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## Private Force/Public Goods

Scott M. Sullivan

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## Article

### Private Force / Public Goods

SCOTT M. SULLIVAN

*This Article rethinks the benefits and dangers of private force in war. It shows that privatization must be viewed within the special requirements and confines of national security policy making and weighed against available alternatives. Contrary to academic and mainstream conventional wisdom, this Article concludes that national security privatization comports well with core constitutional and democratic principles and offers greater transparency and democratic control than commonly understood. Moreover, this Article argues that the American use of privatized force reflects and accomplishes normative and democratic commitments of international and domestic law that would be impossible to replicate through other policy avenues.*

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# Private Force / Public Goods

SCOTT M. SULLIVAN\*

## I. INTRODUCTION

When President George W. Bush announced the beginning of military action in Iraq in March 2003, he set in motion the largest deployment of private military firms abroad in U.S. history. The number, scope of responsibilities, and publicized misdeeds of these private contractors raised substantial concern among the public.

Six years after the initiation of the war in Iraq, President Barack Obama, a vocal critic of private military firms during his campaign, announced a surge of American troops to Afghanistan.<sup>1</sup> The Afghanistan surge requires a parallel surge of military contractors into a theater where, as of March 2009, contractors outnumbered U.S. troops at a rate of more than two to one.<sup>2</sup> According to military service requests, the private actors brought to Afghanistan will protect dignitaries and traveling convoys and guard U.S. bases near insurgent strongholds.

Models for framing the appropriateness of private actors in national security span from outright prohibition to wholesale incorporation, with the former considered impractical, the latter unpalatable, and the middle unprincipled. These extremes are rooted in different conceptions as to the nature of national security privatization relative to core public law values of policy efficacy, governmental accountability, and the diminution of human suffering inherent to war. Proponents of private actors in national security tout the flexibility and ready availability of the market. Opponents warn against the corrupting power of profit motive within armed conflict's already ambiguous morality.

The purpose of this Article is to bridge the gap between these views. Conceptions of public policy efficacy must be viewed relative to the accepted special requirements and limitations of national security policy,

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<sup>1</sup> Anne Flaherty, *Contractors Surge to Afghanistan*, WASH. TIMES, Mar. 26, 2009, <http://www.washingtontimes.com/news/2009/mar/26/contractors-surge-to-afghanistan/>.

<sup>2</sup> *Id.*

specifically lessened public visibility of government action and public intolerance for avoidable dangers. Similarly, a genuine assessment of the danger of private actors has to operate against a baseline of their available alternatives. Combining these concerns enables the movement toward a legal regime that can assure that the privatization of national security functions safeguards rather than corrupts other core public law values associated with American national security prerogatives.

The argument proceeds in four parts. Part II reviews the most common theoretical criticisms of privatizing force, which are framed around constitutional and democratic norms. Most claims against privatization either prove too much (asserting that harms under their own terms not limited to the private sector) or too little (that harms are easily remedied through standard regulation). As a result, the prevailing critiques fail to address the fundamental structural question of privatizing and outsourcing force.

Part III examines contemporary privatization practice alongside the chief normative claims made against it. Using empirical studies and comparative analysis, this Article argues that the perceived harms of private military companies (“PMCs”) are overblown. Instead, the institutional structure and commercial characteristics of PMCs reflect little difference from the values reflected in public troops. PMCs, in fact, exhibit characteristics meaningfully associated with proclivity toward legal and regulatory compliance.

Part IV reviews the politics and values driving the need for private force and contemplates under-examined institutional and policy benefits privatized military services accrue to the State. This section introduces a guiding principle that balances democratic accountability with military efficacy, which creates a reliable standard by which to judge PMC legitimacy. Using this framework, this Article argues that the momentum of growth in the market for private force reflects, more than anything else, the democratic preferences of Western countries’ citizenry and a commitment to reducing the human cost of war consistent with international legal norms.

Finally, Part V discusses the consequences of private force legitimated through the bifocal of democratic accountability and military efficacy.

## II. THE CRITIQUE OF NATIONAL SECURITY PRIVATIZATION

A consensus has emerged within popular media and academic scholarship that privatizing national security functions through military contractors threatens fundamental notions of state sovereignty, democracy,

and constitutional norms.<sup>3</sup> The current legal doctrine on national security privatization presents a void that lends itself to manipulative characterization by opponents and proponents of privatization alike.<sup>4</sup> Academic scholarship has proven incapable of filling the void. Despite their influence in policy, the theoretical arguments debasing privatized force are ultimately unsatisfying. These critiques tend to be thin at their foundations and overbroad in their applications.

#### A. *The Legal Void in Assessing the Legitimacy of Privatization*

The privatization of governmental services has repeatedly arisen as a controversial topic of legal scholarship.<sup>5</sup> The controversy inherent to privatization largely flows from a difficulty in identifying a definitive line separating core public responsibilities.<sup>6</sup> This ambiguity, along with a renewed enthusiasm for cost-efficiency and belief in the virtues of the market, has spurred increased privatization of a variety of public goods and services over the course of the past forty years.<sup>7</sup> As privatization has

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<sup>3</sup> See P.W. SINGER, *CORPORATE WARRIORS: THE RISE OF THE PRIVATIZED MILITARY INDUSTRY* 170–71, 213–15 (2008) (discussing complications that privatized military firms pose to state sovereignty and their implications for democracy); Martha Minow, *Outsourcing Power: How Privatizing Military Efforts Challenges Accountability, Professionalism, and Democracy*, 46 B.C. L. REV. 989, 1022–25 (2005) (arguing that reliance on private contractors jeopardizes democracy by avoiding checks and balances and creating a lack of transparency); 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, 119, 145 (1998) (noting that security companies may have created a greater danger for state sovereignty); Nicholas von Hoffman, *Contract Killers: How Privatizing the U.S. Military Subverts Public Oversight*, HARPER'S MAG., June 2004, at 80 (“[T]he use of private contractors has reduced the military’s accountability with respect to the size of troop deployments overseas.”); Thomas Catan & Stephen Fidler, *Private Companies on the Front Line*, FIN. TIMES (London), Aug. 12, 2003, at A15 (“Many governments view PMCs as challenging states’ sovereignty and monopoly on legitimate violence.”).

<sup>4</sup> See MARTHA MINOW, *PARTNERS, NOT RIVALS: PRIVATIZATION AND THE PUBLIC GOOD* 25–27 (2002) (discussing the movement of privatization as framed by “right-wing” and “left-wing” analysts).

<sup>5</sup> These scholars view the current use of PMCs as “a radical new development in military privatization” creating “the emergence of contemporary ‘mercenaries’ carrying out the assignments that were previously and exclusively reserved for uniformed American soldiers.” Jon D. Michaels, *Beyond Accountability: The Constitutional, Democratic, and Strategic Problems with Privatizing War*, 82 WASH. U. L.Q. 1001, 1018–19 (2004).

<sup>6</sup> See MINOW, *supra* note 4, at 30 (noting that quintessentially private issues related to marriage and family invoke “decisions made by governments with important financial, reputational, and moral consequences”).

<sup>7</sup> Numerous accounts as to the basic benefits and detriments of privatization exist. See, e.g., ELLIOT D. SCLAR, *YOU DON’T ALWAYS GET WHAT YOU PAY FOR: THE ECONOMICS OF PRIVATIZATION* 11–13 (2000) (discussing arguments for privatization based on the standard market model); Ellen Dannin, *Red Tape or Accountability: Privatization, Public-ization, and Public Values*, 15 CORNELL J. L. & PUB. POL’Y 111, 113 (2005) (noting that arguments about cost and efficiency are often a method of addressing accountability); Jody Freeman, *The Contracting State*, 28 FLA. ST. U. L. REV. 155, 170 (2000) (noting that “the case for privatization has sounded largely in the language of cost savings”); Clayton P. Gillette & Paul B. Stephan III, *Constitutional Limitations on Privatization*, 46 AM. J. COMP. L. 481, 490 (Supp. 1998) (“Several courts seem to embrace the broad proposition that a federal court can and should reexamine the cost-benefit calculus supporting a decision about privatization . . . .”); Dru Stevenson, *Privatization of Welfare Services: Delegation by Commercial*

spread, the universe of government activities viewed as unmistakably public, and thus unmistakably inappropriate for privatization, has diminished.<sup>8</sup>

National security functions have, in theory at least, remained one of the last areas of government perceived as “inherently governmental” and thus unsuitable for privatization or outsourcing.<sup>9</sup> In a world where privatization has prevailed as a matter of practice, concerns of national security are described as “uniquely ill-suited to privatization” and “the last refuge of antiprivatization forces.”<sup>10</sup> Given the pervasive mistrust toward privatizing national security functions, one would expect that elements of privatization in defense would be the exception rather than the rule.

