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# OUTSOURCING POWER: HOW PRIVATIZING MILITARY EFFORTS CHALLENGES ACCOUNTABILITY, PROFESSIONALISM, AND DEMOCRACY

MARTHA MINOW\*

**Abstract:** Private contractors have played key roles in recent high-profile scandals. These scandals hint at the degree to which the U.S. military has increased the scope and scale of its reliance on private security companies in recent decades. This trend offers many advantages, including nimbleness in the deployment of expertise and geographic flexibility. But it also departs from conventional methods of accountability through both public oversight and private market discipline. The lack of transparency in the use of private contractors compounds the problem of assessing the impact of their increasing role. Failures of basic governmental oversight to ensure contract enforcement by the Department of Defense are well-documented. Departures from conventional government contracting procedures exacerbate these failures and obscure whether inherently governmental functions are in effect privatized. The large sums of money involved contribute to risks of corruption and a scale of private lobbying that can distort the legislative process. These developments jeopardize the effectiveness of military activities, the professionalism of the military, the integrity of the legislative process and foreign policy decision making, public confidence in the government, national self-interest, and the stability of the world order.

## INTRODUCTION

In a time of scandals, three recent ones share a disturbing, though perhaps not initially obvious, element.

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\* Jeremiah Smith, Jr. Professor, Harvard Law School. This paper derives from the Cecil A. Wright Lecture, University of Toronto Faculty of Law, January 20, 2004. For insightful comments and questions, the Author thanks the editors of the *Boston College Law Review*, Dean Ron Daniels and members of the audience at the Cecil A. Wright Lecture at the University of Toronto; David Luban, Nancy Sherman, and students in their Joint Seminar on War at Georgetown University; and participants in the March 24, 2004, Harvard Law School Conference, *Governance by Design*. Special thanks to Brishon Rogers, Mira Edmonds, and Amanda K. Edwards for research assistance, and Jody Freeman, Bob Monks, and Joe Singer for conversations about this work.

- Congressional and media sources charge the Halliburton Company, a Houston-based oil services firm previously headed by Vice President Richard Cheney,<sup>1</sup> with overcharging \$61 million worth of gasoline and for charging \$186 million for meals not actually served as part of its \$10 billion worth of contracts with the Department of Defense (the "DOD") to support the U.S. military effort in Iraq.<sup>2</sup> Halliburton holds the two largest contracts for reconstruction in Iraq with \$2.5 billion to restore the oil infrastructure and \$6.5 billion to provide the troops with housing, food, laundry, and other services.<sup>3</sup> The contracts guaranteed the company a profit and allowed it to pass on all of its expenses to the government.<sup>4</sup> One account indicates that the unaccounted-for charges amount to 43% of the amount the company billed,<sup>5</sup> though that estimate understates the full

<sup>1</sup> Cheney still holds 433,000 unexercised stock options in the company and also receives deferred salary from Halliburton. *An Oversight Hearing on Iraq Contracting Abuses: Before the S. Democratic Policy Comm.*, 108th Cong. 4 (2004) [hereinafter Dorgan Hearing] (statement of Sen. Byron L. Dorgan, Chairman, Democratic Policy Comm.).

<sup>2</sup> Julie Mason, *Halliburton Back in the Fray*, HOUSTON CHRON., Sept. 18, 2004, at A26. The Army threatened to withhold payments until the company provided requested documentation for supported charges. David Ivanovich, *Army, Halliburton Talk Settlement*, HOUSTON CHRON., Oct. 23, 2004, at D1. In the midst of settlement negotiations over the unaccounted charges, the company's leaders claim that they have made little profit and would demand a much larger profit margin when rebidding. Simon Romero, *Halliburton Weighs Options as Iraq Work Changes*, N.Y. TIMES, Sept. 8, 2004, at C3. Yet some allege Halliburton spent millions of dollars on kickbacks on Kuwaiti contracts and on items including monogrammed towels for the company's health club. William D. Hartung, Senior Research Fellow, World Policy Institute, Prepared Statement at the Briefing on An Incomplete Transition: An Assessment of the June 30th Transition and Its Aftermath: Private Military Contractors in Iraq and Beyond: A Question of Balance (June 22, 2004), <http://www.worldpolicy.org/projects/arms/updates/FPIFJune2004.html>. With the Securities and Exchange Commission, Halliburton settled separate charges of misleading financial statements. Richard Whittle & Jim Landers, *Cheney's Years at Halliburton Under Scrutiny*, DALLAS MORNING NEWS, Sept. 8, 2004, at 1A.

<sup>3</sup> Dorgan Hearing, *supra* note 1, at 6 (statement of Rep. Henry Waxman).

<sup>4</sup> Robert O'Harrow, Jr., *Panel to Hear of Halliburton Waste*, WASH. POST, July 22, 2004, at E1. Concerns about shifting all the costs to citizens and the resulting massive overcharging occupied Congressional discussion in hearings about Halliburton and other private contractors in Iraq. *See generally* Dorgan Hearing, *supra* note 1.

<sup>5</sup> David Teather, *Halliburton Accused of Not Justifying £1bn Army Bills*, GUARDIAN (London), Aug. 12, 2004, at 17; *see also* Dorgan Hearing, *supra* note 1, at 20 (testimony of Danielle Brian, Exec. Director of Project on Government Oversight). On transport subcontracting, a subcontract administrator discovered that the price was inflated by 500%, but no effort was made to recover these costs. Dorgan Hearing, *supra* note 1, at 25-26 (testimony of Maria deYoung, former Halliburton subsidiary Kellogg Brown & Root, Inc. ("KBR") employee).

\$5.6 billion of contracts awarded since the start of the Iraq war.<sup>6</sup>

- The Defense Advanced Research Projects Agency ("DARPA"), a research and development division within the DOD, launched in early 2002 an undertaking it initially called the Total Information Awareness project, but for political reasons later renamed as the Terrorist Information Awareness project ("TIA").<sup>7</sup> The project developed advanced information technology tools to use domestic and foreign databases in both governmental and commercial hands to search for "patterns that are related to predicted terrorist activities."<sup>8</sup> TIA used mathematical algorithms and other features of governmental software to "mine" data about any person, including "religious and political contributions; driving records; high school transcripts; book purchases; medical records; passport applications; car rentals; and phone, e-mail and internet search logs."<sup>9</sup> Overseen by John Poindexter, who was indicted for his involvement in efforts to provide secret and illicit support to a military force in Nicaragua in the Iran-Contra scandal,<sup>10</sup> TIA formally

<sup>6</sup> O'Harrow, *supra* note 4, at E1. Full information about the billing has not been available to the Congress or to the public. The Pentagon blocked Congressional efforts to secure full information about Halliburton's billing under a \$2.5 billion contract for oil site repairs and fuel imports. Erik Eckholm, *Lawmakers, Including Republicans, Criticize Pentagon on Disputed Billing by Halliburton*, N.Y. TIMES, June 22, 2005, at A10.

<sup>7</sup> For a longer analysis of the program, see Peter Galison & Martha Minow, *Our Privacy, Ourselves in the Age of Technological Intrusions*, in HUMAN RIGHTS IN THE "WAR ON TERROR" (Richard Ashby Wilson ed., forthcoming Nov. 2005). Additionally, see DEP'T OF DEF. TECH. & PRIVACY ADVISORY COMM., SAFEGUARDING PRIVACY IN THE FIGHT AGAINST TERRORISM, 15-20 (2004), available at <http://www.cdt.org/security/usapatriot/20040300tapac.pdf>. Probably the first public indication of the effort appeared in testimony by the Director of DARPA before the Senate Armed Services Committee. *Fiscal 2003 Defense Request, Combating Terrorism: Hearing Before the S. Comm. on Armed Services*, 107th Cong. 10 (2002) (statement of Dr. Tony Tether, Director, DARPA).

<sup>8</sup> DEF. ADVANCED RESEARCH PROJECTS AGENCY, REPORT TO CONGRESS REGARDING THE TERRORISM INFORMATION AWARENESS PROGRAM: IN RESPONSE TO CONSOLIDATED APPROPRIATIONS RESOLUTION, 2003, PUB. L. NO. 108-7, DIVISION M, § 111(b) at 14 (2003), <http://www.eff.org/Privacy/TIA/TIA-report.pdf>.

<sup>9</sup> ELEANOR ACER ET AL., LAWYERS COMM. FOR HUMAN RIGHTS, ASSESSING THE NEW NORMAL: LIBERTY AND SECURITY FOR THE POST-SEPTEMBER 11 UNITED STATES, at ix (Fiona Doherty & Deborah Pearlstein eds., 2003), <http://www.humanrightsfirst.org/pubs/descriptions/Assessing/AssessingTheNewNormal.pdf> (report funded by the Atlantic Philanthropies, the John Merck Fund, the Open Society Institute, Matthew Dontzin, and Equal Justice Works fellowship). The Lawyers Committee changed its name recently to Human Rights First.

<sup>10</sup> LAWRENCE E. WALSH, FINAL REPORT OF THE INDEPENDENT COUNSEL FOR IRAN/CONTRA MATTERS, at xiii-xxiii (1993), <http://www.fas.org/irp/offdocs/walsh/>. Oliver North was an aide to National Security Advisor John Poindexter. Bernard Weinraub,

ended when Congress shut down its funding in the face of media critiques and opposition from political leaders on both the right and the left wings.<sup>11</sup> Yet Congress still permits counterterrorism intelligence that targets foreign nations; 199 data mining projects receive or will receive federal support, and many TIA projects may proceed under classified programs outside of public visibility.<sup>12</sup>

- Shocking digital photographs of cruel and abusive practices used by interrogators and guards at the U.S.-run Iraq prison at Abu Ghraib sparked massive investigations.<sup>13</sup> Confirming the worst allegations of imperialism and inhumanity leveled by terrorist propaganda, these revelations brought shame and worldwide criticism to America.<sup>14</sup>

Although not the major element in each story, one common thread among these scandals is the role played by private contractors working for the U.S. government in its response to the 9/11 terrorist attacks. The Halliburton scandal stands out as the most obvious. The largest private oil and military services company in the country, Halliburton received, without competitive bidding, the contract to manage the logistical planning for the Iraq war—and promptly reported a

*Iran Payment Found Diverted to Contras; Reagan Security Adviser and Aide Are Out*, N.Y. TIMES, Nov. 26, 1986, at A1.

<sup>11</sup> *Balance Information With Privacy*, ATLANTA J.-CONST., Dec. 10, 2003, at A22; William Safire, *Privacy Invasion Curtailed*, N.Y. TIMES, Feb. 13, 2003, at A41 (noting range of opponents); *Virtual Borders vs. Civil Liberties*, DENVER POST, May 31, 2004, at C7. DARPA had identified a range of technologies contributing to TIA, and there is no indication that termination of TIA involved terminating development or use of these other technologies. See DARPA, *supra* note 8, at app. B.

<sup>12</sup> U.S. GEN. ACCOUNTING OFFICE, GAO-04-548, DATA MINING: FEDERAL EFFORTS COVER A WIDE RANGE OF USES 2 (2004), available at <http://www.gao.gov/new.items/d04548.pdf> [hereinafter GAO-04-548] (requested by Sen. Daniel K. Akaka (D-Hawaii)); R. Mohanakrishnan, *A Programme to Monitor Terrorists Links*, HINDU (India), Dec. 13, 2004, at 16, available at <http://www.hinduonnet.com/2004/12/13/stories/2004121300551600.htm>; *Total/Terrorism Information Awareness (TIA): Is It Truly Dead?*, ELEC. FRONTIER FOUND., Oct. 3, 2003, [http://www.eff.org/Privacy/TIA/20031003\\_comments.php](http://www.eff.org/Privacy/TIA/20031003_comments.php).

<sup>13</sup> See Josh White & Scott Higham, *Army Calls Abuses 'Aberrations': Report Cites 94 Detainee-Mistreatment Cases in Iraq and Afghanistan*, WASH. POST, July 23, 2004, at A1.

<sup>14</sup> See Michael A. Fuoco, *Forever Stained by Prison Abuse Scandal*, PITTSBURGH POST-GAZETTE, Dec. 21, 2004, at A1; Richard A. Serrano, *4th Soldier Guilty in Prison Scandal*, L.A. TIMES, Nov. 3, 2004, at A12; Helen Thomas, *No One, Not Even Bush, Is Above the Law*, HOUSTON CHRON., July 2, 2004, at A36. In June 2005, international media reported that the U.S. Department of Defense no longer treated the abuse scandal as a matter of public concern while Secretary of Defense Donald Rumsfeld considered a promotion for Lieutenant General Ricardo Sanchez, the commander in Iraq during the Abu Ghraib prison abuse scandal. See Eric Schmitt & Thom Shanker, *Ex-Top General in Iraq in Line for Promotion*, INT'L HERALD TRIB., June 21, 2005, at 10.

62% jump in revenues.<sup>15</sup> Government officials defended the selection of Halliburton on grounds that it was the only firm large enough to manage the job, but Peter Singer notes that Halliburton often outsources further, hiring subcontractors with nationals from countries including Bangladesh and the Philippines.<sup>16</sup>

With private contractors working for the military comes the practice of subcontracting, which raises the question of whether such an arrangement should allow the corporation to distance itself from responsibility any more than a contracting relationship should allow the military to separate itself from the acts of its contractor's employees. In addition, the use of private contractors by the military foreseeably creates extra problems of supervision and control. Legal and political responses will determine whether those problems are excused or instead monitored sufficiently to create incentives for adequate oversight.

Investigative reports into the abuses at the Abu Ghraib prison identify participation of private contractors as one example of the poor supervision, confused lines of authority, and improper procedures at that site.<sup>17</sup> One report, produced by a panel of U.S. generals, concludes that “[c]ontracting-related issues contributed to the problems at Abu Ghraib prison.”<sup>18</sup> An earlier internal Army report traces the involvement of civilian interpreters and interrogators working for CACI International, Inc. (“CACI”) and Titan Corp. (“TTN”) in conjunction with military officers, and concludes that they were either directly or indirectly responsible for the abuses at Abu Ghraib.<sup>19</sup> CACI denied involvement of its employees in the abuse, but also asserted

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<sup>15</sup> Peter W. Singer, *Warriors for Hire in Iraq*, SALON.COM, Apr. 15, 2004, [http://archive.salon.com/news/feature/2004/04/15/warriors/index\\_np.html](http://archive.salon.com/news/feature/2004/04/15/warriors/index_np.html).

