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## Military Professionalism & Private Military Contractors

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Scott L. Efflandt

**ABSTRACT:** The post-9/11 use of private security companies in a combat role has credentialed them in the workplace, public arena, and legal system, thus meeting Andrew Abbott's criteria of an emerging profession. Fiscal challenges and global instability will likely perpetuate this condition and in so doing change the US military profession and its associated civil-military relations that underwrite the all-volunteer force.

As the United States concludes two long wars while facing increasing internal fiscal problems, its government must make tough budget choices. The first decisions will identify the prudence of reducing military expenditures; however, subsequent decisions as to how the Department of Defense should implement these reductions will become problematic. In this environment political leaders seek to rely on current military overmatch to justify budget cuts that reduce near-term readiness. At the same time, they program the remaining monies against science and technology to achieve future overmatch, all while satisfying their constituents. The processes required to make these decisions rely heavily on impartial professional military advice. The robust field of contemporary research on the military profession has largely used functional models to examine and evaluate the military profession. By applying Andrew Abbott's established systems model of professions, this paper argues the use of private security companies in overseas combat theaters has changed the scope of the US military's professional jurisdiction. Because jurisdiction serves as an indicator of the trust relationship between society and the military, this boundary shift could foretell a change in civil-military relations and the associated viability of the all-volunteer force. After establishing the context of the problem and defining the military profession paradigm, this article explains how private security companies are contesting the US military's preeminence. It concludes by recommending an expanded view of the risk associated with military budget decisions so as to preserve the all-volunteer force.

With the end of combat operations in Iraq and Afghanistan, there is a heightened risk of perpetuating the historical pattern of post-war decline of the US military. The end of a conflict is often marked by social fatigue with war and a desire to reap peace dividends. In the 20th century these combined pressures typically yielded a reduction in the military's budget, resulting in a degraded force structure and a decrease in quality of the defense establishment. The full effects of such reductions frequently become apparent at the start of the next conflict, when the US military is found inadequately sized, burdened

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with old equipment, and trapped with an ill-suited doctrine.<sup>1</sup> Unlike past interwar periods, contemporary actions short of war (such as regional security and “mil to mil” exchanges) as well as the need to restructure the force for other forms of conflict besides counterinsurgency, will place a significant peacetime operational demand on the military. To save monies and reconcile these tensions, national leaders will debate how best to fund the competing demands of force structure, near-term readiness, and long-term modernization. There are no easy answers; it is a debate about where to assume the risk of under-resourcing. This is not a new conundrum for America; historically, the employment of short-term contractors mitigated associated risks until resources increased and allowed the military to adjust and negate its need. This pattern was broken in Iraq and Afghanistan, as contractor use in general, and private security companies in particular, did not proportionally decline.

The quality of the US military profession defines the nature of civil–military relations, which is the cornerstone of an effective American all-volunteer force. Therefore, identifying and understanding how private security companies compete with the military profession is important for two reasons. First, it adds context from which to assess the ongoing Department of Defense’s campaign to increase the professionalization of the military. Second, senior civilian and military leaders can understand how an unrestrained reliance on private security companies as risk mitigation affects the military profession’s long-term capabilities, responsibilities, and relationships with society.

### **Defining the Military Profession**

Sociologists generally define a profession as an occupation with both theoretical and practical knowledge that conducts special training and self-regulates its members and is thus credentialed by society with special authority.<sup>2</sup> Continued fulfillment of these expectations allows society to renew the profession’s authority and autonomy. Society credentials two agents with the authority to employ lethal force—law enforcement and the military. The military profession serves society by molding an institution—capable of managing violence toward policy ends—that ensures the members maintain technical currency, doctrinal relevance, a culture subservient to the state’s authority, and reflects civilian values.

### **The 21st Century US Military Profession**

In 2012, the Secretary of Defense recognized the indicators of a strained military profession, and, anticipating the latent detrimental effects from ten years of war, instructed the Chairman of the Joint Chiefs of Staff to take remedial action. The resulting campaign encompassed all military departments by calling for a “Rededication to the Profession

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1 Charles E. Heller and William A. Stofft, eds., *America’s First Battles, 1776-1965* (Lawrence, KA: University Press of Kansas, 1986), ii-ix; John A. Nagl, *Learning to Eat Soup with a Knife: Counterinsurgency Lessons from Malaya and Vietnam*, 1st ed. (Chicago, IL: University Of Chicago Press, 2005), 50-51, 115-16.

