, however, the decision of whether services are outsourced is discretionary.¹⁸² The underlying policy balance is the interest in granting immunity for government functions because taxpayers would absorb the ultimate cost of lawsuits against PMCs.¹⁸³ However, without a penalty incentives are weaker

Halliburton (*Lane I*), No. H-06-1971, 2006 WL 2796249, at *1 (S.D. Tex. Sept. 26, 2006); Fisher v. Halliburton, Inc. (*Fisher I*), 454 F. Supp. 2d 637, 638–39 (S.D. Tex. 2006); Smith-Idol v. Halliburton, No. H06-1168, 2006 WL 2927685, at *1 (S.D. Tex. Oct. 11, 2006).

¹⁷⁹ Jenks, *supra* note 81, at 208.

¹⁸⁰ See Finkelman, *supra* note 72, at 397.

¹⁸¹ See Watts, *supra* note 151, at 666–67 (noting that the immunity was expanded in many non-military, service, and goods procurement contracts); Richland-Lexington Airport Dist. v. Atlas Props., Inc., 854 F. Supp. 400, 422 (D.S.C. 1994) (extending contractor immunity for nonmilitary contractors when “there is a uniquely federal interest in the subject matter of the contract.”). Commentators and some federal courts have opposed further expansion of the discretionary function defense. Watts, *supra* note 151, at 650–51.

¹⁸² Cases can also involve a level of ambiguity as to whether PMC involvement in non-combat military operations is critical to the mission. Some may contend that non-combat military operations most justify immunity because combat-related services should not be outsourced. Alternatively, one could also maintain that an outsourced essential government service is more inherent to the Government's critical functions, thereby validating immunity. Nonetheless, this question still hinges on whether the Government should be able to procure the particular core function in question, such that if the executive is unreasonable in deciding to outsource on specific functions, awarding immunity to the PMC may not be fully substantiated by preexisting reasons for granting immunity.

¹⁸³ See Boyle v. United Techs. Corp., 487 U.S. 500, 507, 511–12 (1988) (“The imposition of liability on Government contractors will directly affect the terms of Government contracts; either the contractor will decline to manufacture the design specified by the Government, or it will raise its price. Either way, the interests of the United States will be directly affected.”).

for the contracting government entity to exercise more diligence in restraining contractor wrongdoing, for PMCs to perform more exceptionally, or even for deterring the executive from recklessly entering the country into war if there is the belief that PMCs could discharge military supply deficits and possess immunity during the process.

C. *Military Court Jurisdiction*

Early into the Iraq War, military courts were also not an availing institution to enhance PMC performance because there was no credible expectation of sanctions. Military jurisdiction has only applied to civilians during war or in the event of an actual invasion,¹⁸⁴ but that prerogative was intended to surmount justice system exigencies incident to a war, when civilian courts might be ineffective in asserting jurisdiction over crimes.¹⁸⁵ Civilians were subject to military courts' martial proceedings during the American Revolution, the Civil War, World War I, and World War II,¹⁸⁶ but military court jurisdiction was not exercised over civilians during the second half of the twentieth century.¹⁸⁷ This change can be attributed to several reasons.

First, pursuant to *Reid v. Covert* and prior to recent legal developments during the occupation of Iraq, civilians could not be tried for court-martial in a non-war situation.¹⁸⁸ The Court emphasized that civilian rights in the Bill of Rights prevail over Congress' use of the Necessary and Proper Clause to impose military law on civilians.¹⁸⁹ Consequently, during peacetime, court-martial only applies

¹⁸⁴ See *Reid v. Covert*, 354 U.S. 1, 30–31 (1957); *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 131 (1866).

¹⁸⁵ *Duncan v. Kahanamoku*, 327 U.S. 304, 330–31 (1946) (“[C]ivil courts must be utterly incapable of trying criminals or of dispensing justice in their usual manner before the Bill of Rights may be temporarily suspended.”); *Ex parte Milligan*, 71 U.S. (4 Wall.) at 121.

¹⁸⁶ John F. O’Connor, *Contractors and Courts-Martial*, 77 TENN. L. REV. 751, 764, 766–68 (2010).

¹⁸⁷ Act of Aug. 1, 1956, ch. 807, 70 Stat. 773 (repealing 22 U.S.C. §§141–143 (1952)); Alan F. Williams, *The Case for Overseas Article III Courts: The Blackwater Effect and Criminal Accountability in the Age of Privatization*, 44 U. MICH. J.L. REFORM 45, 46 (2010) (noting that for over 150 years, civilians could face military court-martial and consular courts for crimes committed during war, but in the second half of the twentieth century military court jurisdiction over civilians was not exercised).

¹⁸⁸ See *Reid*, 354 U.S. at 5.

¹⁸⁹ *Id.* at 21; see also *id.* at 6 (“When the Government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land.”).

to troops,¹⁹⁰ irrespective of the depth of affiliation with the military and the types of contracts.¹⁹¹

Second, there was a reluctance to call armed conflict a “war” after World War II, which may at least partially be attributable to United Nations prohibitions on acts of aggression¹⁹² because issuing a declaration of war might be akin to facilitating prohibited aggression. For example, a civilian contractor who attempted to steal 36,000 batteries from the U.S. military while in South Vietnam during the “Vietnam War” was not subject to military court jurisdiction because the military court held that activities in Vietnam were not occurring pursuant to a declaration of war.¹⁹³ Likewise, during peacetime and even as the U.S. undertook a prominent role in many foreign countries following World War II, the same general rule of restricting military court jurisdiction applied to contractors. The Bill of Rights prevailed; and civilian courts, rather than military courts, handled cases arising from civilians’ participation in armed conflicts—including an ex-military member accused of killing a

¹⁹⁰ See *id.* at 33 (stating that the applicability of UCMJ to civilians is unlikely to apply outside of the context of war and that expanding jurisdiction might require congressional action under war powers); *Grisham v. Hagan*, 361 U.S. 278, 280 (1960) (prohibiting court-martial of civilian employee for capital offenses); Corn, *supra* note 108, at 495, 501 (pointing out that it was more common for civilians to be subject to military court jurisdiction during war prior to 1970 and that jurisdiction was extended for a wide-variety of court-martial offenses)

¹⁹¹ *McElroy v. United States ex rel. Guagliardo*, 361 U.S. 281, 286–87 (1960); *Solario v. United States*, 483 U.S. 435, 439 (1987) (affirming that the status of the accused is critical factor in determining whether the Uniform Code of Military Justice applies and that it is rare for civilians to be held subject to military law standards and jurisdiction).

¹⁹² See Jide Nzelibe, *The Uniqueness of Foreign Affairs*, 89 IOWA L. REV. 941, 979 (2004) (emphasizing that certain clauses in the Constitution have an altered meaning today); Elisabeth Zoller, *The War Powers in French Constitutional Law*, 90 AM. SOC’Y INT’L L. PROC. 46, 49 (1996). However, this U.N. restriction does not necessarily mean jurisprudence associated with an effective “war” should not be recognized. See Saikrishna Bangalore Prakash, *Exhuming the Seemingly Moribund Declaration of War*, 77 GEO. WASH. L. REV. 89, 92 (2008) (“During the founding era, declarations of war were not so narrowly conceived. A document was a declaration of war even if it lacked the ‘declare war’ phrase.”).

¹⁹³ *United States v. Averette*, 19 C.M.A. 363, 365–66 (1970) (dismissing case by reasoning that the Uniform Code of Military Justice was only applicable to civilians in a congressionally declared “time of war”); see also Olivia Zimmerman Miller, Comment, *Murder or Authorized Combat Action: Who Decides? Why Civilian Court Is the Improper Forum to Prosecute Former Military Service Members Accused of Combat Crimes*, 56 LOY. L. REV. 447, 457 (2010) (discussing the jurisdiction gap created by a narrow construction of wartime). This is a surprising decision because the conflict was called the “Vietnam War” and constitutional jurisprudence affirms that there can be an effective war. Robert Bejesky, *War Powers Pursuant to False Perceptions and Asymmetric Information in the “Zone of Twilight,”* 44 ST. MARY’S L.J. 1, 47–48 (2012).

South Korean in South Korea,¹⁹⁴ and a military spouse accused of killing her husband on base in Britain.¹⁹⁵

A marked distinction is that these cases did not involve civilians being employed by the Pentagon in combat roles. The first time PMCs were used to virtually replace troops was during the Bush Administration.¹⁹⁶ Accordingly, the opportunity for a hired PMC to commit offenses against an enemy during U.S. military operations largely did not previously exist. This gap invokes the significance of criteria believed to promote the favorable behavior of U.S. troops in combat. Whether military discipline, military court jurisdiction, chain of command, or perceived legal restrictions assist in bolstering the conduct of troops,¹⁹⁷ the fact that these conditions do not apply to PMCs acutely places into question the logic of hiring combat-available PMCs and holding them outside the military jurisdiction during time of effective war.

Third, international human rights agreements are a basis for preventing civilians from being subject to military law and military tribunals; although it is also true that the intent behind the human rights protection policy is to safeguard individuals from coercive governments and not to shelter PMC personnel who are employed to function as a military unit.¹⁹⁸ Also, Articles 64–67 of the Fourth

¹⁹⁴ Robert Toth left the military and was later charged with the murder of a Korean national, and after he was returned to South Korea to be tried by court-martial in military courts, the Court held that he was now a civilian and that “any expansion of court-martial jurisdiction like that in the 1950 Act necessarily encroaches on the jurisdiction of federal courts set up under Article III of the Constitution where persons on trial are surrounded with more constitutional safeguards than in military tribunals.” *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 15 (1955).

¹⁹⁵ *Reid*, 354 U.S. at 3–4, 6 (dismissing military court jurisdiction over a case involving a civilian wife who was accused of killing her military husband who was stationed on a base in Britain).

¹⁹⁶ U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 90, at 1–5 (listing the gamut of security services, which by definition means wielding weapons).

¹⁹⁷ It may even be offensive to enlisted troops—subject to a strong legal framework that seeks to ensure accountability, provide justice, promote military discipline, effectiveness, and efficiency—to be deployed with contractor personnel who are not subject to similar standards. See DEP’T OF DEF., MANUAL FOR COURTS-MARTIAL, UNITED STATES I–1, (2012) (“The purpose of military law is to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States.”).