<sup>16</sup> *Id.*

<sup>17</sup> See generally MG GEORGE R. FAY, AR 15-6 INVESTIGATION OF THE ABU GHRAIB DETENTION FACILITY AND 205TH MILITARY INTELLIGENCE BRIGADE (2004), <http://www.defenselink.mil/news/Aug2004/d20040825fay.pdf> [hereinafter Fay Report].

<sup>18</sup> See *id.* at 47. One of the companies denies any involvement, although an internal Army report had identified one of its employees as a key player. Ellen McCarthy, *Changes Behind the Barbed Wire: New Standards Are in Place for the Oversight of Contract Workers at Abu Ghraib Prison*, WASH. POST, Dec. 13, 2004, at E1. Steven Schooner concludes that “CACI International provided more than half of the interrogators employed at the facility, while Titan supplied linguistics personnel,” and that “more than a third of the improper incidents involved contractor personnel.” Steven L. Schooner, *Contractor Atrocities at Abu Ghraib: Compromised Accountability in a Streamlined, Outsourced Government*, 16 STAN. L. & POL’Y REV. 549, 555 (2005).

<sup>19</sup> McCarthy, *supra* note 18, at E1 (quoting a leaked internal Army report by Major General Antonio Taguba).

that the individuals in question were no longer employees.<sup>20</sup> Titan quickly responded that the individual associated with its operations actually worked for a subcontractor.<sup>21</sup> Minimal or missing oversight seems to characterize recent military use of contractors.<sup>22</sup> Dan Guttman at the Center for Public Integrity reports that only a thin layer of official oversight existed for the contractors running the TIA data mining project.<sup>23</sup> Admiral Poindexter came to the DOD agency DARPA after working with Syntek Technologies to develop the research tools that became the basis of TIA.<sup>24</sup> TIA worked by awarding contracts to private companies.<sup>25</sup> Through a lawsuit seeking enforcement of the Freedom of Information Act (the "FOIA"),<sup>26</sup> a nonprofit organization obtained information about the DOD contracts with private entities for TIA activities, including large corporations such as Booz Allen Hamilton,<sup>27</sup> Lockheed Martin, and several universities.<sup>28</sup> The government has long contracted out research and development work as well as information technology.<sup>29</sup> Yet outsourcing the tasks of monitoring Americans as part of government investigations seems to represent a new degree of privatization.

The roles played by private contractors in these incidents offer a glimpse of not only the variety and scale of outsourcing by the U.S. military in recent years, but also the departures from conventional methods of accountability accomplished by extensive use of private

<sup>20</sup> *Id.*

<sup>21</sup> Spencer E. Ante & Stan Crock, *The Other U.S. Military*, BUS. WK., May 31, 2004, at 76 (on June 21, 2004, *Business Week* published a retraction for erroneously describing a civilian cited in a report on Abu Ghraib prisoner abuse as an employee of CACI International, Inc., instead of as a Titan subcontractor); see Dan Guttman, *The Shadow Pentagon*, CTR. FOR PUB. INTEGRITY, Oct. 8, 2004, <http://www.publicintegrity.org/pns/report.aspx?aid=386>.

<sup>22</sup> See Dorgan Hearing, *supra* note 1, at 1-2.

<sup>23</sup> See generally Guttman, *supra* note 21.

<sup>24</sup> *Analysis of Total Information Awareness Contractor Documents*, ELEC. PRIVACY INFO. CTR., Feb. 2003, [http://www.epic.org/privacy/profiling/tia/doc\\_analysis.html](http://www.epic.org/privacy/profiling/tia/doc_analysis.html) [hereinafter EPIC]; Adam Mayle & Alex Knott, *Outsourcing Big Brother: Office of Total Information Awareness Relies on Private Sector to Track Americans*, CTR. FOR PUB. INTEGRITY, Dec. 17, 2002, <http://www.public-i.org/report.aspx?aid=106> (stating that DARPA awarded private contracts amounting to \$23 million).

<sup>25</sup> See generally Mayle & Knott, *supra* note 24.

<sup>26</sup> See generally *Elec. Privacy Info. Ctr. v. Dep't of Def.*, 241 F. Supp. 2d 5 (D.D.C. 2003).

<sup>27</sup> Booz Allen received a \$62 million contract to work on TIA. U.S. DEP'T OF DEF., CONTRACT (2002), available at [http://www.defenselink.mil/contracts/2002/c11122002\\_ct577-02.html](http://www.defenselink.mil/contracts/2002/c11122002_ct577-02.html).

<sup>28</sup> *Id.*

<sup>29</sup> Nancy Ferris, *Give and Take*, GOVEXEC.COM, July 1, 2003, <http://www.govexec.com/features/0603/ots03s4.htm> ("Even before the current push to outsource, contractors were doing at least three-quarters of the federal government's IT work . . .").



contractors. Typically proceeding without much publicity or disclosure, private contractors working for the military theoretically could be subject to two systems of accountability: public oversight and private market discipline. Yet in practice, military contractors often evade the oversight intended to determine contract performance and also often bypass private market competition through sole-source bids and other waivers of marketplace practices.<sup>30</sup> Private contractors may also enjoy exclusions from other legal constraints that would attach to government actors engaged in the very same activities.<sup>31</sup>

The prospect of unaccountable private military contractors is disturbing, but also inconsistent with growing demands for compliance with human rights globally. Federal courts in the United States have opened their doors to claims by foreigners of human rights violations by U.S. citizens and U.S.-based corporations acting outside U.S. boundaries.<sup>32</sup> Someday, federal courts may accept suits

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<sup>30</sup> See Dan Guttman, *Governance by Contract: Constitutional Visions; Time of Reflection and Choice*, 33 PUB. CONT. L. J. 321, 344 (2004); Schooner, *supra* note 18, at 564–69.

<sup>31</sup> Even when subsidized by the government, actions by private actors are not governed by the Due Process and Equal Protection Clauses of the Fourteenth Amendment, which read, “nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the laws,” other than in limited exceptions. U.S. CONST. amend. XIV, § 1; see *Rendell-Baker v. Kohn*, 457 U.S. 830, 837 (1982); *Street v. Cori. Corp. of Am.*, 102 F.3d 810, 814 (6th Cir. 1996) (finding that private prison guards act “under color of state law,” thus presenting state action); LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1690 (2d ed. 1988); Shirley L. Mays, *Privatization of Municipal Services: A Contagion in the Body Politics*, 34 DUQ. L. REV. 41, 45–46 (1995); Glenn Chatmas Smith, *We’ve Got Your Number! (Is It Constitutional to Give It Out?): Caller Identification Technology and the Right to Informational Privacy*, 37 UCLA L. REV. 145, 154 (1989) (reviewing contrasting decisions about state action). Private entities similarly are exempt from the disclosure obligations that apply to government entities. Craig D. Feiser, *Privatization and the Freedom of Information Act: An Analysis of Public Access to Private Entities Under Federal Law*, 52 FED. COMM. L.J. 21, 25, 33–34 (1999). The Fourth Amendment’s guarantee against unreasonable searches or seizures does not attach to private entities unless they can be characterized as agents of the government. See *United States v. Jacobsen*, 466 U.S. 109, 113 (1984); Elise M. Bloom, Madeleine Schachter, & Elliot H. Steelman, *Competing Interests in the Post 9-11 Workplace: The New Line Between Privacy and Safety*, 29 WM. MITCHELL L. REV. 897, 899–900 (2003).

<sup>32</sup> See *Sosa v. Alvarez-Machain*, 124 S.Ct. 2739, 2761–62 (2004) (finding jurisdiction under Alien Tort Claims Act for cases alleging some violations of the law of nations); *Filartiga v. Pena-Irala*, 630 F.2d 876, 880 (2d Cir. 1980) (granting jurisdiction in a case of alleged torture of a Paraguayan national by a former Paraguayan official); Daphne Eviatar, *Judgment Day: Will an Obscure Law Bring Down the Global Economy?*, BOSTON GLOBE, Dec. 28, 2003, at D1. The application of the Alien Tort Claims Act to impose liability on corporations for human rights violations generated considerable attention because of potentially massive liabilities. Tawny Aine Bridgeford, Note and Comment, *Imputing Human Rights Obligations on Multinational Corporations: The Ninth Circuit Strikes Again in Judicial Activism*, 18 AM. U. INT’L L. REV. 1009, 1020–21 (2003).

against U.S. corporations consulting with foreign governments—even though judicial remedies would be unavailable for abuses arising from the same contractors' work for the U.S. military, given the court-made government contractor defense.<sup>33</sup>

The current scale of the military's use of private contractors makes the question of accountability particularly pressing.<sup>34</sup> Private military companies—not merely individuals offering their services as mercenaries<sup>35</sup>—have a long lineage,<sup>36</sup> but never have been more central to the U.S. military strategy than in the deployment in Iraq.<sup>37</sup> Peter Singer, one of the key observers of this trend, notes that private military firms in Iraq employ between 20,000 and 30,000 people—and that this, taken together, represents the second-largest force in Iraq after the U.S. military.<sup>38</sup> Private military companies guard U.S. gener-

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In *Sosa v. Alvarez-Machain*, the Supreme Court declined to immunize corporations from application of the Alien Tort Claims Act. 124 S.Ct. at 2766; see also Lisa Girion, *Court Ok's Foreign-Abuse Suits*, L.A. TIMES, June 30, 2004, at C1. This development produced a settlement in the suit against Unocal, in which noncitizens alleged that the corporation was complicit with the Myanmar army that allegedly engaged in forced labor, murder, and rape while working jointly with Unocal on a pipeline. See *Doe I v. Unocal Corp.*, 395 F.3d 932, 939–40 (9th Cir. 2002), *rev'd en banc* 403 F.3d 708 (9th Cir. 2005); Duncan Campbell, *Energy Giant Agrees Settlement with Burmese Villagers*, GUARDIAN (London), Dec. 15, 2004, at 17.

<sup>33</sup> The defense is based on an extension of sovereign immunity. See Anita Bernstein, *How Can a Product Be Liable?*, 45 DUKE L.J. 1, 77–78 (1995); Peter J. Ekberg, Note, *Remotely Delivered Landmines and International Law*, 33 COLUM. J. TRANSNAT'L L. 149, 164 (1995) (“[Government contract defense] protects a government contractor from liability for actions performed while complying with government specifications.”); Larry J. Gusman, Note, *Rethinking Boyle v. United Technologies Corp. Government Contractor Defense: Judicial Preemption of the Doctrine of Separation of Powers?*, 39 AM. U. L. REV. 391, 393–94 (1990). The government contractor defense thus would collide with the law of nations; the defense itself may be difficult to sustain in the context of service contracts with performance standards rather than specifications of inputs or design. See *infra* notes 118–20 and accompanying text.

<sup>34</sup> See Michinobu Yanagisawa, *The Shadowy World of Guns for Hire*, DAILY YOMIURI (Tokyo), May 11, 2005, at 2.

<sup>35</sup> Mercenaries helped give Alexander the Great his name, Henry II banned the Flemish mercenaries that nearly kept him from the throne and hired his own mercenaries, and mercenaries worked for Ramses II and King David. See KENNETH FOWLER, *MEDIEVAL MERCENARIES* ix (2001); KEN SILVERSTEIN, *PRIVATE WARRIORS* xv, 143 (2000); SERGE YALICHEV, *MERCENARIES OF THE ANCIENT WORLD* 43–44, 65, 173–75 (1997); Todd S. Milliard, *Overcoming Post-Colonial Myopia: A Call to Recognize and Regulate Private Military Companies*, 176 MIL. L. REV. 1, 2–3 (2003); W. Scott Jessee, *Mercenaries*, READER'S COMPANION TO MILITARY HISTORY, [http://college.hmco.com/history/readerscomp/mil/huml/mh\\_033800\\_mercenaries.htm](http://college.hmco.com/history/readerscomp/mil/huml/mh_033800_mercenaries.htm) (last visited Oct. 10, 2005).

<sup>36</sup> Norse mercenaries worked for companies that helped the Byzantine Empire in 1032. See Milliard, *supra* note 35, at 2, 9. Free companies of mercenary troops became a familiar staple of Medieval warfare. FOWLER, *supra* note 35, at ix–x; P. (PETER) W. SINGER, *CORPORATE WARRIORS: THE RISE OF THE PRIVATIZED MILITARY INDUSTRY* 22–26 (2003).

<sup>37</sup> See Yanagisawa, *supra* note 34, at 2.

<sup>38</sup> *Id.*

als, essential military sites, and U.S. government compounds in Iraq.<sup>39</sup> The private military companies offer their services to other nations, of course, generating about \$100 billion in annual revenues around the globe.<sup>40</sup> For instance, one U.S. company trained the Croat leadership for eight months, which then defeated Serb forces in 1995.<sup>41</sup>

Familiar in the medieval era, private companies creating and deploying troops diminished with the rise of nation-states, which were capable of raising and supporting their own military and which developed the conception that sovereign nation-states alone may legitimately use military force.<sup>42</sup> The rise of the nation-state marked a shift from multinational armies, composed of soldiers recruited from many places, to the citizen-army.<sup>43</sup> Emerging nation-states asserted their monopoly over not only the legitimate use of force, but also their own citizens' use of force in and outside the nation's territory.<sup>44</sup> By the twentieth century, only those places with legacies of imperialism or temporary shortages of manpower deployed soldiers-for-hire, and the list of such exceptions (for example, Saudi Arabia, Libya, Angola, and Nigeria) matches a list of global trouble spots.<sup>45</sup>

Yet the downsizing of major military efforts at the end of the Cold War and the end of apartheid in South Africa created a supply of individuals with military training in this country and elsewhere who could market their services.<sup>46</sup> The widespread hope that privatization would improve efficiency and save costs for nation-states in turn generated enormous governmental demand for private contractors.<sup>47</sup> Privatization in the abstract could mean ending government involvement alto-

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<sup>39</sup> Daniel Bergner, *The Other Army*, N.Y. TIMES MAG., Aug. 14, 2005, at 29–31.

