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ARTICLE

RESTRAIN “RISKY BUSINESS”: TREAT HIGH-RISK PRIVATE SECURITY CONTRACTORS AS INHERENTLY GOVERNMENTAL

CHARLES TIEFER*

Should Congress limit private security contractors (“PSCs”) in wartime by declaring that high-risk activities are “inherently governmental”? In government contracting law, private contractors are not permitted to conduct activities deemed inherently governmental. As a result, only governmental actors may perform those functions. The role of PSCs in war zones raises a number of questions as to where the line exists, in determining what is, or is not, within this classification. Traditionally, the government draws the line at combat and combat-related activities—only these functions are inherently governmental. This Article argues that the line should instead be drawn at “high-risk” activities, which would include a number of functions outside of combat. The author bases much of his argument on his personal experiences and observations as a member of the Commission on Wartime Contracting.

Should Congress limit private security contractors (“PSCs”) in wartime by declaring that high-risk activity is “inherently governmental”? There is little guidance from statutory sources, which define “inherently governmental,” merely as “so intimately related to the public interest as to require performance by federal government employees.”¹ In the private security context, “inherently governmental” has come to mean only those activities that are very closely related to combat.²

The wars of the past decade in Iraq and Afghanistan included major incidents and appalling discoveries about PSCs. The tremendous rise of PSCs in the United States’ war efforts in Iraq and Afghanistan fits with a broader trend toward privatization³ of military efforts.⁴ These wars dramati-

* Commissioner, Commission on Wartime Contracting in Iraq and Afghanistan; Professor, University of Baltimore Law School. This Article represents the views of its author alone and not those of the Commission or any part thereof. The author is grateful for the research assistance of Jen Machlin, Ian Gore, Elisabeth Connell, Megan Burnett, Katherine Furlong, and Alison Schurick, and also the assistance of Bijal A. Shah, Bob Pool and the rest of the school’s library staff.

¹ 31 U.S.C. § 501 note (2006) (quoting Section 5(2)(a) from Pub. L. 105–270, 112 Stat. 2382 (1998), as amended by Pub. L. 108–271, § 8(b), 118 Stat. 814 (2004); Pub. L. 109–115, § 840, 119 Stat. 2505 (2005)).

² Performance of Inherently Governmental and Critical Functions, 75 Fed. Reg. 56,227 (Sept. 12, 2011).

³ For the background of outsourcing and privatizing, see generally Symposium, *Public Values in an Era of Privatization*, 116 HARV. L. REV. 1211 (2003); Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367 (2003) (giving contemporary examples of privatization and its implications for current constitutional doctrine).

⁴ For discussions of the development of a contractor role in privatized military support, see generally PETER W. SINGER, *CORPORATE WARRIORS: THE RISE OF THE PRIVATIZED MILITARY INDUSTRY* (2003); Deven R. Desai, *Have Your Cake and Eat It Too: A Proposal for a*

generally increased the importance of restraining what PSCs do, within the general issue of the limits of privatization.⁵

The two dominant regulatory models prohibit PSCs from engaging in either combat-related or high-risk related activities. The current preference is to bar PSCs only from combat-related functions, like accompanying troops into battle. In contrast, this Article proposes that the limit instead concern what is “high-risk.” The two models clash as to the lessons drawn from the killing of dozens of Iraqi civilians in Baghdad at Nisour Square in 2007.⁶ Members of the Blackwater Worldwide (“Blackwater”) private security firm were escorting a convoy of State Department personnel through Baghdad. At Nisour Square, the Blackwater guards, some of whom claim they faced a threat, opened fire on civilians, killing seventeen Iraqis. Public attention continued as federal prosecutors charged the guards, and the case immediately devolved into procedural wrangling.⁷

As one commentator put it, “the fallout from the September 16 shooting by Blackwater guards in Baghdad was as publicly damaging to U.S. efforts in Iraq as was the My Lai massacre in Vietnam.”⁸ Moreover, media coverage resembled that of previous incidents in Iraq involving private contractors⁹ such as scandalous interrogation techniques at Abu Ghraib.¹⁰

Layered Approach to Regulating Private Military Companies, 39 U.S.F. L. REV. 825 (2005); Virginia Newell & Benedict Sheehy, *Corporate Militaries and States: Actors, Interactions, and Reactions*, 41 TEX. INT'L L.J. 67 (2006) (exploring the interaction between private military firms and traditional state entities); Clifford J. Rosky, *Force, Inc.: The Privatization of Punishment, Policing, and Military Force in Liberal States*, 36 CONN. L. REV. 879 (2004); Kristen Fricchione, Note, *Casualties in Evolving Warfare: Impact of Private Military Firms' Proliferation on the International Community*, 23 WIS. INT'L L.J. 731 (2005) (discussing the legal and jurisdictional ramifications of the increased reliance on private forces); Ellen L. Frye, Note, *Private Military Firms in the New World Order: How Redefining “Mercenary” Can Tame the “Dogs of War,”* 73 FORDHAM L. REV. 2607 (2005) (proposing a more exact definition of “mercenary” as means of controlling unwanted non-military behavior).

⁵ See generally Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543 (2000); Michele Estrin Gilman, *Legal Accountability in an Era of Privatized Welfare*, 89 CAL. L. REV. 569 (2001); Gillian E. Metzger, *Privatization as Delegation*, 103 MIL. L. REV. 1367 (2003).

⁶ See generally David H. Chen, Note, *Holding “Hired Guns” Accountable: The Legal Status of Private Security Contractors in Iraq*, 32 B.C. INT'L & COMP. L. REV. 101 (2009).

⁷ See Josh Meyer, *Blackwater Killings Called Unprovoked; Unsealed Papers Reveal Prosecutors' Claims that Guards Targeted Iraqis in “Shocking Attack,”* HOUS. CHRON., Dec. 9, 2008, at A1.

⁸ ROGER D. CARSTENS, MICHAEL A. COHEN & MARIA FIGUEROA KUPCU, *CHANGING THE CULTURE OF PENTAGON CONTRACTING* 9 (2008) (quoting from New America Foundation discussion group).

⁹ See, e.g., Mark W. Bina, *Private Military Contractor Liability and Accountability After Abu Ghraib*, 38 J. MARSHALL L. REV. 1237 (2005) (discussing current federal laws, international laws, and cases relevant to the Abu Ghraib scandal); 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 B.Y.U. L. REV. 371; Steven L. Schooner, *Contractor Atrocities at Abu Ghraib: Compromised Accountability in a Streamlined, Outsourced Government*, 16 STAN. L. & POL'Y REV. 549 (2005) (describing the allegations that contractor personnel were involved in the Abu Ghraib abuses, and raising concerns with regard to the outsourcing trend in the military). See generally Mark Osiel, *The Banality of Good:*

The Nisour Square incident illustrates the difference in the models: no enemy was present in the street, so the PSCs were not engaged in anything like combat, just guarding. On the other hand, that kind of PSC work may well have been "high risk," suggesting that PSC presence was improper.¹¹ Generally speaking, three particular problems are present in the war zone: (1) safety risks to local nationals that may occur in mobile protecting or convoying; (2) risks of PSC payoffs to the enemy; and, (3) lack of accountability where PSCs are subcontractors or sub-subcontractors.

How should the United States address this problem? The current government rules and policy put an inadequate limit on what the government classifies as inherently governmental, because the government rules merely preclude activity closely linked to combat.¹²

Unfortunately, the Department of Defense ("DoD") and the State Department ("State") have twice ducked the need to address the failing of the combat-related model. In 2007, they increased regulation without drawing a strong line to limit the functions of PSCs. In 2009, the Obama Administration made efforts to clarify the limits of PSC activity,¹³ but by 2011 had not meaningfully changed the regulatory criteria.

Experience in Iraq and Afghanistan shows that the government should have a stronger limit on PSC activities, precluding "high-risk" functions regardless of whether combat occurs. Many believe the government has incentives, powerful but far from admirable, to use PSCs up to the limit allowed. As one commentator puts it, "[c]ontractor[s] . . . presence dilutes body counts (as contractor fatalities are not officially tallied or publicly announced) . . . Their presence also allows the government to avoid politically difficult policy decisions regarding whether to withdraw . . ." ¹⁴ This is not just the story of President Bush in Iraq; it is also the story of President Obama in Afghanistan.¹⁵

Aligning Incentives Against Mass Atrocity, 105 COLUM. L. REV. 1751 (2005) (discussing how to deter atrocities, including those by privatized military companies).

¹⁰ See generally Marcy Strauss, *The Lessons of Abu Ghraib*, 66 OHIO ST. L.J. 1269 (2005) (referring to the Bush administration's disregard of international legal norms, including the Geneva Conventions).

¹¹ The attack in Benghazi, Libya, in late 2012, which resulted in the killing of a U.S. Ambassador and three other Americans, represents another high-risk, but non-combative situation, in which PSCs were employed. The U.S. State Department chose to employ Blue Mountain Group, a "virtually unknown" PSC, rather than the large firms it usually employs. Blue Mountain in turn hired local Libyans, including some with no prior security training. Tabassum Zakaria et al., *For Benghazi Diplomatic Security, U.S. Relied on Small British Firm*, REUTERS (Oct. 17, 2012), <http://www.reuters.com/article/2012/10/18/us-libya-usa-bluemountain-idUSBRE89G1TI20121018>.

¹² Performance of Inherently Governmental and Critical Functions, 75 Fed. Reg. 56227 (Sept. 12, 2011).

¹³ Government Contract, 74 Fed. Reg. 9755-57 (Mar. 6, 2009).

¹⁴ Jon D. Michaels, *Privatization's Pretensions*, 77 U. CHI. L. REV. 717, 722 (2010) (footnotes omitted).

¹⁵ See generally Walter Pincus, *Contracts May Hold Pointers on Afghan Policy*, WASH. POST, May 10, 2011, at A15 (describing how "[p]rivate security contractors working for the

Legislation in 2007 established the Commission on Wartime Contracting in Iraq and Afghanistan (“Commission”).¹⁶ The Commission’s charter included a provision requiring that the Commission look into whether wartime contractors, like Blackwater, performed inherently governmental functions. From 2008–2011 the Commission studied the PSC issue. It conducted two dozen televised hearings, including several devoted to PSCs,¹⁷ and made trips to Iraq and Afghanistan to look at contracting in the warzone itself. Notably, the Commission drew attention in its final report to an important but little-known problem: that PSCs in Afghanistan divert funding to the Taliban.¹⁸ This amounts to a major funding source for the enemy¹⁹ and also provides funding for problematic warlords.²⁰

Part I of this Article discusses the need for a stronger limit on PSCs, based on the U.S. experience in Iraq and Afghanistan. In Iraq, interest in better defining inherently governmental activities started with the use of PSCs during the period of active combat by United States Armed Forces, and continues to the present day, after military drawdown, in which the State Department is using PSCs extensively in place of military support. The Afghanistan experience, involving diversion of funds by the PSCs to the Taliban and the potential for corruption in the Karzai regime is not widely known and warrants attention. Another problem is the attenuated governmental control when, as is common, PSC firms are not prime contractors, but instead are sub- or sub-subcontractors.

