BEYOND ACCOUNTABILITY: THE CONSTITUTIONAL, DEMOCRATIC, AND STRATEGIC PROBLEMS WITH PRIVATIZING WAR

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I. INTRODUCTION

In late 2002, while grabbing headlines for boldly promising to slash the federal civilian workforce in half,[1] the Bush Administration was at the same time discreetly hiring private contractors to relieve Special Forces troops of their duty to protect President Hamid Karzai in Afghanistan.[2] In the more celebrated declaration regarding workforce reductions—perhaps the culmination of a decade-long, bipartisan initiative to reinvent and streamline government[3]—the President attempted to allay concerns by

1. *See* Edwin Chen, *Bush Aims To Privatize Many Federal Jobs*, L.A. TIMES, Nov. 15, 2002, at A1; Paul C. Light, Editorial, *The End of the Civil Service?*, WASH. POST, May 9, 2003, at A35; Ellen Nakashima, *Bush Opens 40,000 Federal Workers' Jobs to Competition; Goal: Put 425,000 Positions Up for Grabs to Contractors*, WASH. POST, June 8, 2001, at A27 [hereinafter Nakashima, *Bush Opens*]; Ellen Nakashima, *Bush Plan Could Cut Federal Workers*, WASH. POST, Aug. 26, 2001, at A1 [hereinafter Nakashima, *Bush Plan*]; Richard W. Stevenson, *Government May Make Private Nearly Half of Its Civilian Jobs*, N.Y. TIMES, Nov. 15, 2002, at A1 [hereinafter Stevenson, *Government*] (describing President Bush's plan to transfer 850,000 government jobs to private contractors); Richard W. Stevenson, *The Incredible Shrinking Government, Bush Style*, N.Y. TIMES, Dec. 8, 2002, at D4 [hereinafter Stevenson, *Incredible Shrinking*]; Edward Walsh, *OMB Details Outsourcing Revisions*, WASH. POST, May 30, 2003, at A21 (describing President Bush's plan to speed up the process of opening up hundreds of thousands of federal jobs to private sector competition). For the announcement of this policy proposal, see EXECUTIVE OFFICE OF THE PRESIDENT, OFFICE OF MANAGEMENT AND BUDGET, CIRCULAR NO. A-76 (Revised) (Nov. 14, 2002), *available at* http://www.whitehouse.gov/omb/circulars/a076/a76_111402.doc (last visited June 4, 2004) [hereinafter CIRCULAR NO. A-76].

2. *See* James Dao, *U.S. Company To Take Over Karzai Safety*, N.Y. TIMES, Sept. 19, 2002, at A24; Michael Elliott, *The Trouble with Saving the World*, TIME, Dec. 30, 2002, at 109; Eric Pape & Michael Meyer, *Dogs of Peace*, NEWSWEEK: INT'L ED., Aug. 25–Sept. 1, 2003, at 22; Leslie Wayne, *America's For-Profit Secret Army*, N.Y. TIMES, Oct. 13, 2002, at C1.

3. *See* Nakashima, *Bush Plan*, *supra* note 1 ("Bush's management package is but one in a series of attempts to remake the government bureaucracy over the years, from Jimmy Carter[] . . . to Ronald Reagan[] . . . to Al Gore. . . ."); Stevenson, *Incredible Shrinking*, *supra* note 1 ("[I]f Mr. Bush prevails, he could end up doing more to overhaul the Civil Service and to advance the conservative small-government agenda than any of his predecessors, Mr. Reagan included."); *see also* E.S. SAVAS, PRIVATIZATION AND PUBLIC-PRIVATE PARTNERSHIPS 3, 11–12 (2000) (describing the dominance of the domestic privatization agenda over the past decade); Jody Freeman, *Extending Public Law Norms Through Privatization*, 116 HARV. L. REV. 1285, 1292–93 (2003) (describing aims of leaders of both parties to reduce the size and cost of the federal government); Daniel Guttman, *Public Purpose and*

stressing that the proposed job cuts would not intrude on any functions that are "inherently governmental;" these cuts would instead be focused more narrowly on reaping economic benefits by privatizing commercial responsibilities such as catering, gardening, and clerical work. Unfortunately, in replacing Special Forces troops with private military contractors, the Administration offered no comparable words of comfort.

Since then, although the government has subsequently scaled back its ambitious domestic downsizing and privatizing initiatives, it nevertheless has expanded and intensified its military privatization agenda. This has especially been the case in Iraq, where today over 20,000 contractors are securing key American installations, participating in armed raids against insurgents, and—most infamously—serving as interrogators in the occupation's most notorious prisons.[4]

Who would have thought that when the modern wave of government privatization began decades ago with cities experimenting with the contracting out of their sanitation responsibilities,[5] it would swell to encompass the privatization of prisons and welfare services,[6] let alone the

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Private Service: The Twentieth Century Culture of Contracting Out and the Evolving Law of Diffused Sovereignty, 52 ADMIN. L. REV. 859, 861–62 (2000) (noting how the 1990s were a decade "marked by bipartisan agreement on the need to reform and reduce 'Big Government'" and how downsizing was understood to require shrinking the size of the federal workforce); Jerry L. Mashaw, *Small Things Like Reasons Are Put in a Jar: Reason and Legitimacy in the Administrative State*, 70 FORDHAM L. REV. 17, 27 (2001).

4. *See, e.g.*, Spencer Ante, *The Other U.S. Military*, BUS. WK., May 31, 2004, at 76; David Barstow et al., *Security Companies: Shadow Soldiers in Iraq*, N.Y. TIMES, Apr. 19. 2004, at A1; James Dao, *Private Guards Take Big Risks, for Right Price*, N.Y. TIMES, Apr. 2, 2004, at A1; Seymour M. Hersh, *Chain of Command: How the Department of Defense Mishandled the Disaster at Abu Ghraib*, NEW YORKER, May 17, 2004, at 38, 42; Renae Merle, *DynCorp Took Part in Chalabi Raid*, WASH. POST, June 4, 2004, at A17; Dana Priest, *Private Guards Repel Attack on U.S. Headquarters*, WASH. POST, Apr. 6, 2004, at A1; Dana Priest & Mary Pat Flaherty, *Under Fire, Security Firms Form an Alliance*, WASH. POST, Apr. 8, 2004, at A1; P.W. Singer, Editorial, *Have Guns, Will Travel*, N.Y. TIMES, July 21, 2003, at A15; Barry Yeoman, *Soldiers of Good Fortune*, MOTHER JONES, May/June 2003, at 38.

5. *See* JOHN D. DONAHUE, THE PRIVATIZATION DECISION 58–68 (1989) (describing privatization in municipal sanitation); Gerald E. Frug, *City Services*, 73 N.Y.U. L. REV. 23, 85–89 (1998); *see also* SAVAS, *supra* note 3, at 14–16 & nn.20–25 (describing the early history of privatization in the post-WWII era).

6. *See, e.g.*, Jody Freeman, *The Contracting State*, 28 FLA. ST. U. L. REV. 155, 174 (1999) (characterizing the differences between sanitation collection and prison management in terms of how much responsibility and discretion is extended to private actors). For discussions of welfare privatization, see, for example, JOEL F. HANDLER, DOWN FROM BUREAUCRACY (1996); Matthew Diller, *Form and Substance in the Privatization of Poverty Programs*, 49 UCLA L. REV. 1739 (2002) [hereinafter Diller, *Form*]; Matthew Diller, *The Revolution in Welfare Administration: Rules, Discretion, and Entrepreneurial Government*, 75 N.Y.U. L. REV. 1121 (2000) [hereinafter Diller, *Revolution*]; Michele Estrin Gilman, *Legal Accountability in an Era of Privatized Welfare*, 89 CAL. L. REV. 569 (2001); David J. Kennedy, *Due Process in a Privatized Welfare System*, 64 BROOK. L. REV. 231 (1998); and, Jon Michaels, *Deforming Welfare*, 34 SETON HALL L. REV. 573 (2004). For

privatization of foreign policy and national defense? Even staunch libertarians, proponents of the Nozickean night-watchman's state, have long-conceded that when stripped to its core, a nation still must maintain its public commitments to national defense.[7] Indeed, just a few years ago, leading privatization scholars dismissed as implausible the idea that we privatize national security functions.[8]

These individuals, like many others,[9] would thus not have expected Washington—over the past decade under Democrats and Republicans

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discussions of prison privatization, see, for example, John J. DiIulio**,** Jr., *The Duty To Govern: A Critical Perspective on the Private Management of Prisons and Jails*, *in* PRIVATE PRISONS AND THE PUBLIC INTEREST 155 (Douglas C. McDonald ed., 1990); Anne Larason Schneider, *Public-Private Partnerships in the U.S. Prison System*, *in* PUBLIC-PRIVATE POLICY PARTNERSHIPS 199 (Pauline Vaillancourt Rosenau ed., 2000); *Developments in the Law—The Law of Prisons*, 115 HARV. L. REV. 1838, 1868 (2002); Martin E. Gold, *The Privatization of Prisons*, 28 URB. LAW. 359 (1996); Richard Harding, *Private Prisons*, 28 CRIME & JUST. 265, 267 (2001); Clifford J. Rosky, *Force, Inc.: The Privatization of Punishment, Policing, and Military Force in Liberal States*, 36 CONN. L. REV. 879, 897–903 (2004); and, E.S. Savas, *Privatization and Prisons*, 40 VAND. L. REV. 889, 895 (1987). *See also* Rosky, *supra*, at 883 (calling military force a sacred government function and noting that whereas a "liberal state must monopolize the supply of military force . . . [it] need not monopolize the supply of punishment," i.e., prisons).

7. *See* ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 26–27 (1974); *see also* Rosky, *supra* note 6, at 885 (noting that "even in the most minimal accounts, the liberal state encodes rights into laws and uses threats and acts of physical coercion to enforce them . . . The state has, must have, or should have a monopoly of force").

8. *See* SAVAS, *supra* note 3, at 71, 303 (alluding to the fact that in times past some conflicts were fought using mercenaries and indicating that the area of national security is "the last refuge of antiprivatization forces"); Freeman, *supra* note 3, at 1300 (describing foreign policy and national defense as fields "where privatization seems unfathomable"); Oliver Hart et al., *The Proper Scope of Government: Theory and an Application to Prisons*, 112 Q.J. ECON. 1127, 1155–56, 1158–59 (1997) (noting that contracting out foreign policy responsibilities is too dangerous because private providers could refuse to carry out their responsibilities in an effort to seek better contractual terms); Michael J. Trebilcock & Edward M. Iacobucci, *Privatization and Accountability*, 116 HARV. L. REV. 1422, 1444 (2003) ("An extreme example [of a government activity too difficult and sensitive to outsource] is the formulation and implementation of a country's foreign or defense policy, because complexity of objectives and unforeseeable contingencies render delegations of these functions to private actors highly problematic."); *see also* Joel Brinkley & James Glanz, *Contractors in Sensitive Roles, Unchecked*, N.Y. TIMES, May 7, 2004, at A15 ("Thomas E. White, who was secretary of the Army until April 2003 and a leading advocate of privatization in the military said in an interview Thursday that he was *surprised* when he learned this week that employees of private companies were now involved in intelligence work, which suggests how abruptly the trend took off.") (emphasis added); Norman Macrae, *A Future History of Privatisation, 1992–2022*, ECONOMIST, Dec. 21, 1991, at 15 (suggesting that military protection is a core public good, not suitable for privatization); Barbara Whitaker, *Fed by the Hand that Bites*, N.Y. TIMES, Sept. 9, 1998, at G6 (quoting the director of a private prison corporation as suggesting "national security" is a uniquely "inherently governmental" function that should not be privatized).

9. Consider former Congressman Gephardt's words about the privatization of sensitive, national security functions. Not so long before military contractors exploded onto the scene in the wake of America's interventions into Afghanistan and Iraq, Gephardt, who at the time was House Minority Leader, said:

Federal law enforcement patrols the shores of the United States. They guard our borders.

alike—to employ private agents to do its military bidding in the Latin American drug wars, the Balkans, the Middle East, Rwanda, Afghanistan, and now, in Iraq. In short, since the first Persian Gulf War, private soldiers working for "military firms" under contract with the U.S. government have seen active duty in most conflicts involving the United States (and also some in which the United States has had no official military involvement). In another era, we would call these agents "mercenaries" and label their sponsor governments immoral and illegitimate; could it be that, today, these actors are just another set of government contractors, and the United States is just outsourcing one more governmental function?

Observers who react with dismay over the outsourcing of military functions might see it as the modern, or perhaps post-modern, embodiment of President Eisenhower's famous warning in 1961, when the former Supreme Allied Commander portended the rise of the military-industrial complex.[10] But while Eisenhower's prescient words continue to resonate today[11]—as we witness the awarding of hundreds of contracts to private firms, often to those quite friendly with high-ranking government officials, to rebuild the infrastructure and restore the institutions of Iraq and Afghanistan as well as scores of additional contracts for defense hardware[12]—even he could not have foreseen the government's current policy of delegating highly sensitive responsibilities to private soldiers in and near zones of conflict.[13]

> They track terrorists down . . . . I ask all of you, do you want to contract out the Capitol Police? Do you want to contract out the U.S. Marines? Do you want to contract out the F.B.I. and the Customs Service? I do not think so.

147 CONG. REC. H7631 (daily ed. Nov. 1, 2001) (statement of Rep. Gephardt).

10. *See* Dwight D. Eisenhower, Farewell Address (Jan. 17, 1961), *available at* http://www.eisenhower.utexas.edu/farewell.htm (last visited June 22, 2004).

11. *See infra* note 27 and accompanying text.

12. *See infra* note 28 and accompanying text.

13. *See, e.g.*, Kenneth Bredemeier, *Thousands of Private Contractors Support U.S. Forces in Persian Gulf*, WASH. POST, Mar. 3, 2003, at E1; Kathleen Day, *In Haiti, Covering the Bases: Pentagon Cuts Give Private Firms Opportunity To Provide Services to Military*, WASH. POST, Sept. 23, 1994, at D1; Anthony Faiola & Scott Wilson, *U.S. Took Risks in Aiding Peru's Anti-Drug Patrols*, WASH. POST, Apr. 29, 2001, at A1; Juan Forero, *Role of U.S. Companies in Colombia Is Questioned*, N.Y. TIMES, May 18, 2001, at A3; Bradley Graham, *Ex-GIs Work To Give Bosnian Force a Fighting Chance*, WASH. POST, Jan. 29, 1997, at A1 [hereinafter Graham, *Bosnia*]; Bradley Graham, *U.S. Firm Exports Military Expertise: Role in Training Croatian Army Brings Publicity and Suspicions*, WASH. POST, Aug. 11, 1995, at A1 [hereinafter Graham, *Croatia*]; Renae Merle, *More Civilians Accompanying U.S. Military: Pentagon Is Giving More Duties to Contractors*, WASH. POST, Jan. 22, 2003, at A10; Ken Silverstein, *Privatizing War: How Affairs of State Are Outsourced to Corporations Beyond Public Control*, NATION, July 28–Aug. 4, 1997, at 11; P.W. Singer, Editorial, *National Builders and Low Bidders in Iraq*, N.Y. TIMES, June 15, 2004, at A23; Jonathan D. Tepperman, *Out of Service*, NEW REPUBLIC, Nov. 25, 2002, at 10; Wayne, *supra* note 2; *see also supra* note 4.

Indeed the delegation of combat responsibilities presents a qualitatively different and more dangerous privatization agenda than that which troubled Eisenhower. *His* concerns would be reflected today in the recent allegations of "sweetheart" deals between the federal government and the likes of, say, Halliburton for energy services in Iraq[14] or Boeing for Tanker aircraft.[15] But the harms that flow from those types of contracts, however troubling and possibly even scandalous, fit comfortably within the conventional privatization framework of outsourcing functions that are not inherently governmental, but rather are commercial in nature.[16] They are problems of *accountability*, and result mainly from poor oversight, improper contract management, and insufficient fidelity to (or simply inadequate) conflict-of-interest laws.[17] And although these contracts and the harms that may accompany them are worrisome from an array of policy perspectives, conceptually speaking they are unremarkable: Driven by the same market-efficiency impulses that motivate the outsourcing of sanitation, catering, and even prison management responsibilities, the contracts to rebuild roads and schools in failed states and to manufacture new weapons do not compel us to rethink our basic understandings of American privatization.[18]

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14. DAN BRIODY, THE HALLIBURTON AGENDA: THE POLITICS OF OIL AND MONEY (2004); Dan Baum, *Nation Builders for Hire*, N.Y. TIMES, June 22, 2003, § 6 (Magazine), at 34 (suggesting that although it certainly helped that Vice President Cheney was a former chair of Halliburton when its subsidiary, Kellogg Brown & Root ("KBR"), received a $7 billion contract to manage the Iraqi Oil Fields, KBR did not really need the Vice President's assistance since "by now [KBR is] so enmeshed with the Pentagon that it was able essentially to assign the contract to itself"); Kenneth R. Bazinet, *Legislators Seek Investigation as Halliburton Contracts Rise*, ORLANDO SENTINEL, Sept. 19, 2003, at A3; Joshua Chaffin, *Halliburton 'Reaps Nearly $500 million' from Iraq-Related Projects*, FIN. TIMES, May 30, 2003, at P2; Erik Eckholm, *A Top U.S. Contracting Official for the Army Calls for an Inquiry in the Halliburton Case*, N.Y. TIMES, Oct. 25, 2004, at A13 (describing how the Army permitted Halliburton officials to attend internal meetings regarding contracting decisions); Jeff Gerth & Don Van Natta, Jr., *Halliburton Contracts in Iraq: The Struggle To Manage Costs*, N.Y. TIMES, Dec. 29, 2003, at A1 (describing a $2 billion contract awarded to Halliburton by the federal government without first soliciting competitive bids and noting the close ties between the company and Vice President Cheney); Jane Mayer, *What Did the Vice-President Do for Halliburton*, NEW YORKER, Feb. 16, 2004, at 80; Richard A. Oppel, Jr., *Friends in Deed, In the Company of Vice President*, N.Y. TIMES, Mar. 30, 2003, at D5; David E. Rosenbaum, *A Closer Look at Cheney and Halliburton*, N.Y. TIMES, Sept. 28, 2004, at A16.

15. *See* Renae Merle, *Air Force-Boeing Negotiator Criticized*, WASH. POST, Oct. 27, 2003, at A11; Leslie Wayne, *A Growing Military Contract Scandal*, N.Y. TIMES, Oct. 8, 2004, at C1 [hereinafter Wayne, *Growing*]; Leslie Wayne, *Air Force Asks for Broader Inquiry into Charges of Favoritism in Boeing Contracts*, N.Y. TIMES, Oct. 12, 2004, at C2 [hereinafter Wayne, *Air Force*]; Leslie Wayne, *Ex-Pentagon Official Gets 9 Months for Conspiring To Favor Boeing*, N.Y. TIMES, Oct. 2, 2004, at C1 [hereinafter Wayne, *Ex-Pentagon*].

16. *See supra* note 15 and accompanying text; *infra* notes 33–35, 37 and accompanying text.

17. *See infra* notes 38–39 and accompanying text.

18. *See infra* notes 34–35 and accompanying text.

Military privatization of combat duties, on the other hand, decidedly does. It has the potential to introduce a range of novel constitutional, democratic, and strategic harms that have few, if any, analogues in the context of domestic, commercial outsourcing. Military privatization can be, and perhaps already has been, used by government policymakers under Presidents Bill Clinton and George W. Bush to operate in the shadows of public attention, domestic and international laws, and even to circumvent congressional oversight. For a variety of political and legal reasons, the Executive may at times be constrained in deploying U.S. soldiers. The public's aversion to a military draft, the international community's disdain for American unilateralism, and Congress's reluctance to endorse an administration's hawkish foreign goals may each serve to inhibit, if not totally restrict, the president's ability to use U.S. troops in a given zone of conflict. In such scenarios, resorting to private contractors, dispatched to serve American interests without carrying the apparent symbolic or legal imprimatur of the United States, may be quite tempting.

In those instances, it would not necessarily be the cheaper price tag or specialized expertise that makes private contractors desirable. Rather, it might be the *status* of the actors (as private, non-governmental agents) vis-à-vis public opinion, congressional scrutiny, and international law that entices policymakers to turn to contracting. Indeed, "tactical privatization," as I call it, is motivated at least in part by a desire to alter substantive policy: Private agents would be used to achieve public policy ends that would not otherwise be attainable, were the government confined to relying exclusively on members of the U.S. Armed Forces. Tactical privatization thus stands in contradistinction to what is widely understood to be the conventional privatization agenda, driven by economic goals, that strives for verisimilitude in replicating government responsibilities (only more efficiently).[19] To elude public debate, circumvent Congress's coordinate role in conducting military affairs, and evade Security Council dictates may help an administration achieve short-term, realpolitik ends; but in the process, the structural damage to the vibrancy and authenticity of public deliberation, to the integrity of America's constitutional architecture of separation of powers, and to the legitimacy of collective security may prove irreparable.

What is perhaps worse, the structural harms introduced by decisions to privatize may not substantially lessen even if, or when, combat privatization is undertaken relatively transparently and mainly for more

19. *See infra* Part II.C.

traditional, commercial reasons. Since much of Congress's chief warmaking powers flow from its legal authority over the Armed Forces (especially to authorize armed intervention), even assuming the aims of privatization are purely economic and unconnected to any tactical motives to subvert Congress, constitutional harms do not disappear. In those situations and however inadvertently, privatization would still circumscribe Congress's role in military affairs, thus prompting separation-of-powers concerns not altogether dissimilar to those that would exist were the circumvention intentional. Additionally, and also *irrespective* of the Executive's motives for privatizing, the introduction onto the battlefield of for-profit contractors, motivated to fight primarily by money and regulated loosely by contract, rather than by the Uniform Code of Military Justice, breeds an array of strategic and psychic harms for the military commanders, for uniformed soldiers in the field, and for Americans at home. Accordingly, privatization of military functions poses a slew of problems too complicated and varied to resolve merely by enhancing accountability, strengthening contract laws, and tightening contract management.

It is, therefore, the present aim of this Article to identify in yet unexplored ways the profound and pervasive dangers that this new modality of privatization introduces. To date, commentators writing about military privatization have primarily focused on the tangible misdeeds that privateers have perpetrated in zones of conflict and on the reform measures necessary to improve battlefield accountability.[20] But what these scholars have overlooked are the deeper, structural problems. Accordingly, this Article seeks to look beyond economic efficiency and accountability concerns—the principal foci of privatization scholarship[21]—to explore

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20. *See* P.W. SINGER, CORPORATE WARRIORS: THE RISE OF THE PRIVATIZED MILITARY INDUSTRY (2004); Singer, *supra* note 13; *see also* Juan Carlos Zarate, *The Emergence of a New Dog of War: Private International Security Companies, International Law, and the New World Disorder*, 34 STAN. J. INT'L L. 75 (1998); Thomas Catan et al., *Private Companies on the Frontline*, FIN. TIMES, Aug. 12, 2003, at A15; Dao, *supra* note 4; Mary Pat Flaherty & Dana Priest, *More Limits Sought for Private Security Teams*, WASH. POST, Apr. 13, 2004, at A15; Juan Forero, *Private U.S. Operatives on Risky Missions in Colombia*, N.Y. TIMES, Feb. 14, 2004, at A3; Nicholas von Hoffman, *Contract Killers: How Privatizing the U.S. Military Subverts Public Oversight*, HARPER'S, June 1, 2004, at 79; Joshua Kurlantzick, *Outsourcing the Dirty Work*, AM. PROSPECT, May 2003, at 17; T. Christian Miller, *Contract Flaws in Iraq Cited*, L.A. TIMES, Mar. 11, 2004, at A1; Robert O'Harrow Jr., *Democrats Criticize Management Contracts*, WASH. POST, May 19, 2004, at A17; Tepperman, *supra* note 13; Yeoman, *supra* note 4. *See generally* Martha Minow, *Public and Private Partnerships: Accounting for the New Religion*, 116 HARV. L. REV. 1229, 1260 (2003) (defining accountability as "being answerable to authority that can mandate desirable conduct and sanction conduct that breaches identified obligations").

21. *See infra* Part II.C.

how covert and, at times, even transparent delegations of sensitive military responsibilities threaten to (1) violate the constitutional imperatives of limited and democratic government, (2) undermine the institutional excellence of (and patriotic support for) the U.S. Armed Forces, and (3) jeopardize the already shaky diplomatic and moral standing of the United States in the eyes of the rest of the world. Given the current state of military policy in America (and the apparent need to rely increasingly on private troops for the foreseeable future),[22] this Article raises urgent and important arguments and prescribes a set of structural reforms that merit the immediate attention of legal scholars and public policymakers alike.

This Article proceeds in six parts. I begin in Part II first by tracing the modern evolution of military privatization and next by discussing six contemporary case studies. Then, I attempt to locate some of the normative impulses motivating this new wave of privatization and to situate them within the broader pattern of American privatization policy; this last section serves to frame the principal conceptual differences between combat-related and more conventional forms of privatization, which will be important in understanding the unique structural harms introduced by decisions to outsource military responsibilities.

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22. *See, e.g.*, Paul Krugman, Editorial, *Feeling the Draft*, N.Y. TIMES, Oct. 19, 2004, at A27 (finding it unbelievable that the United States will not need to bring back a draft and citing a Pentagon study that said the United States has an inadequate number of troops to sustain the current scope of operations into the future). Krugman further states that President Bush's claim "that we don't need any expansion in our military is patently unrealistic; it ignores the severe stress our Army is already under. And the experience in Iraq shows that pursuing his . . . foreign policy doctrine . . . would require much larger military forces than we now have." *Id*.; *see also* Mary H. Cooper, *Private Affair: New Reliance on America's Other Army*, 62 CONG. Q. WKLY. REP. 2194 (2004) (describing America's servicemen and women as overworked and suggesting that the United States will likely need additional troops); James Dao, *The Option Nobody's Pushing. Yet*, N.Y. TIMES, Oct. 3, 2004, at D1 (noting how overextended the American military is, how fresh soldiers are desparately needed, and how government officials nevertheless refuse to entertain the idea of reintroducing the draft); Michael R. Gordon, *The Strategy To Secure Iraq Did Not Foresee a 2nd War*, N.Y. TIMES, Oct. 19, 2004, at A1 (noting that there are not enough American troops to sustain the scope of overseas commitments and indicating that NATO, the Gulf States, and India all declined to commit forces in Iraq); David M. Halbfinger, *Kerry Attacks on Economy and a Draft*, N.Y. TIMES, Oct. 16, 2004, at A11 (describing presidential candidate John Kerry as expressing concern that the U.S. military, at its current size, is overworked and overcommitted); John Hendren & Mark Mazzetti, *Army Implicates 28 U.S. Troops in Deaths of 2 Afghan Detainees*, L.A. TIMES, Oct. 15, 2004, at A13 (characterizing the military leadership's concern over the lack of trained intelligence officers and its fear that reliance on contractors at Abu Ghraib contributed greatly to the abuses that occurred there); Eric Schmitt, *General Warns of a Looming Shortage of Specialists*, N.Y. TIMES, Sept. 17, 2004, at A16; Eric Schmitt, *Its Recruitment Goals Pressing, the Army Will Ease Some Standards*, N.Y. TIMES, Oct. 1, 2004, at A24; Thom Shanker & Brian Knowlton, *Troop Number Too Low, Military Poll Says*, N.Y. TIMES, Oct. 17, 2004, at A21; Peter Spiegel, *US 'Must Increase Troop Numbers' to Fulfil Commitments*, FIN. TIMES (London), Sept. 27, 2004, at 8.

In Part III, I commence with the inquiry's critical analysis: understanding these structural harms. In this Part, I describe how the Executive can use military contractors to direct national security policy with greater impunity and less oversight than it could if it only had U.S. troops at its disposal. To the extent that Congress's warmaking authority is tied primarily to its regulatory and war-authorizing powers over the American military *qua* U.S. Armed Forces, a president interested in exercising more unilateral control might hire private contractors in lieu of U.S. soldiers and hence avoid having to collaborate as closely with the legislative branch. In circumventing congressional authority, the Executive violates the two principal constitutional imperatives: *limited government*—by bypassing Congress and preventing it from checking the ambitions of the president—and *democratic government*—by acting covertly (i.e., without congressional or, by extension, the People's input) and thus failing to make inclusive policy decisions legitimated by popular consent. While a paradigm case of tactical privatization would involve executive intent to evade congressional monitoring and to avoid having to request authorization for engaging troops in hostilities, harms along these lines would nevertheless ensue even if the president had no such insidious objective—and was instead focused mainly on maximizing economic efficiency. Simply and even inadvertently operating outside of the carefully arranged framework of coordinate military policymaking over the U.S. Armed Forces still has the effect of limiting Congress's formal and informal involvement in decisionmaking.

Then, in Part IV, I characterize how the introduction of private troops, either integrated into a larger contingent of U.S. military personnel or instructed to operate independently, creates considerable institutional harms, strategic liabilities, and morale problems. First, because privateers are not bound by the dictates of the Uniform Code of Military Justice, but rather often only by the terms of their contract, there is a much greater likelihood that they might abandon or distort a mission, ultimately prioritizing some economic goal or their own personal security over the task at hand. Importantly, I argue that this harm goes beyond mere battlefield accountability concerns since it is not so much the potential for privateers to botch a mission that represents the foremost problem; rather, because contractors cannot be regulated as stringently as U.S. troops, also at issue here is the legal dilution of military justice and discipline, on and off the battlefield. The contractors' presence, their uncertain legal status, and their relative impunity from courts-martial could destabilize the delicately balanced constitutional arrangements associated with civil-military relations and democratic warmaking. And, second, I examine how

the presence of contractors (to the extent they are publicly perceived as profit-seekers rather than as patriots) on the same hostile terrain as regular soldiers may ultimately threaten the privileged and honored status the military has historically enjoyed among the American public.

In Part V, the penultimate part, I discuss the international/diplomatic harms privatization engenders. I describe how military privatization can exacerbate foreign critics' worst fears and suspicions about the United States: No longer will the United States retain the moral high ground by risking its *own* young men and women of a volunteer army in the name of freedom. Instead, a critic assumes, outsourcing gives Washington freer rein by allowing the government to indemnify itself against casualties and other "sticky" political situations and therefore permits it broader license to *purchase* strategic outcomes. Moreover, privatization, to the extent that it allows the United States to bypass international agreements and Security Council authorization, undermines the legitimacy and vitality of collective security. Although these harms are felt primarily by the outside, non-American world, they nevertheless have adverse consequences for American foreign policy, for American integrity, and for the interests of containing and regulating the proliferation of even more odious strains of military profiteering that exist in other parts of the world. Therefore, I argue, these international implications should weigh heavily on any structural assessment of the virtues and vices of using private soldiers. Note that whereas the harms explored in Part III chiefly occur when Congress's role is subordinated, the problems analyzed in Parts IV and V do not necessarily depend on circumventing congressional participation in military privatization.

Part VI concludes by first roughly sketching out a set of reform measures that might help to reduce the legal and symbolic status differentials between contractors and soldiers that underlie many of the manifest structural harms described above. Having proffered some reform proposals, I then consider which status disparities may prove the most difficult to eliminate. Finally, I discuss whether these reforms, if successful, might actually reduce, if not altogether destroy, military privatization's raison d'etre.

II. THE MODERN AMERICAN EXPERIENCE WITH MILITARY PRIVATIZATION

By way of introduction, this Part offers some background on defense-related contracting over the last few decades, during which time it has expanded from an exclusively commercial arrangement to one that now

includes the delegation of sensitive combat responsibilities.[23] Throughout much of the Cold War era, defense "privatization" mainly involved the federal government purchasing weapons and hardware from the private sector and contracting out some clerical, custodial, and other support functions.[24] The specter of *that* military-industrial complex imbued generations with the fear that defense industrialists (or, perhaps, war profiteers) were influencing foreign policymaking. Yet, alone, those concerns could not have prepared us for the range of problems that now arise as modern mercenaries emerge on the contemporary American national security landscape. Indeed, over the last ten years, the federal government has entrusted such private agents to thwart the drug trade in Latin America, interrogate enemy combatants and safeguard American installations in Iraq, provide personal security for President Karzai in Afghanistan, train and advise military forces in the Balkans, and protect American diplomats in the Middle East.

Since exchanging gunfire with Iraqi insurgents, Serbian irredentists, and Colombian drug lords is a far cry from staffing the mess halls or even building Army helicopters, it is helpful to commence this study with a brief look at the advent of combat-related military privatization. Accordingly, Section A describes some of the more conventional patterns and practices associated with commercial military privatization. Section B then introduces some of the new concepts in combat-related privatization initiatives today and presents six case studies. Finally, Section C frames the key conceptual differences between military and more conventional forms of privatization.

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23. This is not to say that military privatization is in any way a distinctively modern phenomenon. Its long and varied history is, however, well beyond the scope of this inquiry. In this Article, I am exploring a particularly modern and particularly American strain of military privatization, which is distinguishable from the longer history not just because of its recent vintage, but also because it arises today from the ashes of a wholly delegitimatized landscape. In centuries past, there was not the same taboo as exists now regarding mercenaries. But their re-emergence, today, in light of the relatively recent repudiation, marks a new chapter. *See, e.g.*, R. ERNEST I. DUPUY & TREVOR N. DUPUY, THE ENCYCLOPEDIA OF MILITARY HISTORY FROM 3500 B.C. TO THE PRESENT 6 (2d ed. 1986); G.T. GRIFFITH, THE MERCENARIES OF THE HELLENISTIC WORLD (1935); CHARLES W. INGRAO, THE HESSIAN MERCENARY STATE: IDEAS, INSTITUTIONS, AND REFORM UNDER FREDERICK II, 1760–1785 (1987); ANTHONY MOCKLER, THE NEW MERCENARIES 5, 6, 45, 58 (1985); LYNN MONTROSS, WAR THROUGH THE AGES (3d ed. 1960); H.W. PARKE, GREEK MERCENARY SOLDIERS FROM THE EARLIEST TIMES TO THE BATTLE OF IPSUS (1933); Maj. Todd S. Milliard, *Overcoming Post-Colonial Myopia: A Call To Recognize and Regulate Private Military Companies*, 176 MIL. L. REV. 1 (2003); Rosky, *supra* note 6, at 913.

24. Samantha M. Shapiro, *Iraq, Outsourced*, N.Y. TIMES, Dec. 14, 2003, § 6 (Magazine), at 76.

A. Commercial Privatization in National Defense

With scores of high-profile, multimillion dollar contracts to rebuild Iraq and Afghanistan and to modernize and upgrade America's weapons of war recently awarded to private firms with particularly close ties to government decisionmakers, it is not surprising that contemporary observers have been echoing President Eisenhower's warnings against the union of government officials and defense industrialists aligned in their foreign policy aims and financial interests.[25] At the close of his second term in the White House, Eisenhower cautioned:

> In the councils of government, we must guard against the acquisition of unwarranted influence, whether sought or unsought, by the military-industrial complex. The potential for the disastrous rise of misplaced power exists and will persist.
>
> We must never let the weight of this combination endanger our liberties or democratic processes .... [O]nly an alert and knowledgeable citizenry can compel the proper meshing of huge industrial and military machinery of defense with our peaceful methods and goals, so that security and liberty may prosper together.[26]

Over the decades since Eisenhower's famous speech, concerns regarding the defense industry's influence over American foreign policy have persisted and continue to unsettle us.[27] Exacerbating these long-

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25. *See, e.g.*, GOVERNMENT-BUSINESS COOPERATION, 1945–1964: CORPORATISM IN THE POST-WAR ERA (Robert F. Himmelberg ed., 1994); THE MILITARY-INDUSTRIAL COMPLEX AND UNITED STATES FOREIGN POLICY (Omer L. Carey ed., 1969); SEN. WILLIAM PROXMIRE, REPORT FROM WASTELAND: AMERICA'S MILITARY-INDUSTRIAL COMPLEX (1970); STEPHEN ROSEN, TESTING THE THEORY OF THE MILITARY-INDUSTRIAL COMPLEX (1973); SINGER, *supra* note 20.

26. *See* Eisenhower, *supra* note 10.

27. *See, e.g.*, Brian Duffy et al., *The Enemy Within*, U.S. NEWS & WORLD REP., July 4, 1988, at 16; Eric Gelman et al., *A Giant Under Fire: General Dynamics Faces Numerous Charges of Fraud*, NEWSWEEK, Feb. 11, 1985, at 24; Anthony Lewis, Editorial, *The Military-Industrial Complex*, N.Y. TIMES, Nov. 21, 1985, at A31; William Proxmire, Editorial, *Cleaning Up Procurement: Why Military Contracting Is Corrupt*, N.Y. TIMES, Dec. 15, 1985, at C3; Christopher H. Schmitt, *Wages of Sin*, U.S. NEWS & WORLD REP., May 13, 2002, at 28 ("In the past dozen years, 30 of the 43 largest federal contractors have racked up more than 400 enforcement cases, resulting in at least 28 criminal convictions, 286 civil settlements, and 88 administrative settlements, mostly involving their government contracts."); Hugh Sidey, *Ike's Nightmare Is Upon Us*, TIME, Sept. 14, 1987, at 24; Leslie Wayne, *Pentagon Brass and Military Contractors' Gold*, N.Y. TIMES, June 29, 2004, at C1.

For a sampling of earlier discussions of war profiteering, see DAVID MCCULLOUGH, TRUMAN 256–80 (1992); WALTER MILLIS, ROAD TO WAR: AMERICA 1914–1917 (1935); Sam Nunn, *The Impact of the Senate Permanent Subcommittee on Investigations on Federal Policy*, 21 GA. L. REV. 17, 19–21 (1986).

standing concerns today, of course, are the exceedingly cozy relationships between the government and the defense industry,[28] the elevated levels of military spending in the aftermath of September 11, 2001,[29] and an ongoing war and occupation in Iraq. These temporally converging and reinforcing narratives combine to make the military-industrial story of today a particularly riveting and troubling one. Indeed, this story has invited the public to wonder whether decisions to intervene overseas are ever influenced by the contractors who supply the weaponry and services necessary to vanquish our enemies?[30] To ask if military alliances are

28. *See supra* note 15; SINGER, *supra* note 20; Edmund L. Andrews & Elizabeth Becker, *Bush Got $500,000 from Companies that Got Contracts, Study Finds*, N.Y. TIMES, Oct. 31, 2003, at A8; Baum, *supra* note 14 ("Of the 30 members of the Defense Policy Board—the influential Pentagon advisory panel from which Richard Perle was recently forced to resign—at least nine are directors or officers of companies that won $76 billion in defense contracts in 2001 and 2002."); Bryan Bender, *Study Finds Cronyism in Iraq, Afghanistan Contracts*, BOSTON GLOBE, Oct. 31, 2003, at A1; Bob Herbert, Editorial, *Spoils of War*, N.Y. TIMES, Apr. 10, 2003, at A27 (describing former Secretary of State Schultz's role as both a director of Bechtel and as chairman of "the advisory board of the Committee for the Liberation of Iraq, a fiercely pro-war group with close ties to the White House. . . [that is] committed . . . to work beyond the liberation of Iraq to the reconstruction of its economy"); P.W. Singer, Editorial, *The Enron Pentagon*, BOSTON GLOBE, Oct. 19, 2003, at L12; Tim Shorrock, *CACI and Its Friends*, NATION, June 21, 2004, at 6 (emphasizing the important relationship between the rapidly growing government contractor CACI—one of the companies implicated in the Abu Ghraib prisoner-abuse scandal—and Richard Armitage, a key State Department official); Wayne, *supra* note 27 ("288 top government officials since 1997 have taken positions at the 20 largest military contractors at levels high enough that they were disclosed in federal regulatory filings.").

29. *See* Elizabeth Bumiller, *Bush Urges Congress To Increase Military Budget*, N.Y. TIMES, Mar. 16, 2002, at A8; James Dao, *Bush Sees Big Rise in Military Budget for Next 5 Years*, N.Y. TIMES, Feb. 2, 2002, at A1; James Dao, *Warm Reaction to Bigger Pentagon Budget*, N.Y. TIMES, Feb. 13, 2002, at A28; Ellen McCarthy, *Post-9/11 Mergers Brought Problems: Government Service Firms Often Leaped Before They Looked*, WASH. POST, Aug. 23, 2004, at E1; Editorial, *Spending Spree at the Pentagon*, N.Y. TIMES, Feb. 10, 2003, at A22; Leslie Wayne, *Rumsfeld Warns He Will Ask Congress for More Billions*, N.Y. TIMES, Feb. 6, 2003, at A23; Tim Weiner, *A Vast Arms Buildup, Yet Not Enough for Wars*, N.Y. TIMES, Oct. 1, 2004, at C1; Jonathan Weisman & Thomas E. Ricks, *Increase in War Funding Sought: Bush to Request $70 Billion More*, WASH. POST, Oct. 26, 2004, at A1.

30. *See* William D. Hartung, Editorial, *The Booming Defense Business*, L.A. TIMES, Dec. 10, 2003, at B15; Russell Mokhiber & Robert Weissmann, *Arms Sellers Calling Shots*, BALT. SUN, May 16, 1999, at 1C; Shorrock, *supra* note 28 (commenting on defense contractor CACI's "unabashed . . . back[ing] of Bush's foreign policy and . . . key support[] of the military campaigns in Iraq and Afghanistan"); Ken Silverstein & Chuck Neubauer, *Advisor Perle Has Given Seminars on Ways To Profit from Possible Conflicts Discussed by Defense Board He Sits On*, L.A. TIMES, May 7, 2003, at A1; Leslie Wayne, *After High-Pressure Years, Contractors Tone Down Missile Defense Lobbying*, N.Y. TIMES, June 13, 2000, at A6; *see also* Anthony Bianco & Stephanie Anderson Forest, *Outsourcing War*, BUS. WK., Sept. 15, 2003, at 68 (describing the Pentagon's heavy reliance on private military companies); Day, *supra* note 13 (describing KBR's growing responsibilities as a result of the Defense Department's desire to reduce costs and downsize its payroll); James Surowiecki, *Army, Inc.*, NEW YORKER, Jan. 12, 2004, at 27 (noting that the U.S. military is "more like a complex partnership between the armed forces and a select group of private companies; one half expects to see the C.E.O.s of Halliburton and Bechtel on the Joint Chiefs of Staff"). *See generally* P.W. Singer, *Corporate Warriors: The Rise of the Privatized Military Industry and its Ramifications for*

likewise ever promoted by those who will most benefit from new lucrative opportunities to sell weaponry in untapped markets?[31] And finally, to query whether any of the impetus behind so-called "nation building" in failed states is led by those very contractors who will, ultimately, bid for the rights also to rebuild the nation?[32]

But this story and the questions it provokes, however politically exciting and scandalous, actually belong in yesterday's news cycle—at least when it comes to privatization. Analytically speaking, these commercial defense contracts, which range from building satellites to emptying latrines, introduce few, if any, novel problems from the standpoint of understanding and theorizing privatization as a legal or normative phenomenon.[33] Instead, these arrangements, precisely because they are *commercial* in nature and do not involve the delegation of

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International Security, 26 INT'L SECURITY 3, 186 (2001), *available at* 2002 WLNR 200092.

31. *See* Terence O'Hara, *Carlyle Disavows Plan to Get Kuwait Business*, WASH. POST, Oct. 14, 2004, at E1; Steven Pearlstein, *Defense Contractors Lobbying for Increased Sales to Countries in the Persian Gulf Area*, WASH. POST, Mar. 9, 1991, at C1; Eric Schmitt, *Arms Makers' Latest Tune: "Over There, Over There,"* N.Y. TIMES, Oct. 4, 1992, at C5; Katharine Q. Seelye, *Arms Contractors Spend To Promote an Expanded NATO*, N.Y. TIMES, Mar. 30, 1998, at A1; Tim Smart, *Fighting for Foreign Sales: Arms Firms Increasingly Dependent on Deals Abroad*, WASH. POST, Feb. 17, 1999, at E1; Ralph Vartabedian & Tyler Marshall, *U.S. Defense Industry Heeds Call to Arms—by Foreigners*, L.A. TIMES, Nov. 30, 1993, at A1. *See generally* MORTON H. HALPERIN, BUREAUCRATIC POLITICS AND FOREIGN POLICY (1974) (characterizing ways in which private interest groups, including defense contractors, will seek to influence foreign policy); James M. Lindsay, *Getting Uncle Sam's Ear: Will Ethnic Lobbies Cramp America's Foreign Policy Style*, 20 BROOKINGS REV. 37 (2002); LARRY MAKINSON, THE CENTER FOR PUBLIC INTEGRITY, OUTSOURCING THE PENTAGON: WHO BENEFITS FROM THE POLITICS AND ECONOMICS OF NATIONAL SECURITY? (2004), *at* http://www.publicintegrity.org/pns/report.aspx?aid=385 (last visited Dec. 19, 2004) (noting that the top 737 contractors have contributed approximately $214 million dollars to political campaigns between 1998 and 2003).

32. *See* Baum, *supra* note 14; Bender, *supra* note 28; Herbert, *supra* note 28; Hartung, *supra* note 30; Keith Naughton & Michael Hirsh, *Fanning the Flames: Cheney's Halliburton Ties*, NEWSWEEK, Apr. 7, 2003, at 6; Lorraine Woellert, *Richard Perle Is Not Alone*, BUS. WK., Apr. 7, 2003, at 42; Editorial, *War Profiteering*, NATION, May 12, 2003, at 3.

33. *See, e.g.*, Jack M. Beermann, *Privatization and Political Accountability*, 28 FORDHAM URB. L.J. 1507, 1522 (2001). Professor Beermann writes:

> No business produces all the goods it uses, and the same reasons that lead firms to contract out should lead government to contract out. Government may, for example, shut down a heating plant used to heat government buildings and purchase heat from private sources. . . .
>
> In my view, contracting out of support goods and services does not raise serious accountability issues since the source and quality of such goods and services are not normally something the public cares much about. Of course, corruption in the procurement process may be an issue, and obviously procurement fraud does not exist without procurement, but government officials remain accountable for overspending on goods and services, and the savings from competition to sell to the government is likely to dwarf any increased potential for fraud that procurement entails.

Id. (citations omitted).

sensitive (let alone lethal) policy discretion,[34] are conceptually indistinguishable from other, "garden-variety" contracting-out initiatives currently coursing through the veins of American government.[35] Thus, notwithstanding the fact that the privatized tasks may bring contractors to international hotspots, authorize them to work on top secret projects, and (as an essential, or sole-source, supplier) even give them leverage over the U.S. government,[36] the tasks themselves still comport well with the current President Bush's promise to outsource only those services that are not "inherently governmental."[37] Indeed, any harms that may flow from this

34. *See id.* (noting that "contracting out of support goods and services does not raise serious accountability issues"); Guttman, *supra* note 3, at 896 (indicating that "[w]here [contractors] are relied upon solely for 'commercial' products or services (e.g. janitorial service, office supplies, utilities, weaponry) there is logic to their governance by distinct sets of rules"); Rosky, *supra* note 6, at 906 (emphasizing that "early defense contractors were [not] private military institutions . . . They did not fight wars; they produced military equipment and supplies"); *see also* Federal Activities Inventory Reform Act of 1998, Pub. L. No. 105-270, § 2(a), 112 Stat. 2382 (requiring executive agencies to submit lists of *non*-inherently governmental jobs to the Office of Management and Budget to have them earmarked for potential outsourcing); CIRCULAR NO. A-76, *supra* note 1; John J. DiIulio, Jr., *Response Government by Proxy: A Faithful Overview*, 116 HARV. L. REV. 1271 (2003); Freeman, *supra* note 3; Minow, *supra* note 19.

35. *See infra* Part II.C; *see also* SAVAS, *supra* note 3, at 118–20 (describing the overwhelming motivation driving privatization initiatives as being grounded in a desire for greater efficiency and cost savings).