<sup>40</sup> Barry Yeoman, *Need an Army? Just Pick up the Phone*, N.Y. TIMES, Apr. 2, 2004, at A19 (citing Peter W. Singer).

<sup>41</sup> Milliard, *supra* note 35, at 11–15 (describing fourteen-person team from Military Professional Resources, Inc.). Companies organized in the United Kingdom, South Africa, and Israel, as well as in the United States, have built the modern privatized military industry. See Singer, *supra* note 36, at 9–17.

<sup>42</sup> Deborah Avant, *Think Again: Mercenaries*, FOREIGN POL'Y, July/Aug. 2004, at 20, available at [http://www.foreignpolicy.com/story/cms.php?story\\_id=2577&print=1](http://www.foreignpolicy.com/story/cms.php?story_id=2577&print=1); Clifford J. Rosky, *Force, Inc.: The Privatization of Punishment, Policing, and Military Force in Liberal States*, 36 CONN. L. REV. 879, 912–13 (2004); Janice E. Thomson, *State Practices, International Norms, and the Decline of Mercenarism*, 34 INT'L STUD. Q. 23, 26–27, 34–35 (1990).

<sup>43</sup> Thomson, *supra* note 42, at 26.

<sup>44</sup> *Id.* at 30–31, 34–39.

<sup>45</sup> See *id.* at 27.

<sup>46</sup> JAMES R. DAVIS, FORTUNE'S WARRIORS 109 (2000); Singer, *supra* note 36, at 49, 103; cf. Thomson, *supra* note 42, at 39 (19th century demobilization of British led to surplus of British officers, who joined the Latin American conflicts).

<sup>47</sup> See Singer, *supra* note 36, at 66–70.

gether either by selling off public assets or terminating government funding and involvement in a particular activity. But with much federal governmental action—and most DOD initiatives—privatization simply becomes reliance on nongovernmental actors who are paid under publicly-funded contracts or vouchers.<sup>48</sup> Increasingly, ordinary day-to-day government operations proceed this way.<sup>49</sup> Private companies work under contracts to manage welfare programs, enforce child support obligations, and build and operate prisons.<sup>50</sup> Intended to save money and bring efficiency, the private sector introduces competitive bidding and techniques of business management to government operations.<sup>51</sup>

In my own work, I have explored the potential benefits to society from privatization of schools and human services—involving for-profit, as well as nonprofit and religious organizations.<sup>52</sup> These benefits include innovation, efficiency, and replenishment of pluralism that itself can support individual freedom.<sup>53</sup> There are risks, too: risks of exclusionary practices, fraud, and religious coercion.<sup>54</sup> Therefore, I have argued, privatization should be accompanied by an insistence on public values following private dollars.<sup>55</sup> The content of those values, in turn, should stem from the Constitution and from public debate.<sup>56</sup>

Does privatization make sense when the operations themselves involve the use of force—as they do with war, prisons, and police?<sup>57</sup> In Canada, considerable privatization of social services has been followed by large-scale privatization of prisons, police, and the military.<sup>58</sup> A decision to privatize the Canadian Forces' Department of Supply and Warehousing generated critical television ads and the ironic

<sup>48</sup> See Martha Minow, *Public and Private Partnerships: Accounting for the New Religion*, 116 HARV. L. REV. 1229, 1230–32 (2003); see also Guttman, *supra* note 30, at 330–31.

<sup>49</sup> See MARTHA MINOW, PARTNERS, NOT RIVALS: PRIVATIZATION AND THE PUBLIC GOOD 3 (2002).

<sup>50</sup> See *id.* at 20; Minow, *supra* note 48, at 1242–46.

<sup>51</sup> See Minow, *supra* note 48, at 1243.

<sup>52</sup> See MINOW, *supra* note 49, at 7–22.

<sup>53</sup> See Minow, *supra* note 48, at 1242–46.

<sup>54</sup> See *id.* at 1246–55.

<sup>55</sup> See MINOW, *supra* note 49, at 142–44.

<sup>56</sup> See *id.* at 144–50.

<sup>57</sup> See Sharon Dolovich, *State Punishment and Private Prisons*, 55 DUKE L.J. (forthcoming); Clayton P. Gillette & Paul B. Stephan III, *Constitutional Limitations on Privatization*, 46 AM. J. COMP. L. 481, 482–83 (1998); David A. Sklansky, *The Private Police*, 46 UCLA L. REV. 1165, 1168 (1999); Ahmed A. White, *Rule of Law and the Limits of Sovereignty: The Private Prison in Jurisprudential Perspective*, 38 AM. CRIM. L. REV. 111, 134–35 (2001).

<sup>58</sup> See Alan Cairns, *Jailhouse Blues: Ontario Towns Feel Sense of Betrayal as Gov't Leans to Private-Run Jails*, TORONTO SUN, Apr. 2, 2000, at 32.

phrase, "welcome to War-Mart."<sup>59</sup> Private military companies recruit employees from the United States, Canada, and around the world.<sup>60</sup> This investigation of privatization within the U.S. military requires further discussion about the nature and scope of its use of private military companies. It also invites consideration of three kinds of normative analysis that I pursue here. First, do the military contractors, once engaged, deliver what they promise? Second, does the use of private contractors overall advance or detract from purposes articulated by the military itself? Third, how well does the use of private contractors serve (or disserve) the purposes of a military in a constitutional democracy?

Before proceeding any further, I must acknowledge one great limitation of this effort: the lack of transparency and disclosure makes it difficult for the public—and for me—to know what is going on with the military's use of private contractors. The private firms disclose some of their activities in promoting their services, but they can resist media and Congressional inquiries, claiming that they need to do so to protect proprietary information.<sup>61</sup> Private companies are free from the disclosure obligations placed on the government by the FOIA, the federal law intended to make democracy work by ensuring access to all of the government's information compatible with security.<sup>62</sup> There is some authority that private companies enjoy the ability to enjoin the government from disclosing information they have shared with the government in the course of doing business together.<sup>63</sup> As the

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<sup>59</sup> Ian McDougall, *Bargain Warehouse: Union Irate as Army Privatizes Supply Department*, TORONTO SUN, Mar. 13, 2002, at 33.

<sup>60</sup> Cf. Danilo Burzan, *Arrests Reignite Kosovo Cauldron*, ADELAIDE ADVERTISER (Australia), Aug. 5, 2000, at 56 (reporting that two Canadians, working for a private contractor, were arrested for participation in training Yugoslav Republic forces).

<sup>61</sup> SILVERSTEIN, *supra* note 35, at 145.

<sup>62</sup> See Freedom of Information Act, 5 U.S.C. § 552 (2000); Nicole B. Casarez, *Furthering the Accountability Principle in Privatized Federal Corrections: The Need for Access to Private Prison Records*, 28 U. MICH. J. L. REV. 249, 264–68 (1995); Craig D. Felser, *Privatization and the Freedom of Information Act: An Analysis of Public Access to Private Entities Under Federal Law*, 52 FED. COMM. L.J. 21, 31 (1999). Application of FOIA turns on whether the entity in question is an "agency" and whether the records in question should be considered "agency records." See Felser, *supra*, at 31–32.

<sup>63</sup> Kristen Elizabeth Uhl, Comment, *The Freedom of Information Act Post 9–11: Balancing the Public's Right to Know, Critical Infrastructure Protection, and Homeland Security*, 53 AM. U. L. REV. 261, 293 n.188 (2003); see also 5 U.S.C. §§ 551(1) (defining agencies covered by FOIA), 552(b)(4) (exempting trade secrets and commercial and financial information that is privileged or confidential from statutory disclosure); Jack Beermann, *Privatization and Political Accountability*, 28 FORDHAM URB. L.J. 1507, 1553–56 (2001); Jody Freeman, *Extending Public Law Norms Through Privatization*, 116 HARV. L. REV. 1285, 1306 (2003);

United States fears for its security and engages in war, the executive branch is especially secretive, while Congress and the courts are more than usually deferential. The general public seems mainly unaware of and uninterested in examining the expanding role of private corporations in managing and operating force—weapons, prisons, and policing—in the name of the government. It remains surprising to people to learn that private contractors are engaging in interrogations in Guantanamo and Iraq, that publicly traded companies run prisons in this country, or that Halliburton built the military prison at Guantanamo Bay, Cuba.<sup>64</sup> The lack of transparency about the scope and effects of private company contracts with the U.S. military is not merely a caveat admitting the limitations of my analysis, but an important demerit as I try to assess how well the contractors are performing, how well they are achieving goals of military purposes, and how well they are achieving goals of a constitutional democracy.

Apparently, at least on some level, there is growing public awareness of the presence of private military companies. A recent cartoon in the *New Yorker* magazine shows a group of kids dressed up with combat gear and toy guns.<sup>65</sup> One says to another, "Tommy and Ben are like Green Berets, Dan and Jerry are Navy SEALs, and me and Scott are like private contractors."<sup>66</sup> Another cartoon earlier last year shows one worker referring to two soldiers standing behind his desk as his "private army."<sup>67</sup> Tamed to be part of children's games or office cubicle humor in an elite magazine, the outsourcing of force disturbs at least our humorists. Let's see if we, too, should be disturbed. I will pursue this inquiry both in terms of contract compliance and potential jeopardy to larger missions for the military, the nation, and democracy.

### I. IS THERE BASIC CONTRACTUAL COMPLIANCE?

Whatever debates may arise over the norms that ought to apply in evaluating the performance of private military contractors, the basic

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Karen E. Jones, Comment and Casenote, *The Effect of the Homeland Security Act on Online Privacy and the Freedom of Information Act*, 72 U. CIN. L. REV. 787, 800 (2003).

<sup>64</sup> Singer, *supra* note 15.

<sup>65</sup> William Hamilton, Cartoon, *NEW YORKER*, Oct. 4, 2004, at 89, available at [www.cartoonbank.com](http://www.cartoonbank.com) [ID 119393] (depicting children pretending to be military personnel and "private contractors").

<sup>66</sup> *Id.*

<sup>67</sup> Charles Barsotti, Cartoon, *NEW YORKER*, May 3, 2004, at 34, available at [www.cartoonbank.com](http://www.cartoonbank.com) [ID 70447] (satirizing the privatization of the Army).

elements of contract compliance should not give rise to dispute. Do contractors do what they are asked to do—and not do what they are not asked to do? Massive outsourcing has drawn civilian military contractors into military work without meaningful methods for ensuring contractual compliance.<sup>68</sup> The combination of the scale of the outsourcing, poor communication and coordination of contractors with military personnel, and defective managerial systems within both the DOD and military services produce this unavoidable conclusion.<sup>69</sup>

Presidents Bill Clinton and George W. Bush both embraced outsourcing as a way to help downsize the military.<sup>70</sup> President Bush identified outsourcing as one of his five top government-wide priorities.<sup>71</sup> Congress adopted bipartisan caps on the number of civil servants employed by the government—but did not limit the number of persons who could be employed through contracts with private companies.<sup>72</sup> For nearly a decade this has allowed policymakers to hide from public view the true size of the government.<sup>73</sup> Many of the functions the government could outsource involve not only commercial activities such as transportation, laundry, and food services, but also planning, policy development, managing weapon systems, and managing the military workforce.<sup>74</sup> President Clinton used private contract employees to administer the nuclear nonproliferation agreement with Russia.<sup>75</sup>

That supply and demand resulted in the growth of private corporations that offered military training and assistance, including logistical services and planning, weapons management and servicing, as well as weapons development and management of other private corpora-

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<sup>68</sup> See Guttman, *supra* note 30, at 323–24.

<sup>69</sup> See Schooner, *supra* note 18, at 556–60.

<sup>70</sup> Guttman, *supra* note 30, at 330. See generally Guttman, *supra* note 21. For an example of practices under the Clinton Administration, see *Improving the Combat Edge Through Outsourcing*, in 11 DEF. ISSUES 30 (Mar. 1996), <http://www.defenselink.mil/speeches/1996/s19960301-report.html>.

<sup>71</sup> OFFICE OF MGMT. & BUDGET, THE PRESIDENT'S MANAGEMENT AGENDA: FISCAL YEAR 2002 17–18 (2001), available at <http://www.whitehouse.gov/omb/budget/fy2002/mgmt.pdf>.

<sup>72</sup> Congress required agencies to inventory what work should be understood as commercial and what instead is inherently governmental. OFFICE OF MGMT. & BUDGET, OMB CIR. NO. A-76 (REVISED), PERFORMANCE OF COMMERCIAL ACTIVITY (2003), available at [http://www.whitehouse.gov/omb/circulars/a076/a76\\_incl\\_tech\\_correction.pdf](http://www.whitehouse.gov/omb/circulars/a076/a76_incl_tech_correction.pdf) [hereinafter OMB CIR. NO. A-76 (REVISED)] (regarding the Federal Activities Inventory Reform Act (FAIR) of 1998); see *infra* note 169 (discussing departures from Circular A-76).

<sup>73</sup> See Paul C. Light, *The True Size of Government*, GOV'T EXECUTIVE MAG., Jan. 1, 1999, <http://govexec.com/features/0199/0199s1.htm>.

<sup>74</sup> Schooner, *supra* note 18, at 554. See generally Guttman, *supra* note 21.