Defense Department in Afghanistan actually increased by almost 4,500 in the first quarter this year over last year and totaled almost 19,000 altogether”).

¹⁶ Further information on the Commission may be found on its website, <http://www.war-timecontracting.gov>. The Commission has held a number of televised hearings and issued several reports.

¹⁷ See Jessica Coomes, *Debate Over Private Security Contractors, Inherently Governmental Functions Continues*, 93 FED. CONT. REP. (BNA) No. 197 (June 22, 2010).

¹⁸ Juliette Kayyem, Editorial, *How the US Funds the Taliban*, BOS. GLOBE, Sept. 19, 2011, at 13.

¹⁹ COMM’N ON WARTIME CONTRACTING, TRANSFORMING WARTIME CONTRACTING: CONTROLLING COSTS, REDUCING RISKS 73 (2011) [hereinafter COMMISSION REPORT]. The author of this Article, as a Commissioner, was deeply involved in this issue. The author’s role on the Commission grew from his prior studies as a professor of government contracting law. See generally CHARLES TIEFER & WILLIAM A. SHOOK, GOVERNMENT CONTRACT LAW IN THE TWENTY-FIRST CENTURY (2012) (providing a broad case study of court findings on government contracts); see also Charles Tiefer, *The Iraq Debacle: The Rise and Fall of Procurement-Aided Unilateralism as a Paradigm of Foreign War*, 29 U. PA. J. INT’L L. 1 (2007) [hereinafter Tiefer, *The Iraq Debacle*] (tracing the significance of contracting); Charles Tiefer, *Can Appropriation Riders Speed Our Exit From Iraq?*, 42 STAN. J. INT’L L. 291 (2006) (expressing the potential impact of so-called “riders” on the war).

Also, the author drew on other investigative work as counsel for the congressional investigation of Iran-Contra. As Special Deputy Chief Counsel on the House Iran-Contra Committee, the author co-wrote the chapter in the committee report on the Boland Amendments. See S. REP. NO. 100-216 & H. REP. NO. 100-433, at 395 (1987). For a previous discussion drawing on that service, see George W. Van Cleve & Charles Tiefer, *Navigating the Shoals of “Use” Immunity and Secret International Enterprises in Major Congressional Investigations: Lessons of the Iran-Contra Affair*, 55 MO. L. REV. 43 (1990).

²⁰ Kayyem, *supra* note 18.

Part II discusses how Congress might establish and implement a limit as to high-risk uses and the ensuing benefits. The best examples of “high-risk” uses are Personal Security Details (“PSDs”) or convoy security for mobile work in (1) an area of enemy strength and activity or (2) other areas where PSCs may make payoffs to the enemy.²¹

I. FAILINGS IN IRAQ AND AFGHANISTAN OF THE U.S. POLICY THAT DOES NOT TREAT HIGH-RISK USE OF PSCS AS “INHERENTLY GOVERNMENTAL”

A. *The Start—the Private Armies of State and Halliburton/KBR*²²

Debate over the propriety of privatized security is longstanding and global.²³ One recent commentator, tracing the origins of the debate to past centuries, concluded that though PSC use had begun “as early as the 1970s,” the PSC role had “grown exponentially since September 11, 2001 and with the outbreak of protracted Western military engagements in Afghanistan and Iraq.”²⁴ Another commentator found that “demand for this type of firm [i.e., PSCs] exploded with operations in Iraq and Afghanistan.”²⁵

This expansion took a new form starting in 2003, with the start of the Iraq War. This conflict saw “the *corporatization* of military service providers that sets them apart” from their predecessors.²⁶ In other words, the government now turned over to major private firms the handling of warzone operations on an unprecedented scale. Among other aspects, the federal government privatized some of its own security needs to PSCs. The government also outsourced some of the logistical and construction support for its military, and private companies engaged in such work outsourced their own large security needs to PSCs.²⁷

In Iraq, starting in 2003, DoD and State created an expansive new role for PSC firms. Of the estimated 180,000 contractor employees serving in Iraq at the peak of U.S. military operations in the mid-2000s, up to 30,000 were armed security contractors, “who carry guns and perform quasi-mili-

²¹ See Hamida Ghafour, *Afghans Are Fed Up With Security Firm: Residents of a Kabul Neighborhood Say They Feel They Are Under Occupation as DynCorp Barricades a Street and Conducts Searches*, L.A. TIMES, Sept. 27, 2004, at A3.

²² Initially Halliburton was the name of the logistics contractor in the war zone. Then Halliburton spun off its subsidiary, KBR, which thereafter was the logistics contractor. “KBR” is the acronym for the company that is also called Kellogg, Brown and Root.

²³ See generally DEBORAH AVANT, *THE MARKET FOR FORCE: THE CONSEQUENCES OF PRIVATIZING SECURITY* (2005); SINGER, *supra* note 4; Tiefer, *The Iraq Debacle*, *supra* note 19.

²⁴ Daphne Richemond-Barak, *Rethinking Private Warfare*, 5 LAW & ETHICS HUM. RTS. 159, 165 (2011).

²⁵ E.L. Gaston, Note, *Mercenarism 2.0? The Rise of the Modern Private Security Industry and its Implications for International Humanitarian Law Enforcement*, 49 HARV. INT’L. L.J. 221, 226 (2008).

²⁶ SINGER, *supra* note 4, at 45.

²⁷ SINGER, *supra* note 4, at 45.

tary roles.”²⁸ Moreover, because DoD intended to hold down the number of troops in Iraq, the Army decided not to provide soldiers for duty as security for State. Thus, State had to satisfy its needs for personal security details by turning to PSCs.²⁹ The problems that ensued, such as the Nisour Square incident, originated with the DoD decision not to provide military protection.

The head of the Coalition Provisional Authority, Paul Bremer, made a hasty, unconsidered contract with Blackwater to provide his PSD.³⁰ State followed suit. It thereby took upon itself the potential problems of giving broad functions to PSCs, which often alienate local civilians. State could have taken a truly governmental approach over the longer term by, for example, expanding the Diplomatic Security Bureau, which provides protection for State around the world. State could have created a Bureau reserve force that could activate for wartime situations and could shift to standby in peacetime. PSCs could have filled the gap in the short run while State established its reserve force. However, it did not take any such in-sourcing approach. It did not bring the long-term need to Congress and ask for a long-term solution that would minimize problems of alienating civilians in Iraq and other war zones.

This myopic decision necessitated the broad freedom of activity given to firms like Blackwater. The *New York Times* stated in a 2010 front-page story that “documents sketch, in vivid detail, a critical change in the way America wages war: the early days of the Iraq war, with all its Wild West chaos, ushered in the era of the private contractor, wearing no uniform but fighting and dying . . . and killing presumed insurgents.”³¹

When State turned to PSCs, it passed an invisible line. Traditionally, the government hires private security guards, but these were just static guards to protect civilian or DoD facilities. Such static guarding does not involve high-risk functions and does not raise the possibility of harm to local nationals or of payoffs to the enemy. There are exceptions, of course—guarding of troop camps in areas of Taliban strength and activity may sometimes be on the front line—but the vast majority of static guard tasks are not high risk.

The loose limits on PSC activities also set the stage for another large-scale use of PSCs, distinct from personal security details: convoy duty. When convoys of supply vehicles drive through areas where the enemy

²⁸ Jonathan Finer, Recent Development, *Holstering the Hired Guns: New Accountability Measures for Private Security Contractors*, 33 YALE J. INT’L L. 259, 260 (2008).

²⁹ Kelley Beaucar Vlahos, *Hired Guns: While the Volunteer Army Struggles, the Business of War Booms*, AM. CONSERVATIVE, NOV. 19, 2007 (“As the war grew more dangerous, so did the need for armed contractors. Paul Bremer, head of the Coalition Provisional Authority until it turned over the keys to the Iraqis in 2004, introduced the first private security detail into Iraq, hiring Blackwater to the tune of \$21.3 million. In an astonishing display of firepower, Bremer was routinely surrounded by thirty-six civilian guards and ‘a fleet of SUVs, two bomb-sniffing canine teams with handlers, four pilots, four aerial gunners, a ground crew and three Boeing MD-530 ‘Little Bird’ helicopters,’ Pelton reports.”).

³⁰ Gaston, *supra* note 25, at 228.

³¹ James Glanz & Andrew W. Lehren, *Leaks Reveal Chaos of War: U.S. Reliance on Private Contractors in Iraq Resulted in Numerous Pitfalls*, N.Y. TIMES, Oct. 24, 2010, at A1.

might ambush them, the convoys need security. Halliburton/KBR, a logistics contractor, had the largest number of convoys in Iraq, for work such as delivering food and other supplies to bases and camps. The standard clause in its logistics contract required it to ask the relevant military commanders about Army protection, and not use PSCs without consulting the military.³²

However, Halliburton/KBR apparently did not obey the clause, as alleged in a case brought by the United States. Eventually, in 2010 the Justice Department filed a False Claims Act case against KBR, contending that KBR had concealed the scheme by massive billing for claims for PSC work that it knew to be false.³³ Halliburton is alleged to have made wholesale use of PSCs for convoy duty without the necessary consultation with the military. Its government contract allowed it to obtain reimbursement of costs, plus profit, for its work on the contract, and it allegedly buried the improper PSC bills in its complex subcontracting. This is a sign of yet another of the structural and inherent difficulties of keeping PSCs from posing high risks, namely remoteness or "tiering"—that the government hires prime contractors (first tier), and the prime contractors hire PSC subcontractors (second tier). Sub- (or sub-sub-) subcontractors are even more remote from governmental oversight, to prevent carrying out high-risk functions, than directly-hired PSCs would be.

The Defense Contract Audit Agency ("DCAA")³⁴ in 2008–2009 gave briefings to the Commission on Wartime Contracting about its discovery of some aspects of the scheme.³⁵ Plainly KBR, like Bremer and State, found high-risk use of PSCs sufficiently advantageous to take their use further.³⁶ It is extraordinary to envision an entire army of KBR's subcontracted convoy PSCs as they ride shotgun throughout Iraq, subject neither to governmental oversight nor legal liability.