2 Allan G. Johnson, *The Blackwell Dictionary of Sociology: A User’s Guide to Sociological Language*, 1st ed. (Cambridge, MA: Wiley-Blackwell, 1995), 216-217.

of Arms” (RPA).<sup>3</sup> Their efforts are intended to improve organizational effectiveness (over efficiency) and in so doing maintain society’s trust and preserve the pattern of civil-military relations enjoyed since the advent of the all-volunteer force.<sup>4</sup> With a volunteer force, society represents the sum authority granted by three groups of actors—civilian chain of command, public at large, and servicemembers—with whom a trust relationship must be maintained.<sup>5</sup> The RPA explicitly recognizes the importance of these three relationships yet the program follows precedent by addressing just one relationship—the nurturing of the profession by strengthening servicemembers’ trust.

Peter Feaver’s application of Agency Theory to recent US civil-military relations explains both the difficulty and necessity of maintaining all three relationships.<sup>6</sup> As such, the military (agent) and civilian leadership (principal) reconcile discreet objectives by aligning their interests. Historically, the dilemmas have centered on how the military profession would dissent with civilian leadership.<sup>7</sup> As private security companies become alternative agents to apply lethal force for the state a competitive situation emerges. The presence of multiple agents becomes a disincentive for civilian leadership to align its interests with the military and in doing so weakens the military’s relationships with civil leaders and the public. In this type of environment, the Rededication to the Profession of Arms’ single focus on one of three relationships becomes inadequate to strengthen the US military profession.

### Part of a System of Professions

The challenge for military and civilian leaders in the current environment is to strengthen the profession of arms to ensure adequate military capacity responsive to the state. Recent scholarship suggests the military profession can be better understood with the application of a systems paradigm. Abbott argued that professions form a complex and dynamic social system in a competitive environment where they will adapt or disappear based on their relative performance of work. This system is influenced not only by its own processes but also by larger social forces and other individual professions which also change in response to the same social and environmental forces.<sup>8</sup>

In contrast to the functional models of Samuel Huntington and Morris Janowitz which measured a profession by its ability to develop and apply abstract knowledge, Abbot’s systems model gauges the

3 Martin E. Dempsey, *America’s Military—A Profession of Arms White Paper* (Washington, DC: Department of Defense, 2012); Joint Chiefs of Staff; Jim Garamone, “Dempsey Calls for Rededication to Profession of Arms,” *U.S. Department of Defense*, 2012, <http://www.defense.gov/news/newsarticle.aspx?id=67307>.

4 Dempsey, *America’s Military—A Profession of Arms White Paper*, 3-6; Martin E. Dempsey, *Joint Education White Paper* (Washington, DC: Department of Defense, 2012), 4-6.

5 Don M. Snider, *Dissent and Strategic Leadership of the Military Professions* (Carlisle, PA: Strategic Studies Institute, 2008), 11-13.

6 Peter D. Feaver, “Crisis as Shirking: An Agency Theory Explanation of the Souring of American Civil-Military Relations,” *Armed Forces & Society* 24, no. 3 (Spring 1998): 407-34.

7 Charles D. Allen and Breana E. Coates, “The Engagement of Military Voice,” *Parameters* 39, no. 4 (Winter 2009-10): 73-87.; Donald Drechsler and Charles D. Allen, “Why Senior Military Leaders Fail: And What We Can Learn from Their Mistakes,” *Armed Forces Journal* 146 (July/August 2009); and Charles D. Allen, “Lessons Not Learned: Civil-Military Disconnect in Afghanistan,” *Armed Forces Journal* 148, no. 2 (September 2010).

8 Andrew Abbott, *The System of Professions: An Essay on the Division of Expert Labor* (Chicago, IL: University of Chicago Press, 1988), 19, 33.

strength of a profession by the breadth, scope, and social value of its work—the greater these characteristics, the larger its jurisdiction. In his model, a change of professional jurisdictions results when the demand for the services provided by a profession increase faster than the profession can respond. When this happens, either emerging professions or other existing professions complete the work instead. The outcomes of such jurisdictional challenges are not fixed, but are heavily influenced by the type and nature of the response of the actors within the system.<sup>9</sup> The current jurisdiction of the military profession reflects the actions of its members as well as its history as part of a larger system of professions.<sup>10</sup>