<sup>75</sup> Guttman, *supra* note 30, at 335.

tions doing business with the military.<sup>76</sup> The government increasingly turned to private individuals to perform core military tasks and to private companies to orchestrate plans and implementation.<sup>77</sup> The private firms have strong ties to U.S. government:<sup>78</sup>

The Pentagon and CIA have long used private contractors for a variety of tasks, from building base infrastructure to assisting with covert operations. The current situation differs in both scope and size from past practice, most famously revealed in the Iran/contra scandal. Today, the firms most heavily involved are not CIA cut-outs but multimillion-dollar corporations with diverse interests. Their work is implemented not by foreign locals trained by the CIA but by high-ranking U.S. military officers fresh out of the armed forces.<sup>79</sup>

On September 10, 2001, Secretary of Defense Donald Rumsfeld announced what he called an "all-out campaign to shift [the] Pentagon's resources from bureaucracy to the battlefield, from tail to the tooth."<sup>80</sup> He declared that the Pentagon would be challenged to eliminate or shift to private suppliers any but the core activities of defense.<sup>81</sup> He announced a commitment to ensure that the Pentagon would learn from, and take advantage of, the private sector's expertise in management, technology, and business practices.<sup>82</sup> The Pentagon

<sup>76</sup> Guttman, *supra* note 21.

<sup>77</sup> See Lisa L. Turner & Lynn G. Norton, *Civilians at the Tip of the Spear*, 51 A.F. L. REV. 1, 8 (2001). In 1999, noting that judge advocates increasingly see issues arising from the growing numbers of contractor personnel—and nongovernmental private organizations working alongside or near the military—Colonel Steven J. Zamparelli commented, "[n]ever has there been such a reliance on nonmilitary members to accomplish tasks directly affecting the tactical success of an engagement." *Id.* at 3 (quoting Steven J. Zamparelli, *Competitive Sourcing and Privatization: Contractors on the Battlefield, What Have We Signed Up For?*, 23 A.F. J. LOG. 11, 11 (1999)).

<sup>78</sup> SILVERSTEIN, *supra* note 35, at xv ("[The private firms] are licensed by the State Department and are staffed by former military officers—effectively serving as an extension of foreign policy.")

<sup>79</sup> *Id.* at 143.

<sup>80</sup> Donald H. Rumsfeld, Secretary of Defense, DOD Acquisition and Logistics Excellence Week Kickoff—Bureaucracy to Battlefield (Sept. 10, 2001), <http://www.pentagon.gov/speeches/2001/s20010910-secdef.html>.

<sup>81</sup> *Id.*

<sup>82</sup> Secretary of Defense Donald H. Rumsfeld explained:

Already we have made some progress. We've eliminated some 31 of the 72 acquisition-related advisory boards. We now budget based on realistic estimates. We're improving the acquisition process. We're investing \$400 million in public-private partnerships for military housing. Many utility services to military installations will be privatized.



delivered \$300 billion worth of contracts to private military industries between 1992 and 2002.<sup>83</sup> It has even outsourced security at Army bases within the United States.<sup>84</sup>

When the work of national defense dramatically increased after 9/11, Pentagon reliance on private military companies escalated.<sup>85</sup> Private contractors played key roles in the U.S. war in Afghanistan.<sup>86</sup> They served in paramilitary units with the Central Intelligence Agency (the "CIA") that hit the ground before other combat troops; they maintained combat equipment, provided logistical support, and worked with surveillance and targeting plans. Currently, private contracts are part of the military operation trying to locate Osama bin Ladin.<sup>87</sup> Major Gary Tallman, an Army spokesman, acknowledged the unprecedented level of outsourcing since 9/11 and commented, "[t]he Army is much smaller than in the past. When you run out of soldiers and they don't have an expertise, one way to get that capability on the battlefield is to contract it."<sup>88</sup>

Before the war in Iraq started, the Army announced that it would permit contractors to compete for 154,910 civilian jobs—more than half of its civilian workforce—as well as 58,727 military positions.<sup>89</sup> Economist and columnist Paul Krugman observes that the Bush administration has privatized everything in sight in Iraq, including guards for U.S. installations, interrogators, and other seemingly central military functions.<sup>90</sup> Privatization at the DOD and the armed services has come to mean buying the time of people who work alongside Pentagon officials and troops on the ground. These people do, as Dan Guttman puts it, "what citizens consider the stuff of government: planning, policy writing, budgeting, intelligence gathering, nation

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We're tightening the requirements for other government agencies to reimburse us for detailees, and we're reviewing to see whether we should suspend assignments where detailees are not fully reimbursed.

We have committed \$100 million for financial modernization, and we're establishing a Defense Business Board to tap outside expertise as we move to improve the department's business practices.

*Id.*

<sup>83</sup> Editorial, *War-Mart*, ST. LOUIS POST-DISPATCH, Oct. 18, 2003, at 30.

<sup>84</sup> *Id.*

<sup>85</sup> Singer, *supra* note 15.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> David Washburn & Bruce V. Bigelow, *Debate on Military Contractors Heats Up*, SAN DIEGO UNION-TRIB., May 7, 2004, at A1.

<sup>89</sup> Guttman, *supra* note 21.

<sup>90</sup> Schooner, *supra* note 18, at 553 (quoting Paul Krugman).

building,<sup>91</sup> but under the employment relationship of a temporary worker. After research and development and aircraft, the third largest category for military expenditures on contracted work recently has been for “professional, administrative and management support services.”<sup>92</sup> In a letter to the Congressional Armed Services Committee on May 4, 2004, Secretary of Defense Donald Rumsfeld estimated there were 20,000 private security workers in the DOD’s employment in Iraq, which would make these private workers easily the largest group—larger than the British deployment—working alongside the U.S. military.<sup>93</sup>

Immediate benefits are clear. A private company can handpick the team for a given project, and reassemble or disassemble the team when the job is done or changes. A private company can hire and send twenty former colonels, while the U.S. Army would have to “strip more than an entire combat division to muster that many,” observed Colonel Bruce Grant of the Institute for National Strategic Studies.<sup>94</sup>

This kind of nimbleness is especially difficult for the DOD in its deployment of its civilian workers, even though they increasingly perform key roles in defense policy, intelligence, acquisitions, and weapon system maintenance.<sup>95</sup> By depending on private companies, the military can obtain the newest technology and the staffs trained to maintain it—and even avoid the costs of retraining simply by shifting to a new team. But the heavy reliance on private contractors for both the enormous scale of work underway and for management, planning, and even supervision of other contracts raises questions at the

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<sup>91</sup> Guttman, *supra* note 21.

<sup>92</sup> *Id.* These expenditures more than doubled over the past decade. *Id.*

<sup>93</sup> Ante, *supra* note 21, at 76; see Singer, *supra* note 15 (estimating 15,000–20,000 contract workers in Iraq); see also Robert Collier, *Global Security Firms Fill in As Private Armies*, S.F. CHRON., Mar. 28, 2004, at A1 (estimating 15,000 private security agents were employed by 25 private security firms in Iraq in 2004).

<sup>94</sup> SILVERSTEIN, *supra* note 35, at 167.

<sup>95</sup> Describing these functions performed by the civilian employees of DOD, a 2003 study by the GAO (then called the General Accounting Office, renamed the Government Accountability Office in 2004) observed that such deployment was impossible for the Department of Defense when it came to its civilian workforce because even it did not include “data on the skills and competencies needed to successfully accomplish future missions; therefore, DOD and the components risk not being able to put the right people, in the right place, and at the right time,” nor did it include how to integrate the civilian employees with their military counterparts or sourcing initiatives. U.S. GEN. ACCOUNTING OFFICE, GAO-03-475, DOD PERSONNEL: DOD ACTIONS NEEDED TO STRENGTHEN CIVILIAN HUMAN CAPITAL STRATEGIC PLANNING AND INTEGRATION WITH MILITARY PERSONNEL AND SOURCING DECISIONS Exec. Sum. (2003), available at <http://www.gao.gov/new.items/d03475.pdf> [hereinafter GAO-03-475].

most basic level about whether anyone knows what the private contractors are doing.<sup>96</sup> Are the contractors doing what they promised to do? Ensuring that the contracted work is performed, and performed without fraud, overcharging, or mismanagement, turns out to require clear and consistent oversight.<sup>97</sup> Yet this seems precisely what has been missing certainly during the Iraq war period, but with clear signs of serious problems long before.<sup>98</sup>

Management and oversight problems of two sorts appear to be growing to staggering proportions for the U.S. military: 1) failures of basic oversight and management of specific existing contracts both reflecting and resulting in confused lines of authority and accountability;<sup>99</sup> and 2) widespread departures from established contracting processes due not only to exigencies of emergency but also to convenience and inattention, with disregard for established distinctions between inherently governmental and nongovernmental functions.<sup>100</sup>

#### A. Failures of Basic Oversight to Ensure Contract Enforcement

Managing contracts may seem a nicety in the middle of a war, but when the contracts concern deployment of weaponry, security forces, and interrogators, that excuse seems less convincing. At the Abu Ghraib prison, military personnel did not receive guidance about how to use contracted personnel and did not know the terms of the contracts nor their procedures.<sup>101</sup> Whatever else may be said about Abu Ghraib, this lack of clarity about contract workers and military is not anomalous. The Government Accountability Office (the "GAO") found the same problem in the Balkans in 2000; military officers were confused about whether they could control the actions of contractors, and this lack of understanding was a major factor in the government's inability to control adequately contract costs.<sup>102</sup>

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<sup>96</sup> See Guttman, *supra* note 21.

<sup>97</sup> See U.S. GEN. ACCOUNTING OFFICE, GAO-04-615, DOD BUSINESS SYSTEM MODERNIZATION: BILLIONS CONTINUE TO BE INVESTED WITH INADEQUATE MANAGEMENT OVERSIGHT AND ACCOUNTABILITY 3 (2004), available at <http://www.gao.gov/new.items/d04615.pdf> [hereinafter GAO-04-615]; Schooner, *supra* note 18, at 572.

<sup>98</sup> See GAO-04-615, *supra* note 97, at 3; Schooner, *supra* note 18, at 572; *infra* notes 101–02.

<sup>99</sup> See *infra* notes 101–49 and accompanying text.

<sup>100</sup> See *infra* notes 150–78 and accompanying text.

<sup>101</sup> Schooner, *supra* note 18, at 563–64 (discussing the Fay Report).

<sup>102</sup> U.S. GEN. ACCOUNTING OFFICE, GAO/NSIAD-00-225, CONTINGENCY OPERATIONS: ARMY SHOULD DO MORE TO CONTROL CONTRACT COSTS IN THE BALKANS 21 (2000), available at <http://www.gao.gov/archive/2000/ns00225.pdf> [hereinafter GAO/NSIAD-00-225]

It is difficult to administer a contract when the contracting officer has no representative on site, yet this is the case with many DOD contracts.<sup>103</sup> Even if the lines of authority clearly locate the civilian contractor employees under military command, these civilians do not face the same rewards and sanctions as do the members of the military, and other kinds of sanctions for misbehavior are limited and remote.<sup>104</sup> The Fay Report, following the abuses in Abu Ghraib, concluded that a properly trained contracting officer's representative must be on site to prevent a recurrence of that situation.<sup>105</sup> Congress adopted the Military Extraterritorial Jurisdiction Act to allow prosecutions of contractors for offenses occurring while deployed if those offenses would be felonies in the United States, but this is a very limited tool for holding the line against misconduct far from home.<sup>106</sup>

The contract enforcement failures at the DOD are pervasive and basic.<sup>107</sup> Its financial management and related business operations, when reviewed by the GAO, show persistent fundamental failures that produce waste and inadequate accountability and threaten its mission.<sup>108</sup> Specifically asking whether the DOD has adequate capacity to oversee contracts for logistic support across the military services, the GAO found that the contractors proved responsive when reviewed, but generally received inadequate reviews in part because insufficient numbers of appropriately trained military staff were on hand to provide effective oversight and also because many military units lacked understanding of their role in directing and monitoring the work of contractors.<sup>109</sup> In another study in 2004, the GAO concluded that the fundamental flaws in the DOD's business systems affect the effective-

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(cited in Rebecca Rafferty Vernon, *Battlefield Contractors: Facing the Tough Issues*, 33 PUB. CONF. L.J. 369, 385-86 (2004)).

<sup>103</sup> See Schooner, *supra* note 18, at 557-58.

<sup>104</sup> See Singer, *supra* note 15.

<sup>105</sup> Fay Report, *supra* note 17, at 47; Dorgan Hearing, *supra* note 1, at 17 (testimony of Steve Schooner, Co-Director, Government Procurement Law Program, George Washington University Law School).

<sup>106</sup> Military Extraterritorial Jurisdiction Act, 18 U.S.C. §§ 3261-67 (2000); Fay Report, *supra* note 17, at 50.

<sup>107</sup> See Gutman, *supra* note 30, at 323-24 (discussing high-level official admissions of agency-wide deficiencies and GAO reports).

<sup>108</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-05-140T, DEPARTMENT OF DEFENSE: FURTHER ACTIONS ARE NEEDED TO EFFECTIVELY ADDRESS BUSINESS MANAGEMENT PROBLEMS AND OVERCOME KEY BUSINESS TRANSFORMATION CHALLENGES 1 (2004), available at <http://www.gao.gov/new.items/d05140t.pdf> [hereinafter GAO-05-140T].

<sup>109</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-04-854, MILITARY OPERATIONS: DOD'S EXTENSIVE USE OF LOGISTICS SUPPORT CONTRACTS REQUIRES STRENGTHENED OVERSIGHT 4 (2004), available at <http://www.gao.gov/new.items/d04854.pdf> [hereinafter GAO-04-854].

ness of the agency and contribute to fraud, waste, and abuse.<sup>110</sup> Yet the government rarely suspends contractors, even for misconduct, overcharging, and other violations.<sup>111</sup>

In effect confirming Secretary Rumsfeld's 2001 call to revolutionize the DOD bureaucracy, the GAO has documented several problems: year-long delays in processing security clearances for contractor employees (with failures by individual military services to respect the security clearances granted by another service),<sup>112</sup> inadequate information and no coordinated plan to assess whether various efforts to promote small businesses in the procurement activities could work,<sup>113</sup> and millions of dollars in payment adjustments for mistaken billing.<sup>114</sup> The DOD does not follow the best commercial practices in managing service contracts by analyzing spending patterns to enable savings.<sup>115</sup> The DOD also fails to use value engineering to control costs in weapons until it is too late to make substantial savings.<sup>116</sup> Logistical support contracts used by several of the armed forces with good results in earlier periods have been marred during the recent Iraq efforts by inadequate oversight, poor definition of terms, and failed cost containment.<sup>117</sup>

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<sup>110</sup> GAO-04-615, *supra* note 97, at 3.