Halliburton's subcontracting practices first surfaced in a dramatic incident in 2004 that demonstrated the dangers of using PSCs for high-risk functions. In Fallujah, insurgents attacked a convoy, killed four Blackwater guards, and mutilated the bodies.³⁷ Congressional staff found that "Blackwater USA triggered a major battle in the Iraq war in 2004 by sending an

³² Press Release, U.S. Dep't of Justice, U.S. Sues Kellogg, Brown and Root for Alleged False Claims Act Violations Over Improper Costs for Private Security in Iraq (Apr. 1, 2010) [hereinafter U.S. Sues Kellogg], available at <http://www.justice.gov/opa/pr/2010/April/10-civ-359.html>.

³³ Walter Pincus, *Government Sues Defense Firm KBR*, WASH. POST, Apr. 2, 2010, at A11.

³⁴ DCAA provides audit and accounting services to DoD regarding contracts.

³⁵ E.g., *LOGCAP: Support Contracting Challenges in Iraq and Afghanistan: Hearing Before the Comm'n on Wartime Contracting in Iraq and Afg.*, 111th Cong. (2009) (statement of April G. Stevenson, Dir., Def. Contract Audit Agency), available at <http://www.wartimecontracting.gov/index.php/hearings/46-commission/67-hearing20090504>.

³⁶ See Pincus, *supra* note 33, at A11; U.S. Sues Kellogg, *supra* note 32.

³⁷ Jack Kelly, *Firms Become Targets in Iraq: High-Risk Jobs Get Even Riskier*, PITTSBURGH POST-GAZETTE, Apr. 18, 2004, at A18.

unprepared team of guards into an insurgent stronghold, a move that led to their horrific deaths and a violent response by U.S. Forces”³⁸

In response, United States troops went into the center of the insurgency, the start of a bloody “Battle of Fallujah.” This battle of revenge over PSCs³⁹ exacerbated the division between Iraqi Sunnis and the U.S. military, materially escalating the intensity of hostility and determination on both sides to wage war. This showed one of the ways that the use of mobile PSCs for convoy duty in areas in which the enemy has a substantial, active presence, like Fallujah, presents high risks, including the risk of escalating violence. Moreover, the government did not fully understand the root cause of the incident until the much later lawsuit over KBR exposed the large-scale improper hiring of lower-tier convoy PSCs.

After a series of other problematic PSC incidents came the Nisour Square shooting in 2007.⁴⁰ In a congested intersection in Baghdad, one vehicle in a Blackwater convoy of four vehicles became convinced, probably mistakenly, that it was threatened. It is alleged that each of the four vehicles opened fire with machine guns on the street filled with civilians, leaving seventeen Iraqis dead and more than twenty wounded.⁴¹

In the immediate aftermath of Nisour Square, the government departments, particularly State, implemented damage control measures, channeling criticism of PSCs toward minor regulatory changes rather than strong limits on PSC use. By then, State had spent years using PSCs for its own convenience.⁴² State employees working to coordinate with the Iraqis, or training of the Iraqi police, did not have to beg for troops to be spared for PSDs, because they were willing to serve at State’s convenience—for pay.

Moreover, PSCs such as Blackwater hired ex-soldiers, often from elite special forces units, without having to beg from DoD on the other department’s timetable. KBR/Halliburton, too, benefitted from the easy availability

³⁸ *Dems: Blackwater Provoked Fallujah Battle*, CHICAGO TRIBUNE, Sept. 28, 2007, at 12.

³⁹ “To avenge the deaths [of the contractors] and find the perpetrators, U.S. Marines began an assault on the city [of Fallujah].” BRADLEY GRAHAM, *BY HIS OWN RULES: THE AMBITIONS, SUCCESSES, AND ULTIMATE FAILURES OF DONALD RUMSFELD* 459 (2009).

⁴⁰ *See, e.g.*, STEVE FAINARU, *BIG BOY RULES: AMERICA’S MERCENARIES FIGHTING IN IRAQ* (2008) (describing problematic PSC incidents).

⁴¹ There are countless journalistic accounts of this incident. The one by the Iraqi government has significance, both because of its factual findings and as an indication of the Iraqi governmental reaction. *See, e.g.*, Sudarsan Raghavan, *Iraqi Probe Faults Blackwater Guards; 17 People Killed Without Provocation At Baghdad Square, Officials Conclude*, WASH. POST, Oct. 8, 2007, at A12.

⁴² For a general treatment of Rumsfeld’s relations with State concerning Iraq, see generally SPECIAL INSPECTOR GEN. FOR IRAQ RECONSTRUCTION, *HARD LESSONS: THE IRAQ RECONSTRUCTION EXPERIENCE* (2008). As to State’s use of PSCs to its own convenience, Commission staff briefings were provided to the author in connection with State’s testimony in the June 21, 2010 hearing before the Commission on Wartime Contracting in Iraq and Afghanistan. *See generally Private Security Contractors in Iraq: Where Are We Going?: Hearing Before the Comm’n on Wartime Contracting in Iraq and Afg.*, 111th Cong. (2010), available at <http://www.wartimecontracting.gov/index.php/hearings/commission/hearing2010-06-21>.

of PSCs who would drive convoys on a schedule for the company's convenience without, apparently, having to consult with the military.

So, after Nisour Square, PSC use remained problematic because it was in State's self-interest to continue the hiring and use of PSCs in high-risk situations. State was neither willing nor able to substitute for PSCs either military troops or its own government protection personnel. Hence, State chose not to strengthen limits on uses of PSCs. State executed a Memorandum of Agreement with DoD that clarified the role of military commanders over PSCs in their area.⁴³ The contemporaneous congressional Defense Authorization Act⁴⁴ formalized what State and DoD had agreed. Without State's damage control measures, Congress might have gone further and put in place stronger limits on what high-risk functions PSCs should not perform.⁴⁵

An internal State Department inquiry, headed by a senior State official, produced a report ("Kennedy Report")⁴⁶ with eighteen specific reforms,⁴⁷ some (but not all) of which were soon implemented. State boasted that it implemented the Kennedy Report and that incident report numbers fell.⁴⁸ The department had made some reforms, albeit fewer than it maintained.⁴⁹

State had to decide whether to renew Blackwater's contract at the end of its five year duration. Despite Nisour Square, as the press reported, "[i]n April [2008], the State Department renewed its contract with Blackwater, which is the largest security contractor in Iraq with 1,000 employees."⁵⁰

⁴³ Michael J. Navarre, *Departments of State and Defense Sign MOA on Private Security Contractors*, 43 PROCUREMENT L. 3, 3 (2008).

⁴⁴ 10 U.S.C.S. § 2302 note (LexisNexis 2008).

⁴⁵ One may speculate about why Congress did not put in place stronger limits on PSCs. Congressional reformers had limited legislative resources. They could not overcome, on all PSC issues, the combined resistance of the Bush Administration and the State Department. So, the reformers concentrated on the successful creation of the Commission on Wartime Contracting, which had the jurisdiction to pursue further the PSC issue, and other wartime contracting issues as well.

⁴⁶ See generally ERIC J. BOSWELL ET AL., THE REPORT OF THE SEC'Y OF STATE'S PANEL ON PERS. PROTECTIVE SERVS. IN IRAQ (2007), available at <http://2001-2009.state.gov/documents/organization/94122.pdf>. For a recent comment providing context, see Laura A. Dickinson, *Outsourcing Covert Activities*, 5 J. NAT'L SEC. L. & POLICY 521 (2012).

⁴⁷ Daniel Dombey, *Rice Orders Crackdown on Iraq Contractors*, FIN. TIMES, Oct. 24, 2007, <http://www.ft.com/intl/cms/s/0/f03e10f0-81bb-11dc-9b6f-0000779fd2ac.html#axzz2BM9uW85t>.

⁴⁸ See generally U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-966, REBUILDING IRAQ: DOD AND STATE DEPARTMENT HAVE IMPROVED OVERSIGHT AND COORDINATION OF PRIVATE SECURITY CONTRACTORS IN IRAQ, BUT FURTHER ACTIONS ARE NEEDED TO SUSTAIN IMPROVEMENTS (2008), available at <http://www.gao.gov/assets/280/279161.pdf>. State argued that it had completed "more than half" of the Panel's recommendations, and the GAO concluded that "The State Department has implemented 11 of the 18 recommendations made by the Panel." *Id.*

⁴⁹ State and DoD set up bodies to coordinate PSCs in the field, to supervise their compliance with rules, and to review their self-reported serious incident reports. Moreover, the government stepped up matters like training, vetting, and firearms control.

⁵⁰ Andrea Stone, *Iraqis to Take Charge of Green Zone in '09*, USA TODAY, Dec. 30, 2008, at A7.

State further expressed the position that “it would await the results of an ongoing FBI investigation into the [Nisour Square] shooting in 2007 before possibly reconsidering.”⁵¹ So, State let Blackwater continue to have the privileges of a top private contractor being non-governmental (like paying high salaries and accruing high profits) while performing what were arguably governmental functions. The investigation and prosecution of the guards was drawn out over several years due to arcane procedural issues.⁵²

Back in Iraq, during those years when State had never seriously considered using the opportunity to quickly terminate Blackwater, negotiations between State and the Iraqi government over a Status of Forces Agreement (“SOFA”) bogged down for the entire year of 2008. The SOFA was essential to an orderly drawdown of United States armed forces. The opportunity for a gradual and smooth transition to a good relationship on this issue with a fully independent Iraq was jeopardized by this delay.⁵³ One of the main demands of the Iraqis, which continued unresolved to the very end of the negotiations, consisted of their desire for control over PSCs in order to terminate Blackwater and end the absolute immunity for PSCs from sanctions.⁵⁴

At the end of 2008, after the United States presidential election, State threw in the towel and concluded a SOFA with the Iraqis ceding control over PSCs. As was reported at the time,⁵⁵ “[t]he State Department does not plan to renew a contract with Blackwater . . . the Iraqi government . . . seemed to have forced the State Department’s hand.”⁵⁶

In the following years, the United States began drawing down its troops, and since the drawdown commenced, the Iraqi government—the Maliki regime—has been cracking down on the highly unpopular PSCs.⁵⁷ State tried initially to plan a very large-scale role for PSCs in Iraq to fill some of the vacuum left by the troop drawdown.⁵⁸ Among other initiatives, State made an effort, very unpopular with the Iraqis, to keep a large contin-

⁵¹ *Id.*

⁵² *See* United States v. Slough, 641 F.3d 544 (D.C. Cir. 2011). In April 2011, the D.C. Circuit remanded the case back to the district court for consideration under a different standard. The district court had dismissed the charges. *Id.* These delays on the order of four or more years were not even on an issue of the substantive conduct by PSCs that had been charged, but a collateral issue of the way statements after the incident had been taken and used.

⁵³ *See generally* Stone, *supra* note 50.

⁵⁴ *See id.*

⁵⁵ Monte Morin, *Iraq Rescinds License for Security Firm*, L.A. TIMES, Jan. 30, 2009, at A4.