The fall of the Iron Curtain in 1991 was a watershed event for the US military profession as the all-volunteer force encountered two conditions for the first time: (a) core task expansion as the military undertook peacekeeping missions, and (b) an American desire for a “peace dividend” that reduced the Army end strength from 780,815 to 495,000.<sup>11</sup> To mitigate the shortfall in manpower, the Army developed the Logistics Civilian Augmentation Program.<sup>12</sup> The consequences of this shift remained masked until the 1990s when the demand for forces in the Balkans resulted in the Army ceding some jurisdiction for base support operations, first to the Joint Force and then to contractors in an effort to husband resources for combat operations.<sup>13</sup>

The subsequent recognition of an inadequate force structure, as well as a desire to harness a perceived Revolution in Military Affairs (RMA), and increase Department of Defense efficiency by introducing market competitiveness, created significant environmental change. Accordingly, Office of Management and Budget Circular 76 accelerated and expanded the scope of contractor utilization across all the Department of Defense to increase military capability without raising end-strength.<sup>14</sup> The magnitude of the consequences that resulted from increased outsourcing became evident early in Operation Iraqi Freedom when the contractor-to-servicemember ratio became 1 to 10 (an increase from 1 to 50 for Desert Storm in 1991).<sup>15</sup> While the military was arguably more cost efficient, the reduced force structure proved inadequate for the military to train itself and coalition partners, or protect the force on the modern noncontiguous battlefield.

Prior to this expansion of contractor roles and duties, jurisdictional competition over military work was framed in one of three relationships. First, competition was framed as interservice rivalry within the Department of Defense—a condition for resolution by civilian authority

9 Abbott, *The System of Professions*, 225-227 and 267-279.

10 As an example see the emergence of USAF fighter pilots as detailed by Brian J. Collins, “The Officer Corps and the Profession,” *Joint Forces Quarterly*, no. 45 (2007), 110.

11 Andrew Feickert, *Army Drawdown and Restructuring: Background and Issues for Congress* (Washington, DC: Congressional Research Service, 3 January 2013), 7.

12 Often referred to as LOGCAP or AR 700-137. Camile M. Nichols, “The Logistics Civil Augmentation Program,” *Military Review*, no. 76 (1996), 65–79.

13 Leonard Wong and Douglas V. Johnson II, “Serving the American People: A Historical View of the Army Profession,” in *The Future of the Army Profession*, 2nd ed., eds. Don Snider and Lloyd Matthews (Boston, MA: Learning Solutions, 2005), 93–112.

14 Christopher Spearin, “The Emperor’s Leased Clothes: Military Contractors and Their Implications in Combating International Terrorism,” *International Politics* 41 (2004):243-64.

15 Jonathan A. Johnson, *Private Security Contractors: The Other Force*, Strategy Research Project (Carlisle, PA: US Army War College, 2011), 3, [www.dtic.mil/dtic/tr/fulltext/u2/a560096.pdf](http://www.dtic.mil/dtic/tr/fulltext/u2/a560096.pdf).

based on expert knowledge of each service.<sup>16</sup> Second, scholars detailed intrastate jurisdictional competition between governmental agencies—such as the Department of State.<sup>17</sup> Lastly, jurisdictional competition occurred transnationally where the US military competed with other militaries to perform international missions—such as counterterrorism training.<sup>18</sup> As the Global War on Terror progressed, additional second order effects of contracting became more apparent. A fourth competitive relationship emerged where private companies began to compete with the military for jurisdiction over its core task—the employment of lethal force. In 2004, Deborah Avant argued that the Army's:

. . . ready use of contractors for tasks that are crucial to both the development of the profession in the future and to the success of new missions [such as stabilization], however, has generated competition between the Army and private security companies over who will shape the development of the future professionals and has degraded the Army's ability to undertake successful missions on its own.<sup>19</sup>

The increased use of private security and training companies in a combat zone sanctioned other agents to compete for a portion of what was previously the US military profession's sole jurisdiction.

### Jurisdiction Competition

Abbott's research identified that the competition for professional jurisdiction can occur in three arenas and result in five outcomes. Jurisdiction competition occurs in the arenas of legal action, public opinion, or in the workplace, and with each actor when and where they perceive an advantage. Because these jurisdictional conflicts can produce conflicting decisions (i.e., when the normative workplace behavior does not reflect public perception or the law), final resolution takes time.<sup>20</sup> During the period of jurisdiction contest, work and task quality varies as no single profession can fully police the participants. The allocation of resources and the social need for consistent task fulfillment ultimately force resolution of competing jurisdiction claims, but this takes time and is marked by contention and task failure. An analysis of the jurisdictional competition and the settlements related to the use of private contractors indicate the state of the US military profession.