¹⁹⁸ See International Covenant on Civil and Political Rights, art. 14, ¶ 1, Dec. 16, 1966, 999 U.N.T.S. 171, 173–77 (1967) (stating that criminal defendants must receive a fair hearing before a “competent, independent and impartial tribunal established by law”); U.N. ESCOR, 62d Sess., Principal No. 5, U.N. Doc. E/CN.4/2006/58 (Jan. 13, 2006), available at <http://www1.umn.edu/humanrts/instate/DecauxPrinciples.html> (“Military courts should, in principle, have no

Geneva Convention require occupying powers to ensure that civilian personnel, who are not members of the armed forces, be subject to a non-military criminal law system,¹⁹⁹ however, regulatory obscurity exists due to the nature of the functions of non-military personnel. The PMC's capacity with the military is pivotal because the Geneva Convention treats contractors who discharge mercenary activities as illegal combatants.²⁰⁰

D. New Military Regulations

Well into the occupation of Iraq, there was neither a viable or systematically enforced punishment system under U.S. law, nor a military disciplinary structure applicable to PMC personnel.²⁰¹ In terms of the derivative public accountability for government functions that were emphasized in Part II, PMCs were not subject to the same due process standards, criminal justice system requirements for extraterritorial operations, or disclosure obligations with which government employees must comply,²⁰² including when PMC personnel execute military operations.²⁰³ This inequity was recognized before the recent wars.

Congressional debates over the Military Extraterritorial Jurisdiction Act (MEJA) of 2000 underscored that the legislative intent for the Act was to impose regulations on civilians that would be

jurisdiction to try civilians. In all circumstances, the State shall ensure that civilians accused of a criminal offence of any nature are tried by civilian courts.”).

¹⁹⁹ Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949 arts. 64–67, Aug. 12, 1949, 6 U.S.T. 3516.

²⁰⁰ See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, art. 47, June 8, 1977, 1125 U.N.T.S. 4, 25 (“A mercenary shall not have the right to be a combatant or a prisoner of war.”).

²⁰¹ See William C. Peters, *On Laws, Wars, and Mercenaries: The Case for Courts-Martial Jurisdiction Over Civilian Contractor Misconduct in Iraq*, 2006 BYU L. REV. 367, 367 (2006) (West Point professor noting that “[e]ither every [private contractor] happens to be a model citizen, or there are serious shortcomings in the legal system that governs them”).

²⁰² Minow, *supra* note 31, at 995 n.31, 999. A specific statutory source is necessary to extend jurisdiction extraterritorially. “[S]tatutes apply only to acts performed within the United States territory—unless Congress manifests an intent to reach acts performed outside United States territory.” *United States v. Bin Laden*, 92 F. Supp. 2d 189, 193 (S.D.N.Y. 2000) (citing *EEOC v. Arabian Am Oil Co.*, 499 U.S. 244, 248 (1991)).

²⁰³ See Christopher D. Belen, *Reining in Rambo: Prosecuting Crimes Committed by American Military Contractors in Iraq*, 27 PENN. ST. INT’L L. REV. 169, 203–06 (2008).

required of military personnel when civilians accompany the U.S. military on missions outside U.S. territory.²⁰⁴ MEJA provides:

Whoever engages in conduct outside the United States that would constitute an offense punishable by imprisonment for more than 1 year if the conduct had been engaged in within the special maritime and territorial jurisdiction of the United States . . . while employed by or accompanying the Armed Forces outside the United States . . . shall be punished as provided for that offense.²⁰⁵

However, section 3266 required the Secretary of Defense to consult with the Secretary of State and the Attorney General to “prescribe regulations governing the apprehension, detention, delivery, and removal of persons under [the statutory framework].”²⁰⁶ The Department of Defense did not implement MEJA with regulations until 2005.²⁰⁷ Recall that when President Bush was questioned about the governing law in 2006, Secretary of Defense Rumsfeld reportedly presumed that Iraqi law governed.²⁰⁸ It is true that under MEJA, U.S. jurisdiction cannot be extended “if a foreign government . . . has prosecuted or is prosecuting such person for the conduct constituting such offense,”²⁰⁹ but the Coalition Provisional Authority had stripped Iraq of jurisdiction in 2004.²¹⁰

²⁰⁴ H.R. REP. NO. 106-778, pt. 1, at 1 (2000); 145 CONG. REC. 8194–201 (1999) (statement of Sen. Leahy); Steven P. Cullen, *Out of Reach: Improving the System to Deter and Address Criminal Acts Committed by Contractor Employees Accompanying Armed Forces Overseas*, 38 PUB. CONT. L.J. 509, 531 (2009); Carney, *supra* note 46, at 319 (stating that private military firms can “easily shield themselves from liability”).

²⁰⁵ 18 U.S.C. § 3266(a) (2012).

²⁰⁶ *Id.*

²⁰⁷ See U.S. DEP’T OF DEF., DODI 5525.11, CRIMINAL JURISDICTION OVER CIVILIANS EMPLOYED BY OR ACCOMPANYING THE ARMED FORCES OUTSIDE THE UNITED STATES, CERTAIN SERVICE MEMBERS, AND FORMER SERVICE MEMBERS § 1.1, (2005), *available at* <http://www.dtic.mil/whs/directives/corres/pdf/552511p.pdf>; *see also* Williams, *supra* note 187, at 60–61 (discussing lack of jurisdictional basis); Prystowsky, *supra* note 106, at 56–57 (emphasizing that laws were still not being applied to civilian contractors in Iraq).

²⁰⁸ Bush, *supra* note 142.

²⁰⁹ 18 U.S.C. § 3261(b) (2012).

No prosecution may be commenced against a person under this section if a foreign government, in accordance with jurisdiction recognized by the United States, has prosecuted or is prosecuting such person for the conduct constituting such offense, except upon the approval of the Attorney General or the Deputy Attorney General (or a person acting in either such capacity), which function of approval may not be delegated.

Id.

²¹⁰ L. PAUL BREMER, COALITION PROVISIONAL AUTH., COALITION PROVISIONAL AUTHORITY ORDER NUMBER 17 (REVISED), §§ 4(2)–(3) (June 27, 2004), *available at*

Private contractors were not explicitly subject to the Uniform Code of Military Justice (UCMJ), but Congress adopted extensions under the National Defense Authorization Act of 2007 to apply the UCMJ jurisdiction to PMC personnel “accompanying an armed force in the field” during a “time of declared war or [in] a contingency operation.”²¹¹ A “contingency operation” is “a military operation that . . . is designated by the Secretary of Defense as an operation in which members of the armed forces are or may become involved in military actions, operations, or hostilities against an enemy of the United States or against an opposing military force.”²¹² By expanding the language to a “declared war or a contingency operation,” contractors accompanying soldiers could be subject to the entire UCMJ and military court jurisdiction²¹³ depending on how applicable terms would be interpreted.

Amendments to broaden the jurisdiction of the UCMJ were lauded by experts as “the single biggest legal development for the private military industry since its start.” Yet several years later commentators emphasized that the differing status of military personnel made UCMJ provisions toilsome to apply to civilians.²¹⁴ PMCs contracting with the State Department or another non-military department would not be subject to the UCMJ or MEJA because these statutory frameworks only applied to contractors accompanying the military.²¹⁵ Congress sought to remedy this deficit with the Civilian

http://www.iraqcoalition.org/regulations/20040627_CPAORD_17_Status_of_Coalition_Rev_with_Annex_A.pdf.

²¹¹ 10 U.S.C. § 802(a)(10) (2012); see Corn, *supra* note 108, at 494; David M. Herszenhorn, *House's Iraq Bill Applies U.S. Laws to Contractors*, N.Y. TIMES, Oct. 5, 2007, at A1 (noting that the bill was approved in the House of Representatives by a vote of 389 to 30, “despite strong opposition from the White House”).

²¹² 10 U.S.C. § 101(a)(13)(A) (2012).

²¹³ 10 U.S.C. § 802(a)(10); see Corn, *supra* note 108, at 494.

²¹⁴ David Isenberg, *Ahem: About That Great Change to the UCMJ*, HUFFINGTON POST (Nov. 2, 2010, 11:28 PM), http://www.huffingtonpost.com/david-isenberg/ahem-about-that-great-cha_b_778024.html. Also, the UCMJ might not apply if the military does not accept clear responsibility over contractors during a war or contingency operation. See McKenna Long & Aldridge L.L.P., *Civilians Accompanying Forces in the Field Now Subject to U.S. Military Justice*, 5 GOV'T CONTRACTS ADVISORY No. 4, Jan. 29, 2007, available at http://www.mckennalong.com/media/library/499_GC_Advisory_1-29-07_UCMJ_Jurisdiction.pdf (“Many contractors in contingency operation areas today work side-by-side with DoD personnel, but may not be DoD contractors, and may not be performing a DoD mission, such as firms contracted by the State Department with Iraq Relief and Reconstruction Fund money to perform reconstruction work.”). There are other hybrid and ambiguous possibilities. *Id.* It is logical that other departments would not employ civilians for combat, whereas the Pentagon’s business is combat and security.

²¹⁵ See Jonathan Finer, *Holstering the Hired Guns: New Accountability Measures for Private Security Contractors*, 33 YALE J. INT’L L. 259, 261–63 (2008).

Extraterritorial Jurisdiction Act of 2011, but the bill was not passed.²¹⁶ Also, despite that the UCMJ jurisdictional expansion to “contingency operations” was an alteration particularly relevant to appeasing critics of the behavior of combatants, it was not clear that applications were primarily concerned with regulating actions committed against enemy forces or with the enforcement of criminal laws on civilian contractors for crimes committed against military and other contractor allies.²¹⁷ Many of the significant prosecutions were of the latter type.²¹⁸

For example, Alaa “Alex” Mohammad Ali stabbed another translator on a U.S. base in Iraq and became the first U.S. military contractor since 1968 to be criminally prosecuted by the U.S. military.²¹⁹ Prosecutors brought charges under 10 U.S.C. § 802(a)(10), applicable to “persons serving with or accompanying an armed force in the field.”²²⁰ The problem, as John O’Connor points out, is

²¹⁶ Civilian Extraterritorial Jurisdiction Act (CEJA) of 2011, H.R. 2136, 112th Cong. (2011), available at <http://govtrack.us/congress/bills/112/hr2136#overview>.