⁵⁶ *State Dept. Does Not Plan to Renew Blackwater Security Services Contract*, 91 FED. CONT. REP. (BNA) No. 89 (Feb. 10, 2009).

⁵⁷ Michael S. Schmidt & Eric Schmitt, *Flexing Muscle, Baghdad Detains U.S. Contractors*, N.Y. TIMES, Jan. 16, 2012, at A1.

⁵⁸ “The [State D]epartment plans to hire 5,500 private security contractors, roughly double the current number,” and, “[a]ll this could cost between \$25 billion and \$30 billion over the next five years” Mark Landler, *Report Lists Perils for Envoys After U.S. Exit from Iraq*, N.Y. TIMES, Feb. 1, 2011, at A5.

gent of PSCs.⁵⁹ Besides PSCs directly employed by the United States, this plan included PSCs on the logistics convoys under KBR.⁶⁰

The Iraqi government resisted such a large PSC role. At the start of 2012 it took many steps against PSCs. The press reported that "[p]rivate contractors . . . remain a powerful symbol of American might, with some Iraqis accusing them of running roughshod over the country."⁶¹

B. Afghanistan: PSCs Diverting U.S. Funds to the Enemy

In the absence of a single attention-grabbing horrific event like Nisour Square, PSCs in the Afghanistan War generally did not get major public notice in the early years. Casual observers missed the distinctive high risks of PSCs in Afghanistan. Some aspects of the Afghanistan War warrant consideration nevertheless. Afghanistan was involved in war throughout much of the country at least back to the arrival of the Soviets in 1978. Afghanistan has no recent tradition of a strong central government that would make Kabul a reigning capital over much of the country, like Baghdad in Iraq. Instead, ethnic, tribal, and warlord loyalties reign supreme, particularly over the Afghans likely to take up arms, whether for loyalties, for a living as hired PSCs, or alternating from one to the other.

Accordingly, there is much less reason than in Iraq to bring in many non-Afghans for most PSC work.⁶² One 2011 *Washington Post* article claimed that "[p]rivate security contractors working for the Defense Department in Afghanistan actually increased by almost 4,500 in the first quarter this year over last year and totaled almost 19,000 altogether . . . Only 136 of the added security contractors were American; 322 were third-country nationals; and the remainder were Afghans."⁶³

Also, the United States sent fewer troops into Afghanistan prior to the two surges initiated by the Obama Administration, early in 2009 and in 2010–2011. The smaller number of military and civilian personnel before the surges meant less need for PSDs and less need for convoying PSCs. As a result the PSC problem did not become stark until later.

The distinctive problems with PSCs in Afghanistan burst into public attention with a report by a subcommittee of the House of Representatives

⁵⁹ "The Iraqi public is not happy with private security contractors. They caused a lot of pain." Schmidt & Schmitt, *supra* note 57.

⁶⁰ "Food convoys from Kuwait are guarded by private security contractors under an inherited military contract." Karen DeYoung, *U.S. Evaluating Size of Baghdad Embassy, Officials Say*, WASH. POST, Feb. 8, 2012, at A13.

⁶¹ Schmidt & Schmitt, *supra* note 57.

⁶² As the Commission reported, "[t]he U.S. military employs 4,373 private security contractors . . . with 4000 of them Afghans." David Zucchino, *Afghans Growing Wary of U.S. Security Contractors*, L.A. TIMES, Aug. 13, 2009, at A1.

⁶³ Walter Pincus, *Contracts May Hold Pointers on Afghan Policy*, WASH. POST, May 10, 2011, at A15.

entitled “Warlord, Inc.”⁶⁴ That report explained that PSCs diverted funds to those warlords who have power over highways and over development projects.⁶⁵ The United States government contractors hire security subcontractors.⁶⁶ These subcontractors, in turn, pay off potentially hostile groups by diverting some of that contractor funding.⁶⁷

It is the standard operating procedure in Afghanistan for PSCs to negotiate with those figures—warlords or Taliban—with armed power over an area, rather than fight and die for some remote central regime in Kabul tied to foreign entities from far away.⁶⁸ Sometimes in Afghanistan the individuals employed by a local PSC switch back and forth between working for United States subcontractors, and working for Afghan warlords.⁶⁹

Diversion to the Taliban and to warlords is a distinctive part of a larger problem with reliance on Afghan PSCs. The *New York Times* reported at the end of 2011 that PSCs “have long been a source of tension in the country. Some Afghan companies operated as private militias for warlords and many, along with some American companies, have been plagued by accusations of corruption, illegal use of weapons and reckless use of force resulting in civilian deaths and injuries.”⁷⁰

In spring 2011, a mission by the Commission on Wartime Contracting to Kabul and Kandahar shed light on the PSC situation.⁷¹ Also, the press reported that a special Army task force had made similar findings.⁷² The American government had become alert to the PSC problem, as the American commitment doubled and as the scattered indications formed a clearer pattern.⁷³ Specifically the government recognized that the problem went beyond simply diverting American contracting funds to pay off the warlords. Warlords take regional governing power away from Kabul and in this way

⁶⁴ See generally MAJORITY STAFF OF THE HOUSE SUBCOMM. ON NATIONAL SECURITY AND FOREIGN AFFAIRS, *WARLORD, INC.: EXTORTION AND CORRUPTION ALONG THE U.S. SUPPLY CHAIN IN AFGHANISTAN* (2010) [hereinafter *WARLORD, INC.*].

⁶⁵ *Id.* at 17–28.

⁶⁶ *Id.* at 1.

⁶⁷ *Id.* at 34–39.

⁶⁸ See generally *id.* at 29–33.

⁶⁹ Gaston, *supra* note 25, at 239.

⁷⁰ Ray Rivera, *Obstacles Hinder Formation of Afghan Security Force, Report Says*, N.Y. TIMES, Nov. 2, 2011, at A4.

⁷¹ The author was on that trip and attended briefings by offices or task forces in charge of Afghan corruption, Afghan threat financing, and the Host Nation Trucking Program. The results of that trip were conveyed to the public in the Commission’s final report later in 2011. COMMISSION REPORT, *supra* note 19, at 73–74.

⁷² Deb Riechmann & Richard Lardner, *Corruption Toll on Afghan Contracts Put at \$360m: Task Force Says US Funds Lost to Taliban*, ASSOCIATED PRESS (Aug. 18, 2011), http://articles.boston.com/2011-08-18/news/29901515_1_task-force-insurgents-afghanistan.

⁷³ Two surges in 2009 and 2010–2011 had doubled the troop commitment from 50,000 to 100,000, with a corresponding increase of use of PSCs for supply convoys and the like. Additionally, the government’s information came from different places and from different sources, so that it took time and effort to understand the problem as a whole, and to accept the unwelcome realization of how big the problem was.

weaken the central government, but at least warlords (usually) do not wage open war against Kabul.

Rather, the new insight is how payoffs—not episodically, but in a large-scale way—go to the Taliban for the roads and areas where the Taliban has the power.⁷⁴ The United States is funding the enemy.⁷⁵ It is thought that diversion of American contracting funding constitutes the second largest source of funding for the Taliban, second only to the Taliban take from the immensely lucrative opium poppy trade.⁷⁶

One example of how funding to the Taliban occurs is where an Afghan PSC⁷⁷ for a convoy, pausing at a road barrier, will sit and talk with the head of a Taliban fighting unit who had set up the barrier. Afghan PSCs and the Taliban will negotiate the size of a payoff, with the naturalness of paying a high local "tax" to the "local government" for passage through some unavoidable, locally-controlled stretch of road.⁷⁸ In some instances the convoy PSCs might make a payoff in cash; or, they might turn over some readily salable cargo of a convoy, such as fuel trucks. Without payoffs, a convoy faces a substantial risk of becoming a battle casualty.

Here is a journalistic account of one such sequence:

After a pair of bloody confrontations with Afghan civilians, two of the biggest private security companies . . . were banned from escorting NATO convoys . . . [T]hat day, a NATO supply convoy rolling through the area came under attack. . . . Within two weeks, with more than 1,000 trucks sitting stalled on the highway, the Afghan government granted [the PSC firms] permission to resume.⁷⁹

No example comes to mind in American history when United States funds furnished this large a share of support for the enemy in a war.⁸⁰

It appears that there is little American knowledge of what happens with the PSCs of any particular convoy between their starting point and their

⁷⁴ "Diversion on this scale did not occur in Iraq, where the U.S. military provided most of the escorts for similar convoys." COMMISSION REPORT, *supra* note 19, at 74.

⁷⁵ See Riechmann & Lardner, *supra* note 72, at 1.

⁷⁶ COMMISSION REPORT, *supra* note 19, at 74.

⁷⁷ "As for private security contractors there were 20,735 in Afghanistan—the vast majority of them locals." *U.S. Paid Contractors in Iraq Expected to Total 14,000 by End of FY-12*, INSIDEDDEFENSE.COM (Jan. 30, 2012), http://defensenewsstand.com/index.php?option=com_ppvuser&view=login&return=aHR0cDovL2RlZmVuc2VuZXZzc3RhbmQuY29tL2NvbXBvbmVudC9vcHRpb24sY29tX3Bwdi9JdGVtaWQsMjg4L2lkLDIzODg1Nzgv.

⁷⁸ In the context of deals with warlords: "From the perspective of USPI [a private military and security company], making a deal with the local warlord may be the most effective (and cheapest) way to ensure the security of the construction company it is hired to protect." Gaston, *supra* note 25, at 239.

⁷⁹ Dexter Filkins, *Afghan Guards Suspected of Colluding with Insurgents*, N.Y. TIMES, June 6, 2010, at A1.

⁸⁰ See, e.g., RUSSELL F. WEIGLEY, *THE AMERICAN WAY OF WAR: A HISTORY OF UNITED STATES MILITARY STRATEGY AND POLICY* (1977).

arrival at the destination.⁸¹ No Americans go along with the convoy, and the Afghan PSCs handle their interactions without reporting to the Americans. It does not work to send small contingents of United States troops along with a convoy to watch over it, because a small group of troops face becoming a target themselves in the event of a Taliban ambush.⁸² Moreover, for ordinary cargoes like foodstuffs or construction material, a local commanding officer does not want to spare a significant level of troops from offensive initiatives to supplementing PSCs. A local combat commander views the funds diverted to the Taliban from any particular convoy or development site, not as a direct threat to that commander's troops, but just a drop in the ocean of Afghan corruption.⁸³

Instead, the armed forces ("Army")⁸⁴ do what they feel they can in this situation. The Army provides relatively strong troop contingents—able to protect not only a convoy, but also themselves—for certain convoys. These include convoys with military material, like ammunition, that the Army cannot let the Taliban acquire without disaster.