### Claims for Military Jurisdiction

During the Global War on Terror, private security contractors comprised roughly 10 percent of the contract workforce in Iraq and Afghanistan.<sup>21</sup> Private contractor duties are limited by law to those deemed “defensive in nature” such as providing security for sites,

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16 Richard Lacquement, “Mapping Army Professional Expertise and Clarifying Jurisdictions of Practice,” in *The Future of the Army Profession*, 213–235.

17 For example see Dana Priest, *The Mission: Waging War and Keeping Peace with America's Military*, 1st ed. (New York: W. W. Norton & Company, 2003), 11–13.

18 Burk, “Expertise, Jurisdiction, and the Legitimacy of the Military Profession,” 50–51.

19 Deborah Avant, “Losing Control of the Profession Through Outsourcing?” in *The Future of the Army Profession*, 272.

20 Abbott, *The System of Professions*, 59–63.

21 Moshe Schwartz, *The Department of Defense Contractors in Afghanistan and Iraq: Background and Analysis* (Washington, DC: Congressional Research Service, 22 June 2010), 7–11, [www.fas.org/sgp/crs/natsec/R40764.pdf](http://www.fas.org/sgp/crs/natsec/R40764.pdf).

convoys, select personnel, and special escort.<sup>22</sup> While this scope of work sounds benign, defensive duties placed private security companies at critical points of US counterinsurgency doctrine as it strived to secure and maintain legitimacy with the populous. On the modern battlefield the nominally weaker enemy attacks (with little cost) public officials, supply lines, and base camps to destroy the public's confidence in the local and national governments' ability to secure its population and infrastructure. In this environment, US contractors comprise 25 percent of the US personnel killed in action in Iraq.<sup>23</sup> An armed security contractor was 1.5 to 4.8 times more likely to be killed in Iraq or Afghanistan than US uniformed personnel.<sup>24</sup> In 2009, the International Committee of the Red Cross (ICRC) recognized the magnitude and ramifications of contractors on the battlefield and published a report that stated contract security personnel who are assigned to protect an embassy from attack would likely be considered combatants, "as would private security providers assigned to protect military supply convoys from insurgents because their purpose, although defensive in nature, would affect hostilities and could require engagement with enemy forces."<sup>25</sup>

In addition to the number of contractors being greater than any time in American history, the duration, and scope of their role is likewise without precedent. While previous force design decisions deliberately increased the role of contractors on the battlefield to improve efficiency, Avant contends the Global War on Terror increase "was a tool to fill the mobilization gap created by poor judgment about force requirements after 9/11."<sup>26</sup> With the absence of a precedent to govern contractors as combatants and the absence of guidance for the US government to stop using private security companies, there is no reason to expect private security contractors to retire from the workplace—the new battlefield—and disappear. According to Abbot, this condition where actors perform similar work in the same environment inherently invites competition in the arenas of legal, public opinion, and the workplace.<sup>27</sup>

### *Legal Jurisdiction*

Allegations of abuse and war crimes by private security contractors during the Global War on Terror have led to a series of Congressional hearings, investigations, and legal measures in an attempt to establish oversight.<sup>28</sup> Contracted forces, such as private security companies, work in a contingency area and "operate under three levels of legal authority: (a) the international order of the laws and usages of war, resolutions of

22 Eugene Shearer, *The U.S. Government's Employment of Private Security Companies Abroad*, Strategy Research Project (Carlisle, PA: U.S. Army War College, 2012), 1-2, [www.dtic.mil/dtic/tr/fulltext/u2/a562046.pdf](http://www.dtic.mil/dtic/tr/fulltext/u2/a562046.pdf).

23 T. X. Hammes, "Private Contractors in Conflict Zones: The Good, the Bad, and the Strategic Impact," INSS Strategic Forum, National Defense University, SF No. 260, 3 [http://psm.du.edu/media/documents/reports\\_and\\_stats/think\\_tanks/inss\\_hammes-private-contractors.pdf](http://psm.du.edu/media/documents/reports_and_stats/think_tanks/inss_hammes-private-contractors.pdf)

24 Schwartz, *The Department of Defense's Use of Private Security Contractors*, 8-12.

25 Jennifer K. Elsea, *Private Security Contractors in Iraq and Afghanistan: Legal Issues* (Washington, DC: Congressional Research Service, 7 January 2010), 6, [www.fas.org/sgp/crs/natsec/R40991.pdf](http://www.fas.org/sgp/crs/natsec/R40991.pdf).