²¹⁷ See 145 CONG. REC. 8194 (1999) (Sen. Leahy remarking on concerns to addressing cases involving “sexual molestation of dependent girls, the stabbing of a serviceman and drug trafficking to soldiers”). This intra-ally application was also the logical contextual application with the Special Maritime and Territorial Jurisdiction Act (SMTJA) since it applies “[w]ith respect to offenses committed by or against a national of the United States” on United States installations and bases or buildings and lands used by the U.S. government abroad. 18 U.S.C. § 7(9) (2012); see also Prystowsky, *supra* note 106, at 70–72 (discussing the Fifth and Sixth Amendment protections which keep civilians outside the reach of military courts); Adam Ebrahim, Note, *Going to War with the Army You Can Afford: The United States, International Law, and the Private Military Industry*, 28 B.U. INT’L L.J. 181, 195–98 (2010) (probing whether a PMC employee might be functionally classified “as a member of the armed forces and not as a civilian,” triggering the application of the UCMJ). Nonetheless, the SMTJA and the War Crimes Act could also potentially apply to U.S. contractors committing crimes in foreign countries. See 18 U.S.C. § 7(9); 18 U.S.C. § 2441 (2012).

²¹⁸ Recent applications of MEJA have included a former Marine who was accused of killing civilians in Fallujah but was acquitted. Eugene R. Fidell, *Criminal Prosecution of Civilian Contractors by Military Courts*, 50 S. TEX. L. REV. 845, 846–47 (2009) (noting that the civilian jury acquitted because the prosecutors could produce no bodies, and Marines present refused to testify and were incarcerated for contempt of court); Maureen Cosgrove, *Civilian Appeals Conviction by US Military Court*, JURIST (June 2, 2011, 9:02 AM), <http://jurist.org/paperchase/2011/06/civilian-appeals-conviction-by-us-military-court.php> (prosecution of an Iraqi interpreter). See *United States v. Arnt*, 474 F.3d 1159, 1161 (9th Cir. 2007) (prosecution of a U.S. military member’s wife for stabbing her service member husband on a base in Turkey).

²¹⁹ See O’Connor, *supra* note 186, at 785; Jeremy Scahill, *Contract Justice*, THE NATION, Apr. 21, 2008, <http://www.thenation.com/article/contract-justice>; Michael R. Gordon, *U.S. Charges Contractor at Iraq Post in Stabbing*, N.Y. TIMES, Apr. 5, 2008, at A6.

²²⁰ 10 U.S.C. § 802(a)(10) (2012); see Gordon, *supra* note 219, at A6.

that the military's use of the provision "has not . . . been particularly praiseworthy."²²¹ To illustrate, Ali pled guilty to misappropriating a knife, obstructing justice, and providing a false statement and received a five months sentence under section 802(a),²²² while the original assault charge—which carried a more significant sentence—was dismissed.²²³ Prosecutors did bring court-martial proceedings against other contractors in Iraq.²²⁴

With all of the controversy that arose in the media over PMCs being hired for combat operations and using unlawful force with weapons against perceived foes, a significant number of prosecutions sought to preserve civility among allies on the same side. Enforcing intra-ally amity is salient, but perhaps this application does not remedy concerns pertaining to public interest in whether essential government services are outsourced, the pertinence of legal restrictions on combatants under the Geneva Convention, or conventions prohibiting mercenarism. The most logical alternative to remedy these weaknesses is for a PMC employee, who used unjustified force or committed a crime during an occupation of a foreign country, to be subject to the jurisdiction of the occupied country.

E. Iraqi Law

U.S. law prefers territorial principles and favors the prosecution of wrongdoers inside the jurisdiction in which a criminal action transpired,²²⁵ which suggests that general U.S. policy may favor contractors being subject to a foreign country's law,²²⁶ even though contractors typically operate in regions with suboptimal legal sys-

²²¹ O'Connor, *supra* note 186, at 784–85.

²²² *See id.*

²²³ Press Release, Multi-Nat'l Corps-Iraq, Pub. Affairs Office, Camp Victory, Civilian Contractor Convicted at a Court-Martial (June 23, 2008), *available at* http://contractormisconduct.org/ass/contractors/37/cases/980/1316/1-3-communications-court-martial_pr.pdf; Alexandra Zavis, *Army Interpreter Sentenced at Court-Martial*, L.A. TIMES, June 24, 2008, at A3.

²²⁴ Andres Healy, Note, *The Constitutionality of Amended 10 U.S.C. § 802(A)(10): Does the Military Need a Formal Invitation to Reign in "Cowboy" Civilian Contractors?*, 62 FLA. L. REV. 519, 522 (2010).

²²⁵ *See* FED. R. CRIM. P. 18; D. SCOTT BROYLES, CRIMINAL LAW IN THE USA 56–57 (Roger Blanpain et al. eds., 2011).

²²⁶ *See* 18 U.S.C. § 3261(b) (2012); Danielle Ireland-Piper, *Prosecutions of Extraterritorial Criminal Conduct and the Abuse of Rights Doctrine*, 9 UTRECHT L. REV. 68, 68, 73 (2013) (noting the preference for territorial jurisdiction and that international law references principles of comity, non-interference, and judicial restraint when questions of territorial criminal jurisdiction arise).

tems.²²⁷ Rumsfeld's belief that Iraqi law governed in this instance²²⁸ provides another instance in which the Bush Administration eluded responsibility in Iraq via proclivity for confusion.²²⁹ The Coalition Provisional Authority (CPA) nullified the possibility of Iraq assuming jurisdiction over PMCs by issuing an *extension* to Order 17

²²⁷ Simon Chesterman, *Leashing the Dogs of War: The Rise of Private Military and Security Companies*, CARNEGIE REP., Fall 2008, at 37, 41; Singer, *supra* note 150, at 535–36 (“The real risk of gross misbehavior by [PMC personnel] is not during their operations in sound states like the United States, but rather the contracts they have in weak or failing states.”). In addition to international prohibitions on mercenary activities, private operations that use force without sovereign assent would constitute a criminal offense in a functional legal system. If local authorities are unable and unlikely to indict for criminal operations, risks of mercenary operations could increase.

²²⁸ Bush, *supra* note 142.

²²⁹ The CPA was criticized for controversial acts, but top Bush Administration officials did not know who was responsible for the CPA. See SPECIAL INSPECTOR GENERAL FOR IRAQ RECONSTRUCTION, *HARD LESSONS: THE IRAQ RECONSTRUCTION EXPERIENCE* 120 (Dec. 2008). Deputy Secretary of State Dick Armitage recalled when Dr. Condaleeza Rice, National Security Advisor, turned to Secretary of Defense Donald Rumsfeld and asked him to direct Coalition Provisional Authority head, Ambassador Paul Bremer, to carry out some initiatives, but Rumsfeld remarked: “No, he doesn’t work for me.” [Rice] said, ‘Yes, he does. Who does he work for?’ And [Rumsfeld] said, ‘He works for the NSC.’” *Id.* (quoting an interview with Deputy Secretary Armitage). Similarly, after the notorious Abu Ghraib scandal erupted, which unfolded after top government officials specifically dispensed orders to engage in abusive interrogations in violation of the Geneva Conventions, there was a combination of CIA agents, Defense Department interrogators, and private contractors involved. Robert Bejesky, *The Abu Ghraib Convictions: A Miscarriage of Justice*, 32 *BUFF. PUB. INT. L.J.* 103, 148–49 (2014). Responsibility was again difficult to pinpoint. See *id.* at 168–73. See generally Robert Bejesky, *The Utilitarian Rational Choice of Interrogation from a Historical Perspective*, 58 *WAYNE L. REV.* 327 (2012) (describing the CIA’s history of relying on psychological interrogation methods well understood to lead to abuse and unreliable information, despite the condemnation of such techniques); Deborah Avant, *What Are Those Contractors Doing in Iraq?*, *WASH. POST*, May 9, 2004, at B1 (“[W]e are not even sure for whom these contractors work or worked. Nor do we know how many other contract employees were . . . at [Abu Ghraib]. . . . We do not know . . . to which group or agency they were accountable. To trace that, we would need to know the contracting agent—someone representing a group within the Army, probably, but which one?”). Craig T. Jones, an attorney representing victims of Abu Ghraib, stated: “[W]e have got people whose basic human rights are being violated by American corporations for profit. And we’re interested in holding these companies accountable for their war crimes” Atif Rehman, Note, *The Court of Last Resort: Seeking Redress for Victims of Abu-Ghraib Torture Through the Alien Tort Claims Act*, 16 *IND. INT’L & COMP. L. REV.* 493, 493 (2006). Indictments were not brought against PMC personnel who were perhaps equally as culpable. Won Kidane, *The Status of Private Military Contractors Under International Humanitarian Law*, 38 *DENV. J. INT’L L. & POL’Y* 361, 405 (2010).

on June 27, 2004, one day before the CPA dissolved.²³⁰ The Order stated that military forces and contractors “shall respect relevant Iraqi laws,” but “Contractors shall not be subject to Iraqi laws or regulations in matters relating to the terms and conditions of their Contracts” and “shall be immune from Iraqi legal process with respect to acts performed by them pursuant to the terms and conditions of a Contract or any sub-contract thereto.”²³¹

U.S. troops and civilian contractors could be subject to “Sending State” law, but the Order immunized U.S. troops and PMC personnel from prosecution under Iraqi law unless the U.S. permitted prosecution by expressing that the suspect contractor did not act pursuant to the relevant contract.²³² If a contractor allegedly committed a crime, the Department of Defense, the U.S. State Department, and the U.S. Department of Justice could decide to send a waiver to the Iraqi government to permit a local prosecution.²³³ However, by stating that contractors are immune for acts pursuant to the terms of their contracts, Order 17 effectively relayed, for terms of liability under Iraqi law, that PMCs were an extension of U.S. government agencies.²³⁴ As Part II emphasized, there was much

²³⁰ BREMER, *supra* note 210, §§ 4(2)–(3); Hamada Zahawi, *Redefining the Laws of Occupation in the Wake of Operation Iraqi Freedom*, 95 CALIF. L. REV. 2295, 2332 (2007); *see also Responses to Excessive Uses of Force*, *supra* note 113, at 161 (noting the Blackwater guards’ status under U.S. law, as opposed to the CPA, remained unclear).

²³¹ BREMER, *supra* note 210, §§ 4(2)–(5) (“Certification by the Sending State that its Contractor acted pursuant to the terms and conditions of the Contract shall, in any Iraqi legal process, be conclusive evidence of the facts so certified.”).