36. *See, e.g.*, Guttman, *supra* note 3, at 873, 888 (highlighting the problems that may arise when entities outside of the government possess technical and technological expertise that the government itself no longer possesses); Stan Crock, Editorial, *The Way the Military Does Business*, WASH. POST, July 22, 1997, at A15 (noting that when there is limited competition among private sector contractors, the government may become dependent on one or a handful of companies); Michael Hirsh, *The Great Technology Giveaway?*, FOREIGN AFF., Sept./Oct. 1998, at 2 (noting how consolidation of the defense industry has left the United States with very few suppliers of essential governmental goods and services); MAKINSON, *supra* note 31 (detailing the scope of sole source, no-bid contracts); *cf.* Dru Stevenson, *Privatization of Welfare Services: Delegation by Commercial Contract*, 45 ARIZ. L. REV. 83, 89–92 (2003) (describing how a single contractor operating in a market with high start-up costs can exert a great deal of pressure on its governmental clients); Jonathan Rabinovitz, *In Connecticut, A Privately Run Welfare Program Sinks into Chaos*, N.Y. TIMES, Nov. 24, 1997, at B1 (underscoring the difficulties for government agencies to reform a program once they come to rely on a private contractor).

37. *See* Guttman, *supra* note 3, at 891–94; Stevenson, *Government*, *supra* note 1; *see also* 48 C.F.R. § 7.301 (1999) ("It is the policy of the Government to . . . rely generally on private commercial sources for supplies and services" except with regard to inherently governmental functions); GEN. ACCT'G OFFICE, NO. GGD-92-11, ARE SERVICE CONTRACTORS PERFORMING INHERENTLY GOVERNMENTAL FUNCTIONS? (1991); Office of Federal Procurement Policy: Policy Letter on Inherently Governmental Functions, 57 Fed. Reg. 45,096 (Sept. 30, 1992); Freeman, *supra* note 6, at 172 (characterizing a set of core governmental functions—including national defense—as inherently governmental and not easily outsourced); Stevenson, *supra* note 36, at 83 (describing the Bush administration's order for federal agencies to take inventory of their functions and determine which ones should be subject to privatization and which ones should be preserved as inherently governmental); Oliver E. Williamson, *Public and Private Bureaucracies: A Transaction Cost Economics Perspective*, 15 J.L. ECON. & ORG. 306, 322–24 (1999); Baum, *supra* note 14 (describing Circular No. A-76 as a Reagan administration memorandum urging outsourcing in all aspects of

sort of privatization result principally from poor contract management, inadequate oversight, and insufficient fidelity to conflict-of-interest laws;[38] they speak mainly to issues of corruption and mismanagement rather than to improper delegations of government responsibilities.[39] After all, food, custodial, maintenance, and even construction projects characterize that which is ancillary to America's national security apparatus—or, for that matter, to America's public policymaking prerogatives more generally.

B. Transitioning to Combat-Related Privatization

But, of late, a radical new development in military privatization has quietly and slowly begun to take hold—adding new complexity to the military-industrial dyad. Confined for decades strictly to commercial functions, defense-oriented privatization over the past ten years has expanded in directions that would seemingly belie any stock assurances

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government programs when it is efficient to do so).

38. *See, e.g.*, Guttman, *supra* note 3, at 888 (noting that many of the key federal conflict-of-interest laws do not govern the behavior of federal contractors); *Deaver Was in White House When His Firm Was Set Up*, N.Y. TIMES, May 3, 1986, at A34; Renae Merle, *Recruiting Uncle Sam: The Military Uses a Revolving Door to Defense Jobs*, WASH. POST, Feb. 19, 2004, at E1; Renae Merle & Jerry Markon, *Ex-Pentagon Official Admits Job Deal*, WASH. POST, Apr. 21, 2004, at A1; Judith Miller, *Navy Secretary Said to Keep Ties to Company Aiding Arms Makers*, N.Y. TIMES, Dec. 27, 1982, at A1; *see also* R. Jeffrey Smith, *U.S. Deal To Lease Tankers Criticized: Report: Procedures Waived for Boeing*, WASH. POST, Apr. 1, 2004, at E1; Jackie Spinner & Thomas E. Ricks, *Halliburton Unit Probed for Possible Overbilling of U.S.*, WASH. POST, Dec. 12, 2003, at A1; Wayne, *Growing*, *supra* note 15; Wayne, *Air Force*, *supra* note 15; Wayne, *Ex-Pentagon*, *supra* note 15. *See generally* Beth Nolan, *Public Interest, Private Income: Conflicts and Control Limits on the Outside Income of Government Officials*, 87 NW. U. L. REV. 57 (1992).

39. *See* Beermann, *supra* note 33, at 1522; Guttman, *supra* note 3, at 921–22; Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1462 (2003). Improper, of course, may not mean illegal or unconstitutional. The non-delegation doctrine has not been robustly interpreted, and moreover, it refers chiefly to congressional delegations, rather than executive ones. *See, e.g.*, Indus. Union Dep't v. Am. Petroleum Inst., 448 U.S. 607, 685 (1980) (Rehnquist, J., concurring) (noting that the non-delegation doctrine ensures that important decisions are made by "the branch of our Government most responsive to the popular will"); United States v. Robel, 389 U.S. 258, 277 (1967) (Brennan, J., concurring) (suggesting that congressional delegations are at times improper when they transfer policymaking functions to executive agencies not as responsive to the People); Arizona v. California, 373 U.S. 546, 626 (1963) (Harlan, J., dissenting in part) (describing the non-delegation doctrine as crucial to ensuring that "fundamental policy decisions . . . will be made not by an appointed official but by the body immediately responsible to the people"); Field v. Clark, 143 U.S. 649, 692 (1892) ("[T]hat Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution."); *see also* Developments in the Law, *supra* note 6, at 1871. Hence I am not drawing a direct comparison to the constitutional principle of non-delegation, but rather I am simply suggesting that outsourcing sensitive military functions may be illegitimate to the extent it engenders an array of constitutional and prudential problems.

that "inherently governmental" responsibilities would remain untouched and unaffected by the current privatization revolution.[40]

1. "[T]hey are not just running the soup kitchens."[41]

Today, the U.S. military contracts out more than just catering and laundry responsibilities; and more than just billion dollar infrastructure or fighter-jet contracts. The federal government now also outsources a host of combat-related tasks and responsibilities in zones of conflict. For example, it is becoming increasingly commonplace to find private agents at the situs of conflict as communications specialists, intelligence operatives, target selectors, surveillance pilots, armed security and peacekeeping agents, hostage rescuers, interrogators, and weapons systems operators. Additionally, contractors serve as strategic planners and military advisors in the field, in the Pentagon, for foreign armies, and across the United States as ROTC instructors.[42] As such, their places in sensitive positions of authority and policy discretion and their pivotal roles in lethal engagements often set them apart from mere commercial contractors and, moreover, have the effect of blurring the distinction between commercial contractor and battlefield soldier,[43] in ways civilians staffing the mess halls or designing submarines never did.

In a word, then, we are witnessing the emergence of contemporary "mercenaries" carrying out the assignments that were previously and exclusively reserved for uniformed American soldiers entrusted with combat-related responsibilities and disciplined through the military chain-of-command. For what it is worth, today's military contractor operating in the United States has come a long way in shedding the baggage of and disavowing kinship to his predecessors, largely known as pirates and scoundrels who would offer their murderous service to the highest bidder.[44] But, however civilized, skilled, and professional he may be, he is

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40. *See infra* Part III.A.

41. Wayne, *supra* note 2 (quoting John H. Hamre, deputy secretary of defense under President Clinton).

42. *See also* Major Lisa L. Turner & Major Lynn G. Norton, *Civilians at the Tip of the Spear*, 51 A.F. L. REV. 1, 22–23 (2001); Bianco & Forest, *supra* note 30 (describing Secretary Rumsfeld's desire to expand the military's fighting capabilities without increasing the size of the regular army); Wayne, *supra* note 2 (describing the extent to which the U.S. government relies on private support); Yeoman, *supra* note 4.

43. Although within the vernacular of the U.S. military "soldiers" typically refers only to members of the U.S. Army (and not to Marines, or sailors, or airmen), I will, at times, use the term more generically to describe all military personnel.

44. *See* James Dao, *'Outsourced' or 'Mercenary', He's No Soldier*, N.Y. TIMES, Apr. 25, 2004, at D3 (contrasting less scrupulous mercenaries of earlier generations with the more professional breed

still not an American soldier, sworn to uphold the Constitution and governed by the Uniform Code of Military Justice; instead, he is a private agent, principally motivated by profit.[45]

2. The Advent of Combat-Related Privatization

Combat-related military privatization arose in the 1990s at a time when considerable cutbacks in the size of the U.S. Armed Forces were underway,[46] when technological and geostrategic changes transformed

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that currently occupies an important role in the American military); Pape & Meyer, *supra* note 2 (quoting British Foreign Secretary Jack Straw as saying "[t]oday's world is a far cry from the 1960s, when private military activity usually meant mercenaries of the rather unsavory kind involved in postcolonial or neocolonial conflicts"); Yeoman, *supra* note 4, at 42 (describing the contractors as patriots still eager to serve their country). *But see* SINGER, *supra* note 20, at 115–18 (noting how private military firms still conduct business with and help bolster repressive regimes).

Legally, most American privateers are not actually "mercenaries," at least as defined by international law. Mercenaries are a subset of contractors who fight for a nation that is not their own native or adopted one. *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, art. 47, 1125 U.N.T.S. 3; *see also* SINGER, *supra* note 20, at 42–44; Susan S. Gibson, *Lack of Extraterritorial Jurisdiction over Civilians: A New Look at an Old Problem*, 148 MIL. L. REV. 114 (1995); Herbert M. Howe, *The Privatization of International Affairs: Global Order and the Privatization of Security*, 22 FLETCHER F. WORLD AFF. 1 (1998); Dino Kritsiotis, *Mercenaries and the Privatization of Warfare*, 22 FLETCHER F. WORLD AFF. 11, 18 (1998); L.C. Green, *The Status of Mercenaries in International Law*, 9 MANITOBA L.J. 201, 203 (1979).

45. *See* Wayne, *supra* note 2 ("In war, while providing functions crucial to the combat effort, they are not soldiers. Private contractors are not obligated to take orders or to follow military codes of conduct. Their legal obligation is solely to an employment contract, not to their country."); Yeoman, *supra* note 4 ("We have individuals who are not obligated to follow orders or follow the Military Code of Conduct. Their main obligation is to their employer, not their country.") (quoting Congresswoman Jan Schakowsky); *cf.* Bianco & Forest, *supra* note 30 (quoting a U.S. Army publication acknowledging that "[c]ontractor loyalty [is] to the almighty dollar"); Wesley Clark, *America's Virtual Empire*, WASH. MONTHLY, Nov. 1, 2003, at 20 (noting how members of America's volunteer army have no passion for glory, fortune, or fame and prefer instead to accomplish a mission and return to their families).

Another category of non-U.S. military combatant is the foreign soldier working for the United States, either for money or out of a commonality of interest. These contributors, which include members of the Northern Alliance and Kurdish nationals, have been on display most recently in Afghanistan and Iraq, respectively. *See, e.g.*, Michael Ware, *Lying in Wait in Kurdistan*, TIME, Mar. 3, 2003, at 48; Kevin Whitelaw, *War in the Shadows*, U.S. NEWS & WORLD REP., Nov. 11, 2002, at 48; *see also* ROBERT M. BLACKBURN, MERCENARIES AND LYNDON JOHNSON'S "MORE FLAGS": THE HIRING OF KOREAN, FILIPINO, AND THAI SOLDIERS IN THE VIETNAM WAR (1991) (describing the United States's use of foreign soldiers in Vietnam); JANICE E. THOMPSON, MERCENARIES, PIRATES, AND SOVEREIGNS: STATE-BUILDING AND EXTRATERRITORIAL VIOLENCE IN EARLY MODERN EUROPE 94 (1994) (same). Although these actors' relationship to the United States is quite interesting, such an examination is well beyond the scope of this Article.

46. Recall how the demise of the Soviet Union sparked a massive downsizing of the U.S. military. The absence of a large-scale nuclear threat coupled with Americans' demand for a fiscal peace dividend for winning the Cold War (which had been won at the expense of balanced budgets and low national debts) emboldened efforts to slash the U.S. military. *See* David A. Kaplow & Philip G.

national security practices,[47] and when traditional types of covert operations, utilized in Southeast Asia in the 1970s and Latin America in the 1980s, had fallen into serious disfavor.[48]

Schrag, *Carrying a Big Carrot: Linking Multilateral Disarmament and Development Assistance*, 91 COLUM. L. REV. 993, 1038 (1991); McGeorge Bundy, *From Cold War Toward Trusting Peace*, FOREIGN AFF., Jan. 1990, at 197; Alan Tonelson, *Superpower Without a Sword*, FOREIGN AFF., June 1993, at 166; *see also* Merle, *supra* note 13 (describing the heavy downsizing that began in 1991 as a "push to privatize anything and everything") (quoting P.W. Singer).

Between the first Gulf War and the months leading up to Operation Iraqi Freedom in 2003, U.S. Army personnel numbers were nearly cut in half, from 780,000 to 480,000; during the same period, the overall active military shrunk by 500,000. *See* Wayne, *supra* note 2; *see also* Tepperman, *supra* note 13 (noting that this shrinkage has not only "caused manpower shortages within the services [but also] . . . a glut of retired officers flooding the private sector").

47. During the 1990s, the Pentagon began shifting away from a "forward deployed" Army with sizable military forces positioned overseas to a smaller, "power projection" Army with most of its personnel stationed in the United States. This change in force size and force location created a number of sensitive military jobs that—because they are far removed from the frontlines—have the apparent trappings of commercial service provision, but actually involve the exercise of inherently governmental, lethal responsibilities. *See* DANA PRIEST, THE MISSION (2003); Gibson, *supra* note 44; Bredemeier, *supra* note 13 (noting that today, "[l]ogistics . . . is the heart of warfare, and much of it has been privatized"); Kurlantzick, *supra* note 20, at 17. Simply put, no longer are the frontline soldiers with guns and grenades the only real combatants in a military campaign. *See* Matthew Brzezinski, *The Unmanned Army*, N.Y. TIMES, Apr. 20, 2003, at F38 (quoting a high-ranking Air Force official as saying that "[i]t's possible, that in our lifetime we will be able to run a conflict without ever leaving the United States"); Wayne, *supra* note 2 (noting the sensitive work private agents perform and how critical such work is to successful combat operations); *see also* Michael N. Schmitt, *Bellum Americanum: The U.S. View of Twenty-First Century War and Its Possible Implications for the Law of Armed Conflict*, 19 MICH. J. INT'L L. 1051, 1061–64 (1998); John M. Broder, *Far Behind the Front, But Not Out of Danger*, N.Y. TIMES, Mar. 26, 2003, at B2; Vernon Loeb, *An Unlikely Super-Warrior Emerges in Afghan War: U.S. Combat Controllers Guide Bombers to Precision Targets*, WASH. POST, May 19, 2002, at A16. Technology has made traditional—and even modern—forms of warfare quite primitive.

If much of a given war is waged from the air or from gunships and battle cruisers hundreds of miles from the physical targets, there may be a need to extend and enlarge the conventional definition of a combat zone and of a "combatant," if only for the purposes of identifying what range of actors are being delegated responsibilities for exercising lethal force and managing national security interests. Accordingly, this possible need for a definitional expansion comes at a particularly vexing moment: The definition of combatant may be broadening just as the breadth of the citizen-soldier's role in the American military narrows; in his or her stead, oftentimes, we may find an employee of a private corporation intimately involved in operating the machinery of war. *See, e.g.*, Major Michael E. Guillory, *Civilianizing the Force: Is the United States Crossing the Rubicon?*, 51 A.F. L. REV. 111, 111 (2001); Turner & Norton, *supra* note 42, at 25–27 (2001); *see also* Merle, *supra* note 13 (suggesting that in modern warfare, the frontline is becoming an increasingly irrelevant term since actors traditionally understood as "staff" may be the ones launching the missiles).

48. Covert operations and proxy wars, hallmarks of the extended reach of the American Cold War national security apparatus for the past half-century, were in the 1990s increasingly untenable due to a range of legislative, popular, and diplomatic constraints. Perhaps private military firms today perform some of the tasks and serve in some of the functions previously undertaken by special covert intelligence forces and/or leaders of American-supported regimes. The Pentagon and the State Department, increasingly constrained in their use of "black" operations, may instead turn to contractors, who (as will be discussed below) are regulated more loosely than American intelligence officials, to bypass public attention and, often, congressional scrutiny and carry out policy endeavors

Today's contractors, for their part, have taken considerable steps to upgrade the image of what has historically been an unsavory profession, thus helping to make the outsourcing of combat responsibilities more palatable. Indeed, contemporary American outfits are not dyed-in-the-wool bands of ruthless warriors, but rather they are incorporated businesses often headed by retired generals and colonels who have traded in their fatigues for pinstripes and left the barracks for the Beltway. Their employees, in turn, are not a rag-tag lot pulled from the ranks of society's denizens like the French Foreign Legion of yesteryear,[49] but are likewise often recruited from among the most decorated echelons of the American military establishment.[50]

For example, one notable contractor, MPRI, a major participant in the Balkans during the war-ridden 1990s as well as in the Latin American drug wars, boasts of having "more generals per square foot than the Pentagon."[51] Indeed, MPRI's veritable "dream team" includes General Carl Vuono, former Army chief of staff during the invasion of Panama and the first Gulf War, Lt. General Harry Soyster, a onetime director of the Defense Intelligence Agency,[52] and General Crosbie E. Saint, the former commander of the U.S. Army in Europe.[53] MPRI advertises a breadth of competency that includes airborne operations, the provision of air support for ground troops and convoys, counterinsurgency work, force integration, tactical and strategic intelligence, reconnaissance, security assistance, and weapons control.[54] Another contractor, SAIC, a corporate giant with annual revenues topping $1 billion, boasts of a blue-ribbon directorate that

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that would not be achievable if carried out through conventional or previously used "unconventional" (i.e., covert operations and proxy wars) routes. *See* SINGER, *supra* note 20; Marshall Silverberg, *The Separation of Powers and Control of the CIA's Covert Operations*, 68 TEX. L. REV. 575 (1990).

49. *See* ANTHONY CLAYTON, FRANCE, SOLDIERS AND AFRICA (1988); TONY GERAGHTY, MARCH OR DIE: A NEW HISTORY OF THE FRENCH FOREIGN LEGION (1986); DOUGLAS PORCH, THE FRENCH FOREIGN LEGION: A COMPLETE HISTORY OF THE LEGENDARY FIGHTING FORCE (1991).

50. *See* SINGER, *supra* note 20, at 76–78; PETER TICKLER, THE MODERN MERCENARY 71 (1987); Milliard, *supra* note 23, at 14; Montgomery Sapone, *Have Rifle with Scope, Will Travel: The Global Economy of Mercenary Violence*, 30 CAL. W. INT'L L.J. 1, 3 (1999); Bianco & Forest, *supra* note 30, at 74 (noting that many contemporary outfits of hired guns are "ragtag units"); Fred Coleman, *Colonial Grunts No Longer*, U.S. NEWS & WORLD REP., Nov. 1, 1993, at 74 (describing history of rogue volunteers who joined the French Foreign Legion); David Shearer, *Outsourcing War*, FOREIGN POL'Y, Fall 1998, at 68, 71.

51. von Hoffman, *supra* note 20, at 79; *see also* Esther Schrader, *U.S. Companies Hired to Train Foreign Armies*, L.A. TIMES, Apr. 14, 2002, at A1.

52. *See* Graham, *Croatia*, *supra* note 13.

53. *See* Wayne, *supra* note 2; *see also* Matthew J. Gaul, Note, *Regulating the New Privateers: Private Military Service Contracting and the Modern Marque and Reprisal Clause*, 31 LOY. L.A. L. REV. 1489 (1998); Stan Crock, *Trouble Is Our Business*, BUS. WK., Nov. 20, 1995, at 52.

54. Milliard, *supra* note 23, at 11–12.

includes two former defense secretaries (William Perry and Melvin Laird) and two former CIA directors (John Deutch and Robert Gates).[55] Other notable—and influential—firms such as Blackwater USA, DynCorp, Ronco, CACI, and Titan, are also led by former high-ranking military officers.[56] The presence of distinguished leaders and reputable ex-soldiers impresses upon government decisionmakers that these businesses will be responsible, professional partners.

In addition to their all-star rosters, these firms have gained credibility and legitimacy because of their corporate ties. Many of the major contracting firms have close connections not only to the Pentagon but also to Wall Street, and are actually divisions or subsidiaries of such prominent businesses as Northrop-Grumman, Booz Allen Hamilton, the Carlyle Group, and Bechtel. Hence, corporate oversight and shareholder pressure may provide external sources of discipline and conformity.[57]

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55. *See* Silverstein, *supra* note 13.

56. For detailed discussions of these firms, see, for example SINGER, *supra* note 20; Gaul, *supra* note 53, at 1493–99. *See also* Joel Brinkley & James Glanz, *Contract Workers Implicated in February Army Report on Prison Abuse Remain on the Job*, N.Y. TIMES, May 4, 2004, at A6 (describing CACI as a 41-year-old public company that does extensive information technology contract work for the U.S. government and that has only just, in the 1990s, expanded to offer military intelligence and field work services); Shorrock, *supra* note 28; Barry Yeoman, Editorial, *Need an Army? Just Pick Up the Phone*, N.Y. TIMES, Apr. 2, 2004, at A19 (noting that Blackwater provides services in Iraq such as soldier training and convoy protection, and that it employs ex-Green Berets, Army Rangers, and Navy SEALs).

57. *See* Wayne, *supra* note 2; Jack M. Beermann, *Administrative-Law-Like Obligations on Private[ized] Entities*, 49 UCLA L. REV. 1717, 1721–22 (2002); *see also* Sean Creehan, *Soldiers of Fortune 500: International Mercenaries*, HARV. INT'L REV., Winter 2002, at 6–7. Creehan writes: "The organization of mercenaries into corporations that function like consulting firms has put distance between them and their activities. Mercenary corporations' increasing efficiency and self-regulation is influencing the way legitimate governments view mercenaries as instruments of state policy." *Id*. at 6; *see also* Pape & Meyer, *supra* note 2, at 22. Notably, Lockheed Martin, poised to acquire Titan in Spring of 2004, quickly backed off once it was made public that Titan was intimately involved in the prisoner-abuse scandals in Iraq. *See* Greg Jaffe et al., *Titan Worker Is Cited in Iraqi Scandal*, WALL ST. J., May 21, 2004, at A3; Renae Merle, *Prisoner-Abuse Report Adds to Titan's Troubles; Lockheed Plan To Buy Firm Already Stalled*, WASH. POST, May 7, 2004, at E3. *But see* Deborah Hastings, *Use of Civilian Contractors in War Zones Is at Record Levels*, AP, Oct. 19, 2004, *available at* http://nunnews.net/nucnews/2004nn/0410nn/041019nn.htm#329 (last visited Dec. 27, 2004) (noting CACI's considerable profits in 2004, notwithstanding its troubles related to Abu Ghraib and indicating that Titan, which also was involved in Abu Ghraib, received up to $400 million from the U.S. government for additional translators in the wake of the Iraq prison abuse scandals); McCarthy, *supra* note 29 (characterizing the lack of effective corporate control over defense firms, especially subsidiaries, in the post-September 11 contracting frenzy); Ellen McCarthy, *Demand Helps CACI Profit Increase 56%*, WASH. POST, Aug. 19, 2004, at E5 [hereinafter McCarthy, *Demand*] (describing CACI's ability to continue to reap massive profits notwithstanding the political and legal fallout from its involvement in the Abu Ghraib scandal).

There are other paths that these outfits, which work closely with the U.S. government, could have taken. They could perhaps get more business if they were to operate off-shore and sell their services to the highest world bidder. Military firms headquartered elsewhere have engaged in outright, unabashed

3. A Survey of Recent Combat-Related Private Contracts

As mentioned above, in recent years, private military firms have protected the Karzai administration in still-unstable Afghanistan, secured American civil and military installations and served as interrogators in Iraq, bolstered and then counterbalanced the military capabilities of both the Bosnians and Croats in the Balkans, engaged in surveillance, reconnaissance, and coca-crop destroying as well as in counter-insurgency missions in Latin America, staffed security details for American officials in, among other areas, the Middle East, and attempted to bring some stability to war-ravaged Rwanda. This policy of federal contracting with private forces to serve in an array of critical zones of conflict to support American national security and foreign policy interests involves the delegation of not simply commercial responsibilities and accordingly represents a startling departure from previous partnerships with the private sector. In an effort to provide more specific details, I discuss six case studies.

a. Latin America

The United States's lukewarm commitment to fighting the War on Drugs at its sources has set the stage for the introduction of military contractors. With stringent limitations imposed by Congress regarding the number of U.S. Armed Forces personnel and the scope of their activities in Colombia,[58] and therefore only a relatively modest contingent of U.S.

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warfare, especially in Africa, with fewer reservations. *See infra* Part V.C. The fact that the U.S.-based groups discussed in this Article have tied their fortunes to U.S interests does not necessarily make them morally better, but it does make them more reliable and accountable, even if the American contractors' motivations are entirely self-interested.

58. *See* Catan et al., *supra* note 20; *see also* John Otis, *U.S. Invasion of Colombia Urged*, HOUSTON CHRON., Mar. 24, 2002, at A28 (describing long-standing restrictions against U.S. troops in counter-insurgency efforts); Yeoman, *supra* note 4, at 43 ("Federal law bans U.S. soldiers from participating in Colombia's war against left-wing rebels [who traffic in drugs to finance their insurgency] and from training army units with ties to right-wing paramilitaries infamous for torture and political killings."). Accordingly, there usually is never more than a small group of American military and diplomatic personnel on the ground, coordinating efforts with the local governments. *See* GEN. ACCT'G. OFFICE, NO. GAO-01-1021, DRUG CONTROL: STATE DEPARTMENT PROVIDES REQUIRED AVIATION PROGRAM OVERSIGHT, BUT SAFETY AND SECURITY SHOULD BE ENHANCED 17–18 (2001) [hereinafter GAO, AVIATION REPORT]; SINGER, *supra* note 20, at 206–09 (noting congressional unease about allowing U.S. troops to work with Colombian military units with egregious human rights records and who fight rebels rather than narcotraffickers); Kurlantzick, *supra* note 20. *But see* Editorial, *Sliding into Colombia's Morass*, CHI. TRIB., Oct. 12, 2004, at C18 (noting Congress's recent decision to authorize an increase in the number of troops to be deployed in Colombia); ERIC GREEN, U.S. STATE DEP'T, STATE DEPT. EXPLAINS NEED FOR MORE U.S. PERSONNEL IN COLOMBIA (2004), *at* http://usinfo.state.gov/gi/Archive/2004/Oct/14-50113.html (last

troops and officials present on the ground, the Clinton administration turned to contractors, awarding them over $1.2 billion in contract work to slow down the production and exportation of narcotics.[59] In this capacity, private agents, notably from DynCorp and MPRI, have helped train local enforcement agents in counter narcotics work; but they have been more than just advisors: these contractors have flown sensitive reconnaissance missions, patrolled the skies to turn back (under the threat of force) smugglers, and piloted crop-dusters to destroy coca fields.[60] Their efforts have not gone unchallenged and, as a result, military contractors have at times been drawn into firefights with narco-traffickers and even leftist rebels,[61] some of whom had no direct connection to the drug trade.[62]

In the course of their dangerous work, a number of American contractors have been killed;[63] these casualties have largely escaped public notice, media attention, and congressional scrutiny.[64] Indeed, relatively little is known about the extent of America's involvement in Colombia, let alone details regarding the delegation of specific activities to private firms. And, although the GAO rated DynCorp's performance in Latin America as

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visited Nov. 20, 2004).

59. *See* Yeoman, *supra* note 4, at 43 (noting that "since the late 1990s, the United States has paid private military companies an estimated $1.2 billion . . . to eradicate coca crops and to help the Colombian army put down rebels who use the drug trade to finance their insurgency"); *see also* Kurlantzick, *supra* note 20; Pape & Meyer, *supra* note 2; Tepperman, *supra* note 13, at 10; Wayne, *supra* note 2.

60. SINGER, *supra* note 20, at 206–08; Guillory, *supra* note 47, at 127; Juan Forero, *3 Americans on Search Mission Killed in Colombian Plane Crash*, N.Y. TIMES, Mar. 27, 2003, at A7 (describing the civilian contractors' assignment to rescue American citizens held in hostile regions of Colombia); Tepperman, *supra* note 13, at 10–11; Wayne, *supra* note 2 (noting the dangers associated with the flight assignments of private military employees).

61. *See* Guillory, *supra* note 47, at 127 (noting DynCorp's involvement in firefights with FARC leftist guerillas); Rosky, *supra* note 6, at 911 n.141; *see also* GAO, AVIATION REPORT, *supra* note 58 (estimating that between 1998 and 2000 alone, military contractors for the U.S. government in Latin America came under fire nearly seventy times).

62. *See* Victoria Burnett et al., *From Building Camps to Gathering Intelligence, Dozens of Tasks Once in the Hands of Soldiers Are Now Carried Out by Contractors*, FIN. TIMES, Aug. 11, 2003, at 13; Catan et al., *supra* note 20; Forero, *supra* note 20; Gary Marx, *U.S. Civilians Wage Drug War from Colombia's Skies*, CHI. TRIB., Nov. 3, 2002, at A4; *see also* Wayne, *supra* note 2 (reporting that on one occasion, contractors shot down a plane over Peru carrying American missionaries, who were mistaken for drug traffickers).

63. Catan et al., *supra* note 20; Kurlantzick, *supra* note 20 (noting the deaths of at least eight American contractors).

64. *See, e.g.*, Catan et al., *supra* note 20 (suggesting that the lack of media attention notwithstanding the contractors' deaths is a main reason why the project in Colombia is still in existence and quoting a Colombian general as saying "Imagine if 20 American troops got killed here. Plan Colombia would be over"); Forero, *supra* note 20 ("My complaint about use of private contractors is their ability to fly under the radar and avoid any accountability.") (quoting Congresswoman Jan Schakowsky); Tepperman, *supra* note 13, at 12; Wayne, *supra* note 2.

"unsatisfactory" over several years, the State Department repeatedly renewed the firm's contract.[65]

b. The Balkans

In the Balkans during the mid-1990s, the bloody contests between and among Serbs, Croats, and Bosnian Muslims produced unspeakable carnage and threatened to destabilize the entire region. The Clinton administration, hamstrung by U.N. arms embargos,[66] hesitant allies,[67] wary adversaries[68]—not to mention internal White House indecision and congressional opposition[69] and, also, its desire to retain the appearance of an honest, neutral broker in the region[70]—was militarily limited in its ability to help quell the violence. Nevertheless, the Administration actively wanted to resolve the conflicts and chose, in part, to augment the relative military strength and self-sufficiency of the Croats and, later, the Bosnian Muslims to counter Serb aggression.[71]

Unable, for the reasons mentioned above, to provide direct assistance through much of the years of fighting (but also unwilling to remain fully on the sidelines), the United States turned to private solutions. First, it

65. *See* GAO, AVIATION REPORT, *supra* note 58, at 7–8; *see also infra* notes 83 and 333 (noting that the U.S. government continues to use DynCorp elsewhere in the world despite the fact that DynCorp has been a problematic contractor in the Balkans and Afghanistan too).

66. In September, 1991, the Security Council imposed a mandatory arms embargo on all of Yugoslavia. *See* U.N. SCOR, 46th Sess., 3009th mtg. at 43, U.N. Doc. S/RES/713 (1991); *see also* WARREN CHRISTOPHER, IN THE STREAM OF HISTORY: SHAPING FOREIGN POLICY FOR A NEW ERA (1998); Michael R. Fowler & Jessica Fryrear, *Collective Security and the Fighting in the Balkans*, 30 N. KY. L. REV. 299, 325–26 (2003); Marc Weller, *The International Response to the Dissolution of the Socialist Federal Republic of Yugoslavia*, 86 AM. J. INT'L L. 569, 583 (1992).

67. *See* BOB WOODWARD, THE CHOICE 255–56 (1996) (describing the indecision and hesitancy among European allies regarding more forceful intervention); Fowler & Fryrear, *supra* note 66, at 334 (noting Europe's fear that lifting the embargo would create greater instability and threaten to fracture the NATO alliance).

68. *See infra* note 74 and accompanying text.

69. *See, e.g.*, WOODWARD, *supra* note 67, at 255–56; Steven L. Burg, *Coercive Diplomacy in the Balkans: The U.S. Use of Force in Bosnia and Kosovo*, *in* THE UNITED STATES AND COERCIVE DIPLOMACY 57, 64 (Robert J. Art & Patrick M. Cronin eds., 2003) (describing how foreign policy in the Balkans became a critical issue in the 1996 presidential election); Roger Cohen, *Why the Yanks Are Going. Yet Again.*, N.Y. TIMES, Nov. 26, 1995, at D1 (citing "fears . . . of involvement in a Vietnam-like quagmire"); Elaine Sciolino, *Clinton on Serbs: Pacing Shaky Ground*, N.Y. TIMES, May 1, 1993, at A6 (noting the general reluctance on the part of the Administration to enter the fray in the former Yugoslavia).

70. WOODWARD, *supra* note 67, at 257–60 (emphasizing how diplomatically important it was for the United States to appear neutral); John J. Mearsheimer & Stephen Van Evera, *When Peace Means War*, NEW REPUBLIC, Dec. 18, 1995, at 16 (indicating that the United States could not arm the underdog Bosnian Muslims without sacrificing its status as a neutral peace broker).

71. *See infra* note 76 and accompanying text.

sought to bolster the fledgling Croatian state and arranged for the American firm, MPRI, to provide strategic and tactical military training as well as instruction in modern weaponry.[72] In working "under the guise of a private commercial enterprise, MPRI could achieve what would otherwise be impermissible military objectives."[73] Since directly supplying training and materiel to the Croats would have violated the U.N. arms embargo, and perhaps prompted Russia, in turn, to fortify its traditional ally, the Serbs,[74] the United States's use of MPRI effectively permitted it to remain neutral yet *still* pursue its unilateral humanitarian and geostrategic interests in the region.[75]

Then, later, to entice the Bosnian Muslims to accept the Dayton Peace Accords, the need arose to strengthen their position, too, vis-à-vis the Serbs.[76] Again, the United States—intent on remaining ostensibly neutral—played matchmaker and, interestingly, recommended MPRI's services.[77] As a matter of fact, the Bosnians ultimately conditioned their

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72. *See* Sapone, *supra* note 50, at 24–25; Schrader, *supra* note 51 (explaining how the U.N. embargo compelled the United States to rely on private agents to help support its political aims in the Balkans); Mark Thompson, *Generals for Hire*, TIME, Jan. 15, 1996, at 34–36 (noting the extensive work MPRI has performed for Croatia during the years of strife in the Balkans).

73. Wayne, *supra* note 2; *see also* Schrader, *supra* note 51.

74. *See* WOODWARD, *supra* note 67, at 256 (noting that the Russians would quickly arm the Serbs if the United States were seen as violating the U.N. arms embargo by supplying the besieged Bosnian Muslims and Croats); Tony Barber, *Yeltsin Proposes Lifting Sanctions on Belgrade*, INDEPENDENT (London), July 28, 1995, at 8; Daniel Williams, *Administration May Ask U.N. to Lift Arms Embargo on Bosnian Muslims*, WASH. POST, Aug. 9, 1994, at A14.

75. *See* Wayne, *supra* note 2; *see also* Gaul, *supra* note 53, at 1490 ("[W]ithout the involvement of a single American soldier . . . the MPRI project strengthened Croatia's military and bolstered the nation's strategic position in the region."); Mearsheimer & Van Evera, *supra* note 70, at 16 (noting that the United States tacitly supported the flow of arms and military expertise to the Croatians in exchange for their support at the negotiating table).

76. *See* Gaul, *supra* note 53; Howe, *supra* note 44; Roger Cohen, *Bosnia Asks U.S. Arms Aid as Part of Any Peace Accord*, N.Y. TIMES, Nov. 19, 1995, at A10 (noting that the Bosnian Muslims conditioned their acceptance of the peace agreement on the assurances of greater military parity in the Balkans); William Safire, Editorial, *Balance the Power*, N.Y. TIMES, Oct. 9, 1995, at A17 (advocating the bolstering of the Bosnian Muslims' military capacity to counterbalance that enjoyed by the Bosnian Serbs); Eric Schmitt, *The Bosnian Playing Field*, N.Y. TIMES, Oct. 30, 1995, at A8 (noting the American and European desire to enhance the military strength of the Bosnian Muslims vis-à-vis the Bosnian Serbs); *see also* Douglas Jehl, *U.S. Looks Away as Iran Arms Bosnia*, N.Y. TIMES, Apr. 15, 1995, at A3 (noting America's willingness to permit Iran to violate the arms embargo and bolster Bosnian capabilities even before the Dayton agreement). *See generally* Warren Bass, *The Triage at Dayton*, FOREIGN AFF., Sept./Oct. 1998, at 95.

77. Sapone, *supra* note 50, at 25 (noting how the United States encouraged Bosnia to procure private military support well-before the lifting of the arms embargo); Bianco & Forest, *supra* note 30; Roger Cohen, *U.S. Cooling Ties to Croatia After Winking at its Buildup*, N.Y. TIMES, Oct. 28, 1995, at A1; Eric Schmitt, *Retired American Troops to Aid Bosnian Army in Combat Skills*, N.Y. TIMES, Jan. 15, 1996, at A1 (noting that the contracts for MPRI will be paid by Muslim nations, including Saudi Arabia); Thompson, *supra* note 72; Wayne, *supra* note 2.

signing of the Dayton Accords on the State Department's promise to secure for them "the same guys who helped the Croatians."[78] So, while the United States committed thousands of troops to the region as *neutral* peacekeepers (to enforce the Dayton agreement), it also helped the Bosnian Muslims acquire additional support:[79] Privatized intervention thus allowed Washington to have its cake and eat it too.

In both Croatia and Bosnia, the training allegedly exceeded what one might expect a purely advisory engagement to entail. In fact, some reports of the contractors' involvement invited comparisons to what had transpired in the early years of America's "advisory" involvement in Vietnam.[80] The training in the Balkans included practical instruction such as strategic planning and targeting enemy locations, skills that were soon utilized in actual offensives. In one particularly bloody campaign, in which the Croatian leaders in command were ultimately charged with international war crimes for their brutality,[81] it has been alleged that MPRI was intimately involved in all stages of planning.[82]

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78. Wayne, *supra* note 2.

79. The troops committed to the Balkans as part of the Dayton agreement would serve as neutral peacekeepers, not advocates or aides to any one side. *See, e.g.*, *Bosnia's Lingering Peace*, ECONOMIST, Nov. 9, 1996, at 57 (noting the effective role of peacekeepers in Bosnia after the Dayton Accords); Mearsheimer & Van Evera, *supra* note 70, at 16 (arguing that the United States could not openly support the Bosnian Muslims without destroying their reputation as neutral peacekeepers and regional brokers); Norman Podhoretz, *Why We Are in Bosnia*, WKLY. STANDARD, Dec. 11, 1995, at 9 (arguing that peacekeepers should not be neutral but should bolster the position of the Muslims); Thompson, *supra* note 72, at 34 (describing the Clinton administration's "pledge[] that U.S. troops will not play an active role in rearming the Bosnians"); Jonathan Turley, Editorial, *Soldiers of Fortune—At What Price?*, L.A. TIMES, Sept. 16, 2004, at B11 (noting how contractors were used in the Balkans to exceed the congressional cap on the number of soldiers authorized to be deployed in the Balkans).

80. *See* DAVID HALBERSTAM, THE BEST AND THE BRIGHTEST (1969) (describing how America's involvement in Vietnam began with limited participation of U.S. military advisors in what was then mainly a Vietnamese civil war and how the United States's role expanded over the years through incremental increases in commitment levels); STANLEY KARNOW, VIETNAM: A HISTORY 267–70 (2d rev. ed. 1997); Michal R. Belknap, *The Warren Court and the Vietnam War: The Limits of Legal Liberalism*, 33 GA. L. REV. 65, 72 (1998) (noting how President Kennedy "deepened the American commitment [to the Vietnam conflict] by dispatching . . . hundreds of military advisors"). *See generally* Jules Lobel, *Covert War and Congressional Authority: Hidden War and Forgotten Power*, 134 U. PA. L. REV. 1035, 1088–89 (1986) (describing "the dispatch of American military advisors" into a zone of conflict as having "a strong tendency to escalate into a larger American role involving United States troops").

81. *See* Raymond Bonner, *War Crimes Panel Finds Croat Troops "Cleansed" the Serbs*, N.Y. TIMES, Mar. 21, 1999, at A1 (describing a brutal Croatian offensive as having been carried out with the "tacit blessing" of the United States); Wayne, *supra* note 2.

82. *See* Graham, *Croatia*, *supra* note 13; Schrader, *supra* note 51 (describing the advisory and support role played by MPRI in the 1995 Croatian offensive that prompted allegations of war crimes and ethnic cleansing).

Retired Lt. Col. Roger Charles, now a military analyst, suspected that MPRI had a good deal to do with this gruesome assault on Serb villages. "No country moves from having a ragtag militia to

Fortunately, while the participation of such advisors did not lead to an escalation of America's entanglement, as was the case in Vietnam, the story of private soldiers in the Balkans nevertheless gets worse. DynCorp, the same company employed to protect President Karzai, the same company that received unfavorable performance ratings in Latin America, and the same company that is now spearheading a good deal of security-oriented contracting work in Iraq, was (along with MPRI) also providing security services in Bosnia. While there, DynCorp personnel were accused, by colleagues and by the British government, of operating a full-fledged sex-slave operation involving young female war refugees.[83] Given the vagaries of the contractors' legal status and the jurisdictional limitations of American criminal law,[84] there was little the United States could do, that is, short of refusing to contract for DynCorp's services in the future. As explained above and below, however, the United States has not even taken that modest step.[85]

c. Afghanistan

As referenced in the Introduction, in the Fall of 2002, the United States withdrew its elite Special Forces team assigned to protect President Karzai and, in its stead, contracted (yet again) with DynCorp to provide security.[86] Ensuring the stability and safety of the pro-Western Karzai regime, I need not add, is widely considered absolutely critical not only to rebuilding a free Afghanistan, but also to waging a successful war on global terrorism.[87] Nevertheless, though the decision to privatize came at a

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carrying out a professional military offensive without some help. . . . That's not something you learn while being instructed about democratic values." Silverstein, *supra* note 13, at 14.

83. *See* P.W. Singer, *War, Profits, and the Vacuum of Law: Privatized Military Firms and International Law*, 42 COLUM. J. TRANSNAT'L L. 521, 524–25 (2004) (noting also that a DynCorp supervisor was found to have videotaped himself raping two young women); John Crewdson, *Contractor Tries to Avert Repeat of Bosnia Wars: Sex Scandal Still Haunts DynCorp*, CHI. TRIB., Apr. 19, 2003, at A3; Tepperman, *supra* note 13, at 11; Wayne, *supra* note 2.

84. *See infra* Parts III.C.1 and IV.A.

85. *See also* Hastings, *supra* note 57; McCarthy, *Demand*, *supra* note 57; T. Christian Miller, *Army Gives Contract to Company in Jail Scandal*, L.A. TIMES, Aug. 5, 2004, at A9.

86. *See* Dao, *supra* note 2; Tepperman, *supra* note 13, at 10.

87. *See, e.g.*, Bradley Graham, *Officers: Iraq Could Drain Terror War; Diversion of Afghan Forces to Gulf Raises Concerns*, WASH. POST, Sept. 1, 2002, at A1; Carl Hulse, *In Senate, a Call for Answers and a Warning on the Future; Focus on Iraq Criticized*, N.Y. TIMES, Sept. 10, 2002, at A5; Glenn Kessler, *Clarke's Critique Reopens Debate on Iraq War*, WASH. POST, Mar. 28, 2004, at A22; Jim VandeHei, *Clark Urges New Focus on Terrorist; Democratic Candidate Would Shift Forces to Hunt Bin Laden*, WASH. POST, Nov. 13, 2003, at A7; *see also* Vincent M. Cannistraro, Editorial, *Keep the Focus on Al Qaeda*, N.Y. TIMES, Dec. 3, 2001, at A19 (warning against diverting military attention away from fighting terrorism and cautioning against devoting too many resources to fighting Saddam

time when Kabul remained incredibly unstable and threats on the new president and his cabinet were tangible and ever-present,[88] Defense Secretary Rumsfeld insisted that privatization was a necessity: He simply could not spare the handful of troops any longer.[89]

This justification may not seem totally satisfying. The military detail originally assigned to Karzai numbered approximately forty Special Forces soldiers. To put that number in perspective, conservative estimates suggest that, at the time, the total number of active U.S. Special Forces personnel was between 40,000 and 50,000 strong.[90] And, moreover, there were tens of thousands of additional regular American soldiers stationed throughout Afghanistan carrying out all sorts of duties, from protecting the construction workers building roads to rooting out Taliban and al-Qaeda operatives in the caves along the Pakistani border.[91] Finally, as mentioned above, DynCorp has received abysmal performance evaluations ranging from poor service in Latin America to horrible human rights violations in Bosnia. More recent reports, from Fall 2004, have described DynCorp employees as alienating and intimidating locals in Kabul.[92] Nevertheless, despite the obvious significance and importance of protecting Karzai and

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Hussein in Iraq); William Safire, Editorial, *The View from Purgatory*, N.Y. TIMES, June 16, 2004, at A21 (noting that promoting and protecting President Karzai's administration is essential to establishing an Islamic model of democracy); Thom Shanker, *Pentagon Weighs Transferring 4,000 G.I.'s in Korea to Iraq*, N.Y. TIMES, May 17, 2004, at A11 (noting the potential need to move U.S. troops from the volatile Korean Peninsula to Iraq).

88. *See* James Brooke, *The Tangled History of Karzai's Would-Be Killer*, N.Y. TIMES, Sept. 18, 2002, at A20; John F. Burns, *Afghan President Escapes Bullets; 25 Killed by Bomb*, N.Y. TIMES, Sept. 6, 2002, at A1; Dexter Filkins, *Afghan Official Is Assassinated; Blow to Karzai*, N.Y. TIMES, July 7, 2002, at A1; Carlotta Gall, *Another Assassination Attempt Is Stopped*, N.Y. TIMES, Nov. 24, 2002, at A22.

89. *See* Tepperman, *supra* note 13, at 12 (citing Rumsfeld as having suggested that "he can't spare the manpower to protect Afghanistan's president").

90. *See id.*; *see also* PRIEST, *supra* note 47, at 129 (estimating 46,000 Special Forces troops in the current U.S. military's arsenal and noting that the Special Forces units were not part of the downsizing efforts that occurred throughout the military in the 1990s); Eric Schmitt & Thom Shanker, *Special Warriors Have Growing Ranks and Growing Pains in Taking Key Antiterror Role*, N.Y. TIMES, Aug. 2, 2004, at A1.

91. *See* James Dao, *U.S. Shifts Emphasis in Afghanistan to Security and Road Building*, N.Y. TIMES, Nov. 12, 2002, at A14 (noting the influx of Special Forces personnel to help train Afghan security forces and help build civil infrastructure projects); Baron Gellman & Thomas E. Ricks, *U.S. Concludes Bin Laden Escaped at Tora Bora Fight; Failure To Send Troops in Pursuit Termed Major Error*, WASH. POST, Apr. 17, 2002, at A1; Amy Waldman, *Link Between Afghanistan's North and South Is Restored*, N.Y. TIMES, Dec. 17, 2003, at A10 (describing how the United States provided military protection to construction workers who were building a major highway in Afghanistan); *see also Transcript of the Candidates' First Debate in the Presidential Campaign*, N.Y. TIMES, Oct. 1, 2004, at A20 (quoting Senator Kerry as criticizing President Bush for pulling too many U.S. troops out of Afghanistan and "outsourc[ing]" the job of hunting Osama Bin Laden to local Afghan warlords).

92. *See infra* notes 333 and 399 and accompanying text.

the apparent option of diverting a handful of regular U.S. soldiers to relieve the outgoing Special Forces team, the Bush administration preferred this private alternative.