<sup>111</sup> Dorgan Hearing, *supra* note 1, at 20 (testimony of Danielle Brian).

<sup>112</sup> U.S. GEN. ACCOUNTING OFFICE, GAO-04-632, DOD PERSONNEL CLEARANCES: ADDITIONAL STEPS CAN BE TAKEN TO REDUCE BACKLOGS AND DELAYS IN DETERMINING SECURITY CLEARANCE ELIGIBILITY FOR INDUSTRY PERSONNEL 3 (2004), available at <http://www.gao.gov/new.items/d04632.pdf> [hereinafter GAO-04-632].

<sup>113</sup> U.S. GEN. ACCOUNTING OFFICE, GAO-04-381, CONTRACT MANAGEMENT: DOD NEEDS MEASURES FOR SMALL BUSINESS SUBCONTRACTING PROGRAM AND BETTER DATA ON FOREIGN SUBCONTRACTS 2-3 (2004), available at <http://www.gao.gov/new.items/d04381.pdf> [hereinafter GAO-04-381].

<sup>114</sup> U.S. GEN. ACCOUNTING OFFICE, GAO-03-727, DOD CONTRACT PAYMENTS: MANAGEMENT ACTION NEEDED TO REDUCE BILLIONS IN ADJUSTMENTS TO CONTRACT PAYMENT RECORDS 28 (2003), available at <http://www.globalsecurity.org/military/library/report/gao/d03727.pdf> [hereinafter GAO-03-727].

<sup>115</sup> U.S. GEN. ACCOUNTING OFFICE, GAO-03-661, BEST PRACTICES: IMPROVED KNOWLEDGE OF DOD SERVICE CONTRACTS COULD REVEAL SIGNIFICANT SAVINGS 3 (2003), available at <http://www.globalsecurity.org/military/library/report/gao/d03661.pdf> [hereinafter GAO-03-661].

<sup>116</sup> U.S. GEN. ACCOUNTING OFFICE, GAO-03-590R, USE OF VALUE ENGINEERING IN DEFENSE ACQUISITIONS 2 (2003), available at <http://www.globalsecurity.org/military/library/report/gao/d03590r.pdf> [hereinafter GAO-03-590R].

<sup>117</sup> GAO-04-854, *supra* note 109, at Highlights. The report notes:

In its contingency operations since the early 1990s, the Department of Defense (DOD) has relied extensively on logistics support contractors to provide many of the supplies and services needed by deployed U.S. forces. As requested, GAO assessed DOD's planning in its use of logistics support con-

The form of some government contracts itself renders cost management difficult. Share-in-savings contracts allow the contractor who develops a system for the government to share in the savings the system is supposed to generate.<sup>118</sup> Yet it is difficult to measure such savings.<sup>119</sup> The lack of caps in these contracts exposes the government to potentially limitless demands for payment by the contractors, and questionable accounting practices used with these contracts exacerbate these problems.<sup>120</sup>

Some problems with contract oversight are not new with the war in Iraq and substantially pre-date the Bush Administration.<sup>121</sup> The GAO reported confusion by Army officers over whether they could control the actions of contractors in the Balkans in 2000, given the performance-based nature of the contract.<sup>122</sup> Years of reports document problems with Los Alamos, the weapons facility run under contract by the University of California.<sup>123</sup> Repeatedly losing classified and sensitive material and technology, more than three-quarters of the security personnel there also failed tests of required skills and were unable to demonstrate abilities to arrest intruders or shoot with

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tracts in contingency operations; determined whether DOD has had contract oversight processes that are adequate to ensure that quality services were provided in an economical and efficient manner; and assessed the extent to which DOD provided trained personnel qualified to oversee its contractors. GAO focused its efforts on four logistics support contracts chosen because of their size and chosen to represent more than one military service—the Army's Logistics Civil Augmentation Program (LOGCAP) and Balkans Support Contract, the Navy's Construction Capabilities Augmentation Program, and the Air Force's Contract Augmentation Program.

DOD did not have sufficient numbers of trained personnel in place to provide effective oversight of its logistics support contractors. The Army has deployed units responsible for supporting the LOGCAP contract, but some of the personnel have little knowledge of the contract. The Air Force did not consistently train evaluators to monitor its logistics support contractor's performance. Military units across the services receiving contractor support have lacked a comprehensive understanding of their roles and responsibilities, which include establishing the work to be done by contractors and monitoring contractors' performance.

*Id.*

<sup>118</sup> Jason Miller, *Former OFPP Head Warns Agencies About Risks of Share-in-Savings Contracts*, GOV'T COMPUTER NEWS, Nov. 12, 2004, [http://www.gcn.com/vol1\\_no1/daily-updates/27887-1.html](http://www.gcn.com/vol1_no1/daily-updates/27887-1.html) (describing comments by Angela Styles, former head of the Office of Federal Procurement Policy).

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> See *infra* notes 122–25 and accompanying text.

<sup>122</sup> GAO/NSIAD-00-225, *supra* note 102, at 21.

<sup>123</sup> See Kenay Davidson, *Lapses at Labs Go Back Decades*, S.F. CHRON., Aug. 1, 2004, at A1.

accuracy.<sup>124</sup> But the deeper problem is the failure of the U.S. Department of Energy—after years of repeated complaints, congressional investigations, and reports—to demand accountability of the contracting parties, whether nonprofit institutions like universities or for-profit companies.<sup>125</sup> To demand accountability is either to secure compliance or else find the contractors in breach, unworthy of payment, or renewal. To hold contractors accountable requires knowledge of what they have done, and if they have failed to perform adequately, then to replace them with another contractor or else to take the tasks back in-house.

Problems with contract monitoring may have been most acute during the Iraq war, and they did not much improve despite infusions of resources and the passage of time.<sup>126</sup> Steven Schooner attributes this to a failure to recruit aggressively the staff necessary to manage the contracting responsibilities.<sup>127</sup> The DOD repeatedly has failed to hold private contractors accountable for their performance of multi-million dollar contracts in Iraq.<sup>128</sup>

Not only are there major examples of overcharging and failures to perform, illustrated by the Congressional and media investigations of Halliburton, but there is the more fundamental failure of the DOD itself to manage and enforce the contracts.<sup>129</sup> The Office of the Inspector General issued a 2004 report on the Coalition contracts in Iraq and found not only missing and incomplete records, but an inef-

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<sup>124</sup> *See id.*

<sup>125</sup> *See id.*

<sup>126</sup> Dorgan Hearing, *supra* note 1, at 18 (testimony of Steve Schooner). Congress called upon the DOD to devise a plan to supervise the private security companies and monitor human rights violations, overcharging, and quality. DOD has missed the deadline. *See* Berger, *supra* note 39, at 54.

<sup>127</sup> *See generally* Dorgan Hearing, *supra* note 1.

<sup>128</sup> A contracting officer who told Congress that Halliburton was abusing the contracting protocol faced a demotion; some viewed this as retaliation. *See* T. Christian Miller, *Democrats Demand Probe of Demotion*, L.A. TIMES, Aug. 30, 2005, at A8 (describing treatment of Bunnatine Greenhouse); Mark A. Stein, *Indictments and Statistics All Overwhelmed by Tragically Down South*, N.Y. TIMES, Sept. 3, 2005, at C3 (same).

<sup>129</sup> DOD and the Army also lack sufficient controls when it acts as a seller of military technology, resulting in the shipment of classified materials to countries not cleared for receipt of such information. Apparently, the Army does not even have a method for retrieving materials shipped to countries ineligible to receive classified materials. U.S. GEN. ACCOUNTING OFFICE, GAO-04-327, FOREIGN MILITARY SALES: IMPROVED ARMY CONTROLS COULD PREVENT UNAUTHORIZED SHIPMENTS OF CLASSIFIED SPARE PARTS AND ITEMS CONTAINING MILITARY TECHNOLOGY TO FOREIGN COUNTRIES 3 (2004), available at <http://www.gpoaccess.gov/gaoreports/> (enter "GAO-04-327" in "2004 GAO Reports Only") [hereinafter GAO-04-327].

fective system for contract review, tracking, and monitoring.<sup>130</sup> Again, the lack of transparent information about all of this makes assessment necessarily incomplete, but the failure to obtain sufficient information apparently runs all the way to the DOD, which lacks basic information about how many private contract employees are on the ground in Iraq, the specific tasks each are to perform, and if they are in fact performing those tasks.<sup>131</sup> This means that the DOD simply is defaulting on its contractual role as the paying, bargaining partner.

The DOD also relies heavily on contracts with private companies to monitor other private contracts.<sup>132</sup> For example, Aegis was hired as the coordinating hub for more than 50 other private security companies in Iraq; it provides its own force of heavily armed protection teams to oversee reconstruction efforts, but also oversees the work of the other companies under a contract worth \$293 million (£163m).<sup>133</sup> The award to Aegis became a lightning rod. Former British army officer, Lieutenant Colonel Tim Spicer, heads Aegis.<sup>134</sup> He commanded and defended two soldiers charged and convicted with a murder in Northern Belfast.<sup>135</sup> He also previously directed a company that sold arms to Sierra Leone in violation of a United Nations embargo.<sup>136</sup> The particular worries about him or his company should not obscure the larger problem: how well can one company monitor another in advancing governmental purposes? Such an arrangement is doomed if there are no clear guidelines and no sustained monitoring by the government of the oversight process itself.<sup>137</sup>

In the Iraq war, the DOD has relied heavily on contractors who in turn subcontracted.<sup>138</sup> At a Congressional hearing about Hallibur-

<sup>130</sup> OFFICE OF INSPECTOR GENERAL, COALITION PROVISIONAL AUTHORITY REPORT NO. 04-013, COALITION PROVISION AUTHORITY'S CONTRACTING PROCESSES LEADING UP TO AND INCLUDING CONTRACT AWARD (2004) (cited in Schooner, *supra* note 18, at 558).

<sup>131</sup> See generally Singer, *supra* note 15.

<sup>132</sup> See Severin Carrell, *Spicer Cleared to Pursue £160m Iraq Contract*, INDEP. (London), Sept. 19, 2004, at 2.

<sup>133</sup> *Id.*

<sup>134</sup> See *id.*

<sup>135</sup> *Family Lobbies over U.S. Contract*, IRISH TIMES, June 18, 2004, at 8.

<sup>136</sup> *Id.* The GAO rejected a challenge to the award of the contract brought by rival DynCorp, which pointed out Spicer's involvement in violating an arms embargo. Jimmy Burns & Thomas Catan, *DynCorp Seeks to Overturn Iraq Security Contract: Dispute Over Award to Company Headed by Controversial Former British Army Officer*, FIN. TIMES (London), July 22, 2004, at 8.

<sup>137</sup> The downsizing of the Department of Defense's workforce dedicated to acquisitions coincided with the expanded use of outsourcing. See David A. Whiteford, *Negotiated Procurements: Squandering the Benefit of the Bargain*, 32 PUB. CONT. L.J. 509, 555 (2003).

<sup>138</sup> Dorgan Hearing, *supra* note 1, at 12.



ton cost-overruns and inefficiencies, one of the witnesses, Marie deYoung, was an employee of Halliburton and a former army captain.<sup>139</sup> Marie deYoung testified that Halliburton subcontracted to companies that in turn subcontracted, producing two or three layers of subcontracts.<sup>140</sup> She concluded, “[w]e, essentially, lost control of the project and paid between four to nine times what we needed to fund that project.”<sup>141</sup> An element of the scandal around Halliburton was its own failure to act promptly in paying its subcontractors who in turn faced bankruptcy and even threatened to stop performance—putting the security and effectiveness of the troops in jeopardy.<sup>142</sup> The heavy reliance on subcontractors and on contractors to monitor other contractors may result from reductions in the government’s own acquisition workforce—a legacy of the downsizing movement.<sup>143</sup> Steven Schooner concludes, “[t]he government has no choice at this point but to enter into larger, more complicated contracts, because they don’t have enough people to manage the contracts. So we’re being penny wise and pound foolish by not staffing up our acquisition workforce.”<sup>144</sup>

The stream of studies by the GAO—as requested by members of Congress—offers some spot checks.<sup>145</sup> Those checks, however, raise alarms about Pentagon failures to monitor contract performance. Reviews from the outside, by the GAO, Inspectors General of other departments, or the media, show failures to ensure cost-effectiveness and achievement of DOD purposes—and also failures to gather and review information sufficiently to permit ongoing contract oversight.<sup>146</sup> The promise of cheaper and more efficient services at the heart of privatization in any field bears little relationship to reality in the military context where competition is difficult or impossible to

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<sup>139</sup> *Id.* at 10.

<sup>140</sup> *Id.* at 12.

<sup>141</sup> *Id.* (testimony of Marie deYoung).

<sup>142</sup> *Id.* at 13 (“All Halliburton had to do was to negotiate reasonable prices and then pay its subcontracts for services rendered. But many of these vendors were not paid for months for a year at a time.”).

<sup>143</sup> See Dorgan Hearing, *supra* note 1, at 33.

<sup>144</sup> *Id.* (testimony of Steve Schooner).

<sup>145</sup> See, e.g., GAO-03-661, *supra* note 115, at 3, 6; U.S. GEN. ACCOUNTING OFFICE, GAO-03-574T, SOURCING AND ACQUISITION: CHALLENGES FACING THE DEPARTMENT OF DEFENSE 1 (2003), available at <http://www.gao.gov/new.items/d03574t.pdf> [hereinafter GAO-03-574T].

<sup>146</sup> See GAO-03-661, *supra* note 115, at 3, 6; GAO-03-574T, *supra* note 145, at 1. On failures to even secure the data that would allow control and management see Guttman, *supra* note 21.

sustain and where the private industry rather than the contracting government actors calls the shots.<sup>147</sup> When the government is the sole purchaser, and a handful of contractors dominate the field, it is difficult to bar or suspend a major contractor and often difficult even to get the contractors to perform and document their costs.<sup>148</sup> Ironically, as the Iraq war unfolded, the GAO changed its name from the General Accounting Office to the Government Accountability Office, just as the proliferating privatization of the military made government accountability newly elusive.<sup>149</sup> It almost has an Orwellian quality; if we declare there is an office of accountability, there is accountability—yet the GAO reports repeatedly expose the failures of accountability within the DOD.