The Karzai regime takes steps to discredit PSC firms, such as financial audits and investigations⁸⁵ and announcements⁸⁶ of the number of their legal violations. These actions do not seem calibrated to address those PSCs who violate Afghan law, but seem an indiscriminate move by the Karzai regime against most or all of the PSC industry.

At first President Karzai issued decrees to ban PSCs, an extraordinary shock to his ally the United States.⁸⁷ As it turns out, this prepared the way for phasing out independent PSCs⁸⁸ and unveiling in stages a plan for the Karzai regime to establish an Afghan Personal Protection Force (APPF).⁸⁹ The APPF incorporates some substantial part of the pre-existing PSCs, and the American prime contractors (such as for development) will make contracts with the APPF.⁹⁰

⁸¹ This paragraph is based on the briefings of the Commission's mission to Afghanistan in spring 2011. See COMMISSION REPORT, *supra* note 19.

⁸² Such an ambush could strike at a time and place of their choosing and in a situation without American military tactical initiative and flexibility.

⁸³ See COMMISSION REPORT, *supra* note 19.

⁸⁴ "Army" is used as a shorthand. The other United States armed forces, especially the Marines, were very heavily involved as well. Additionally, the United States acted as part of an international coalition, especially in Afghanistan, which was a NATO operation.

⁸⁵ See Joshua Partlow & Rajiv Chandrasekaran, *Security Firms Are Accused of Breaking Afghan Laws*, WASH. POST, Jan. 23, 2011, at A15.

⁸⁶ See Joshua Partlow, *Afghanistan Says 16 Private Security Firms Broke Laws*, WASH. POST, Feb. 9, 2011, at A9.

⁸⁷ See generally Lucas Anderson, *Kicking the National Habit: The Legal and Policy Arguments for Abolishing Private Prison Contracts*, 39 PUB. CONT. L.J. 113 (2009).

⁸⁸ See Ray Rivera, *Afghanistan Sets Timetable for Phasing Out Most Private Security Companies*, N.Y. TIMES, Mar. 17, 2011, at A9.

⁸⁹ See Lauren Groth, *Transforming Accountability: A Proposal for Reconsidering How Human Rights Obligations Are Applied to Private Military Security Firms*, 35 HASTINGS INT'L COMP. L. REV. 29, 42 & nn.52-54 (2012).

⁹⁰ See Matthew Rosenberg & Graham Bowley, *Afghan Anger and Security Fears Put Aid Groups' Plans at Risk*, N.Y. TIMES, Mar. 11, 2012, at A1.

As the *New York Times* reported, development organizations "feared that the new [APPF] force would be poorly trained and end up as little more than a militia for the variety of power brokers who dominate Afghan politics—or the Taliban."⁹¹ An inspector general studied the expected costs of the APPF: "The auditor's analysis found that the cost of Afghan guards who provide security for U.S.-funded projects could increase by as much as 46 percent."⁹²

In some respects, this just carries the initial mistake by the United States of putting PSCs in a high-risk situation to the next level. By having security provided by private companies, the United States allows corruption in its allied government, the building up of the power of rival warlords, and the funding of the enemy. Now, the APPF may keep the same individual PSCs, with higher levels of payment by prime contractors and hence higher levels of corruption, warlordism, and diversion to the Taliban.

II. LIMITING HIGH RISK USES OF PSCs BECAUSE THESE ARE "INHERENTLY GOVERNMENTAL"

The category of "inherently governmental" should limit the use of PSCs for high-risk functions. The years of use of PSCs in Iraq and Afghanistan have shown the great harm that comes from allowing use of PSCs for high-risk functions and only limiting combat functions. Local nationals are seriously alienated, government funds flow through PSCs to warlords and the enemy, and PSCs become especially remote from accountability when they are subcontractors or sub-subcontractors. However, to date, the debates over PSCs have not led to imposing overall solutions to these problems.

A. *Improving on the Current Legal Regime for PSCs*

To deal with the particular problems of PSCs performing "high-risk" functions in the war zone, the current approach must change, to define "inherently governmental" functions as more than just those involving combat. Generally speaking, three particular problems have occurred in the war zone. First, there are risks to local nationals from mobile PSC work protecting or conveying, as shown in Nisour Square. Such incidents destroy the faith of local nationals that only the governing sovereigns—their government and its allied governments—may drive about their roads wielding weapons. Second, in Afghanistan, there are risks of PSC payoffs to warlords and the enemy. Third, PSCs serve under prime contractors, as subcontractors or sub-subcontractors, which render them remote from accountability.

⁹¹ *Id.*

⁹² Ernesto London, *Audit: Afghan Guards Will Cost More*, WASH. POST, Mar. 29, 2012, at A11.

There is little hope that strong administrative oversight will suffice to resolve these problems. Oversight may somewhat reduce some of these PSC risks. However, with the limited oversight that is feasible in the war zone, the risks remain high. For example, it is highly impractical to oversee PSC-accompanied convoys in Taliban territory and to restrain them from payoff for passage.

The military has a specific reason for overlooking the high-risk aspects of Afghan PSCs that implicate inherently governmental functions. Namely, the local military commanders want to keep all of their own forces for military operations, and to farm out what duties they can to private actors like PSCs. The point of a definite line regarding inherently governmental functions is to take away the tactical judgment from a local combat commander thinking primarily about local missions. The establishment of rules removes the temptation of using PSCs for a duty that should only be governmental.

The current regime has a main component, namely, the domestic rules defining “inherently governmental” in terms of combat, built upon disappointing policies promulgated from the Office of Federal Procurement Policy (“OFPP”),⁹³ and a secondary component, international law, specifically the Montreux Document, shaped to suit the PSC industry.

To solve the problems of warzone PSCs, the rules should change from their present focus just on combat, to a broader focus on high risk situations.

1. Office of Federal Procurement Policy Rules

The Obama Administration started out with a White House initiative to strengthen the rules about PSCs as part of revisiting what in government contracting is inherently governmental. This was, by far, the closest the government has come in the last four years to addressing the inadequate regime. That initiative started hopefully, but did not accomplish enough in the PSC context.

In spring 2009, the White House released a bold presidential statement on several aspects of government contracting. The presidential statement warned that “the line between inherently governmental activities that should not be outsourced and commercial activities that may be subject to private sector competition has been blurred” and inadequately defined.⁹⁴ As a result, contractors may be performing inherently governmental functions.⁹⁵ The presidential statement commanded the federal government to ensure that those functions that are inherently governmental in nature are performed by

⁹³ See generally Performance of Inherently Governmental and Critical Functions, 76 Fed. Reg. 56,227 (Sept. 12, 2011).

⁹⁴ Memorandum from President Barack Obama to the Heads of Executive Departments and Agencies (Mar. 4, 2009), http://www.whitehouse.gov/the_press_office/Memorandum-for-the-Heads-of-Executive-Departments-and-Agencies-Subject-Government.

⁹⁵ See Work Reserved for Performance by Federal Governmental Employees, 75 Fed. Reg. 16,188, 16,188–89 (Mar. 31, 2010).

federal employees and are not outsourced.⁹⁶ Accordingly, the presidential statement proposed to "clarify when governmental outsourcing for services is and is not appropriate."⁹⁷

Of course, the 2009 presidential statement applies to the whole range of the inherently governmental issue, including many important domestic contexts. It does not purport to apply solely to wartime contracting. However, PSCs matter in the context of the President's statement. Use of PSCs received intense criticism after Nisour Square, both in the United States and in Iraq. Moreover, the 2008 election brought into office a president with a new willingness to recognize the controversial aspects of the Iraq War, including the role of PSCs like Blackwater. On the Iraqi side, during the same period at the start of 2009, the SOFA gave control over PSCs to the Iraqis, who proceeded to expel Blackwater.

This presidential statement (and the Iraqi action) seemed to usher in an entirely new phase of strengthening the limits on PSCs, possibly moving toward a new standard beyond merely keeping PSCs away from combat.⁹⁸ A year later, in 2010, the OFPP, the White House's arm on government contracting, put forth a draft rule on the subject of what is inherently governmental, expressly linked to the 2009 presidential statement, notably including its PSC aspect.⁹⁹ However, the proposed rule remained with the basic guide of relation to combat, not to high-risk activities.¹⁰⁰ It did not announce much hope for reforms, but it did not close the door to the possibility of other developments.

In late 2011, OFPP announced its final version of the rule.¹⁰¹ By that time, years had passed with the government still using PSCs extensively in high-risk situations both in Iraq and Afghanistan. Furthermore, the 2010 election took away majority control from those members of Congress who had held hearings and issued staff reports for limiting PSCs.¹⁰²

Hence, the final version of the rule mostly shows that limits on PSCs would receive no strengthening, even as to areas of enemy forces. As OFPP noted, in its list of inherently governmental examples, "[m]any of those

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ This initiative generated hope, as the author personally expressed at the time in an interview by National Public Radio for a news segment entitled "Obama Cracks Down on Government Contractors." *Morning Edition: Obama Cracks Down on Government Contractors*, NAT'L PUB. RADIO (Mar. 5, 2009), available at <http://www.npr.org/templates/story/story.php?storyId=101465347>.

⁹⁹ See generally Work Reserved for Performance by Federal Governmental Employees, 75 Fed. Reg. 16,188 (Mar. 31, 2010).

¹⁰⁰ A subheading referred to the "use of deadly force, including combat, security operations performed in direct support of combat, and security that could evolve into combat." *Id.* at 16,192.

¹⁰¹ See generally Performance of Inherently Governmental and Critical Functions, 76 Fed. Reg. 56,227 (Sept. 12, 2011).

¹⁰² See generally *Hearing of the House Comm. on Oversight and Gov't Reform: Blackwater USA; Private Security Contracting in Iraq & Afghanistan*, 112th Cong. (2007); WARLORD, INC., *supra* note 64.

[commenters] who believed the list was too narrow suggested the addition of functions involving private security contractors, especially when performed in hostile environments.”¹⁰³ The rules still retain their combat focus, in regard to what they expressly declare. The OFPP policy letter¹⁰⁴ “[a]dded to the list of inherently governmental functions: (i) [a]ll combat and (ii) security operations in certain situations connected with combat or potential combat.”¹⁰⁵

Moreover, the rules accomplish even less in the way of limits than they seem to at first glance. It is no wonder that two commentators—lawyers in this field—analyzing the late 2011 DoD rules on PSCs actually titled their comment, alarmingly, “Contingency Contracting: Contractors Continue March Toward Full Combat Roles.”¹⁰⁶ OFPP’s ambiguities open the way for departments, both State in Iraq and the Army in Afghanistan, to press forward with including inappropriate war functions for PSCs.