As an additional note regarding contractors in Afghanistan, it has also recently come to light that private contractors working as interrogators in American military prisons in Afghanistan have been deemed responsible for brutal beatings (and even deaths) of al-Qaeda and Taliban inmates.[93] There is even evidence of Americans running "private" detention centers, possibly—but not definitively—in some loose affiliation with the CIA, purportedly to acquire information regarding terrorism.[94]

d. Iraq

With hundreds of thousands of contractors involved in the liberation and occupation in Iraq, in jobs ranging from cooking and construction to armed security and intelligence, no combat venue has witnessed a greater influx of American private agents. Among them, many perform traditional commercial services. But a sizeable number, estimated between 20,000–30,000 contractors, carry out many of the core security functions typically understood to be inherently governmental—and inherently soldierly.[95] The difficulties of the occupation,[96] coupled with the relative shortages of U.S. troops,[97] an unwillingness to contemplate a military draft,[98] and only

93. *See, e.g.*, John Hendren & Mark Mazzetti, *U.S. Charges Contractor over Beating of Afghan Detainee*, L.A. TIMES, June 18, 2004, at A6; Richard A. Oppel, Jr. & Ariel Hart, *Contractor Indicted in Afghan Detainee's Beating*, N.Y. TIMES, June 18, 2004, at A1; Susan Schmidt & Dana Priest, *Civilian Charged in Beating of Afghan Detainee*, WASH. POST, June 18, 2004, at A1.

94. *See, e.g.*, Hamida Ghafour, *Afghans Are Fed Up with Security Firm*, L.A. TIMES, Sept. 27, 2004, at A3 (describing allegedly "freelance" work by Jonathan Idema, an American accused of detaining suspected al-Qaeda and Taliban members); Turley, *supra* note 79 (describing Idema's private prison as full of beaten and tortured detainees and commenting on Idema's claims that he had been working with the CIA).

95. *See* Priest & Flaherty, *supra* note 4, at A1.

96. *See, e.g.*, Neela Banerjee & Ariel Hart, *Inquiry Opens After Reservists Balk in Baghdad*, N.Y. TIMES, Oct. 16, 2004, at A1; Jeffrey Gettleman & Douglas Jehl, *Up to 12 Marines Die in Raid on Their Base As Fierce Fighting Spreads to 6 Iraqi Cities*, N.Y. TIMES, Apr. 7, 2004, at A1; Douglas Jehl & David E. Sanger, *Iraqis' Bitterness Is Called Bigger Threat than Terror*, N.Y. TIMES, Sept. 17, 2003, at A12; Thomas E. Ricks, *Probe of Reservists Underway*, WASH. POST, Oct. 16, 2004, at A14 [hereinafter Ricks, *Probe*]; Thomas E. Ricks, *Strains Felt by Guard Unit on Eve of War Duty*, WASH. POST, Sept. 19, 2004, at A1 [hereinafter Ricks, *Strains*]; Thom Shanker & Eric Schmitt, *Armor Scarce for Heavy Trucks Transporting U.S. Cargo in Iraq*, N.Y. TIMES, Dec. 10, 2004, at A1; Steven R. Weisman, *Rocky Path for Bush: Effort To Remake Iraq Hits Roadblocks*, N.Y. TIMES, Sept. 18, 2003, at A12; Edward Wong, *Iraq Chief Gives a Sobering View About Security*, N.Y. TIMES, Oct. 6, 2004, at A1.

97. *See* Editorial, *Costly Troop Deficit in Iraq*, N.Y. TIMES, Nov. 22, 2004, at A26; Shanker & Knowlton, *supra* note 22; Spiegel, *supra* note 22.

98. *See Dao*, *supra* note 22; Carl Hulse, *Military Draft? Official Denials Leave Skeptics*, N.Y.

minimal assistance from foreign allies[99] have made contractors close to indispensable.[100] Along the way, of course, many contractors have been killed. Casualties among contractors, to date, are not insubstantial, but of course they are not as high as the number of reported casualties among members of the U.S. military.[101] Yet comparatively speaking, rarely are those contractor-casualty numbers tallied with such care, publicity, and despondency as soldier-casualties are.[102]

In the interests of providing some descriptions of the type of private military-security work undertaken in Iraq, I offer three representative illustrations.

First, both the Coalition Provisional Authority ("CPA") and the U.S. government have contracted with private military firms to provide security for key American and CPA positions, important Iraqi locations (such as banks, museums, and oil fields) as well as for American and CPA officials, including Ambassadors Paul Bremer and John Negroponte.[103] These contractors often carry automatic weaponry and, at times, have been provoked into exchanging fire with insurgents. For example, in early April 2004, Shiite militia forces attacked the CPA's headquarters in Najaf. Eight employees of Blackwater, unaided by members of the U.S. military—or by any other national army participating in the liberation and occupation—had to fend off the siege until they were ultimately supported by reinforcements. The cavalry, so to speak, came by way of a helicopter crew, comprised of *additional* Blackwater agents, not American military

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TIMES, July 3, 2004, at A1; Krugman, *supra* note 22; Thom Shanker, *Need for Draft Is Dismissed by Officials at Pentagon*, N.Y. TIMES, Oct. 31, 2004, at A22.

99. *See* Gordan, *supra* note 22; Nicholas D. Kristof, Editorial, *Brother, Can You Spare A Brigade?*, N.Y. TIMES, Dec. 11, 2004, at A19; Elain Sciolino, *Spanish Premier Says Troops Will Not Return to Iraq*, N.Y. TIMES, May 7, 2004, at A3; *see also infra* note 417 and accompanying text.

100. *See, e.g.*, Cooper, *supra* note 22.

101. *See id.*; Mary Ann Fergus, *Iraq's Other Toll*, HOUSTON CHRON., Oct. 24, 2004, at A1; von Hoffman, *supra* note 20.

102. *See infra* notes 145–61 and accompanying text.

103. *See The Baghdad Boom*, ECONOMIST, Mar. 27, 2004, at 56; Cooper, *supra* note 22; Dao, *supra* note 4; Priest & Flaherty, *supra* note 4; *see also* Barstow et al., *supra* note 4. Barstow and his colleagues write:

> Far more than in any other conflict in United States history, the Pentagon is relying on private security companies to perform crucial jobs once entrusted to the military. In addition to guarding innumerable reconstruction projects, private companies are being asked to provide security for the chief of the Coalition Provisional Authority, L. Paul Bremer III, and other senior officials; to escort supply convoys through hostile territory; and to defend key locations, including 15 regional authority headquarters and even the Green Zone in downtown Baghdad, the center of American power in Iraq.

Id.

personnel.[104] Similar battles, waged principally by armed contractors (with more or less success), have been fought in such places as Mosul, Kut, and Fallujah since the occupation began.[105]

Second, private contractors have assumed now infamous roles as intelligence agents, translators, and supervisors in Iraq's most notorious prison, Abu Ghraib. In the weeks following formal investigations by General Taguba,[106] General Fay,[107] and former Defense Secretary Schlesinger,[108] it became apparent that employees of Titan and CACI, who devised interrogation techniques and supervised the military police, were central participants in the horrific prisoner-abuse scandal.[109]

Third, contractors working for DynCorp helped stage and raid Ahmed Chalabi's personal compound as well as his offices at the Iraqi National Congress in Baghdad. This raid—which occurred soon after the Pentagon suspected that Chalabi had passed along U.S. national security secrets to Iran—is indicative of the fact that military contractors in Iraq have

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104. *See* Priest, *supra* note 4.

105. For example, in March 2004, four employees were similarly pinned down by insurgents in Fallujah and were killed. *Id*.; *see also* Barstow et al., *supra* note 4; Sewell Chan, *U.S. Civilians Mutilated in Iraq Attack*, WASH. POST, Apr. 1, 2004, at A1; Dana Priest & Mary Pat Flaherty, *Slain Contractors Were in Iraq Working Security Detail*, WASH. POST, Apr. 2, 2004, at A16.

106. *See* Article 15-6 Investigation of the 800th Military Police Brigade ("Taguba Report"), *at* http://www.publicintegrity.org/docs/abughraib/taguba_report.pdf (last visited Dec. 12, 2004).

107. *See* Article 15-6, Investigation of the Abu Ghraib Detention Facility and 205th Military Intelligence Brigade ("Fay Report"), *at* http://news.findlaw.com/hdocs/docs/dod/fay82504rpt.pdf (last visited Dec. 24, 2004).

108. *See* Final Report of the Independent Panel To Review DoD Detention Operations ("Schlesinger Report"), *at* http://www.c-span.org/pdf/prisonerfinalreport.pdf (last visited Feb. 24, 2005).

109. *See supra* notes 106–08; *see also* Editorial, *Abuse by Outsourcing*, WASH. POST, May 26, 2004, at A26; Deborah Avant, *What Are Those Contractors Doing in Iraq?*, WASH. POST, May 9, 2004, at B1; Joel Brinkley, *Army Policy Bars Interrogations by Private Contractors*, N.Y. TIMES, June 12, 2004, at A5; Joel Brinkley, *U.S. Civilian Working at Abu Ghraib Disputes Army's Version of His Role in Abuses*, N.Y. TIMES, May 26, 2004, at A5; Brinkley & Glanz, *supra* note 8, at A15; Ariana Eunjung Cha & Renae Merle, *Line Increasingly Blurred Between Soldiers and Civilian Contractors*, WASH. POST, May 13, 2004, at A1 (noting that contractors in Abu Ghraib were known to exert considerable influence over the Army's rank and file); Joshua Chaffin, *Contract Interrogators Hired To Avoid Supervision*, FIN. TIMES, May 21, 2004, at 9; Sewell Chan, *U.S. Official: Abuse Allegations Are "a Big Deal": Charges Involving Army-Run Prison in Iraq Seen as Setback*, WASH. POST, May 3, 2004, at A16; Hersh, *supra* note 4; Seymour M. Hersh, *Torture at Abu Ghraib*, NEW YORKER, May 10, 2004, at 42; David Johnston & Neil A. Lewis, *U.S. Examines Role of C.I.A. and Employees in Iraq Deaths*, N.Y. TIMES, May 6, 2004, at A16; Renae Merle, *CACI and Titan Sued Over Iraq Operation; Legal Center Representing Prisoners*, WASH. POST, June 10, 2004, at E3; Renae Merle, *Contractor Investigated by Justice*, WASH. POST, May 22, 2004, at A17 (describing allegations that CACI employees instructed the military police in interrogation tactics that the contractors "knew . . . equated to physical abuse"); James Risen, *Command Errors Aided Iraq Abuse, Army Has Found*, N.Y. TIMES, May 3, 2004, at A1.

undertaken offensive missions.[110] Within the industry, which vociferously contends that it only accepts "defensive" assignments, this example signals a major evolution in contractor responsibilities and protocols.[111]

With extreme stress on the active U.S. Armed Forces,[112] the withdrawal of troops by Coalition partners,[113] a lack of faith in Iraqi security teams,[114] and no end in sight to the insurgents' hostilities, one would have to assume that the demand for (and utility of) military contractors, in spite of the notoriety they received at Abu Ghraib, will only increase.[115]

e. Rwanda

Another interesting but not widely reported case of military privatization involved the United States supporting the very limited use of private agents in Rwanda. In the midst of that horribly brutal genocide campaign,[116] an extremely small (and admittedly *insignificant*) group of private agents under the employ of the Ronco firm were dispatched to protect some villages, to provide some humanitarian relief, and to offer training to the fledgling Rwandan Patriotic Army.[117] Contrasting the magnitude of the travesties against the modest deployment of private agents, it is safe to conclude that Ronco did not make much of a dent in stopping intertribal violence.[118] It is even safer to say, that the United

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110. Merle, *supra* note 4, at A17; Scott Shane, *Chalabi Raid Adds Scrutiny to Use of U.S. Contractors*, BALT. SUN, May 30, 2004, at 1A.

111. *See* SINGER, *supra* note 20; Tepperman, *supra* note 13, at 10–12; Wayne, *supra* note 2; *see also* Rosky, *supra* note 6, at 908 (characterizing the private military industry as insisting that its contractors largely confine themselves to defensive and logistical tasks).

112. Thom Shanker & David E. Sanger, *The Struggle for Iraq: Contingencies; Pentagon Drafts Iraq Troop Plan To Meet Violence*, N.Y. TIMES, Apr. 21, 2004, at A1 (noting that estimates in the Spring of 2004 indicated that American forces in Iraq were short by about 20,000 the number of troops requested by General Abizaid, head of the U.S. Central Command).

113. *See* Carlos H. Conde, *The Reach of War; Manila Starts Withdrawing Troops from Iraq; U.S. Criticizes Step*, N.Y. TIMES, July 15, 2004, at A7; Shanker & Sanger, *supra* note 112 (noting the withdrawal of troops in Iraq by Spain, Honduras, and the Dominican Republic).

114. *See* Rajiv Chandrasekaran & Scott Wilson, *Marines Begin to Cede Control of Restive Fallujah*, WASH. POST, May 2, 2004, at A1.

115. *See supra* note 57; *see also supra* note 85.

116. Within a matter of one hundred days, over 800,000 Tutsis were slaughtered. *See* MICHAEL BARNETT, EYEWITNESS TO A GENOCIDE: THE UNITED NATIONS AND RWANDA 1 (2002); SAMANTHA POWER, "A PROBLEM FROM HELL": AMERICA AND THE AGE OF GENOCIDE 362, 381–82 (2002).

117. *See* DEP'T OF DEFENSE, SUMMARY—REPORT TO CONGRESS ON U.S. MILITARY ACTIVITIES IN RWANDA, 1994 – AUGUST 1997, *available at* http://www.defenselink.mil/pubs/rwanda/summary.html (last visited May 4, 2004) (noting Ronco's participation in dog de-mining program as part of humanitarian relief); *see also* Victoria Brittain, *Absolute Minefield*, GUARDIAN (London), Aug. 27, 1994, at T20 (describing Ronco's contractual responsibilities in Rwanda, including detecting mine fields); *Pentagon Provides Dogs To Detect Landmines in Rwanda*, AFRICA NEWS, Mar. 1996 (same).

118. *See* Milliard, *supra* note 23, at 18–19 (noting that while it is "unlikely that any modern

States, like most other nations, did almost nothing else to stop the genocidal massacre.[119] Indeed, General Dallaire, a Canadian commander of U.N. peacekeepers in Rwanda who condemned his own leadership as well as that of the entire Western world, said:

> I haven't even started my real mourning of the apathy and the absolute detachment of the international community, and particularly the Western world, from the plight of Rwandans. Because fundamentally, to be very candid and soldierly, who the hell cared about Rwanda? . . . Who is grieving for Rwanda and really living it and living with the consequences?[120]

Nevertheless, despite its extremely limited scope and even more limited success, the Rwanda-Ronco project provides a powerful if incomplete model of possibilities. Irrespective of any U.N. hesitancy,[121] it is doubtful that the American public would have countenanced U.S. servicemen and women being sent to Central Africa to stop internecine tribal violence—especially on the heels of the recent debacle in Somalia.[122] On the other

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[private military company, or "PMC"] could have diffused the Rwandan crisis in mid-1994 . . . [a] capable and willing PMC could have seized, disabled, or simply jammed Hutu-controlled Radio Mille Collines early on to prevent further anti-Tutsi propaganda . . . [and] intervened to prevent or at least discourage those responsible for the organized but small-scale assaults, rapes, and murders that began in 1990"); Pape & Meyer, *supra* note 2 (describing Executive Outcome's early and unsuccessful pitch to the Clinton administration to provide services to stabilize Rwanda).

119. *See* DAVID HALBERSTAM, WAR IN A TIME OF PEACE 276 (2001) ("The genocide succeeded . . . because it took place in a moral and political vacuum."); POWER, *supra* note 116 (noting the complete lack of urgency from the West to intervene); Alison L. Des Forges, *Shame: Rationalizing Western Apathy on Rwanda: Alas, We Knew*, FOREIGN AFF., May/June 2000, at 141 (describing how western leaders refused to intervene at a sufficiently early junction to prevent the mass slaying of the Tutsis); Chaim Kaufmann, *See No Evil: Why America Doesn't Stop Genocide*, FOREIGN AFF., July/Aug. 2002, at 142–43 ("[T]he United States not only did not halt the killing but actively prevented other [more] willing powers from taking effective action.").

120. HALBERSTAM, *supra* note 119, at 277.

121. *Report of the Independent Inquiry into the Actions of the United Nations During the 1994 Genocide in Rwanda*, United Nations Security Council, U.N. Doc. S/1999/1257 (1999). In fact, the United Nations withdrew a sizable percentage of its on-the-ground troops that had already been in Rwanda (enforcing a pre-existing truce between the Hutus and Tutsis) when the deadly tribal violence began. BARNETT, *supra* note 116, at 62–64, 105–07 (2002); *see also* Jose E. Alvarez, *Crimes of States/Crimes of Hate: Lessons from Rwanda*, 24 YALE J. INT'L L. 365, 390 (1999) (describing how the United Nations withdrew most of its troops as soon as violence commenced and some Westerners were killed); *Who Will Save Rwanda?*, ECONOMIST, June 25, 1994, at 13 (describing the United Nations's belated efforts to commit peacekeeping troops).

122. *See* BARNETT, *supra* note 116, at 123–24, 174 (describing how the international community was reluctant to undertake another difficult peacekeeping mission so soon after what had transpired in Somalia); *United Nations Peacekeeping; Trotting to the Rescue*, ECONOMIST, June. 25, 1994, at 19 (noting that the Somalia disaster shaped America's apathy in Rwanda and also characterizing the United States's position on relief in Rwanda as "[n]ot a soldier, not a cent"); *Who Will Save Rwanda?*, *supra* note 121 (noting America's reluctance to engage in humanitarian intervention in the aftermath

hand, the public might be more comfortable with—or less aware of—dispatching contractors, who specifically agreed to sign up for such a dangerous mission, than with sending over regular U.S. soldiers whose defense of American sovereignty and interests does not (as the public might believe) legitimately extend to humanitarian police actions.[123] Dangerous humanitarian work such as what may be warranted today in the Darfur region of Sudan[124] may, accordingly, prove to be a new growth industry of assignments for contractors who consent to enter dangerous situations well outside of the scope of what is conventionally understood as core American national security interests.[125]

f. Gaza Strip

A final, recent illustration of military privatization on a very small scale involved the terrorist attacks on U.S. consular attachés in Gaza.[126] In October 2003, a caravan of U.S. diplomats was shepherded through a virtually lawless area of Palestinian-controlled Gaza by DynCorp security forces, not State Department Diplomatic Service agents or U.S. Marines, who otherwise often guard embassies and overseas diplomats.[127] The

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of Somalia).

123. *See* PRIEST, *supra* note 47, at 52 (characterizing Colin Powell's belief that national security commitments should not extend to humanitarian relief missions); *see also* James Mann, *Not Your Father's Foreign Policy*, AM. PROSPECT, Apr. 9, 2001, at 28 (emphasizing the current Bush administration's embrace of the Powell Doctrine's prescription—at least before September 11—to use military force only when "vital U.S. interests [are] at stake"); Michael O'Hanlon, *Come Partly Home, America: How To Downsize U.S. Deployments Abroad*, FOREIGN AFF., Mar./Apr. 2001, at 2 (describing efforts to conserve military resources and use them only to further national security interests).

124. *See* Romeo Dallaire, Editorial, *Looking at Darfur, Seeing Rwanda*, N.Y. TIMES, Oct. 4, 2004, at A25 (noting the need for intervention and doubting whether help will be forthcoming); JIM FISHER-THOMPSON, STATE DEP'T, IMPORTANT ROLE SEEN FOR PRIVATE FIRMS IN AFRICAN PEACEKEEPING (2004), *at* http://usinfo.state.gov/af/Archive/2004/Oct/19-30116.html (last visited Dec. 12, 2004) (quoting Congressman Royce as seeing "a role for private military contractors . . . in attempting to bring stability to Africa" and noting the nascent presence in the Darfur region of Sudan of at least two private firms hired by the African Union).

125. *See infra* notes 159 and 397 and accompanying text.

126. *See* John F. Burns, *3 Americans Slain in Blast in Gaza Strip*, N.Y. TIMES, Oct. 16, 2003, at A1; Mark Matthews, *Bomb Strikes Diplomatic Convoy, Killing 3 Americans in Gaza Strip: Marks First Fatal Attacks Against U.S. Personnel*, BALT. SUN, Oct. 16, 2003, at 1A; Molly Moore & John Ward Anderson, *Bomb Kills 3 Americans in Gaza Strip: Guards Were Escorting U.S. Diplomatic Convoy*, WASH. POST, Oct. 16, 2003, at A1; Rebecca Santana, *Americans Killed in Gaza: Embassy Convoy Bombing Crosses a New, Deadly Line*, ATLANTA J.-CONST., Oct. 16, 2003, at 1A.

127. *See, e.g.*, *After Iran, Millions To Make Embassies Safer*, U.S. NEWS & WORLD REP., Mar. 2, 1981 at 52 (indicating efforts to bolster Marine Corps security forces); Arthur J. Goldberg, Editorial, *Security of American Embassies*, CHRISTIAN SCI. MONITOR, Jan. 23, 1984, at 12 (describing large security role played by U.S. Marines in American embassies); Smith Hempstone, *Embassies at Risk*, NAT'L INTEREST, Fall 1998, 53, 53–55 (describing the Marine Corps guards' role in the U.S. Embassy

killing of three American contractors on the security detail did make the news for a day or so,[128] but it did not become a serious media or diplomatic story, and little was ultimately made of the attack in terms of creating an impetus for a counter-strike, or even a rethinking of U.S. Middle East policy. Perhaps, for better or worse, if it were American soldiers killed, a different response would have been forthcoming.[129]

C. Conceptualizing Tactical Privatization

Without having looked at these specific case studies, one might readily assume that economic efficiency, the *sine qua non* of privatization, explains the evolution and expansion of military outsourcing.[130] But these examples, which paint a vivid though still inchoate and fragmentary picture of military privatization, actually suggest that there might be alternative (or at least additional) reasons why policymakers employ contractors. Examining the six examples above, we begin to realize that not only must we grapple with the implications of the dynamic transformations from outsourcing strictly commercial functions to ones involving the exercise of considerable discretion of the sort normally considered "inherently governmental;" we must also come to terms with the possibility that conventional, economic justifications do not explain the full breadth of normative reasons for soliciting private soldiers.

Traditionally, the lens of privatization scholarship has focused on economic efficiency, how competitive market forces and profit incentives can inject cost-savings and quality-enhancing measures into the provision of government services and functions.[131] Scholars have also examined ways in which contracting out may generate additional cost-savings benefits. For example, contractors are not subject to the costly and time-consuming notice-and-comment requirements of the Administrative Procedure Act or to the disclosure mandates of the Freedom of

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in Somalia in the early 1990s); Jim Hoagland, *Miscasting the Marines*, WASH. POST, Apr. 10, 1987, at A2 (characterizing U.S. Marines's expansive security responsibilities when they are assigned to an overseas embassy).

128. *See supra* note 109.

129. *See infra* note 159 and accompanying text.

130. *See, e.g.*, von Hoffman, *supra* note 20, at 79 ("The rationale for privatizing American war making is that corporate warriors can do the job for less.").

131. *See, e.g.*, SAVAS, *supra* note 3, at 118–20; Stuart Butler, *Privatization for Public Purposes*, *in* PRIVATIZATION AND ITS ALTERNATIVES 17 (William T. Gormly, Jr. ed., 1991); Freeman, *supra* note 6, at 170; Metzger, *supra* note 39, at 1377, 1433; Minow, *supra* note 20, at 1230, 1242–46; Rosky, *supra* note 6, at 929; Trebilcock & Iacobucci, *supra* note 8, at 1424–30, 1436; Michael D. Wright, *A Critique of the Public Choice Theory Case for Privatization: Rhetoric and Reality*, 25 OTTAWA L. REV. 1 (1993).

Information Act.[132] Nor are they necessarily deemed "state actors" for purposes of *Bivens* or 42 U.S.C. § 1983 liability.[133] Finally, employees of contracting firms are less likely to have union protection, and thus they can be made more responsive to market incentives (and more easily fired) than can civil servants.[134] Accordingly, the lower costs associated with contracting out are thus a function not only of competition and innovative business planning, but also of public-private status differentials. Even though they provide cost-savings too, these incidents of privatization, which permit contractors to bypass channels of accountability and to use more "casualized" labor, are, especially since the government is outsourcing increasingly sensitive functions, a growing source of concern.[135]

In the military context, non-economic status differentials can emerge as all-important in (rather than incident to) decisions to privatize. Private actors *qua* private actors may be sought—not because they are situated in a more efficient market or even because they command lower market wages, but because legally, politically, and symbolically they are *not* soldiers. Military privatization can allow the government to achieve national security and even humanitarian ends that would be more difficult, if not impossible, to accomplish using American soldiers.[136] Perhaps, at

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132. *See* Freeman, *supra* note 3, at 1302, 1305 (describing how private actors, even those responsible for providing services under government contracts, are largely exempt from APA and FOIA requirements); Guttman, *supra* note 3, at 895, 898 n.137, 901–05 (noting how FOIA does not apply to contractors); *see also* Public Citizen Health Research Group v. HEW, 668 F.2d 537 (D.C. Cir. 1981) (noting that holding private contractors to the same disclosure standards as are applied to government agents would not be in keeping with the aims of using private contractors in the first place).

133. *See* Metzger, *supra* note 39, at 1410–37 (characterizing the legal gap between government providers disciplined by threat of 42 U.S.C. § 1983 actions and private contractors who are not considered state actors for such suits).

134. *See* Beermann, *supra* note 33, at 1523–24 (describing cost-savings associated with hiring private employees who lack the job security and civil service status that government employees enjoy); Gilman, *supra* note 6, at 602–03 (characterizing some percentage of the presumed savings associated with privatization as resulting from the replacement of unionized labor with non-union labor).

135. *See, e.g.*, DiIulio, *supra* note 34; Diller, *Revolution*, *supra* note 6; Freeman, *supra* note 3; Kennedy, *supra* note 6; Minow, *supra* note 20, at 1232–34, 1241.

136. *See* SINGER, *supra* note 20, at 133 (noting that private firms are able to go where the United States could not officially go and explaining that "[d]irect participation could thus be denied and there [would be] no limiting public oversight or debate"); Lobel, *supra* note 80, at 1079 (suggesting that decisions to use private troops rather than American soldiers often are aimed at circumventing democratic decisionmaking); Eugene B. Smith, *The New Condottieri and U.S. Policy: The Privatization of Conflict and Its Implications*, PARAMETERS, Winter 2002, at 104, 111 (noting that some observers believe that the use of private firms is "simply a convenient way for the executive branch to avoid congressional oversight"); Tim Spicer, *Why We Can Help Where Governments Fear to Tread*, TIMES (London), May 24, 1998, at Features Section ("It's not so much that we can do things

various times, a desire, however latent, to avoid instituting a draft, to lessen public awareness, to dilute casualty counts, to bypass congressional troop limitations, and/or to evade international arms embargoes, entice policymakers to outsource because private actors are not regulated, controlled, or even mourned to the same extent that public soldiers are. But, if a decision to outsource does reflect "tactical" aims to circumvent political and legal obstacles associated with the conventional deployment of regular, U.S. troops, an entire set of problems for constitutional principles and democratic virtues—*independent of any actual, tangible misdeeds that privateers may perpetrate in a zone of conflict*—must be anticipated. It is these structural problems, deeper than just accountability concerns, which command my attention.[137] Indeed, these structural problems are so great in the context of military privatization that even absent any express intent by the Executive to leverage or exploit status differentials between contractors and soldiers, many of the chief constitutional and democratic harms would still arise.

Economic privatization is, ostensibly speaking, ideologically agnostic. Its advocates may have particular agendas, but efficiency-driven privatization per se mainly creates an alternative *process* for carrying out government contracts that strive to replicate government provision—only at a fraction of the cost (and perhaps with less government red-tape). On the other hand, "tactical" privatization, which may seek to exploit status differentials, is predicated on substantive rather than administrative or bureaucratic reform. Privatization, in this latter case, could be used to achieve objectives materially different than those that could be—for a number of reasons—achieved within the public sector. For example, a conflict may prompt an outsourced response if it would otherwise be difficult for the president to secure congressional and/or international support to deploy members of the U.S. Armed Forces. In such scenarios, it is not the cheaper price tag, but rather the *status* of the private actors (as distinct from U.S. military personnel) vis-à-vis congressional oversight,

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better than sovereign governments . . . it's that we can do it without any of the spin-offs that make military intervention unpalatable to governments; casualties among [private military companies] do not have the same emotive impact as those from national forces."); Yeoman, *supra* note 4 (indicating that privatization is a way of bypassing Congress and the American people).

137. By structural problems, I am referring to the ways in which military privatization can bypass congressional war powers, dampen public awareness, and destabilize the delicate balance between civilian and military governance. These problems are deeper and, I will argue, more intractable than those associated simply with subpar contract performance. For instance, the danger with a contractor possibly circumventing 42 U.S.C. § 1983 state-actor liability or evading FOIA disclosures runs principally to concerns of effective provision of services—not to the structural dynamics of constitutional and democratic governance. *See supra* notes 131–35.

public attention, and international law that may motivate policy planners to hire contractors.

In this Section then, I focus on the structural challenges posed by forms of military privatization that leverage status differentials, purposefully or even inadvertently. This is not to say that there are not instances where "tactical" aims may influence outsourcing patterns in domestic policy contexts.[138] Nor is it the case that the lessons and insights we can glean from the already rich, nuanced, and comprehensive scholarship on economic privatization would not be immeasurably helpful here. I nevertheless leave much of that conventional, scholarly analysis to the side for now in order to explore some of the deeper concerns that are triggered when privatization can be undertaken for purposes of limiting political and legal oversight. Thus, for instance, I do not consider the potential economic gains and efficiencies associated with military privatization, though such an exploration would, no doubt, prove quite interesting.

Instead, I briefly discuss how the "optics" of privatization as well as how the legal and political differences between using private troops and American soldiers could create opportunities for national security policymaking that would not be possible were the Executive limited to deploying only members of the U.S. Armed Forces. This short discussion, in turn, helps lay a framework for examining in Parts III, IV, and V, how status differentials not only threaten effective service provisions, but also may disrupt the democratic and constitutional workings of the federal government.

1. Using Private Troops To Minimize Political and Legal Contests

As will be explored at length in the course of the discussions in subsequent parts of this Article, privatization expands the horizon of executive policymaking discretion in the context of military affairs. Using privateers, whose legal status differentiates them from regular, U.S. soldiers, could help enable the president to bypass congressional oversight and even international collective security arrangements. Indeed, outsourcing may be undertaken to exploit this legal gap between what is the official state policy (say, non-intervention, limited involvement, or limited troop deployment) and what military goals can actually be accomplished through private channels. If contractors operate within these interstices, the president can presumably satisfy national security aims

138. *See, e.g.*, Diller, *Form*, *supra* note 6; Diller, *Revolution*, *supra* note 6, at 1166–72; Michaels, *supra* note 6.

without expending the time and political capital to secure formal approval at home or internationally.

First, pursuant to the U.S. Constitution, customary practice, and statutory framework laws such as the War Powers Resolution, the president shares many warmaking powers with Congress. While retaining exclusive jurisdiction over command decisionmaking, the president must nevertheless seek, inter alia, authorization and funding from Congress to deploy U.S. troops into zones of hostility. But, many of Congress's powers over military affairs are keyed to its Article I authority over the Armed Forces per se. Congress can, for instance, regulate the use and number of servicemen and women abroad, curtail funding for operations, and withhold support for a military engagement. Hence, as it stands, the president must often seek congressional approval in some form or another.

If the Executive were, however, to deploy private troops in lieu of U.S. soldiers, it might be able to evade much of Congress's oversight jurisdiction—at least temporarily. Without having to seek authorization and funds from the national legislature, the president can more easily engage in unilateral policymaking and dispatch private contractors who are not part of the regular U.S. military. In so doing, objectives can perhaps be achieved more swiftly and with less political wrangling and opposition. This privatization agenda is discussed further in Part III.

Second, an additional—and this time constitutionally exogenous—check on presidential discretion comes by way of the United Nations Security Council. In the post-Cold War era, the Security Council has reemerged as a, if not the, legitimate source for the authorization of military intervention in the name of collective security. Without the endorsement of the Security Council, any one nation's decision to intervene in the affairs of another sovereign state is subject to criticism and charges of illegality and illegitimacy. But although the Security Council attempts to regulate the behavior of nation-states and their national militaries, it (like international law more generally) has comparatively less influence over the activities of private agents.[139]

If a country were to utilize the services of private contractors, it could bypass a Security Council vote—or possibly evade an already passed resolution prohibiting intervention by member states. Thus, the use of private troops in lieu of the U.S. military may free the Executive from having to depend on the support of the Security Council in order to initiate

139. *See, e.g.*, Zarate, *supra* note 20, at 116–44 (describing some of the successes and limitations of regulating private military actors through the United Nations and other international bodies).

a foreign deployment. This privatization agenda is explored at greater length in Part V.

2. The Optics of Military Privatization

Beyond leveraging the legal status differentials between U.S. soldiers and private actors to evade oversight by Congress (and maybe even the U.N.), the Executive might further, or alternatively, resort to privateers precisely because they may have a different social or symbolic status in the American consciousness. Privateers do not, so it appears, occupy the same special place in the hearts and minds of the American public as do its citizen-soldiers.[140] By contrast, it is that special regard for soldiers, well-understood by military and political leaders alike, that often constrains the government from readily sending public troops into harm's way.[141]

Conversely, it is doubtful also that privateers go overseas with the symbolic "baggage" that U.S. soldiers tend to carry—as exemplars (at least in the minds of many) of hegemony and coercion.

Hence in either or both scenarios, the use of private agents may prove more palatable (or at least more discreet) than sending in the Marines. Dispatching private contractors may not trouble and worry the American people as profoundly as if their boys and girls in uniform were sent into battle. And, likewise, dispatching private troops—who do not even wear the uniforms of the U.S. military and are not as likely to hoist an American flag in celebration on foreign soil[142]—may accomplish goals more readily and with less resistance than if U.S. soldiers were actually deployed.

Below I posit that differences between soldiers and contractors, based on (a) normative value judgments and traditional affinities for U.S. servicemen and women, and (b) sensitivities of foreign hosts, may lead policymakers to prefer private contractors in certain situations. The harms

140. *See infra* Part IV.B; *see also* notes 152–57 and accompanying text.

141. *See* Lawrence F. Kaplan, *Willpower*, NEW REPUBLIC, Sept. 8, 2003, at 19, 20; Wayne, *supra* note 2 (describing the difference in symbolic importance between U.S. soldiers and government contractors). For further discussion, see *infra* Part IV.B.

142. *See, e.g.*, Jim Dwyer, *Troops Told To Carry Freedom, Not the Flag*, N.Y. TIMES, Mar. 20, 2003, at A6 (noting that the U.S. military leadership instructed American soldiers not to raise the American flag in Iraq in order to avoid appearing as conquerors); Emily Wax & Alia Ibrahim, *TV Images Stir Anger, Shock and Warnings of Backlash*, WASH. POST, Apr. 10, 2003, at A41 (describing how poorly received the image of the American flag draped over a statue of Saddam was on the "Arab street"); Bernard Weinraub, *Display of U.S. Flag Barred After Unfurling on Statue*, N.Y. TIMES, Apr. 11, 2003, at B13 (highlighting the appearance problem associated with hanging the American flag in Iraq).

associated with exploiting these sets of status differentials will be addressed more fully in Part IV.

a. Public Opposition Grounded in an Expectation of Zero-Casualties: A Focus on Soldiers' Deaths

Americans' general distaste for war is a significant factor circumscribing the government's ability to deploy and use force abroad. But that aversion is not necessarily grounded in pacifist or even isolationist sentiments; another significant factor is a low tolerance for casualties: the squeamishness associated with watching soldiers arrive home in body bags and with tallying the rising casualty counts in the morning newspapers. Indeed, though the United States has not necessarily been shy about military interventions in principle, it has often been hyper-vigilant about minimizing soldiers' casualties in any way possible. Billions of dollars expended for stealth fighters, cruise missiles, unmanned drones, and smart bombs aim to ensure that harm to American soldiers is kept to an absolute minimum.[143] In fact, key military decisions are at times made with the public's concerns in mind even at the expense of sound national security policymaking. For instance, in his efforts to galvanize domestic support for intervening in Kosovo, President Clinton publicly and repeatedly promised not to engage in a ground war.[144] His pledge not to put troops in harm's way may have secured the public support at home necessary to liberate Kosovo, but it also reduced the strategic discretion the Pentagon would have otherwise possessed were no such promise made.[145]

An attitude of risk-aversion and faith in what is the now-popularized "zero-casualty," force-protection military paradigm[146] constrains the

143. *See, e.g.*, Brzezinski, *supra* note 47 (noting that the development of unmanned flight and marine vehicles could reduce the need for Air Force pilots, thus taking many combatants out of the direct theater of combat); Kaplan, *supra* note 141.

144. The combination of a nation's interventionist bent and its low tolerance for casualties reveals its preference for air campaigns over ("messy") ground wars. *See* PRIEST, *supra* note 47, at 53; Peter J. Boyer, *A Different War*, NEW YORKER, July 1, 2002, at 54; Brzezinski, *supra* note 47; Philip Everts, *When the Going Gets Rough: Does the Public Support the Use of Military Force*, WORLD AFF., Jan. 1, 2000, at 91 (identifying the strong zero-casualty sentiment felt among the American public).

145. *See* PRIEST, *supra* note 47, at 53–54; Boyer, *supra* note 144 (describing the military's frustration with Clinton's promise and characterizing the strategic difficulties this pledge created for the military).

146. *See* Michael P. Scharf, *Enforcing International Criminal Justice in the New Millenium*, 49 DEPAUL L. REV. 925, 958 (2000); Ivo H. Daalder & Michael E. O'Hanlon, *Unlearning the Lessons of Kosovo*, FOREIGN POL'Y, Sept. 22, 1999, at 128; *see also* Charles J. Dunlap, Jr., *Kosovo, Casualty Aversion, and the American Military Ethos: A Perspective*, 10 USAFA J. LEG. STUD. 95, 101–03

effective exercise of military power—but not as much as if the overriding concern among Americans were purely pacifist in nature. This distinction between a zero-casualty and pacifist mentality may be less meaningful in the context of sending American troops into a conflict zone: either way, the public would be reticent to support a combat-related engagement. But, in the context of employing private troops who may not have the preternatural connection to the American people that U.S. soldiers enjoy,[147] this distinction might make all the difference in how a president conducts foreign policy.

Enter the contractor. Tim Spicer, founder of Sandline, a prominent British military firm, believes military contractors can "fill the gap" left in the wake of the debacle in Somalia more than a decade ago.[148] Recall that America's low tolerance for casualties, perhaps a by-product of Vietnam,[149] was tragically tested in Somalia, where the sight of American soldiers dragged through the streets of Mogadishu was televised stateside for all to see.[150] Indeed, "the live footage on CNN of United States troops being killed in Somalia has had staggering effects on the willingness of governments to commit to foreign conflicts."[151]

Private firms can undertake dangerous missions on behalf of the U.S. government without the attention, media coverage, or official sponsorship;

(1999) (noting how pervasive the concerns over casualty avoidance and force protection have become within the military establishment).

147. *See infra* Part V.B.

148. *See* Andrew Gilligan, *Inside Lt. Col. Spicer's New Model Army*, SUNDAY TELEGRAPH, Nov. 22, 1998, at A1; *see also* Howe, *supra* note 44, at 5 ("Private security [forces] can enter situations where Western governments presently fear to tread, especially after the world's intervention into Somalia.").

149. *See, e.g.*, John Kerry & Vietnam Veterans Against the War, *The New Soldier* 14–18 (David Thorne & George Butler eds., 1971) (describing as senseless the mounting casualties in Vietnam and noting how the tallying of the body counts became a national obsession); Robert N. Strassfeld, *How Can the Law Regulate Loyalty Without Imperiling It?: "Lose in Vietnam, Bring the Boys Home*," 82 N.C. L. REV. 1891, 1892 (2004) (calling Vietnam "almost certainly America's most unpopular war"); James Dao, *How Many Deaths Are Too Many?*, N.Y. TIMES, Sept. 12, 2004, at D1 (comparing the angst about body counts in the Iraqi conflict with that which existed during the Vietnam War).

150. *See, e.g.*, Brzezinski, *supra* note 47 (noting that "[e]ver since Vietnam, the American public's threshold for casualties has been thought to be very low"); Nancy Gibbs, *Can the Pro-War Consensus Survive?*, TIME, Feb. 18, 1991, at 32 (speculating that public support for military operations can rapidly dissipate once the death toll mounts, as it did in Vietnam).

151. *See* Gilligan, *supra* note 148 (quoting Tim Spicer); *see also* Jonathan Alter, *Does Bloody Footage Lose Wars?*, NEWSWEEK, Feb. 11, 1991, at 38 (describing the public's low tolerance level for American casualties); Brzezinski, *supra* note 47; Kenneth L. Cain, Editorial, *The Legacy of Black Hawk Down*, N.Y. TIMES, Oct. 3, 2003, at A27 (describing the anguish felt by the soldiers who were pinned down in the streets of Mogadishu); Clark, *supra* note 45 (noting America's impulse to be risk-averse after Vietnam and how that aversion was strengthened in wake of Somalia); Andrew Kohut & Robert C. Toth, *Arms and People*, FOREIGN AFF., Nov./Dec. 1994, at 47 (describing television's impact on Americans' aversion to casualties).

if things go wrong, the line of blame to the government is more attenuated and the casualties would not be patriotic American soldiers serving under (and being carried home under) the American flag, but rather defense contractors whose deaths are not officially reported.[152] As former U.S. Ambassador to Colombia Myles Frechetter noted: "If the narcotraffickers shot American soldiers down, you could see the headlines: 'U.S. Troops Killed in Colombia.'" But when three DynCorp employees were shot down during an anti-drug mission in Peru, their deaths "merited exactly 113 words in the New York Times."[153] And, as Doug Brooks, a private military industry spokesperson explains, if an American soldier is killed overseas, it is front-page news. If he is not a soldier, and instead is a private contractor who "is shot wearing blue jeans, it's page fifty-three of their hometown newspaper."[154] Journalist Kevin Myers has come to a similar conclusion: If a private military contractor is "killed in action, the tabloid sob-industry cannot then move into tearful action, wondering about our brave boys perishing on a foreign field."[155] In the hearts and minds of the people, private actors "are excluded from such hand-wringing."[156] Indeed, although ABC's *Nightline* recently devoted an entire episode to a solemn reading of the names of the slain American servicemen and women in Iraq, it is highly doubtful that it or a similar show would allot comparable time to fallen contractors.[157]

Thus in conflict zones, or areas of potential conflict, such as Colombia, Afghanistan, Iraq, and Rwanda, the use of private agents rather than

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152. *See* Shapiro, *supra* note 24; *see also supra* note 64 and accompanying text; *infra* notes 153–56 and accompanying text.

153. Yeoman, *supra* note 4, at 43.

154. Tepperman, *supra* note 13, at 12; *see* Marego Athans, *To Make a Living, Driver Risked It All*, BALT. SUN, Feb. 8, 2004, at 1A ("Americans are accustomed to hearing the military death toll in Iraq . . . . But largely absent from the public consciousness are the thousands of civilians putting their lives on the line as contractors in Iraq . . . ."); Bredemeier, *supra* note 13 (describing the media's relative indifference to the two private military agents killed in Kuwait by terrorists).

155. Kevin Myers, *Mercenaries Are Much Misunderstood Men*, DAILY TELEGRAPH, Feb. 17, 2002, at 26.

156. *Id.*; *see also* PRIEST, *supra* note 47, at 140 (indicating that the "world's terrorists and despots" believe that "killing a few American soldiers . . . is enough to spook Uncle Sam" into inaction) (quoting MARK BOWDEN, BLACK HAWK DOWN: THE STORY OF MODERN WAR 355 (1999)); Shapiro, *supra* note 24; Editorial, *Soldiers Honored, Soldiers Dishonored*, N.Y. TIMES, May 1, 2004, at A14 (describing America's "yearning to give military casualties the honor of an individual remembrance [that] is ingrained in the modern national fabric").

157. Bill Carter, *Debate Over "Nightline" Tribute to War Dead Grows, as McCain Weighs In*, N.Y. TIMES, May 1, 2004, at A5 (noting the prominent reporting of slain American soldiers on television and in the print media); Bill Carter, *"Nightline" To Read Off Iraq War Dead*, N.Y. TIMES, Apr. 28, 2004, at A9; Mark Steyn, Editorial, *"Nightline" Demoralizes America*, JERUSALEM POST, May 5, 2004, at 15 (quoting Ted Koppel as saying "[t]he most important thing a journalist can do is remind people of the cost of war").

American soldiers does not lower the likelihood of death. But their acting in lieu of soldiers does perhaps lower the likelihood of the unacceptable imagery of American *soldiers* coming off cargo planes in bodybags draped with the flag.[158] It is possible that, at least in terms of small-scale operations (such as in Rwanda or Sudan), this gives the president greater discretion to place troops on the ground for humanitarian peacekeeping or even hostage-rescue assignments that the public would deem too remote an interest to justify jeopardizing American soldiers.[159] And, in high-profile interventions, such as in Iraq or Afghanistan, the use of contractors can lower the number of soldiers who have to be called into or kept in service, dilute the tally of official casualties, and lessen the need to cultivate a broader international coalition. The U.S. government may, in turn, exploit this gap in how contractors are valued vis-à-vis soldiers and place privateers in harm's way at a lower political cost.

Perhaps these observations overstate the difference, especially in light of the Bush administration's ongoing War on Terror and the war in Iraq. After September 11, the force-protection theory of warmaking may seem more of a naïve luxury than a sustainable national defense strategy.[160] Casualties to American troops struck down in the caves of Afghanistan or

158. *See, e.g.*, Sheryl Gay Stolberg, *Senate Backs Ban on Photos of G.I. Coffins*, N.Y. TIMES, June 22, 2004, at A17 (noting the Senate's support of the Bush administration's ban on photographing the flag-covered coffins of service members killed overseas and quoting Senator McCain as opposing the ban and saying "I think we ought to know the casualties of war"); Alan Wirzbicki, *Show Room*, NEW REPUBLIC ONLINE, Apr. 29, 2004, *at* http://www.tnr.com/doc.mhtml?I=express&s=wirzbicki042904 (last visited Dec. 18, 2004) (citing accusations that President Bush is not releasing photographs of America's war casualties in an effort "to sanitize the human cost of war" and suggesting that "it's hard to avoid the suspicion that something other than concern for privacy drives [the] photoban"); *see also* Cooper, *supra* note 22.

159. DAVID CALLAHAN, UNWINNABLE WARS 187–88 (1997) ("Since the United States will rarely have vital interests at stake in an ethnic conflict, it will almost always be inclined to use military force on a limited scale, if at all . . . . It will seek to keep causalities low."); *see also* Jane E. Stromseth, *Collective Force and Constitutional Responsibility: War Powers in the Post-Cold War Era*, 50 U. MIAMI L. REV. 145, 164 (1995) (noting that when "operations do not implicate core U.S. security interests, the American public will have a very low tolerance for casualties"); Pape & Meyer, *supra* note 2, at 22 (suggesting that it might be tempting to American leaders to hire a private security force to oust Liberia's Charles Taylor without having the "risk of dead American . . . soldiers"); *The O'Reilly Factor* (Fox News television broadcast, Oct. 6, 2004) (suggesting that the United States should use contractors to do America's dirty work in order to let soldiers, reservists, and members of the National Guard go home and to spare them from "getting grinded up").