26 Deborah Avant, "The Mobilization of Private Forces After 9/11: Ad Hoc Response to Inadequate Planning," in *How 9/11 Changed Our Ways of War*, ed. James Burk (Palo Alto, CA: Stanford University Press, in press), 8-28.

27 Abbott, *The System of Professions*, 59-60.

28 Jennifer K. Elsea, Moshe Schwartz, and Kennon H. Nakamura, *Private Security Contractors in Iraq: Background, Legal Status, and Other Issues* (Washington DC: Congressional Research Service, August 25, 2008), 1.

the United Nations Security Council, and relevant treaties; (b) U.S. law; and (c) the domestic law of the host countries.”<sup>29</sup> This condition allows for jurisdictional claims in three different legal systems, whose respective authorities remain largely unchallenged and without codification. Prior to the National Defense Authorization Act (NDAA) of 2007, legal precedent held that civilians acting within a combat zone during “time of war” were subject to the Uniform Code of Military Justice (UCMJ), the legal authority of the military profession.<sup>30</sup>

The changes in the 2008 NDAA required the Department of Defense, the Department of State, and the US Agency for International Development to establish a memorandum of understanding that specified the responsibility of the parent department to investigate and refer possible violations of the UCMJ or the Military Extraterritorial Judicial Act (MEJA)—in the case of civilians.<sup>31</sup> The expanded application of the MEJA to a combat zone required the Department of Justice be notified if a civilian employee (to include those of a private security company) is suspected of having committed a felony.<sup>32</sup> This 2008 NDAA instituted two changes. First, it removed private security contractors employed in a combat zone by other governmental agencies and civilian contractors from military oversight and investigation authority. Second, it removed the military’s legal authority to enforce professional standards against those security contractors it employed. By omission, this division of legal jurisdiction moved some private security companies completely outside any US oversight as:

... some contractor personnel who commit crimes might not fall within the statutory definitions described [above], and thus might fall outside the jurisdiction of U.S. criminal law, even though the United States is responsible for their conduct as a matter of state responsibility under international law.<sup>33</sup>

### *Public Jurisdiction*

The websites of private security companies such as Academi (formerly Blackwater, then Xe), DynCorps and Triple Canopy illustrate private security companies’ open declaration of their qualifications and their offer of an alternative to traditional military forces. In a free market society, however, the public contests for jurisdiction are often more oblique and insidious. The highly publicized stories and detailed investigations associated with the role of private security contractors in Fallujah and Nisoor Square (Baghdad), Iraq are public examples of the new combat role of private contracting companies.<sup>34</sup> The acceptance of news and periodical stories of private contractors as warriors on the front lines provides a third indicator of the ongoing security companies’

29 Elsea, *Private Security Contractors in Iraq and Afghanistan*, 5.

30 The John Warner National Defense Act 2007 made provisions for those contractors employed by DOD to be subjected to UCMJ jurisdiction. This authority remained largely untested, as any exercise of this law would likely be challenged as unconstitutional or superseded by subsequent legislation. See Shearer, *The U.S. Government’s Employment of Private Security Companies Abroad*, 23.

31 Elsea, *Private Security Contractors in Iraq and Afghanistan*, 19.

32 Military Extraterritorial Jurisdiction Act, Title 18 Part II, Chapter 212, Sec. 3261 (January 3, 2012) <http://www.gpo.gov/fdsys/granule/USCODE-2011-title18/USCODE-2011-title18-partII-chap212-sec3261/content-detail.html>

33 Elsea, *Private Security Contractors in Iraq and Afghanistan*, 18.

34 “Contractors - The High-Risk Contracting Business,” *Frontline PBS*, 2005 <http://www.pbs.org/wgbh/pages/frontline/shows/warriors/contractors/highrisk.html>; Doug Miller, “Blackwater Settles With Families of Nisoor Square Victims,” *Charlotte Observer*, January 7, 2012.



public claims for jurisdiction over state-sanctioned application of lethal force.<sup>35</sup> Lastly, and arguably most compelling, private security companies maintain publicly they are more cost effective (as a result of no long-term obligations to the institution or the workforce) and timely (rapid mobilization) than the military.<sup>36</sup> Private security companies publicly claim immediate cost savings without a counterargument as to the long-term effects on military force structure and capabilities.<sup>37</sup>

Because the eroded US military jurisdiction has not yet produced a crisis, public efforts to restore the military profession's jurisdiction have not been compelling and thus are ineffective. For example, national security scholars Fontaine and Nagl concluded:

Most experts agree that contracting out logistics and construction activities tends to result in significant cost savings to the government, while more skilled labor—and private security functions in particular—tends toward parity with the cost of using federal employees.<sup>38</sup>

While these and similar findings challenge the economic rationale for private contractors, such findings do not resonate with the American public in a manner that encourages strengthening of the military profession.