### B. *Failures to Comply with Contracting Processes*

Several critics of private contracting by the DOD focus not on the DOD's failures to manage and enforce particular contracts, but on its departure from the norms and standards of established contracting processes.<sup>150</sup> Given the urgency of the situation in Iraq, Congress permitted waivers and irregularities in established procurement procedures,<sup>151</sup> just as Congress authorized the Department of Homeland Security to pilot the use of acquisition agreements that departed from the usual government contract procedures.<sup>152</sup> With Halliburton, the irregularities were justified because of the exigent circumstances—and also by claims that it was the only company with the relevant experience.<sup>153</sup> Yet subsequent evidence indicated that another company had equal, if not superior, experience.<sup>154</sup> Overall, the Policy Adminis-

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<sup>147</sup> Ann R. Markusen, *The Case Against Privatizing National Security*, 16 GOVERNANCE 471, 471 (2003).

<sup>148</sup> See Guttman, *supra* note 30, at 344.

<sup>149</sup> Stephen Barr, *GAO Gets New Name, Permission to Launch New Compensation System*, WASH. POST, July 12, 2004, at B2; John Kelly, *Answer Man: Name That Agency*, WASH. POST, Mar. 14, 2005, at C11.

<sup>150</sup> See Schooner, *supra* note 18, at 564–65.

<sup>151</sup> *Contract and Fiscal Law Developments of 2003—The Year in Review: Appendix A: Department of Defense (DOD) Legislation for Fiscal Year 2004*, ARMY LAWYER, 199 (Major J. Huyser ed., 2004).

<sup>152</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-05-136, HOMELAND SECURITY: FURTHER ACTION NEEDED TO PROMOTE SUCCESSFUL USE OF SPECIAL DHS ACQUISITION AUTHORITY 1–2 (2004), available at <http://gao.gov/new.items/d05136.pdf> [hereinafter GAO-05-136] (detailing the authority granted in the Homeland Security Act of 2002).

<sup>153</sup> Singer, *supra* note 15.

<sup>154</sup> Dorgan Hearing, *supra* note 1, at 6 (comment by Rep. Waxman describing Bechtel); *id.* at 8 (testimony of Sheryl Tappan, former Bechtel Proposal Manager) (“In my

trator of the Office of Federal Procurement observed as she left office in September 2003, “[t]here is still not a lot of oversight in some areas of our contracting system, and I think it will haunt us.”<sup>155</sup>

The contracts involved in the Abu Ghraib abuses proceed through an end-run around standard contracting procedures—an end-run that turns out to be well-trod.<sup>156</sup> Agencies can streamline the purchasing process by paying a fee to a program manager in another agency, which in turn can select a favored contractor without a competitive bid.<sup>157</sup> This shortcut permits sole-source awards and is supposed to separate programmatic authority from procurement authority, but also permits an agency to bypass procedural restrictions within its own department.<sup>158</sup> Steven Schooner worries that, as a result, procurement is often accomplished by an agency working for the fee rather than results.<sup>159</sup> The Inspector General for the Department of Interior concluded that chasing fees distorted the judgment of procurement officials.<sup>160</sup>

These interagency task-order service contracts were routed through the Department of Interior and the General Service Administration (the “GSA”) in contracts for interrogation, intelligence, and security services in Iraq without establishing clear content or monitoring for those contracts.<sup>161</sup> This approach may exempt the contractors from exposure to criminal liability that otherwise would attach through the Military Extraterritorial Jurisdiction Act.<sup>162</sup> Alerted to these departures from checks and controls in the contracting process, the Defense Inspector General reviewed twenty-four contracts awarded between February and August 2003 by DOD and found that eighteen were awarded through the GSA supply schedule approach,

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12 years doing government proposals, I had never seen anything as arrogant, as egregious as the ways in which Pentagon officials, in particular Corps of Engineer contracting staff at the Fort Worth district, treated the bidders, how they ignored our federal laws and regulations and the procedures that I still believe normally ensure fair play.”)

<sup>155</sup> Guttman, *supra* note 30, at 331 (quoting Angela Styles).

<sup>156</sup> See Schooner, *supra* note 18, at 564–70.

<sup>157</sup> *Id.* at 569.

<sup>158</sup> See *id.* at 564–69.

<sup>159</sup> *Id.* at 568.

<sup>160</sup> Dorgan Hearing, *supra* note 1, at 19 (testimony of Steve Schooner).

<sup>161</sup> See Schooner, *supra* note 18, at 570; Guttman, *supra* note 21.

<sup>162</sup> Schooner, *supra* note 18, at 570 (citing the Fay Report and the Military Extraterritorial Jurisdiction Act).

bypassing procurement rules, and thirteen lacked adequate surveillance.<sup>163</sup>

Experiments in streamlined contracting processes also have allowed the military to pay contractors for a flexible delivery order rather than specifying detailed agreement by contract.<sup>164</sup> The Department of Interior's Inspector General investigating the Abu Ghraib situation reported that CACI, a private contractor, was given six orders predominantly for interrogation, intelligence, and security services in Iraq.<sup>165</sup> Reviewing this situation, Dan Guttman at the Center for Public Integrity concluded that neither his own research nor review by the GSA "could find any existing schedule that provided for these services."<sup>166</sup> Apparently, no one had checked to determine whether the contract work at Abu Ghraib was permitted or authorized, no one monitored the steps leading to hiring those individuals and directing their behavior, and no one determined whether those tasks were supposed to be contracted out at all.<sup>167</sup>

Yet involving private individuals in interrogations and intelligence activities crosses the line into centrally governmental work.<sup>168</sup> A longstanding executive policy, now expressed in Office of Management and Budget (the "OMB") Circular No. A-76, directs that inherently governmental functions should not be outsourced.<sup>169</sup> In 1998, Congress adopted a statute requiring agencies to inventory civil service work and to identify jobs as commercial or inherently government-

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<sup>163</sup> Guttman, *supra* note 21 (citing Inspector General report). In addition, a "blanket purchase agreement" allows one government department to add to another department's existing contract with a vendor and, in so doing, avoid bidding out the new and potentially unrelated services. See Jon D. Michaels, *Beyond Accountability: The Constitutional, Democratic, and Strategic Problems with Privatizing War*, 82 *WASH. U. L.Q.* 1001, 1068 n.226 (2004); Mary H. Cooper, *Private Affairs: New Reliance on America's Other Army*, 62 *CONG. Q. WKLY REP.* 2194 (2004).

<sup>164</sup> Schooner, *supra* note 18, at 564.

<sup>165</sup> Guttman, *supra* note 21.

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*; see also Guttman, *supra* note 30, at 340.

<sup>168</sup> Guttman, *supra* note 21.

<sup>169</sup> See generally OMB CIR. NO. A-76 (REVISED), *supra* note 72. This document includes a categorization of governmental activities into commercial and inherently governmental. Inherently governmental jobs would be those "so intimately related to the public interest as to mandate performance by government personnel." *Id.* at A-2. Additionally, functions may be "inherently governmental" where they involve discretion and sovereign authority that could bind the U.S. and "[s]ignificantly affect[] the life, liberty, or property of private persons." *Id.*

tal in order to assist the privatization effort.<sup>170</sup> A GAO report in 2002 indicated that the government should retain for its own workers certain tasks of “warfighting, judicial, enforcement, regulatory, and policymaking functions.”<sup>171</sup> Nevertheless, disagreements over precisely what an inherently governmental activity is and gaps in governmental capacity contribute to ambiguity over what can or should be outsourced.<sup>172</sup> For example, a private contractor may be entrusted with providing security, as well as driving trucks to transport soldiers, equipment, and food, but when does this function move from civilian support to core military activity?<sup>173</sup> The Department of Defense has not adopted nor consistently applied measures to identify and track what functions should remain within the government and what can be outsourced.<sup>174</sup> The DOD increasingly spends billions of dollars in private contracts without clarifying or monitoring this policy.<sup>175</sup>

In its recent consideration of these issues, the government of Great Britain concluded that “[t]he distinction between combat and non-combat operations is often artificial. The people who fly soldiers

<sup>170</sup> Federal Activities Inventory Reform (“FAIR”) Act of 1998, 31 U.S.C. § 501 (2000) (stating that in using the private sector for needed commercial services, officials are to identify savings and also identify noninherently governmental functions to enable cost comparisons between private bids and public budgets); see Maj. Mary E. Harney, *The Quiet Revolution: Downsizing, Outsourcing, and Best Value*, 158 MIL. L. REV. 48, 61–92 (1998) (describing FAIR, Circular A-76, and the competitive cost comparison process); see also *Diebold v. United States*, 947 F.2d 787, 789–90 (6th Cir. 1991) (finding the Army’s decision to contract out food services was required by federal procurement law because the private company could provide the services at a lower cost than the DOD cost).

<sup>171</sup> U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-02-847T, COMMERCIAL ACTIVITIES PANEL: IMPROVING THE SOURCING DECISIONS OF THE GOVERNMENT: FINAL REPORT 7 (2002), available at [www.gao.gov/new.items/d02847t.pdf](http://www.gao.gov/new.items/d02847t.pdf) [hereinafter GAO-02-847T]; see Schooner, *supra* note 18, at 555–56.

<sup>172</sup> See Schooner, *supra* note 18, at 556 n.22 (describing fights within the government over outsourcing what may be inherently governmental functions). The official Pentagon statement is that private security companies “are not being used to perform inherently military functions.” Bergner, *supra* note 39, at 32 (quoting an “officially approved written statement”).

<sup>173</sup> See Schooner, *supra* note 18, at 553–54. “Just as the distinction between combat arms and non-combat arms has become blurred during operations, the distinction between ‘advising’ and ‘doing’ for these contractors is similarly blurred,” states Major Thomas Milton of the Foreign Area Officer Association. SILVERSTEIN, *supra* note 35, at 166. Ken Silverstein writes: “[t]he reality is that most of these corporations’ operations become an integral part of the foreign government’s military capability.” *Id.* Although Silverstein was writing about private military companies working for foreign governments, the points would seem to hold for the relationship between such companies and our government and military, too. Eroding or elusive, the distinctions between noncombat and combat and between advising and doing are difficult to track and monitor. See Singer, *supra* note 15.

<sup>174</sup> Schooner, *supra* note 18, at 555–56.

<sup>175</sup> See *id.* at 555–57; Singer, *supra* note 15.

and equipment to the battlefield are as much a part of the military operation as those who do the shooting."<sup>176</sup> A contractor may be hired to support a complex technological weapons system, which may be an unmanned surveillance aircraft and support for it may include its deployment. If so, has the surveillance and deployment of that aircraft become an inherently governmental function? Is interrogation an inherently governmental task?<sup>177</sup> What if the government lacks sufficient knowledge of the subject's language to engage in effective interrogation while a contract employee may have that knowledge?

We do not even have to reach—at least not yet—the difficult philosophic question about what should be viewed as an inherently governmental activity, sheltered from contracting out, in order to conclude that the current governmental practices fail to provide sufficient monitoring even to attend to that question. Whatever the line is or should be, there must be sufficient government resources and attentiveness to monitor it and to review outsourced functions.<sup>178</sup> That, at minimum, is an inherently governmental task.

## II. FURTHER JEOPARDY TO THE MILITARY, THE NATION, AND DEMOCRACY

The reliance on contractors—even if subject to adequate oversight and appropriate procurement practices—risks jeopardy to the quality of military activities, the national interest, and democratic values.

### A. *Jeopardy to the Military*

Investigation of the abuses in Abu Ghraib revealed that private contractor employees "wandered about with too much unsupervised free access in the detainee area."<sup>179</sup> The situation in Abu Ghraib, one hopes, was anomalous in many respects. Abu Ghraib did, however, also expose problems that arise with the command structure, disci-

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<sup>176</sup> NINTH REPORT OF THE FOREIGN AFFAIRS COMMITTEE: PRIVATE MILITARY COMPANIES, SESSION 2001–2002, RESPONSE OF THE SECRETARY OF STATE FOR FOREIGN AND COMMONWEALTH ACTIVITIES (Great Britain) 4 (Oct. 2002); RETURN TO AN ADDRESS OF THE HONOURABLE THE HOUSE OF COMMONS, PRIVATE MILITARY COMPANIES: OPTIONS FOR REGULATION (Great Britain) 8 (Feb. 12, 2002).

<sup>177</sup> Dan Gutunan reports that although the Army concluded that intelligence work is inherently governmental, it did not bar contractors from that work in the *Contractors on the Battlefield* field manual used in Abu Ghraib. Guttman, *supra* note 21.

<sup>178</sup> See GAO-02-847T, *supra* note 171, at 2–4.

<sup>179</sup> Washburn & Bigelow, *supra* note 88, at A1 (quoting the report by Army Maj. Gen. Antonio M. Taguba, who led the investigation at Abu Ghraib).

pline, accountability, security, and predictability when personnel working together include members of the military and private contract employees.<sup>180</sup> This is precisely the situation established when the military contracts out logistical planning and support as it has in Iraq.<sup>181</sup> Marie deYoung, former U.S. Army captain and former employee of Halliburton, observed the loss of control produced by layers of contracting and subcontracting, and the confusion over lines of authority and measures of accountability.<sup>182</sup>

Congress adopted the Military Extraterritorial Jurisdiction Act to allow the prosecution of contractors in the United States for offenses occurring while they are deployed abroad, but only if the conduct would be a felony if committed in the United States.<sup>183</sup> Congress adopted this law after U.S. military and local Bosnian law enforcement found they had no ability to prosecute employees of DynCorp apparently engaged in human sex trafficking.<sup>184</sup> Through the prostitution ring, employees of DynCorp "purchased" young women and children to serve as their sexual slaves.<sup>185</sup> Once the practice was exposed, the company fired the individuals involved—but there were no prosecutions for statutory rape, human trafficking, or anything under military, Bosnian, or U.S. law.<sup>186</sup> The U.S. military uses this same company to train the Iraqi police.<sup>187</sup> Members of the military can face swift court marshals, but civilian contractors fall outside that jurisdiction and elude any domestic legal system as well.<sup>188</sup> A whistleblower lost

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<sup>180</sup> See Dorgan Hearing, *supra* note 1, at 18.