160. *See* Michael Hirsh, *America Adrift; Writing the History of the Post Cold Wars*, FOREIGN AFF., Nov./Dec. 2001, at 158 (noting how the Bush administration was forced after September 11 to abandon its isolationist campaign promises and engage in multilateralism in order to jump-start the War on Terror); *see also* PRIEST, *supra* note 47, at 38–40 (noting the new imperative to expand military operations). *But see* Jeffrey Bell, *Rumsfeld's Vietnam Syndrome*, WKLY. STANDARD, May 24, 2004, *available at* http://www.weeklystandard.com/content/public/articles/000/000/004/097jzsnm.asp (last visited Dec. 24, 2004) (noting the enduring vitality of the zero-casualty doctrine).

the streets of Iraq may be considered acceptable in ways they might not have been in Kosovo or Colombia. And, in Iraq, as contractors become more commonplace on the battlefield and more closely associated with the American commitment there, the symbolic differences between them and soldiers may lose some currency.[161] Accordingly, to the extent the differences lose meaning, however, so does the policymakers' perceived flexibility to employ privateers as less politically costly stand-ins (and hence contractors may become less useful).[162]

Nevertheless, the public's sense of the differences may endure—and may even become more acute in instances where national security interests *are not* implicated. In other words, the loss of military lives in a humanitarian intervention—conducted contemporaneously as "real" wars are being fought on the frontlines of American security interests—may become even less acceptable. But, as often is the case with trying to glean meaning from dynamic trends, this discussion is speculative, of course, and any statements proffered here would benefit from further empirical analysis and/or a longer period of time to gauge cultural changes brought about in the post-September 11 climate.

b. Lowering the American Profile Abroad

Moreover, at times U.S. expertise and strength may be warranted—and even solicited by foreign leaders—but the symbolism of inviting American troops may prove too problematic for the host country, and the decision to dispatch them may do more harm than good. One need only consider the level of hostility shown toward U.S. GIs in countries with complicated histories of an American military presence, such as Japan, Saudi Arabia, and the Philippines,[163] to appreciate that in some circumstances private

161. *See, e.g.*, Cha & Merle, *supra* note 109 (noting that the Pentagon awarded—though mistakenly—honors such as Purple Hearts and Silver Stars to contractors); Richard Lezin Jones, *A Family Tries To Remember a Son Killed in Iraq and His Style*, N.Y. TIMES, May 15, 2004, at A11 (reporting on the death of civilian—but non-military—contractor, Nicholas Berg); Jay Price, *The Bridge*, NEWS & OBSERVER (Raleigh), July 25, 2004, at A1 (describing the killing in Fallujah of four American contractors whose bodies were defiled and whose deaths were very widely reported in the United States); Edward Wong, *Islamist Website Reports Beheading of Second American*, N.Y. TIMES, Sept. 22, 2004, at A11 (reporting on the death of a captured American contractor).

162. *See infra* Part VI.

163. *See* Gwyn Kirk & Carolyn Bowen France, *Redefining Security: Women Challenge U.S. Military Policy and Practice in East Asia*, 15 BERKELEY WOMEN'S L.J. 229, 237–41 (2000) (describing local hostility toward American military presence in Japan and the Philippines); Rafael A. Porrata-Doria, Jr., *The Philippine Bases and Status of Forces Agreement: Lessons for the Future*, 137 MIL. L. REV. 67, 68, 85–91 (1992) (characterizing the resentment among Filipinos over the long-term presence of the U.S. military in the Philippines); Toni M. Bugni, Note, *The Continued Invasion:*

contractors not wearing uniforms and not waving American flags may be much more effective agents of foreign policy than would soldiers, whose presence often invites anti-American sentiments.[164]

Contractors, even if they are all Americans, may not exhibit any telltale signs of nationality. Hence, they may be especially valuable in places where the willingness of foreign leaders to help the United States fight the War on Terror exists but is offset by strong domestic opposition to U.S. forces on the ground. After all, one of Osama bin Laden's principal reasons for threatening Saudi Arabia remains the Kingdom's willingness to host American military bases in the "Holy Land."[165] And, on the flip side, the deaths of American contractors overseas (as opposed to U.S. soldiers) may be less likely to lead to a public outcry at home, which then might require the United States to respond with even greater force in defending its interests.

III. THREATENING THE NATIONAL SECURITY CONSTITUTION

While the immediate benefits of cost-savings, economic efficiency, and greater political maneuverability provide strong incentives for policymakers to consider employing private contractors, a full accounting of the concomitant harms is also in order. In the parts that follow, I focus on structural harms and catalogue the depth and breadth of the potential dangers brought about when core governmental responsibility over military engagement is delegated to privateers. Indeed, whether explicitly seeking to evade political and legal constraints—or even *inadvertently* doing so in the course of trying to save money—the enhanced discretion associated with military privatization may: (1) subvert the constitutional imperatives of limited and democratic government, (2) diminish the effectiveness of the U.S. Armed Forces, and (3) undermine the already weak diplomatic and moral standing of the United States abroad.

Assessing the United States Military Presence on Okinawa Through 1996, 21 SUFFOLK TRANSNAT'L L. REV. 85, 93–94 (1997) (indicating the tensions between the U.S. military and the Japanese government due to the high rate of criminal and violent behavior among American servicemen); Michael R. Gordon & Eric Schmitt, *U.S. Will Move Air Operations To Qatar Base*, N.Y. TIMES, Apr. 28, 2003, at A1 (alluding to the uncomfortable coexistence between American military personnel and Saudi citizens on Saudi soil).

164. *But see infra* note 405.

165. *See, e.g.*, PRIEST, *supra* note 47, at 84 ("The presence of Americans on Islamic holy land in Saudi Arabia was highly controversial among Islamic states (and one reason Osama Bin Laden called for a jihad against the Saudi monarchy and the United States).").

In this Part, I focus on how private contractors may enable the Executive to conduct military policy with relatively few constraints. To the extent that Congress's authority over warmaking is principally tied to its Article I powers over the U.S. Armed Forces, a president seeking more unilateral control might deploy private troops instead of U.S. soldiers. By bypassing congressional authority, the president violates the two chief constitutional imperatives: limited government—by circumventing Congress and limiting its ability to rein in the power of the president—and democratic government—by acting covertly without the national legislature's and, by extension, the People's consent. Problematically, even if the Executive had no such insidious aim—and was instead seeking primarily to maximize efficiency gains—simply and even inadvertently operating outside of the constitutional framework of shared military policymaking has the effect of limiting Congress's and, again, the People's formal and informal involvement in national security affairs, a limitation that, of course, is harmful to the proper functioning of government. For the most part, over time, Congress should be able to recover and reassert much of its authority by actively legislating to impede or, perhaps just counterbalance, the president's unilateral activity. Therefore, presidential discretion by way of outsourcing may not create an *insurmountable* constitutional crisis, but can, at the very least, create a critical imbalance that has yet to be satisfactorily anticipated.

And, in the subsequent two Parts, I discuss, first in Part IV, how military privatization damages the institutional integrity and effectiveness of the U.S. Armed Forces and, also, how it may threaten the normative standing of the American soldier as an embodiment of the patriot-citizen; and then in Part V, I characterize how military privatization, by undermining the legitimacy and vitality of collective security agreements, provides additional fodder for those already suspicious of American foreign policy.

Some of these harms identified in this Part as well as Parts IV and V, lend themselves to amelioration through more procedural transparency, through legislation mandating greater coordination with Congress, and through more candor with the American people. Other harms, however, are more intractable and, for constitutional and cultural reasons, not as easily remedied. A discussion of an agenda for reform—and the limitations of reform—will be reserved for this Article's conclusion.

A. Military Privatization's Threat to Limited and Democratic Governance

Although, we might think of the call to Philadelphia in the Summer of 1787 as a concerted effort to redistribute power away from the national legislature and toward a strong Executive,[166] the Founders nevertheless retained for Congress a sizable bulk of the Republic's warmaking powers.[167] Scholars have suggested that the motivation for the Convention lied principally in addressing the Articles of Confederation's defects in domestic governance (as well as in its misallocation of powers between the states and the Union), rather than any shortcomings in the nascent country's perceived abilities to take up arms in defense of its sovereignty.[168] Indeed, perhaps centuries of Old World tyranny and scores of bloody wars instigated by petulant European kings sensitized the Founders to the dangers of entrusting the sword *and the decision to wield that sword* in the same set of hands.[169]

Vesting warmaking decisions—to authorize war, fund war, and supply and regulate the personnel involved in war—in Congress advanced, as I have intimated above, the two chief aims of the American experiment in constitutional democracy. The United States would be a limited government: its Commander-in-Chief would be constrained by sets of laws, deliberative processes, and by other, equally ambitious leaders in

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166. *See, e.g.*, PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING 2–3 (4th ed. 2000); MAX FARRAND, THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES 3 (1913) (characterizing the non-existence of an executive capable of enforcing the laws of the new union as a key weakness inherent in the Articles of Confederation).

167. *See* 1 THE RECORDS OF THE FEDERAL CONVENTION of 1787, at 292 (Max Farrand ed., rev. ed. 1937) [hereinafter FEDERAL CONVENTION]; Lobel, *supra* note 80, at 1098–99; Charles A. Lofgren, *War-making Under the Constitution: The Original Understanding*, 81 YALE L.J. 672, 679–82 (1971) (describing the Constitution's vesting of key war powers in Congress).

168. *See, e.g.*, BREST ET AL., *supra* note 166, at 2 (cataloguing the deficiencies of government under the Articles and emphasizing the weakness of that national government in managing the economy, taxing, and printing money); Mark E. Brandon, *War and American Constitutional Order*, 56 VAND. L. REV. 1815, 1860 (2003) (characterizing the chief aims of the Constitutional Convention as directed at reallocating powers from the states to the federal government); Lofgren, *supra* note 167, at 675, 697 (noting that although criticism of the Articles of Confederation regime prompted the call for a strong executive, that criticism did not extend to concerns that the legislature was unable or ill-suited to commit the nation to war); *see also* 2 FEDERAL CONVENTION, *supra* note 167, at 318–19 (documenting the rather limited discussion at the Convention regarding the placement and reallocation of war powers); William Michael Treanor, *Fame, The Founding, and the Power To Declare War*, 82 CORNELL L. REV. 695, 698 (1997) (indicating that the entire debate on warmaking powers occupied only a "page of the published record").

169. LOUIS FISHER, PRESIDENTIAL WAR POWERS 1–6 (1995); Brandon, *supra* note 168, at 1845; Louis Fisher, *Unchecked Presidential Wars*, 148 U. PA. L. REV. 1637, 1637 (2000); Treanor, *supra* note 168, at 699–702; *see also* Henfield's Case, 11 F. Cas. 1099, 1109 (C.C.D. Pa. 1793) (No. 6,360) (holding that the Constitution allowed no citizen, not even the president, to lift up the sword of the United States without congressional authorization).

coordinate branches.[170] And the United States would also be a great democracy: its decisions would reflect the will of the citizenry.[171] Hence, Congress as the most direct representatives of the People, would necessarily be involved in military policy, simultaneously promoting the virtues of limited government by checking the perceived natural inclinations of the strong Executive[172] and upholding the ideals of democracy by remaining the true servants of the People. Moreover, decisions by the president to wage war could not be undertaken without first benefiting from the deliberative insights of a legislative assembly and

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170. *See* THE FEDERALIST NO. 51 (James Madison). The dominant theme of separation of powers served as one of the American republic's leitmotifs, even in the area of warmaking responsibilities. *See, e.g.*, HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION 83 (1990) (suggesting that the Framers intended the constitutional system of checks and balances to apply equally in the domain of foreign affairs); Gerhard Casper, *An Essay in Separation of Powers: Some Early Versions and Practices*, 30 WM. & MARY L. REV. 211, 212 (1988) (describing separation of powers as an "almost sacred article of faith in the deliberations of the constitutional assemblies of the United States"); Gerhard Casper, *Constitutional Constraints on the Conduct of Foreign and Defense Policy*, 43 U. CHI. L. REV. 463, 488–89 (1976) [hereinafter Casper, *Constitutional Constraints*] (emphasizing how separation of powers remained a central constitutional tenet for the Founders even in the allocation of war powers); Treanor, *supra* note 168, at 700 (describing the Founders' recognition that a strong executive would need to be kept in check by the Congress in matters of war powers); *see also* Myers v. United States, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting) (noting that the separation-of-powers doctrine's purpose was "not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy").

171. *See, e.g.*, GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787 (1969).

172. Madison confided in Jefferson: "The constitution supposes, what the History of all Governments demonstrates, that the Executive is the branch of power most interested in war, and most prone to it. It has accordingly with studied care, vested the question of war in the Legislature." *Letter from James Madison to Thomas Jefferson (Apr. 2, 1798)*, *in* 6 THE WRITINGS OF JAMES MADISON 311, 312 (Galliard Hunt ed., 1906); *see also* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 629–34 (1952) (Douglas, J., concurring) (emphasizing that the intent of a government organized around separation of powers is to deter arbitrary exercises of power); FISHER, *supra* note 169, at 1650 (noting that the cluster of war powers vested in Congress represented a marked break "with prevailing theories that placed war powers, foreign affairs, and judgments on the law of nations with the Executive"); FRANCIS D. WORMUTH & EDWIN B. FIRMAGE, TO CHAIN THE DOG OF WAR 179 (1989) ("The legislative branch was purposely given the war power as a check upon the impulsive use of military force by the executive.").

Hamilton, for his part, acknowledged the vast war-making power of the legislature, which alone could not only declare war, but could "actually transfer the nation from a state of peace to a state of hostility. . . . The Legislature alone can interrupt the [blessing of peace] by placing the nation in a state of war." *Letters of Pacificus No.1*, *in* 4 THE WORKS OF ALEXANDER HAMILTON 432, 443 (Henry Cabot Lodge ed., 1904). As Professor Ramsey notes, since Hamilton was such a "vigorous advocate for presidential powers in general . . . his concession that the war-initiation power lay with Congress must be counted as substantial." Michael D. Ramsey, *Textualism and War Powers*, 69 U. CHI. L. REV. 1543, 1607 (2002).

without concomitantly securing the tacit blessings and consent of the citizenry.[173]

Military privatization threatens this framework of coordinate decisionmaking. The potential to outsource combat roles necessarily carries with it opportunities for the Executive to wield powers unimaginable were it limited to the use of regular, U.S. troops. By shifting responsibilities away from America's armed forces and delegating them to private contractors, the president can circumvent constitutional obligations to share warmaking authority with Congress. Privatization, therefore, may destabilize the delicate balance of powersharing built into what Dean Harold Koh calls the National Security Constitution,[174] by weakening a critical check on presidential power—a failure of constitutional governance—and also by engendering a level of distrust and sense of disenfranchisement among the population writ large—a failure of

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173. Montesquieu, who is so intimately associated with the theory and architecture of separation of powers, was not unaware of the democratic reasons—and not just the limited-government reasons—why legislatures should be entrusted with considerable warmaking powers. He articulated the need for popular consent in such weighty policy decisions: "To prevent the executive power from being able to oppress, it is requisite that the armies with which it is intrusted should consist of the people, and have the same spirit as the people. . . . To obtain this end . . . if there be a standing army . . . the legislative power should have a right to disband them as soon as it pleased." C. MONTESQUIEU, THE SPIRIT OF THE LAWS (C.T. Nugent trans., 1949). Moreover, Blackstone noted that "[o]ne of the principal bulwarks of civil liberty . . . was the limitation of the king's prerogative by bounds so certain and notorious, that is impossible he should ever exceed them, without the consent of the people . . . or without . . . a violation of that original contract." 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, ch. 7 (1st ed. 1765); *see also* JOHN LOCKE, TWO TREATISES OF GOVERNMENT ch. 14, para. 160 (P. Laslett rev. ed., New American Library 1963) (3d ed. 1698) (characterizing the term "prerogative" as one including executive authority over military affairs). Madison took exception with the longstanding Lockean theory of executive prerogative in making martial decisions and recognized that "the power to declare war . . . is not an execution of laws. . . . It is, on the contrary, one of the most deliberative acts that can be performed." James Madison, *Letters of Helvidius, No. I, Aug–Sept 1793*, *reprinted in* 6 THE WRITINGS OF JAMES MADISON, *supra* note 172, at 138.

174. KOH, *supra* note 170. Dean Koh has asserted:

> The National Security Constitution grows out of the . . . principle that the system of checks and balances is not suspended simply because foreign affairs are at issue. . . . [T]he Constitution requires that we be governed by separate institutions *sharing* foreign policy powers. . . . As it has evolved, the National Security Constitution assigns to the president the predominant role in the process, but affords him only a limited realm of exclusive powers, with regard to diplomatic relations and negotiations and to the recognition of nations and governments. *Outside of that realm, government decisions regarding foreign affairs must transpire within a sphere of concurrent authority, under presidential management, but bounded by the checks provided by congressional consultation*. . . .

Id. at 69 (emphasis added); *see also* Dellums v. Bush, 752 F. Supp. 1141, 1148 (D.D.C. 1990) (noting that the deployed forces were construed to be of such a magnitude and significance as to present no serious claim that a war would not ensue if they became engaged in combat.); Harold Hongju Koh, *The Coase Theorem and the War Power: A Response*, 41 DUKE L.J. 122, 123 (1991) ("[T]he Constitution d[oes] not permit the President to order U.S. armed forces to make war without meaningful consultation with Congress and receiving its affirmative authorization . . . .").

democratic legitimacy. In the process, the People lose effective control over the helm of national security policy; and, institutionally speaking, once lost, such control will take time and considerable effort for Congress to regain.

B. The Fallacy of Imperial Warmaking and the Reality of Coordinate Powersharing

Were Congress unquestionably subordinated by an Executive authorized to assert exclusive powers to engage troops in combat unilaterally, then any separation-of-powers concern stemming from military privatization would fall to the wayside: Regarding the deployment of U.S. soldiers in zones of hostility, without any obligation to consult with Congress, let alone seek its approval, it would make no difference at least from this perspective if the Executive outsourced military responsibilities to private contractors. Although other constitutional and prudential harms would still ensue, the structure of powersharing between the elected branches would not be destabilized as a result of privatization. But despite actions and rhetoric suggesting that the Executive possesses unrivaled warmaking authority, the Constitution does not grant the president those exclusive powers,[175] and hence in order to grasp the very real threat privatization poses to the equitable and prudent allocation of war powers, we must appreciate Congress's important role in military affairs.

The exact contours of congressional-presidential powersharing need not be explored here; nor need we debate which branch, if either, has a preponderant say in decisions to commit troops. Those critically important questions are beyond this inquiry's ken. The more modest aim is simply to establish the existence and persistence of a strong congressional role in military affairs both as a vital check on the Executive and as a necessary conduit to ensure the continued informed consent of the American people. In what follows directly below, I describe the principal ways in which Congress typically plays a prominent role in shaping military policy and, concomitantly, in constraining presidential unilateralism. Then, in Section C, I will discuss how privatization allows the Executive greater leave to

175. *See, e.g.*, Brandon, *supra* note 168, at 1843 (recognizing the shared authority over military affairs that the Constitution vests in its two elected branches); H. Jefferson Powell, *The President's Authority over Foreign Affairs: An Executive Branch Perspective*, 67 GEO. WASH. L. REV. 527, 550 (1999) (recognizing the important role Congress plays in warmaking decisions even while the author advocates expansive presidential authority).

bypass congressional oversight and authorization in those key domains. I do note at the outset, however, that congressional authority over the affairs of the U.S. Armed Forces is not perfect; nor is Congress entirely unable to oversee the activities of military contractors. Accordingly, though I do want to highlight the important differences between Congress's influence over the Armed Forces and its influence over military contractors (both in theory and in practice), I recognize that at times these differences are ones of degree, rather than of kind.

Congress tends to exercise its authority over military policy along three key axes: its power to regulate military personnel, to appropriate funds to the military, and to authorize the deployment of U.S. combat troops in conflict zones. First, through its authority to *regulate military personnel*, Congress can constrain presidential warmaking by limiting the size of the U.S. military,[176] by imposing restrictions and regulations on how and where soldiers can be deployed,[177] and by structuring the chains of command to limit an Executive's ability to politicize the military leadership.[178]

Indeed, by possessing power over the conscription of American civilians[179] and by regulating the standards of reserve activations,[180] Congress can potentially limit the size of a conflict and its relative

176. *See* Swaim v. United States, 28 Ct. Cl. 173, 221 (1893) ("Congress may increase the Army, or reduce the Army, or abolish it altogether . . . . "); Powell, *supra* note 175, at 569 (noting that Congress can limit the exercise of the president's deployment power by refusing to provide the Executive with the force necessary to conduct military affairs). For a recent example involving congressional deliberation as to the size of the American military, see Thom Shanker, *Officials Debate Whether To Seek a Bigger Military*, N.Y. TIMES, July 21, 2003, at A6.

177. *See* Powell, *supra* note 175, at 569.

178. *See infra* note 184 and accompanying text.

179. *See, e.g.*, United States v. O'Brien, 391 U.S. 367 (1968); Selective Draft Law Cases, 245 U.S. 366 (1918); Harrup A. Freeman, *The Constitutionality of Peacetime Conscription*, 31 VA. L. REV. 40, 56–59 (1944); Leon Friedman, *Conscription and the Constitution: The Original Understanding*, 67 MICH. L. REV. 1493, 1494–1500 (1969); David I. Lewittes, *Constitutional Separation of War Powers: Protecting Public and Private Liberty*, 57 BROOK. L. REV. 1083, 1138–47 (1992) (describing Congress's exclusive powers over drafting and maintaining an army); *see also* U.S. CONST. art. I, § 8, cl. 12 (raise and support clause); *id*. at art. I, § 8, cl. 15–16 (providing for Congress's exclusive authority to call forth the states' militias). Congress also can terminate, or refuse to call for a draft. *See, e.g.*, Selective Service Act of 1948, Pub. L. No 80-759, 62 Stat. 604 (1948).

180. U.S. CONST. art. I, § 8, cl. 12 (raise and support clause); *see* Perpich v. Department of Defense, 496 U.S. 334 (1990) (upholding Congress's power to activate reservists); *Selective Draft Law Cases*, 245 U.S. at 369 (affirming that Congress could call up state militia personnel to fight foreign enemies); Johnson v. Powell, 414 F.2d 1060 (5th Cir. 1969) (acknowledging Congress's power to activate national guard units for combat duty); Dukakis v. Department of Defense, 686 F. Supp. 30 (D. Mass. 1988) (same); *see also* Presidential Reserve Call-Up Act, 10 U.S.C. § 12304 (2000) (prescribing the scope and procedures for the president to call up reservists); Capt. Kenneth M. Theurer, *Low-Level Conflicts and the Reserves: Presidential Authority Under 10 U.S.C. 673(b)*, 62 U. CIN. L. REV. 1135, 1141–43 (1994) (describing the process by which reservists are activated).

duration. Without the prospects of an unlimited, fresh supply of troops as replacements and reinforcements, the president may feel constrained in initiating and continuing unilateral engagements.[181] Also, Congress can impose rules regarding the internal governance of the military, set terms for the conduct of war, and establish restrictive guidelines for engagement.[182] In the absence of this set of Article I powers, the president—as Commander-in-Chief—presumably would possess the exclusive authority to determine the acceptable contours of soldierly conduct.[183] And finally, still within this first set of powers, Congress can limit the politicization of the military by legislating hierarchical promotional guidelines[184] and by organizing units around civilian and

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181. Though, of late, Congress has at times preferred a larger military than the president, this disagreement is one often shaped by local politics and an unwillingness among members of Congress to allow base closings in their respective districts. *See, e.g.*, Elizabeth Becker, *Senate Rejects Pentagon's Request to Close More Bases*, N.Y. TIMES, Aug. 27, 1999, at A22; Andrew Rosenthal, *Lawmakers Scurrying To Protect Home Bases*, N.Y. TIMES, Jan. 27, 1990, at A13. Such considerations reveal how any one congressional power may not be a sufficient or effective check on the president since external considerations (such as preserving local jobs and securing re-election) may be prioritized by the People's representatives.

182. *See* Loving v. United States, 517 U.S. 748, 768 (1996) ("[W]e give Congress the highest deference in ordering military affairs."); Gilligan v. Morgan, 413 U.S. 1, 10 (1973) ("The . . . decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject *always* to civilian control of the Legislative and Executive Branches."); *see also* U.S. CONST. art. I, § 8, cl. 14; Uniform Code of Military Justice, 10 U.S.C. §§ 801–946 (2000).

183. As Commander-in-Chief, the president's powers are undisputed. *See, e.g.*, THE FEDERALIST NO. 74, at 447 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("[T]he direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand."); WILLIAM HOWARD TAFT, OUR CHIEF MAGISTRATE AND HIS POWERS 128–29 (1916) ("In carrying on the war as Commander-in-Chief, it is he who is to determine the movements of the army and navy. Congress could not . . . themselves . . . carry on campaigns."); William Howard Taft, *The Boundaries Between the Executive, the Legislative, and the Judicial Branches of the Government*, 25 YALE L.J. 599, 610–12 (1916).

However, while Congress cannot deprive the president of the command of the Army and Navy, it alone can provide him with an army or navy to command. And, since Congress is empowered to make rules for the "Government and Regulation of land and naval Forces," U.S. CONST. art. I, § 8, cl. 14, it may, to some extent, also impinge on command functions. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 644 (1952); *see also id.* at 646 (Jackson, J., concurring) ("No penance would ever expiate the sin against free government of holding that a President can escape control of executive powers by law through assuming his military role."); *Ex parte* Quirin, 317 U.S. 1, 26 (1942) (noting that the president has the power to "carry into effect all laws passed by Congress for the conduct of war and for the government and regulation of the Armed Forces. . . ."); LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 337 n.11 (2d ed. 1996); ABRAHAM SOFAER, WAR, FOREIGN AFFAIRS AND CONSTITUTIONAL POWER 3 (1976) (asserting that it is most accurate to understand the president as Commander-in-Chief as an "agent of the legislature").

184. Congress has control of the administration and structuring of the military, which can be exercised in ways to thwart presidential aims. *See, e.g.*, WORMUTH & FIRMAGE, *supra* note 172, at 91 (noting how Congress's seniority rules as applied to the promotion of military officers limited Lincoln's flexibility in appointing certain generals); Richard Hartzman, *Congressional Control of the Military in a Multilateral Context*, 162 MIL. L. REV. 50, 99–100 (1999) (describing Congress's efforts

military leaders whose positions require Senate confirmation pursuant to the Appointments Clause.[185] In all, this first category of checks constrains the exercise of unbridled presidential warmaking and adds layers of transparency vis-à-vis fixed rules of military conduct and decisionmaking that ensure greater public awareness of military policymaking.

Second, another critically effective axis-of-constraints check on executive-driven military policy is Congress's *power of the purse*, perhaps its ultimate trump card.[186] Appropriations decisions, which belong to Congress and within the context of U.S. military spending *must* be constitutionally revisited at least every two years,[187] are often "conceived of as lump-sum grants with 'strings' attached . . . binding the operating arm of government."[188] This power was notably employed in the Vietnam era, when Congress cut off all funds for use in operations in Cambodia;[189] then, a decade later, Congress again tightened the purse strings to limit the

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to reform military command structures both within the armed forces and vis-à-vis civilian department heads); *see also* 1986 Goldwater-Nichols Department of Defense Reorganization Act of 1986, Pub. L. No. 99-433, 100 Stat. 992 (1986); Act of Feb. 14, 1903, ch. 553, 32 Stat. 830 (1903); *Youngstown*, 343 U.S. at 644; PRIEST, *supra* note 47, at 95–96 (characterizing the 1986 reorganization by Congress as altering the chain of command at the higher levels of military and civilian leadership within the Department of Defense); Col. Charles J. Dunlap, Jr., *Welcome to the Junta: The Erosion of Civilian Control of the U.S. Military*, 29 WAKE FOREST L. REV. 341, 375–76 (same).

185. *See* U.S. CONST. art. II, § 2; *infra* notes 231–46 and accompanying text; *see also* Yeoman, *supra* note 4.

186. *See* U.S. CONST. art. I, § 9, cl. 7. Appropriations power can effectively limit a president's ability to command troops and sustain efforts abroad. *See, e.g.*, WILLIAM C. BANKS & PETER RAVEN-HANSEN, NATIONAL SECURITY LAW AND THE POWER OF THE PURSE, 119, 137–57 (1994); Michael J. Glennon, *Strengthening the War Powers Resolution: The Case for Purse-Strings Restrictions*, 60 MINN. L. REV. 1 (1975); Harold Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 YALE L.J. 1255, 1267 (1988) (describing that between 1973 and 1974 alone, "Congress enacted seven separate provisions declaring that no funds authorized or appropriated . . . could be expended to support United States military . . . forces in Vietnam, Cambodia, or Laos"); Peter Raven-Hansen & William C. Banks, *Pulling the Purse Strings of the Commander in Chief*, 80 VA. L. REV. 833 (1994); Kate Stith, *Congress' Power of the Purse*, 97 YALE L.J. 1343, 1353 (1988); *see also* FISHER *supra* note 169, at 199–206 (advocating the importance of congressional power over appropriations to serve as an effective check against an overzealous executive branch); John Hart Ely, *The American War in Indochina, Part II: The Unconstitutionality of the War They Didn't Tell Us About*, 42 STAN. L. REV. 1093, 1105 (1990) ("Even the staunchest supporters of presidential power in this area grant—indeed adopt as a critical premise of their argument—that if Congress does not like the way a war is being conducted it can pull the financial plug on it . . . .").

187. U.S. CONST. art. I, § 8, cl. 12 ("[B]ut no Appropriation of Money to that [military] Use shall be for a longer Term than two Years").

188. Stith, *supra* note 186, at 1353.

189. *Id*. at 1361. In a 1973 appropriations bill, Congress told the President to stop bombing Cambodia by August 15, and he did. *See* Charles L. Black, Jr., *The Working Balance of the American Political Departments*, 1 HASTINGS CONST. L.Q. 13, 15–16 (1974). Professor Black added that "[i]f the will had existed, [Congress] could have done much the same thing four, or six or eight tragic years ago—at any time they really had wanted." *Id.*; *see also* Koh, *supra* note 186, at 1267.

president's efforts in Nicaragua;[190] and, in the present, post-Cold War era, Congress has used its appropriations power with some regularity to limit presidential power and narrow the scope of military engagements in Haiti, Somalia, the Balkans, and Rwanda.[191] As will be discussed below, for a number of reasons it is much more administratively difficult to regulate the funding that ultimately flows to privateers, because contractors are often paid through more discreet, even convoluted bureaucratic channels (if they are even paid through the U.S. Treasury at all). Of course, it could be the case that Congress, in making its appropriations, begins with the foundational assumption that executive agencies—even ones not directly involved in national security[192]—employ military contractors. But while this may very well become a commonplace assumption among future congresses, it is doubtful that previous and even the contemporary congresses, which appropriated war spending in Afghanistan and Iraq, contemplated the scope (and complexities) of private military funding.

Third, there is Congress's most direct (but also most contested) power: to *authorize military deployments* even short of a formal declaration of war.[193] Today, pursuant to the War Powers Resolution,[194] a statutory

190. Koh, *supra* note 186, at 1265 n.41 (describing the Boland Amendment that prohibited "the expenditure of funds . . . to any entity of the United States . . . for assistance to the Nicaraguan democratic resistance to support . . . operations in Nicaragua"); *see also* Andrew W. Hayes, *The Boland Amendments and Foreign Affairs Deference*, 88 COLUM. L. REV. 1534, 1565–69 (1988) (describing the congressional appropriations bill that cut off the Executive's ability to fund the Contras in 1984); Frank G. Colella, Note, *Beyond Institutional Competence: Congressional Efforts To Legislate United States Foreign Policy Toward Nicaragua—The Boland Amendments*, 54 BROOK. L. REV. 131 (1988).

191. For examples of Congress restricting funds to curtail—or register disapproval of—military engagements, see Act of Nov. 11, 1993, Pub. L. No. 103-139, § 8151(b), 107 Stat. 1418 (1993) (restricting funds to the efforts in Somalia); Act of Sept. 30, 1994, Pub. L. No. 103-335, § 8135, 108 Stat. 2599 (1994) (same); and, Act of Sept. 30, 1994, Pub. L. No. 103-335, tit. IX, 108 Stat. 2599 (1994) (restricting funds to finance any military efforts in Rwanda). Moreover, in September 1995, the House passed an appropriations limitation that prohibited funds for new operations in Bosnia, and the Senate passed 94–2 an amendment against funds for new combat deployments in Bosnia. *See* Charles Tiefer, *War Decisions in the Late 1990s by Partial Congressional Declaration*, 36 SAN DIEGO L. REV. 1, 11–12 (1999). Professor Jane Stromseth notes that with respect to Bosnia, in September 1995, the Senate "passed an amendment to the State, Commerce, and Justice Appropriations Bill for Fiscal Year 1996, which expressed the sense of the Senate that funds provided by the bill should not be used to deploy U.S. combat troops to Bosnia unless Congress first approved the deployment in advance." Jane E. Stromseth, *Understanding Constitutional War Powers Today: Why Methodology Matters*, 106 YALE L.J. 845, 903 n.304 (1996). *But see* LOUIS HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 109 (1st ed. 1972) ("In fact, Congress has rarely refused to adopt the laws or appropriate the funds required to implement an international undertaking, though Congress might differ with the president as to how much money or what laws were required.").

192. *See infra* notes 223–27.

193. *See* U.S. CONST. art. 1, § 8. Definitionally, at the time of the Founding, there was little legal difference between formal and undeclared, or limited wars—and it was thought that both types of wars would require congressional authorization. *See, e.g.*, EMMERICH DE VATTEL, THE LAW OF NATIONS

399 (J. Chitty ed. 1863) (1758); Ely, *supra* note 186, at 1104 ("[T]he framers and ratifiers of the Constitution provided that all acts of war performed on behalf of the United States—even when they fell short of full-fledged war and *even when undertaken by private parties* . . . had to be authorized by Congress.") (emphasis added); Ramsey, *supra* note 172, at 1546 (noting that because war can be declared by simply commencing hostilities—as well as by formal announcement—it is clear that Congress was given power over both sorts of declarations); *id*. at 1545 (indicating that "declaring war meant initiating a state of war by public act, and it was understood [at the time of the Founding] that this could be done either by formal declaration *or* by commencing armed hostilities"); *see also* JOHN HART ELY, WAR AND RESPONSIBILITY 3 (1993) (describing how all wars, large or minor, declared officially or not, had to be legislatively authorized).

As Judge Sofaer has pointed out, none of the first five presidents ever claimed inherent constitutional powers that would permit him to deploy troops in combat zones, even in instances well short of formal declarations of war, without congressional approval. *See* Abraham D. Sofaer, *The Presidency, War and Foreign Affairs: Practice Under the Framers*, 40 L. & CONTEMP. PROBS. 12, 36–37 (1976); *see also* KOH, *supra* note 170, at 80. Specifically, in the early years of the Republic, the president sought congressional authorization for a series of what would have to be construed as limited wars. These conflicts included the Neutrality crisis of 1793, the 1798 Naval War with France, the Nootka Sound incident, as well as skirmishes with Native American tribes and Algierian pirates. *See* SOFAER, *supra* note 183, at 100–27; Ramsey, *supra* note 172, at 1551, 1608. For instance, in a conflict against some Native American tribes, President Washington confined his troops to defensive postures until he received congressional authorization. *See* SOFAER, *supra* note 183, at 116–27 (describing this restraint in the context of Native American incursions against America's western border); Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231, 346–50 (2001) (describing similar restraint under later presidents with respect to the Barbary pirates).

This practical deference by the Executive to Congress had judicial support in the early 1800s. When John Adams initiated an *undeclared war* with France, the Supreme Court, in *Bas v. Tingy*, 4 U.S. (4 Dall.) 37, 43–46 (1800), upheld this exercise *not because the president had plenary power in military affairs*, but because it believed that Congress had authorized limited hostilities by means other than a formal war declaration. *See id*. at 43; *see also* ALEXANDER DECONDE, THE QUASI WAR: THE POLITICS AND DIPLOMACY OF THE UNDECLARED WAR WITH FRANCE, 1797–1801, at 89–98 (1966). Accordingly, though none of the Justices explicitly stated that only Congress might authorize even a limited, or "imperfect" war, that conclusion was clearly conveyed by the fact that even this modest engagement with the French required some form of congressional authorization. *See, e.g.*, Lofgren, *supra* note 167, at 701. And, in *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1 (1801), the Court again located the authority for a naval capture of a neutral ship as stemming from Congress. Chief Justice Marshall held that "[t]he whole powers of war being, by the constitution of the United States, vested in congress, the acts of that body can alone be resorted to as our guides in this enquiry." *Id*. at 28. The Chief Justice further noted that the authorization for even limited wars was squarely within the purview of Congress. *Id*. at 32; *see also* Mark T. Uyeda, Note, *Presidential Prerogative Under the Constitution to Deploy U.S. Military Forces in Low-Intensity Conflict*, 44 DUKE L.J. 777, 794–95 (1995) (suggesting that the consensus surrounding the fact that, in the early years of the Republic, even limited wars required congressional approval served to lay the "primary legal foundation for the assertion of congressional supremacy in the context of [low-intensity conflicts]").

194. 50 U.S.C. §§ 1541–1548 (2000). The War Powers Resolution has three highly pertinent sections. Section 3 of the Resolution requires:

> The President in every possible instance shall consult with Congress before introducing United States Armed Forces into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and after every such introduction shall consult regularly with the Congress until United States Armed Forces are no longer engaged in hostilities or have been removed from such situations.

50 U.S.C. § 1542 (2000).

Section 4 of the Resolution requires the President to send a report within forty-eight hours when, absent a declaration of war, he introduces American forces:

rule[195] ensuring that the collective judgment of both elected branches will apply to military intervention in a manner consistent with "the intent of the framers,"[196] the president must consult with Congress and ultimately seek its approval to deploy and retain U.S. military forces in zones of combat.[197] Despite opposition to this statutory framework and a refusal to concede that Congress has any role to play in military engagements short of formal war,[198] recent administrations have nevertheless consulted with

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> (1) into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances;
>
> (2) into the territory, airspace or waters of a foreign nation, while equipped for combat, except for deployments which relate solely to supply, replacement, repair, or training of such forces; or
>
> (3) in numbers which substantially enlarge United States Armed Forces equipped for combat already located in a foreign nation.

50 U.S.C § 1543 (2000).

Finally, § 5(b) of the Resolution states that the president may not commit troops to combat for longer than sixty days. If the president wants to commit American forces for a longer period, he may seek the joint resolution provided for in the War Powers Resolution, or he may request separate enabling legislation. 50 U.S.C. § 1544 (2000).

195. Gerhard Casper has called the Resolution a "framework statute." Framework statutes describe major legislative achievements that do not merely "formulate specific policies for the resolution of specific problems, but rather . . . implement constitutional policies." Casper, *Constitutional Constraints*, *supra* note 170, at 482; *see also* KOH, *supra* note 170, at 69–70 (describing framework statutes as specifying the "legal authorities and constraints for particular institutional acts," providing "procedures to evaluate and control particular exercises of delegated powers," and fostering "institutional expectation as to how those powers will be exercised in the future"); Gerhard Casper, *The Constitutional Organization of the Government*, 26 WM. & MARY L. REV. 177, 187 (1985) (listing other framework statutes).

196. *See* 50 U.S.C. § 1541(a) (2000); *see also* Treanor, *supra* note 168, at 705.

197. *See* Sen. Joseph R. Biden, Jr. & John B. Ritch III, *The War Power at a Constitutional Impasse: A "Joint Decision" Solution*, 77 GEO. L.J. 367, 385–90 (1988); Michael Stokes Paulsen, *Youngstown Goes To War*, 19 CONST. COMMENT. 215, 222 (2002). As Professor Lori Damrosch argues:

> The War Powers Resolution . . . reclaimed Congress's powers both with respect to "war" and with respect to lesser degrees of "hostilities." . . . Congress has surely not abandoned—and indeed has expressed its insistence on asserting—its constitutional prerogatives with respect to *introduction of U.S. Forces into hostilities*, whether or not those hostilities are denominated "war."

Lori Fisler Damrosch, *The Constitutional Responsibility of Congress for Military Engagements*, 89 AM. J. INT'L L. 58, 66–67 (1995).

198. *See* EDWARD S. CORWIN, THE PRESIDENT: OFFICE AND POWERS, 1787–1957, at 198–201 (1957); ELY, *supra* note 193, at 10–11 (highlighting Truman's strong executive assumption of powers in initiating the Korean War); WALTER F. MURPHY ET AL., AMERICAN CONSTITUTIONAL INTERPRETATION 460 (2d ed. 1995) (noting how infrequently presidents have sought to comply with the War Powers Resolution); QUINCY WRIGHT, THE CONTROL OF AMERICAN FOREIGN RELATIONS 306–10 (1922); Philip Bobbitt, *War Powers: An Essay on John Hart Ely's War and Responsibility: Constitutional Lessons of Vietnam and its Aftermath*, 92 MICH. L. REV. 1364, 1370–88 (1994); Casper, *Constitutional Constraints*, *supra* note 170, at 463 ("The manner in which recent Presidents have conducted United States foreign and defense policy suggests the absence in practice of constitutional constraints and the presence of surprisingly few political constraints."); Robert J.

Congress—and sought formal authorization—*before* deploying troops for combat duty abroad. For example, both President George H.W. Bush in the Gulf War and President Clinton in the Balkans and Iraq aligned

> themselves with, rather than against, the powerful argument that Congress should take responsibility [in war decisions]. Each President submitted his defining military action to Congress along with a request for congressional approval in advance. Thus . . . highly publicized congressional debates characterize the present arena for resolving questions about putting the military in harm's way.[199]

Delahunty & John C. Yoo, *The President's Constitutional Authority To Conduct Military Operations Against Terrorist Organizations and the Nations that Harbor or Support Them*, 25 HARV. J.L. & PUB. POL'Y 487, 503–04, 509 (2002) (noting that 125 deployments abroad came about by unilateral action by the President without prior express authorization by Congress); Michael D. Ramsey, *Presidential Declarations of War*, 37 U.C. DAVIS L. REV. 321 (2003); Eugene V. Rostow, *Great Cases Make Bad Law: The War Powers Act*, 50 TEX. L. REV. 833, 864–66 (1972); Eugene V. Rostow, *"Once More unto the Breach:" The War Powers Resolution Revisited*, 21 VAL. U. L. REV. 1, 6 (1986); Glen E. Thurow, *Presidential Discretion in Foreign Affairs*, 7 VAND. J. TRANSNAT'L L. 71, 86 (1973) ("[T]he thrust of the *Federalist Papers*. . . . is that the great discretion required in foreign affairs can be made compatible with republican government not by dispersing the power to the greatest extent possible, but by concentrating it in the hands of the President."); John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Power*, 84 CAL. L. REV. 167 (1996); *see also* Deployment of United States Armed Forces into Haiti, 18 Op. Off. Legal Counsel 173, 175–76 (1994) (recommending to the President that Congress had given him considerable discretion as Commander-in-Chief in deciding how to deploy troops); Authority To Use U.S. Military Forces in Somalia, 16 Op. Off. Legal Counsel 6 (1992) (authorizing the President to "commit troops overseas [to Somalia] without specific prior Congressional approval 'on missions of good will or rescue, or for the purpose of protecting American lives or property or American interests.'"); Presidential Power to Use the Armed Forces Abroad Without Statutory Authorization, 4A Op. Off. Legal Counsel 185, 185–86 (1980) (advising the President that he had independent constitutional authority to order a unilateral deployment abroad at some risk of engagement, to rescue hostages and retaliate against Iran, and to repel any assault against American interests in the Persian Gulf); Training of British Flying Students in the U.S., 40 Op. Att'y Gen. 58, 61–62 (1941) (authorizing the President to "dispose of troops and equipment in such manner and on such duties as best to promote the safety of the country"); Address to the Nation on Military Action Against Terrorist Sites in Afghanistan and Sudan, 2 PUB. PAPERS 1460 (Aug. 20, 1998) (noting President Clinton's unilateral order for American forces to strike at terrorist facilities in Sudan and Afghanistan because of the threat they posed to national security); Leonard Meeker, *The Legality of United States Participation in the Defense of Viet-Nam*, 54 DEP'T ST. BULL. 474 (1966), *reprinted in* PETER M. SHANE & HAROLD H. BRUFF, SEPARATION OF POWERS LAW 771 (1996).

199. *See* Tiefer, *supra* note 191, at 4; *see also* Damrosch, *supra* note 197, at 68 (describing George H.W. Bush's "military strategy [as] deriv[ing] much-needed legitimacy from the fact that he was able to persuade Congress to support him; that congressional articulation of national interest has provided authority and credibility . . . for the 1991 war."). As Peter Spiro has stated:

> With the end of the Cold War, Congress has become increasingly assertive on the foreign policy stage. The legislative branch may never have reflexively done the President's bidding on national security matters, but today the White House can no longer even indisputably claim to set the general course of the nation's foreign dealings. On defense and security

And notwithstanding otherwise embracing the pretensions of vast executive prerogative,[200] President George W. Bush has followed his predecessors' deferential lead by seeking congressional votes of support and authorization before taking up arms in both Afghanistan and Iraq.[201]

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policy, Congress may now call the shots.

Peter J. Spiro, *Old Wars/New Wars*, 37 WM. & MARY L. REV. 723, 723–24 (1996). Consistent with the dictates of the War Powers Resolution, President Clinton also duly reported the bombing of Serb forces in Kosovo. *See* Campbell v. Clinton, 52 F. Supp. 2d 34, 37–38 (D.D.C. 1999); Note, *D.C. Circuit Holds that Members of Congress May Not Challenge the President's Use of Troops in Kosovo*, 113 HARV. L. REV. 2134 (2000).

200. *See, e.g.*, T.J. Halstead, *The Law:* Walker v. Cheney*: Legal Insulation of the Vice President from GAO Investigations*, 33 PRESIDENTIAL STUD. Q. 635 (2003); Jules Lobel, *The War on Terrorism and Civil Liberties*, 63 U. PITT. L. REV. 767 (2002); Mark J. Rozell, *Executive Privilege Revived? Secrecy and Conflict During the Bush Presidency*, 52 DUKE L.J. 403 (2002); James Carey, *7 Clues To Understanding Dick Cheney*, TIME, Dec. 30, 2002, at 98; Harold Hongju Koh, *Rights to Remember*, ECONOMIST, Nov. 1, 2003, at 24; John Podesta, *Taking Liberty*, AM. PROSPECT, Sept. 2003, at 44; Benjamin Wittes, *Enemy Americans*, ATL. MONTHLY, July 1, 2004, at 127; *see also* Rumsfeld v. Padilla, 124 S. Ct. 2711 (2004); Rasul v. Bush, 124 S. Ct. 2686 (2004); Hamdi v. Rumsfeld, 124 S. Ct. 2633 (2004); *In re* Cheney, 334 F.3d 1096 (D.C. Cir. 2003).

201. *See* Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, 116 Stat. 1498 (2002); Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001); Alison Mitchell & Carl Hulse, *Congress Authorizes Bush To Use Force Against Iraq, Creating a Broad Mandate*, N.Y. TIMES, Oct. 11, 2002, at A1. And, as Professor Michael Paulsen reminds us, just because Congress's Authorization for Use of Military Force on September 18, 2001, gave the President nearly plenary power to conduct the war on terrorism, without apparent limitation as to duration, scope, and tactics, it does not mean that congressional authorization was not an important prerequisite to military action. Paulsen, *supra* note 197, at 251–52; *see also Hamdi*, 124 S. Ct. at 2635, 2640–42 (plurality opinion) (characterizing Congress's 2001 authorization of military force to fight terrorism as quite broad).

Indeed, none of these authorizations should be viewed merely as a rubber stamping. *See, e.g.*, Joseph R. Biden, Jr., *Fires Next Time*, NEW REPUBLIC, June 28, 2004, at 14 (describing congressional efforts to narrow the scope of the president's "mandate" in Iraq); Donna Cassata & Pat Towell, *Doubts About Clinton's Strategy Stall Iraq Resolution*, 56 CONG. Q. WKLY. REP. 397 (1998) (describing Congress as refusing either to approve *or disapprove* of military action in 1997–98 in Iraq); Damrosch, *supra* note 197, at 68 (noting that Somalia lacked the popular support that might have been obtainable had George H.W. Bush first sought to involve Congress in a meaningful way); Tiefer, *supra* note 191, at 8–9 (noting that the House had drafted funding cutoffs and was prepared to vote on them if the President had expanded U.S. military involvement in Bosnia); *id.* at 13–14 (describing Senator Dole's proposal that would guarantee congressional decision making over what type of military work U.S. soldiers would handle); Tracy Wilkinson, *U.S. To Provide Bosnia 116 Heavy Cannons*, WASH. POST, May 10, 1997, at A22 (noting that pure military work, not nation building, was what Congress specified under Dole's plan); *see also* Hartzman, *supra* note 184, at 95 (describing congressional efforts in the 1990s to limit the number of U.S. troops dispatched for U.N. peacekeeping to 1000 at any one time and to limit their *function* to guarding, observing, and other *non-combatant* roles); *id.* at 95–96 (characterizing other bills limiting the president's ability to dispatch military officials to foreign countries or to have them participate in joint military actions); Tiefer, *supra* note 191, at 25 n.109 (describing Congress's refusal to support Eisenhower's request for combat involvement in Vietnam in 1954). *But see* Treanor, *supra* note 168, at 702–05 (suggesting modern presidents have not deferred to congressional authority in matters of engaging troops in hostile environs).