The use of private contractors and the subsequent erosion of the military profession's jurisdiction resulted from the inability of the military to meet an increase in demand for operational forces—not from an attempted cost savings measure. The debate on the level of resourcing required by the military to protect the profession's jurisdiction over its core competency—and sustain the pattern of US civil-military relations—lacks a public audience. In this instance, the military may be a victim of its own success. The trust relationship between the military and the public is now so strong tactical success is taken for granted, with little regard by civilian leaders or the public for the profession's requirements beyond having sufficient resources.

### *Workplace Jurisdiction*

The current military to civilian contractor ratio of 1:1 in the Global War on Terror reflects the degree of privatization that has occurred within the Department of Defense. It is accepted and expected that civilians now perform tasks previously accomplished by uniformed personnel. This ratio reflects the increased number of nonmilitary personnel performing security operations for the US government. At the end of the Iraq troop surge in 2009, the Department of Defense and the Department of State employed 16,263 private security personnel in Iraq and 5,062 in Afghanistan.<sup>39</sup> For perspective, the totals are equivalent to

35 For examples of public acceptance of private security contractors as warriors, see Lee Sharon, "Private Security Contractors: Sifting Out the Wannabes, Never-Have Beens and Never-Will-Bes," *Soldier of Fortune Magazine*, 2008, 24–25, <http://www.sofmag.com/>; Suzanne Kelly, "Confessions of a Private Security Contractor," *Security Clearance CNN*, Dec 27, 2011, <http://security.blogs.cnn.com/2011/12/27/confessions-of-a-private-security-contractor/>.

36 Hammes, "Private Contractors in Conflict Zones," 2.

37 Elsea, Schwartz, and Nakamura, *Private Security Contractors in Iraq*, 36.

38 Richard Fontaine and John A. Nagl, *Contracting In Conflicts: The Path to Reform* (Washington, DC: Center for a New American Security, 6 June 2010), 18–19, <http://www.cnas.org/node/4560>.

39 Department of Defense figures as of March 31, 2009, Commission on Wartime Contracting, *At What Cost? Contingency Contracting in Iraq and Afghanistan* (June 2009), 62.

six Brigade Combat Teams. With 2010 beginning the operational withdrawal of US forces from both theaters of war, private security company personnel totaled over 28,000 and represented over 10 percent of the total contractors employed by the Departments of Defense and State in Iraq and Afghanistan.<sup>40</sup> These trends indicate significant incursion by private contractors into the workplace and that the jurisdictional claim of these contractors has expanded—rather than contracted—as US military involvement in a combat zone declined.

### Jurisdiction Settlements

Competition between professions requires each to adapt and secure its jurisdiction or become a bureaucracy or occupation.<sup>41</sup> Conversely, adaptation by an emerging profession or a challenger produces the means to claim a jurisdiction in legal, public, or workplace arenas. These claims, in turn, produce five types of settlements, arranged on a continuum. First, one of the actors can be awarded full jurisdiction in a zero sum gain arrangement. Second, one of the actors can be subordinated to the other. Third, the claim could be divided among the actors with each becoming a formal profession, independently responsible to society. Midway between a formal division and subordination lies the intellectual settlement, where one profession retains authority and responsibility for the abstract knowledge while competitors operate on an unrestricted basis. The final settlement type—and least enduring—is advisory jurisdiction. Such arrangements grant one group independent authority to interpret another profession's actions as its jurisdiction (i.e., the clergy may interpret and explain the larger meaning of medical conditions to patients).<sup>42</sup> Recent jurisdiction settlements resulting from competition in the three arenas illustrate the ongoing challenges to the US military profession.