<sup>181</sup> See *id.* at 10–13.

<sup>182</sup> *Id.* at 12 (testimony of Marie deYoung).

<sup>183</sup> Military Extraterritorial Jurisdiction Act, 18 U.S.C. §§ 3261–67 (2000). See generally Michael J. Davidson, *Ruck Up: An Introduction to the Legal Issues Associated with Civilian Contractors on the Battlefield*, 29 PUB. CONT. L.J. 233 (2000).

<sup>184</sup> Robert Capps, *Crime Without Punishment*, SALON.COM, June 27, 2002, <http://www.salon.com/news/feature/2002/06/27/military/> [hereinafter Capps, *Crime Without Punishment*]; Robert Capps, *Outside the Law*, SALON.COM, June 26, 2002, <http://archive.salon.com/news/feature/2002/06/26/bosnia/> [hereinafter Capps, *Outside the Law*].

<sup>185</sup> See Capps, *Crime Without Punishment*, *supra* note 184; Capps, *Outside the Law*, *supra*, note 184. As Laura Dickinson has noted, this statute would not reach contractors working with the CIA or Department of Interior unless they are running U.S. facilities overseas as specified in a recent statutory provision. Laura A. Dickinson, *Government for Hire: Privatizing Foreign Affairs and the Problem of Accountability Under International Law*, 47 WM. & MARY L. REV. (forthcoming 2005) (manuscript at 52, on file with author) (discussing the USA PATRIOT Act of 2001, 18 U.S.C.A. § 7 (West 2005)).

<sup>186</sup> See Capps, *Crime Without Punishment*, *supra* note 184.

<sup>187</sup> See *id.*; Capps, *Outside the Law*, *supra*, note 184.

<sup>188</sup> See T. Christian Miller, *Contractors Fall Through Legal Cracks*, L.A. TIMES, May 4, 2004, at A8; Capps, *Crime Without Punishment*, *supra* note 184.

her job for exposing the scandal—and later won a damages award on that basis in Britain.<sup>189</sup> If left entirely to the military, it is not obvious that such scandals would get swift treatment. At least one civilian officer in Bosnia was told by his military commanders to lie about the DynCorp sex scandal, and if he had been a member of the armed services, he would not even have been able, as he was, to quit.<sup>190</sup>

Yet even with the Military Extraterritorial Jurisdiction Act, procedures to move against civilian contractors remain unclear.<sup>191</sup> Its scope may not apply to civilians who do not work directly for the government.<sup>192</sup> It offers only limited control on the scene for the military commanders or even civilian supervisors.<sup>193</sup> Military lawyers have been writing for a decade about the ambiguity over what law applies to contractors working in military settings.<sup>194</sup> The contract employees are not governed by military discipline or norms; nor are they regulated by rules that apply only to government actors, such as the FOIA, limits on political activities, and conflict of interest rules.<sup>195</sup> Ambiguities remain over what law applies if contract employees are captured or injured in confrontations with enemies.<sup>196</sup> Both in terms of legal

<sup>189</sup> John Crewdson, *Contractor Tries to Avert Repeat of Bosnia Woes, Sex Scandal Still Haunts DynCorp*, CHI. TRIB., Apr. 19, 2003, at C3.

<sup>190</sup> Dominic Hipkins, *Bosnia Sex Trade Shames UN*, SCOTLAND ON SUNDAY, Feb. 9, 2003, at 24 (describing cover-up); Vivion Vinson, Letter to the Editor, *Military Shouldn't Investigate Itself*, BOSTON GLOBE, May 5, 2004, at A10 (reporting conversation with a civilian civil affairs officer).

<sup>191</sup> See Katie Fairbank, *Who Investigates Private Interrogators in Iraq? Use of Contractors to Gather Intelligence Raises Concerns*, DALLAS MORNING NEWS, May 7, 2004, at 22A.

<sup>192</sup> Miller, *supra* note 188, at A8.

<sup>193</sup> See Major Karen L. Douglas, *Contractors Accompanying the Force: Empowering Commanders with Emergency Change Authority*, 55 A.F. L. REV. 127, 135–36 (2004).

<sup>194</sup> See, e.g., *id.*; Major Mark R. Ruppert, *Criminal Jurisdiction over Environmental Offenses Committed Overseas: How to Maximize and When to Say "No,"* 40 A.F. L. REV. 1, 17–19 (1996); Turner & Norton, *supra* note 77, at 25 (discussing lack of clarity over whether contractors, unlike military, are subject to the employment, tax, and customs laws of the host nation); see also Charles E. Cantu & Randy W. Young, *The Government Contractor Defense: Breaking the Boyle Barrier*, 62 ALB. L. REV. 403, 406 (1998) (exploring liability issues); Washburn & Bigelow, *supra* note 88, at A1 (stating that it remains unclear whether military, U.S., or Iraqi law applies to crimes committed by civilian contractors, and whether these civilian contractors are subject to FOIA and direct congressional oversight).

<sup>195</sup> Guttman, *supra* note 30, at 338; see David A. Whiteford, *Negotiated Procurements: Squandering the Benefit of the Bargain*, 32 PUB. CONTR. L.J. 509, 542 n.226 (2003).

<sup>196</sup> Lawyers and commentators debate whether civilian contractors are intended to receive prisoner-of-war status. See THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS 334–35 (Deiter Fleck ed., 1999) (discussing prisoner-of-war status); Major Charlotte M. Liegl-Paul, *Civilian Prisoners of War: A Proposed Citizen Code of Conduct*, 182 MIL. L. REV. 106, 113–16 (2004); Kristen McCallion, *War for Sale! Battlefield Contractors in Latin America & the 'Coporatization' of America's War on Drugs*, 36 U. MIAMI INTER-AM. L. REV. 317,



authorization and actual competence and training, can contract employees defend themselves with force—or does that exceed their role and jeopardize the safety of the military members working alongside them?<sup>197</sup> Do civilian contractors compromise the security of a mission when they discuss troop movements in a restaurant in Baghdad?<sup>198</sup> The Third Geneva Convention would seem to cover combatants who are civilians if they are under the command of a superior, wear distinctive fixed signs recognizable at a distance, carry arms openly, and conduct themselves in accord with the laws of armed conflict, although each of these elements may be ambiguous in the case of particular contract employees.<sup>199</sup> But Protocol I to the Geneva Convention deprives mercenaries of the privilege of serving as lawful combatants or immunity as prisoners of war upon capture.<sup>200</sup> The line between “contract employee” and “mercenary” for this or other purposes in international law remains unclear.<sup>201</sup> Confusion about precisely these legal questions can lead to disorder and ineffectiveness in actual operations, harming military effectiveness.

The military can be harmed in a different way if the option of retiring to a new career with a better-paid private contractor appeals to talented officers. Margaret Stock, a professor at the United States Military Academy at West Point and a reserve officer, explains how retiring officers can benefit from entering the private sector:

Military officers may be very tempted to retire in order to work for private military companies because the day after retiring, an individual can collect his or her retired pay, which is typically 50% of an active duty salary, and at the same time return to work as a consultant in essentially the same capacity, but with a new salary. Such individuals perform the same

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350 (2004–05); Adam Sherman, *Forward unto the Digital Breach: Exploring the Legal Status of Tomorrow's High-Tech Warriors*, 5 CHL. J. INT'L L. 335, 337–39 (2004); Turner & Norton, *supra* note 77, at 9; Kenneth Watkin, *Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict*, 98 AM. J. INT'L L. 1, 15–16 (2004).

<sup>197</sup> See Dorgan Hearing, *supra* note 1, at 13 (testimony of Marie deYoung).

<sup>198</sup> *Id.* The for-profit entities working under contract may avoid disclosure by using the trade secret exemption. See Freedom of Information Act, 5 U.S.C. § 552(b)(4) (2000); Dickinson, *supra* note 185 (manuscript at 86).

<sup>199</sup> Vernon, *supra* note 102, at 405–08.

<sup>200</sup> See Milliard, *supra* note 35, at 30–36.

<sup>201</sup> Even the definition of “mercenary” in international law is unclear. See *infra* note 211 and accompanying text.

function while receiving both their retired pay and the consultant salary.<sup>202</sup>

Reliance on private sources for important tasks, such as logistics and maintenance of advanced technological weapons, may in addition relieve the military of developing those capacities internally—to the long-term detriment of military strength.<sup>203</sup> Similarly, depending upon contracts for the leases of trucks and equipment without ensuring appropriate maintenance plans can leave the military vulnerable at crucial movements to failures beyond their control to remedy.<sup>204</sup> If the contractor in turn does not pay subcontractors—as was the case apparently with Halliburton—vendors may grow resentful or even collapse under bankruptcy.<sup>205</sup>

Alternatively, the military also may compromise its strength by relying through layers of subcontracts on people it would never use directly, or by relying on individuals from third-country nations who are paid little and shift loyalties based on who pays them.<sup>206</sup> Global military companies have recruited members of defeated armed groups and militias as mercenaries.<sup>207</sup> Some of the companies do little to screen employees.<sup>208</sup> One contract employee turned out to be a fugitive charged with embezzlement and previously convicted of assault in the United States.<sup>209</sup> The work can attract volatile individuals. Mercenary involvement in the Congo over decades is a notable dimension of the area's violence and instability.<sup>210</sup>

<sup>202</sup> E-mail from Margaret Stock, Associate Professor of Law, United States Military Academy, to Martha Minow, Jeremiah Smith, Jr. Professor of Law, Harvard Law School (Oct. 20, 2005, 16:54:21 EST) (on file with author). Westerners earn between \$400 and \$700 each day they work in Iraq for private security companies, whereas employees from Fiji, Chile, and other non-Western nations earn between \$40 and \$150 per week. Bergner, *supra* note 39, at 34.

<sup>203</sup> Davidson, *supra* note 183, at 265.

<sup>204</sup> *Id.*; see Vernon, *supra* note 102, at 393–94 (discussing risks of contracting for maintenance and repair of weapon system and other military equipment).

<sup>205</sup> Dorgan Hearing, *supra* note 1, at 13 (testimony of Marie deYoung).

<sup>206</sup> See *id.*

<sup>207</sup> See Singer, *supra* note 15.

<sup>208</sup> See, e.g., Bergner, *supra* note 39, at 50.

<sup>209</sup> See *id.*

<sup>210</sup> See Stella Mapensauswa, *Briton Jailed for Arms Dealings*, WASH. POST, Sept. 11, 2004, at A16; Andrew Meldum, *Thatcher's Son Implicated in Failed Coup*, IRISH TIMES, Aug. 26, 2004, at 10; Keith Suter, *Why Those Dogs of War Are Still Barking*, DAILY TELEGRAPH (Sydney, Austl.), Feb. 18, 2005, at 64; Singer, *supra* note 15 (discussing former South African soldiers and police recruited as guards in Iraq).

Here the use of contractors raises the enduring question about mercenaries.<sup>211</sup> Nicolo Machiavelli argued against mercenaries in his classic work of politics, *The Prince*, because they work for pay.<sup>212</sup> Illustrating Machiavelli's warning that soldiers working for pay would not take the kind of life-risking action that can turn the tide of battle, some contractors during the Gulf War fled from a possible chemical weapons attack.<sup>213</sup> Perhaps if the contractors build a team of retired military officers, the ethos of loyalty to the country and the military can be sustained even among these civilian employees.<sup>214</sup> Yet Machiavelli's warnings become more powerful for other employees, and especially for low-paid employees brought in from other countries under subcontracts.<sup>215</sup>

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<sup>211</sup> There is no settled definition of a mercenary in international law. See Milliard, *supra* note 35, at 19–69 (discussing alternative meanings under different international sources). The British government has considered regulation for private military companies and tries to distinguish mercenaries from servicemen in foreign armies and defense industrial companies. NINTH REPORT, *supra* note 176, at 1–3; RETURN TO AN ADDRESS OF THE HONOURABLE THE HOUSE OF COMMONS, *supra* note 176, at 7–8, 22–24. The distinction might be drawn between an individual (or group) selling combat services and an individual (or group) selling support services to government militaries, but the increasing roles of technological and complex logistical operations make this distinction increasingly of little significance in terms of advancing military effort. See RETURN TO AN ADDRESS OF THE HONOURABLE THE HOUSE OF COMMONS, *supra* note 176, at 7–8.

<sup>212</sup> NICOLO MACHIAVELLI, *THE PRINCE* (1515), reprinted in 23 GREAT BOOKS OF THE WESTERN WORLD 17–19 (Robert Maynard Hutchins ed., W.K. Marriott trans., Encyclopedia Britannica, Inc. 1952) (arguing that mercenaries are disloyal and cowardly); see also THUCYDIDES, *THE PELOPONNESIAN WAR* in *THE LANDMARK THUCYDIDES* 67 (Robert B. Strassler ed., Richard Crawley trans., Touchstone 1996) (quoting speech by the Corinthians asserting that the weakness of Athens' army rested in the fact that it was "more mercenary than national").

<sup>213</sup> Vernon, *supra* note 102, at 394 ("During the Persian Gulf War, a small number of contractors fearful of chemical weapon attacks fled from an air base in Saudi Arabia. While the contractor's [sic] departure did not disrupt the operation, it highlighted potential weaknesses. The contractor [sic] decided that financial gain was simply not worth the risk. This highlights the major difference between military personnel and contractors: one is present to serve his country, the other to make a profit.")

<sup>214</sup> See *id.* at 394–95 (discussing contractors' arguments).