C. Bypassing Congress Through Privatization: An Attack on Constitutional, Limited Government

Privatization, accordingly, creates unprecedented opportunities for the Executive to circumvent Congress and act unilaterally in military affairs. By opting to employ private contractors—rather than members of the U.S. Armed Forces—the president can avoid triggering many of Congress's commonly exercised war powers, which are by-and-large specifically linked to constitutional authority over America's military branches.[202] Hence, the utilization of private agents has led scholars such as Professor Jules Lobel to suggest engagement without U.S. troops could be a shortcut around "democratic decisionmaking that distorts the democratic process and is fundamentally incompatible with the demands of our constitutional system."[203] Whether bypassing Congress is an intentional aim of privatization or an inadvertent byproduct (perhaps, the Executive sought to reap cost-efficiencies), this damage to the tenets of separation of powers, even if temporary—until Congress can revise its background assumptions and seek to establish formal authority over privateers—could compromise the strategic and physical security of the nation, the well-being of individuals inappropriately endangered, and the confidence of the People in the democratic practices and institutions of this nation. Below, I describe how privatization enables the Executive to bypass many of the avenues through which Congress typically exercises its constitutional authority over military affairs.

1. Denial of Congress's Regulatory Role

a. Size of Military

As mentioned above, Congress can preemptively constrain the excesses of a hawkish president by limiting the number of available troops.[204] With a finite-sized public military, the president must deploy troops judiciously, or otherwise be forced to ask Congress to authorize a draft, liberalize

202. *See supra* note 194 and accompanying text.

203. Lobel, *supra* note 80, at 1079; Juan O. Tamayo, *Private Firms Take on Jobs, Risks for U.S. Military in Andes Drug War*, MIAMI HERALD, May 22, 2001, at 1A ("Privatization is a way of going around Congress and not telling the public. Foreign policy is made by default to private military consultants motivated by bottom-line profits.") (quoting U.S. Army Col. Bruce Grant).

204. Lewittes, *supra* note 179, at 1132–33 (contrasting the American president's limitations on calling up a standing army with the broad powers to conscript enjoyed by monarchs and tyrants of centuries ago).

reservist activation policies, or slowly expand through recruitment and retention programs.[205] Any such request by the president to Congress would invite questions and criticisms of current strategies and priorities.[206] The president's expectation of political opposition provides crucial ex ante checks on executive adventurism and thus has the effect of counseling caution in how soldiers are deployed around the world. The other option for a president constrained by the size of the military is also disastrous politically: The overextended president (unwilling to request a draft) might be forced to withdraw troops from a conflict zone prematurely, and face the inevitable criticism for starting a war that could not be successfully completed.

If on the other hand, there were some external, elastic source of troops, who could complement and supplement the U.S. Armed Forces, provide needed reinforcements, and help the president avoid having to activate reservists and/or reinstituting a military draft, the costs of *not* acting conservatively and judiciously are lowered. Privatization, at least at the margins, therefore presents a great alternative to lobbying Capitol Hill and the American people for permission to increase the size of the military quickly.[207] While contractors could not "discreetly" command an entire theater in a major conflict, smaller outfits can be selectively positioned to provide the president with much greater flexibility—to continue, for instance, an unpopular or unexpectedly demanding war (that neither the president nor Congress would want to bolster with fresh newly conscripted

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205. *See, e.g.*, Joseph C. Anselmo, *Pentagon Plans for Bigger, Better Army with 'Spike,'* 62 CONG. Q. WKLY. REP. 270 (2004) (noting the Army's need to add more troops to satisfy the nation's international commitments); Eric Schmitt, *Army Extending Service for G.I.s Due in War Zones*, N.Y. TIMES, June 3, 2004, at A1; Eric Schmitt, *General Says He May Ask for More Troops*, N.Y. TIMES, Apr. 24, 2004, at A10.

206. Joseph C. Anselmo, *Rangel Legislation Stirs Draft Debate*, 62 CONG. Q. WKLY. REP. 273 (2004); Dao, *supra* note 22; Monica Davey, *Eight Soldiers Plan To Sue over Army Tours of Duty*, N.Y. TIMES, Dec. 6, 2004, at A15; Helen Dewar, *Hagel Seeking Broad Debate on Draft Issue*, WASH. POST, Apr. 22, 2004, at A25; Lee Hockstader, *Army Stops Many Soldiers from Quitting; Orders Extend Enlistments To Curtail Troop Shortages*, WASH. POST, Dec. 29, 2003, at A1; Krugman, *supra* note 22; Vernon Loeb, *Army Reserve Chief Fears Retention Crisis*, WASH. POST, Jan. 21, 2004, at A4; Manuel Roig-Franzia, *Weekend Warriors Go Full Time*, WASH. POST, Mar. 2, 2004, at A1; *see also* SINGER, *supra* note 20, at 211 (noting that using privatization to circumvent congressional troop caps can help avoid the domestic uproar associated with calling up the National Guard or Reservists); Bianco & Forest, *supra* note 30, at 78 ("Why take the heat of calling up reservists when you can summon civilians-for-hire?"); Catan et al., *supra* note 20; Thomas E. Ricks, *Wars Put Strain on National Guard*, WASH. POST, June 6, 2004, at A1; Wayne, *supra* note 2 (noting that private military firms can be used not simply to elude public scrutiny but also, more affirmatively, to evade existing congressional limits on troop strength).

207. *See* Cooper, *supra* note 22 (noting the much higher political and economic costs associated with increasing troop levels or reintroducing the draft relative to those related to relying on private contractors).

soldiers). Hence with lower political opportunity costs for waging war, the president may be more apt to overcommit American capital—human, monetary, and diplomatic—in ways that would be less likely to occur were Congress and the American people (through their legislators) given a more direct say.

One need not ponder hypotheticals to appreciate this potential for dangerous presidential unilateralism. If it were not for the tens of thousands of private troops supporting and serving alongside of U.S. soldiers in Iraq and Afghanistan, perhaps the President would not have been so eager to invade Iraq;[208] or, perhaps, the limited number of American troops available would have compelled him to seek a broader coalition of countries willing to commit their own personnel to these endeavors at the outset.[209] By relying on external, private sources for troops, the President has, perhaps, overextended American obligations abroad, turned his back on collective security measures, and in the process drawn the ire of a great many. (Hence, these "structural" harms are independent of any accountability-related transgressions that privateers might themselves perpetrate once deployed.)[210]

Accordingly, tapping into an external, elastic supply of contract personnel could breach a tacit—and, no doubt, often hard fought—agreement between the Executive and Congress on the size of the military. This harm is, immediately, a fiscal one: it might be the case that Congress and the president agreed to keep the military comparatively small to reduce expenditures and reap peace dividends after, for example, the thawing of the very costly Cold War.[211] But, the harm is also a political

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208. *See* Elizabeth Bumiller & Jodi Wilgoren, *Ex-Administrator's Remark Puts Bush on the Defensive*, N.Y. TIMES, Oct. 6, 2004, at A22 (noting Ambassador Bremer's claim that the United States never deployed enough troops in Iraq to support the occupation and transition).

209. *See* Hastings, *supra* note 57 (noting that the United States has relied on military contractors in Iraq to a greater extent than on any foreign ally, including Britain).

210. *See, e.g.*, Editorial, *The Coalition of the Willing*, N.Y. TIMES, Feb. 19, 2003, at A24 (characterizing the U.S.-led coalition against Iraq as lacking in the coercive legitimacy that would exist were the United Nations Security Council included); Michael Dobbs, *Concern Grows Over U.S. Need for Allies*, WASH. POST, Jan. 27, 2003, at A1 (describing the United States's willingness to invade Iraq by itself while taking note of the benefits that could be achieved were a broader coalition included); Michael R. Gordon, *Serving Notice of a New U.S., Poised to Hit First and Alone*, N.Y. TIMES, Jan. 27, 2003, at A1 (describing President Bush's willingness to disarm Iraq without the assistance or support of the international community); Elizabeth Kolbert, *Solo Act*, NEW YORKER, Oct. 6, 2003, at 43; Patrick E. Tyler, *Annan Presses Bush To Avoid a Rush To War*, N.Y. TIMES, Nov. 14, 2002, at A1; Patrick E. Tyler & Felicity Barringer, *Annan Says U.S. Will Violate Charter If It Acts Without Approval*, N.Y. TIMES, Mar. 11, 2003, at A10; *Very Well, Alone—Dealing with Iraq*, ECONOMIST, Mar. 15, 2003, at 3 (noting how the Anglo-American initiative in Iraq lacked widespread international support).

211. *See supra* note 46 and accompanying text.

and legal one: Perhaps Congress kept the military small to dissuade an overly interventionist president from participating in far-flung engagements. Moreover, Congress might have agreed to authorize specific war powers requests *only* with the knowledge that the engagement would be of a limited scope commensurate with the manpower resources it assumed were available.[212] Again, to the extent that the president could extend the duration and expand the magnitude of war by employing private contractors and to the extent that Congress had not been anticipating the wholesale reliance on military privateers, privatization provides opportunities to subvert these carefully arrived at arrangements.

b. Reporting and Oversight

Another key constraint on the president's conduct of war takes the form of Congress's reporting and oversight functions.[213] Consultation with, written reports to, and oversight hearings before Congress represent important ways in which military policy is subject to considerable scrutiny and accountability.[214] Typically, Congress has opportunities to debate and hold hearings on matters of national security—shedding light and imposing accountability on the Executive Branch. If any given deployment of forces would be received critically, say, as overly dangerous, destructive, or antithetical to American principles of

212. After *Hamdi*, of course, it may be the case that Congress will be more careful and precise with respect to what it actually authorizes in terms of presidential warmaking. *See Hamdi*, 124 S. Ct. at 2641–42 (plurality opinion) (holding that the 2001 congressional authorization of military force provided the Executive with sufficient legal grounding to detain enemy combatants); *id*. at 2656–57 (Souter, J., concurring) (construing the force authorization statute more narrowly so as not to grant the Executive blanket detention powers over individuals within the United States); *see also infra* notes 256–63 and accompanying text.

213. U.S. CONST. art. I, § 8; War Powers Resolution, *supra* note 194; Nunn, *supra* note 27, at 18–19.

214. *See, e.g.*, RAOUL BERGER, EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH 108–09 (1974) ("In the entire armory of war powers only one has been exclusively conferred upon the President, the power as 'first General' to direct the conduct of war once it has been commenced. Even in this area, the military and naval command were not immune from parliamentary inquiry into the conduct of the war."); *see also* BARRY M. BLECHMAN, THE POLITICS OF NATIONAL SECURITY 3–22 (1990); ALLAN R. MILLETT, THE AMERICAN POLITICAL SYSTEM AND CIVILIAN CONTROL OF THE MILITARY: A HISTORICAL PERSPECTIVE 47–48 (1979); Dunlap, *supra* note 184, at 379 ("Since the Vietnam War . . . Congress has sought to become much more active in the management and oversight of military affairs . . . . [S]ince 1974, Congress annually makes 750,000 inquiries of the Pentagon and demands 750 yearly reports. Furthermore, the Congress created potent support agencies like the General Accounting Office (GAO) a huge 5,000 person investigatory organization that frequently targets the military."); Carl Hulse, *Byrd Questions Use of Money for Iraq*, N.Y. TIMES, Apr. 21, 2004, at A11 (noting the senator's dismay that the Administration "might have broken the law by failing to inform Congressional leaders in mid-2002 of its use of emergency antiterror dollars to begin preparations for an invasion of Iraq").

democracy,[215] an administration might be deterred from pursuing such ends in the first place.[216] And, even if the Executive, wanting to avoid the use of actual soldiers (because of the reporting requirements under the War Powers Resolution) used CIA operatives,[217] a framework of reporting and oversight statutes are in place to ensure a modicum of accountability and transparency over those individuals too.[218] But when neither members of the U.S. Armed Forces nor other government officials are intimately involved in a particular engagement, it is quite possible that members of Congress would not be as fully informed about the activities being undertaken by private contractors.[219]

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215. *See, e.g.*, SINGER, *supra* note 20, at 210. Singer notes:

> Military consulting firms also offer the possibility of providing military assistance to allies with negative images, which would otherwise be unable to garner Congressional approval. For example, both Angola and Equatorial Guinea are nondemocratic states with poor human rights records, that by law are ineligible for U.S. military assistance. However, with the emergence of [private military firms], the United States has been able to offer to arrange the privatized equivalent for both. Similar discreet moves were made to aid the Nigerian military in Liberia . . . in 1996–97, again against the law (in this case sanctions against the Abacha dictatorship) . . . .

Id at 210–11; *see also infra* notes 217–18 and accompanying text (noting no disclosure to Congress is required if a military contract with a foreign nation is valued at less than $50 million).

216. This is the case even if it could secure authorization ex post. *See, e.g.*, Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. 1029, 1048 (2004) (noting how built-in separation-of-powers checks to limit executive authority in times of emergency "will lead [the president] to use his powers cautiously"); Oren Gross, *Chaos and Rules: Should Responses to Violent Crimes Always Be Constitutional?*, 112 YALE L.J. 1011, 1123–24 (2003) (characterizing the ex post evaluation of an Executive's actions during times of crisis as a means of constraining ex ante decisions to engage in potentially unlawful or overzealous behaviors).

217. Koh, *supra* note 186, at 1273 (indicating that War Powers impediments have not eliminated executive warmaking attempts, but has driven them "underground . . . to substitute *covert* for overt operations") (emphasis added); Lobel, *supra* note 80, at 1038 (noting that modern presidential administrations have argued that authority over covert operations is an inherent presidential power); Silverberg, *supra* note 48; Uyeda, *supra* note 193, at 784, 792.

218. *See* KOH, *supra* note 170; Koh, *supra* note 186; *see also* Lobel, *supra* note 80, at 1093–97. As Professor Lobel notes, although this act appears to allow the Executive to conduct covert operations without congressional approval, it should not be read as broadly delegating all power to the president. Instead, it "should be understood as a supplement to preexisting statutory and constitutional limits on the executive use of covert operations. The purpose of the statute was to provide procedural limitations on the exercise of executive power in order to augment the substantive restraints that already existed." *Id*. at 1094; *see also* Act of Dec. 21, 1982, Pub. L. No. 97-377, § 793, 96 Stat. 1830 ("None of the funds provided by this Act may be used by the Central Intelligence Agency or the Department of Defense to furnish military equipment, military training or advice, or other support for military activities, to any group or individual, not part of a country's armed forces, for the purpose of overthrowing the government of Nicaragua . . . .").

219. *See, e.g.*, Avant, *supra* note 109 (noting how Congress is not adequately informed of deployments and operations involving private soldiers); Day, *supra* note 13 (indicating that executive agencies do not always have a complete, comprehensive record of all the outsourcing initiatives undertaken by their various sub-divisions); Forero, *supra* note 20 (noting that very few members of Congress have any familiarity with the details of the contracts authorizing counternarcotics work in

Private firms thus permit the president to conduct military operations (especially small-scale ones *not involving many, or any, U.S. troops*) without having the same obligations to notify and involve Congress as would exist were American soldiers used.[220] Privateers can, moreover, be contracted into service through third-party nations, host countries, or quasi-independent agencies, as has been the case with some American-based firms operating in the Balkans and even in Iraq. In these instances, Congress has comparatively little oversight authority. Indeed, the principal federal law, the Arms Export Control Act ("AECA"),[221] which, inter alia, sets the terms by which information about American contractors working for foreign nations must be disclosed to Congress, currently requires the State Department to notify Congress only when a contract it authorizes exceeds $50 million.[222]

And, even if the privateers were operating directly for the federal government, their contracts might (purposefully or unintentionally) have been indirectly routed through the Commerce, Interior, or the State Department,[223] rather than the Defense Department. The congressional committees that principally oversee Commerce and Interior, for example, may not be sufficiently informed or interested, and may not have developed the requisite expertise to be effective monitors of such

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Latin America); *see also* Ely, *supra* note 186, at 1100 (noting that wars may not need to be authorized by Congress if they are not fought by regular members of the U.S. Armed Forces).

As Congresswoman Schakowsky has noted, contracting "masks just what the U.S. commitment is in places like Iraq and allows many of these activities to literally fly under the radar of the Congress and the consciousness of the American people." Cooper, *supra* note 22

220. SINGER, *supra* note 20, at 214.

221. 22 U.S.C. §§ 2751–2799(d) (2000); *see* 22 U.S.C. §§ 2776–2778 (2000).

222. Only if a contract between an American military firm and a foreign state exceeds $50 million does the State Department *even* have to notify the Speaker of the House and the Chair of the Senate Foreign Relations Committee prior to effectuating it. At the time of notification, a notice of the contract is also published in the Federal Register. Congress has between 15 and 30 days to react by passing a joint resolution; otherwise the contract will automatically take effect. *See* 22 U.S.C. § 2776 (2000). Anything short of $50 million—and many sizable contracts, of course, can be broken down into several, smaller contracts under $50 million—does not require any active involvement by Congress, though the president must update the Speaker and the Senate Foreign Relations Chair on a quarterly basis. *Id.*; *see also* Gaul, *supra* note 53 (noting that "[t]he AECA provides little public accountability for non-classified contracts that commit the entire nation to acts of war."); Kurlantzick, *supra* note 20; Kevin P. Sheehan, Note, *Executive and Legislative Relations and the U.S. Armed Export Control Regime in the Post-Cold War Era*, 33 COLUM. J. TRANSNAT'L L. 179, 186–88 (1995).

223. SINGER, *supra* note 20, at 208 (describing Colombian contracts that are routed through the State Department's anti-narcotics section); Guillory, *supra* note 47, at 127 (noting that DynCorp's contracts in Colombia have been routed through the State Department); Robert O'Harrow, Jr. & Ellen McCarthy, *Private Sector Has Firm Role in the Pentagon*, WASH. POST, June 8, 2004, at E1 (noting that the contracts for interrogators at Abu Ghraib were overseen by the Interior Department, which had little expertise in knowing how to monitor or define the role of such intelligence work); *see also infra* notes 226, 227, and 251 and accompanying text.

contracts.[224] Finally, even if the contracts were issued through the Pentagon, matters of military privatization may not arise per se—short of a massive fiasco such as the Iraq prison-abuse scandal—that would warrant congressional interest from the Armed Services committees.[225] This is, again, not to say Congress is unfailingly vigilant with respect to oversight of "public" military affairs, and entirely enfeebled with respect to overseeing military contractors. But while recognizing that the differences in congressional oversight are quantitative rather than qualitative, they are nevertheless important.

Indeed, speaking about contracting in Iraq, Professor Deborah Avant notes:

> We are not even sure for whom these contractors work or worked. Nor do we know how many other contract employees were—and may still be—working at . . . [Abu Ghraib] . . . . We do not know precisely what roles these contract employees had at the prison or to which group or agency they were accountable. To trace that, we would need to know the contracting agent—someone representing a group within the Army, probably, but which one?[226]

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224. SINGER, *supra* note 20, at 209–10 (noting how the many layers of contracts and subcontracts make congressional oversight very difficult and indicating that "Congress tends to focus its attention on official aid programs"); *id*. at 214 (noting that many military contracts are paid through off-budget funds); *id*. at 240 (suggesting that oversight committees with jurisdiction over Commerce and State need to become learned in military affairs); Guttman, *supra* note 3, at 894 (indicating that even little things such as contractors not being required to publish personnel directories and phone books, organization charts, and pay grades complicates and frustrates congressional oversight).

225. Even in a highly publicized, nationally televised committee hearing in the immediate wake of the Abu Ghraib scandal, the Senate Armed Services Committee members could not get any answers from top Pentagon officials about what contractors and what contracting firms were involved in the brutal activities. *See* Testimony of Secretary of Defense Donald H. Rumsfeld, Testimony as Prepared by Secretary of Defense Donald H. Rumsfeld Before the Senate and House Armed Services Committees, U.S. Department of Defense Speech (May 7, 2004), *available at* http://www.defenselink.mil/speeches/2004/sp20040507-secdef1042.html (last visited Dec. 12, 2004) (indicating that the Secretary of Defense and Chairman of the Joint Chiefs of Staff could not respond to Senator McCain's request for the names of the military firms under contract to work at Abu Ghraib); *see also* Avant, *supra* note 109; Joel Brinkley, *Army Policy Bars Interrogations by Private Contractors*, N.Y. TIMES, June 12, 2004, at A1.

226. Avant, *supra* note 109; *see* Editorial, *Contractors in Iraq Need Strict Oversight*, DENVER POST, June 20, 2004, at E6 (noting that CACI's contract governing its interrogation work in Abu Ghraib was embedded in a computer services contract with the Department of the Interior); *see also* Cooper, *supra* note 22 (describing loopholes that contractors and the executive branch use to help evade congressional oversight). As Cooper notes:

> [A] new "blanket-purchase agreement" allows a government department to avoid bidding out contracts by piggybacking onto another department's existing contract with a company for unrelated services. In this way, the Defense Department contracted with CACI to provide interrogators for Iraq using an existing agreement the firm had for unrelated services with the

And, as *Washington Post* journalists have recently observed:

> The bureaucracy of the contracting process also complicates how contractor operations are run because it's unclear who the client is. For example, the request for contract interrogation support . . . came from . . . the military group that oversees coalition forces in Iraq. It was then sent to the Interior Department and processed at a federal business center . . . .[227]

These oversight difficulties cannot be reduced to mere accountability lapses. Rather these oversight difficulties also sound in terms of structural concerns about the architecture of American government. Even if Congress insisted on more centralization in the contracting process, because of the nature and design of military contracts and because of issues of private-sector proprietary information more generally, it is still questionable whether adequate information would readily be disclosed to an oversight committee were either a private military firm or a government official subpoenaed and asked to testify about critical details of an agreement.[228] This proprietary information concern has already become a major source of executive-congressional tension in the commercial military contracting realm. One notable example involves the Air Force invoking the principle of proprietary information to fend off repeated

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Interior Department.

Id.

227. Cha & Merle, *supra* note 109; *see also* GREEN, *supra* note 58 (noting how private military contracts for work in Latin America are routed through at least five U.S. executive agencies).

228. *See* SINGER, *supra* note 20, at 214 (noting that the firms "claim that they cannot provide information, without government approval" and that the government does not provide information about the private contracts in accordance with proprietary information protections); *id*. at 208–09 (citing both contractual imperatives not to discuss the details of plans related to missions and discussing the fact that neither contracting firms nor the federal government is required to release names of slain contractors).

For similar patterns of proprietary information being withheld from oversight committees and/or the public in other contexts, see Barbara L. Bezdek, *Contractual Welfare: Non-Accountability and Diminished Democracy in Local Government Contracts for Welfare-to-Work Services*, 28 FORDHAM URB. L.J. 1559, 1570–71 (2001); Diller, *Revolution*, *supra* note 6, at 1199; Freeman, *supra* note 3, at 1303–06; Merrill Goozner, *Welfare's Gold Rush: Private Sector Mining Hard for Reform Effort's Contracts*, CHI. TRIB., June 29, 1997, at C1; David A. Super, *Policy Considerations Relating to Privatization in the Food Stamp Program*, Center on Budget and Policy Priorities, Oct. 28, 2004, *available at* http://www.cbpp.org/10-28-04fa.pdf (last visited Dec. 14, 2004); *cf*. Forsham v. Califano 587 F.2d 1128, 1136 n.19 (D.C. Cir. 1978) ("Where records are created by a private entity, we believe the applicability of FOIA will turn on whether the government is involved in the core planning or execution of the program or whether, by contrast, the entity retains its private character in bona fide fashion during the course of the endeavor that results in the records.").

requests by Congress to disclose certain information regarding its Tanker contract with Boeing.[229]

Therefore, with limited congressional oversight and reporting, there are comparatively fewer political and legal checks constraining how the president conducts military affairs. The Executive's policies may not be in line with the priorities and principles of Congress and the American people, such as when, for instance, the State Department, under the AECA framework, approved requests from MPRI to perform military consulting services for the repressive regime running Equitorial Guinea as well as for the Abacha dictatorship in Nigeria.[230] It is at least debatable whether such permission would have been as readily granted were congressional consent a bona fide prerequisite. And, strategic interests and prudential policymaking aside, the lack of effective oversight deprives Congress and the People of an opportunity to debate normative concerns about delegating governmental policymaking decisions to privateers in the first place.

Accordingly, circumventing congressional oversight lengthens the leash the Executive has in conducting national security policy and, concomitantly, limits the effective transmission of information to the American public.

c. The Appointments Clause: Senate Confirmation of Military Officers

Since military officers are "appointed in the manner of principal officers [of the United States],"[231] every individual, holding at least the rank of second lieutenant or ensign must be nominated by the president

229. Senator McCain, a senior member of the Senate Armed Services Committee, has repeatedly requested that the Pentagon turn over its communications with Boeing regarding negotiations over a new fleet of Air Force Tankers. The Pentagon has resolutely refused, citing the need to preserve its contractors' proprietary information. McCain, in turn, blocked the confirmation of all civilian nominees to the Defense Department and promised to continue to do so until those documents were disclosed. Philip Dine, *Probe Continues on Boeing Lease/Pentagon Official Says Investigation Could Hold Up Tanker Deal*, ST. LOUIS POST-DISPATCH, Feb. 12, 2004, at B3 (noting Senator McCain's frustration with the Defense Department for its refusal to disclose communications between the Pentagon and its contractors); Renae Merle, *Pentagon Refuses To Give Panel Documents on Tanker Contracts*, WASH. POST, Dec. 17, 2003, at E6 (describing the Pentagon's refusal to share contract documents with the Senate Armed Services Committee because of Boeing's need to protect its proprietary information); *see also supra* notes 132 and 137 and accompanying text.

230. SINGER, *supra* note 20, at 131–34; *see also infra* note 431 and accompanying text.

231. Weiss v. United States, 510 U.S. 163, 182 (1994) (Souter, J., concurring); *see also* 10 U.S.C. § 531 (2000); United States v. Corson, 114 U.S. 619, 622 (1885) (characterizing military officials as officers of the United States who require presidential appointment and Senate confirmation).

and confirmed by the Senate.[232] The Senate must also confirm the commissions of all reservists above the level of major.[233] And, each time an officer is promoted to a higher rank, another round of Senate confirmations is required.[234]

Though it is rare and administratively difficult for either the president or members of the Senate to be intimately involved in, say, the promotion of any particular Army captain,[235] at the higher levels of military commissions, individual evaluations and considerations become more commonplace.[236] In those cases, where appointments are important in shaping the policy direction as well as the public image of the American military, both presidential and Senate scrutiny is evident.[237] Importantly, however, as Justice Souter noted in *Weiss v. United States*, many of the military officers subject to Senate confirmation are, constitutionally speaking, "inferior officers" that do not require the advice and consent of the upper house.[238] But Congress has not chosen to vest the appointment of those (inferior) officers in the president and, instead, continues to subject those officers to the "rigors" of Senate confirmation; Congress's decision not to abdicate this responsibility suggests that the Senate values and takes seriously its oversight role in this capacity.[239]

If contractors carrying out American policy are not vetted through the process of presidential appointment and Senate confirmation, it is questionable whether, given the Senate's oversight of military officers'

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232. U.S. CONST. art. II, § 2, cl. 2 ("[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States. . . ."); 10 U.S.C. § 531 (2000); *Weiss*, 510 U.S. at 170 (confirming that the Appointments Clause applies at least to some military officers); Buckley v. Valeo, 424 U.S. 1, 126 (1976) (noting that any individual "exercising significant authority" under the laws of the United States is an "Officer of the United States" and must therefore be appointed pursuant to the Constitution's Appointments Clause); *see also Weiss*, 510 U.S. at 182 (Souter, J., concurring) (noting that even though many military officers may be deemed "inferior officers" for constitutional purposes, Congress has not chosen to designate them as such for purposes of dispensing with Senate confirmation proceedings).

233. 10 U.S.C. § 531 (2000).

234. 10 U.S.C. § 624 (2000); *Weiss*, 510 U.S. at 170 n.5.

235. JOSEPH HARRIS, THE ADVICE AND CONSENT OF THE SENATE 331 (1953) (noting that the "Senate confirmation of military and naval officers has become for all practical purposes an empty formality" because of the sheer number of appointments annually under consideration).

236. *See, e.g.*, 10 U.S.C. §§ 152, 154 (2000) (prescribing the appointments process for the chair and vice-chair of the Joint Chiefs of Staff).

237. *See, e.g.*, Dunlap, *supra* note 184, at 364–65 (noting the significant public opposition for the appointment of General Hoar to the chairmanship of the Joint Chiefs of Staff); *id.* at 376–77 (describing the desire among some to replace General Powell with a more docile chairman who would not publicly oppose presidential policy aims).

238. *Weiss*, 510 U.S. at 182.

239. *See* Morrison v. Olson, 487 U.S. 654, 673 (1988).

nominations down to the level of ensigns and lieutenants, they possess the legal authority or legitimacy to exercise the lethal discretion bestowed on them. As discussed, at Abu Ghraib, private contractors with little oversight were allegedly given broad (officer-like) discretion in helping set and implement interrogation policies and, in turn, were themselves issuing to U.S. enlisted soldiers orders that included the directives—ostensibly speaking—to brutalize or humiliate detainees.[240] Whether bypassing the appointments process is a deliberate aspect of the decision to privatize or, more likely, an unintended consequence of the outsourcing objective, the fact remains that contracting out the responsibilities of active military engagement to ersatz "officers" deprives the Senate of one of its core duties—as applied both as a check on an injudicious Executive[241] and as a safeguard for continued civilian control over the military.[242]

Presumably even if the confirmation process is not treated with the individualized attention given, for example, to Supreme Court nominees, the Senate could still insist that all prospective nominees to command positions must satisfy certain blanket requirements. Those might include an absence of any type of criminal or domestic-abuse citation to ensure that the military advances only those individuals with impeccable professional and ethical credentials.[243] Without such review processes,[244] privatization (as in Abu Ghraib) may continue to permit the advancement of a range of less desirable candidates who lack the moral virtues and skills necessary to lead by deed and example.[245]

Of course, since many military officers also were intimately involved in the prison-abuse scandal, clearly the appointments process alone is not a dispositive factor. So while I do not want to overstate the importance of

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240. *See supra* notes 106–09 and accompanying text.

241. *See, e.g.*, Freytag v. Commissioner, 501 U.S. 868, 883 (1991) (acknowledging that the Appointments Clause was at least in part a reflection of the Founders' attempt to thwart the unilateral manipulation of official appointments by the Executive); 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, 374–77 (1833) (noting that the "consciousness of this [Senate confirmation] check will make the president more circumspect and deliberate in his nominations for office"); *see also* 2 FEDERAL CONVENTION, *supra* note 167; THE FEDERALIST NO. 76 (Alexander Hamilton).

242. *See infra* notes 290–303 and accompanying text.

243. *Cf.* James Dao, *A Man of Violence, or Just "110 Percent" Gung-Ho?*, N.Y. TIMES, June 19, 2004, at A6 (noting the inadequate screening by the CIA of contractor David Passaro accused of perpetrating brutalities against Afghan detainees).

244. Beermann, *supra* note 33, at 1511 ("The best candidate for a federal constitutional constraint on privatization of federal government activity may be the Appointments Clause.").

245. *See* Jeffrey Addicott & William A. Hudson, Jr., *The Twenty-Fifth Anniversary of My Lai: A Time To Inculcate The Lessons*, 139 MIL. L. REV. 153, 184–85 (1993) (emphasizing how important it is for America's junior officers to be well-trained in the laws and ethics of military engagement to insure against battlefield transgressions).

the Appointments Clause,[246] I do note that it would be significantly easier to conduct more searching review processes for military officers than it would for both the House and Senate to pass—and the president to sign—comprehensive legislation regulating and, perhaps, licensing the types of employees that military contractors can hire.

d. Governance and Discipline of the Military

Finally, the Constitution authorizes Congress to establish codes of governance for members of the U.S. Armed Forces.[247] Congress sets disciplinary guidelines for soldiers and authorizes the imposition of penalties in the event that they violate their oaths of duty or engage in any other form of proscribed behavior. Civilian contractors are not (and perhaps cannot be) effectively regulated to the same extent—and thus this status differential between contractors and soldiers may provide the Pentagon with opportunities to permit practices and behaviors (such as physical abuse for the purpose of extracting information) that are otherwise off-limits to U.S. troops.[248] Leaving that insidious possibility aside, this issue of discipline via Congress is important because the

246. Again, we have an issue where the difference between Congress's relationship to soldiers and to contractors is one of degree rather than kind. As evidence of perhaps the need for Congress to exercise greater control over the enlisted ranks, it should be noted that the Army in 1998—and well before the current state of the United States's overcommitted military—approved 68% of all waiver requests for applicants with felony convictions. Editorial, *Keep the Bad Apples Out of Military Units*, NEWS & RECORD (Greensboro), July 6, 2004, at A10; *see also* Ken Silverstein, *Pentagon Alerted to Trouble in Ranks*, L.A. TIMES, July 1, 2004, at A1 (noting that in 1998 nearly one-third of military recruits had arrest records).

247. U.S. CONST. art. 1 § 8, cl. 16.

248. *See* Chaffin, *supra* note 109; *see also* Neil A. Lewis, *Documents Build a Case for Working Outside the Laws on Interrogating Prisoners*, N.Y. TIMES, June 9, 2004, at A8 (citing memoranda by the Bush administration's lawyers on how to evade the legal restrictions on "torturing" detainees); Neil A. Lewis, *Justice Memos Explained How To Skip Prisoner Rights*, N.Y. TIMES, May 21, 2004, at A10 (describing steps taken by the Administration to justify the legality of "torture"); Neil A. Lewis, *U.S. Court Asserts Authority over American in Saudi Jail*, N.Y. TIMES, Dec. 17, 2004, at A17 (noting how the American federal judiciary is asserting jurisdiction over Americans detained abroad and how the courts' actions are seen as an attempt to "rebuff[] the Bush administration in its efforts to keep detention policies and actions connected to fighting terrorism beyond the reach of the [courts]"); Dana Priest & Charles Babington, *Plan Would Let U.S. Deport Suspects to Nations that Might Torture Them*, WASH. POST, Sept. 30, 2004, at A1 (describing the Bush administration's support for a proposal in the House leadership's Intelligence Reform bill "that would allow U.S. authorities to deport certain foreigners to countries where they are likely to be tortured or abused, an action prohibited by the international laws against torture the United States signed 20 years ago" and noting that this support "contradicts pledges President Bush made after the Abu Ghraib prisoner-abuse scandal erupted [last] Spring that the United States would stand behind the U.N. Convention Against Torture"); Eric Schmitt & Thom Shanker, *Rumsfeld Issued an Order To Hide Detainee in Iraq*, N.Y. TIMES, June 17, 2004, at A1 (noting that prisoners called "ghost detainees" had not been listed on officials rolls and were hidden from Red Cross monitors).

Constitution separates the *command* of the military from the *governance* of the military, presumably to prevent an aggrandizement of war powers. But military discipline is broader than a separation-of-powers matter because the president, even as Commander-in-Chief, also may not be able to control contractors to a satisfactory extent. Part of this difficulty in disciplining contractors as if they were soldiers is that the Supreme Court has given Congress virtually plenary power to regulate the behavior of military personnel, and it is at least an open question whether the Court would also permit Congress to impose similarly strict rules backed by criminal punishments on top of—or in lieu of—contractual arrangements with privateers absent a formal declaration of war.[249] Accordingly, because of its complexity and because it is not just a separation-of-powers concern, this subject will be treated at greater length and with broader sweep in Part IV.

2. Denial of the Appropriations Role

By using private contractors, the president may also reduce the likelihood of Congress easily terminating military funding.[250] The sources of funds for private guards in Afghanistan, for coca-crop dusters in Colombia, and for security forces in Iraq may be outside the formal scope of Defense Department appropriations budgets, and hence may be buried within longer-term funding sources that are not as readily apparent to Congress. As noted above in the context of identifying oversight difficulties, when contracts with privateers are scattered throughout or among executive agencies, it becomes very difficult for Congress to detect, target, and—if need be—attack particular streams of funding in order to influence policy via the purse.[251] Congress could, of course, always strike at the Pentagon's budget writ large in lieu of trying to track down discrete funding sources to privateers, but the political fallout for not

249. *See infra* notes 312–13, 444–46 and accompanying text.

250. *See, e.g.*, Jonathan Weisman, *War May Require More Money Soon*, WASH. POST, Apr. 21, 2004, at A1 (describing the Administration's reluctance to ask for more money for the prolonged occupation of Iraq and characterizing some members of Congress as accusing the President of concealing his true funding needs in an election year for fear of political fallout).

251. *See* SINGER, *supra* note 20, at 209–10, 214 (describing how contractors may be paid by off-budget funds); *see also* O'Harrow, Jr. & McCarthy, *supra* note 223 (characterizing how disorganized and hard-to-access military contracts are and noting that it took the Pentagon a full week to pinpoint the contracts that authorized the outsourcing of military prison intelligence at Abu Ghraib). *See generally supra* note 223 and accompanying text.

appearing to support America's troops and war effort may be too great of a disincentive.[252]

And perhaps most troubling from a legal-control vantage point, sometimes military operations are funded off-shore, by host countries or sympathetic third-parties. This was the case in Bosnia, where for a variety of reasons, a coalition of Muslim nations paid the American contractors for services rendered.[253] Obviously, when engagements are financed from sources outside of the U.S. Treasury, Congress's power of the purse may not be an effective constraint.[254] This is also somewhat of the case in Iraq, where a percentage of the funding for operations (including security operations) administered through the CPA supposedly came from Iraqi oil sales and thus was disconnected from the federal fisc.[255] Hence from an appropriations standpoint, there may be occasions where Congress's influence is quite weak. Therefore, without yet another check, Congress and the American people not only have fewer means of halting operations they deem to be counterproductive, but they also have a more limited appreciation of how well-funded select operations in general may actually be.

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252. *See* Jim Rutenberg, *A Bush Commercial Takes Aim at Kerry's Defense Credentials*, N.Y. TIMES, Apr. 27, 2004, at A20 (noting how President Bush heavily criticized John Kerry for allegedly not supporting military appropriations); Jim Rutenberg, *90-Day Strategy by Bush's Aides To Define Kerry*, N.Y. TIMES, Mar. 20, 2004, at A1 (describing how the Bush campaign highlights "Kerry's vote against the $87 billion package to support military efforts in Iraq and Afghanistan").

253. *See* SINGER, *supra* note 20, at 128 (noting that the United States arranged for the contractors to be paid by, inter alia, Saudi Arabia, Malaysia, Kuwait, Brunei, and the United Arab Emirates); Eric Schmitt, *Retired American Troops To Aid Bosnian Army in Combat Skills*, N.Y. TIMES, Jan. 15, 1996, at A1 (describing the process by which Muslim nations paid for MPRI to provide services to Bosnia).

254. *See* Koh, *supra* note 186.

255. *See* Jackie Spinner & Ariana Eunjung Cha, *U.S. Decisions on Iraq Spending Made in Private*, WASH. POST, Dec. 27, 2003, at A1 (describing how some of the CPA's operational expenses are funded through the sale of Iraqi oil and noting that the CPA's "process for spending Iraq's money has little of the openness, debate, and paper trails that define such groups in democratic nations"); *see also id.* (commenting on how a "mini-Congress" of Americans, Britons, and Australians comprise the core group of administrators awarding and overseeing reconstruction contracts); Steven R. Weisman, *U.S. Seeks Help of Iraq Costs, But Donors Want a Larger Say*, N.Y. TIMES, July 14, 2003, at A6 (noting how oil revenues are used to help fund Iraqi reconstruction). The CPA would be even more independent of Congress if the occupation and transition to a free Iraq were less problematic—and less costly. *See, e.g.*, Christopher Dickey, *$1 Billion a Week*, NEWSWEEK, July 21, 2003, at 28 (noting how unannounced and hidden costs associated with the military occupation in Iraq has required additional funding from Congress); *cf.* ROBERT CARO, THE POWER BROKER 618–20 (1974) (describing how civil bureaucrat Robert Moses was able to develop an independent and unaccountable financial power base through the creation of public authorities—such as toll roads and bridges—unconnected to legislative appropriations).

3. Denial of the Authorization Role

Regulating military personnel and patrolling funding allocations are secondary weapons in Congress's quiver. The degree to which Congress can regulate personnel and require testimony and briefings may have a modest impact on fundamental presidential decisions to deploy and direct forces in zones of conflict. This is not to diminish the importance of these congressional powers, but rather to acknowledge their individual limitations in terms of influencing and altering executive policymaking. When aggregated, however, these powers loom larger: Congress's cumulative ability to limit troop size *and* to curtail funding *and* to insist on oversight briefings weaves a thick web of checks possibly sufficient to constrain unilateral action (and more certainly sufficient to provide incentives for the Executive to *want to* work closely with Congress).

When we turn to the issue of express authorization, however, Congress's power is immediately evident. While often insisting that congressional authorization is unnecessary, presidents—especially over the last decade—have routinely if begrudgingly sought congressional resolutions in support of military action.[256] Hence the authorization power does serve as a considerable constraint. As Professor Charles Tiefler notes:

> The presidential request-for-approval interaction with Congress cranks up an elaborate machinery for the democratic inclusion of the nation in the military commitment decision. Hearings, news coverage, briefings, disputes over conditions or demands for assurances, and floor debate ventilate and test the propositions as to the soundness of the commitment . . . .[257]

Without the customary and statutory need for ex ante consultation and authorization, the president could deploy private troops in a way that otherwise would never have dared been initiated if limited to American troops and, correspondingly, beholden to the dictates of the War Powers Resolution.[258] But since the War Powers Resolution applies *only* to the deployment of U.S. Armed Forces[259] and, moreover, since anti-covert operations legislation requiring congressional notification and consultation

256. *See supra* notes 199, 201 and accompanying text.

257. *See* Tiefer, *supra* note 191, at 25.

258. *See* Powell, *supra* note 175, at 569–70.

259. *See* 50 U.S.C. § 1542 (2000); Biden & Ritch, *supra* note 197, at 385–90; Damrosch, *supra* note 197, at 66–67; Koh, *supra* note 186, at 1259–60.

applies *only* to members of the U.S. intelligence community,[260] there is room to maneuver unilaterally if the president were to use privateers.

The drug war in Colombia provides an apt example.[261] Due to frustrations associated with Congress's stringent limitations on the number and responsibilities of American soldiers in Colombia in the 1990s, private military firms were utilized probably in no small part to circumvent these legislative restrictions.[262] According to P.W. Singer, the

> intent of privatized military assistance is to bypass Congressional oversight and provide political cover to the White House if something goes wrong. . . . [So,] the United States quietly arranged the hire of a slew of PMFs, whose operations in Colombia range far beyond the narrow restrictions placed on U.S. soldiers fighting the drug war. Rather, the firms' operations are intended to help the Colombian military finally end the decades-old [rebel] insurgency.[263]

Again, the structural damage is clear: through bypassing Congress—and the American people—the Executive can initiate more conflict than the public might otherwise have been willing to support. And, extending the War Powers Resolution to contractors—though possible (as will be discussed in the Conclusion)—would be politically very difficult given the troubles Congress faced trying to pass the 1973 legislation over the President's veto (and that was when antiwar sentiment and hostility toward presidential warmaking power were both exceedingly high).[264]

D. Bypassing the People Through Privatization: Harms to Democracy

Having explored how privatization can short-circuit the effective workings of *constitutional* government as a government of checks and

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260. *See supra* note 48.

261. *See supra* notes 58–64 and accompanying text.

262. SINGER, *supra* note 20, at 207.

263. *Id*.

264. THOMAS M. FRANCK & EDWARD WEISBAND, FOREIGN POLICY BY CONGRESS 76 (1979) (noting the number of attempts by Congress to rein in unilateral presidential warmaking prior to the passage of the War Powers Resolution); Michael Ratner & David Cole, *The Force of Law: Judicial Enforcement of the War Powers Resolution*, 17 LOY. L.A. L. REV. 715, 728–36 (1984) (characterizing efforts to limit presidential war powers during the Vietnam era); *see also* H.R. REP. NO. 93-287, at 4–5 (1973), *reprinted in* 1973 U.S.C.C.A.N. 2346; William Van Alstyne, *Congress, the President, and the Power To Declare War: A Requiem for Vietnam*, 121 U. PA. L. REV. 1, 13 (1972); W. Taylor Reveley III, *Presidential War-Making: Constitutional Prerogative or Usurpation?*, 55 VA. L. REV. 1243, 1300 (1969); Patrick D. Robbins, Comment, *The War Powers Resolution After Fifteen Years: A Reassessment*, 38 AM. U. L. REV. 141, 154 n.80–83 (1988).

balances, I turn now to the corollary harm: how privatization, by bypassing Congress, can damage the proper functioning of *democratic* government as one predicated on informed, popular consent. To the extent privatization permits the Executive to carry out military policy unilaterally, without consulting Congress and without seeking formal authorization, it circumvents primary avenues through which the People are informed and blocks off primary channels (namely Congress) through which the People can register their approval or voice their misgivings.[265]

In short, the legitimacy of military policymaking depends not just on broad congressional involvement, but also on democratic input and popular consent.[266] In a liberal democracy, the consent of the People is necessary and

> ought to be more express in entering war than at almost any other time [or in any other policy matter] both because of the adversity the war will bring (the bodies of the population are subject to the risk of great injury) and also because the existence of the nation (the elemental social pact) is itself at risk.[267]

Thus, when, or even if, the public is potentially precluded from taking part in such discussions, the democratic integrity of the country is greatly compromised.[268] As Kant argued:

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265. *See, e.g.*, THE FEDERALIST NO. 49 (James Madison); Gary Born, *Review Essay: The President's War Powers*, 23 TEX. INT'L L.J. 153, 161–63 (1988); Lewittes, *supra* note 179, at 1132–46; Jules Lobel, *"Little Wars" and the Constitution*, 50 U. MIAMI L. REV. 61, 73 (1995); Nunn, *supra* note 27, at 18; *see also* Peter M. Shane, *Learning McNamara's Lessons: How the War Powers Resolution Advances the Rule of Law*, 47 CASE W. RES. L. REV. 1281, 1284 (1997) (noting that the approval of Congress often represents the existence of broad political support).

266. *See, e.g.*, EDMUND S. MORGAN, INVENTING THE PEOPLE (1988); WOODROW WILSON, CONGRESSIONAL GOVERNMENT: A STUDY IN AMERICAN POLITICS 303 (1913) (suggesting that the duty to inform the public is Congress's most important function and noting that "[t]he only really self-governing people is that people which discusses and interrogates an administration"); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776–1787 (1969); Brandon, *supra* note 168, at 1856–57 (characterizing popular sovereignty and self-government as principal features of American constitutionalism); Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493 (1988); *see also* Bruce A. Williams, *War Rhetoric's Toll on Democracy*, CHRON. OF HIGHER EDUC., Apr. 16, 2004, at B15 (describing the imperative to gain popular support for wars in democratic societies).

267. Elaine Scarry, *War and the Social Contract: Nuclear Policy, Distribution and the Right to Bear Arms*, 139 U. PA. L. REV. 1257, 1258 (1991).

268. *See* MICHAEL WALZER, JUST AND UNJUST WARS 25–29, 287–303 (2d ed. 1992); *see also* Freeman, *supra* note 3, at 1302–03 (noting many public law scholars' belief that privatization weakens the mechanisms "designed to ensure public participation and individual fairness [that] improve the rationality of decisionmaking and legitimize the authority of the state"); Mashaw, *supra* note 3, at 26 (describing public administrative law as the embodiment of a rational, deliberative government that subordinates power to reason-giving); Sapone, *supra* note 50, at 6–10 (describing the use of force by the government as "appropriate violence" and questioning the moral legitimacy of engagement via private actors).