²³² *Id.* §§ 2(3), 4(2), 5(2); *see also* Scott J. Borrowman, *Sosa v. Alvarez-Machain and Abu Ghraib—Civil Remedies for Victims of Extraterritorial Torts by U.S. Military Personnel and Civilian Contractors*, 2005 BYU L. REV. 371, 375 (2005) (exploring remedies against U.S. contractors under U.S. law like the Foreign Claims Act); Tom Engelhardt, *Order 17*, THE NATION, Sept. 24, 2007, <http://www.thenation.com/article/order-17> (describing Order 17 as “a get-out-of-jail-free card in perpetuity” for contractors); Joanne Williams, *Al Skeini: A Flawed Interpretation of Bankovic*, 23 WIS. INT’L L.J. 687, 689 (2005) (noting that Britain also provided immunity to U.K. soldiers under Iraqi law, providing that they would be subject to the exclusive jurisdiction of the U.K.); Myriam Gilles, *Introduction: Private Parties as Defendants in Civil Rights Litigation*, 26 CARDOZO L. REV. 1, 7 (2004) (“Iraq lacks a functional judiciary, and even if one rises from the rubble, private contractors are immune for criminal liability.”). Without political support within the US government to state that a contractor did not act pursuant to their contract terms, Iraqis could not hold contractors responsible.

²³³ *See* BREMER, *supra* note 210, § 5(1); *see also* Lara Jakes Jordan & Matthew Lee, *Immunity Deals ‘Routine’ For Contractors*, USA TODAY, Oct. 30, 2007, http://usatoday.com/news/topstories/2007-10-29-3036624540_x.htm (“Limited immunity has been routinely offered to private security contractors involved in shootings in Iraq . . .”).

²³⁴ *See* BREMER, *supra* note 210, §§ 4(2)–(5).

disagreement over government obligations to control PMCs. The U.S. Justice Department could prosecute under U.S. law, which is the implication of Order 17, but as previously discussed, there was no adequate sending state law for several years.

The existing principle that granted supremacy to Order 17 over general Iraqi statutes was Coalition Provisional Authority Regulation Number 1 Section 3, which stated: “Regulations and Orders issued by the [CPA] Administrator shall take precedence over all other laws and publications to the extent such other laws and publications are inconsistent.”²³⁵ Essentially, CPA Orders would prevail unless and until a new Iraqi government rescinded them,²³⁶ and early Iraqi governments did not rescind directives so that they could decide criminal law issues applicable to PMCs.²³⁷ It was not until late-October 2007 and after the Nisour Square massacre, that the Iraqi government finally contemplated adopting legislation that would eliminate Order 17 and place the actions of private security company employees under Iraq’s criminal law jurisdiction.²³⁸

After the massacre, Secretary of State Condoleezza Rice and Secretary of Defense Robert Gates explained that a Status of Forces Agreement (SOFA) could resolve “a number of legal questions . . . ranging from the overall scope of [the U.S. military’s] mission to the minutiae of day-to-day life.”²³⁹ CPA Order 17 was a dictated SOFA.²⁴⁰ SOFAs are typically negotiated and adopted with the sending state having disproportionate bargaining power over the

²³⁵ See L. PAUL BREMER, COALITION PROVISIONAL AUTH., COALITION PROVISIONAL AUTHORITY REGULATION NUMBER 1, § 3(1) (May 16, 2003), available at http://www.iraqcoalition.org/regulations/20030516_CPAREG_1_The_Coalition_Provisional_Authority_.pdf.

²³⁶ See L. PAUL BREMER, COALITION PROVISIONAL AUTH., COALITION PROVISIONAL AUTHORITY ORDER NUMBER 100, § 1 (June 28, 2004), available at http://www.iraqcoalition.org/regulations/20040628_CPAORD_100_Transition_of_Laws_Regulations_Orders_and_Directives.pdf.

²³⁷ ELSEA, SCHWARTZ & NAKAMURA, *supra* note 107, at 19.

²³⁸ Jordan & Lee, *supra* note 233 (noting that Iraqi authorities finally “approved draft legislation lifting immunity for foreign security companies” in order to “make all foreign private contractors in Iraq subject to the nation’s criminal laws”).

²³⁹ Condoleezza Rice & Robert Gates, Editorial, *What We Need Next in Iraq*, WASH. POST, Feb. 13, 2008, at A19.

²⁴⁰ See generally R. CHUCK MASON, CONG. RESEARCH SERV., RL34531, STATUS OF FORCES AGREEMENT (SOFA): WHAT IS IT, AND HOW HAS IT BEEN UTILIZED? 1 (2009) (explaining that SOFA governs operations between the U.S. military and basing operations in foreign countries and determines criminal law jurisdiction in the foreign country). See also 18 U.S.C. §§ 3261(b)–(c) (2012) (discussing potential and concurrent jurisdiction possibilities).

receiving state.²⁴¹ A few months after the Nisour Square massacre, the US-Iraq Security Agreement of 2008 became more lenient and stated that “Iraq shall have the primary right to exercise jurisdiction over members of the United States Forces and of the civilian component for the grave premeditated felonies enumerated pursuant to paragraph 8, when such crimes are committed outside agreed facilities and areas and outside duty status.”²⁴² Iraqi courts were therefore permitted to exercise criminal jurisdiction over contractors and civilian or military components if the U.S. determined premeditated felonies were committed “outside duty status.”²⁴³

IV. SAVING ECONOMIC COST BY USING CONTRACTORS

A. Introduction

To this point, the article has addressed reasons the use of PMCs might aid government leaders in diminishing the political costs of war. In essence, if a government’s oversight responsibilities are reduced by outsourcing essential government functions and there are no reasonably effective regulatory structures to promote appropriate contractor behavior, perhaps it is logical to presume that there is inadequate democratic assent on the execution of the foreign policy. Likewise, a current concern to the U.N. Working Group on the Use of Mercenaries is that PMCs may allow states to

²⁴¹ See Gwyn Kirk & Carolyn Bowen France, *Redefining Security: Women Challenge U.S. Military Policy and Practice in East Asia*, 15 BERKELEY WOMEN’S L.J. 229, 231 (2000). The disproportional power can be contrasted with the elevated reciprocity language of the North Atlantic Treaty Organization SOFA, which applies to the 48 member countries and their exchange of troops. See North Atlantic Treaty on Status of Forces Proclamation, June 19, 1951, 4 U.S.T. 1792. The NATO SOFA is more deferential to local jurisdiction; it permits the sending state to have jurisdiction over activities involving its own property, security, or personnel, and “offenses arising out of any act or omission done in the performance of official duty” and allows the receiving state to retain jurisdiction over transgressions unrelated to military functions. *Id.* art. 7. This can provide some deference depending on who asserts the terms. See MASON, *supra* note 240, at 3–5.

²⁴² Agreement Between the United States of America and the Republic of Iraq on the Withdrawal of United States Forces from Iraq and the Organization of Their Activities During Their Temporary Presence in Iraq, U.S.-Iraq, art. 12, Nov. 17, 2008, available at <http://www.state.gov/documents/organization/122074.pdf>.

²⁴³ *Id.* art. 12(1)–(2); *Iraqi Parliament Approves Status-of-Forces Agreement Setting Timetable for U.S. Withdrawal*, 103 AM. J. INT’L L. 132, 133–34 (John R. Crook ed., 2009). The U.S. can still hold the defendant, except the U.S. must make the defendant available for investigation and trial, and jurisdiction can also be waived. Agreement Between the United States of America and the Republic of Iraq on the Withdrawal of United States Forces from Iraq and the Organization of Their Activities During Their Temporary Presence in Iraq, *supra* note 242, art. 12(5)–(6).

elude full responsibility for combat operations under rules governing the use of force.²⁴⁴ Since the rise of the system of sovereignty, states have been obliged to be responsible for their use of force and for the actions of their military forces.²⁴⁵ But today private contractors are sometimes regarded as so pivotal to military functions that war could not exist without them.²⁴⁶ There undoubtedly has been a contemporary increase in the use of PMCs; however, supporters seem less enthusiastic about scrutinizing the legitimacy of this shift at the domestic and international levels and more willing to presume the progression is justified and legitimate because of the purported benefits of privatization.

This part addresses whether the promoted advantages of using contractors—privatized services are less expensive and have superior expertise—are compelling justifications to offset the negative ramifications of employing PMCs. Part B weighs considerations of the purported exceptional expertise boon by considering some of the types of PMC positions. Part C addresses the alleged cost advantages of PMCs by examining comparative compensation for military personnel and PMC employees and considering how compensation levels may influence the supply of a fighting force. Even if these are advantages that favor outsourcing, there is the question of whether inadequate oversight of private organizations can engender moral hazard concerns, which is the topic of Part D.

B. *PMC Expertise*

The private sector's exceptional efficiency and technological advantages over the public sector are premised on market competition, pecuniary incentives, and cost savings.²⁴⁷ These advantages have been the basis for competitive government procurement processes for decades.²⁴⁸ High-technology products can be supplied on economies of scale, particularly for dual-use goods that are purchased by other private sector firms.²⁴⁹ However, production for

²⁴⁴ See United Nations Human Rights, *supra* note 2.

²⁴⁵ Robert Bejesky, *Mercenaries, Myrmidons, and Missionaries*, 37 U. ARK. LITTLE ROCK L. REV. (forthcoming 2014) (manuscript at 7–16) (on file with author).

²⁴⁶ P.W. Singer, *Can't Win With 'Em, Can't Go To War Without 'Em: Private Military Contractors and Counterinsurgency*, FOREIGN POLICY AT BROOKINGS, no. 4, Sept. 2007, at 3. Goods procurement is certainly essential. *Id.* at 2.

²⁴⁷ See Michaels, *supra* note 21, at 1037–38; Rosky, *supra* note 42, at 929.

²⁴⁸ See Mary H. Cooper, *For Warring Nations, a Tradition of Armies Bought, Not Built*, 62 CONG. Q. WKLY. 2196, 2197 (2004) (noting the enhanced efficiency for procuring goods and services from military contractors).

²⁴⁹ See JAMES JAY CARAFANO, PRIVATE SECTOR, PUBLIC WARS: CONTRACTORS IN COMBAT—AFGHANISTAN, IRAQ, AND FUTURE CONFLICTS 36–37, 120–22 (2008). See

some goods procurement contracts derive entirely from military demand, such as: manufacturers of advanced weaponry, armaments, specialized vehicles, fighter aircraft, and other military equipment designed to Pentagon specifications.²⁵⁰ Thus, for goods procurement, the government does not operate factories, making private sector acquisitions of military and dual-use goods a necessity. For services, however, the options are quite different.