First, in Iraq, the policy expresses what seems, at first, a limit that might keep PSCs from joining ongoing fighting. This seemed, at a minimum, to rule out the type of activity termed quick reaction forces. In this activity, when any group, which would include mobile PSCs such as convoy security, run into an ambush or some other sudden enemy attack, they may summon “quick reaction forces” as fighters to help get them away.¹⁰⁷ Quick reaction forces seek to do their job without engaging with the enemy, but they may well get involved in trading fire with enemy ambushers, with all the risks of such firing, such as injury to civilians. This is a vital function, but OFPP may rightly reserve it to governmental fighters, because there is much more than a minimal chance, but rather a serious possibility, of exchanges of fire.

However, State wants PSC quick reaction forces in Iraq.¹⁰⁸ State has still not developed any kind of diplomatic security reserve that could shore up State’s position in Iraq. State may have to exploit what that department perceives as ambiguities in OFPP’s rules in order to get quick reaction forces in Iraq.¹⁰⁹ State argues that such PSCs are available for already-occurring

¹⁰³ Performance of Inherently Governmental and Critical Functions, 76 Fed. Reg. at 56,231.

¹⁰⁴ As one article summarized in 2012: “Most recently, in September 2011, the Obama administration issued a final policy letter on inherently governmental functions . . . including (1) combat and (2) security operations in direct support of combat or when there is a significant potential for combat.” Groth, *supra* note 89, at 74.

¹⁰⁵ Performance of Inherently Governmental and Critical Functions, 76 Fed. Reg. at 56,229.

¹⁰⁶ Herbert Fenster & John Sorrenti, *Contractors Continue March Toward Full Combat Roles*, 97 FED. CONT. REP. (BNA) No. 74 (Jan. 23, 2012).

¹⁰⁷ See generally Col. F.M. Lorez, *Rules of Engagement in Somalia: Were They Effective?*, 42 NAVAL L. REV. 62 (1995).

¹⁰⁸ See Morgan Cohen, *State Department Assuming Military Duties in Post-Withdrawal Iraq*, HARV. NAT’L SEC. J. (Mar. 1, 2012, 6:23 PM), <http://harvardnsj.org/2012/03/state-department-assuming-military-duties-in-post-withdrawal-iraq> (“State Department contractors in Iraq could be . . . retrieving casualties if there are violent incidents . . .”) (citation omitted).

¹⁰⁹ See *Status Report on the Transition to a Civilian-Led Mission in Iraq: Hearing Before the H. Subcomm. on Nat’l Sec., Homeland Sec. and Foreign Ops., H. Comm on Oversight and*

fighting, but only when that fighting is defensive, rather than military, in its mission.¹¹⁰ Since the convoy PSCs did not have a military mission, quick reaction forces helping them did not have a military mission, either.¹¹¹

In this view, the quick reaction PSCs merely assist the defensive effort in the State Department's other non-military missions.¹¹² State may have to highlight that the goal of protecting and extracting (from hostile fire) for quick reaction forces contrasted with an Army unit's military missions of engaging enemy forces for the goal of inflicting casualties or strategic losses on them. This may narrowly construe the limit on PSCs in "combat" by emphasizing the difference between military and diplomatic mission goals, rather than how the PSCs get involved where risks are high.

The issue is not whether the quick reaction function warrants performance by someone on the United States side. Rather, the issue is whether State may contend that the function could be private rather than being inherently governmental.¹¹³ The OFPP policy letter seems to answer "no," but since it does not flat-out condemn high risks, it leaves ways that State may reinvent it as a "yes."

A second, less immediately apparent aspect lets State free itself from serious constraint by the 2011 OFPP rules. The rules cite examples of what might come too close to combat, but these did not, at least with explicitness, constrain State's planned large PSC force in Iraq. The OFPP's cited examples tout that guards—around consulates, perhaps, as distinct from mobile con-

Gov't Reform, 112th Cong. 3 (2011) (statement of Patrick Kennedy, Under Sec'y for Mgmt., U.S. Dep't of State) [hereinafter *State Testimony*].

¹¹⁰ The press has repeated the questions asked about such issues. What happens if "a supply convoy comes under fire" and "[w]ho determines whether contract guards engage the assailants and whether a quick-reaction force is sent to assist them?" Luiza Savage, *The Trouble with Security*, MACLEAN'S, Nov. 8, 2010, at 41 (quotations omitted).

¹¹¹ PSCs "will be focused, primarily, exclusively, on the protection of our diplomatic personnel. They are not going to be involved in any operations beyond that." *White House Confidential State Department Can Manage Enormous Private Security Contractor Force in Iraq*, NEWSTEX WEB BLOGS (Oct. 22, 2011, 3:13 PM), <http://news.firedoglake.com/2011/10/21/white-house-confident-state-department-can-manage-enormous-private-security-contractor-force-in-iraq> (quoting Ben Rhodes, White House deputy national security adviser for strategic communications).

¹¹² The discussion of the kind of arguments that State may convey comes mostly from informal exchanges at briefings by State to the Commission on Wartime Contracting. One formal expression of State's approach came in a report by the Government Accountability Office ("GAO"). The Commission had a recommendation to "phase out the use of host-nation private security contractors in Afghanistan for the convoys on high-volume roads that the insurgency controls or contests." U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-854R, CONTINGENCY CONTRACTING: AGENCY ACTIONS TO ADDRESS RECOMMENDATIONS BY THE COMMISSION ON WARTIME CONTRACTING IN IRAQ AND AFGHANISTAN 10 (2012). State's rejoinder: "State officials stated that this recommendation is not applicable because they interpreted it being directed towards DOD." *Id.* State similarly ducked a recommendation about assessing the risk of static-security sites. *Id.* at 11. As for a recommendation explicitly directed at "the ambassador" in a country about formally making "determinations of security-contracting appropriateness," State just bluntly said: "State officials stated the department does not plan to implement this recommendation." *Id.*

¹¹³ State plans to "increase our Quick Reaction Force capabilities." *State Testimony, supra* note 109, at 13.

voys or mobile PSDs—may be PSCs. That seems an entirely appropriate example. Moreover, it connects up the situation in peacetime, in which the need for PSCs predominantly consist of such guarding—an era comforting for the absence of new interpretive issues such as “quick reaction forces.”

Yet State may apply an approach to make use of the examples put forth in order to expand the role for PSCs. The examples range from those linked to combat, at one end of the spectrum, and static guarding of facilities, at the other end of the spectrum. OFPP does not touch on examples in the middle that were high risk but unrelated to combat, like supporting supply convoys going through areas of enemy strength and activity, in a country in which this may mean payoffs by PSCs to the enemy. Therefore, State may make arguments to stretch analogies between all the PSC activities it wants and merely guarding facilities.¹¹⁴

For example, in Iraq, State may need to use counter-battery radar when insurgents fire rockets or mortars at a State embassy or consulate or other facility, to locate the source of the insurgent fire and possibly to direct striking back (either by its own or by Iraqi Army¹¹⁵ weapons).¹¹⁶ Explicit OFPP rules with more examples might consider saying that directing firing with weaponry beyond small arms¹¹⁷ is inherently governmental. The task certainly needs doing, but the direction of firing back should come from the government itself, not PSCs.

However, State may push the envelope by contending that the counter-battery radar function has many resemblances to static guarding. Counter-battery radar was static, too, as well as defensive, protective, and, supportive of State’s (diplomatic) missions rather than the Army’s (military) missions.

No one should underestimate the willingness of State to look for loopholes in the OFPP rule in order to say that outlying high-risk functions for PSCs in Iraq are not inherently governmental.¹¹⁸ OFPP states the illustration

¹¹⁴ State asserts it is closely coordinated with the OFPP rules. “State personnel were actively engaged with the Office of Federal Procurement Policy in preparing its new policy letter.” *State Testimony*, *supra* note 109, at 6.

¹¹⁵ State seems to separate counter-battery radar, which it acquires just for warning of incoming fire, and counter-battery fire, which is to fire back, professing it does not intend to have its own counter-battery firing. One possibility is that State may acquire the counter-battery radar, and only go to counter-battery fire if the Iraqi Army does not provide such fire. However, the Iraqi Army does not appear ready to take on that task. ANTHONY CORDESMAN ET AL., *THE REAL OUTCOME OF THE IRAQ WAR: U.S. AND IRANIAN STRATEGIC COMPETITION IN IRAQ 57* (2011) (“The IA [Iraqi Army] has very little in the way of artillery, and what it does possess is mostly light and outdated. The IA has virtually no counter-battery capabilities.”).

¹¹⁶ “Other U.S. military infrastructure could also remain in Iraq. The State Department is negotiating with the Pentagon to have its security contractors assume control of a rocket-detection system that protects the U.S. Embassy in Baghdad, military officials said.” Aaron C. Davis, *U.S. Plans for Presence in Iraq After Pullout*, WASH. POST, Jan. 14, 2011, at A8.

¹¹⁷ See generally *State Testimony*, *supra* note 109, at 16 (alluding to how State’s PSC “Kabul and Baghdad guard forces also have specialized weapons and equipment”).

¹¹⁸ State equates its “task orders for static and movement security” as though there were not enormous differences between static guarding and convoy security in areas of enemy strength and activity. *State Testimony*, *supra* note 109, at 6.

of a barred function: “Security that entails augmenting or reinforcing others (whether private security contractors, civilians, or military units) that have become engaged in combat.”¹¹⁹

State may push for a focus on “combat.” The department may see “combat” as only military missions for military purposes. A State convoy with material for State’s consulates or training centers that goes through an area of potential enemy strength and activity and comes under enemy fire, or a quick reaction force that joins it, does not engage in “combat”—it does not have a military mission for a military purpose.

In any of these situations, moreover, a critic of State has no neutral arbiter to whom an appeal might exist to rein in State. OFPP does not perform that role. Therefore, State just needs a rationalization, however thin, to take high risks, when it responds to inquiries by, for example, Congress.

2. *Montreux Document*

Another key legal instrument about PSCs consists of an international agreement, the Montreux Document.¹²⁰ After Nisour Square, seventeen nations, including the United States, negotiated Montreux. This was not a rule cracking down on the PSC industry—it was written with the fullest industry participation.¹²¹ The result is an agreement which urges nations to follow “best practices.”¹²² It legitimatizes the higher-quality PSC firms, helping them get and keep business in the war zone and elsewhere. Montreux is important in the putative “framework” of international law for PSCs. Its best practices, like the palliative reforms of State and DoD after Nisour Square, help PSCs to get work at the outer limits of what current legal restrictions let them do.¹²³

However, Montreux does not take on the task, even to the limited extent done by the late 2011 OFPP policy letter, of sorting out or explaining how to draw a limit for PSCs in the war zone. It does not help find the line between the polar examples of PSCs taking part in military operations with combat units—something which no one considers proper for PSCs—and static guarding in relatively safe areas, which all consider proper for PSCs. Whatever attention Montreux may get in some realms, namely, the self-justi-

¹¹⁹ Performance of Inherently Governmental and Critical Functions, 76 Fed. Reg. 56,227, 56,240 (Sept. 12, 2011).