That is not the case. In practice, the story is more complicated. Privatization and outsourcing have saturated U.S. national security since the Eisenhower administration. The formation of NASA in 1958 introduced the federal government’s first agency in which full-time private contractors ultimately outnumbered federal employees.<sup>11</sup> The same decade

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*Contract*, 45 ARIZ. L. REV. 83, 83–84 (2003) (noting that advocates of privatization argue that it provides more efficiency, yet also acknowledging that a trend is emerging to analyze costs and benefits of privatization prior to outsourcing); David A. Super, *Privatization, Policy Paralysis, and the Poor*, 96 CAL. L. REV. 393, 409–10 (2008) (noting transaction costs as a factor in choosing whether to privatize services). The basic normative justification for the privatization movement is the claim that the delegation of governmental services to private industry is advantageous in both quantitative and qualitative measures. In other words, privatized services cost less and are performed more effectively because the private sector can act untethered to political burdens innate to bureaucratic administration.

<sup>8</sup> Administrative guidance relating to national security is not excepted from this movement. In 2001, the Department of Defense *Quadrennial Defense Review Report* argued that the Department of Defense should move the performance of non-core functions (e.g., war fighting) from uniformed service members to the private sector. U.S. DEP’T OF DEFENSE, QUADRENNIAL DEFENSE REVIEW REPORT 53–54 (2001) [hereinafter QDR REPORT]. Of course, this guidance itself is rife with characterization issues, and in this particular case, tautological. See *id.* at 53 (noting that “[a]ny function that can be provided by the private sector is not a core government function”).

<sup>9</sup> *Oversight Hearing to Review the Findings of the Commercial Activities Panel: Hearing Before the Subcomm. on Technology and Procurement Policy of the H. Comm. on Government Reform*, 107th Cong. 33 (2002) (statement of David M. Walker, Comptroller General, U.S. General Accounting Office), available at [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107\\_house\\_hearings&docid=f:86063.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107_house_hearings&docid=f:86063.pdf). The GAO has provided little guidance to understanding the “inherently governmental function” test in national security, only that it is “clear that government workers need to perform certain warfighting, judicial, enforcement, regulatory, and policymaking functions . . . . Certain other capabilities, . . . such as those directly linked to national security, also must be retained in-house to help ensure effective mission execution.” *Id.* at 33–34. This guidance offers little to the issue of national security privatization. No one doubts that the U.S. government must retain “certain warfighting” functions. *Id.* at 34. Similarly, according to the GAO, capabilities “directly linked to national security” must only be retained if demonstrable that in-house assistance helps “ensure effective mission execution.” *Id.* The exact characterization of an acceptable public/private division in national security varies along axes of the variety, typology, and degree of privatization and delegation. See Michael J. Trebilcock & Edward M. Iacobucci, *Privatization and Accountability*, 116 HARV. L. REV. 1422, 1444 (2003) (contending that “formulation and implementation of a country’s foreign or defense policy [cannot be outsourced] because complexity of objectives and unforeseeable contingencies render delegations of these functions to private actors highly problematic”).

<sup>10</sup> E. S. SAVAS, PRIVATIZATION AND PUBLIC-PRIVATE PARTNERSHIPS 303 (2000).

<sup>11</sup> Thomas P. Hughes, *The Space Agency as Manager*, SCI. MAG., Sept. 15, 1967, at 1298, 1299 (reviewing ROBERT L. ROSHOLT, AN ADMINISTRATIVE HISTORY OF NASA, 1958–1963 (1966)); see

also witnessed private contractors building the country's first long-range ballistic missiles and designing high-tech military aircraft.<sup>12</sup> Private contractors have manned and operated U.S. nuclear missile silos since their inception.<sup>13</sup> In the 1960s, the military hired private contractors to train South Vietnamese troops prior to U.S. entrance in the Vietnam War.<sup>14</sup> In 1972, private contractors held thirty-six percent of all defense-related jobs.<sup>15</sup> By 2000, that number had risen to fifty percent.<sup>16</sup> One 1996 study concluded that every Department of Defense civil servant was outnumbered by five private contract and grant jobs.<sup>17</sup> During 2007 and 2008, the number of PMCs in the Iraqi theater was reported to have eclipsed the number of U.S. troops.<sup>18</sup>

The disconnect between the theoretical admonition of privatizing national security functions and its pervasive practice stems from confused governmental guidelines covering contracting. The Office of Management and Budget's *Circular No. A-76* establishes the U.S. government's policy to proscribe outsourcing activities that are "inherently [g]overnmental" in nature.<sup>19</sup> This test has proven hopelessly unhelpful in clarifying how to determine whether a particular governmental function is appropriate for outsourcing.<sup>20</sup> Neither the OMB Circular nor accompanying interpretation

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*also Hearing Before the S. Commerce, Science, and Transportation Comm.*, 108th Cong. (2003) (statement of Sen. Lautenberg) (noting that "the privatization program that we see in government almost began with NASA").

<sup>12</sup> See Howard Mingos, *The Rise of the Aircraft Industry*, in *THE HISTORY OF THE AMERICAN AIRCRAFT INDUSTRY: AN ANTHOLOGY* (Gene R. Simonson ed., 1968).

<sup>13</sup> See R.L. Garwin, *The Wrong Plan*, *BULL. ATOM. SCI.*, Mar./Apr. 2000, at 36.

<sup>14</sup> Barry Yeoman, *Soldiers of Good Fortune*, *MOTHER JONES*, May/June 2003, at 43.

<sup>15</sup> Ann R. Markusen, *The Case Against Privatizing National Security*, 16 *GOVERNANCE* 471, 474 (2003).

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

<sup>17</sup> PAUL C. LIGHT, *THE TRUE SIZE OF GOVERNMENT* 38 (1999).

<sup>18</sup> See, e.g., Ike Skelton, Chairman, House Armed Servs. Comm., Opening Statement: Hearing on Contingency Contracting: Implementing a Call for Urgent Reform (Apr. 10, 2008), available at [http://armedservices.house.gov/list/speech/armedsvc\\_dem/skeltonos041008.shtml](http://armedservices.house.gov/list/speech/armedsvc_dem/skeltonos041008.shtml) (noting that this is an "era where contractors outnumber soldiers on the battlefield"); Lauren Gregory, *Increasing Reliance on Private Contractors in Iraq Raises Questions*, *CHATTANOOGA TIMES FREE PRESS*, May 2, 2008 (noting that one scholar "believes the number of contractors now outnumbers the total number of troops overseas"); T. Christian Miller, *Contractors Outnumber Troops in Iraq*, *L.A. TIMES*, July 4, 2007, at A1 ("There are more U.S.-paid private contractors than there are American combat troops in Iraq."); James Risen, *Use of Contractors in Iraq Costs Billions, Report Says*, *N.Y. TIMES*, Aug. 12, 2008, at A11 ("[E]mployees of private contractors now outnumber American troops [in the war zone]."). Prior to the Iraq War, the number of public troops to civilian contractors had never exceeded a 3:1 ratio. See Press Release, Sen. Kent Conrad, Conrad Warns of Dangerous Over-Reliance on Outsourcing in Iraq War (Aug. 12, 2008), available at <http://conrad.senate.gov/pressroom/record.cfm?id=302012> (summarizing a CBO report that stated that the current number of contracts is unprecedented and that "[t]he contractor-to-troop ratio is 2.5 times higher in Iraq than during the Korean War, and 5 times higher than during the Vietnam War").

<sup>19</sup> OFFICE OF MGMT. & BUDGET, *CIRCULAR NO. A-76: PERFORMANCE OF COMMERCIAL ACTIVITIES*, Aug. 4, 1983 (revised 1999), available at <http://www.whitehouse.gov/omb/circulars/a076/a076.html> [hereinafter OMB CIRCULAR NO. A-76].

<sup>20</sup> See Simon Chesterman, *We Can't Spy . . . If We Can't Buy!*, 19 *EUR. J. INT'L L.* 1055, 1069–73 (2008) (examining the difficulty and malleability of the inherent governmental function test in the



provides principles useful in illuminating how and why certain functions accrue “inherently governmental” status. As a result, the guiding policy is one of characterization rather than fact.<sup>21</sup>

Under the Obama administration, the administrative prohibition on using contractors for “inherently governmental functions” is inapplicable to security contractors because those contractors are prohibited from engaging in offensive military action.<sup>22</sup>

The open-ended nature of the inherently governmental function test reflects the reality that division between the public and private sphere has always been complicated.<sup>23</sup> The intrinsic difficulty of identifying “public” and “private” functions is exacerbated when requiring a further parsing of such functions once they are identified as inherently “public.”<sup>24</sup> As the “inherently governmental” test means little in and of itself, the question of the wisdom and appropriateness of privatizing elements of national security has fallen to scholars.