There are several varieties of service contracts. First, private contractors may provide construction, infrastructure development, engineering specialization, and other services for the Pentagon to meet periodic spikes in demand,²⁵¹ such as in the case of war. Private sector companies provide the same services in the market. Contractors provide food, household and upkeep services, and transportation for troops and equipment to given destinations.²⁵² Private contractors may supply these services more effectively if the private sector is more proficient than the public sector;²⁵³ can relieve the service member from doing menial activities and boost morale; and can allow the government to survey the market and use competitive procurement practices to locate the optimal source of supply, perhaps from a company with a proven track record in the private sector.

Pentagon procurement for combat-related and security services is quite different because private citizens are unlikely to be able to acquire certain military weaponry without government authorization and training on that weaponry. For example, Navy pilots learn to operate sophisticated aircraft for bombing and aerial combat missions in the military, not in civilian life. Experts in strategic operations and intelligence analysis attain their skills and understanding of national security analysis while holding a security clearance in government service, normally not as a non-government employee. Special Forces personnel become experts in multiple modes of combat and demolition as a member of the military. In civilian life such training might raise suspicions of ter-

also Newell & Sheehy, *supra* note 19, at 73 (noting the divergent motivations for retaining PMCs between strong states and weak states, even while efficiencies may be a shared goal).

²⁵⁰ The private sector cannot operate stealth bombers, tanks, artillery, or other equipment produced specifically by government authorization and for military demand. *But cf.* Singer, *supra* note 246, at 2 (noting that private contractors loaded stealth bombers and assisted in the operation of the Patriot and Aegis missile systems).

²⁵¹ See Addicott, *supra* note 29, at 346–47.

²⁵² *Id.*

²⁵³ See Chesterman, *supra* note 227, at 39.

rorism or mercenarism. Combat-related professional skills are acquired in the military or other law enforcement agencies where these skills are inherent and essential government functions.

Insufficiently trained PMC personnel typically will have a lower skill level than a similarly situated government employee.²⁵⁴ Perhaps this is particularly true if there is a significant periodic spike in demand²⁵⁵ that requires PMCs to rapidly recruit police officers, unemployed civilians, and low cost security personnel from foreign countries.²⁵⁶ Other PMC personnel are former or retired military troops, who are presumably well-trained because they attained skills in the military.²⁵⁷ The Pentagon's essential service and expertise is combat. If security-related PMCs do reduce cost, this may be partially attributable to training expenses being absorbed by the military at taxpayer expense.²⁵⁸ Lost taxpayer value may even suggest that there are problems with the military and private sector incentive structures, and PMCs might equalize those incentives by reimbursing taxpayers for training PMC personnel received at public expense.²⁵⁹ Instead, the diametric result unfolded during the Iraq War.

²⁵⁴ See Schooner, *supra* note 52, at 562.

²⁵⁵ It is not clear why the military would be unable to acquire the same capabilities for a set duration and would instead need to outsource at a price to urge supply unless there is some labor market disequilibrium that is not sufficient to sustain the policy.

²⁵⁶ Carney, *supra* note 46, at 324–25. Reports surfaced that roughly 35,000 of the 48,000 contractors working for KBR in Iraq were from third-countries and that they had been recruited through deceptive practices. Amy Kathryn Brown, Note, *Baghdad Bound: Forced Labor of Third-Country Nationals in Iraq*, 60 RUTGERS L. REV. 737, 737–39 (2008); Cam Simpson, *Iraq War Contractors Ordered to End Abuses*, CHI. TRIB. (Apr. 24, 2006), http://articles.chicagotribune.com/2006-04-24/news/0604240221_1_orders-promise-harsh-actions-iraq-from-impooverished-countries-return-passports (“Human brokers and subcontractors from South Asia to the Middle East have worked together to import thousands of laborers into Iraq from impoverished countries.”).

²⁵⁷ Carney, *supra* note 46, at 326; Michaels, *supra* note 21, at 1014–15. To suggest that former military personnel lack sufficient expertise would connote that Pentagon units and personnel are incompetent in training government personnel. Private contractor employees may not always be better than a soldier, but such employees may choose more money and have less of a disciplinary code as a contractor employee. See Dickinson, *supra* note 93, at 358–59, 376–78 (JAG officers referencing a soldier who was kicked out of the military but then went and worked for a contractor and earned twice as much).

²⁵⁸ See Richer, *supra* note 121, at 1731–32; Davidson, *supra* note 61, at 265.

²⁵⁹ A percentage of PMC employees are military retirees who are collecting a pension because they spent approximately twenty years in the military. See 38 C.F.R. § 3.750 (2014). See also Carney, *supra* note 46, at 326; Michaels, *supra* note 21, at 1014–15. These demographics ostensibly factor into PMC personnel rosters because of the age difference between troops and PMC personnel. See Sullivan, *supra*

C. *Economics of Exit from Service*

Consistent with the Bush Administration's zeal for privatization²⁶⁰ and the U.S. and British-led trend of relying on the use of private military forces,²⁶¹ an escalating number of PMC personnel were hired to execute military tasks in Iraq.²⁶² Five years into the war, Department of the Army Pamphlet 27-50-428 (2008) stated: "The United States this year will have spent \$100 billion on contractors in Iraq since the invasion in 2003, a milestone that reflects the Bush administration's unprecedented level of dependence on private firms for help in the war. . . ."²⁶³ For example, Blackwater, a company which engaged in security and combat operations, was awarded federal government contracts that multiplied nearly one-thousand times in value in just over seven years.²⁶⁴

note 7, at 876 (noting that military troops deployed abroad are on average 26 years of age and PMC employees are on average 40 years of age). It is an advantage for exceptionally skilled and experienced former military commanders to be involved as PMC consultants. SINGER, *supra* note 36, at 96. However, the option of early retirement and ability to work for a PMC has also been called a brain drain from the military. *See id.*; Michaels, *supra* note 21, at 1096. To some extent the early retirement system may not be logical if one intention is to ensure that more physically able individuals are active in military missions, but retirees can still execute similar tasks for a PMC. The early retirement system may be perceived as a perk when enlisting, cannot be significantly modified to meet a spike in demand, and may increase available personnel for PMCs.

²⁶⁰ Edward Rubin, *Book Review: The Possibilities and Limitations of Privatization: Government by Contract: Outsourcing and American Democracy*, 123 HARV. L. REV. 890, 890–91 (2010) (reviewing NEAL STEPHENSON, SNOW CRASH (1992)); Schooner, *supra* note 52, at 551 (remarking on "the Bush administration's relentless pressure to accelerate the outsourcing trend").

²⁶¹ Jenny S. Lam, Comment, *Accountability for Private Military Contractors Under the Alien Tort Statute*, 97 CALIF. L. REV. 1459, 1460 (2009) (reporting that the U.S. and Britain together account for more than 70% of annual spending on private military companies); Carney, *supra* note 46, at 319 (noting that worldwide, privatized military services are a \$100 billion per year industry). The U.S. and Britain would not politically be able to place official military troops in many foreign countries, whereas private companies from these countries can more quietly be involved in foreign countries without confronting political backlash.

²⁶² Finkelman, *supra* note 72, at 402–04. In late-2002 and at the same time the Bush administration was attempting to cut federal civilian workers in half, it hired private contractors to undertake troop obligations in Afghanistan. Michaels, *supra* note 21, at 1003.

²⁶³ James Risen, *Use of Iraq Contractors Costs Billions, Report Says*, N.Y. TIMES, Aug. 12, 2008, at A11, available at <http://www.nytimes.com/2008/08/12/washington/12contractors.html>; CONG. BUDGET OFFICE, *supra* note 30, at 2.

²⁶⁴ Blackwater's contracts rose in value from less than \$1 million in 2001, to \$593 million in 2006. STAFF OF H. COMM. ON OVERSIGHT & GOV'T REFORM, *supra* note 93, at 3. Contracts rose to over \$2 billion. Nissenbaum, *supra* note 85. Due to its size

Using PMCs is a mode of meeting spiked demand for military personnel by relying on efficient market mechanisms to produce a fighting force faster and with more flexibility than government policies or national conscription would permit.²⁶⁵ As demand contracts, so does the additional cost that would accompany having excess troops remain in the military with a fulltime salary through the remainder of the enlistment period;²⁶⁶ although, this cost could presumably be reduced to the extent that there are accurate forecasts of future military need. However, the real predicament may not be due to inability to forecast need, the existence of disequilibrium, or difficulty in making an optimal choice between using the public or private sector for a similar mission, but instead the fact that price must be continually raised to persuade sufficient supply precludes the use of public sector employees due to long-existing government pay grades.²⁶⁷ Several pieces of evidence indicate that in the case of the Iraq War, either combat troops were inadequately compensated or the mission was not sufficiently compelling to continue to be executed.

First, the allegation that PMCs are cheaper or more efficient than the military is improbable.²⁶⁸ Contractors may earn three or four times more monetary compensation than a U.S. military sol-

and in depth involvement with the Pentagon, Blackwater has been called a fifth branch of the military. SCAHILL, *supra* note 73, at 25.

²⁶⁵ See Chesterman, *supra* note 227, at 38–39. This spike in demand can be driven by foreign policies, military actions, or services at foreign US bases.

²⁶⁶ Mercenary forces are generally perceived as less organized and apt to disperse after the employment for conflict ends, whereas a private military force is a corporation with structure and continuity. See Jon Cadieux, *Regulating the United States Private Army: Militarizing Security Contractors*, 39 CAL. W. INT'L L.J. 197, 201–02 (2008); Newell & Sheehy, *supra* note 19, at 72.

²⁶⁷ See generally UNDER SEC'Y OF DEFENSE, PERSONNEL & READINESS, MILITARY COMPENSATION: ACTIVE DUTY PAY (2014), <http://militarypay.defense.gov/pay/BASIC/ACTIVEDUTY.ASPX> (providing list for government active military pay schedules since 2011). If new public sector recruits must be paid more to be persuaded to participate in expected deployment operations, this would cause inequitable pay considerations with current enlistees. The query is whether the private sector compensation should continue to escalate to a level to entice sufficient supply as a mode of executing a policy when the established public-sector pay grade is ostensibly insufficient and the sovereign use of force is inevitably interdependent with democratic legitimacy.