> Every nation must be so organized internally that not the head of the nation—for whom, properly speaking, war has no cost (since he puts the expense off on others, namely the people)—but rather the people who pay for it have the decisive voice as to whether or not there should be war.[269]

Privatization creates opacities that may occlude the ready awareness of events. Americans who are unwittingly kept ill-informed of their country's involvement in matters overseas cannot serve their necessary roles in keeping the State responsive and responsible.[270] Conversely, when they are made aware of such engagements, they can express opposition or consent, organize parades or protests, enlist in the military as a sign of support or burn draft cards as a sign of disapproval.[271] However inconvenient it might be for the Executive to be constrained by the opinions of the People,[272] public participation is a necessary and valued component of the republican system as evidenced in the Constitution, culture, and customs of the United States. To use privatization to limit public disclosures and curtail

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269. Immanuel Kant, *On the Proverb: That May Be True in Theory, But Is of No Practical Use*, *in* PERPETUAL PEACE AND OTHER ESSAYS ON POLITICS, HISTORY AND MORALS 61, 88 (T. Humphrey trans. 1983); *see also* JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 72 (C.B. Macpherson ed., 1980) (6th ed. 1764) (contending that military powers must be distributed pursuant to the social contract and warning that individuals in a community are "in a much worse condition . . . [when] exposed to the arbitrary power of one man, who has the command of 100,000, than [those] that [are] exposed to the arbitrary power of 100,000 single men").

270. *See* Scarry, *supra* note 267, at 1302 (describing one of colonists' chief grievances against the Crown in the Declaration of Independence as that the king "has kept among us, in times of peace, Standing Armies without the Consent of our legislature. He has affected to render the Military independent of and superior to the Civil Power") (quoting THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776)).

271. *See* ALEXANDER BICKEL, THE MORALITY OF CONSENT 102–03 (1975) ("[T]he waging of war needs continuous political support [and] it is subject to a continuous round of informal referenda."). Professor Bickel noted that the anti-war movement sentiment in America was so palpable in 1968 that it dissuaded Lyndon Johnson from running for a second presidential term. *Id.* at 102 (describing how public opinion managed to "toppl[e] a sitting president, in the midst of war, in 1968, before a single national vote had been cast"); *see also* Avant, *supra* note 219 (emphasizing how the media is not well-equipped to report on military privateers in the same way that they are able to chronicle the activities of regular outfits of U.S. soldiers).

272. *See* Scarry, *supra* note 267, at 1259 (describing the burdens of democratic deliberation on matters of foreign conflict). Professor Scarry writes:

> Though it is difficult and time-consuming to convert hundreds of representatives from uncertainty to the decisiveness required for a declaration of war, this very unwieldiness was saluted as a great virtue at the original constitutional convention, and again by later jurists who, like Story, argued that a country must be slow to go to war but quick to attain peace.

Id.; *see also* Thomas E. Ricks, *Rumsfeld Gets Earful from Troops; Complaints Cite Equipment Woes, Extended Tours and Pay Delays*, WASH. POST, Dec. 9, 2004, at A1 (chronicling a candid, public town-hall discussion between American military personnel and Secretary Rumsfeld); Eric Schmitt, *Troops' Queries Leave Rumsfeld On the Defensive*, N.Y. TIMES, Dec. 9, 2004, at A1 (noting the value of a public town-hall discussion between Iraq-bound troops and the Defense Secretary).

public debates is to diminish popular sovereignty. But even without that intent on the part of the Executive, privatization has the effect of circumscribing not only Congress's deliberative role, but also its oversight role, and thus, it could end up limiting the information that reaches the People.

Congress's constitutional role in preserving popular sovereignty is, of course, critical—and revealing. Far from simply serving as an institutional counterbalance to the president, the architecture of congressional responsibility in warmaking bespeaks an express recognition of the imperative to keep the public informed and to keep elected officials responsive. Just as it is endowed to do in the context of presidential treaty-making or ministerial appointments,[273] the Senate, on its own, could have been exclusively entrusted to resist the tendencies of an imperial president bent on unilaterally sending troops into zones of hostility. At the Founding, however, Senators, like the president, were not directly elected by the People—only the House was.[274] So if congressional warmaking authorities were vested only in the Senate (as Hamilton originally proposed),[275] one might read the Constitution as saying that although the Executive must be kept in check by a competing branch of government, there is no corresponding responsibility to ensure that the People (through their biannually elected representatives in the House) would be given a say. But, because the entire Congress was and is empowered in matters of authorizing and funding wars, evidently there is a compelling democratic element to the allocation of war powers that complements the limited-government analysis discussed above in Part III.C.[276]

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273. *See* U.S. CONST. art. 2, § 2, cl. 2.

274. *See* U.S. CONST. art. 1, § 2.

275. *See, e.*g., 1 FEDERAL CONVENTION, *supra* note 167, at 292; Lofgren, *supra* note 167, at 680; *see also* JOHN NORTON MOORE ET AL., NATIONAL SECURITY LAW 821 (1990).

276. *See, e.g.*, Scarry, *supra* note 267, at 1265, 1269 (describing Article I, section 8 of the Constitution, which calls for a "deliberate assembling of the representatives of the people for a voiced affirmation of war," as embodying America's "Social Contract" and suggesting with regard to the Second Amendment that "if as a nation-state we are to have injuring power, the authorization over the action of injuring (as well as over the risk of receiving injury in return) must be dispersed throughout the population in the widest possible way"); *see also* U.S. CONST., art. I, § 8, cl. 12. Section 8, clause 12 imposes limits on the general power to tax and spend by ensuring military appropriations must be debated and re-authorized at least every two years. Hence, Congress cannot lock in long-term plans for, say, a standing army, but must have to reauthorize funds with regularity. *See, e.g.*, THE FEDERALIST NO. 41, at 259 (James Madison) (Clinton Rossiter ed., 1961) (calling the two-year limitation provision the "best possible precaution against the danger from standing armies"); Dunlap, *supra* note 184, at 345, 348 (noting that among those debating the virtues of the 1787 Constitution, the "danger posed by a permanent military establishment was a preeminent concern"); "Brutus" X, *That Dangerous Engine of Despotism, A Standing Army*, N.Y.J., Jan. 24, 1788, *reprinted in* THE DEBATE ON THE CONSTITUTION, FEDERALIST AND ANTI-FEDERALIST SPEECHES, ARTICLES, AND LETTERS

The expectation of popular ratification of war does not only follow from the fact that the Constitution gives the lower legislative house a role in decisionmaking; the Constitution provides additional support. Many believe, for example, that the Second Amendment embodies a popular-sovereignty right vis-à-vis military matters. As Professor Elaine Scarry notes:

> the history of [the Second Amendment's] formulation and invocation makes clear that whatever its relation to the realm of individuals and the private uses they have devised for guns, the amendment came into being primarily as a way of dispersing military power across the entire population. Like voting, like reapportionment, like taxation, what is at stake in the right to bear arms is a just distribution of political power.[277]

Indeed, the Second Amendment gave the People a physical "say" over the conduct of war by limiting the capacity of the federal executive to aggrandize central military power. In providing for the dispersed ownership of weapons by the citizens, the Founders envisioned the existence of a people's army, and thus vested decisions over matters of defense in the hands of people, and communities.[278] Since, at least in the premodern era of warfare, weapons had to "be carried onto the field by persons, the leaders [had to] address the population and persuade them to carry those guns."[279] This understanding comports with Akhil Amar's as well. Professor Amar understands the Second Amendment as originating out of Locke's recognition that "the people's right to alter or abolish tyrannous government invariably required a popular appeal to arms,"[280] and as reflecting a deep anxiety about a centralized federal military.[281]

DURING THE STRUGGLE OVER RATIFICATION: PART TWO: JANUARY TO AUGUST 1788, at 86 (1993).

277. Scarry, *supra* note 267, at 1268–69.

278. *See* MORGAN, *supra* note 266, at 85–87 (describing the linkages between popular sovereignty and the right to bear arms); Scarry, *supra* note 267, at 1301–09; *see also* H. RICHARD UVILLER & WILLIAM G. MERKEL, THE MILITIA AND THE RIGHT TO ARMS, OR, HOW THE SECOND AMENDMENT FELL SILENT (2002); Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309, 314, 321 (1991); Lawrence Delbert Cress, *An Armed Community: The Origin and Meaning of the Right To Bear Arms*, 71 J. AM. HIST. 22, 31 (1984); Joyce Lee Malcolm, *The Right of the People to Keep and Bear Arms: The Common Law Tradition*, 10 HASTINGS CONST. L.Q. 285 (1983).

279. Scarry, *supra* note 267, at 1266.

280. AKHIL REED AMAR, THE BILL OF RIGHTS 47 (1998) (citing JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT §§ 221–43 (Thomas P. Peardon ed., 1952)); Cottrol & Diamond, *supra* note 278, at 327–30; Nelson Lund, *The Second Amendment, Political Liberty, and the Right To Self-Preservation*, 39 ALA. L. REV. 103, 111, 113–15 (1987); *see also* STEPHEN P. HALBROOK, THAT EVERY MAN BE ARMED 76–77 (1984) (noting that it was a chief aim of the Second Amendment to

Today, of course, the role of the militia (and the relevance, at least in this context, of the Second Amendment) has been diminished by the needs of a standing professional army. But that spirit of popular sovereignty has endured and surfaced elsewhere, often at the intersection of war and voting: "Apparently it takes war to open the eyes of America to the injustice she imparts to her young men. For it is surely unjust and discriminating to command men to sacrifice their lives for a decision which *they had no part in making*."[282] Hence, as early as the Revolutionary War, the franchise has been expanded and enlarged at times of combat to accommodate not only the service of soldiers for their patriotic labor, but also out of recognition for their desire to have a say over the conduct of the war.[283] That tradition of expanding and protecting the franchise for soldiers has continued throughout the decades and centuries. President Lincoln insisted, for example, that the nation hold presidential elections in 1864, in the midst of the Civil War, even though he knew that his defeat would likely lead to the abandonment of efforts to preserve the Union.[284] And during World War II, the United States passed

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ensure America's citizenry had the capacity to oppose federal tyranny).

281. *See* AMAR, *supra* note 280, at 46–50; MORGAN, *supra* note 266; UVILLER & MERKEL, *supra* note 278; Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637, 647–48 (1989); Lund, *supra* note 280, at 111–16.

282. Pamela S. Karlan, *Ballots and Bullets: The Exceptional History of the Right to Vote*, 71 U. CIN. L. REV. 1345, 1359 (2003) (quoting *Lowering the Voting Age to 18: Hearings Before the Subcomm. on Constitutional Amendments of the Sen. Judiciary Comm.*, 90th Cong. 23 (1968) (statement of R. Spencer Oliver) (emphasis added)).

283. What, however, should we think about privatization decisions to use contractors rather than soldiers not for purposes of deceiving the People, but to appease them? In other words, the ulterior aim may not be to conceal policymaking decisions so much as to change the substantive shape of those decisions and give them the contours that the People implicitly prefer. The government in this case would be divining the wishes of the public and sending contractors into harm's way where U.S. soldiers would not be dispatched. Accordingly, an argument can be made that privatization is actually democratic-enhancing to the extent that the government would be accurately gauging what the public would find acceptable.

That argument, however, trivializes the importance of "process." Public acquiescence should not be equated with public input, and to circumvent the process by which Congress, and through them, the People, are involved in the decisionmaking is to do harm to the citizens of this country and the institutions that represent their interests.

284. *See* HERMAN BELZ, ABRAHAM LINCOLN, CONSTITUTIONALISM, AND EQUAL RIGHTS IN THE CIVIL WAR ERA 33–34 (1998); Akhil Reed Amar, *Abraham Lincoln and the American Union*, 2001 U. ILL. L. REV. 1109, 1118. Professor Amar adds:

> In this regard it is supremely noteworthy (but rarely noticed by those who accuse Lincoln of acting like a dictator) that in 1864, in the middle of an all-out Civil War, Lincoln allowed a regular presidential election to proceed, and pledged to abide by its outcome—even though electoral victory for his opponent might well have led to compromise with the Confederacy and a negotiated dissolution of the Union that Lincoln loved . . . Lincoln's decision in 1864 to submit himself and his platform to the judgment of the supreme tribunal of the American people deserves our highest praise . . . [and has] given the rest of the world a stunning

> [t]he Soldier Voting Acts of 1942 and 1944 [that] not only guaranteed soldiers and sailors overseas the right to vote during World War II, but also served as an opening wedge in the battle for poll tax repeal and other congressional action to guarantee the voting rights of blacks more generally.[285]

More recently, the democratic linkages to war have been exemplified by the Vietnam era's constitutional amendment that lowered the voting age from twenty-one to eighteen[286] and thus addressed the perceived injustice of denying young soldiers and draftees a formal voice in the direction of war efforts.[287] These tangible connections between war and democracy have prompted Professor Pam Karlan to assert that "virtually every major expansion in the right to vote was connected intimately to war."[288]

Accordingly, with a built-in expectation of involvement in matters of war, any effort deliberate or otherwise to bypass Congress—and concomitantly—the People is a direct blow to the vitality of America's democratic system. The unauthorized wars in Laos and Cambodia during the Vietnam conflict and the covert operations to prop-up anti-Communist regimes throughout the 1970s and 1980s in the Americas led to great disillusionment and distrust.[289] It is the People who have been assigned the constitutional right and responsibility to register or withhold their informed consent. Anything serving to undercut that right threatens the legitimacy of the government.

IV. UNDERMINING THE INSTITUTIONAL INTEGRITY AND STRATEGIC COMPETENCE OF THE U.S. MILITARY

Even if Congress, and the People, were broadly informed and consulted about the shift toward privateers—and even if privatization were explicitly authorized by Congress—serious structural harms could still flow from the

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> illustration of the true meaning of constitutional democracy—government of, by, and for the people.

Id.

285. Pamela S. Karlan, *Foreword: Litigation, War, and Politics, By Other Means*, 13 STAN. L. & POL'Y REV. 5, 7 (2002); *see also* ALEXANDER KEYSSAR, THE RIGHT TO VOTE 246–47 (2000).

286. U.S. CONST. amend. XXVI; *see also* Kenneth Karst, *The Pursuit of Manhood and the Desegregation of the Armed Forces*, 28 UCLA L. Rev. 499, 500 (1991) (describing the connection between being eligible to fight at age eighteen and being able to vote at that age).

287. *See supra* note 285 and accompanying text.

288. *See id.* at 1346; *see also* KEYSSAR, *supra* note 285.

289. Ely, *supra* note 186, at 1145–48. Moreover, diluting body counts through the use of contractors (whose deaths are not officially tallied) also hampers Americans' ability to make informed decisions about military policy. *See supra* note 158.

delegations of military functions to the private sector. In this Part, accordingly, I describe how contracting for the services of private troops, either to serve alongside U.S. military personnel or to operate by themselves, engenders significant institutional harms, strategic liabilities, and morale problems. First, because the Uniform Code of Military Justice does not apply to privateers, there is a greater possibility that contractors would distort a mission or abandon it altogether. This harm transcends the mere accountability concerns that can be remedied through more stringent oversight and more careful contracting. Indeed, it is not so much the possibility that privateers will fail to carry out a mission that is the principal concern; rather, at issue is the weakening of military justice and discipline on the battlefield that could upset civil-military relations and delegitimize democratic warmaking. Accordingly, as I will discuss below, to ensure military contractors comport themselves with the same discipline and restraint expected of regular soldiers, absent a congressional declaration of war, constitutional reform (not simple legislation) might be required.

And, second, I also explore in this Part a concomitant harm: how privateers who participate in U.S. military operations might tarnish public perceptions of the American military and debase the iconography of soldiers as citizen-patriots. Indeed, placing contractors alongside (or in lieu) of soldiers may ultimately damage the privileged normative status the American military has historically enjoyed. This too is not readily remedied through accountability-oriented, or simple legislative reforms.

A. Harms to the Institutional Integrity—and Comparative Excellence—of the American Military

1. The Notion of "Separate Community"

Regardless of whether she is stationed in Tikrit or Fort Dix and whether she is rounding up POWs or walking her dog on the base, the American soldier—from private to four-star general—lives in a "separate community."[290] Members of the U.S. Armed Forces operate within a

290. James M. Hirschhorn, *The Separate Community: Military Uniqueness and Servicemen's Constitutional Rights*, 62 N.C. L. REV. 177, 178 (1984); Jonathan Turley, *Tribunals and Tribulations: The Antithetical Elements of Military Governance in a Madisonian Democracy*, 70 GEO. WASH. L. REV. 649 (2002) (describing the pervasiveness of military law even in matters that seem not to require a code of discipline distinct from the civilian laws of the United States); *see also* Parker v. Levy, 417 U.S. 733, 743–44 (1974) ("[T]he military is, by necessity, a specialized society separate from civilian society."). Among the rights subject to curtailment in the confines of military service are free speech,

unique constitutional framework of governance and discipline necessary to ensure that they serve as effective yet restrained actors in national defense.[291] Simply stated: the American people entrust to their soldiers the awesome tools of devastating destruction, as well as an equally awesome democratic authority to wield them. In return, the People insist that their delegates on the battlefield are rigidly disciplined and handle their responsibilities with great humility and humanity.[292] Professor James Hirschorn writes:

> As long as the Constitution gives the President and Congress the authority to determine the ends for which military force will be used, civilian supremacy requires a system of military discipline that inculcates all ranks with an attitude of active subordination, i.e., the will to carry out the instructions of their civilian superiors despite their own disagreement.[293]

Therefore, since the military has a sacred duty to carry out the directives of civilian authorities to a tee, it is crucial (not only for the success of missions, but moreover, for the enduring legitimacy of democratic warmaking) that under no circumstances will an order be ignored or distorted.[294] This degree of absolute and uncompromising

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sexual freedom, and religious expressions. *See, e.g.*, Goldman v. Weinberger, 475 U.S. 503, 507 (1986) (upholding the military's prohibition of those visible religious accoutrements that are inconsistent with the Air Force's dress code, on the basis of the military's need for "instinctive obedience, unity, commitment, and esprit de corps"); Brown v. Glines, 444 U.S. 348, 350 (1980) (allowing a base commander to suppress written materials posing "a clear danger to the loyalty, discipline or morale of members of the armed forces"); Greer v. Spock, 424 U.S. 828 (1976) (holding that there is no constitutional right to make political speeches or distribute leaflets on a military base).

291. *See* Hirschhorn, *supra* note 290, at 217; Mark J. Osiel, *Obeying Orders: Atrocity, Military Discipline, and the Law of War*, 86 CAL. L. REV. 939, 953–57 (1998) (characterizing the fostering of a culture of discipline and integrity as a central aim of the system of military governance).

292. Indeed, the bedrock of a liberal democracy is civilian control over the military. *See, e.g.*, MILLETT, *supra* note 214; Kenneth W. Kemp & Charles Hudlin, *Civil Supremacy over the Military: Its Nature and Limits*, ARMED FORCES & SOC'Y, Fall 1992, at 7. In order to ensure that democratic institutions control the machines of war, civilian control can permit no acts of deviation or insubordination that might compromise the careful orchestration of a military engagement and yield results not intended by the civilian authorities. *See* Hirschhorn, *supra* note 290, at 217.

293. Hirschhorn, *supra* note 290, at 217. *See* Lawrence F. Kaplan, *Officer Politics*, NEW REPUBLIC, Sept. 13, 2004, at 23 (describing the "principle of subordination to civilian control and nonpartisanship" as the essence of American military professionalism); *see also* SAMUEL P. HUNTINGTON, THE SOLDIER AND THE STATE 15–16 (1957) (noting that the military's role in society is understood as being directed entirely by the State and its political agents); MILLETT, *supra* note 214, at 2, 61; Kemp & Hudlin, *supra* note 292, at 7–9; Richard H. Kohn, *Out of Control: The Crisis in Civil-Military Relations*, NAT'L INTEREST, Spring 1994, at 3.

294. SINGER, *supra* note 20, at 191 ("Maintaining proper control of the military is a key priority of governance. . . ."). In what Foucault characterizes as the "microphysics of power," constant training, drilling, and surveillance and supervision of activities serves to foster discipline and unity and thus

discipline requires a constitutionally separate governing infrastructure, far stricter than ordinary civil and criminal codes promulgated by civilian governments and necessarily entailing some loss of the ordinary and even constitutional rights citizens of the United States otherwise enjoy.[295] In other words, "[a]n Army sent into combat by a democracy cannot act like one."[296]

Accordingly, for generations, the American military community has been a social, legal, and economic entity onto itself;[297] systems have been in place—in one form or another—since the dawning days of the American Revolution to treat members of the U.S. Armed Forces differently (and more restrictively).[298] In 1950, Congress introduced the modern incarnation of this separate system: the Uniform Code of Military Justice ("UCMJ").[299] The UCMJ represents an entirely endogenous value system that recognizes the weighty authority and discretion given to soldiers and attempts to control that authority and discretion more stringently than regular American constitutional and statutory law would ever permit. The code subjects to military discipline, and at times to court-martial, those individuals who are, inter alia, AWOL, disobedient, insubordinate, malingering, misbehaving, or who render faulty performances of duty.[300]

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leaves little room for deviancy. *See, e.g.*, MICHEL FOUCAULT, POWER/KNOWLEDGE 135–58 (Colin Gordon et al., trans., Colin Gordon ed., 1980); THOMAS DUMM, *Michel Foucault and the Politics of Freedom* 104, *in* 9 MODERNITY AND POLITICAL THOUGHT (Morton Schoolman, ed.) (1996). *But see* Banerjee & Hart, *supra* note 96; Ricks, *Probe*, *supra* note 96; Ricks, *Strains*, *supra* note 96.

295. *See supra* note 290 and accompanying text; *infra* note 303 and accompanying text.

296. Thom Shanker, *Experts See Little Defense for Troops' Disobedience*, N.Y. TIMES, Oct. 17, 2004, at A12 (noting that "[o]rder and discipline required for successful combat operations cannot exist if subordinates are allowed to vote on their mission or second-guess superiors").

297. Jonathan Turley, *The Military Pocket Republic*, 97 NW. U. L. REV. 1, 6 (2002).

298. *See* RICHARD S. HARTIGAN, INTRODUCTION TO LIEBER'S CODE AND THE LAW OF WAR 1 (1983); JAMES C. NEAGLES, SUMMER SOLDIERS, A SURVEY AND INDEX OF REVOLUTIONARY WAR COURTS-MARTIAL (1986); WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS, app. X. at 961 (2d ed. 1920) (reprinting 1775 and 1776 Articles of War); James F. Childress, *Francis Lieber's Interpretation of the Laws of War: General Orders No. 100 in the Context of His Life and Thought*, 21 AM. J. JURIS. 34 (1976); Hon. Walter T. Cox III, *The Army, the Courts, and the Constitution: The Evolution of Military Justice*, 118 MIL. L. REV. 1, 5–6 (1987); Alexander Holtzoff, *Administration of Justice in the United States Army*, 22 N.Y.U. L. REV. 1 (1947); Edmund M. Morgan, *The Background of the Uniform Code of Military Justice*, 6 VAND. L. REV. 169 (1953); Edmund M. Morgan, *The Existing Court-Martial System and the Ansell Army Articles*, 29 YALE L.J. 52 (1919); *see also* Goldman v. Weinberger, 475 U.S. 503, 507 (1986) ("The military need not encourage debate or tolerate protest to the extent that such tolerance is required of the civilian state by the First Amendment. . . .").

299. Uniform Code of Military Justice of 1950, Pub. L. No. 81-506, 64 Stat. 107.

300. *See, e.g.*, UCMJ art. 85 (desertion); 86 (AWOL); 88 (using contemptuous words against the president); 89 (showing disrespect toward a superior officer); 91 (insubordination toward non-commissioned officer); 92 (failure to obey an order); 113 (misbehaving); 115 (malingering); 133

The UCMJ is more than a simple legislative enactment, but rather has the effective currency of what Professors William Eskridge and John Ferejohn call "super-statutes"[301] and what Professor Gerhard Casper describes as a "framework statute"[302] because it takes on quasi-constitutional qualities and prescribes an entire positive code of regulations and conduct, respectively. Indeed, the courts have recognized the special and distinct qualities of this governing regime and defer to Congress even when the UCMJ limits soldiers' constitutional liberties in ways unimaginable if ever applied to civilians.[303] Given the intrusive scope of the UCMJ, and the courts' emphasis on Congress's special Article I powers over the Armed Forces *qua* Armed Forces, it may be

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(conduct unbecoming an officer and gentleman); *see also* 10 U.S.C. § 976 (2000) (prohibiting members of the military from organizing or engaging in any other union activities); 18 U.S.C. § 2387 (2000) (prohibiting interference with the discipline or morale of the armed forces); Hirschhorn, *supra* note 290, at 208; Turley, *supra* note 290, at 666. As Professor Diane Mazur underscores, the UCMJ is not simply a punitive apparatus; rather, on a day-to-day basis it provides soldiers with a guiding framework for carrying out duties responsibly. *See* Diane H. Mazur, *Rehnquist's Vietnam: Constitutional Separatism and the Stealth Advance of Martial Law*, 77 IND. L.J. 701, 709 (2002).

301. *See* William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1216 (2001). Professors Eskridge and Ferejohn note that:

> A super-statute is a law or series of laws that (1) seeks to establish a new normative or institutional framework for state policy and (2) over time does "stick" in the public culture such that (3) the super-statute and its institutional or normative principles have a broad effect on the law—including an effect beyond the four corners of the statute.

Id.

302. *See supra* note 195 and accompanying text.

303. *See, e.g.*, Solario v. United States, 483 U.S. 435, 447 (1987) (quoting Rostker v. Goldberg, 453 U.S. 57, 70 (1981)) ("[J]udicial deference . . . is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged."); *Rostker*, 453 U.S. at 65 ("[I]t is difficult to conceive of an area . . . in which courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially . . . military judgments."); U.S. *ex rel*. Toth v. Quarles, 350 U.S. 11, 22–23 (1955); Dynes v. Hoover, 61 U.S. (20 How.) 65, 79 (1857) (noting that Article I provisions "show that Congress has the power to provide for the trial and punishment of military and naval offenses . . . and that the power to do so is given without any connection between it and the 3d article of the Constitution defining the judicial power of the United States; indeed that the two powers are entirely independent of each other."); Dinsman v. Wilkes, 53 U.S. (12 How.) 390, 403 (1851); Martin v. Mott, 25 U.S. (12 Wheat.) 19, 30 (1827) (refusing to review the validity of military orders or military punishments); *see also Goldman*, 475 U.S. at 507; Brown v. Glines, 444 U.S. 348, 350 (1980); Greer v. Spock, 424 U.S. 828 (1976); Cox, *supra* note 298, at 23 (noting that the military by necessity imposes restrictions on the lives of service members that are much more stringent than anything imposed on the civilian population); Hirschhorn, *supra* note 290, at 184; Karst, *supra* note 286, at 570 (indicating that "entry into the armed forces implies some separation from the norms of the larger community, including some yielding of individual freedoms to . . . make a fighting force effective"); Mazur, *supra* note 300, at 707–12; Osiel, *supra* note 291, at 953 (suggesting that key codes of military regulations are "largely distinct from, even at odds with, the common morality of civilian society"); *id*. at 1023 (noting that the Supreme Court "has displayed extraordinary deference toward the armed forces as a community possessed of its own *nomos*, or norm-creating and norm-sustaining mechanism").

unlikely that these regulations could easily be extended and applied to civilians, even ones who serve as privateers.[304]

And, beyond the formal, legal structure of discipline, the military's separate community bespeaks a distinct social and moral experience. The cohesion of military units (and their detachment from the outside, civilian sphere of life) creates camaraderie and engenders an esprit de corps necessary for optimal performance on the battlefield—where it is said that individuals put their lives on the line for one another as much as for their nation.[305] This inculcation of virtue and honor is accomplished through the "personal immersion" in the ongoing "collective narrative of [the] corps,"[306] a narrative that is supplemented in part by an inward-looking sense of shared culture and in part by an outward-oriented aversion to what is perceived as the lax values of civilian life.[307] Again, but for obviously different reasons than legal-constitutional ones, this esprit is difficult to extend to privateers via fiat—legislative or otherwise.[308]

It is with this context and history in mind that the blithe introduction of civilian contractors into positions involving the exercise of sensitive military authority seems particularly dangerous and counterproductive—violating the carefully crafted arrangements established over time precisely to minimize the possibility that agents of combat will disobey

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304. *See infra* notes 444–46.

305. Studies suggest troop camaraderie appears to strengthen the resolve of military units more than any other bond (including nationalism or political ideology). *See, e.g.*, J. GLENN GRAY, THE WARRIORS 27 (1959) (characterizing the strength of ties within military units as "unequaled in forging links among people of unlike desire and temperament"); Osiel, *supra* note 291, at 1053–55 (highlighting how the basic units of military association provide core groupings for displays of loyalty, bravery, and self-sacrifice); *cf.* Ricks, *Strains*, *supra* note 96 (emphasizing differences between units of regular soldiers and national guard units in terms of trust and unit cohesion).

306. Osiel, *supra* note 291, at 955.

307. *See, e.g.*, Dunlap, *supra* note 184, at 388 ("Military personnel perceive most of American society as conspicuously lacking those qualities [of duty and community.] Not surprisingly, therefore, they often prefer to live in their own military enclaves, complete with homes, schools, churches, stores, and entertainment facilities."); Mazur, *supra* note 300, at 756 ("Today . . . military haircuts are often designed to separate a serviceman from civilian society, to define a servicemember as different and apart. Extremely shaved styles that would be considered inappropriate for a civilian professional are chosen for just that reason—they identify a servicemember as *not* civilian."); Diane H. Mazur, *Why Progressives Lost the War When They Lost the Draft*, 32 HOFSTRA L. REV. 553, 566–67 (2003); Adam Clymer, *Sharp Divergence Found in Views of Military and Civilians*, N.Y. TIMES, Sept. 9, 1999, at A20; Ole R. Holsti, *A Widening Gap Between the U.S. Military and Civilian Society?: Some Evidence, 1976–96*, INT'L SECURITY, Winter 1998/99, at 5–9; Thomas E. Ricks, *The Widening Gap Between the Military and Society*, ATL. MONTHLY, July 1997, at 66; David Wood, *Duty, Honor, Isolation: Military More and More a Force unto Itself*, STAR-LEDGER (Newark), Apr. 21, 1991, at A1.

308. Of course, since contractors are often veterans and have self-selected to return to a martial vocation, perhaps the socio-cultural affinities to regular members of the Armed Forces exist even in the absence of any formal program of inculcation.

their principals' commands and/or abandon their comrades in the heat of battle.

2. Privatization's Harms

Civilian contractors, not similarly subject to the dictates of military law or to the constitutional oath of office,[309] cannot necessarily be expected or permitted to exercise the authority, judgment, or lethal force entrusted to soldiers. Contractors are not governed and disciplined by the same legal and socio-cultural obligations of duty and loyalty required to ensure the effective subordination of soldiers' own interests and to guarantee the success of a given endeavor.[310] No legal contract between the Pentagon and a private firm can hope to imitate, let alone replicate, this sacred relationship.[311] Otherwise, why would U.S. military personnel be treated

309. *See, e.g.*, SINGER, *supra* note 20, at 213 (noting that privateers do not take an oath to uphold the Constitution); Christopher Marquis, *Inquiry on Peru Looks at a C.I.A. Contract*, N.Y. TIMES, Apr. 28, 2001, at A4 (describing how an Alabama-based private military company was responsible for the killing of civilians in Peru and characterizing the outrage of a government official who took note that the privateers were not operating under the Constitution, but rather "were just businessmen"); Singer, *supra* note 83, at 537 (noting that contractors cannot be disciplined under the UCMJ).

Under the 2000 Military Extraterritorial Jurisdiction Act, 18 U.S.C. §§ 3261–67 (2000), Congress attempted to hold contractors criminally liable for acts committed in violation of the U.S. Code on foreign soil. *See* Guillory, *supra* note 47. However, the law is limited in its coverage and applies only to civilian contractors working for the Defense Department on U.S. military facilities. It does not, however, expand the substantive scope of criminal liability (and thus does not attempt to extend the UCMJ in toto to contractors). *See* Joseph R. Perlak, *The Military Extraterritorial Jurisdiction Act of 2000: Implications for Contractor Personnel*, 169 MIL. L. REV. 92, 95–101 (2001); Singer, *supra* note 83, at 537–46. To make the UCMJ too comprehensive and too broad in its applicability to contractors, could pose constitutional questions regarding Congress's ability to regulate non-military personnel. *See infra* notes 312, 339, 444–45.

But see Vanessa Blum, *DoD's New War Zone Rules for Contractors*, LEGAL TIMES, Apr. 19, 2004, at 1. Blum notes that the Pentagon has proposed rules to place greater liability on contractors and also to permit military commanders to alter government contracts in the field, thus "reduc[ing] red tape for companies working under increasingly dangerous conditions." *Id*. The increased level of corporate liability may, however, make it more likely that contractors, knowing the government may not cover losses, will flee rather than suffer personal injury as well as damage to sensitive equipment. Moreover, giving military commanders authority to alter contracts opens the door for even less civilian control and legal oversight of military privateers.

310. *See supra* notes 305–07 and accompanying text. Likewise, as noted above, see *supra* note 308, since many are former members of the U.S. Armed Forces, they may very well have been instilled with the same esprit de corps. Yet because they no longer face the same rigid discipline and command structure and are no longer embedded in a separate community of soldiers, it is uncertain what degree of commitment and self-sacrifice exists among contractors.

311. *See* Metzger, *supra* note 39, at 1462 (noting that permitting a private actor to carry out tasks "on behalf of government is what makes . . . private delegations particularly threatening to the principle of constitutionally-constrained government" and suggesting that when private actors "effectively step[] into the government's shoes in its dealings with third parties, private entities are more likely to have access to powers that are distinctly governmental"); *see also* DiIulio, *supra* note 6, at 155–57 (contending that in the context of prison management, the profit motive is incompatible with

so differently than, say, civil servants working in the Department of Veterans Affairs? If American servicemen and women could be trusted to do their job as effectively *without the UCMJ*, then the entire legal and cultural architecture of the "separate community" would be largely unnecessary. The fact, however, that the separate community is so important to maintaining order and ensuring fidelity gives us a sense of why merely tightening contractual obligations and increasing contractor oversight might be all that would be needed when the government outsources commercial responsibilities at Veterans Affairs, but that those measures may not be enough when it comes to privatizing military functions.

Indeed, constitutionally speaking, it is at least questionable whether contractual penalties for violating many of the terms of a private military agreement can rise to the threat-level of an impending court-martial.[312] Thus, given, for example, the Court's historical jurisprudence invalidating laws that criminalize the mere breaking of private employment contracts, one might suppose that there would be some resistance to penalizing contractors as if they were U.S. soldiers (for all sorts of small infractions).[313]

Since private agents are not controlled and disciplined by their governmental principals to the extent Congress requires and the Supreme Court allows for U.S. soldiers within the chain-of-command, it would seem inappropriate to delegate to private actors crucial military

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the types of non-economic services being administered); Michaels, *supra* note 6.

312. Indeed, in the wake of the horrific sex-slave scandals perpetrated by DynCorp officials in Bosnia, no employees—save the whistleblowers—were fired. *See* Singer, *supra* note 83, at 525, 538; Jennifer Murray, Note, *Who Will Police the Peace-Builders?*, 34 COLUM. HUMAN RIGHTS L. REV. 475, 505–06 (2003) (noting the dismissal of a DynCorp employee for disclosing evidence that her colleagues were involved in sex-trafficking practices); Antony Barnett & Solomon Hughes, *British Firm Accused in U.N. "Sex Scandal*," THE OBSERVER (London), July 29, 2001, at 4.

313. Courts historically have been reluctant to support statutory or private schemes whereby satisfactory performance of contracts can be enforced by threat of imprisonment. *See* Bailey v. Alabama, 219 U.S. 219, 243 (1911); Karen Gross, *The Debtor as Modern Day Peon: A Problem of Unconstitutional Conditions*, 65 NOTRE DAME L. REV. 165, 181 (1990); Anthony Kronman, *Specific Performance*, 45 U. CHI. L. REV. 351 (1978). For discussions of courts refusing to endorse any contractual schemes under which failure to meet the terms are grounds for imprisonment, see BERNARD SCHWARTZ, STATUTORY HISTORY OF THE UNITED STATES: CIVIL RIGHTS, PART I, at 159–72 (1970); 2 BERNARD SCHWARTZ, A COMMENTARY ON THE CONSTITUTION OF THE UNITED STATES: RIGHTS OF THE PERSON 801–07 (1968); 2 EMERSON, HABER, & DORSEN, POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES 517–20 (Norman Dorsen et al. eds., 4th ed. 1979); Benno C. Schmidt, Jr., *Principle and Prejudice: The Supreme Court and Race in the Progressive Era. Part 2: The Peonage Cases*, 82 COLUM. L. REV. 646 (1982). It may be more likely that Congress would be permitted to legislate directly to criminalize certain affirmative *actions* that happen to correspond with contractual breaches (such as desertion *qua* breach of military contract), but it is beyond the scope of this Article to try to resolve that question.

responsibilities, which require not only the careful exercise of life-and-death discretion, but also the internalization of civilian-military protocols regarding fidelity to officers' orders. In short, contractors are not necessarily appropriately situated within the delicately woven legal and constitutional fabric that both endows the military with authority to serve as an effective fighting force and, at the same time, severely curtails soldiers' freedom to deviate in any way from their explicit charge.[314]

a. Potential Strategic Liability

First, privateers may at times prove ineffective, if not harmful. As already suggested, they are bound principally by contractual obligations to complete their missions—not by the command structure of the UCMJ nor, probably, by the ethos of honor and self-sacrifice cultivated within military units. Legal threats of punishment, or emotional appeals to fraternity or patriotism may not work to compel contractors to remain in harm's way and accomplish their assigned tasks. Though these contractors may even be decorated veterans and steadfast patriots, no threats of courts-martial or fears that they will be harshly disciplined as deserters enter into their minds and oblige them to complete the assignments.[315] As Bianco and Forest observe:

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314. The harms associated with introducing privateers into combat situations are not simply on the order of accountability—that contractors might distort missions on the margins. Rather, the Armed Forces have been regulated "separately" precisely to ensure absolute and effective discipline over its members in ways that have no civilian analogues for public actors such as prison guards or welfare caseworkers serving in any other (domestic) capacity. Without the framework of military discipline, privateers may not be trusted with military orders. The same cannot be said about prison guards who, for argument's sake, may or may not be construed to be state actors. *See* Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 72–73 (2001); Richardson v. McKnight, 521 U.S. 399, 413 (1997). Private guards can disobey orders to the same extent as state guards, and vice versa. Both sets of guards would be subject to dismissal and possibly monetary liability. But in the military context, a soldier who disobeys an order could go to jail—whereas a contractor, most likely, is just sent home. In other words, the status differentials between soldiers and contractors (or any other civilians for that matter) *define* the very nature of the U.S. Armed Services—and this *constitutionally* separate community is organized precisely to control and discipline its members in ways far more restrictive than that allowable in the realm of civilian law. *See supra* notes 296, 308–09.

315. As Singer notes:

> One essential difference between exit by private employees and by those in public institutions is that leaving a PMF post is not desertion—punishable by prosecution and even death, but merely the breaking of a contract with limited enforceability. The simple matter is that no equivalent enforcement exists for PMFs to prevent desertion by their employees.

SINGER, *supra* note 20, at 159; *see also id.* (noting that an entire firm or a select set of employees may break agreements with client governments if matters become unexpectedly dangerous, with the only repercussion being economic); Turner & Norton, *supra* note 42, at 38–41; Ariel Hart, *Solider Who Refused To Return Is Found Guilty*, N.Y. TIMES, May 22, 2004, at A10 (describing the prosecution of a soldier who refused to deploy to Iraq).

> As civilians, contract employees are not subject to military command and discipline. Workers who refuse an assignment can be fired by their employers but not tossed into the brig. The Pentagon's only recourse is to sue—no comfort at all to a commander in the field who has been left in the lurch by vanished contractors.[316]

Immune from the harsh measures of military justice intended to ensure no soldier will prioritize self-preservation over the good of the mission, it is more likely that key contractors, engaged in surveillance flights, responsible for caravanning necessary materiel to the frontlines, or defending key American installations in hostile territory, will simply shirk their duties.[317] Moreover, among contractors there may not be the same psycho-social urgency to display true honor as a selfless contributor in the military effort.[318]

The Pentagon is not unaware of the fact that when contractors are deployed, there is a greater likelihood of desertions and refusals to obey orders.[319] As early as 1976, when tensions flared up on the Korean

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316. Bianco & Forest, *supra* note 30, at 72; *see* 2000 Military Extraterritorial Jurisdiction Act, 18 U.S.C. §§ 3261–67 (2000); Gibson, *supra* note 44; Glenn R. Schmitt, *Closing the Gap in Criminal Jurisdiction Over Civilians Accompanying the Armed Forces Abroad*, 51 CATH. U. L. REV. 55 (2001); Turner & Norton, *supra* note 42, at 21 ("The degree of authority a commander holds over these civilians is significantly different than that held over combatants. Commanders are accustomed to issuing orders and having unity of command over their assigned and attached personnel."); Wayne, *supra* note 2 (describing how a commander cannot give orders to a contractor with the same authority he can to a soldier); *see also* Andrew M. Ferris, *Military Justice: Removing the Probability of Unfairness*, 63 U. CIN. L. REV. 439, 446 (1994) (describing how, in attempting to combat desertion during the Revolutionary War, General George Washington ordered public execution of deserters with mandatory attendance by the members of the condemned soldier's unit). *See generally* Maj. Gen. Jack Rives & Maj. Steven J. Ehlenbeck, *Civilian Versus Military Justice in the United States: A Comparative Analysis*, 52 A.F. L. REV. 213 (2002) (focusing on criminal remedies).

317. As I have repeatedly tried to remind readers, the differences are of degree, not kind. American military personnel have too been accused of desertions and of failing to report for duty. But in those situations, they are exposed to criminal punishments. *See, e.g.*, *Army Says It Will Punish Convoy Officers*, N.Y. TIMES, Oct. 21, 2004, at A10 (noting that a number of soldiers will be prosecuted as a result of the convoy incident); Banerjee & Hart, *supra* note 96 (noting the detention of eighteen reservists for refusing to go on a convoy mission in Iraq); James Dao, *Soldier Who Seized Car in Iraq Is Convicted of Armed Robbery*, N.Y. TIMES, July 30, 2004, at A9; Ricks, *Probe*, *supra* note 96 (describing how members of a South Carolina National guard unit were detained for going AWOL to see their families on the night before they shipped out to Iraq); *see also* Eric Schmitt, *Its Recruitment Goals Pressing, the Army Will Ease Some Standards*, N.Y. TIMES, Oct. 1, 2004, at A24 (describing the criminal charges filed against former soldiers who failed to mobilize when called up as members of the Individual Ready Reserve).

318. *See, e.g.*, Osiel, *supra* note 291, at 952–55; *see also* MOCKLER, *supra* note 23 (noting that private contractors are often more likely to flee a dangerous situation and ignore orders/requests to stay by military colleagues); Barry McCaffrey, *Role of the Armed Forces in the Protection and Promotion of Human Rights*, 149 MIL. L. REV. 229, 236–37 (1995) (emphasizing the moral and legal training given to military officers to promote ethical practices and to deter human rights abuses).

319. SINGER, *supra* note 20, at 161 (noting that "military commanders cannot assume that PMF

peninsula, a number of Defense Department civilian and contract personnel (rendering commercial services) made a mass exodus. Military officers could not "order" the contractors to stay and, as a result, their absence—to the extent their services were missed—compromised American and South Korean interests.[320] More recently, the Pentagon commissioned a study that found commercial contractors might have fled the Persian Gulf theater during the first war against Iraq, were gunfire to have intensified or were Saddam Hussein to have unleashed chemical or biological weapons.[321]

With this historical sensitivity to civilian desertions in mind, it seems somewhat reckless for the current Administration to have leveraged the battlefield and the post-war occupation with private contractors in Iraq—especially since this invasion was largely predicated on the U.S. government's conviction that Saddam had (and was prepared to use) Weapons of Mass Destruction.[322] As Colonel Steven Zamparelli has argued:

> If death becomes a real threat, there is no doubt that some contractors will exercise their legal rights to get out of the theater. Not so many years ago, that may have simply meant no hot food or reduced morale and welfare activity. Today, it could mean the only people a field commander has to accomplish a critical "core

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personnel will stay on the battlefield, or even in the theater").

320. *See id*. at 139–40 (describing the mass civilian support staff exodus from the Korean peninsula when tensions flared); *see also* Eric A. Orsini & Lt. Col. Gary T. Bublitz, *Contractors on the Battlefield: Risks on the Road Ahead?*, ARMY LOGISTICIAN, Jan./Feb. 1999, at 130–32; Turner & Norton, *supra* note 42, at 40. For historical precedents, see SINGER, *supra* note 20, at 162. *See also* Lou Marano, Editorial, *The Perils of Privatization; In a Crunch, Soldiers Can't Count on Civilian Help*, WASH POST. May 27, 1997, at A15. Marano raises concerns that the contractors supporting American soldiers in the Balkans could abandon their responsibilities were their lives endangered. *Id.*

321. *See* Guillory, *supra* note 47, at 140–41; *see also* SINGER, *supra* note 20, at 161 (noting the distinct likelihood of civilian fleeing if threatened with weapons of mass destruction such as chemical or biological agents); Turner & Norton, *supra* note 42, at 40 (describing how "[d]uring Operation Desert Storm, food support contractor employees refused to perform until they were provided with chemical attack protective equipment").

322. *See* Bianco & Forest, *supra* note 30, at 70 (noting that some military contractors have "refused to deploy to particularly dangerous parts of Iraq [and, as a result,] that soldiers had to go without fresh food, showers, and toilets for months"); *see also President's Address to the Nation on Iraq*, 39 WEEKLY COMP. PRES. DOC. 329 (Mar. 24, 2003) (emphasizing the fact that Saddam was stockpiling and ready to use Weapons of Mass Destruction); Henry J. Hyde, Editorial, *Delivering Ourselves from Evil; Bush Is Laying the Foundation for a Comprehensive Root-and-Branch Approach to the Mortal Danger of the Proliferation of Weapons of Mass Destruction*, CHI. TRIB., Feb. 20, 2004, at C25 ("[E]very [U.S.] intelligence agency—along with the United Nations . . . believed that the Iraqi regime possessed weapons of mass destruction prior to last year's invasion. . . .").

> competency" task such as weapons-system maintenance . . . have left and gone home.[323]

Recently, contractors in Iraq have been put to the test and, by and large, have comported themselves quite admirably. Employees of Blackwater were besieged by insurgents and nevertheless ably defended an American installation without the assistance of U.S. troops.[324] Obviously individuals who agree to serve as privateers in conflict zones are aware of the dangers, and companies and their employees who want to be repeat players have every incentive to exhibit that type of responsible, even heroic performance. Yet, on the aggregate, the possibility of desertions, acts of defiance, or reluctance to put one's life on the line is likely to be greater when individuals outside the special confines of the military community are delegated combat responsibilities.[325]

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323. Yeoman, *supra* note 4, at 93; *see also* SINGER, *supra* note 20, at 162–63 (noting that at times military personnel, including cooks and secretaries, serving in rear support positions have been summoned to the frontlines to provide combat assistance such as during the Battle of the Bulge and, more recently, in Mogadishu).

324. *See supra* note 104 and accompanying text.

325. The fact that many of the contractors served in the U.S. military and were trained and inculcated within the command structures of the U.S. military narrows the values-integrity gap. Yet, it is unclear whether privateers, no longer enticed with the carrots associated with being a good soldier (such as receiving promotions and medals) and no longer disciplined by the sticks (of, say, a court-martial) that work to constrain the behavior of regular troops, embrace the same ethos of honor. Moreover, military firms may be unconcerned with promoting that ethos or even fostering an esprit de corps. *Cf.* SINGER, *supra* note 20, at 153–58 (noting DynCorp's routine use of unqualified individuals for peacekeeping in Kosovo and for aircraft maintenance throughout the world). There may also be reasons why a firm would not want to encourage its agents to identify too closely with its sponsor nation, whether that nation be the United States or Equatorial Guinea, for fears of the contractors internalizing objectives outside the scope of the corporate enterprise.