¹²⁰ U.N. General Assembly, Letter Dated Oct. 2, 2008 From the Permanent Representative of Switzerland addressed to the U.N. Secretary-General, U.N. Doc. A/63/467 (Oct. 6, 2008) [hereinafter *Montreux Document*], available at http://www.icrc.org/eng/assets/files/other/icrc_002_0996.pdf.

¹²¹ The industry association is the International Stability Operations Association (“ISOA”).

¹²² James Cockayne, *Regulating Private Military and Security Companies: The Content, Negotiation, Weaknesses and Promise of the Montreux Document*, 13 J. CONFLICT & SEC. L. 401, 403 (2009).

¹²³ See generally Stephanie M. Hurst, “Trade in Force”: *The Need for Effective Regulation of Private Military and Security Companies*, 84 S. CAL. L. REV. 447 (2011).

fication by the high-quality end of the PSC industry, it has not become a cynosure of United States government limits on PSC functions.¹²⁴

The PSC industry took a large role in Montreux seemingly as a priority to legitimate all of its functions, and perhaps secondarily for the higher-status components of the industry to bar the lower-status ones from winning lucrative work. After the fact, a pro-industry commentator showed how industry would like to use Montreux: to assert that anything PSCs might do in Iraq and Afghanistan could never pose a challenge to rules about inherently governmental functions. Industry cites this paragraph of Montreux:

Paragraph 9 states:

(a) 'PMSCs' are private business entities that provide military and/or security services, irrespective of how they describe themselves. Military and security services include, in particular, armed guarding and protection of persons and objects, such as convoys, buildings and other places; maintenance and operation of weapons systems; prisoner detention; and advice to or training of local forces and security personnel.

This paragraph seems to be just a standardized international definition to show what is being discussed under the rubric of the term PMSCs (or PSCs). It does not seem drafted to separate what is or is not inherently governmental.¹²⁵

However, the PSC industry could try to stretch much further this use of the simple definition of "PMSC" as not subject to override by self-labeling. Their argument loosely says that the line for that definition is the line for inherently governmental. More specifically, they note that the Montreux category (at another provision in the Montreux document), of "attribution" as inherently governmental, is a categorization that focuses on "formal authority."¹²⁶ In this view, as long as PSCs do not have formal authority, and as long as they engage in what the definition says of "armed guarding and protection of persons and objects, such as convoys,"¹²⁷ they would not perform inherently governmental functions.

¹²⁴ In all of the meetings or briefings of the Commission on Wartime Contracting with DoD and State officials, high and low, attended by the author, Montreux hardly got mentioned, apart from extremely narrow considerations of policy in Washington regarding the implementation of Montreux in regards to third-party certification of PSCs.

¹²⁵ Rather, it seems drafted primarily just so that the self-labeling of groups does not define them. For example, guns for hire that serve as front-line combat units for third-world leaders could not come under the definition of proper PMSCs even if they self-labeled themselves "Blackwater Protective, Defensive and Advisory Services."

¹²⁶ This is similar to the difference in the context of domestic prisons between a parole board which has authority to let a prisoner out and a prison guard who does not have anything like that kind of authority. The parole board with that authority may perform an inherently governmental function while the prison guard without that authority does not.

¹²⁷ Montreux Document, *supra* note 120, at 6.

PSC spokespersons may try to use in the same way a comment in the OFPP policy of September 12, 2011. OFPP said:

government performance may be the only way that Federal officials can retain control of their inherently governmental responsibilities. For example, providing security in a volatile, high-risk environment may be inherently governmental if the responsible Federal official cannot anticipate the circumstances and challenges that may arise, and cannot specify the range of acceptable conduct.¹²⁸

Using this limited example of what may be considered inherently governmental PSC firms would propose to draw a very broad swath as to what is *not* inherently governmental. Seemingly, the PSC industry may contend there is nothing wrong with using PSCs even "in a volatile high-risk environment"—they just need government planning in advance, and rules of engagement.¹²⁹

The PSC industry does not need to use this in a loudly proclaimed effort to legitimate that PSCs can perform high-risk functions. They merely need to lay the groundwork for some day when the annual defense authorization law touches on PSCs for some other, non-crucial reason, and ease in a confirmation of the industry view of OFPP and Montreux. The industry may very well get support on this from DoD and State. After that, the law and policy of the United States will not only have failed to expressly establish the right lessons of the past decade of war in Iraq and Afghanistan, but also the United States will have confirmed a very wrong lesson from the overreliance on PSCs during these long wars.

However, the relevant aspect, for OFPP policy and Montreux for "attribution" as inherently governmental, in the PSC context has to do with the context of the government's "monopoly of violence," not the government's monopoly of authority over liberty as in prison parole. There is a very separate issue, as a concern of the inherently governmental boundary, about the "authority" of private prison managers over the liberty of inmates,¹³⁰ unrelated to the concerns about PSCs on the battlefield. Authority over the liberty of inmates might be the key factor for whether parole decisions are inherently governmental, but it is not a helpful factor in analyzing PSCs.

¹²⁸ Performance of Inherently Governmental and Critical Functions, 76 Fed. Reg. 56,227, 56,238 (Sept. 12, 2011).

¹²⁹ In other words, all the high-risk situations from Nisour Square, to Afghan convoys in areas of Taliban strength, belong in this industry view as functions of PSCs and that the government just needs to do planning and guidance. What starts out in the OFPP 2011 policy, in a ponderous way to rule *out* some PSC functions as patently inherently governmental, ends up in the industry's view as ruling *in* most other high-risk situations as not "inherently governmental."

¹³⁰ Lucas Anderson, *Kicking the National Habit: The Legal and Policy Arguments for Abolishing Private Prison Contracts*, 39 PUB. CONT. L.J. 113 (2009).

Rather, for PSCs, the issue of what is inherently governmental deals with the making of exceptions, and especially in a war zone, in the issue of sending sometimes PSCs with powerful arms into high-risk situations and/or into dealings with the enemy. These high-risk situations may make local civilians fearful of the potential use of that powerful armament. Or, the situations may routinely put PSCs where the enemy may hinder (perhaps even destroy) their convoys, and where they have their substantial American funds for payoffs to the enemy.

If the Army hired PSC groups to go along on Army missions as a reserve in case of big trouble, those PSCs would not need to have the *authority* over liberty the way a parole board does. Rather, PSC reserve units would be there to take part in combat. So even with advanced planning and rules of engagement, PSCs cannot go with Army missions as their reserve. Hence, by any definition, such reserve units would perform an inherently governmental function, regardless of their not having *authority* over liberty. When PSCs take part in this type of violence, they demonstrate the reason war, and its high-risk situations, is the business of government, and not a place where a business (the PSC business) can wholly replace government.¹³¹

B. Defining, in Terms of "High Risk," Not "Combat," the Scope of "Inherently Governmental"

The United States must draw a line regarding "inherently governmental" based on high risk rather than combat. The government must draw the line by keeping front and center that palliative reforms, although welcome, cannot obviate the need for limits on which functions are inherently governmental.

Leaving whether to draw a line to State's preferences in Iraq led to planning for virtually a mobile PSC army in Iraq's capital.¹³² In future interventions, the United States might find its armed, omnipresent PSC use alienates the local nationals, who see it as stripping them of sovereign self-government.¹³³ Leaving this to the Army's outsourcing in places of tribal loyalty, like Afghanistan or Somalia, may lead to the continuation of a flow of American funds to the enemy.¹³⁴

¹³¹ Nor should PSCs perform the protective or defensive functions of quick reaction forces and counter-battery radar. This, too, is government's business, not the role of business in the place of government. If industry would dispute this, imagine if Army units in the Afghanistan war brought along PSC groups to be passive until needed to protect their flanks. Posit that the PSCs did not perform the central military mission of pushing forward toward and against the enemy but merely performed the passive, "protective and defensive" function of readiness to return fire if the enemy attacks the Army unit's flanks.

¹³² See Aaron Davis, *Contours of Lasting American Presence in Iraq Take Shape*, *CANBERRA TIMES*, Jan. 15, 2011, at A22.

¹³³ Schmidt & Schmitt, *supra* note 57, at A1.

¹³⁴ Riechmann & Lardner, *supra* note 72, at 2.

Line-drawing based on different aspects of high risk—in addition just to combat alone—should speak to the diverse functions of PSCs that may present a high risk. The first aspect consists of the potential for seriously alienating local nationals by casualties, fear-inspiring high-visibility presence unleashed from stationary facilities guarding, or otherwise. Only in the contemporary wars in Iraq and Afghanistan has the new extensive use of PSCs for mobile functions in areas of enemy strength and activity brought the lesson home of the high risk from the widespread and intense fear and distrust of the local nationals and their government about PSCs.

Apart from the impact of the civilian casualties themselves, other matters multiply this. The United States has never used PSCs on this scale before. In these countries, the gratitude among the population for the United States throwing out their old regimes—the Ba'ath Party and the Taliban—will not last throughout the population in the long term. Local tribal groups may see PSCs as a private armed force intruding on their territory. PSCs serve as a lightning rod for other local discontent and a convenient whipping boy for antagonistic leaders.¹³⁵ Today's phone cameras, Internet, and social media propagate vivid images of civilian casualties at an unheard of speed. Well before the population wants the American military presence to depart, it will want the PSC presence gone.

The war against an insurgency consists in part of a contest for the hearts and mind of the population. The vigor of the Iraqi government efforts to reduce the PSC presence during the negotiation of the SOFA and its subsequent expulsion of Blackwater and pressuring of the remaining PSCs bespeaks the population's reactions. Insurgencies in the two wars present a greater problem for the use of PSCs. The mixing of the insurgents and the population means that incidents and casualties from PSCs may occur anywhere, including, dramatically, at the heart of the capital. The population feels itself without protection from PSCs anywhere, by either their own government or the United States government. They feel at the mercy of intimidating for-profit private firms without military discipline and sovereign accountability.

Second, agencies should not weigh high-risk use of PSCs as a balance of pros and cons.¹³⁶ There are absolute limits, not just balancing tests. For example, even if the Army showed that its efforts required more armed warriors than its own units had, it could not hire PSCs to provide flank protection or reserves for its units moving forward against the enemy. There is a taboo. Inherently governmental lines require line-drawing, not balancing by agencies. The public in an insurgent country must view its own government as a partner with the United States, not just a helpless entity which gives

¹³⁵ Davis, *supra* note 132, at A22 (antagonism by prominent Iraqi figure, Moqtada al-Sadr, to State Department planning for presence supported by private security).