### B. *The Academic Critique of Privatizing National Security*

Two varieties of scholarly orientation form the core of the theoretical assault against national security privatization: (1) critiques of PMCs based in constitutional terms,<sup>25</sup> and (2) concerns rooted in international relations

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context of intelligence); Minow, *supra* note 3, at 1015 (noting that “disagreements over precisely what an inherently governmental activity is and gaps in governmental capacity contribute to ambiguity over what can or should be outsourced”).

<sup>21</sup> See Minow, *supra* note 3, at 1015 (noting that “disagreements over precisely what an inherently governmental activity is . . . contribute[s] to ambiguity over what can or should be outsourced”); Steven L. Schooner, *Contractor Atrocities at Abu Ghraib: Compromised Accountability in a Streamlined, Outsourced Government*, 16 STAN. L. & POL’Y REV. 549, 556 n.22 (2005) (discussing internal government conflict over “[c]hoosing between the labels ‘outsourcing’ and ‘competitive sourcing’”). In the view of one scholar, “the definition of ‘inherently governmental’ has thus emerged not as a sphere to be protected but rather as an exception to the more general push to privatization.” Chesterman, *supra* note 20, at 1070.

<sup>22</sup> See William Matthews, *State Pays \$1,222 Per Day for Contractor Security Guards*, FED. TIMES, Mar. 3, 2008, at 8 (“Guards defending a base . . . are not engaged in inherently governmental activity because that is not offensive action . . .”).

<sup>23</sup> See DEBORAH D. AVANT, *THE MARKET FOR FORCE: THE CONSEQUENCES OF PRIVATIZING SECURITY* 23–24 (2005) (“What is private (and by association, public) offers up a different set of confusions.”); JEAN BETHKE ELSHTAIN, *PUBLIC MAN, PRIVATE WOMAN: WOMEN IN SOCIAL AND POLITICAL THOUGHT* 1, 4–6 (1981); MINOW, *supra* note 4, at 30 (noting that “the interconnections between public rules and private authority permitted by public rules make it difficult to sort out what is a private realm and what is not”).

<sup>24</sup> At its most expansive, all aspects and decisions affecting “national security,” the core organizing principle of the State, including procurement, weapons development, weapons maintenance, and providing health and other services to public troops, could be considered ill-suited for privatization. At its most narrow, all of national security could be privatized as long as the State reserved a sovereign right to dictate how such force would be used.

<sup>25</sup> See, e.g., Michaels, *supra* note 5, at 1009–10; Minow, *supra* note 3, at 999; Paul R. Verkuil, *Public Law Limitations on Privatization of Government Functions*, 84 N.C. L. REV. 397, 439 (2006). For a more general examination of the constitutional challenges of privatization in the context of the state action doctrine, see Daphne Barak-Erez, *A State Action Doctrine for an Age of Privatization*, 45 SYRACUSE L. REV. 1169, 1183–86 (1995); Jack M. Beermann, *Privatization and Political*

principles of state sovereignty and state control over the traditional “state monopoly” over the use of force.<sup>26</sup>

Raising constitutional concerns, several legal scholars have argued that national security privatization poses risks to separation of powers, transparency, or fundamentals of democracy.<sup>27</sup> Martha Minow intimates that private contractors disserve the military and create separation of powers concerns because “Congress would be largely constrained in reviewing the actions and practices of private military contractors.”<sup>28</sup> In addition to a host of normative claims suggesting that private contractors degrade military culture and pose strategic risks due to their weakened resolve to risk death and overaggressive predisposition to use deadly force, Jon Michaels sees a constitutional and democratic risk in national security privatization. Specifically, he argues that functional dominance of contractor control, oversight, and recruitment by the Executive Branch poses separation of powers problems in bypassing congressional checks over military action.<sup>29</sup> Under his analysis, these harms are attached to privatization because “[i]f the Executive were . . . 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.”<sup>30</sup>

The international relations-oriented argument against national security privatization focuses on institutionalist concerns of state sovereignty and the state monopoly of legitimate violence.<sup>31</sup> Under the argument advanced by political scientists like Deborah Avant and Anna Leander, the private military industry as an institution undermines “states’ collective ability to

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*Accountability*, 28 FORDHAM URB. L.J. 1507, 1508–09, 1556–57 (2000); Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1374–76 (2003).

<sup>26</sup> See, e.g., AVANT, *supra* note 23, at 65–66; Rita Abrahamsen & Michael C. Williams, *Selling Security: Assessing the Impact of Military Privatization*, 15 REV. INT’L POL. ECON. 131, 133–34, 136, 141 (2008) (reviewing four books and finding that “[m]uch first wave literature . . . tended to read the privatization of security as a prime example of the erosion of sovereignty and state power”); Steven Brayton, *Outsourcing War: Mercenaries and the Privatization of Peacekeeping*, 55 J. INT’L AFF. 303, 317–26 (2002) (examining the benefits and drawbacks to privatization of military force, including a focus on international peacekeeping); Markus Jachtenfuchs, *The Monopoly of Legitimate Force: Denationalization, or Business as Usual?*, 13 EUR. REV. 37, 39 (2005) (acknowledging privatization as a challenge to state monopoly on legitimate force); Anna Leander, *The Market for Force: The Consequences of Privatizing Security*, 11 J. INT’L REL. & DEV. 75 (2008) (book review).

<sup>27</sup> This is often couched as transparency or democratic concerns with a sharp constitutional edge. See *supra* note 3 (listing a variety of scholars with this angle implicit in their work).

<sup>28</sup> Minow, *supra* note 3, at 1025.

<sup>29</sup> See Michaels, *supra* note 5, at 1011, 1062–74 (arguing that contractors enable the President to: (1) evade congressional caps on the number of troops; (2) short circuit Congress’s oversight role; (3) evade Senate power over military appointments of officers; and (4) compromise congressional ability to regulate military disciplinary procedures).

<sup>30</sup> *Id.* at 1041.

<sup>31</sup> See AVANT, *supra* note 23, at 3–4 (discussing how private security affects the State’s control of force); Leander, *supra* note 26, at 75 (discussing how the market for force undermines the State’s ability to monopolize violence).

monopolize violence in the international system.”<sup>32</sup> In this view, the state projection of force is a quintessential state function, over which any cession invites harms to military and foreign policy effectiveness.<sup>33</sup> The precept of the state monopoly of violence is key to creating institutional hierarchy or organization as to how violence can be projected.<sup>34</sup> The role of the State as the “superior authority” and only legitimate purveyor of violence helps “keep the lid on violence.”<sup>35</sup> Breaking this monopoly results in lessened political and functional control over military action, thus compromising the role of the State as the exclusive arbiter over the purveyors and means of violence, and simultaneously, compromising the State’s ability to accomplish foreign policy goals through military force.<sup>36</sup>

While the theoretical orientation of these groups differs, essential strands of analysis create cohesion among their diverging approaches. The most prominent unifying thread is an underlying concern over the lack of accountability of contractors for crimes perpetrated in the field.<sup>37</sup> Other scholars who focus their efforts on crafting reform proposals also emphasize this contractor accountability theme.<sup>38</sup>

### C. *The Fallacies of the Critique*

Developing a principled theory for assessing the legitimacy of privatized force in our constitutional structure is a fundamental question. It compels answers to the secondary questions of contractor accountability, defines subsequent regulatory questions, and impacts policy frameworks affected by private actor performance (such as economic efficiency and the

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<sup>32</sup> AVANT, *supra* note 23, at 264. Some scholars, including Deborah Avant, are helpfully specific in their paradigms of control, focusing on political, functional, and social control. *See id.* at 40–41; *see also* Leander, *supra* note 26, at 75–77 (“We are talking about a change in one of the primary institutions of international life: ‘sovereignty’: a shift in the way that the use of force is controlled.”).

<sup>33</sup> *See* Laura A. Dickinson, *Government for Hire: Privatizing Foreign Affairs and the Problem of Accountability Under International Law*, 47 WM. & MARY L. REV. 135, 147 (2005) (“[P]rivatization of the military is one area where privatization does not, or should not, occur.”). After all, international law has often been criticized for having relatively weak enforcement mechanisms. *See, e.g.*, Louis Henkin, *The Politics of Law-Making*, in INTERNATIONAL LAW: CLASSIC AND CONTEMPORARY READINGS 17, 18–19 (Charlotte Ku & Paul F. Diehl eds., 1998).

<sup>34</sup> *See* Anna Leander, *Conditional Legitimacy, Reinterpreted Monopolies: Globalisation and the Evolving State Monopoly on Legitimate Violence*, ISA Panel on Legitimacy and Violence: Globalization and the Displacement of the State, 31–35 (Mar. 24–27, 2002), available at <http://www.ciaonet.org/coursepack/cp09/cp09b.pdf> (arguing the extent to which globalization is affecting the state monopoly on legitimate violence).