²⁶⁸ Using contractors does not always save money. SINGER, *supra* note 36, at 157 (referencing RAND study); Cadieux, *supra* note 266, at 202 (noting that the pay differential is so extreme that it is unfathomable that money is actually saved by using PMCs); Carney, *supra* note 46, at 323–24 (stating that there is “no proof” that PMCs are more efficient or cost effective); Singer, *supra* note 87, at B03 (opining that the “common myth” about lower cost with PMCs “stems from a wider craze of privatizing government services”).

dier.²⁶⁹ A PMC employee can earn \$1,000 per day, where enlisted soldiers earn between \$1,193 and \$5,054 per month.²⁷⁰ Peter Singer, the author of *Corporate Warriors*, explained:

Confronting the problem of controlling private contractors requires challenging a common myth: that outsourcing saves money [H]iring private employees in Iraq at pay rates several times more than what soldiers make, plus paying the overhead at the private firms, has never been about saving money. It's more about avoiding tough political choices concerning military needs, reserve call-ups and the human consequences of war.²⁷¹

Second, young troops departing from the military were hired by contractors for additional compensation²⁷² and constituted PMCs because of the occupation of Afghanistan and Iraq.²⁷³ Due to the salaries in the private security market, the U.S. military offered reenlistment bonuses of up to \$150,000 to Special Forces.²⁷⁴ Offering a lump sum is an avenue for evading the pay grade salary restrictions. Viewed from another perspective, if the PMC market did not exist, then some military personnel might not have exited the service or would still have departed from the military, but would not have continued to be involved in Iraq. However, the market did exist because the Executive pushed for and continued an occupation policy without strong acceptance and with a lower willing

²⁶⁹ See CONG. BUDGET OFFICE, *supra* note 30, at 14 (acknowledging numbers confirming that private contractors can make nearly ten times more than U.S. troops but then rationalizing that these numbers represent the PMC's billing rate for each personnel, as opposed to the individual PMC employee salary); see also Finkelman, *supra* note 72, at 442–43; Jackson, *supra* note 27, at 288 (“Contractors are paid nearly five- to ten-times what a soldier makes doing the same job.”); Schmitt, *supra* note 91, at 515 (“Senior PSC personnel regularly earn in the \$20,000 a month range, sometimes more.”); Singer, *supra* note 1, at 129 (private contractors earn two to ten times more than military soldiers).

²⁷⁰ Carney, *supra* note 46, at 327–28; National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, § 601(b), 117 Stat. 1392, 1495–98 (2003) (providing standard military pay grades).

²⁷¹ Singer, *supra* note 87, at B03.

²⁷² Dickinson, *supra* note 93, at 375 (statement from a JAG attorney).

²⁷³ See John Helyar, *Fortunes of War*, FORTUNE, July 26, 2004, http://money.cnn.com/magazines/fortune/fortune_archive/2004/07/26/377180/index.htm (explaining the market competition phenomenon in the PMC industry); Charles R. Babcock, *Contractor Fraud Trial to Begin Tomorrow*, WASH. POST, Feb. 13, 2006, <http://www.washingtonpost.com/wp-dyn/content/article/2006/02/12/AR2006021200732.html> (noting that the founders of Custer & Battles, a PMC firm which was established in the fall of 2002 by two former Army soldiers in their early-30s, met while in the Army and subsequently made the decision to co-found the PMC).

²⁷⁴ *Private Warriors: Frequently Asked Questions*, FRONTLINE (June 21, 2005), <http://www.pbs.org/wgbh/pages/frontline/shows/warriors/faqs/>.

supply of military troops,²⁷⁵ and offered a notoriously broad interpretation of “non-inherent” governmental functions. Once that interpretation becomes axiomatic, PMCs arise to offer services and the labor markets form.

Third, the intent underlying an individual’s choice to participate in a PMC can be categorized. Even though a higher private sector price may be mandatory to entice more supply of personnel for the mission, some percentage of participants may still be devoted to the war policy and perceive a national interest,²⁷⁶ but they may not be willing to perform similar tasks in the military for less compensation. Another percentage of contractors may not be fighting for national honor or higher ideals, but are predominantly committed to attaining lucrative contracts.²⁷⁷ These PMCs seek profit for what is supposed to be a civic duty.²⁷⁸ A foremost pecuniary motive might make PMCs very similar to mercenaries.²⁷⁹ This may particularly be the case when PMC employees are hired from a third-country that does not register a convincing national interest in the military mission, but instead the foreigner is enticed by wage rates that may be twenty times more than a public security wage in that home country.²⁸⁰

Fourth, without being employed by a state, it appears that PMCs run the risk of engaging in mercenary operations. Yet some authorities support privatization of security services on several

²⁷⁵ Bejesky, *supra* note 3, at 16–29.

²⁷⁶ One position views PMCs as “mercenaries,” or one who fights chiefly for financial gain. Shakiba Kouchakpour, *Regulating Law or Being Regulated by the Law? An Analysis of Private Military 41–44* (Spring 2013) (unpublished Masters’ thesis, Lund University) (on file with author) (emphasizing distinguishing elements and international law restrictions and noting that there may not be “sufficient grounds for distinguishing PMSCs from the mercenaries”). Another position views civilian contractors as veterans who deserve government compensation, disability, and death benefits. Matthew R. Kestian, Comment, *Civilian Contractors: Forgotten Veterans of the War on Terror*, 39 U. TOL. L. REV. 887, 910–11 (2008). Yet, not including additional costs or having to pay for medical expenses, retirement, and other perks are justifications given for the purported cost savings with PMCs. Wood, *supra* note 79, at 96–97. It is possible that these expenses are still indirectly paid by taxpayers when contractors are paid several times more than regular troops. The military may indeed have more expenses with healthcare, insurance, and other non-wage incentives, but this may also be calculated into the additional compensation that PMC employees receive.

²⁷⁷ Michaels, *supra* note 21, at 1107.

²⁷⁸ See SINGER, *supra* note 36, at 203–04, 226; Michaels, *supra* note 21, at 1108.

²⁷⁹ See Singer, *supra* note 150, at 525; Finkelman, *supra* note 72, at 446.

²⁸⁰ See Brown, *supra* note 256, at 737–38 (noting that over two-thirds of KBR personnel were recruited from third countries). The wage disparity generates a supply of security personnel many times more than would otherwise exist for the same mission at the public security wage. See *id.*

grounds. For example, apparently looking beyond the role of PMCs in war and military occupation, British Foreign Secretary David Milliband explained: “The private military and security company industry is essential, inevitable and international. It is essential because people need protecting in dangerous countries; inevitable, because governments cannot deploy protection in all theatres; and international, because the market and suppliers are global.”²⁸¹ The premises relating to the degree of peril and the varying forms of security deployment are both debatable.²⁸² The praise for a globalized security market unfortunately is inseparable from the fact that PMCs predominantly hail from the U.S. and Britain.²⁸³ PMCs from wealthy countries have a comparative advantage in procuring higher technology weapons and equipment and cutting costs by hiring employees from countries with lower per capita incomes. Otherwise it is mystifying how hiring a foreign PMC, which is merely a corporation that provides a military security product,²⁸⁴ would be less expensive when operating in countries with a much lower cost of living.

In short, for the Iraq War, both Pentagon troops and private contractors were employed by U.S. taxpayer dollars and private contractors were paid much more than enlistees.²⁸⁵ American taxpayers fund the inconsistency between the level of support for the foreign policy and the market price for services to sustain the mission. It would appear that military labor supply has an inherent

²⁸¹ Shannon Bosch & Marelie Maritz, *South African Private Security Contractors Active in Armed Conflicts: Citizenship, Prosecution and the Right to Work*, 14 POTCHEFSTROOMSE ELEKTRONIESE REGSBLAD no. 7, 71, 72 (2011), available at <http://dx.doi.org/10.4314/pej.v14i7.4>.

²⁸² It is not clear that the world is more dangerous or that the risk from criminal activity is higher today than in the past, and even if there is more peril, that does not evince PMCs are required to provide security. If assets, resources, or people need protecting, the local government within the country of operation could choose to assign a security, police, or military force to that vicinity. If a private principal is the employer, there must be a revenue stream that finances security operations. If operations are not supported by the local government and PMC revenues are privately funded and combat is anticipated, this may be a shade of mercenarism. Historical privateers were supported by private expense rather than by government funds. See EDGAR STANTON MACLAY, *A HISTORY OF AMERICAN PRIVATEERS* 20 (1899). State-sanctioned military contractors earn a profit from the government. See Michael D. Green & Richard A. Matasar, *The Supreme Court and the Products Liability Crisis: Lessons from Boyle's Government Contractor Defense*, 63 S. CAL. L. REV. 637, 652–53 (1990).

²⁸³ Lam, *supra* note 261, at 1460 (noting that the U.S. and Britain together account for more than 70% of annual global spending on private military companies).

²⁸⁴ See SINGER, *supra* note 36, at 8; Richard Morgan, *Professional Military Firms Under International Law*, 9 CHI. J. INT'L L. 213, 223 (2008).

²⁸⁵ See *supra* Part IV; *Boyle v. United Techs. Corp.*, 487 U.S. 500, 507 (1988).

economic value that may differ depending on assigned tasks, such that perceiving a risk of being deployed to a war zone will have a different financial incentive structure than assuming a safe non-combat position. If this is true, then retired or former troops may exit the military and execute operations that enlisted soldiers would not undertake in sufficient numbers at the government pay grade, and this process might even inveigle expertise from the public to the private sector. The derivative public choice problem for democracy is that there should be populace support for the foreign policy at an acceptable level of taxpayer-funded compensation because making war and executing essential government services are public functions. But if excessive compensation drives personnel supply without adequate checks on the outsourcing process to impute political costs, the scenario may engender the same concerns that banned mercenarism.

D. Moral Hazards

Data indicates that profligate use of PMCs does not necessarily result in better efficiency than the public sector if an artificially high private sector wage must be offered to entice personnel to participate and execute dangerous combat and security missions.²⁸⁶ In effect, the demand curve for services to execute the policy is set artificially high to stimulate labor supply at the elevated compensation level. There are also additional costs because military procurement does not always result in exemplary acquisitions or performance, and it may be formidable to protect against moral hazards concurrent with motives of profit maximization.²⁸⁷

First is the problem of substandard work product. Normally, a private sector firm that competes in the market will have a catalyst to perform exceptionally because cultivating a favorable reputation will procure repeat business and foster goodwill.²⁸⁸ However, if individuals in the PMC industry are employed for short-term missions, and firms do not have an expectation of future contracts or

²⁸⁶ See generally *supra* Part IV.C (comparing the economics of public and private military service).

²⁸⁷ See McCallion, *supra* note 48, at 343–44 (noting that just as profit maximization is a standard corporate goal, a “private contractor’s loyalty to his salary, or an executive’s loyalty to the company’s bottom line will most certainly lead to inflated charges, over-billing, cost cutting and worse, the furtherance of war”).