¹³⁶ The author respects both the sacrifices of PSCs and their properly proud stance that their PSDs have never lost a client. Their accomplishments are impressive.

over control of territory to what local nationals may see as roving armed foreigners or local fighters without fixed loyalties. Furthermore, the Taliban must know that the kind of armed personnel who move convoys in areas of enemy strength and activity are not open, like some Afghan PSCs, to bargaining for mutual profit.¹³⁷ Therefore, the United States must apply the criterion of inherently governmental as a matter of its own sovereignty.

Additionally, State and DoD have shown that they will strike any balance left to their discretion in favor of hiring PSCs, even for high-risk functions. This is not from ignoble motives. There is no reason to think the State and DoD officials have any disloyalty to their job in their agency in hiring PSCs. The State and DoD officials in the field are dedicated and professional, giving years of their lives to a grueling and dangerous struggle. Rather, DoD wants to save its troops for military missions and State wants to save its personnel for diplomatic missions. Naturally, to them, the agency mission comes first, if any balancing occurs. Both State and DoD can more easily obtain from Congress the money needed for PSCs than the authority to hire additional personnel to insource that security work or to create reserve personnel units for the years to come. The agency and Congress both see adding personnel, as contrasted with merely buying PSC help, as an unwelcome expansion of the government. Because of this, the high risks with hiring PSCs seem acceptable to the agencies.

Particularly with respect to local national PSCs in convoys without American personnel, as is standard in Afghanistan, the United States has little visibility and little oversight as to what the PSCs do when their convoys travel through areas without a large United States presence. The United States cannot police the dealings of Afghan PSCs with other armed Afghans.¹³⁸ Yet, to have PSCs without local national Afghans would amount to a cure worse than the disease. Afghans know they are good fighters¹³⁹ and civilian Afghans trust, relatively, other Afghans (at least those with similar backgrounds, i.e., compatible Pashtuns or Tajiks) more than they would trust third country national PSCs. Even as it is, Afghans resent how little of American contracting dollars trickle down to them. Bringing non-Afghans into the country to take away PSC jobs from Afghans would alienate them further.

PSC spokesmen might argue that the government does have oversight mechanisms, including the "Serious Incident Reports" or SIRs.¹⁴⁰ These are

¹³⁷ COMMISSION REPORT, *supra* note 19, at 34.

¹³⁸ "In contrast to Iraq where 8% of armed security contractors are local nationals, in Afghanistan, 95% are local nationals." MOSHE SCHWARTZ, CONG. RESEARCH SERV., THE DEPARTMENT OF DEFENSE'S USE OF PRIVATE SECURITY CONTRACTORS IN IRAQ AND AFGHANISTAN: BACKGROUND, ANALYSIS, AND OPTIONS FOR CONGRESS 6 (2009).

¹³⁹ The wry comment about Afghan hires for their own army or for PSCs is, give them a first-class new rifle, they can't hit the target, but let them bring along the old one, with the off-center scope, that they have used all their life—and then, they will.

¹⁴⁰ See HUMAN RIGHTS FIRST, PRIVATE SECURITY CONTRACTOR AT WAR: ENDING THE CULTURE OF IMPUNITY 9–10 (2008).

self-reporting about incidents—reports that the PSCs should fill out when they get in a firefight or even discharge a weapon and engage in shooting.¹⁴¹ The government touts SIRs as showing it had taken control of the PSC problem after Nisour Square.¹⁴² However, virtually none of the various studies of SIRs find PSCs ever saying they caused a civilian casualty, regardless of how violent various particular fracasés might be.¹⁴³

Rather, the SIRs tell a one-sided tale of PSCs (properly) resisting dangerous enemy attacks without ever having any such civilian injuries,¹⁴⁴ not even anonymous civilians that the PSCs might unavoidably injure during entirely proper efforts to get who, or what, they were protecting out of an ambush. This type of incident report may well have accuracy for some types of PSCs, but taken as a profession of universal PSC perfection, the SIRs just reflect how little incentive PSCs have to report civilian casualties. Of course, PSCs will turn in more credible SIRs when Americans from the Army or the Diplomatic Security Bureau¹⁴⁵ accompany the PSCs, as became the case for State PSDs after Nisour Square. But that arrangement does not appear feasible to do with convoys because the enemy might turn out in strength, and overwhelm the PSCs mainly to kill the Americans.

More broadly, apart from the nitty-gritty of these particular examples, they should suggest what may feed into a high-risk function being inherently governmental rather than suitable for PSCs. It matters whether to expect local civilians (say, Afghans) not only to escape from becoming potential casualties, but also to have good channels to complain when they or their families do become casualties.

In an incident involving PSCs accompanying convoys, an injured family probably does not know from which base or camp or similar facility the PSCs came. PSCs just may roar through town and exchange fire. The presence in that town of the PSCs may have occurred so momentarily and unexpectedly that the family of the casualties can give very little description of the PSCs. When the family of the casualty tries to obtain official redress, they have the classic lack of clues as in a domestic hit-and-run driver acci-

¹⁴¹ There are certainly Iraq PSC weapon firings in large numbers in the SIRs, but reports of Iraqi civilian casualties from such shootings are few and far between. Richard Hall, *Security Firms Involved in 200 Shootings in Iraq*, THE INDEP., Dec. 14, 2011, at 32, available at <http://www.independent.co.uk/news/world/middle-east/security-firms-involved-in-200-shootings-in-iraq-6276688.html>.

¹⁴² William Pincus, *Fatal Shootings by Iraq Contractors Drop in 2008*, N.Y. TIMES, Dec. 20, 2008, at A9.

¹⁴³ *Are Private Security Contractors Performing Inherently Governmental Functions?: Hearing Before the Comm'n on Wartime Contracting*, 111th Cong. (2010) (no witnesses contradicted this).

¹⁴⁴ *Id.*

¹⁴⁵ For a description of the Bureau, see *Bureau of Diplomatic Security*, U.S. DEP'T OF STATE, <http://www.state.gov/m/ds/index.htm> (last visited Oct. 15, 2012).

dent. Furthermore, PSCs as sub- or sub-subcontractors are remote from government accountability.¹⁴⁶

Moreover, the cloak of uncertainty increases when the convoy went through an area of enemy strength because of tension inhibiting trust and communication. Tension may exist between the civilians and the typically corrupt police, or between the civilians and the nearest United States forces. The occurrence of a firefight with injuries or deaths only increases the tension. The Fallujah incident of 2004 shows the extremes of anger on both sides.¹⁴⁷ There is a general problem of privatizing functions where the individuals on the “receiving” end, like prisoners, schoolchildren, inmates at mental institutions, and so on do not have the usual channels of complaint that exist in the general population. How much worse that problem becomes in a place where the United States wages war on an armed insurgency.

These concrete examples open up another line of inquiry: the contrast between static guards of installations in safe areas, on the one hand, and mobile PSD or convoy PSCs operating in areas of enemy strength on the other. Proponents of PSCs may tout, as their model, static guards in safe areas. Such PSC proponents maintain that as long as some other function shares characteristics of such static guards—say, that a personal security detail in Baghdad is far away from combat, and such a PSC has a protective and defensive function—the PSCs are not inherently governmental. However, mobile PSDs or convoy PSCs may have a serious dose, regardless of their defensive or protective functions, of the high-risk aspects just discussed. This lays bare the fallacy of State’s generalizing the static guard functions to justify what it planned for its mini-army in post-drawdown Iraq.¹⁴⁸ Some of State’s PSCs simply have too much risk not to be inherently governmental.

III. CONCLUSION

The wars in Iraq and Afghanistan were the first long wars for the United States since the Vietnam War over forty years ago. Necessarily, with all the changes in four decades, the United States took many experimental leaps in how to conduct war with an insurgency. Strikingly, the United States used PSCs on a massive scale never seen before. PSCs operated at the very limits of the boundary area between what they can be allowed to do and what is inherently governmental and beyond what they should do.

This Article has laid out the choice between the existing policy, of deciding what is inherently governmental only by a relation with combat, and a

¹⁴⁶ See generally Pincus, *supra* note 15; U.S. Sues Kellogg, *supra* note 32 (government suing KBR relating to bills from its sub-subcontractors).

¹⁴⁷ See GRAHAM, *supra* note 39, at 459. See generally JEREMY SCAHILL, BLACKWATER: THE RISE OF THE WORLD’S MOST POWERFUL MERCENARY ARMY (2007).

¹⁴⁸ See Richard Lardner, *State Wants to Form Mini-Army for Iraq Security*, ASSOCIATED PRESS (June 14, 2010), <http://www.deseretnews.com/article/700040170>.

more robust criterion keeping PSCs out of other high-risk activity. These distinctions matter greatly for post-drawdown Iraq, and, also, for Afghanistan during its own drawdown and afterwards.

Unfortunately, if inevitably, these distinctions matter for another reason: the wars to come. The lessons of Iraq and Afghanistan will be with us as long as the lessons of Vietnam, notwithstanding the intense debate over just what those lessons are. The United States Army may someday become irresistibly drawn into Yemen, Somalia,¹⁴⁹ Pakistan,¹⁵⁰ Syria, Mexico, or another place where perils lurk for the United States' security. Then and there, the United States may use PSCs. Yet, high risks will occur in future wars, too. A story about the supply convoys in Pakistan headed for Afghanistan epitomizes this prospect: "Tribal-area militants will profit, too. They demand protection money from the companies that haul the freight."¹⁵¹ It seems the problems of PSCs paying the enemy will happen outside Afghanistan, conceivably again and again.

The United States will lose out if the PSC industry, and the bureaucratic interests of State and DoD, effectively codify the wrong lessons about the last decade of those long wars. Hopefully, Congress will draw the right lesson. In long future wars, the United States can entrust PSCs with certain limited tasks, but, after that, must do its own war work.

¹⁴⁹ See Jeffrey Gettleman, *Somalia Is Likely to Cut Ties to Mercenaries, Official Says*, N.Y. TIMES, Jan. 24, 2011, at A6; Chris Tomlinson, *U.S. Hires Military Contractor to Back Peacekeeping Mission in Somalia*, WASH. POST (Mar. 7, 2007), http://www.washingtonpost.com/wp-dyn/content/article/2007/03/07/AR2007030701304_pf.html.

¹⁵⁰ Karen DeYoung, *CIA Suspends Drone Launches from Southwest Pakistani Base*, WASH. POST, July 2, 2011, at A12 ("The number of CIA personnel, along with contractors from the private security company then known as Blackwater, grew as the Obama administration rapidly increased the number of drone strikes.").

¹⁵¹ Richard Leiby, *Many Stand to Gain If Pakistan Reopens NATO Supply Lines*, WASH. POST, May 16, 2012, at A12.