<sup>35</sup> *Id.* at 5.

<sup>36</sup> *See* AVANT, *supra* note 23, at 75–76 (explaining how transnational financiers can take control of military forces and direct their attention away from public functions).

<sup>37</sup> *See* Minow, *supra* note 3, at 995–96 (noting that “[t]he prospect of unaccountable private military contractors is disturbing” and contending that it undermines human rights).

<sup>38</sup> *See* Dickinson, *supra* note 33, at 165–68 (discussing how the contractor accountability critique is driven by a legal regime that places individual criminal and civil liability within a morass of overlapping, and sometimes conflicting, statutes and policies).

size and traits of public forces).<sup>39</sup>

The theoretical approaches offered by both legal and international relations scholars tend to become stranded in one of two dead ends: one where scholars are forced to engage in illusory line drawing between hopelessly intertwined conceptual dimensions; and a second, which emphasizes derivative issues of policy which can be capably handled through regulation. Theories warning against privatization tend to prove too much (by implicitly rejecting a variety of acts far afield of military contracting) or too little (through emphasizing resolvable questions of process).

### 1. *Illusory Line Drawing*

The quintessential public nature of national security is a fundamental trait of the theoretical critiques of national security privatization. Despite the intuitive attraction, accepting national security as inherently public would require a principled assessment that lands it irretrievably and impermeably in the “public” sphere.<sup>40</sup> Such a position would require a determination that national security is necessarily “public” because its private provision would cause societal harm and evade societal benefit.<sup>41</sup>

There has never been a clear division of public and private functions. However, the prevalence of privatized governmental services, the expanded markets of globalized business, the interconnectedness provided by contemporary technology, and the predominant corporatization of the

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<sup>39</sup> See Jody Freeman, *Extending Public Law Norms Through Privatization*, 116 HARV. L. REV. 1285, 1292–93 (2003) (“Privatization coincides with other political and economic developments—including globalization, free trade, market integration, and deregulation—that similarly reinforce an ideological preference for private over public ordering and market over noneconomic values.”); Daniel Guttman, *Public Purpose and Private Service: The Twentieth Century Culture of Contracting Out and the Evolving Law of Diffused Sovereignty*, 52 ADMIN. L. REV. 859, 887–88 (2000) (noting that the Bell Report, written in 1962, dealt with many of the same questions about privatization and contractor accountability that are raised today).

<sup>40</sup> There are both theoretical and pragmatic sources for this position. In the national security context, efficiency is the fundamental concern. See QDR REPORT, *supra* note 8, at 53–54 (guiding the Department of Defense that only core public functions should not be privatized). Expanded privatization in all contexts is encouraged to avoid governmental competition with domestic private business, an admonition explicitly part of the original OMB *Circular A-76*, but deleted “to avoid a presumption that the government should not compete for work to meet its own needs.” Performance of Commercial Activities, 68 Fed. Reg. 32,134, 32,136 (May 29, 2003); see also Kevin J. Huyser et al., *Competitive Sourcing*, ARMY LAW., Jan. 2004, at 109, 111 (“[T]o emphasize the importance of competition in determining the best service provider for commercial activities, the *Revised A-76* ‘deletes a longstanding statement that the government should not compete with its citizens.’”); OMB CIRCULAR NO. A-76, *supra* note 19 (requiring outsourcing where possible).

<sup>41</sup> See Federal Activities Inventory Reform Act of 1998, Pub. L. No. 105-270, § 5(2), 112 Stat. 2382, 2384 (1998) (codified as amended at 31 U.S.C. § 501(2) (2006)) (prohibiting privatization of functions “so intimately related to the public interest as to require performance by Federal Government employees”); see also Lester M. Salamon, *The New Governance and the Tools of Public Action: An Introduction*, 28 FORDHAM URB. L.J. 1611, 1614 (2001) (arguing that it is inappropriate when privatization cedes inherently governmental “exercise of discretion over the use of public authority and spending of public funds”).

free-market make such a determination even more challenging.<sup>42</sup> Traditionally, the drive for privatization is couched in economic terms.<sup>43</sup> Economically, necessarily “public” services are those that cannot be denied to people who refuse to pay and, thus, do not create a favorable market for private provision.<sup>44</sup> Such a quality would exist where the service in question, much like national security, requires universal coverage and would encourage free riding.<sup>45</sup> The “public” nature of a service, however, only speaks to a prohibition from public withdrawal in offering the service generally, not to the private provision of such a service.<sup>46</sup> As a result, just as the State can privatize the manufacture of weaponry, “[i]t could in principle contract out the operation of that weaponry as well.”<sup>47</sup>

Deviating from questions of the private provision of goods, national security privatization commentary has often focused on the ideological argument that privatization should be prohibited (or deeply limited) on concerns of discretion and importance.<sup>48</sup> In making the claim that the privatization of force represents a distinctively public endeavor of discretion, scholars have pointed their criticism toward contractors of a lethal nature (i.e., armed) while avoiding contractors considered more benign, thus engaging in another line-drawing exercise that only exacerbates the theoretical problem.<sup>49</sup> Couched in different terms such as active/passive, armed/non-armed, or lethal/non-lethal potential, the

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<sup>42</sup> See Freeman, *The Contracting State*, *supra* note 7, at 174 (demonstrating the difficulty of determining public versus private functions by analyzing waste collection and prison operation as both public and private).

<sup>43</sup> See Freeman, *Extending Public Law Norms*, *supra* note 39, at 1299 n.50 (outlining the varied economic models that have been applied to privatization).

<sup>44</sup> See Posting of Richard Posner to the Becker-Posner Blog, [http://www.becker-posner-blog.com/archives/2006/05/privatizing\\_sec.html](http://www.becker-posner-blog.com/archives/2006/05/privatizing_sec.html) (May 28, 2006, 18:12 EST) (“[I]t is thought that only government can provide services that cannot be denied to people who refuse to pay for them, so that efficiency in a broader sense requires public provision of such services.”).

<sup>45</sup> See Brett M. Frischmann, *An Economic Theory of Infrastructure and Commons Management*, 89 MINN. L. REV. 917, 948 (2005) (citing national security as a nonrivalry good and noticing that such goods open the door to free-riding); cf. Lisa L. Martin, *Interests, Power, and Multilateralism*, 46 INT’L ORG. 765, 771–72 (1992) (discussing free-riding in the context of multilateral security structures).

<sup>46</sup> See ROBERT COOTER & THOMAS ULEN, *LAW AND ECONOMICS* 40 (2d ed. 1997) (citing national security as an illustration of non-excludability); see also Frischmann, *supra* note 45, at 948 (noting that “not all nonrival goods are produced by entities seeking to maximize profits”).

<sup>47</sup> Posting of Richard Posner, *supra* note 44.

<sup>48</sup> The belief that some services should not be privatized, regardless of economic impact, stems from the belief that privatization is “an illegitimate choice for organizing service provision, at least for those functions that are so inherently governmental as to be categorically nondelegable.” Freeman, *Extending Public Law Norms*, *supra* note 39, at 1295.

<sup>49</sup> See, e.g., SINGER, *supra* note 3, at 89 (creating a taxonomy that differentiates between “active” firms, whose employees are actually armed and in combat areas, and “passive” firms, who simply provide logistical support); Benjamin Perrin, *Promoting Compliance of Private Security and Military Companies with International Humanitarian Law*, 88 INT’L REV. RED CROSS 613, 622 (2006) (discussing the market demand for “disreputable” services). Other work has focused on the armed/unarmed distinction. See, e.g., Clive Walker & Dave Whyte, *Contracting Out War?: Private Military Companies, Law and Regulation in the United Kingdom*, 54 INT’L & COMP. L.Q. 651, 664–65 (2005) (noting that forbidden activities could include “direct participation in combat operations”).

conceptual dilemma is the same.<sup>50</sup> Clear lines between a Blackwater guard, an unmanned aerial drone operator, and a weapons logistical mechanic are impossible to materially differentiate within the dimension of public and private functions.<sup>51</sup>

The sovereignty critique suffers from the same failings of public and private line drawing endemic to that of the legal scholarship. It multiplies the complication by also failing to discern forms of sovereignty cession that are commonly accepted as not representing an accompanying loss of control.

First, sovereignty in all forms possesses a character of a state right of dominion—of law, as authority, and as gatekeeper—the intrinsic nature of which creates a threshold determination of “public” powers residing in the State.<sup>52</sup> Just as legal scholars struggle with the public and private characterization, international law scholars do so in the context of sovereignty as well.