#### *Full Jurisdiction*

In the 2009 NDAA, Congress expressed that:

. . . private security contractors should not perform certain functions, such as security protection of resources, in high-threat operational environments, and that DOD regulations 'should ensure that private security contractors are not authorized to perform inherently governmental functions in an area of combat operations.<sup>43</sup>

This legal directive acknowledged the military had come to rely heavily on private contractors to complete its mission and required the Department of Defense to reconcile the intent of the law with conditions on the ground. It presented a nuanced interpretation that did “not prohibit the use of contract personnel for security, but . . . limits the extent to which contract personnel may be hired to guard military installations.”<sup>44</sup> The same legislation also specified that the “Combatant Commander has the authority to decide whether to classify security functions as

40 John P. Carrell, *Government Contractors – Do We Really Need Them?*, Strategic Research Project (Carlisle, PA: U.S. Army War College, 2011) 2, [www.dtic.mil/dtic/tr/fulltext/u2/a553013.pdf](http://www.dtic.mil/dtic/tr/fulltext/u2/a553013.pdf), 2.

41 Don M. Snider, *Dissent and Strategic Leadership of the Military Professions* (Carlisle, PA: Strategic Studies Institute, 2008), 9, [www.strategicstudiesinstitute.army.mil](http://www.strategicstudiesinstitute.army.mil).

42 Snider, *Dissent and Strategic Leadership of the Military Professions*, 69-77.

43 Elsea, *Private Security Contractors in Iraq and Afghanistan*, 15.

44 *Ibid.*, 16.

commercial.”<sup>45</sup> In theory this caveat allows military commanders some degree of authority to protect the US military’s professional jurisdiction based on their ability to define the scope of security tasks suitable for contract work.

In reality, senior commanders (the agent) met political leaders’ (the principal) expectations to “do more with less,” by resorting to private contractors. The increased use of such contractors allowed commanders to remain under theater of operation force-level caps and have sufficient combat power to achieve the mission. In Iraq and Afghanistan, the numbers of such personnel did not count against “force caps” or troop strength limitations, and thus minimized the public exposure as to the level of US involvement.<sup>46</sup> Despite the intent of the legislation, senior leaders were placed in an ethical dilemma—use private security contractors to meet the workplace requirements for security with reduced troop levels, or employ only the authorized number of US military professionals (as the state’s sole agent of lethal force) and risk mission failure/increased casualties.

### *Subordination*

The enactment of the 2008 NDAA intended to give the military oversight of private security contractors but did little to enable the US military profession to defend its jurisdiction for two reasons. First, the military cannot write or execute security contracts for the multitude of other government agencies—such as the Department of State, and private companies that employ private security contractors in a combat zone—so there is no clear subordination of authority. Second, the large demand for contractors during the Global War on Terror had the compounding effect of overwhelming the work capacity of the government’s contracting officers. Military contracting professionals lacked the capacity to respond to the anticipated demand foreseen in the military reduction of the 1990s.<sup>47</sup> Consequently, the military had to hire private security companies to hire sufficient contractors.

### *Divided Settlements*

Some political leaders recognized that in some instances effectiveness over efficiency is appropriate and thus granted the military the legal authority to avoid being forced to outsource its own demise. For example, Presidential Policy Letter 11-01 allows any agency or department to in-source any capability they determine is essential to performing core missions regardless of comparative costs.<sup>48</sup> While well intended, the policy does not address the root problem of inadequate Department of Defense capacity to meet a sudden increase in demand. Moreover, these prescriptive attempts to divide and define jurisdiction in order to protect the military profession remain subject to interpretation in the workplace. For example, because of the large presence of military and contract personnel working on the same task in the same environment, migration from one profession to the other is not uncommon.

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45 Ibid., 17.

46 John P. Carrell, *Government Contractors – Do We Really Need Them?*, 4-5.

47 Karen L. Coccio, *Outsourcing, In-sourcing, and Maintaining the Acquisition Workforce Profession*, Strategy Research Project (Carlisle, PA: U.S. Army War College, 2012), 11-12.

48 Ibid., 12.

The greater the resources or legitimacy of one profession as compared to the other, then the greater the propensity for personnel to join the competing profession, which in this case forces the US military to incur significant second order costs and loss of social capital.<sup>49</sup>

### *Intellectual Settlements*

The 2011 National Defense Acquisition Act (Section 833) mandated “third-party certification processes for determining whether private security contractors adhere to standards for operational and business practices” (currently under development).<sup>50</sup> This legal action moved the authority to conduct lethal force training for combat operations outside the military’s jurisdiction and sanctioned the associated development of abstract knowledge to competing nongovernmental professions. The initial migration of uniformed personnel to private security companies made for great congruence of the governing abstract knowledge; however, the demand for contractors drove many companies to meet manpower and cost savings by employing large numbers of people from other nations who have no association with, or training from, the US military profession. For example, in 2004 private security companies in Iraq employed approximately 30,000 personnel from over 30 countries.<sup>51</sup>

### *Advisory Settlements*

The military profession briefly held jurisdiction over private security companies via the National Defense Act of 2008 which required all Department of Defense, Department of State, and governmental agencies employing these contractors to comply with DOD Instruction 3020-50.<sup>52</sup> However, market forces made this settlement brief as other legal actions, such as NDAA 2011, nullified the provision by clouding the combatant commander’s ability to enforce this law with competing sets of guidance, such as references to an industry standard.