Additionally, perhaps concerns about meshing private and U.S. troops take on heightened importance as we consider the possibility of "friendly fire" risks. An issue during the first Gulf War, see, for example, Eric Schmitt, *U.S. Striving To Prevent "Friendly Fire,"* N.Y. TIMES, Dec. 9, 1991, at A12, perhaps it will become an issue once again in light of the much-publicized death of former football star Pat Tillman. *See* Roland Watson, *All-American Icon Was Shot Dead in Blunder by Own Platoon*, TIMES (London), May 31, 2004, at 11. Certainly, one might speculate that privateers and soldiers working with different equipment and acting pursuant to different sets of command structures may increase the likelihood of a tragic mistake occurring on the field of combat. *See, e.g.*, Priest & Flaherty, *supra* note 4 (characterizing how difficult it has been for private military firms to communicate with the American military, as well as with other firms, in Iraq); *see also* Fay Report, *supra* note 107 (noting how some of the problems at Abu Ghraib were exacerbated by poor communication between the contractors and the soldiers); Taguba Report, *supra* note 106 (same).

Moreover, international law's inhospitable treatment of armed civilians makes contractors, oftentimes, unlikely to carry weaponry. To do otherwise may place them in an "unprotected" status if captured as a prisoner of war. *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 47, *reprinted in* THE LAWS OF ARMED CONFLICTS 649 (Dietrich Schindler & Jiri Toman eds., 3d ed. 1988) (entered into force Dec. 7, 1978). Article 47 of Protocol I of the Geneva Conventions of 12 August 1949 "removed the protection of combatant of prisoner of war status from mercenaries." David Kassebaum, Note, *A*

b. Perceived Strategic Liability/Morale Problem

Moreover, even if the contractors do not appreciably undermine a campaign, regular U.S. troops' misgivings may not subside—and for a justifiable reason: there's always the threat that the contractors will walk out during the next siege. For the reason expressed above, the mere belief that contractors may flee is enough to introduce uncertainty and distrust among the U.S. troops—which is probably already high given the host of other existing morale problems currently plaguing the service ranks.[326] And, the soldiers' insecurity and their misgivings about privateers must be treated seriously; the military goes to such extensive lengths to engender the appropriate level of cohesion, discipline, and camaraderie[327] that it seems inexplicable why the Pentagon would sacrifice those goals in the name of outsourcing.[328]

Parenthetically speaking, there is, of course, a real irony here regarding military morale. For years, while the Pentagon has been consumed with the fear that the presence of gay soldiers might destroy morale,[329] perhaps it has failed to consider the negative ramifications of engaging non-U.S.

Question of Facts—The Legal Use of Private Security Firms in Bosnia, 38 COLUM. J. TRANSNAT'L L. 581, 589 (2000); *see also id.* at 589 n.50; Thomas K. Adams, *The New Merceneries and the Privatization of Conflict*, PARAMETERS, Summer 1999, at 103; Wayne, *supra* note 2. Consequently, if besieged, they may prove unable to defend themselves; thus, their presence on the battlefield places an additional burden on the regular troops to safeguard them while still attending to their own functions. Bianco & Forest, *supra* note 30, at 70 (noting that contractors often depend on "their military customers for protection in combat zones").

326. Neela Banerjee & John Kifner, *Along with Prayers, Families Send Armor*, N.Y. TIMES, Oct. 30, 2004, at A1; Davey, *supra* note 206; Bob Herbert, Editorial, *War on the Cheap*, N.Y. TIMES, Dec. 20, 2004, at A29; Hockstader, *supra* note 206; Ricks, *supra* note 206; *see also* Editorial, *Ill-Serving Those Who Serve*, N.Y. TIMES, July 6, 2004, at A18; Thom Shanker, *Military Plans to Call Up Soldiers Who Left Service*, N.Y. TIMES, June 30, 2004, at A10.

327. *See, e.g.*, STEPHEN PETER ROSEN, SOCIETIES AND MILITARY POWER 268 (1996) (noting how the U.S. military takes steps to keep its soldiers separate from the civilian society at large).

328. *See* Bruce D. Grant, *U.S. Military Expertise for Sale: Private Military Consults as a Tool of Foreign Policy*, *in* ESSAYS 1998, at 89, 91 (National Defense University Press 1998), *available at* http://www.ndu.edu/inss/books/books%20-%201998/Essays1998/ESSAY98.pdf (last visited Dec. 9, 2004) (noting that military privatization has a corrupting effect on the U.S. military and creates a dispirited army). Introducing money differentials and separate housing installations may further contribute to a sense of alienation and breakdown in morale. Bianco & Forest, *supra* note 30, at 71, 72, 78 (noting that members of the military have expressed doubts whether contractors would possess the loyalty to support frontline soldiers in times of crisis).

329. *See, e.g.*, PRIEST, *supra* note 47, at 44 (noting that the joint chiefs, including Chairman Colin Powell, would have resigned if President Clinton "pursued his campaign promise to allow gays to serve openly in the armed forces"); David Hackworth, Editorial, *The Case for a Military Gay Ban*, WASH. POST, Jun. 28, 1992, at C4; Tom Morganthau, *Gays and the Military*, NEWSWEEK, Feb. 1, 1993, at 52. *But see* Nathaniel Frank, Editorial, *Why We Need Gays in the Military*, N.Y. TIMES, Nov. 28, 2003, at A43 (indicating the ban on gay soldiers is counterproductive, harms morale, and undermines national security).

military personnel in essential positions alongside regular troops when those private actors have not labored through basic training nor spent years drilling and dwelling with their military counterparts.[330] Soldiers are aware that not only do privateers often get compensated at a higher rate, but that they also can leave if the fighting gets too intense—hardly factors working in favor of community-building.[331]

An additional cause of concern from a morale and confidence-damaging perspective is the possibility that privateers will comport themselves in an unbecoming manner. Unhinged from the narrative of military honor, privateers may never have internalized the ethos of honor and dignity that is inculcated in American GIs.[332] (And, even if the contractors are themselves veterans, that esprit may have long since diminished and been superseded by the mores of the marketplace.) As one recent observer of DynCorp's behavior in Kabul noted, "[c]ontractors do not live by the same constraints as active-duty soldiers . . . . [T]heir blurring of the military-civilian line serves as a reminder that military discipline not only keeps up morale, but encourages moral behavior."[333] American soldiers today (though admittedly not all model citizen-soldiers themselves) are taught the lessons of, for example, the My Lai massacre, and are told that those who helped stop the bloodshed were given medals; but that those who orchestrated it (and even those who just followed

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330. Jeffrey W. Anderson, *Military Heroism: An Occupational Definition*, 12 ARMED FORCES & SOC'Y 591 (1986); Karst, *supra* note 286, at 573 (focusing on the extent to which bonding and camaraderie in military units engenders acts of heroism and self-sacrifice); Osiel, *supra* note 291, at 1053–55 (commenting on how the cohesive bonds of military communities help prepare soldiers for the difficulties of battle and fortify their courage so as not to disappoint their colleagues); *see also* CRAIG M. CAMERON, AMERICAN SAMURAI 192 (1994) (noting that small military units foster a shared sense of purpose that helps individuals perform well under intense duress).

331. Singer, *supra* note 83, at 536–37; *The Baghdad Boom*, *supra* note 103 ("[T]he rising profitability of private sector [military] work is tempting unprecedented numbers of [Britain's elite soldiers] to leave."); Dao, *supra* note 4 (noting that private military firms "are offering yearly salaries ranging from $100,000 to nearly $200,000 to entice senior military Special Operations forces to switch careers. Assignments are paying from a few hundred dollars to as much as $1,000 a day"); Eric Schmitt & Thom Shanker, *Big Pay Luring Military's Elite To Private Jobs*, N.Y. TIMES, Mar. 30, 2004, at A1.

332. *See* Addicott & Hudson, *supra* note 245, at 154 ("[T]he American military has an incredible reservoir of noble and fantastic figures to draw from—men whose military proficiency and ethical conduct in combat have maintained an impeccable American reputation for both battlefield excellence and strict adherence to the laws regulating warfare."); Osiel, *supra* note 291, at 955–56 (describing the military's efforts to instill an ethos of honor and dignity in its soldiers); *see also* David L. Englin, *Troop Movement*, NEW REPUBLIC, Aug. 18, 2004, *available at* http://www.tnr.com/doc.mhtml?i=express&s=englin081804 (last visited Dec. 12, 2004) (describing how the U.S. military's "[m]andatory briefings, military public service announcements, and admonishments from commanders and teachers [serve] constantly [to] remind [soldiers and their families] that they are ambassadors of all things American").

333. Craig S. Smith, *The Intimidating Face of America*, N.Y. TIMES, Oct. 13, 2004, at A4.

orders), were court-martialed.[334] Situating soldiers in a storied tradition of honor may not eradicate all instances of criminal or excessively brutal behavior, but that educational process may inform the soldiers of the institutional condemnation that will be affixed to any such transgressions.[335] It should not therefore be surprising that privateers, though hardly alone, were nevertheless at the center of the Abu Ghraib scandal in Iraq—involving the brutal torturing of Iraqi civilian prisoners—not just as participants, but as supervisors.[336] Whereas courts-martial quickly followed for the U.S. soldiers involved,[337] thus signaling (albeit belatedly) the government's intolerance toward such behavior,[338] it was reported that even after the news of the scandal broke and courts-martial

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334. *See* WALTER E. BOOMER ET AL., FACING MY LAI: MOVING BEYOND THE MASSACRE 153 (David L. Anderson ed., 1998) (describing the U.S. military's use of moral teachings gleaned from failures in Vietnam); Addicott & Hudson, *supra* note 245, at 154.

> [T]he United States military can take full credit for its commendable record in adhering to the law of war largely because of its commitment to institutionalizing the lessons learned from My Lai. Accordingly, every American soldier must understand the significance of the My Lai massacre and steadfastly must keep it in the forefront of his or her conscious.

Id. at 160–61 (describing the government's attempt to punish such transgressions by way of military investigations and courts-martial); McCaffrey, *supra* note 318, at 232 (emphasizing the important lessons inculcated in soldiers to prevent any reoccurrences of human rights violations such as occurred in My Lai); Steve Sheppard, *Passion and Nation: War, Crime, and Guilt in the Individual and Collective*, 78 NOTRE DAME L. REV. 751, 779 (2003) (noting that "the only saving grace from this sordid passage [in My Lai] is that the U.S. military . . . established training regimes to enhance compliance with the laws of land warfare"); *see also* Colin Powell, *The Day We Stopped the War*, NEWSWEEK, Jan 20, 1992, at 18 (suggesting that it would be "un-American and unchivalrous" to attack retreating Iraqis during the first Gulf War).

335. *See, e.g.*, Peter Singer, Editorial, *Beyond the Law: The Abuse of Iraqi Prisoners by US Personnel Shows that Outsourcing Military Jobs Has Gone Too Far*, GUARDIAN (London), May 3, 2004, at 16 ("We're appalled [by the prison abuse scandals]. These are our fellow soldiers . . . they wear the same uniform as us . . . these acts may reflect the actions of individuals but, by God, it doesn't reflect my army.") (quoting Brigadier General Mark Kimmit); *see also* Addicott & Hudson, *supra* note 245, at 180 (noting that "civilized societies will not provide the necessary homefront support for an army that it perceives to be acting in violation of the law of war"); Cox, *supra* note 298, at 10–11 (noting that during World War II, over two million courts-martial were commenced, indicating the importance of the UCMJ in regulating military behavioral patterns).

336. *See supra* note 109 and accompanying text.

337. *See, e.g.*, Tom Bowman, *Soldier Guilty in Iraq Abuses*, BALT. SUN, Oct. 21, 2004, at 1A; Dexter Filkins, *G.I. Pleads Guilty in Court-Martial for Iraqis' Abuse*, N.Y. TIMES, May 20, 2004, at A1; Thom Shanker & Dexter Filkins, *Army Punishes 7 with Reprimands for Prison Abuse*, N.Y. TIMES, May 7, 2004, at A1; Jackie Spinner, *MP Gets 8 Years for Iraq Abuse*, WASH. POST, Oct. 22, 2004, at A20; *see also* Hendren & Mazzetti, *supra* note 22 (noting the ease with which soldiers can be punished relative to contractors).

338. *See* Fay Report, *supra* note 107; Schlesinger Report, *supra* note 108; Taguba Report, *supra* note 106; *see also* Ann Scott Tyson, *US Military in Afghanistan Overhauls Prison Procedures*, CHRISTIAN SCI. MONITOR, June 23, 2004, at 7 (noting the number of official reports generated and suggesting that the "commanders' willingness to exercise their prerogative to undertake investigations demonstrates how seriously they take any hint of wrongdoing").

were being convened, the contractors were still on the job,[339] just as was the case with those DynCorp employees who ran a sex-slave operation in Bosnia.[340] In the wake of that travesty in the Balkans, the only prophylactic measure taken by the company was to insist that each employee sign a statement saying she understands "human trafficking and prostitution are 'immoral, unethical, and strongly prohibited.'"[341] Recall, too, that DynCorp summarily fired rather than rewarded the whistleblower in that case.[342] Since misdeeds like what happened at Abu Ghraib redound through the regular ranks of the military and lead to disillusionment and demoralization,[343] the government, at least by staging investigations and courts-martial, can at least try to embrace a zero-tolerance policy and hope to rebuild confidence among the rank and file and offer credible reassurances to Iraqis and the global community that such behavior is not condoned.[344]

c. Perverse Incentives To Prolong/Expand War

An additional harm, which I discuss even though it may seem to be simply a conventional *accountability* concern, is the possibility that the incentive differential between soldiers and contractors could lead to

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339. *See* Editorial, *Abuse by Outsourcing*, WASH. POST, May 26, 2004, at A26 (noting how much quicker the Pentagon could act to prosecute the accused soldiers at Abu Ghraib than it could work to dismiss the private contractors); Avant, *supra* note 109; Joel Brinkley & James Glanz, *Contract Workers Implicated in February Army Report on Prison Abuse Remain on the Job*, N.Y. TIMES, May 4, 2004, at A6; Farah Stockman, *Civilians ID'd in Abuse May Face No Charges*, BOSTON GLOBE, May, 4, 2004, at A1; *see also* Adam Liptak, *Who Would Try Civilians From U.S.? No One in Iraq*, N.Y. TIMES, May 26, 2004, at A11 (characterizing how difficult it would be to prosecute civilian contractors for even the most flagrant of violations overseas).

340. *See supra* note 83 and accompanying text.

341. Singer, *supra* note 83, at 538; *see also* Crewdson, *supra* note 83.

342. *See supra* note 312 and accompanying text.

343. *See, e.g.*, Addicott & Hudson, *supra* note 245, at 180–81 (characterizing how easily a few transgressions threaten the confidence and assuredness of the entire military forces); *see also* Sherri Day, *Near Reservists' Base, Disappointment at Accusations of Abuse*, N.Y. TIMES, May 3, 2004, at A11.

344. *See* Thomas L. Friedman, Editorial, *Restoring Our Honor*, N.Y. TIMES, May 6, 2004, at A35 (noting that the Bush administration must take decisive steps to regain the trust and confidence of the world community); Paul Krugman, Editorial, *America's Lost Respect*, N.Y. TIMES, Oct. 1, 2004, at A27 ("[B]oth the revelations and the cover-up [in Abu Ghraib] did terrible damage to America's . . . authority. To much of the world, America looks like a place where top officials condone and possibly order the torture of innocent people, and suffer no consequences."); Editorial, *The Roots of Abu Ghraib*, N.Y. TIMES, June 9, 2004, at A22 (blaming civilian leaders in Washington for the prisoner-abuse scandal); Thom Shanker, *At Iraqi Prison, Rumsfeld Vows To Punish Abuse*, N.Y. TIMES, May 14, 2004, at A1; *cf.* Dao, *supra* note 317 (characterizing the court-martial of a soldier allegedly ordered to commandeer a car as designed to "send[] a message to both American troops and Iraqi authorities that [the military] will not tolerate soldiers who violate the rights of Iraqi civilians").

mission distortions. Such an incentive differential (and the corresponding threat of policy distortions) is common, of course, in any number of other policy domains in which privatization has been introduced.[345] Money after all is the reason contractors show up, and monetary considerations may skew the aims of the mission.[346] Whereas presumably many regular soldiers would gladly forgo their "danger pay" to be stateside with their families and out of harm's way, contractors' livelihoods depend on the continuation—if not exacerbation—of conflict. Indeed, it is reported that military contractors have referred to the current administration's reliance on military outsourcing as the "Iraq Gold Mine"[347] and have likewise mused (quite presciently) that the fallout from September 11 would prove to be a privateer's windfall.[348]

Outfits paid a per diem may prefer to prolong the engagement, perhaps not working as swiftly or efficiently as they otherwise should.[349] There have, for instance, been allegations that Halliburton has run additional *but*

345. Although the tangible harms may manifest themselves in ways similar to what we expect (and observe) in more conventional privatization realms, underlying those harms in the military context are deeper, structural concerns that are qualitatively unlike those found in domestic domains. Again, this point turns on an appreciation of the constitutional distinctiveness of the military community—and of how the legitimacy of the military in good part depends on its unique status in the larger American legal and social order. Accordingly, whereas profit motives may equally distort the incentives of private sanitation workers as well as military privateers, only in the latter case do those distortions threaten to undermine the entire architecture of civil-military relations.

346. *Report on the Question of the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, U.N. ESCOR, 50th Sess., Agenda Item 9, at 15, U.N. Doc. E/CN.4/1994/23 (1994) (noting that financial considerations may motivate paid combatants to prolong the war); Paul W. Mourning, *Leashing the Dogs of War: Outlawing the Recruitment and Use of Mercenaries*, 22 VA. J. INT'L L. 589 (1982); Sapone, *supra* note 50, at 4 ("[B]ecause the business of mercenaries is war, they have no incentive to encourage the peaceful resolution of the conflict.").

347. *See The Baghdad Boom*, *supra* note 103 (describing the upsurge in demand for privatized military services since the outbreak of conflict in Iraq); Singer, *supra* note 28.

348. *See* SINGER, *supra* note 20, at 232 (noting how privateers have viewed the events of September 11 as both increasing demand for their services and increasing the public's willingness to accept contractors undertaking national security responsibilities).

349. *See id.* at 157 (noting how contractors tasked with clearing minefields are likely to ignore rural roads that involve greater danger, expense, and effort); Grant, *supra* note 328 (suggesting that military privatization has a corrupting effect on the U.S. military and creates a dispirited army). Moreover, as Professor Howe describes, soldier-of-fortune "[p]ilots for Nigeria during the Civil War (1967–1970) deliberately failed to bomb Biafra's single airport: since their salaries were based on months and not results, their prolongation of the war procured financial gain." Howe, *supra* note 44, at 4. Of course, this moral hazard exists in any contractual relationship—but usually does not take on a life-and-death gravity.

There also may be an impulse toward self-preservation at play: in the late 1990s, when the Ethiopians hired a Russian firm to conduct aerial offensives in its war with Eritrea, the fighters would bomb civilian targets, but would studiously avoid engaging the Eritrean air force in combat. *See* SINGER, *supra* note 20, at 158.

unnecessary supply convoys through Iraq because it gets paid by the trip.[350] If true, this wasteful practice not only endangers the lives of Halliburton employees, but also U.S. troops, who may be dragged into the fray were an insurgent attack to occur. Hence, just as in other privatization contexts where monitoring is difficult or costly, private military contractors may deliberately take longer, say, to train and certify the competency of a domestic police force; or they may slow down their rate of coca-burning work to get paid for a few extra days or weeks.[351] Alternatively, instead of sitting on their hands, they may have the converse—but no more acceptable—agenda: to be as destructive as possible. In this scenario, there may be an impulse to level rather than preserve since oftentimes it is the same (or related) firms providing security services in a zone of conflict that are also key players in physical reconstruction.[352] A particularly devastated area may create the need for a government to issue contracts for road-building, public works projects, and security-training. As Enrique Bernales Ballesteros, a high-ranking official with the United Nations, has noted:

> Once a greater degree of security has been attained, the firm apparently begins to exploit the concessions it has received by setting up a number of associates and affiliates which engage in such varying activities as air transport, road building, and import and export, thereby acquiring a significant, if not hegemonic, presence in the economic life of the country in which it is operating.[353]

Again, this is not to say perverse incentives are unique to a military-contracting context. But because flying surveillance missions, destroying coca-fields, and providing security details abroad are not linear tasks that lend themselves to precise contractual regimentation and oversight, the agreements between the government and the firms must necessarily be somewhat open-ended;[354] recognizing the uncertainties of dangerous assignments and crediting the service providers with the ability to adapt

350. *See* Cooper, *supra* note 22.

351. *See* SINGER, *supra* note 20, at 151–57 (describing how particularly difficult it is to monitor contracts when the assignments are complex and standards of performance are not easily designed).

352. *See id*. at 158 (noting that a client's interests may be subordinated when the private firm has some commercial incentive to create more work for itself or for an affiliated private firm).

353. Enrique Bernales Ballesteros, UN Press Release 5 Nov. 1996, U.N. Doc. GA/SHC/3376 (1996); *see also* G.A. Res. 47/84 U.N. GAOR, 47th Sess., Supp. No. 84, at 165, U.N. Doc. A/47/84 (1992).

354. Blum, *supra* note 309 (characterizing proposals to make military contracting more open-ended by giving military commanders authority to change the terms of a military contract).

and change course when exigencies require doing so leaves the government vulnerable to more than economic abuses of the contractual relationship. (Among such non-economic concerns would be (1) the erosion of confidence among regular, U.S. soldiers, who do not trust the motives or reliability of self-interested contractors,[355] and (2) extra violence, if it is profitable but otherwise unnecessary to be more violent.)

B. Debunking the Normative Iconography of the Citizen-Soldier

The introduction of private contractors—and their attempted integration into the American fighting forces—may also create a gap, a breach in America's storied civic republican narrative such that now, perhaps, military service to the State will be even more disassociated with notions of citizenship than it already has begun to be in this era of an all-volunteer military; indeed, taking up arms will be viewed even more widely as yet another commercial relationship, not totally unlike catering or maintaining public grounds.[356]

Historically, Americans have looked to the moral authority of their country's foreign policy and based it, on no small part, on the willingness of its citizens to put down their ploughshares and fight (and die) for a cause. To disaggregate that connection and commodify the role of a soldier as for-profit contractor may further separate the bounty of citizenship from the obligations that membership entails. That is, at a time when that connection is already tenuous—due in part to the replacement of a universally conscripted military with one comprised of volunteers—further disassociation through the practice of contracting out may prove quite disruptive.

1. First Among Equals: Traditional Laurels for Citizen-Soldiers

Many believe that military service is inextricably linked to citizenship, and vice versa.[357] Accordingly, although this nation's conception of

355. *See* SAVAS, *supra* note 3 (suggesting that the more difficult a task is to define clearly and authoritatively, the more difficult it will be for there to be effective oversight); Trebilcock & Iacobucci, *supra* note 8, at 1444–45 (indicating that it is very difficult to design contracts that effectively constrain contractors' behavior when the assignments call for a broad delegation of responsibilities).

356. *See* Freeman, *supra* note 6, at 161.

357. *See, e.g.*, Selective Draft Law Cases, 245 U.S. 366, 367 (1918) ("[T]he very conception of a just government and its duty to the citizen includes the duty of the citizen to render military service in case of need and the right of the government to compel it."); MORRIS JANOWITZ, MILITARY CONFLICT 70–88 (1975) (characterizing military service as a constitutive right and duty of citizenship); Sebastian

service has changed over time, American soldiers and veterans have almost always enjoyed a preeminent status in our society. In a country of equals, founded on the rejection of titles, inherited or even merited,[358] U.S. military officers are, perhaps uniquely, addressed by their command ranks long after their tenure in the military ends—a testament to their esteem in the eyes of the State and its citizenry as well as to the value of those titles above all others. True patriots from generals like Washington[359] to grunts like Truman[360] have taken up arms when their country has needed their service. And, like the ancient Cincinnatus, they returned home to civilian life when the fighting was done.[361] This restraint, this willingness (if not eagerness) to beat their swords back into ploughshares and resume the business of ordinary living, has marked the American military as exceptional and amateurish in the noblest sense of that latter term.[362]

Thus, in many circles, to be an American citizen is to be an American solider.[363] Anything short of that demonstrated commitment to the safety

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De Grazia, *Political Equality and Military Participation*, 7 ARMED FORCES & SOC'Y 181, 185 (1981) ("The possessor of equal political rights, . . . the citizen, was in origin a soldier. . . ."); Karst, *supra* note 286, at 501 (noting the special, privileged place the Armed Forces occupy in the United States); Linda K. Kerber, "*A Constitutional Right To Be Treated Like . . . Ladies": Women, Civic Obligation and Military Service*, 1993 U. CHI. L. SCH. ROUNDTABLE 95, 119 (noting the ancient connection between arms-bearing military service and citizenship).

358. *See* U.S. CONST. art. I, § 9 ("No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any . . . Office, or Title, of any kind whatever, from any King, Prince, or foreign State.").

359. As Gordon Wood notes:

> George Washington, of course, was the perfect Cincinnatus, the Roman patriot who returned to his farm after his victories in war. . . . The greatest act of [Washington's] life, the one that gave him the greatest fame, was his resignation as commander in chief of the American forces. . . . Washington stunned the world when he surrendered his sword to the Congress on December 23, 1783, and retired to his farm at Mount Vernon.

GORDON S. WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION 205 (1991).

360. MCCULLOUGH, *supra* note 27, at 102–04, 142–43.

361. *See* John Withrop Hackett, *The Military in the Service of the State*, *in* WAR, MORALITY, AND THE MILITARY PROFESSION 107, 110 (Malham W. Wakin ed., 1979) (noting the ethos within democratic nations that the military exists to serve the state rather than for any other self-aggrandizing purpose); Clark, *supra* note 45 (describing the American military across generations as a citizen army that achieved victory and then "wanted to go home").

362. Indeed, unlike elsewhere across Europe as well as across the developing world, American soldiers have not used their military resources and popular appeal to seize control over the political institutions of government and stage a coup.

363. *See, e.g.*, LINDA KERBER, NO CONSTITUTIONAL RIGHT TO BE LADIES 236 (1998) (citing the toast proposed by John Jay's wife, Sarah: "May all our Citizens be Soldiers, and all our Soldiers Citizens."); J.G.A. POCOCK, THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION 544 (1975) (describing the American tradition of intimately connecting citizenship and military service); *see also* Philip Gold & Erin Solaro, Editorial, *PMCs in the Arsenal*, WASH. TIMES, Sept. 2, 2003, at A14 (noting strong historical link between citizenship and participation in the national defense).

and security of the Republic relegates one to a lower rung of society,[364] especially if one is an able-bodied male who intentionally avoided military service.[365] Among other reasons, it is the reality of this socio-political hierarchy in America that makes the Pentagon's refusal to permit gays into the military and to permit women into combat (not to mention a bitter history of discrimination against blacks) particularly painful and debilitating to those excluded.[366]

I do not want to overstate this point as "soldier-worship," especially in the post-Vietnam climate, when military service has lost some of its imperative and much of its status as an intuitive obligation of citizenship.[367] But, throughout the longer history of this country (and perhaps increasingly again today[368]), it is undeniable that the military "man"—be he a patriot-planter of the Eighteenth Century, a universal

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364. *See* RICHARD HOFSTADTER, ANTI-INTELLECTUALISM IN AMERICAN LIFE 194 (1963) (citing Theodore Roosevelt as suggesting the "good American" would possess the hardy virtues of a soldier: "the virile fighting qualities without which no nation . . . can ever amount to anything"); *id*. at 195–96 (indicating the principal demonstration of patriotism and heroism is through military service); KERBER, *supra* note 363.

365. *See* Dan Balz, *Citing His Vietnam Service, Kerry Assails Cheney, Rove*, WASH. POST, Apr. 17, 2004, at A4; Adam Nagourney & Jodi Wilgoren, *Kerry Questions Bush Attendance in Guard in 70's*, N.Y. TIMES, Apr. 27, 2004, at A3; Katharine Q. Seelye, *Cheney's Five Draft Deferments During the Vietnam Era Emerge as a Campaign Issue*, N.Y. TIMES, May 1, 2004, at A1; *see also* Michael Duffy, *How Well Did He Serve?*, TIME, Feb. 23, 2004, at 22 (describing the potential importance of President George W. Bush's military record in his reelection bid).

366. KERBER, *supra* note 363 (describing how women's lack of military experience disadvantages them in the workforce and more dramatically in their quests for elected office); William N. Eskridge, Jr., *The Relationship Between Obligations and Rights of Citizens*, 69 FORDHAM L. REV. 1721, 1744 (2001) ("[L]ike prior exclusions [by the U.S. Armed Forces] of women and people of color, the exclusion of GLB people in effect disrespects them as second-class citizens. All citizens should be able and obliged to serve and help defend this country."); Karst, *supra* note 286, at 500, 516–18, 525, 545–49 (noting the larger symbolic effects of excluding women, minorities, and homosexuals from full participation in the U.S. military); Wendy W. Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, 7 WOMEN'S RTS. L. REP. 175, 190 (1982) (noting how not giving women opportunities to be drafted and to serve in combat details deprives them of taking part in some of the principal responsibilities of citizenship); *see also* Mimi Kelber, *Combat in the Erroneous Zone*, NATION, July 25–Aug. 1, 1981, at 71 (describing a NOW legal brief that detailed how women's exclusion from the draft and combat duty "injures their self-perception, reinforces the stereotypes of women as weak" and also noting how failing to serve in the military diminishes women's social and economic standing in the United States).

367. *See, e.g.*, Dunlap, *supra* note 184, at 365–66 (noting that since Congress ended the draft, service is no longer considered to be a near-universal obligation); Mazur, *supra* note 307, at 606; Eliot A. Cohen, *After the Battle: A Defense Primer for the Next Century*, NEW REPUBLIC, Apr. 1991, at 19; *see also* Charles Moskos, *From Citizens' Army to Social Laboratory*, WILSON Q., Winter 1993, at 83, 86–87 (insisting that military service is no longer a rite of passage for American politicians).

368. *See, e.g.*, Mazur, *supra* note 307, at 569 (suggesting that as the military shifts toward being an all-volunteer outfit, Americans' admiration for it may actually grow); Pamela Paul, *Attitudes Toward the Military*, AM. DEMOGRAPHICS, Feb. 2002, LEXIS, News & Business, News; Robin Toner, *Trust in the Military Heightens Among Baby Boomers' Children*, N.Y. TIMES, May 27, 2003, at A1 (noting Americans' close symbolic and emotional connection to the military).

conscriptee in World War II or Korea, a draftee in Vietnam, or a volunteer from today—has been treated as a paragon of civic virtue for dutifully embracing this gravest of responsibilities of citizenship.[369] For their patriotism and sacrifices, they have been duly rewarded, not through the currency of the marketplace, but rather through the currency of the polis. Hence, in addition to the honorific awards associated with rank and merit,[370] military service has also been directly rewarded with the wholesale expansion of the franchise, the furthering of civil rights, and the development of a welfare system that in part predates and in some instances has even outclassed that afforded to America's widows and children.[371]

In the Founding years of the Republic, it was non-property holding veterans of the War of Independence who sought and were given the franchise[372]—well before the Jacksonian Revolution ushered in an era of universal (white) manhood suffrage;[373] it was black soldiers' service in the

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369. *See, e.g.*, SINGER, *supra* note 20, at 204. Singer writes:

> In the United States, the military is the most respected government institution in the American public's judgment, consistently ranking among the highest esteemed professions. This stems from the perceived integrity and values of the soldiers within it and the spirit of selfless service embedded in their duty on behalf of the country.

Id. (internal citation omitted); *see also* Gallup Organization, *Military on Top, HMOs Last in Public Confidence Poll* (July 14, 1999), *available at* http://www.gallup.com/poll/releases/pr990714.asp (last visited Dec. 9, 2004); Dunlap, *supra* note 184, at 354 (quoting a Harris poll spokesperson reporting in 1993 that "no other major institution, profession, or interest group comes close to the military" in terms of public approval ratings); Dunlap, *supra* note 146, at 101 ("To Americans, those wearing uniforms collectively are the most trusted part of the citizenry well ahead of organized religion, universities, and every branch of government."); Mazur, *supra* note 307, at 569 (describing how Americans "romanticize and idealize the military" and reserve a "special pedestal for those who serve in uniform"); Marano, *supra* note 320 (describing the unsung heroism of military cooks during the Vietnam War as something unique to the Armed Forces); Steven V. Roberts & Bruce Auster, *Colin Powell, Superstar*, U.S. NEWS & WORLD REP., Sept. 20, 1993, at 48 ("[A]t a time when a growing number of Americans are disillusioned with government . . . the military stands in singular counterpoint to that disillusionment.").

370. *See, e.g.*, PETER KARSTEN, THE NAVAL ARISTOCRACY: THE GOLDEN AGE OF ANNAPOLIS AND THE EMERGENCE OF MODERN AMERICAN NAVALISM 64–68 (1972); CHRISTOPER MCKEE, A GENTLEMANLY AND HONORABLE PROFESSION: THE CREATION OF THE U.S. NAVAL OFFICER CORPS, 1794–1815, at 296 (1991); Nicholas Parrillo, Deprivatization of American Warfare (June 2004) (working draft, Yale University) (on file with author).

371. For an examination of the connections between military service and civil rights, see MARY L. DUDZIAK, COLD WAR CIVIL RIGHTS (2000); PHILIP A. KLINKNER & ROGERS M. SMITH, THE UNSTEADY MARCH: THE RISE AND DECLINE OF RACIAL EQUALITY IN AMERICA (1999). For an examination of political rights, see KERBER, *supra* note 363. And, for an examination of economic rights, see THEDA SKOCPOL, PROTECTING SOLDIERS AND MOTHERS (1992).

372. *See, e.g.*, KEYSSAR, *supra* note 285, at 14, 46, 342–43; Karlan, *supra* note 282, at 1346–48; Scarry, *supra* note 267, at 1304.

373. *See* 1 BRUCE ACKERMAN, WE THE PEOPLE 75 (1991); KEYSSAR, *supra* note 285, at 32–52; CHILTON WILLIAMSON, AMERICAN SUFFRAGE FROM PROPERTY TO DEMOCRACY 190 (1960).

Civil War that, at least in part, paved the way for many of the rights associated with Reconstruction;[374] and it was the battlefield contributions of the great-grandchildren of these freemen soldiers, again, in the Second World War, Korea, and Vietnam that helped spark and sustain the Civil Rights Movement.[375] Moreover, despite generally lagging behind men in the achievement of political rights, a lag attributable to some extent to their lack of military service,[376] it was women's participation and sacrifices as part of the war effort in World War I that helped solidify support for female voting during critical stages of the suffrage movement.[377] And, importantly from the social-citizenship perspective,[378] the range of public-benefits programs created for servicemen and their

374. As W.E.B. Dubois said: "Nothing else made Negro citizenship conceivable, but the record of the Negro soldier as a fighter." W.E.B. DUBOIS, BLACK RECONSTRUCTION IN AMERICA 104 (1935). As Linda Kerber has stated:

> The Emancipation Proclamation itself merged emancipation and arms-bearing, welcoming into the armed service of the United States the people whom Lincoln declared free. For enslaved blacks, arms-bearing for the Union was an experience that came before citizenship and helped to set the terms for it. Black men risked their lives for the Union long before the Thirteenth Amendment, and the claim that they had bought their rights with their blood suffused constitutional debate and also the discourse of Reconstruction.

KERBER, *supra* note 363, at 243; *see also* KEYSSAR, *supra* note 285, at 88 ("General William Tecumseh Sherman himself noted, 'when the fight is over, the hand that drops the musket cannot be denied the ballot.'"); Vikram David Amar & Alan Brownstein, *The Hybrid Nature of Political Rights*, 50 STAN. L. REV. 915, 932 (1998) ("[B]lacks as individuals had earned the right to vote by their participation in Union armies during the war. No country with integrity could accept a person's service in arms to save the nation and then repudiate that same individual by denying him the right to vote."); Karst, *supra* note 286, at 513 ("The moment was ripe for a triumphant ending in which the wartime sacrifices of black men vindicated the claims of black people to full citizenship. . . . After the war three constitutional amendments and a package of Reconstruction civil rights acts not only abolished slavery, but promised black Americans equal citizenship, including the equal right to vote.").

375. DUDZIAK, *supra* note 371, at 9–10, 87–88 (describing how the moral messages associated with fighting for the freedom of other peoples and the exemplary service of black soldiers pushed the Civil Rights Movement forward); Karlan, *supra* note 285; Karst, *supra* note 286, at 502 ("The issue of full citizenship for black people was never far below the surface of the question of black participation in the Army and the militia."); *id*. at 518–20 (describing civil rights advancements linked to participation in World War II and the Korean War).

376. KERBER, *supra* note 363, at 221 (describing how the political laurels of military service fell disproportionately on men and noting how even when women volunteered to serve, their participation was understood outside the bounds of the normal civic republican narrative).

377. Amar & Brownstein, *supra* note 374, at 963 (characterizing President Wilson's support for the Nineteenth Amendment as grounded in part in his appreciation of women's service during World War I); Karlan, *supra* note 282; *see also* KERBER, *supra* note 363 (describing the legal battles fought by Helen Feeney to be treated on the same footing for employment opportunities as those who served their country in the Armed Services).

378. *See, e.g.*, T.H. MARSHALL, CITIZENSHIP AND SOCIAL CLASS (1950); William E. Forbath, *Constitutional Welfare Rights*, 69 FORDHAM L. REV. 1821 (2001); Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964); Jon D. Michaels, Note, *To Promote the General Welfare: The Republican Imperative To Enhance Citizenship Welfare Rights*, 111 YALE L.J. 1457, 1485 (2002).

families have often been more comprehensive and popularly supported than those designed to aid the country's poor and infirm.[379]

These servicemen have also been feted and elevated to the highest ranks of political prestige: on the hustings, a congressional medal of honor, a purple heart, or even an officer's title often trumps the biggest campaign war chest.[380] Being a war hero is not just a proxy for possessing acuity in foreign policy and national defense, but it also is a marker of unparalleled service and self-sacrifice. As Professor Ross Baker has noted, "It's the aura of heroism, the idea that this is someone who is prepared to sacrifice, someone who has demonstrated bravery . . . [t]hose are qualities

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379. During World War II, Congress passed the G.I. Bill and rewarded veterans with pensions, housing and education subsidies, as well as health-care benefits. *See, e.g.*, Servicemen's Readjustment Act of 1944, Pub. L. No. 346, 58 Stat. 284 (1944) (providing education stipends, favorable loans for home and business purchases, and generous unemployment benefits). And prior to that, Civil War veterans were offered "an entire edifice of honorable income supplements and institutional provision[s]." SKOCPOL, *supra* note 371, at 7. Indeed, even the National School Lunch Program—and improving the nutrition of low-income families more generally—was championed by General Hershey, who was the director of the Selective Service during World War II, to help soldiers. *See* Susan Lynn Roberts, Note, *School Food: Does the Future Call for New Food Policy or Can the Old Still Hold True?*, 7 DRAKE J. AGRIC. L. 587, 593–94 (2002) (noting that America's war efforts were severely hampered by high rates of malnutrition among entering conscriptees). *But see* Stephen Barr, *Advocates for Activated Guards, Reserve Troops Renewing Calls for Pay Relief*, WASH. POST, Nov. 11, 2004, at B2; Barbara Ehrenreich, *Bush's Odd Warfare State*, PROGRESSIVE, Apr. 2004, at 24 (noting that many soldiers require food stamp supplements to make ends meet and indicating that President Bush had suggested the possibility that he would propose cutting soldiers' combat pay); Ian Williams, *Bush's War Against the Military*, IN THESE TIMES, Nov. 15, 2004, at 22 (noting the Administration's recent cutbacks in disability benefits and pensions for veterans).

380. *See* HALBERSTAM, *supra* note 119, at 111–12 (describing Senator Bob Kerrey in 1992 as an ideal presidential candidate because of his war record, which included a Congressional Medal of Honor); JAMES M. PERRY, TOUCHED WITH FIRE: FIVE PRESIDENTS AND THE CIVIL WAR BATTLES THAT MADE THEM (2003); John Wheller, *Coming to Grips with Vietnam*, FOREIGN AFF., Spring 1985, at 74 (noting how important military service in Vietnam has been to office-seekers despite the fact that the Vietnam War remains politically divisive and unpopular); Frank Bruni, *There's Something About a Candidate in Uniform*, N.Y. TIMES, Oct. 24, 1999, at D3; James Carney, *Playing the POW Card*, TIME, Sept. 6, 1999, at 44; Sheryl Gay Stolberg, *A War Is Nice on the Resume, But It May Not Get You the Job*, N.Y. TIMES, Sept. 28, 2003, at D3; *see also The Search for the Perfect President*, ECONOMIST [H.W.], Nov. 18, 1995, at 93. The *Economist* writes:

> In all, seven generals have reached the White House. At least ten have been declared papabile by the population at large. A raft of presidents, besides, have used a stint of soldiering to burnish their resumes. Teddy Roosevelt's jungle-hopping imperialism was much enhanced by his earlier adventures with the Rough Riders and his charge up San Juan Hill. George [H.W.] Bush derived what profit he could from being the youngest American pilot on second-world-war service in the Pacific. Bob Dole's withered arm, shot up in Italy, is his most reliable campaign credential. The reason is clear. Soldiers do difficult things despite appalling danger; they, above all others, should be able to cut through the tape of bureaucracy and take faint-hearted nations by the scruff of the neck. When they are heroes, they are charismatic to the level of film stars.

Id.

that are esteemed by Americans, and these qualities can be transferred to politics."[381]

In short, the normative treatment of the soldier is as a public figure and hero. Victorious or slain, he (and increasingly she, too) is one of our "boys" (or "girls") in the field.[382] The military of today may no longer be comprised of citizen-militias, but the resonance of its members' public service cannot be ignored.[383] Empirically speaking, it is of course still unclear how privateers will affect this conception of citizen-soldiers; but one might presume, as a starting point, that profit-seeking contractors would diminish the normative standing of soldiers in general.

2. The Marketplace Debases the Polis

We do know (or rather, we *think* we know) this: Contractors are not per se battling for their country and their countrymen. They are not fighting to defend some ideal, vindicate some set of rights, or achieve national honor. As mentioned earlier, they are not even looking to lay down their weapons and go home.[384] Instead, when objectives are achieved, privateers almost by definition look forward to the next lucrative engagement.[385] Hence, to

381. Stolberg, *supra* note 380; *see also* Kaplan, *supra* note 293 (noting the importance politicians place on securing the endorsement of retired military leaders).

382. *See* Adams, *supra* note 325 ("A military force that is drawn from the people of a given nation and dedicated only to the defense of that nation is seen as an expression of the consent of the governed. They legitimize their government by their desire to defend it."); Karst, *supra* note 286, at 501 ("Our popular culture repeatedly confirms our attachment to this democratic, unifying ideal [of the U.S. military]. Consider the typical war movie, in which the soldiers' faces tacitly represent our ethnic diversity, and the roll call reminds us more explicitly that our many cultures add up to one nation: Abrams, Anderson, Arenella, Crenshaw, Dukeminier, García, Graham, Matsuda, Munzer, Warren."); Paul, *supra* note 368; Toner, *supra* note 368; *World News Tonight with Peter Jennings* (ABC News television broadcast, Apr. 30, 2004) (quoting a spokesperson for the Veterans of Foreign Wars as saying that "[w]e need to memorize those faces [of the killed soldiers], know their names . . . America should get down on their hands and knees and give thanks for them.").

383. *See* Rosky, *supra* note 6, at 922–23 (emphasizing the salience of symbols and rituals within citizen-military culture); Clark, *supra* note 45 (capturing the moral symbolism of America's all-volunteer army as "citizens first, soldiers second"); Michael J. Sandel, *What Money Can't Buy: The Moral Limits of Markets*, *in* THE TANNER LECTURES ON HUMAN VALUES 89, 112–14 (1998), *available at* www.tannerlectures.utah.edu/lectures/sandel00.pdf (last visited June 27, 2004) (contending that there are great civic virtues in citizen armies that cannot be replicated when armies become for-hire institutions).

384. *See* Dunlap, *supra* note 146, at 100 ("[T]he persisting ideal of the American-at-arms is the altruistic yeoman farmer who lays down his plow to take up arms for the duration, *always nevertheless intending to return to the responsibilities of family and farm at the very first opportunity*. It would be a great mistake to underestimate how deeply embedded this archetype still remains in American culture.") (emphasis added).

385. *See* SINGER, *supra* note 20, at 216 (noting that private soldiers "directly benefit from the existence of war and suffering; it is a precursor to their hire"). Of course, this is a difficult proposition because one would suspect that many American privateers would identify themselves as patriots of the

transform and possibly dilute[386] the public service of national defense by introducing profit-motivated contractors may very well debase and commodify what has been the highest civic calling this or any other republic has known.[387]

Whether it actually does so or not, privatization *appears* to weaken this connection between soldier and citizen—a connection that might, as suggested above, already be tenuous in a military era characterized by an all-volunteer fighting force, which includes many who enlist, at least in part, for financial reasons. Simply stated, the outbreak of war constitutes an economic windfall for contractors. With this profit-motive comes a perversion: As Colonel Thomas Dempsey has put it, when an American soldier kills, it is "'because [his] president told [him] to'. . . . If a contractor shoots someone, it's for another reason: 'to get paid.'"[388] This distinction, though perhaps overstated here, may not be lost on the American people, especially given the tenor of the news coming out of Iraq in 2004. During the same week that Pat Tillman, a former NFL standout died in Afghanistan,[389] news broke of the central role privateers

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first order, and who signed up with DynCorp or Blackwater to get another chance to see combat duty. The differences between soldiers and contractors, then, may be largely perceptual: We can, after all, imagine some contractors being infinitely more "gung-ho" about an additional tour of duty than members of the volunteer Army—ostensibly the epitome of the patriot-citizen—who may be second-guessing their decision to sign up for military service mainly to get the government to pay for their schooling.

386. To an extent, we can draw a parallel between the idealization of the citizen-soldier and the family farmer. Like the soldier who protects both our ideals and physical security, the farmer feeds our people and nourishes our psychic connections to our agrarian, Jeffersonian roots. The farmer too, is often given special and preferential economic and political treatment. The decline of the family farmer, and his replacement by commercial, corporate agro-businesses, such as Archer Daniels Midland, is greeted with a similar sense of frustration and a felt loss of something that had previously been more pure. *Cf.* Jedediah Purdy, *The New Culture of Rural America*, AM. PROSPECT, Dec. 20, 1999, at 26; George Scialabba, *How the Other Half Votes*, NATION, June 14, 2004, at 50; Joseph Weber, *Will Agribusiness Plow Under the Family Farm?*, BUS. WK., Oct. 23, 2000, at 50.

387. *See* RICHARD GABRIEL, TO SERVE WITH HONOR: A TREATISE ON MILITARY ETHICS AND THE WAY OF THE SOLDIER 58 (1982) (noting that "[t]he military's loss of some of its traditional values and their replacement with the values of the economic marketplace can lead to the abandonment of ethical precepts . . . to the point that combat effectiveness itself is affected."); Sapone, *supra* note 50, at 5–7 (describing the inalienability and non-commodification of military power as exercised by the State and by actors serving the State); *see also* W.E.B. DUBOIS, THE CRISIS WRITINGS 259 (1972) (describing the preeminent obligation of blacks to serve in World War I even though many were not afforded the equal rights of American citizenship).

388. Pape & Meyer, *supra* note 2 (quoting Col. Thomas Dempsey); *see also* SINGER, *supra* note 20, at 204 ("[A]rmed forces' professionalism must not be associated with or compromised by commercial enterprise. To do so potentially endangers the fabric of community loyalty."); Sapone, *supra* note 50, at 6–7 (comparing the military's extensive connections to the national community against those of the private industry).

389. *See, e.g.*, Dirk Johnson & Andrew Murr, *A Heroic Life*, NEWSWEEK, May 3, 2004, at 26 (reporting on the heroism of slain soldier Pat Tillman); Bill Pennington, *Ex-N.F.L. Player Is Killed in*

had in abusing Iraqi prisoners. The contrast between an All-American gridiron hero who gave up millions of dollars and his prime years as a professional athlete to enlist in the Army and an unscrupulous contractor brutalizing Iraqi detainees could not be starker.