The argument that delegation of governmental services represents a forfeiture of sovereign power (in any degree) conflicts with conventional conceptions of sovereignty.<sup>53</sup> Scholars have long accepted that questions of sovereign control reside within the realm of sovereignty gauged by the process and effectiveness of state decision making rather than the formal executor of those decisions.<sup>54</sup> State national security is not an exception. For example, the complete outsourcing of Japan’s national security to the U.S. neither legally divests it of other sovereign powers nor demonstrates any functional inability to reassert sovereign powers (including defense) or effectuate the same goals through other policy points. Just as treaty

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<sup>50</sup> Attempts have been made to bridge this divide, such as distinctions between PMCs and “private security firms” or distinguishing “active” from “passive” PMCs. Recent reports about contractors in Iraq use various terms when referring to private contractors. See, e.g., Spencer E. Ante, *The Other U.S. Military*, BUS. WK., May 31, 2004, at 76, 78 (“PMC”); David Barstow et al., *Security Companies: Shadow Soldiers in Iraq*, N.Y. TIMES, Apr. 19, 2004, at A1 (“private commandos”); James Dao et al., *Private Guards Take Big Risks, for Right Price*, N.Y. TIMES, Apr. 2, 2004, at A1 (“private contractors”); 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 (“civilian contractors”).

<sup>51</sup> For example, such classifications seem to make military training passive despite its purported central role in the sovereignty and public/private debate. The same is true with intelligence contractors engaged in interrogations. Similarly, many contractors engaged in the production of weapons and logistical support play essential roles in the lethality of armed attack and would be considered passive. See Patrick Radden Keefe, *Iraq: America’s Private Armies*, N.Y. REV. BOOKS, Aug. 12, 2004, at 48 (reviewing SINGER, *supra* note 3) (noting that the active/passive line “is blurred considerably by the many PMFs that engage in the ‘passive’ task of training troops in foreign countries”).

<sup>52</sup> The various forms of sovereignty include international legal sovereignty (the recognition of the State by international bodies and international law); Westphalian sovereignty (the right to exclude external actors from domestic authority); and domestic sovereignty (the right to act as ultimate authority). See STEPHEN D. KRASNER, *SOVEREIGNTY: ORGANIZED HYPOCRISY* 4 (1999).

<sup>53</sup> See *id.* at 224–25 (stating that domestic sovereignty is not necessarily compromised when rulers voluntarily invite external actors to interfere in their authority structures, such as through conventions).

<sup>54</sup> See *id.* at 210–12 (describing how, while the United States formally had supreme authority over Germany after World War II, the Americans could not pursue all of its policies due to the lack of German support).

regimes with reporting requirements and alliances among nations may complicate sovereign rights, the complication is undertaken as part of a presumed state interest in consenting to that exchange.

## 2. *Secondary Issues of Regulation*

The vast majority of scholarship on national security privatization focuses on the specific issues of contractor accountability, which is unsurprising because concerns over privatization have coordinately risen alongside questions of how contractors would face prosecution for high-profile criminal acts in Iraq.<sup>55</sup> The emphasis on contractor accountability has created detailed and creative thinking in resolving regulatory questions emanating from national security privatization.<sup>56</sup> These, however, are secondary issues. Liability frameworks, quality assurance, and military/contractor coordination are amenable to resolution through standard regulation that tells us little about whether and how contractors can legitimately take part in state force operations.

### III. THE PUBLIC FORCE STANDARD: DISTINCTIONS AND DIFFERENCES

Why do attitudes toward national security, the “last refuge of antiprivatization forces,”<sup>57</sup> deviate so far from contemporary taste regarding privatization? The wisdom and theory of extending privatization to national security matters was left unexamined by the privatization scholarship boom of the 1980s and 1990s. Its neglect ended decisively as private contractors poured into Iraq in support of the war and their participation was highlighted in events that shaped the conflict.<sup>58</sup>

One might think that the relative silence of early privatization scholarship regarding national security simply reflects a tacit understanding that the subject matter represented an agreed backstop to the rapidly expanding privatization movement. As noted above, however, national security privatization accelerated in lockstep with other forms of privatized governmental services and dates back to at least the Vietnam

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<sup>55</sup> See Dickinson, *supra* note 33, at 182–85 (noting that while private contractors participated in abusing prisoners at Abu Ghraib, few legal remedies against the contractors exist); Minow, *supra* note 3, at 1005 (stating that “[m]anagement and oversight problems” exist with regards to contractors in the military); Schooner, *supra* note 21, at 555 (attributing the abuses at Abu Ghraib to contractor-related problems).

<sup>56</sup> The question of an understandable regulatory structure for prosecuting crimes perpetrated in Iraq by contractors is indeed of great importance, especially as it appears that the source of the dilemma is less a lack of law precluding effective prosecution and more an administrative matter. See Dickinson, *supra* note 33, at 183–89 (describing the criminal and civil remedies one could obtain against a private contractor when the contractor has committed abuses, such as at Abu Ghraib).

<sup>57</sup> Michaels, *supra* note 5, at 1005 (citing E. S. SAVAS, PRIVATIZATION AND PUBLIC-PRIVATE PARTNERSHIPS 303 (2000)).

<sup>58</sup> *E.g.*, Ante, *supra* note 50; Barstow et al., *supra* note 50; Dao et al., *supra* note 50.

War.<sup>59</sup> More likely, the perceived pressing need to insulate national security from privatization emanates from a belief that combining profit and guns leads to normatively undesirable behaviors of both the private actor and the State.<sup>60</sup>

Public disclosure of several allegations of contractor misconduct inflamed scholars and the public alike and appeared to confirm normative suspicions. Contractors involved in the Abu Ghraib prison abuses, the alleged murder of an Iraqi official's bodyguard, and the civilian shootings at Nisoor Square focused public attention on what several scholars called the "new mercenaries" and created new urgency in ensuring liability for contractor misdeeds.<sup>61</sup> Apparent hesitancy of federal and military officials to file official charges against contractors accused of crimes combined with a Coalition Provisional Authority order that provided immunity to contractors for their acts exacerbated indignation and further spurred urgency for contractor accountability.<sup>62</sup>

The reaction to incidents like Abu Ghraib sparked a tendency to extrapolate the negative character of the individual contractors to the private military services industry as a whole. Normative complaints about PMCs arose, centering around characterizations that flow from their profit motive. These normative complaints, which have been woven as support for the legal and theoretical complaints covered in Part II of this Article, belie the evidence.<sup>63</sup> If valid, these complaints should be supportable by

<sup>59</sup> See *Law Regarding Civilian Combatants, Contractors Murky, Say Experts*, TARGETED NEWS SERVICE, Nov. 20, 2007 (discussing the history of military contractors in relation to Iraq).

<sup>60</sup> See Christian Davenport et al., *The Puzzle of Abu Ghraib: Are Democratic Institutions a Palliative or Panacea?* 1 (Oct. 10, 2007) (unpublished manuscript, on file with author) (discussing private sector incentivization and restraints relative to torture).

<sup>61</sup> See Thomas K. Adams, *The New Mercenaries and the Privatization of Conflict*, PARAMETERS, Summer 1999, at 103, 103–04, available at <http://www.carlisle.army.mil/usawc/parameters/99summer/adams.htm> (describing "new mercenaries" as "militarily skilled groups and individuals who have no special ideological stake in the conflict at hand"); Dickinson, *supra* note 33, at 183–88 (discussing the Abu Ghraib prison abuses in the context of stressing the need for legal remedies for contractors who participated in the abuse); J. Ricou Heaton, *Civilians at War: Reexamining the Status of Civilians Accompanying the Armed Forces*, 57 A.F. L. REV. 155, 199 (2005) (expressing concern that "[i]f contractors misbehave, the armed forces may have limited options for dealing with the misconduct"); Mark A. Ries, *Contingency Contractor Personnel: What To Do with Security Contractors*, ARMY LAW., Jan. 2008, at 96, 96–97 (discussing a Blackwater employee's murder of an Iraqi bodyguard and the Nisoor shootings, as well as the congressional and executive concerns that quickly followed).

<sup>62</sup> See COALITION PROVISIONAL AUTHORITY ORDER NO. 17 (REVISED): STATUS OF THE COALITION PROVISIONAL AUTHORITY, MNF-IRAQ, CERTAIN MISSIONS & PERSONNEL IN IRAQ, June 2004, available at [http://www.cpa-iraq.org/regulations/20040627\\_CPAORD\\_17\\_Status\\_of\\_Coalition\\_Rev\\_with\\_Annex\\_A.pdf](http://www.cpa-iraq.org/regulations/20040627_CPAORD_17_Status_of_Coalition_Rev_with_Annex_A.pdf) (immunizing Coalition Forces and contractors from Iraqi legal processes); John R. Crook, *Contemporary Practice of the United States Relating to International Law*, 102 AM. J. INT'L L. 155, 161–62 (2008) (discussing the U.S. House of Representatives' passage of legislation to extend criminal laws against contractors despite the administration's lack of support and the U.S. Department of Justice's prosecution of contractors in the aftermath of the killings at Nisoor Square).