## **Conclusion**

An examination of the recent roles of private contracting companies during the Global War on Terror indicates they are actively and passively contesting the US military profession’s jurisdiction over its core task—the authority to employ lethal force as *the* agent of the state. The US military profession is under assault in all three arenas: the workplace (predominantly), the legal system, and the public. Since this contest is without precedence it is not surprising that the jurisdictional settlements to date have been inconclusive and contradictory, thus leaving the final outcome undetermined.

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49 Fontaine and Nagl, *Contracting In Conflicts*, 18; also Burk, “Expertise, Jurisdiction, and the Legitimacy of the Military Profession,” 56.

50 “DoD Issues Interim Rule for Contractors Performing Private Security Functions,” August 19, 2011, National Contract Management Association at Legislative and Regulator Alerts, <http://www.ncmahq.org/NewsPublications/LegAlertDetail.cfm?itemnumber=10336>.

51 Elsea, Schwartz, and Nakamura, *Private Security Contractors in Iraq*, 3; also Sarah K. Cotton et al, *Hired Guns: Views About Armed Contractors in Operation Iraqi Freedom* (Santa Monica, CA: Rand Corporation, 2010), 20.

52 Department of Defense Instruction (DODI) 3020.50, *Private Security Contractors (PSCs) Operating in Contingency Operations, Humanitarian or Peace Operations, or Other Military Operations or Exercises* (Washington, DC: Department of Defense, July 22, 2009, Incorporating Change 1, August 1, 2011)..

There are two countervailing arguments to these findings. First, private security contractors are numerically niche players whose involvement is strategically insignificant. Second, the problem is self-correcting at the end of conflict demand for these contractors will decrease. Accepting these counterarguments is not wise for three reasons. In regards to the former, the magnitude of contractor involvement is strategically significant as are the consequences of their actions—regardless of aggregate numbers—as shown by the actions in Nisoor Square. As to the latter, the pattern of private security contractor involvement is not self-correcting as evidenced by the patterns established in the Balkans, Iraq, and Afghanistan. Lastly, other research on the use of security contractors in combat zones has come to critical conclusions about cost efficiency, congruence within COIN doctrine, and organizational ethics.

Recommendations from previous scholarship included increasing military capacity to negate the need for security companies, severely restricting them to locations where rule of law prevails, and increasing Congressional oversight of them.<sup>53</sup> While valid structural recommendations, they are either too narrow or unrealistically broad, and risk repeating past mistakes. In the absence of deliberate effort, the erosion of the US military's jurisdiction can be expected to continue. At issue here is not the military profession's jurisdiction per se, but how to nurture the profession so it can ensure future military effectiveness. The answer to this question must recognize that because the four services are subordinate to civilian leaders, they cannot be solely responsible for the US military profession in today's environment. Additionally, current operating environment and domestic fiscal constraints dictate the United States will almost certainly have to continue to use private security companies.

Thus, the current fiscal debate among military and civilian leaders as to whether to assume risk with short-term readiness or long-term technological superiority is a false dichotomy. The concept of risk in the ongoing "build down" must be expanded to include an institutional dimension to recognize second order detrimental effects to the military profession. Decisions based solely on efficiency arguments related to near-term cost and future program development timelines do not provide for a military profession of sufficient caliber to protect and nurture the all-volunteer force. As an alternative, requisite military fiscal decisions should be informed by their effect on services' core jurisdictions, and implemented with deliberate settlements to protect them. This is a new approach and requires additional research and a larger shared sense of responsibility.

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53 Molly Dunigan, *Considerations for the Use of Private Security Contractors in Future U.S. Military Deployments* (Santa Monica, CA: Rand Corporation, June 2010), 10; Moshe Schwartz, *The Department of Defense's Use of Private Security Contractors in Iraq and Afghanistan*, 20.