²⁸⁸ See AVANT, *supra* note 39, at 85–86 (referencing a private military firm that did not accept specified obligations in Sierra Leone for fear that it would be reputed as a “mercenary”).

even solvency²⁸⁹ due to the uncertainty and duration of foreign policy, then effective incentives to improve reputation may not be robust.²⁹⁰ In fact, prolonging the duration of involvement begets more pecuniary gain for PMCs. When this is combined with PMCs having more freedom from the military chain of command and not being substantially confined by military rules that carry a significant penalty, PMCs may not have private or public sector enticements to deliver superior performance.²⁹¹ If performance is substandard—perhaps due to the private sector motivations and lack of restrictive rules—risk of loss for poor performance could even be implicitly included in cost calculations and profit margins when PMCs apply for contracts.²⁹²

Second, government contractor fraud and overbilling in the United States have been recognized problems for 150 years.²⁹³ A downside to privatization is the government's need to increase protective checks on outsourcing to reduce the likelihood of contractors abusing discretion.²⁹⁴ When there is a lack of oversight and accountability in federal contracts, the government must increase monitoring capabilities, increasing costs.²⁹⁵ Instead, despite a significant increase in private military contracts over the past two decades, there has been a decrease in government personnel to moni-

²⁸⁹ See Peter Apps, *As Iraq, Afghan Wars End, Private Security Firms Adapt*, REUTERS (Oct. 21, 2012, 01:25 AM), <http://www.reuters.com/article/2012/10/21/us-usa-arms-contractors-idUSBRE89K02B20121021>.

²⁹⁰ The duration of contractual relations between the Pentagon and PMCs will remain for as long as the foreign policy demands, which means that the foreign policy determines the continuity and the magnitude of the revenue stream. If there is less of a correlation between PMC actions and control over the revenue generation, this may mean that PMCs will not have an incentive to perform efficiently or rapidly. See Cooper, *supra* note 248, at 2194.

²⁹¹ This apprehension unfolded during the Iraq War and occupation with contentions that private contractors had been poor at securing bases, supplying convoys, and performing other functions, which led to troop lawsuits against PMCs. See Donohue, *supra* note 62, at 115–17.

²⁹² See *Boyle v. United Techs. Corp.*, 487 U.S. 500, 507 (1988) (Court wary of the economic impact).

²⁹³ See H.R. REP. NO. 111-97, at 2–3 (2009). In 1863, President Lincoln and Congress adopted the first False Claims Act. See *id.* Past abuse has involved contractors for the federal government charging \$600 for toilet seats, \$748 for pliers, and \$7,000 for coffeepots, and it is still believed that fraud may account for up to 10% of the federal budget. Barry M. Landy, Note, *Deterring Fraud to Increase Public Confidence: Why Congress Should Allow Government Employees to File Qui Tam Lawsuits*, 94 MINN. L. REV. 1239, 1239 (2010).

²⁹⁴ See Michaels, *supra* note 60, at 718; Sullivan, *supra* note 7, at 878–79.

²⁹⁵ See SINGER, *supra* note 36, at 152–53; Landy, *supra* note 293, at 1240–41.

tor contracts.²⁹⁶ In a sample survey, the Department of Defense Inspector General estimated that approximately 55% of procurement contracts were not adequately monitored.²⁹⁷ In one extreme case, a goods contractor who bilked the Pentagon out of \$20.5 million over a ten-year period was finally caught by the automated procurement system when identical invoices were sent for mailing two nineteen cent washers with an added \$998,798 charge for transportation.²⁹⁸

Attention was first drawn to the issue of fraud and profiteering within the system of military contracting during 2004 Congressional hearings.²⁹⁹ Noting an additional reason why outsourcing was not cheaper, the Senate Committee on the Judiciary stated that “war profiteering has . . . plagued this nation during the engagement of U.S. forces in Iraq and Afghanistan” to an amount in the “hundreds of billions of dollars.”³⁰⁰ The Bush Administration’s “wars in Afghanistan and Iraq have . . . involved billions of dollars in waste, fraud, and abuse” from contractors,³⁰¹ which diverted taxpayer resources to the private sector.³⁰² Additionally, while outsourcing

²⁹⁶ See David Jackson & Jason Grotto, *Inside the World of War Profiteers*, CHI. TRIB., Feb. 21, 2008, http://articles.chicagotribune.com/2008-02-21/news/0802210232_1_kbr-iraq-rock-island. Army contracts increased from \$23.3 billion in 1992 to \$100.6 billion in 2006, but the Army contract supervisors decreased from 10,000 in 1990 to 5,500 in 2008. *Id.*

²⁹⁷ See OFFICE OF THE INSPECTOR GEN., U.S. DEP’T OF DEF., ACQUISITIONS: CONTRACTS AWARDED FOR THE COALITION PROVISIONAL AUTHORITY BY THE DEFENSE CONTRACTING COMMAND—WASHINGTON, REP. NO. D-2004-057 at 24 (Mar. 18, 2004). “The number of private contractors doing the work of government has accelerated, while the number of federal employees needed to supervise them has eroded.” Verkuil, *supra* note 74, at 399.

²⁹⁸ Renae Merle, *Defense Contractor Was Paid \$1 Million to Ship 2 Washers*, WASH. POST, Aug. 17, 2007, <http://www.washingtonpost.com/wp-dyn/content/article/2007/08/16/AR2007081602230.html>; James Orr, *Hardware Firm Charges Pentagon \$1m to Deliver Two Washers*, THE GUARDIAN, Aug. 17, 2007, <http://www.theguardian.com/world/2007/aug/17/usa>.

²⁹⁹ See Jackson & Grotto, *supra* note 296.

³⁰⁰ S. REP. NO. 110-66, at 2 (2007); see also Chesterman, *supra* note 227, at 39.

³⁰¹ *Lessons from the Inspectors General: Improving Wartime Contracting, Hearing Before the S. Comm’n on Wartime Contracting in Iraq and Afghanistan*, 111th Cong. 1 (2009) (joint statement of Michael Thibault & Grant Green, Co-Chairs), available at http://www.wartimecontracting.gov/images/download/documents/hearings/20090202/Joint_Statement_MichaelThibault_GrantGreen.pdf.

³⁰² See generally *Stabilizing and Rebuilding Iraq, Conditions in Iraq Are Conducive to Fraud, Waste, and Abuse: Hearing Before the Subcomm. on Defense of the H.R. Comm. on Appropriations*, 110th Cong. (2007) (statement of David M. Walker, Comptroller Gen. of the U.S.) (discussing how poor security conditions in Iraq lead to challenges in managing contractors), available at <http://www.gao.gov/new.items/d07525t.pdf>; Minow, *supra* note 31, at 1022 (“War profiteering . . . diverts public mon-

might presumably reduce cost with competitive bidding, Congress found that private contracting was marked by limited competition and no-bid contracting.³⁰³

Dozens of individuals working for PMCs in Iraq were indicted in federal court for contract crimes,³⁰⁴ and civil investigations were opened. One of the largest beneficiaries of the Iraq War was Kellogg, Brown, & Root (KBR), a former subsidiary of Halliburton Co.³⁰⁵ KBR was plagued with charges of “war profiteering” and fraud.³⁰⁶ Blackwater fared relatively well after being accused of avoiding tens of millions in employment-related taxes³⁰⁷ and over-billing the U.S. government by as much as \$300 million.³⁰⁸ Custer Battles became a PMC star,³⁰⁹ but was later accused of defrauding

ies – the money of the citizens – to private hands through overcharging and fraud . . .”).

³⁰³ See Representative Henry Waxman, Chairman, Comm. on Oversight and Government Reform, Prepared Remarks at The Center for American Progress Forum on a Return to Competitive Contracting, (May 14, 2007), available at <http://oversight-archive.waxman.house.gov/documents/20070515121402.pdf>; Press Release, Senate Homeland Security & Governmental Affairs Comm., Senators Introduce IG Reform Legislation (Nov. 8, 2007), available at <http://www.hsgac.senate.gov/media/minority-media/senators-introduce-ig-reform-legislation.>; Dickinson, *supra* note 79, at 169–72 (espousing the need for transparency in contracting with PMCs).

³⁰⁴ Jackson & Grotto, *supra* note 296 (noting that 36 people had been indicted in federal court on Iraq war-contract crimes).

³⁰⁵ See DAVID FRIEDRICH, TRUSTED CRIMINALS: WHITE COLLAR CRIME IN CONTEMPORARY SOCIETY 78 (2009) (stating that “Halliburton, described as the biggest private contractor for American forces in Iraq, was subsequently accused of excess billing”); Jackson & Grotto, *supra* note 296 (noting that Halliburton employed approximately 20,000 employees and 40,000 subcontractors in Iraq and was paid \$28 billion since 2002 under the “Army’s LOGCAP III troop support contract”).

³⁰⁶ See FRIEDRICH, *supra* note 305, at 78. KBR subcontract administrator, Anthony Martin, pled guilty to violations of the Anti-Kickback Act for taking bribes from a Kuwaiti company that was awarded a multimillion dollar contract. *Guilty Plea in Iraq Kickback Case*, N.Y. TIMES, July 14, 2007, <http://www.nytimes.com/2007/07/14/us/14contract.html>.

³⁰⁷ Justine Redman, *Waxman: Blackwater May Have Evaded Millions in Taxes*, CNN (Oct. 23, 2007, 08:58 AM), <http://www.cnn.com/2007/POLITICS/10/23/congress.blackwater/index.html> (estimating that Blackwater may have avoided paying \$31 million in employment related taxes).

³⁰⁸ *Jury Rules in Favor of Blackwater in Lawsuit*, ASSOCIATED PRESS (Aug. 5, 2011), available at <http://www.foxnews.com/us/2011/08/05/jury-rules-in-favor-blackwater-in-lawsuit/>. However, the company did enter into a settlement agreement to pay \$42 million in fines for export-related violations. *U.S., Blackwater Reach Settlement Over Export Violations*, CNN (Aug. 21, 2010, 02:02 PM), <http://www.cnn.com/2010/US/08/21/us.blackwater.settlement/>.