<sup>63</sup> See SINGER, *supra* note 3, at 186–87 (discussing how private firms might operate differently if motivated by profit and will not be seen as a legitimate source of authority for keeping peace); Michaels, *supra* note 5, at 1007–09 ("[T]he introduction . . . of for-profit contractors, motivated to fight



empirical observation. That is not the case.

### A. *The Profit Motive*

The concept of force privatization is rife with highly negative historical connotations due to the popular conceptions of mercenarism or soldiers of fortune.<sup>64</sup> The profit motive concern derives from a belief that private actors are materially (and negatively) different from the public military's citizen-soldier due to the fact that they work for companies that operate for profit.<sup>65</sup> Under this view, these differences manifest themselves through a host of harms, including increased propensity toward violence threatening human rights and larger U.S. policy goals,<sup>66</sup> compromising the integrity of the military, and undermining transparency and democratic norms.<sup>67</sup>

There is a core conceptual difficulty that infects all genres of privatization—assessing the impact of motivation. The core difference driving the narrative of empirical claims is situated in the difference between public sector and private sector motives.<sup>68</sup> The private sector

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primarily by money and regulated loosely by contract . . . breeds an array of strategic and psychic harms for the military commanders, for uniformed soldiers in the field, and for Americans at home.”); Todd S. Milliard, *Overcoming Post-Colonial Myopia: A Call To Recognize and Regulate Private Military Companies*, 176 MIL. L. REV. 1, 60 (2003) (noting that mercenaries are mainly motivated by financial reasons); Clifford J. Rosky, *Force, Inc.: The Privatization of Punishment, Policing, and Military Force in Liberal States*, 36 CONN. L. REV. 879, 979–80 (2004) (examining a hypothetical situation to illustrate a private contractor's motivation for money); Tina Garmon, Comment, *Domesticating International Corporate Responsibility: Holding Private Military Firms Accountable Under the Alien Tort Claims Act*, 11 TUL. J. INT'L & COMP. L. 325, 331–34 (2003) (describing a private firm's willingness to engage in violence because of “how easy it is to stray from lofty goals given financial returns”).

<sup>64</sup> SINGER, *supra* note 3, at 40.

<sup>65</sup> *See id.* at 44–45.

<sup>66</sup> *See* Rosky, *supra* note 63, at 943 (“The central claim is that private punishment, policing, and military corporations violate *human rights* more often than public punishment, policing, and military institutions.”).

<sup>67</sup> The potential for fraud is also frequently pointed to as a drawback to privatization. I do not specifically address it above because it is less dependent on subsidiary dimensions that can be assessed independently from the overarching “private” nature of privatized force (e.g., training and qualifications in assessing war crime propensity). It is true, for example, that procurement fraud cannot exist without procurement, and some level of fraud is intrinsic to privatization. There is no evidence, however, that the cost of such fraud would supersede the cost of governmental waste that is similarly endemic to a purely public program. *See generally* Stephen Schooner, *Competitive Sourcing Policy: More Sail Than Rudder?*, 33 PUB. CONT. L.J. 263 (2004).

<sup>68</sup> The crucial role of motivation is unmistakable in the work of privatization opponents. *See* David M. Driesen & Shubha Ghosh, *The Functions of Transaction Costs: Rethinking Transaction Cost Minimization in a World of Friction*, 47 ARIZ. L. REV. 61, 107 (2005) (“[P]rivate entities' profit motives may disserve relevant public functions.”); Martin A. Geer, *Human Rights and Wrongs in Our Own Backyard: Incorporating International Human Rights Protections Under Domestic Civil Rights Law—A Case Study of Women in U.S. Prisons*, 13 HARV. HUM. RTS. J. 71, 89 n.97 (2000) (“The profit motive prevents private corporations from working for the public good.”); Michaels, *supra* note 5, at 1107–08 (“[T]o transform and possibly dilute 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.”); Milliard, *supra* note 63, at 60 (stating that a

operates for profit. The public sector operates for the public good.<sup>69</sup> Prognosticating as to the effects of these different motivations has been a crucial component of the privatization debate in a wide variety of regimes far afield from that of military force. The effects of differing motivations of public and private gain in privatization are a source of disagreement among scholars. As noted by Gillian Metzger, opponents of privatization typically argue that privatized services are compromised by shortcuts to fatten the bottom line while “privatization advocates maintain that, on the contrary, harnessing the profit motive of private actors and increasing competition in service provision improves the quality and efficiency of services.”<sup>70</sup>

Privatization scholars have generally acknowledged that the diverging motivations of the public and private sector do not typically, in and of themselves, provide substantial insight as to the effects of privatization in delivering public goods and services.<sup>71</sup> Instead, conclusions as to the impact of motivation are dependent on the observable subsidiary qualities of private actors engaged in delivering public services. In this context, assessing the subsidiary qualities of the private sector requires examining whether the private nature of PMCs infuses negative dynamics into dimensions more closely tied to actions of private force.<sup>72</sup>

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mercenary’s primary reason for killing is money); Minow, *supra* note 3, at 1020–22 (describing that when contractors work for money, concerns of fraud and loyalty exist). Beyond the academic literature, the primacy of motive is also reflected in current international law treaties and the work of the United Nations Working Group on the Use of Mercenaries. See José Luis Gómez del Prado, President of the Working Group, Statement at the Human Rights Council on the Use of Mercenaries as Means of Violating Human Rights and Impeding the Rights of Peoples to Self-Determination (Mar. 10, 2008), available at [http://www2.ohchr.org/english/issues/mercenaries/docs/StatementHRC\\_7.doc](http://www2.ohchr.org/english/issues/mercenaries/docs/StatementHRC_7.doc) (“These transnational companies are neither humanitarian actors nor peace-makers, and their motivations are fundamentally of a commercial character.”); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, art. 47, June 8, 1977, 1125 U.N.T.S. 3 (emphasizing a mercenary’s motivation for “private gain”); International Convention Against the Recruitment, Use, Financing and Training of Mercenaries, G.A. Res. 44/34, U.N. GAOR, 44th sess., 72d plen. mtg., U.N. Doc. A/RES/44/34 (Dec. 4, 1989) (defining a mercenary as one who is motivated to fight for private gain).

<sup>69</sup> Obviously, this representation of the fundamental motives of the private and public sectors is highly simplified. Substantial data indicate that private actors often consider the public good, while public actors are often affected by calculations of personal gain. See Alexandra Natapoff, *Sniitching: The Institutional and Communal Consequences*, 73 U. CIN. L. REV. 645, 670 (2004) (discussing “public officials . . . who may be driven by inappropriate motives such as personal gain”); Jennifer Roback, *Beyond Equality*, 82 GEO. L.J. 121, 127 (1993) (describing how some “people are quite comfortable with the notion that elected officials and public administrators are motivated by personal gain”). The discussion below, however, operates under this binary characterization as the most generous light in which the prevailing empirical conclusions can be assessed.

<sup>70</sup> Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1372 n.9 (2003).

<sup>71</sup> See, e.g., Freeman, *Extending Public Law Norms*, *supra* note 39, at 1339 (“[I]t seems both premature and drastic to suggest that the current trend toward privatization will, as a general and absolute matter, compromise public law norms, regardless of the context in which it is being tried, the availability of accountability mechanisms, and the intentions of government.”).

<sup>72</sup> The concern over the use of private actors in augmenting the armed forces is that privatization introduces the element of pecuniary gain in executing state policy through force. The thinking here is

## B. *The Empirical Claims*

As Gary Becker noted, “To my knowledge there is no compelling evidence that American private guards in Iraq have been likely to behave irresponsibly, cowardly, or use excessive force. The relevant comparison would be with the behavior of soldiers in Iraq, and I do not know of such comparisons.”<sup>73</sup> Do contractors possess traits prone to normatively undesirable behavior relative to the behavior of the public soldiers? In answering this question, dimensions of military culture, propensity for violence, and cost efficiency create the primary fields where contractor status is suspected by scholars to create normative harms.

### 1. *Integrity / Culture of the Military*

A major concern of privatization is that the profit motive of contractors compromises the cultural norms of military life.<sup>74</sup> Critics of privatization claim that the use of PMCs causes military brain drain,<sup>75</sup> undermines military discipline and morale, and fractures the persona of the citizen-soldier.<sup>76</sup> Under this view, the use of PMCs undermines the military community and morale through higher pay for contractors (causing brain drain), the contractor’s ability to refuse to deploy or leave the theater, and “the possibility that privateers will comport themselves in an unbecoming manner.”<sup>77</sup>

If the use of PMCs, independent of their unquestioned benefits in providing surge capacity and specialized (often technical) expertise, compromises the effectiveness of the public military in engaging in its primary goal of combat, then the entire industry of private force is called into question. The unmistakable primary objective of the military is to offer a society a force capable of defending its territory and winning wars.