The damage here could run beyond morale concerns just on the frontlines; Americans' pride in their "boys and girls" may be dampened not just by the dismay felt at the appalling acts of brutality perpetrated under the American flag (by soldiers and contractors alike), but also by what they may view as the commodification of war, killing for money.[390] In large part, the laurels bestowed on soldiers are premised on their endangering their lives to promote an ideal, preserve justice, or introduce freedom.[391] Even knowing that, for many, their service is economically driven, i.e., performed with an eye toward learning trade skills or seeking the military's help to pay for further education, we still consider today's soldiers to be citizen-patriots. But we do not as readily reconcile economic self-interest and public service when it comes to contractors.[392] If soldiers serve as liberators while incurring great personal sacrifices, then they are heroic; if they instead do so for profit, then they might tarnish the entire enterprise.[393] Moreover, if the country's pride and respect for its military

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Combat, N.Y. TIMES, Apr. 24, 2004, at D1 (same); Gary Smith, *Code of Honor*, SPORTS ILLUSTRATED, May 3, 2004, at 40 (same); Mike Wise & Josh White, *Ex-N.F.L. Player Tillman Killed in Combat: Army Ranger Turned Down Millions To Serve His Country in Afghanistan*, WASH. POST, Apr. 24, 2004, at A1.

390. *See* SINGER, *supra* note 20, at 226 (noting that with the increase in a private market for military services, perceptions about power belonging to the rich—rather than righteous—will multiply); Mourning, *supra* note 346; Chaffin, *supra* note 109 (acknowledging the possibility that private soldiers will perform certain acts that would not be asked of soldiers); Grant, *supra* note 328, at 106 (opining that when retired soldiers sell their military skills in the marketplace, the entire profession loses the high moral ground).

391. *See* Addicott & Hudson, *supra* note 245, at 154 (highlighting the proud traditions of military service and military restraint that characterizes the U.S. Armed Forces and noting that the "military proficiency and ethical conduct in combat have . . . [earned American soldiers a] reputation for both battlefield excellence and strict adherence to the laws regulating warfare"); McCaffrey, *supra* note 318, at 233–34 (describing honorable values of American soldiers to protect and promote human rights); Sheppard, *supra* note 334, at 777–78 (characterizing military traditions in America dating back to the Union Army as fighting to uphold and preserve dignity). *But see* SINGER, *supra* note 20, at 204 (suggesting that the traditional ethos of the military as an honorable calling rather than just a job may be waning in the United States as soldiers increasingly view the military as a stepping stone for private sector opportunities).

392. *See, e.g.*, Rosky, *supra* note 6, at 969 ("Sometimes, private purposes exist within a larger institutional framework of public purposes and public responsibility . . . . Our . . . soldiers are not drafted, and they do not work for free. They are a volunteer corps that applies to work and gets paid for it. Presumably, these payments introduce some private purposes into our public . . . armies. [But, a]s a society, however, we dismiss these [self-interested] purposes as culturally irrelevant."). *But see supra* note 385.

393. *See* Grant, *supra* note 328, at 91 ("Ultimately, the privatization of US military services under

wanes, perhaps more than the stature of GIs will fade. Perhaps veterans' benefits will be cut—justified by the somewhat cynical expectation that those who serve in the armed forces are likely to find gainful employment afterwards as military contractors (even if many veterans consider the idea of private combat anathema).[394]

Thus, strangely, a public disillusioned by military privatization might end up forcing citizen-soldiers into post-military careers as privateers.[395] Even more significantly, American support for idealistic military endeavors, if those endeavors are perceived as being "corrupted" by the presence of profiteers, might similarly wane—and the notion of American intervention, humanitarian or otherwise, would then become less popular domestically as the public takes stock of who is fighting and for what reasons.[396]

Or, returning to a point made earlier in this Article, a transition toward using greater numbers of private troops might engender the opposite result—more indifference to casualties and the lowering of the public's apprehensions about waging war. If those fighting are not America's boys and girls risking their lives to defend core interests of the State, but rather agents who voluntarily contract to perform explicitly dangerous missions, maybe the libertarianism of the market will outweigh the paternalism felt toward America's soldiers and thus ultimately lower inhibitions against armed conflict.[397] But in either case—if Americans are disillusioned with

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direct foreign contract corrupts our military both in the eyes of society and from within the ranks.").

394. *See* SINGER, *supra* note 20, at 205 ("Those in service also fear that the military pension system might be called into question; profit is being incurred from the very same service for which the public is paying retired personnel back.").

395. Already, even before the advent of military privatization, economic pressures to leave the military for the private sector were strong. The existence of lucrative contractor assignments may encourage qualified, dedicated soldiers to opt for life in the private military sector. If the best soldiers can make up to $250,000 a year as contractors, then they have strong financial incentives to leave the military—taking with them their expertise, commitment to service, and years of training. *See, e.g.*, Barstow et al., *supra* note 4 (describing the concern that the ranks of Special Forces will be drained by the lure of private contracts); James Glanz, *Modern Mercenaries on the Iraqi Frontier*, N.Y. TIMES, Apr. 4, 2004, at D5 (noting the comparative salary boost private military firms can offer members of the U.S. Armed Forces).

396. We have seen this happen at other moments in time, when faith in the military was low, and thus America retreated from an interventionist posture. *Cf.* Dunlap, *supra* note 184, at 349–51 (describing deep disillusionment and anti-militarism in America in the wake of Vietnam); George C. Herring, *America and Vietnam: The Unending War*, FOREIGN AFF., Winter 1991, at 104 (emphasizing the "extent to which Vietnam continued to prey on the American psyche [for many] years after the fall of Saigon" and suggesting that only with the victory in the first Gulf War did the disillusionment that accompanied the morass of Vietnam begin to abate).

397. *Cf.* Richard A. Posner, *An Army of the Willing*, NEW REPUBLIC, May 19, 2003, at 27 (highlighting the benefits of a market-based army system as opposed to one based on coercion and conscription).

military action as illegitimate or if they become desensitized to combat losses—privateers could tarnish the luster of American foreign policy and spark *immoderate* feelings that may not match the goals and values of balanced, reasoned foreign policy. Again, tighter regulations or other reforms aimed at curtailing contractor discretion and contractor mismanagement are not, by themselves, capable of addressing these broad symbolic and cultural incidents of military privatization.

V. INTERNATIONAL LAW/DIPLOMACY HARMS

Having canvassed the constitutional, legal, and democratic harms in Parts III and IV, I turn now to the international/diplomatic harms privatization may cause. These harms pose considerable consequences for American foreign policy, for American credibility abroad, and for the interests of containing the proliferation of even less well-regulated military profiteering practices around the world.

A. Alienating Friends and Foes Alike

Contracting out allows the U.S. government to purchase strategic outcomes at a much lower political cost than if the boys and girls of America's volunteer army were dispatched. Indeed, an overseas engagement involving contractors might, accordingly, produce neither an official body count nor much political opposition.[398] But, the security and flexibility the United States gains without expending domestic political capital and/or the lives of servicemen and women may, however, serve to validate the perception that the American agenda is driven by dollars rather than ideals; that decisions are made in private, smoke-filled backrooms rather than openly on the floors of Congress. It also invites concerns that the United States is represented in zones of hostilities by individuals who are not subject to the same standards of legal conduct and ethical restraint that this nation and the international community expects of the U.S. Armed Forces.

1. Allies

Among America's allies, when the *private* cavalry is dispatched instead of the U.S. military, they may think that their particular crisis is outside of core American interests. This suspicion or sense of being slighted can

398. *See supra* notes 153–57.

breed resentment and a weakening of ties, a response not altogether lost on American leaders. Congressmen Tom Lantos and Henry Hyde had this precise concern in mind when they questioned the wisdom of contracting out President Karzai's security detail. In a joint statement, they noted: "[T]he presence of commercial vendors [protecting Karzai] would send a message to the Afghan people and to President Karzai's adversaries that we are not serious enough about our commitment to Afghanistan to dispatch U.S. personnel."[399]

Other allies too may be dissatisfied by the conduct of military engagements by private troops. No doubt the Bosnians would have preferred to receive the help of DynCorp contractors, without their extracurricular involvement in sex-trafficking operations. Moreover, perhaps pro-American leaders in the Middle East similarly feel betrayed, today, by the conduct of American privateers toward Iraqi prisoners.[400] Leaders who endorse American foreign policy aims, often at great domestic peril,[401] are then placed in an even more difficult situation at home when forced to defend their support in the face of American acts of brutality.[402] Of course, transgressions by American soldiers certainly do occur. But, at least those acts can be reported up the chain of command and, in turn, can be swiftly punished, thus demonstrating the U.S. government's commitment to justice and self-restraint;[403] as we have discussed, comparable firmness with contractors is much more difficult to achieve.[404]

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399. Tepperman, *supra* note 13, at 12; *see also* Ghafour, *supra* note 94 (noting growing concerns about how DynCorp employees' brash behavior in Kabul is damaging the Afghan people's perceptions of Americans, describing how these contractors drive their vehicles aggressively and randomly point their weapons at onlookers, and suggesting that "[w]hen American private contractors behave aggressively, it confirms the worst suspicions in the minds of some Afghans").

400. Alan Cowell, *Powell, on Trip to Mideast, Vows Justice on Iraq Abuse*, N.Y. TIMES, May 16, 2004, at A18; Neil MacFarquhar, *Arab Meeting Expected To Produce Mostly Criticism of U.S.*, N.Y. TIMES, May 22, 2004, at A3; *see also* Friedman, *supra* note 344 (recommending that President Bush convene a summit of world leaders at Camp David to apologize for what transpired in Abu Ghraib).

401. *See, e.g.*, Carlos H. Conde, *Manila Starts Withdrawing Troops from Iraq; U.S. Criticizes Step*, N.Y. TIMES, July 15, 2004, at A7; David E. Sanger, *Blow to Bush: Ally Rejected*, N.Y. TIMES, Mar. 15, 2004, at A1.

402. *See also* Alan Cowell, *Bush's Words Do Little To Ease Horror at Prison Deeds*, N.Y. TIMES, May 7, 2004, at A12; Christine Hauser, *Many Iraqis Are Skeptical of Bush TV Appeal*, N.Y. TIMES, May 6, 2004, at A16; Neil MacFarquhar, *Revulsion at Prison Abuse Provokes Scorn for the U.S.*, N.Y. TIMES, May 5, 2004, at A18.

403. *See supra* notes 341–44.

404. *See supra* notes 294–319.

2. Would-Be Allies

Let us also not forget that American military personnel are, increasingly, serving as diplomats, humanitarian providers, political consultants, and "liberators."[405] Their conduct on such missions could leave as large of an impression on their hosts as would any tangible project or aid package they deliver. Therefore, if the United States is dispatching private actors, who are not comporting themselves well, the conduct of these privateers will inevitably be imputed to all soldiers, if not all Americans, and the goods and services they provide will be, in the long run, devalued. As P.W. Singer notes, a "key realization of contracting is that a firm becomes an extension of government policy and, when operating in foreign lands, its diplomat on the ground. As such, the firm's reputation can . . . implicate the government['s] as well."[406]

And, finally, America acts not just as an intervenor or liberator, but also as an occupier. While on the ground, in Kabul or Baghdad, the U.S. personnel must work to win the hearts and minds of the locals.[407] If American contractors were to act in an undignified, or offensive manner, it would only hamper the process of gaining the trust of the people. (Again, this assumes that because of the UCMJ and because of the military's ethos of honor, soldiers are less likely to act inappropriately.)

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405. *See* PRIEST, *supra* note 47, at 44–47, 112–13 (describing military personnel during the Clinton administration serving, in addition to their conventional responsibilities, as diplomats, guides to improve civil societies, overseers of de-mining, disarmament, and humanitarian projects); *see also* Englin, *supra* note 332 (characterizing American military families stationed overseas as "front-line ambassadors of American values and culture," and arguing that moving American soldiers out of Western Europe will further strain relations with long-time allies because "[t]here is no easy public-relations substitute for 100,000 Americans . . . serving as ambassadors to and from their host countries"); Robert D. Kaplan, *The Man Who Would Be Khan*, ATL. MONTHLY, Mar. 1, 2004, at 55 (describing the role of a U.S. Army colonel in forging strong military and political ties with Mongolia). *But see* Smith, *supra* note 333 (quoting a former DynCorp employee as calling DynCorp "the worst diplomat our country could ever want overseas").

406. *See* SINGER, *supra* note 20, at 236; *see also* Dexter Filkins, *A Prison Tour with Apologetic Generals*, N.Y. TIMES, May 6, 2004, at A16 (describing the disillusionment and shame felt by members of the U.S. Armed Forces in the wake of the Abu Ghraib scandal); Smith, *supra* note 333 (noting DynCorp's bullying tactics in Kabul and suggesting that "[t]hese days . . . belligerent men with sunglasses and guns are America's most visible civilian representatives in some parts of the world"); *supra* note 163 and accompanying text.

407. *See, e.g.*, Robert Kagan, *America's Crisis of Legitimacy*, FOREIGN AFF., Mar./Apr. 2004, at 65 (noting widespread European distrust and opposition to the war in Iraq and to American foreign policy in general); *see also* PRIEST, *supra* note 47, at 386 (describing the military objective to win the "hearts and minds" of the people of Iraq and Afghanistan).

3. Adversaries

And, among those who already consider America a corrupting force in the world, the privatization of military might, especially in efforts to circumvent U.N. agreements and arms embargoes, only further fan the flames of international dissent and discontent.[408] The maniacal bombers of September 11 undertook diabolical deeds purportedly in the name of the disgruntled who viewed the World Trade Center and the Pentagon as the West's twin evil exports. Amalgamating and *conflating* those formerly distinct entities via privatized war makes it that much harder to disabuse the world of its perceptions of the United States as an evil economic-military imperialist.[409]

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408. *See, e.g.*, Editorial, *The Anger of Arab Youth*, N.Y. TIMES, Aug, 15, 2002, at A22; Thomas L. Friedman, Editorial, *Under the Arab Street*, N.Y. TIMES, Oct. 23, 2002 at A23 (describing the hostility against American and Western interests); Neil MacFarquhar, *Arab Protestors Focus Ire on U.S.*, N.Y. TIMES, Apr. 6, 2002, at A1.

409. *See* SINGER, *supra* note 20, at 226–27 (noting that with the introduction of private firms, "[p]olitics are now directly and openly linked with economic interests . . . which can lead to breakdown of respect for governmental authority, and also delegitimizes its right to rule").

Finally, should consideration be given to the interests of the foreign nationals, on whose turf these quasi-private operations take place? Intuitively speaking, we might think foreign countries and their citizens have no say over what the status of the troops is whom we airlift into a battlefield. But, in very important ways, they do (or should). The Westphalian nation-state is a, if not *the*, defining feature of international relations in the modern era of world history; underlying that system is an explicit understanding that nations and national armies, not bands of mercenaries, fight wars. This understanding is reaffirmed in the modern, Weberian notion of a state possessing a monopoly over the use of force and in the Geneva Convention's definitive statement regarding who can legitimately engage in combat. Moreover, it is a central feature of the United Nations Charter that only states can lawfully take up arms (and only then under limited circumstances). To indicate that adversaries have no formal say regarding the composition of the contingent that takes up arms against them is to disregard centuries of work trying to regulate and "civilize" the course and conduct of war. For the United States to employ private agents may be for it to reprise the role of the illegitimate colonial empires and business interests that retained coercive power over other sovereignties and thus served to de-legitimate the concept of a world (and family) of nations. *See* U.N. CHARTER art. 2, para. 4; U.N. CHARTER art. 2, para. 5; U.N. CHARTER art. 51; Sapone, *supra* note 50, at 4 n.22 (cataloguing the array of UN resolutions condemning the use of mercenaries generally and with respect to particular conflicts); *id.* at 36–41 (describing the UN resolutions more thoroughly); Schmitt, *supra* note 47, at 1086 (describing the centrality of legal international norms even during times of conflict and war); Adams, *supra* note 325, at 103; *see also* Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S 85; Geneva Convention for the Amelioration of the Conditions of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, *opened for signature* Dec. 12, 1977, 1125 U.N.T.S. 609; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, *opened for signature* Dec. 12,

B. Flaunting the Ideals and Undermining the Institutions of Collective Security and Global Governance

The U.N. Security Council is widely viewed as the principal venue for deliberating on matters of collective security.[410] Though hamstrung by internecine fighting among the permanent members during most of the Cold War,[411] the Security Council emerged as an authoritative and relatively effective body in the early 1990s,[412] serving as the centerpiece of what the first President Bush dubbed the "New World Order."[413]

For the most part, this renewed faith in the Security Council has been affirmed by member nations;[414] but not entirely. Facing opposition on a proposal to intervene in Kosovo in 1999 and again, in 2002-03, on a decision to invade Iraq, the United States has forsaken the imprimatur of the Security Council and sought legitimation elsewhere.[415] For Kosovo,

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1977, 1125 U.N.T.S. 3; A.P.V. ROGERS, LAW ON THE BATTLEFIELD (1996) (describing ways in which national armies are instructed and expected to preserve human life and refrain from excessively destructive practices while waging war).

410. F.H. HINSLEY, POWER AND THE PURSUIT OF PEACE 225–37 (1963); HANS KELSEN, COLLECTIVE SECURITY UNDER INTERNATIONAL LAW (2001); Charles A. Kupchan, *The Case for Collective Security*, *in* COLLECTIVE SECURITY BEYOND THE COLD WAR 41 (George W. Downs ed., 1994); Fowler & Fryrear, *supra* note 66, at 305; Gene M. Lyons, *A New Collective Security: The United Nations and International Peace*, 17 WASH. Q. 173 (1994); *see generally* INIS L. CLAUDE, JR., POWER AND INTERNATIONAL RELATIONS 106–07 (1962).

411. *See, e.g.*, Kagan, *supra* note 407, at 74 ("During the four decades of the Cold War, the Security Council was paralyzed by the implacable hostility between its two strongest veto-wielding members.").

412. Inis L. Claude, Jr., *The Gulf War and Prospects for World Order by Collective Security*, *in* THE PERSIAN GULF CRISIS: POWER IN THE POST COLD WAR WORLD 23, 24 (Robert F. Helms II & Robert J. Dorff eds., 1993) ("[T]he ending of the Cold War, creating the expectation of a United Nations Security Council no longer paralyzed by conflict between the superpowers, has inspired the suggestion that the Council can now become what it was presumably intended to be, an agency for the collective enforcement of the ban on aggression."); Thomas M. Franck, *What Happens Now? The United Nations After Iraq*, 97 AM. J. INT'L L. 607, 608 (2003) ("[F]or one dazzling moment in the 1990s, the end of the Cold War seemed to revive faith in the [U.N.] Charter system, almost giving it a rebirth.").

413. *See, e.g.*, LAWRENCE FREEDMAN & EFRAIM KARSH, THE GULF CONFLICT, 1990–91: DIPLOMACY AND WAR IN THE NEW WORLD ORDER (1993); *Transcript of President's State of the Union Message to Nation*, N.Y. TIMES, Jan. 30, 1991, at A12 ("[T]onight we lead the world in facing down a threat to decency and humanity. . . . [I]t is a big idea—a new world order where diverse nations are drawn together in common cause to achieve the universal aspirations of mankind: peace and security, freedom and the rule of law.").

414. *See* Michael Barone, *Taking the U.N. Seriously*, U.S. NEWS & WORLD REP., Sept. 23, 2002, at 43; Philip Gourevitch, *The Optimist*, NEW YORKER, Mar. 3, 2003, at 50 (describing the heightened importance of the UN in the aftermath of the Cold War).

415. Todd Gitlin, *America's Age of Empire: The Bush Doctrine*, MOTHER JONES, Jan. 1, 2003, at 34; G. John Ikenberry, *America's Imperial Ambition*, FOREIGN AFF., Sept./Oct. 2002, at 44; John B. Judis, *Two Steps Backward; Unilateralism Revisited*, AM. PROSPECT, Aug. 12, 2002, at 10; Fareed Zakaria, *The Trouble with Being the World's Only Superpower*, NEW YORKER, Oct. 14, 2002, at 72;

America secured NATO's approval;[416] and for Iraq, the United States cobbled together a band of allies, euphemistically called the "Coalition of the Willing."[417] In the process of circumventing the United Nations, however, the United States has damaged the Security Council's authority and called into question the credibility of collective security writ large.[418]

Privatization only makes bypassing the U.N. easier and even more insidious than patching together an alternative source of collective authorization. At least with respect to small-scale interventions, where private troops could act in lieu of public soldiers, the United States could nominally remain a good global citizen and nominally recognize the supremacy of the Security Council, while still achieving those desired aims that the Council refuses to endorse. This would allow the United States to avoid the political backlash it felt (vis-à-vis Kosovo and especially Iraq) when it publicly eschewed the Security Council in favor of a more compliant authorizing community.[419] For instance, say the United States or another member proposes a resolution in support of intervening in a small country, perhaps besieged by a humanitarian crisis or laboring

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see also Kagan, *supra* note 407. For a discussion of efforts to circumvent the Security Council, see Jules Lobel & Michael Ratner, *Bypassing the Security Council: Ambiguous Authorizations To Use Force, Cease-Fires and the Iraqi Inspection Regime*, 93 AM. J. INT'L L. 124 (1999).

416. *See* W. Michael Reisman, *Kosovo's Antinomies*, 93 AM. J. INT'L L. 860 (1999); Ruth Wedgwood, *NATO's Campaign in Yugoslavia*, 93 AM. J. INT'L L. 828 (1999); John R. Bolton, *U.S. Foreign Policy Doesn't Require the Permission of the Security Council*, WKLY. STANDARD, Oct. 4, 1999, at 13; Roger Cohen, *Europe's New Policeman; NATO Shatters Old Limits in the Name of Preventing Evil*, N.Y. TIMES, Oct. 18, 1998, at D3; Michael Hirsh, *Washington's Self-Defeating Assault on the U.N.*, FOREIGN AFF., Nov./Dec. 1999, at 2; *see also* Jane E. Stromseth, *Future Implications of the Iraq Conflict: Law and Force After Iraq: A Transitional Moment*, 97 AM. J. INT'L L. 628, 632 (2003) (contrasting the legitimacy bestowed on the coalition-building efforts to liberate Kosovo with the utter lack of such approbation vis-à-vis the Iraq campaign in 2003).

417. *See* Franck, *supra* note 412, at 617 (questioning the legitimacy and effectiveness of the Coalition of the Willing and characterizing it as including "a sizable contingent from Britain, a few hundred policemen from Poland, Romania, and Bulgaria (at least until their nations are integrated into the European Union), a few soldiers from Australia and Albania, and good wishes from Israel"); Clark, *supra* note 45; Ivo H. Daalder & James M. Lindsay, *Bush's Flawed Revolution*, AM. PROSPECT, Nov. 2003, at 43; Francis Fukuyama, Editorial, *U.S. vs. Them: Opposition to American Policies Must Not Become the Chief Passion in Global Politics*, WASH. POST, Sept. 11, 2002, at A17; Kristof, *supra* note 99; James Traub, *The Next Resolution*, N.Y. TIMES, Apr. 13, 2003, § 6 (Magazine), at 50.

418. *See, e.g.*, Franck, *supra* note 412, at 617–19 (suggesting that the current American foreign policy's use of alternative sources of multilateral consent could effectively "disable the United Nations" and its endorsement of preemptive uses of force "stand[s] the [U.N.] Charter on its head"); Roger Cohn, *Editor's Note*, MOTHER JONES, Jul./Aug. 2003, at 37 (noting that the United States's decision to go to war in Iraq without Security Council authorization signaled its disregard for the United Nations and dealt it a "stunning blow").

419. *See* Kagan, *supra* note 407; *see also* Michael J. Glennon, *Why the Security Council Failed*, FOREIGN AFF., May/June 2003, at 16–18, 23–24 (noting that the military intervention in Iraq undermined the U.N. Charter and signaled the end of "the grand attempt to subject the use of force to the rule of law").

under civil war. Such a resolution fails.[420] The United States can abide by the decision not to intervene formally, yet can still make available to the country in question a private American outfit to carry out the objectives that the Council rejected.[421]

While this avenue of clandestine circumvention is, probably, unavailable in most instances where an effective force would have to be quite large, there are still opportunities in certain situations where small, discrete units would suffice. For example, small forces might prove especially useful in the nascency of attempted coups or during the early stages of civil unrest in the likes of Liberia, Sierra Leone, Sudan, or even Rwanda, where experts have now suggested that if intervention had occurred early enough, a crack outfit could have helped prevent genocidal civil war without the need for an overwhelming show of force.[422] With the use of contractors, therefore, the U.S. government could also achieve some of its foreign policy ends, while not taking any responsibility for promoting them.

But the problem with contracting to avoid a Security Council veto is bigger than the mere issue of avoiding responsibility in any particular engagement: What is worse is that the nation would be turning its back on the legitimate collective security apparatus it helped found and promote, and would not even be doing so in a transparent way, i.e., calling for reforms to the Council's procedures and operations or publicly shaming obstinate members. It would be more honest and responsible for the United States, if it were dissatisfied with some aspect of the Security Council, to seek direct reform.[423] Such reform efforts would demonstrate

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420. In addition to the political rivalries among Security Council members that serve to stymie U.N. authorization, there is a general unwillingness to support intervention, out of fear (especially among non-Western nations) that such precedents will ultimately lead to further scrutiny of their own domestic situations. *See* Kagan, *supra* note 407. Other concerns that dampen enthusiasm for intervention include financial costs, danger to soldiers, and insufficient strategic interests. *See, e.g.*, Milliard, *supra* note 23, at 16; Michael Scharf & Valerie Epps, *The International Trial of the Century? A "Cross-Fire" Exchange on the First Case Before the Yugoslavian War Crimes Tribunal*, 29 CORNELL INT'L L.J. 635 (1996).

421. *See* SINGER, *supra* note 20, at 213 (noting the scandal involving Britain's use of Sandline in Sierra Leone was viewed by critics as a way to circumvent the UN arms embargo—as well as British troop limitations—and ultimately almost forced the resignation of then-Foreign Minister Cook).

422. *See* Milliard, *supra* note 23, at 18–19; Des Forges, *supra* note 119, at 142 (noting that a small contingent of peacekeepers and a team otherwise assigned to evacuate westerners in Rwanda "could have deterred the killings had they acted promptly); Michael Hirsh, *Calling All Regio-Cops: Peacekeeping's Hybrid Future*, FOREIGN AFF., Nov./Dec. 2000, at 2 (suggesting that much bloodshed could be stopped relatively easily if intervention happened quickly enough); Kaufmann, *supra* note 119, at 143 (suggesting that "[o]f all the genocides since World War II, this would perhaps have been easiest to stop").

423. *See* Michael J. Kelly, *U.N. Security Council Permanent Membership: A New Proposal for a*

the United States's faith in the system of collective security and international law. But, to continue to operate outside its bounds, either via makeshift coalitions or private operations, while still purporting to respect the institution is to make a mockery of the Security Council and, moreover, to jeopardize the integrity of America's foreign policy.[424]

C. Setting Bad Precedents and Encouraging the Global Growth in Private Military Forces and Capabilities

Compared with foreign mercenaries operating elsewhere around the globe, U.S.-based privateers are relatively restrained. To satisfy both the generals in the Pentagon and the investors on Wall Street, American private military firms maintain a level of professionalism and decorum[425] not always shared by their counterparts operating in other regions of the world.[426] According to those who have surveyed privateers from a comparative perspective, there are major military firms based overseas, that lack the professional scruples that American companies appear to possess; simply stated, those firms are more likely to work for despotic or repressive regimes.[427]

For example, major international military firms such as Executive Outcomes, Stablico, and Omega Support have each worked at various times on both sides of the Zaire-Congo conflict in the late 1990s.[428]

Twenty-First Century Council, 31 SETON HALL L. REV. 319 (2000); Stromseth, *supra* note 416, at 641–42 (highlighting ways in which the United States's leadership could help improve Security Council governance); Richard N. Haass, *What To Do with American Primacy*, FOREIGN AFF., Sept./Oct. 1999, at 37 (emphasizing the importance of American efforts to persuade the Security Council to be a more effective institution in enforcing collective security norms); Dmitri V. Trenin, Editorial, *If the U.N. Were Being Created Today: Veto the Veto*, N.Y. TIMES, Mar. 15, 2003, at B9 (suggesting that the dramatic types of reform the U.N. Security Council needs today must be spearheaded by the United States).

424. This analysis is equally applicable in any multilateral context, such as in the Balkans. *See supra* notes 66–84 and accompanying text.

425. *See supra* Part II.B.1.

426. *See, e.g.*, SINGER, *supra* note 20; Howe, *supra* note 44; Gaul, *supra* note 53.

427. *See* SINGER, *supra* note 20, at 222–23 (noting that since neither the international marketplace nor home governments have effectively regulated private military firms, contractors have taken on clients "about whom the home state government or public had normative concerns"); Howe, *supra* note 44 (indicating that some private firms will accept offers from roguish clients, including neo-colonial groups in Africa); Singer, *supra* note 83, at 523 (describing how some private firms accept contracts with "dictatorships, rebel armies, terrorist groups, and drug cartels"); Gaul, *supra* note 53; Zarate, *supra* note 20, at 93–104 (characterizing non-American firms as more likely to engage in offensive enterprises and as also more likely to work for morally questionable client states).

428. SINGER, *supra* note 20, at 224; *see* Philip Winslow, *Why Africa's Armies Open Arms to Elite Fighters From S. Africa*, CHRISTIAN SCI. MONITOR, Oct. 19, 1995, at 7 (quoting South African Deputy Foreign Minister Pahad as saying "[T]oday they're there to defend you, tomorrow those forces will be there to overthrow you").

Executive Outcomes also helped the Sierra Leone government fend off rebel advances in 1995–96,[429] and then had a hand in appointing an interim head of government—one reportedly with whom the South African-based firm could "work."[430] Evidence also points to the fact that Executive Outcomes considered the possibility of assisting the Rwandan Hutu government in 1994—not too far in advance of the time that the Hutus were planning to unleash their murderous campaign against the Tutsis—and that Sandline came similarly close to working for the Mobutu regime in Zaire, despite its widespread notoriety as repressive and corrupt.[431] More recently, a failed military coup in Equatorial Guinea involved privateers financed by, among others, the son of Margaret Thatcher. The goal, apparently, was to install a more business-friendly leader as head of the oil-rich state.[432]

Private military firms help prop up rogue regimes, resist struggles for self-determination, and contribute to the proliferation and diffusion of weaponry and soldiers around the world—axiomatically a destabilizing and thus undesirable phenomenon.[433] The existence of armaments held by stateless groups complicates the task for responsible countries who (for purposes of self-defense and collective security) keep track of and seek to contain the spread of weapons. The availability and acceptability of contractors makes it more difficult for countries to assess the relative strengths of rival nations, since one phone call to a group of out-of-work Ukrainian fighter pilots could radically alter a region's balance of power.[434] Of course, the existence of one such outfit also spawns greater

429. Sapone, *supra* note 50, at 22; Christo Johnson, *Troops Foil Coup in Sierra Leone*, INDEPENDENT (London), Oct. 4, 1995, at 15.

430. SINGER, *supra* note 20, at 112–13; *see id*. at 115 (noting Sandline's contract to reinstate the government after Executive Outcomes left and a coup was staged).

431. *See* SINGER, *supra* note 20, at 225. In fairness, even the American-based MPRI has taken on as a client the military dictatorship of Equitorial Guinea. *See id.* at 132, 223.

432. *See* David Leigh et al., *Pentagon Link to Guinea Coup Plot*, GUARDIAN, Sept. 27, 2004, at 11; *see also* Michael Wines, *An African Foul-Up, With an Intriguing Cast of Britons*, N.Y. TIMES, Sept. 3, 2004, at A4 (noting that the coup was engineered by those who wanted to enhance their business prospects in the country).

433. *Id*. at 170; Sapone, *supra* note 50, at 2–3 (noting private military firms' participation in Chechnya, Tajikistan, Azerbaijan, Georgia, Kashmir, Sierra Leone, and East Timor); Kevin Whitelaw, *Have Gun, Will Prop Up Regime*, U.S. NEWS & WORLD REP., Jan. 20, 1997, at 47.

434. *See* SINGER, *supra* note 20, at 174–75 ("[I]t was already difficult to access a rival's capabilities or force postures. Now with PMFs, the combination of an openly accessible military services market and the new heterogeneity of military actors makes this appraisal even more difficult. When externalized onto an ever-changing market, a rival's potential capabilities or force postures are highly variable and able to transform rapidly. Thus, seemingly predictable power balances and deterrence relationships are now made unstable."); Singer, *supra* note 83, at 522 (noting how private firms helped to win wars in Angola, Croatia, Ethiopia-Eritrea, and Sierra Leone).

demand—as every government would like the security of a few Ukrainian fighter pilots on retainer.[435] Moreover, to the extent that privateers, especially those operating in Africa, may frequently be foreign nationals, the political and human costs of war may be quite low.[436]

All of these factors point toward dangerous forms of military proliferation and thus threaten peace and stability. By all accounts, this global trend should be one the United States vociferously condemns. But can it do so credibly with thousands of its own privateers under contract? Even if the United States were to draw distinctions and make exceptions for its "professional" contractors, it probably still would be unable to lead a campaign against privateers. Therefore, privatization by the United States helps set a bad, enduring precedent and lends the global practice an unwarranted veneer of legitimacy.

VI. CONCLUSION

Given my analysis in the preceding parts, I might be tempted to conclude with the utmost of economy—and use only three letters: *Q.E.D.* However, despite the litany of structural (not to mention accountability-based) harms that private contractors introduce onto the national security landscape, it is doubtful that this new phenomenon—however much decried—will quickly fade away. Indeed, the combination of America's extensive overseas military commitments, its already taxed store of reservists, and its inability to stomach a universal draft will probably ensure the continued need for an elastic supply of private troops for the foreseeable future.[437] Hence, although this inquiry would rather conclude by way of proscription than prescription, realism preaches the latter approach might prove more prudent.

Appreciating the staying power of military privatization, critics and apologists alike have started to propose reforms centered on greater

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435. *See, e.g.*, SINGER *supra* note 20, at 52 (describing how all sides in the Angolan Civil War secured private military assistance); *id*. at 164–65 (noting that at times private firms have become so powerful that they can influence internal political decisions in the client's country); *id*. at 172 (positing how small, population-light countries can build up military strength overnight through contracting out); *id*. at 175 (predicting that the combination of heightened uncertainty regarding rival nations' forces and increased availability of military resources in the marketplace could spawn overnight arms races).

436. *Id*. at 174 (noting that leasing a foreign army lowers the cost of war: "A new international market of private military services means that economic power is now more threatening."); Kurlantzick, *supra* note 20 (suggesting that "the fact that states could hire PMCs relatively cheaply to prosecute their battles made them less willing to come to the bargaining table and more willing to continue fighting"); *see also* Posner, *supra* note 397.

437. *See supra* notes 22, 96–100, and 206 and accompanying text.

contractual control and oversight. These measures should, of course, be applauded as steps in the right direction. But, on their own, these reforms do not penetrate deeply enough to reduce the battery of structural harms military privatization creates; in other words, they do not go beyond accountability. Effective reform to combat the harms identified in this Article must accordingly look beyond tightening contracting law and enforcing accountability norms. Reform instead must attack the underlying status discrepancies that distinguish contractors from U.S. troops. If there were no gaps in the way troops and privateers were governed, disciplined, and publicly perceived, then many of the institutional, legal, and symbolic distortions that threaten the vitality of America's democratic institutions, the integrity of its fighting forces, and the legitimacy of its international relations would be greatly reduced.

Accordingly, by way of conclusion, I offer just a few words in service of sketching out a blueprint for reform.[438] Irrespective of the particular details, any such blueprint to alleviate the structural problems raised in this Article must promote symmetry and parity between contractors and American troops in three distinct ways. First, reform must give Congress the regulatory and warmaking authority over privateers that is commensurate with what it enjoys over the U.S. Armed Forces. Achieving parity here, of course, would help minimize the democratic and constitutional harms that may exist today in situations where the legal status differentials between private contractors and U.S. troops can be exploited to circumvent Congress and the American people. Second, reform must enable the federal government to exercise the same amount of control and discipline over privateers as it does over members of the Armed Forces. Eliminating this disparity would help alleviate the concern that private troops representing American interests are—unlike public soldiers—not effectively constrained by civilian and political officials. And, third, reform must somehow serve to lessen the symbolic differences between contractors and soldiers, differences that currently can be leveraged to deploy privateers in zones of hostility where the American people would not as readily commit public soldiers.

The crucial questions this reform agenda ultimately invites, then, are two-fold. Can these status disparities actually be eliminated? And, if so, does achieving parity reduce, if not altogether destroy, military privatization's raison d'etre?

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438. I do not, however, take a strong position necessarily endorsing or rejecting any of these measures. I simply proffer them as a set of policies that might help address some of the concerns raised in this Article.

A. Achieving Parity: Leveling the Asymmetries Between the Public and Private

1. Restoring Equilibria in the National Security Constitution

For Congress to establish similar levels of control over privateers to that which it possesses over public troops, it must draft a comprehensive framework statute. Such a statute would both assert Congress's authority over privateers and formalize the processes by which the national legislature is kept informed of their activities. This statute, for instance, might create a department within a federal agency, e.g., the Military Privatization Office of the Department of Defense ("MPO"), that Congress designates as the focal point for all military contracts and that has one assistant secretary in charge. The MPO would be guided by a set of clear regulations, one of which would necessarily be: no federal money can be disbursed to any contractor whose employees carry or fire guns overseas unless (1) the corresponding contract is routed through the MPO and (2) the recipient registers (like a lobbyist would[439]) and discloses information about its employees, its clients, and its engagements. The MPO would be required to share this data with Congress and the public, as well as to report more generally—on, say, a quarterly basis—on the location, number, and activities of all contractors serving abroad as part of federal contract work. Moreover, the assistant secretary would have to advise Congress within 48 hours if any of the contractors engage in gunfights and/or if there are any contractor casualties abroad.

Concomitantly, the statute would formalize a process by which Congress can officially authorize privateers to participate in conflicts. This could be achieved simply by extending the application of the existing War Powers Resolution beyond members of the Armed Forces to include contractors. Such a measure would work both to ensure congressional authority over privateers commensurate with the powers it possesses over U.S. military personnel and to increase the level of public awareness and transparency required not only for prudential, accountability reasons, but also to comport with the normative imperatives of democratic governance and popular sovereignty.[440] Obviously, such legislation would probably be

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439. *See, e.g.*, Lobbying Disclosure Act of 1995, Pub. L. No. 104-65, 109 Stat. 691 (codified at 2 U.S.C. §§ 1602–1603 (2000)); *see also* Guttman, *supra* note 3, at 888 (noting that federal conflict-of-interest rules are more lax with regard to contractors than with federal employees).

440. Moreover, the greater the degree to which privateers are incorporated into the legal architecture of congressional regulation and authorization, the less likely it is that such contractors could in any way be considered independent from the U.S. government. Hence, the status differential

imperiled by the threat of a presidential veto and, perhaps, even a constitutional challenge (at least with respect to congressional insistence on its power to authorize contractor-led military engagements).[441]

2. Disciplining Contractors As Soldiers

The next step would be for Congress to reduce the status disparities between U.S. troops and private contractors in the context of military discipline and control. Currently, these disparities generate reliability and dependability gaps: the government cannot impose the requisite discipline and penalties on privateers to ensure that they do not deviate from, undermine, or otherwise jeopardize a military mission through acts of insubordination and desertion. Such conduct disparities also spawn broader, structural concerns for the effective control and subordination of the U.S. military to the civilian federal government. As discussed at length in Part IV, whereas the UCMJ creates for U.S. troops an entire framework of discipline, *under pains of severe punishment*, there are no comparable disincentives that exist in the realm of contract law. The threat of a civil breach, even if its consequences ever run to the breaching privateer (and not just to the firm), cannot compare to the threat of being thrown in the brig.[442]

Congress, of course, can extend the jurisdictional reach of the codes of American criminal law to contractors overseas—and has already done so with the Military Extraterritorial Jurisdiction Act of 2000.[443] But for a variety of constitutional reasons, it may have more difficulty extending some of the unique rights-infringing provisions of the UCMJ to private contractors, or to any other civilians for that matter (at least in the absence of a concomitant congressional declaration of war).[444] I have in mind here

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for purposes of exploiting legal gaps to circumvent collective security agreements would also be reduced.

441. For strategic and political reasons, however, Congress would be unlikely to undo extant presidential deployments. *See, e.g.*, ELY, *supra* note 193, at 52–53; Louis Fisher, *Congressional Abdication: War and Spending Powers*, 43 ST. LOUIS U. L.J. 931, 1006 (1999); John O. McGinnis, *Constitutional Review by the Executive in Foreign Affairs and War Powers: A Consequence of Rational Choice in the Separation of Powers*, 56 L. & CONTEMP. PROBS. 293, 301–06 (1993); Treanor, *supra* note 168, at 701. At best, and explaining away any constitutional challenges for the moment, Congress would probably have to wait for a conflict to abate and than legislate in its wake. *See, e.g.*, Spiro, *supra* note 199, at 726 (noting that Congress can rarely criticize and legislate to limit the president during the course of military engagement, only afterward); *see also* Koh, *supra* note 186.

442. *See supra* notes 309–18 and accompanying text.

443. *See supra* note 309 and accompanying text.

444. *See* Reid v. Covert, 354 U.S. 1, 35 (1957) ("[A] statute cannot be framed by which a civilian can lawfully be made amenable to the military jurisdiction in time of peace."); *see also* Grisham v.

those behaviors or practices such as insubordination, criticism of military policy, and desertion that alone are not criminal acts (and arguably could not, constitutionally speaking, be *criminalized*) if applied to civilians, but which the Supreme Court has allowed Congress, in essence, to criminalize vis-à-vis active members of the Armed Forces precisely because of the military's special, subordinated positioning in the architecture of American governance.[445]

To narrow this gap, therefore, would probably require more dramatic measures than could be achieved through ordinary legislation. Perhaps, a constitutional amendment limiting the rights of overseas military contractors, an explicit step to "deputize" contractors and incorporate them into the larger fold of the American military community, or a congressional declaration of war, which definitely extends military law to contractors working overseas with members of the Armed Forces,[446] would be required to achieve effective control on par with what currently disciplines U.S. military personnel.

3. Cultural Conflation: Publicization of Contractors

The final step, then, would be to smooth out the symbolic differences between public and private troops. This would require (1) instilling in contractors a sense of their public charge (what Professor Jody Freeman has called "publicization"[447]) and (2) conveying to the American people the sense that soldiers and contractors, symbolically speaking, are one and

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Hagan, 361 U.S. 278 (1960); McElroy v. Guagliardo, 361 U.S. 281 (1960). These latter two cases hold that the UCMJ applies to contractors only in instances of congressionally declared wars. *See* Perlak, *supra* note 309, at 97–100. Hence, in Vietnam, contractors were not held subject to the Uniform Code even though the United States was in a de facto state of war. *See* Latney v. Ignatius, 416 F.2d 821 (D.C. Cir. 1969); United States v. Averette, 19 C.M.A. 363 (1970).

445. Efforts to do so may run afoul of a contractor's constitutional rights not only on procedural grounds (soldiers are not entitled to a grand jury indictment, a jury trial, or an Article III judge), see Gibson, *supra* note 44, but also some substantive ones. To criminalize the breach of contract per se would pose an interesting challenge to the long-held anti-peonage jurisprudence of the Thirteenth Amendment. *See, e.g.*, United States v. Reynolds, 235 U.S. 133 (1914); Bailey v. Alabama, 219 U.S. 219 (1911); Hodges v. United States, 203 U.S. 1, 20 (1906); Perlak, *supra* note 309, at 118–19; Schmidt, *supra* note 313 ("Because the UCMJ does not apply to contractor employees (except potentially in a declared war), and because the [Military Extraterritorial Jurisdiction] Act addresses only civilian criminal statutes, it appears there is no relationship that *could* result in 'discipline' over a contractor. Clearly, the options that the government has to ensure proper performance by contractors do not include any *actual ability to punish* individual contractor employees.") (emphasis added).

446. *See, e.g.*, *Grisham*, 361 U.S. at 278; *McElroy*, 361 U.S. at 281; *Averette*, 19 C.M.A. at 363; Perlak, *supra* note 309, at 98. Note that in many situations it would simply be imprudent to declare war, and certainly not worth the status-reveling advantages.

447. Freeman, *supra* note 3.

the same. Accomplishing these twin aims might increase morale among public troops worried that their private compatriots will not perform ably and reduce the status disparities that currently allow the president to overcommit forces for a given engagement, respectively.

In some ways, of the three sets of reforms, this is the most difficult task, because it is quite difficult for policymakers to legislate a change in perceptions (either among the contractors or among the American public more generally). It would be pointless, or at least inefficacious, to regulate how people go about valuing one life compared to another when any such exercise is inherently subjective and, likely, also idiosyncratic. But, on the other hand, perhaps the "publicization" follows closely—and somewhat effortlessly—on the heels of the foregoing tangible reforms.[448] Perhaps with the incorporation of private soldiers into the regulatory framework already established for the Armed Forces, with the combining and conflating of soldier and contractor casualty counts, with comparable requirements of oversight and formal authorization, and, moreover, with some measures taken to discipline contractors like soldiers, contractors could feel more closely aligned with the American military and embrace its esprit; and the public, in turn, might begin to view contractors as more closely integrated into the American military community. Indeed, it may be the case that the symbolic differences are largely a function of status differences, and to the extent privateers are limited in their ability to act (comparatively speaking) *ultra vires*, they may not see themselves—or be perceived—as all that distinct from members of the Armed Forces.

Of course, some residual disparities of no small import will remain. For example, the social and emotional bonds forged while training and serving in military units, emphasized above as instrumental in fostering selflessness, valor, and an esprit de corps,[449] cannot be transmitted to privateers just because they would now be governed by the same disciplinary standards and counted as soldiers for purposes of calculating force projections and body counts. Nor can the public be immediately persuaded that contractors and soldiers are one and the same just because they are similarly regulated. Ultimately, therefore, additional affirmative steps to integrate the two distinct cultures, such as by having privateers eat, train, and live with soldiers, by minimizing salary differentials, and by circumscribing opportunities for privateers to serve foreign clients

448. *See id.*
449. *See supra* notes 332–38 and accompanying text.

(tereby minimizing reasons for the public to perceive them as mercenaries) would be necessary to reduce further the symbolic differences in a more meaningful way.

B. Coming Full Circle: Arriving at a Place Where Issues of Accountability and Efficiency Are (Again) Paramount

Assuming *arguendo* that the difficulties associated with devising and implementing the reform measures are overcome—and a comprehensive set of prescriptions do help eliminate many of the structural distortions that currently correspond with military privatization initiatives—there is an additional concern: Would closing these structural gaps destroy military privatization's raison d'etre? In other words, does military outsourcing exist principally to leverage status differentials?

Closing the status gaps would indeed add to the "publicization" of private contractors. As mentioned above, if regulated and disciplined like U.S. troops and if the American people start thinking of them as comparable to U.S. troops, contractors may not be used as readily (or successfully) to exploit legal and symbolic asymmetries. This means, however, that policymakers could not rely on them to accomplish military objectives otherwise difficult to obtain, if not unobtainable, using U.S. soldiers. Yet room would still exist for private actors on the national security landscape: The economic-efficiency virtues of privatization would largely remain unaffected by the structural sets of policy reforms. Indeed, it is possible that contractors from the private sector could still offer the Pentagon high-quality services and lower prices. They could also provide the Defense Department with force-multiplying and specialization capabilities if additional troops are needed.[450]

Arriving at that point, where the principal reasons for privatization center on economic efficiency gains, would, actually, permit scholarly analysis to come full circle as well. Once military privatization is stripped of its potential to be structurally damaging, it could then be scrutinized principally on accountability and efficiency grounds. That is, once the legal, constitutional, and symbolic concerns are allayed, we can be in a position to evaluate the true economic virtues of privatization (and the "inherently governmental" tradeoff), an inquiry I expressly bracketed for

450. *But see* DONAHUE, *supra* note 5, at 37–56; Beermann, *supra* note 57, at 1736; Freeman, *supra* note 3, at 1339. These scholars suggest that there is some argument to be made that, as Professor Freeman puts it, "Adherence to public law norms might be costly for private providers, and those costs might undermine the potential for efficiency gains to some extent." *Id.*

the purposes of this Article. It is then—and perhaps only then—that conventional discussions centering on costs and benefits, transparency, and accountability (all of which are very important) should resume in earnest.