³⁰⁹ Jessica C. Morris, *Civil Fraud Liability and Iraq Reconstruction: A Return to the False Claims Act’s War-Profiteering Roots?*, 41 GA. L. REV. 623, 625 (2007) (reporting that in August 2004, the WALL STREET JOURNAL praised Custer Battles for its “street smarts

the American taxpayer for tens of millions of dollars in overbilling in security contracts for various locations in Iraq.³¹⁰ In February 2006, the first security firm fraud case to proceed to trial involved the Alexandria, Virginia firm, Custer Battles.³¹¹ The plaintiffs used the Civil War-era False Claims Act to file suit on behalf of the government³¹² with a *qui tam* action.³¹³ A jury ordered Custer Battles to pay \$10 million, but this was overturned.³¹⁴

Ultimately, it appears that PMCs defended themselves against fraud charges fairly successfully relative to common perceptions. Those common perceptions may be attributable to befuddlement over compensation comparisons. In 2007, the Pentagon paid PMC firms an average of \$445,000 for each employee per year while an Army sergeant would earn \$51,100 to \$69,350 per year.³¹⁵ Effectively, the massive profits were institutionalized as legal. Nonetheless, more cases could still potentially emerge. Due to the difficulty of

and canny use of military experience” to become a “U.S. business success story amid the country’s haphazard reconstruction” and expected it to earn \$200 million in revenue in the coming year).

³¹⁰ *United States ex rel. DRC, Inc. v. Custer Battles, LLC*, 376 F. Supp. 2d 617, 619, 630–32 (E.D. Va. 2005) (noting that Custer Battles provided security to the Iraqi airport and the Iraqi currency exchange); Babcock, *supra* note 273; Dana Hedgpeth, *Judge Clears Contractor of Fraud in Iraq Case*, WASH. POST, Feb. 9, 2007, at D1. One point of contention is that Custer Battles’ contracts for security were clearly a matter within the jurisdictional prerogative of Iraqis, who probably would not have needed to be paid tens of millions of dollars to carry out the operations.

³¹¹ Babcock, *supra* note 273.

³¹² *Id.*

³¹³ See Dan L. Hargrove, *Soldiers of Qui Tam Fortune: Do Military Service Members Have Standing to File Qui Tam Actions Under the False Claims Act?*, 34 PUB. CONT. L.J. 45, 51 (2004). Custer Battles defended the case by contending that a *qui tam* action was inappropriate because the CPA was not an official government agency, and that CPA funds were only to be used “for the Iraqi people.” *United States ex rel. DRC, Inc.*, 376 F. Supp. 2d at 624, 633. The Justice Department was asked to join the lawsuit, but declined. *Custer Battles: Why Won’t the Justice Dept. Intervene to Reclaim Millions From Military Contractor in Iraq?*, DEMOCRACY NOW! (Mar. 1, 2005), http://democracynow.org/2005/3/1/custer_battles_why_wont_the_justice. The public treasury benefits with a *qui tam* action by receiving between 70 and 100 percent of the funding that was procured by fraud. *Cf.* 31 U.S.C. § 3730 (2012) (discussing the apportionment of recovery by a *qui tam* plaintiff).

³¹⁴ Renae Merle, *Verdict Against Iraq Contractor Overturned*, WASH. POST, Aug. 19, 2006, <http://www.washingtonpost.com/wp-dyn/content/article/2006/08/18/AR2006081801171.html>. There seems to be many unsettled questions under the False Claims Act as Custer Battles became defunct. *United States ex rel. DRC, Inc. v. Custer Battles, LLC (DRC IV)*, 562 F. 3d. 295, 298, 305–06 (4th Cir. 2009) (reversing and remanding in part on a \$3 million dollar verdict against Custer Battles).

³¹⁵ CONG. BUDGET OFFICE, *supra* note 30, at 14.

addressing legal claims while there is an ongoing war,³¹⁶ the War-time Suspension Act was adopted to suspend the statute of limitations for the federal government's claims against perpetrators of fraud for five years after the war ends.³¹⁷

V. CONCLUSION

In adopting the U.S. Constitution, the Framers were concerned with ensuring that the American people would be able to hold government in check and impose responsibility for wrongdoing,³¹⁸ and these fundamental precepts glare in the case of intrinsic governmental functions related to war powers. Scandal over the use of PMCs in Iraq periodically arose for several years, but it required a massacre to fully appreciate the need for effective laws and oversight. The U.S. government exercises jurisdiction over Americans committing sex tourism offenses in foreign countries;³¹⁹ extra-territorial American business operations under the Foreign Corrupt Practices Act;³²⁰ and citizens generally as a basis for jurisdiction, such that the state can require individuals to return to home countries to address juridical matters, pay taxes, and answer for crimes. However, the Bush Administration could not exert effective jurisdiction over PMC personnel who were armed with assault weapons, authorized to use those weapons in combat and for secu-

³¹⁶ See Lindsey Powell, *Unraveling Criminal Statutes of Limitations*, 45 AM. CRIM. L. REV. 115, 122–23 (2008).

³¹⁷ 18 U.S.C. § 3287 (2012) (providing the framework for false claims). Because federal courts noted that the U.S. was at war in Afghanistan and Iraq, the claims were not time barred. See generally *United States ex rel. Carter v. Halliburton*, 710 F.3d 171 (4th Cir. 2013) (deciding that the Wartime Suspension of Limitations Act suspended the statute of limitations for any offense under the False Claims Act).

³¹⁸ HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR 205–06* (1990) (discussing the purpose of separation of powers discourages domination by any one branch and invokes friction between the branches and emphasizing that personal incentives encourage politicians to keep other branches in check). Direct and indirect populace checks are also assumed to exist in war powers. W. TAYLOR REVELEY III, *WAR POWERS OF THE PRESIDENT AND CONGRESS: WHO HOLDS THE ARROWS AND OLIVE BRANCH? 72* (1981) (discussing the purpose of the checks-and-balances system embedded in the United States governmental structure as inducing “consensus behind American action for war and peace,” encouraging “rational war and peace decisions,” and “permit[ting] emergency action for war or peace that has not yet been blessed by national consensus or democratic control”).

³¹⁹ See 22 U.S.C. § 7103 (2012). This point is not designed to question the importance of the extraterritorial efforts, restrictions, and cooperation with other states, but to acknowledge that extensive regulatory efforts have been made to extend jurisdiction. See *id.*

³²⁰ See 15 U.S.C. § 78dd-1 (2012).

military operations, and hired by the government to execute U.S. military sponsored missions inside zones of war and occupation.

The state *can* adopt laws that prevent citizens and organizations from engaging in operations that are apt to violate international law and transgress universally understood crimes. The U.S. government was expressly barred from outsourcing inherently governmental functions.³²¹ Without having a legal framework, exerting reasonable control, and imposing an expectation of punishment, particularly when the outsourcing of tasks is thoroughly amiss, private contractors may be a mode of circumventing international law and avoiding the “state” from being involved in conflict or from being fully implicated in controversial acts. How precedent and equiponderance on the nexus between the state and non-state actor should be interpreted seems discombobulating from the vista of assuming that states can be attacked because of a believed connection to suspected terrorists being harbored by a state³²² and presumption that there is an unlawful enemy combatant category that denies POW rights under the Geneva Convention because combatants and suspected combatants arguably lack the characteristics of an organized military force.³²³ As for the proposition that government agencies and the military are not able to assume control and discipline PMCs, Americans enlisting in the military are subject to puissant command structure and there is absolutely no compelling reason why PMCs, executing security functions on behalf of the

³²¹ See *supra* Part II.B.

³²² Theresa Reinold, *State Weakness, Irregular Warfare, and the Right to Self-Defense Post-9/11*, 105 AM. J. INT'L L. 244, 251 (2011) (citing Memorandum for Edwin Meese III (Aug. 15, 1984)) (noting that the Reagan administration contended that there is a right to use force when a state that harbors terrorists “is unable or unwilling to take effective action”); Milena Sterio, *A Grotian Moment: Changes in the Legal Theory of Statehood*, 39 DENV. J. INT'L L. & POL'Y 209, 222 (2011) (noting that Richard Haass, an advisor during the George H.W. Bush Administration, contended that if states hide weapons of mass destruction, harbor terrorists, and abuse human rights, they relinquish sovereignty). In November 2001, Bush stated: “If you harbor terrorists, you are terrorists If you feed a terrorist or fund a terrorist, you’re a terrorist, and you will be held accountable by the United States and our friends.” George W. Bush, President of the United States of America, Remarks to the Community at Fort Campbell, Kentucky 1703 (Nov. 21, 2001) (transcript available at <http://www.gpo.gov/fdsys/pkg/WCPD-2001-11-26/pdf/WCPD-2001-11-26-Pg1702.pdf>).

³²³ Robert Bejesky, *How the Commander in Chief’s “Call for Papers” Veils a Path Dependent Result of Torture*, 41 SYRACUSE J. INT'L L. & COM. 1, 30–37 (2013).

military, cannot be subject to a control level that is comparable to that which is imposed on troops.³²⁴

From the perspective of domestic public choice, what was deceptive about the use of PMCs in Iraq was that when Americans decided that they wanted *U.S. troops* to return home, U.S. taxpayers were paying for troops *and* private contractors.³²⁵ Americans paid for these PMCs because it was necessary to boost the compensation for security services through the market to entice adequate labor supply that could not be delivered through the military to continue the mission, even though a majority of Americans and troops clearly rejected the continuing occupation.³²⁶ The number of PMC personnel in Iraq escalated and eventually exceeded the number of U.S. troops, even as public opinion polls reflected this opposition. If excessive use of the private sector to fulfill essential government services did in fact reduce the Government's political cost of using force,³²⁷ then American support for continuing military operations may have dissipated even further. The critical nature of questions regarding the use of force at the domestic and international levels, the respect for democracy, the need to equitably enforce law, and the importance of promoting public will and rebuking propaganda are additional domestic benefits to the United Nations Working Group's recent appeal to consummate a convention that will adequately address and parameterize the privatization of security services.

³²⁴ See Bejesky, *supra* note 3, at 60–67; U.S. Dep't of Def., Enlistment/Reenlistment Document, DD Form 4/1, at cl. 9–10 (Oct. 2007), available at <http://dtic.mil/whs/directives/infomgt/forms/eforms/dd0004.pdf>

³²⁵ See Miller, *supra* note 29; Minow, *supra* note 31, at 1024 (emphasizing that the “[u]se of contractors contributes to a lack of transparency in the conduct of military activities . . . [on the] total numbers of people deployed, and, indeed, the total size of the government-sponsored effort”). *But see* CONG. BUDGET OFFICE, *supra* note 30, at 1, 8 (calling it a one to one ratio of troops to PMC personnel).

³²⁶ See Bejesky, *supra* note 3, at 16–29, 49–58; Levinson, *supra* note 20 (citing Zogby Poll finding that 72% of U.S. troops favored withdrawal).

³²⁷ See *supra* Part I.