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that the profit-seeking motive thus frustrates the proper functioning of the relationship that underscores military civilian control by turning the executors of that force into profit maximizers and, by necessity, compromising the purer virtues of self-sacrifice. At the institutional level, this means that PMCs should seek to lower costs by shortchanging quality for capacity. At the individual level, private forces should demonstrate a willingness to sacrifice the collective good of the force for either individual gain or institutional gain that redeposits back at the individual level.

<sup>73</sup> Posting of Gary Becker to the Becker-Posner Blog, [http://www.becker-posner-blog.com/archives/2006/05/on\\_privatizing.html](http://www.becker-posner-blog.com/archives/2006/05/on_privatizing.html) (May 28, 2006, 16:33 EST).

<sup>74</sup> See Michaels, *supra* note 5, at 1101 (“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.”).

<sup>75</sup> See Michael N. Schmitt, *Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees*, 5 *CHI. J. INT’L L.* 511, 515 (2005) (“The pay is so good relative to military salaries that the US Special Forces are experiencing a ‘brain drain’ as well-trained troops depart for more lucrative positions with civilian contractors.”).

<sup>76</sup> Michaels, *supra* note 5, at 1095–97.

<sup>77</sup> *Id.* at 1096.

However, there are good reasons to be suspect of these claims. Further, recent empirical studies indicate that such harms do not play out in practice.

As a historical matter, the indoctrination of public soldiers into military culture during basic training has traditionally been considered of preeminent importance.<sup>78</sup> The armed forces operate in a necessarily complicated moral atmosphere where certain core components of mainstream morality are overturned (i.e., the prohibition on killing) and popular mainstream virtues are suppressed (i.e., independence, challenging authority) for the sake of military efficiency. In theory, public soldiers are indoctrinated in military culture in order to absorb complicated rules to facilitate navigating the resulting moral minefield and gain a sense of community housed within the pursuit of a larger purpose.<sup>79</sup> Fidelity to this community, as well as adherence to military values of honor and courage, are fundamental to military culture.<sup>80</sup>

Concerns over military retention rates and overall morale are essential to an all-volunteer force. Morale is an important, if ubiquitous, concern for a military extended all over the world and engaged in multiple, simultaneous armed conflicts. Similarly, sluggish military retention has been cited as a reason for unpopular and invasive stop-loss programs which have unilaterally extended soldiers' contracts and forced them into unwanted deployments.<sup>81</sup> In 2003, following the commencement of the Iraq War, the number of soldiers indicating intent to leave the military at the conclusion of their present assignment moved from about 12.5% to 20%.<sup>82</sup>

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<sup>78</sup> See, e.g., Michaels, *supra* note 5, at 1088 (stating that the “inculcation of virtue and honor is accomplished through the ‘personal immersion’ in the ongoing ‘collective narrative of [the] corps,’ a narrative that is supplemented in part by an inward-looking sense of shared culture” (alteration in original)); see also *id.* at 1095 (noting that “the military goes to . . . extensive lengths to engender the appropriate level of cohesion, discipline, and camaraderie”).

<sup>79</sup> See STEPHEN PETER ROSEN, *SOCIETIES AND MILITARY POWER: INDIA AND ITS ARMIES* 6 (1996) (discussing the importance of discipline to turn civilians into soldiers); Bruce D. Grant, *U.S. Military Expertise for Sale: Private Military Consultants as a Tool of Foreign Policy* (1998) (Inst. for Nat'l Strategic Studies, Strategy Essay Competition), <http://web.archive.org/web/20020819173425/http://www.ndu.edu/inss/books/essaysch4.html> (claiming that privatization undermines morale).

<sup>80</sup> See generally Earl F. Martin, *America's Anti-Standing Army Tradition and the Separate Community Doctrine*, 76 *MISS. L.J.* 136 (2006) (tracing the listing of the U.S. standing army to illustrate the separation between military and civilian cultures); see also Michaels, *supra* note 5, at 1084–88.

<sup>81</sup> Evan M. Wooten, *Banging on the Backdoor Draft: The Constitutional Validity of Stop-Loss in the Military*, 47 *WM. & MARY L. REV.* 1061, 1063 (2005); see also Press Release, Sen. Frank R. Lautenberg, Military Groups and Veterans Call for Compensation for Soldiers Forced Into Extended Military Service (July 10, 2008), available at <http://lautenberg.senate.gov/newsroom/record.cfm?id=300474> (discussing the stop-loss policy and the hardships it imposes on soldiers, including mental trauma and increased divorce and suicide rates).

<sup>82</sup> See Charles Aldinger, *Survey Suggests U.S. Military Retention Problems*, *REUTERS*, Jan. 23, 2004 (discussing a survey taken of 5000 Guard troops returning from Iraq and other overseas deployments and finding that the rate of those leaving the military after the end of their assignments could jump from 12.5% to more than 20% in 2004).

Military culture and the incorporation of private actors in exerting state force are not mutually exclusive. Most contractors acting in an operational capacity have served in the military and are indoctrinated in its principles. Contractors who provide logistical support have spared public soldiers many of an enormous spectrum of mundane tasks of the potato peeling and latrine cleaning variety that defined the World War II era military. To the extent there has been an increase in cynicism in the military and a societal downgrade in honor and prestige afforded to soldiers since World War II, it more likely reflects the rise of an all-volunteer force, the sociological remnants of Vietnam, and a pervasive mistrust of governmental entities, generally.<sup>83</sup> Claims that public soldiers mistrust PMCs in a way that disrupts military culture shortchange the successful incorporation of foreign forces with U.S. forces in multinational operations and the relative separation of PMC duties from that engaged in by regular soldiers.<sup>84</sup> The concern that PMCs and their contractors might fail to perform in dangerous circumstances has not proven to be true in the context of the Iraq War, where nearly all PMCs have deployed as contracted.<sup>85</sup>

Empirical data assessing the mindset and relationship of the contractor/soldier relationship also contests the claims of disrupted military integrity and effectiveness. Data suggest that members of the public military and contractors in all strata of PMCs possess the same motives for joining each institution and utilize similar reasoning for final determinations to stay or leave at the end of their contract. The increased difficulties in retaining military personnel appear to reveal more traditional concerns than a rush for greener pastures. All branches of the U.S. Armed Forces faced recruiting and retention shortfalls in the late 1990s.<sup>86</sup> As

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<sup>83</sup> See Lawrence E. Mitchell, *Talking with My Friends: A Response to a Dialogue on Corporate Irresponsibility*, 70 GEO. WASH. L. REV. 988, 990 (2002); Jonathan D. Moreno, *Bioethics and the National Security State*, 32 J.L. MED. & ETHICS 198, 204 (2004). Obviously, and ironically, such mistrust is a force in the general movement toward privatization in other sectors as well.

<sup>84</sup> The Iraq War itself possesses a variety of different public actors, the cooperation and coordination with which public soldiers rely. These relationships, as might be expected, create numerous obstacles. While those obstacles undoubtedly cause operational difficulties, they are not typically viewed as a threat to the fabric of military discipline and culture.

<sup>85</sup> For example, in 2003, a total of 1.1% of British contractors failed to deploy in Iraq. MATTHEW UTTLEY, CONTRACTORS ON DEPLOYED MILITARY OPERATIONS: UNITED KINGDOM POLICY AND DOCTRINE 49 (2005), available at <http://www.strategicstudiesinstitute.army.mil/pubs/display.cfm?pubID=624>. While contractor "failure" attracts great attention, the number of those leaving the field is comparable to, and perhaps meaningfully less than, the number of U.S. military desertions during the same time period. For example, in 2007, the U.S. had approximately 166,000 soldiers in the Iraqi theater and 4700 desertions were reported (about 2.8% of the public force). *Defense Secretary Gates Seeks To Build on Positive Momentum in Iraq*, U.S. FED. NEWS, Dec. 5, 2007; Jay Price, *Deserter May Fare Worse Due to Flight*, NEWS & OBSERVER (Raleigh, N.C.), Aug. 17, 2008.