<sup>215</sup> Machiavelli wrote:

Mercenaries and auxiliaries are useless and dangerous; and if one holds his state based on these arms, he will stand neither firm nor safe; for they are disunited, ambitious and without discipline, unfaithful, valiant before friends, cowardly before enemies; they have neither the fear of God nor fidelity to men, and destruction is deferred only so long as the attack is; for in peace one is robbed by them, and in war by the enemy. The fact is, they have no other attraction or reason for keeping the field than a trifle of stipend, which is not sufficient to make them willing to die for you.

### B. *Jeopardy to the United States and Democracy*

Reliance on private contractors also risks exposure to war profiteering: the exploitation of the chaos and fear of wartime by suppliers of materials to the military. Resisting war profiteering has been a governmental goal as long as this nation has existed.<sup>216</sup> War profiteering is a serious problem not only because it diverts public monies—the money of the citizens—to private hands through overcharging and fraud, but also because it can jeopardize peacemaking and broader confidence in government. These issues overshadow but should not obscure the problems of former government officials finding employment with contractors after helping them build connections with the government.<sup>217</sup>

Meanwhile, the revenues pouring into private military companies—the stock in publicly traded private military companies jumped 50% after 9/11—are funneled into lobbying.<sup>218</sup> Iraq contractors DynCorp, Bechtel, and Halliburton donated more than \$2.2 million to political causes—mainly Republican—between 1999 and 2002, according to the Center for Responsive Politics.<sup>219</sup> Lobbying efforts by private contractors have documented effects on policies regarding weapons systems development.<sup>220</sup> It does not seem out of bounds to wonder about the influence contractor lobbying has on foreign policy.

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MACHIAVELLI, *supra* note 212, at 18; see PROTOCOL ADDITIONAL TO THE GENEVA CONVENTIONS OF 12 AUG. 1949, AND RELATING TO THE PROTECTION OF VICTIMS OF INTERNATIONAL ARMED CONFLICTS (Protocol I), June 8, 1977, art. 47, 1125 U.N.T.S. 3, available at <http://www.ohchr.org/english/law/protocol1.htm> (defining mercenary as one recruited to and taking part in armed hostilities, motivated essentially by desire for material compensation in excess of what combatants of similar ranks earn in armed forces, and not a national of a party to the conflict or member of armed forces of a party to the conflict).

<sup>216</sup> See John Terrence A. Rosenthal & Robert T. Alter, *Clear and Convincing to Whom? the False Claims Act and Its Burden of Proof Standard: Why the Government Needs a Big Stick*, 75 NOTRE DAME L. REV. 1409, 1449–58 (2000).

<sup>217</sup> See Lt. Colonel Richard B. O'Keefe, Jr., *Where There's Smoke . . . Who Should Bear The Burden When a Competing Contractor Hires Former Government Employees?*, 164 MIL. L. REV. 1, 2–5 (2000).

<sup>218</sup> Publicly traded stocks in private military companies jumped roughly fifty percent, making this one of the few industries whose economic outlook improved after 9/11. Singer, *supra* note 15; see Nelson D. Schwartz, *Pentagon's Private Army*, FORTUNE, Mar. 17, 2003, at 100, 102.

<sup>219</sup> See Rupert Cornwell, et al., *How the Allies Won the War, But Then Lost the Battle for Peace*, INDEP. (London), Jan. 28, 2005, at 4; Jim Krane, *Private Armies Also Fight*, ST. LOUIS POST-DISPATCH, Oct. 30, 2003, at A8. Companies with strong ties to the Bush Administration have received contracts in the efforts to rebuild after Hurricane Katrina. *Bush Associates Win Disaster Relief Contracts; Special Report: After Katrina*, INDEP. (London), Sept. 11, 2005, at 18.

<sup>220</sup> See Markusen, *supra* note 147, at 484–85.

Political scientists have studied the relationship between defense spending and domestic political goals.<sup>221</sup>

But even more troubling is the possibility that by using private contractors, the government can avoid checks and balances in a democratic system. This is the caution pressed in articles by Deborah Avant and Jon Michaels.<sup>222</sup> Because private contractors are obliged to share far less information with Congress than required of the DOD or the military, Avant argues that the administration can effectively limit congressional checks on foreign policy.<sup>223</sup> She claims that the United States can also advance its interests indirectly by licensing a private military company to assist another government, so that the United States itself can deny that it is actually pursuing foreign policy.<sup>224</sup> As an example, she notes that "in 1994, the United States licensed U.S. company Military Professional Resources International (MPRI) to provide advice and training to the Croatian government. The country's president, Franjo Tudjman, received the advantages of U.S. military assistance, but through a private entity."<sup>225</sup> Jon Michaels similarly warns that democratic accountability can be bypassed with private contractors doing military work.<sup>226</sup>

The lack of clear lines of authority and sanctioning power over civilian contractors also potentially impairs the nation's reputation internationally. The Iraqis do not distinguish between the civilian contractors and the U.S. military in judging the conduct of the U.S. occupation.<sup>227</sup>

Foreign policy can be shaped even more insidiously by reliance on private contractors. As Jim Krane put it for the Associated Press, "the use of contractors also hides the true costs of war. Their dead

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<sup>221</sup> See generally Thomas R. Cusack, *On the Domestic Political-Economic Sources of American Military Spending*, in *THE POLITICAL ECONOMY OF MILITARY SPENDING IN THE UNITED STATES* (Alex Mintz ed., 1992); Karl Derouen, Jr. & Uk Heo, *Defense Contracting and Domestic Politics*, 53 *POL. RES. Q.* 753 (2000).

<sup>222</sup> Avant, *supra* note 42; see Michaels, *supra* note 163, at 1040-41.

<sup>223</sup> See Avant, *supra* note 42.

<sup>224</sup> *Id.*

<sup>225</sup> *Id.* At least one reporter saw a connection between the private military company aid and later U.S. support. See Richard Whittle, *U.S. Loan to Fund Bell Aircraft Deal*, *DALLAS MORNING NEWS*, Oct. 31, 1996, at 12D.

<sup>226</sup> Michaels, *supra* note 163, at 1011, 1050-52.

<sup>227</sup> See Michaels, *supra* note 163, at 1040-41; Barry Yeoman, *Need an Army? Just Pick Up the Phone*, *N.Y. TIMES*, Apr. 2, 2004, at A19; see also Jon Michaels, *Deforming Welfare: How the Dominant Narratives of Devolution and Privatization Subverted Federal Welfare Reform*, 34 *SETON HALL L. REV.* 573, 636-39 (2004) (considering civic harms of privatization in the context of welfare reform).

aren't added to official body counts."<sup>228</sup> With an estimated thirty to forty private contractor employees killed due to fighting in Iraq in 2004, and many more killed in accidents, including these private employees would notably increase the total casualties and injuries from the war.<sup>229</sup>

Use of contractors contributes to a lack of transparency in the conduct of military activities regarding not only casualties and injuries, but also total numbers of people deployed, and, indeed, the total size of the government-sponsored effort.<sup>230</sup> This puts the scale of the initiative outside of public awareness and full political discussion, obscuring choices about military needs and human implications.<sup>231</sup> Congressional interest in private contracting may emerge, but full oversight will be hampered by the insulation of the private companies from public review.<sup>232</sup> Even information about procurement decisions and practices has been privatized, placing them further out of public reach.<sup>233</sup> Previously, the Federal Procurement Data Center made available through the Internet information about the allocation of defense contracts to private firms, which could be searched by the name of the firm.<sup>234</sup> In the past year, however, the government has outsourced this service and now charges for access to the data.<sup>235</sup> The ability of the government to bypass public debate may also make it easier, on occasion, for the government to plan and launch either an aggressive war or a humanitarian intervention. Even if I agree with the ends, should I not worry if the means require bypassing democratic review?

I began with a caveat about the limitations of my entire discussion given the curbs on information available about outsourcing by

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<sup>228</sup> Krane, *supra* note 219, at A8.

<sup>229</sup> Some estimates indicate that more than 200 private contract employees have been killed in Iraq. *Risk and Reward in Iraq*, N. TERRITORY NEWS (Austl.), May 7, 2005, at 15.

<sup>230</sup> Light, *supra* note 73; see Schooner, *supra* note 18, at 549–50, 553; P.W. Singer, *The Contract the Military Needs to Break*, WASH. POST, Sept. 12, 2004, at B3; Singer, *supra* note 15.

<sup>231</sup> See Singer, *supra* note 15. The 15,000–20,000 private contractor employees in Iraq point to the Bush Administration's inadequate planning and preparation, lack of transparency about the war's financial and human cost, and "its sense of denial about whether it put enough American troops on the ground to accomplish the task handed to them. . . . The hiring of such a large private force and the ensuing casualties that it has taken outside of public awareness and discussion have served as a novel means for displacing some of the political costs of the war." *Id.*

<sup>232</sup> See SILVERSTEIN, *supra* note 35, at 143.

<sup>233</sup> See Dorgan Hearing, *supra* note 1, at 31–33 (testimony of Steve Schooner).

<sup>234</sup> *Id.*

<sup>235</sup> *Id.*

the military.<sup>236</sup> Even if it had the political will to try to exercise oversight, Congress would be largely constrained in reviewing the actions and practices of private military contractors.<sup>237</sup> Media and ordinary citizens—even competitors—also face constraints, including curbs on otherwise available tools of disclosure.<sup>238</sup> In the past, courts have construed exemptions from the FOIA to protect private contractor records compiled for law enforcement purposes.<sup>239</sup> Reading together the Trade Secrets Act and the FOIA exemption for trade secrets and confidential or privileged commercial or financial information, courts have rejected release of prices paid by the government for servicing planes to be flown by military personnel on dangerous missions.<sup>240</sup> At stake in these rather technical cases is nothing less than the ability of citizens to know what the government is doing, and yet outsourcing veils its conduct. The Court of Appeals for the District of Columbia Circuit asserted that the prices at issue concern the internal workings of a contractor, not the Government.<sup>241</sup> As Judge Garland wrote in partial dissent, this nondisclosure interferes with the public's ability to evaluate "whether the government is receiving value for taxpayer funds, or whether the contract is instead an instance of waste, fraud, or abuse of the public trust."<sup>242</sup> Yet the public interest is even more extensive when the military outsources logistics, services, and security to a contractor.<sup>243</sup> It remains to be seen how transparent any of those actions will become.

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<sup>236</sup> See *supra* notes 61–63 and accompanying text.

<sup>237</sup> See SILVERSTEIN, *supra* note 35, at 143.

<sup>238</sup> See *id.*

<sup>239</sup> See *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152–53, 157–58 (1989). Focusing on the format in which data can be disclosed, a court did reject a summary judgment ruling denying a request for procurement data in an electronic format. *TPS, Inc. v. U.S. Dep't of Def.*, 330 F.3d 1191, 1197 (9th Cir. 2003).

<sup>240</sup> *E.g.*, *McDonnell Douglas Corp. v. U.S. Dep't of Air Force*, 375 F.3d 1182, 1193 (D.C. Cir. 2004); see *id.* at 1194 (Garland, J., dissenting in part) (characterizing the contract at issue); see also *McDonnell Douglas Corp. v. Nat'l Aeronautics & Space Admin.*, 180 F.3d 303, 307 (D.C. Cir. 1999) (rejecting disclosure of line item prices in contract awarded to private company by NASA); *McDonnell Douglas Corp. v. Widnall*, 57 F.3d 1162, 1164 (D.C. Cir. 1995) (noting that items falling within trade secret exemption from FOIA may not be disclosed).

<sup>241</sup> *McDonnell Douglas Corp.*, 375 F.3d at 1193.

<sup>242</sup> *Id.*

<sup>243</sup> See Dorgan Hearing, *supra* note 1, at 12–13; Guttman, *supra* note 21.

## CONCLUSION

Besides jeopardizing internal democratic monitoring and besides failing to control costs or even the performance of private employees, the expanded governmental use of private military companies erodes the control of force represented by the ascendancy of the nation-state.<sup>244</sup> The nation-state itself had an interest in demonstrating its neutrality vis-à-vis other states as part of the Westphalian Pact: the leaders of each nation would respect the borders and sovereignty of another state while expecting other states to respect their own borders and sovereignty. In turn, the leaders would regulate the conduct of their own citizens to make sure they would not join foreign armies or otherwise jeopardize this system. And deployment of a non-national by a foreign sovereign would itself be viewed as infringement of the home nation's sovereignty.

Thomas Jefferson argued that "the granting of military commissions, within the United States, by any other authority than their own, is an infringement on their sovereignty, and particularly so when granted to their own citizens, to lead them to commit acts contrary to the duties they owe their own country."<sup>245</sup> As the system developed, it supported national self-interest by ensuring that "no one can raise an army within the jurisdiction of the United States with the intention to commit hostile acts against a state friendly to the U.S. state."<sup>246</sup> By controlling private desires for money or adventure, the nation-state would build a more secure world.

Signs of the decline of the nation-state come in many contexts besides the rising use of private military companies.<sup>247</sup> Nonetheless, the growing role of private military companies is a symptom of a larger, dangerous challenge to the aspirations of order in the world represented by the system of nation-states and the rule of law.<sup>248</sup>

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<sup>244</sup> See Thomson, *supra* note 42, at 36-39.

<sup>245</sup> *Id.* at 37 (citing CHARLES G. FENWICK, *THE NEUTRALITY LAWS OF THE UNITED STATES* 19 (1913)).

<sup>246</sup> *Id.* at 38.

<sup>247</sup> See John O. McGinnis, *The Decline of the Western Nation States and the Rise of the Regime of International Federalism*, 18 *CARDOZO L. REV.* 903, 905 (1996); Robert D. Kaplan, *The Coming Anarchy: How Scarcity, Crime, Overpopulation, Tribalism, and Disease Are Rapidly Destroying the Social Fabric of Our Planet*, *ATLANTIC MONTHLY*, Feb. 1994, at 46, 73-74. See generally KENICHI OHMAE, *THE END OF THE NATION STATE: THE RISE OF REGIONAL ECONOMIES* (1995); ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* (2004).

<sup>248</sup> See McGinnis, *supra* note 247, at 905; Kaplan, *supra* note 247, at 46, 73-74. See generally OHMAE, *supra* note 247; SLAUGHTER, *supra* note 247.