<sup>86</sup> See LAWRENCE KAPP, CONG. RESEARCH SERV., CRS REPORT FOR CONGRESS: RECRUITING AND RETENTION IN THE ACTIVE COMPONENT MILITARY: ARE THERE PROBLEMS? 1 (2002), available at <http://hdl.handle.net/10207/1356> (discussing military retention and noting that over recent years the military services have experienced "recruiting and retention shortfalls" for their active component forces).

recently as 2004, surveys indicated that soldiers who had served in Afghanistan and Iraq predominantly indicated that their intention to leave the military was due to familial concerns (often relating to deployments) and general job dissatisfaction (primarily tied to feeling tied up by bureaucracy).<sup>87</sup> Intent to leave the military in favor of private military service was not even on the radar.<sup>88</sup> In contrast, studies indicate that “[n]either level of contact nor social comparisons with civilian contractors have a significant direct effect on intention to remain in service for military personnel.”<sup>89</sup> Further, soldiers informed researchers that contractors possess similar experience as active duty soldiers, increase efficiency, increase effectiveness, free active duty personnel to focus on core military duties, and are equally motivated as soldiers to do a good job.<sup>90</sup>

While PMCs are paid a higher salary, both contractors and soldiers acknowledge that public soldier benefits outstrip those of the contractor community.<sup>91</sup> These non-salary-based advantages of job security, retirement benefits, and health benefits appear to effectively bridge the perception of economic disparity between them and their private counterparts.<sup>92</sup> Outside of pay, public soldiers indicated that they believe that civilian contractors possess greater opportunities for autonomy and an ability to negotiate terms of their employment.<sup>93</sup> Interestingly, the primary point of social disadvantage that soldiers feel relative to contractors is “the way the Army’s policies are put into practice,” in other words hurdles of governmental bureaucracy.<sup>94</sup> Contractors and public soldiers had an identical score in their agreement that their work “makes a contribution to society.”<sup>95</sup> Overall, the empirical data conclude that while soldiers feel somewhat disadvantaged on issues of pay and job flexibility, this disadvantage is ascribed to military structure and, as a result, the “social comparisons do not appear to impact service members’ feelings toward their civilian coworkers.”<sup>96</sup>

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<sup>87</sup> HOWARD M. WEISS ET AL., RETENTION IN THE ARMED FORCES: PAST APPROACHES AND NEW RESEARCH DIRECTIONS 14 (2003), available at [http://www.cfs.purdue.edu/MFRI/pages/research/Retention\\_Report.pdf](http://www.cfs.purdue.edu/MFRI/pages/research/Retention_Report.pdf) (finding “non-work variables including such things as career development, limitations to geographical region, non-centrality of work/life values, and family considerations” as important in retention decisions).

<sup>88</sup> See *id.*

<sup>89</sup> See RYAN D. KELTY, CIVILIANIZATION OF THE MILITARY: SOCIAL-PSYCHOLOGICAL EFFECTS OF INTEGRATING CIVILIANS AND MILITARY PERSONNEL 150–51 (2005).

<sup>90</sup> Dr. Ryan Kelty, LTC Irving Smith & MAJ Darcy Langkamp, Dep’t of Behaviors Sciences & Leadership, U.S. Military Academy, Civilianizing the Military: Effects on Unit Cohesion, Commitment, and Retention (June 2008) (presentation slides on file with author).

<sup>91</sup> *Id.* at 16.

<sup>92</sup> *Id.* at 153.

<sup>93</sup> *Id.* at 121.

<sup>94</sup> *Id.* at 130–31.

<sup>95</sup> *Id.* at 124.

<sup>96</sup> *Id.* at 162.

## 2. *A Propensity for Violence?*

The claim that private actors threaten human rights and larger U.S. policy goals emanates from a presumption that contractors are intrinsically more likely to use force, both lawful and unlawful, in the field.<sup>97</sup> At the institutional level, the perceived propensity for violence stems from the tie between destruction in the field and the need for reconstruction contracts. At the individual level, critics suspect that selection effects and responsibility to private authorities for job performance result in a contracting base that is especially prone to violence and is apathetic toward larger collective policy goals. Gideon Sjöberg has characterized the institutional concern as a military animation of “Joseph Schumpeter’s concept of creative destruction as the foundation of capitalist endeavor takes on new meaning in Iraq: the greater the destruction the greater the demand for goods and services.”<sup>98</sup> Under this view, PMCs are inclined to inflict more damage than necessary as part of a larger commercial incentive to reap the benefits of the reconstruction contracts that would follow. The quintessential example of this pattern is Halliburton, which has garnered over \$15 billion in reconstruction contracts in Iraq, often through no-bid administrative award processes.<sup>99</sup> As part of their reconstruction costs, Halliburton sub-contracts security services to other PMCs like Blackwater Worldwide.<sup>100</sup> In a different but related vein, MPRI, which offers a diverse portfolio of military services, has been accused of manipulating information of foreign political circumstances to secure foreign military training contracts, the result of which potentially

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<sup>97</sup> In the words of ArmorGroup Senior Vice President James Schmitt, “At best, private security contractors are viewed as a necessary evil; and, at worst, as trigger happy thugs who sacrifice America’s reputation at home and abroad and damage its strategic operations by operating as if they were above the law in their pursuit of a quick, opportunistic buck.” *An Uneasy Relationship: U.S. Reliance on Private Security Firms in Overseas Operations: Hearing Before the S. Comm. on Homeland Sec. and Governmental Affairs*, 110th Cong. 2 (2008) (statement of James D. Schmitt, Senior Vice President, ArmorGroup); see also Ries, *supra* note 61, at 96 (noting that allegations of excessive force of contractors have resulted in a reactionary response to privatization).

<sup>98</sup> Gideon Sjöberg, *The Corporate Control Industry and Human Rights: The Case of Iraq*, 4 J. HUM. RTS. 95, 98 (2005).

<sup>99</sup> See Harry Maurer, *Marching Orders for Halliburton*, BUS. WK., July 24, 2006, at 25 (stating that Halliburton has taken in roughly \$15 billion since 2001); Op-Ed., *Sharing the Riches of War*, INT’L HERALD TRIB., July 25, 2006, at 6 (stating that the Army has placed \$17 billion worth of orders for Iraq services, of which \$15 billion has gone to Halliburton); Cary O’Reilly, *Government Won’t Join Lawsuit; “Whistle-Blower” Says Halliburton Overcharged for Iraqi Recreation*, HOUS. CHRON., Sept. 9, 2006, at 3 (discussing a lawsuit that alleges that Halliburton overcharged the government for recreation facilities in Iraq, and also was awarded \$15 billion in private military contracts from the government).

<sup>100</sup> See Jim Mullins, Editorial, *Privatizing the War Has Unpleasant Costs*, SUN-SENTINEL (Fla.), May 22, 2004, at A15 (stating that Halliburton and other primary pentagon contractors subcontract with security companies); *New Documents Reveal Unauthorized Halliburton Security Subcontracts in Iraq*, U.S. FED. NEWS, Dec. 7, 2006 (discussing new documents obtained by Reps. Waxman and Van Hollen that disclose that Halliburton had security subcontracts with Blackwater).

increased the level of fighting on the ground.<sup>101</sup>

At the individual level, it is commonly accepted that “security contractors are more likely to commit violations of the laws of war when they become involved in difficult security operations.”<sup>102</sup> The “prone to violence” claim against PMCs has also been cited by legislators as a fundamental basis for barring PMCs from certain activities.<sup>103</sup>

The data, however, does not bear out these claims. The likelihood of both PMCs and public soldiers using violence, especially unlawful violence, reflect independently associated variables such as training level and military experience.<sup>104</sup> As in the public military, PMCs possess varying degrees of training and military experience. Over seventy percent of the PMCs employed in Iraq are believed to have served in a Western military institution.<sup>105</sup> During the course of their military service, many future contractors act as part of their military’s special operations forces, requiring the highest level of training one typically receives in military life.<sup>106</sup> Private contractor experience also provides crucial experience in military-oriented nation building roles, such as civilian policing, of which the public force is otherwise completely bereft.<sup>107</sup>

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<sup>101</sup> See Michaels, *supra* note 5, at 1099 (“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.”).

<sup>102</sup> See Scott Horton, *War Profiteering and Other Contractors Crimes Committed Overseas: Hearing on H.R. 369 Before the Subcomm. on Crime, Terrorism and Homeland Security of the H. Comm. on the Judiciary*, 110th Cong. 52 (2007) (statement of Scott Horton, Adjunct Professor, Columbia University School of Law), available at <http://judiciary.house.gov/hearings/printers/110th/36173.pdf> (arguing that, in contrast to the number of prosecutions of contractors, their lack of training intimates a likelier draw to unlawful violence); Jeffrey S. Thumher, *Drowning in Blackwater: How Weak Accountability over Private Security Contractors Significantly Undermines Counterinsurgency Efforts*, ARMY LAW., July, 2008, at 64 (quoting Colonel Thomas X. Hammes stating that to do what they are “tasked to do” occasionally calls for contractors to be “very aggressive”).

<sup>103</sup> See 154 CONG. REC. S8045 (daily ed. Aug. 1, 2008) (statement of Sen. Feinstein) (stating that a bar on private interrogators was necessary because “the use of contractors leads to more brutal interrogations than if they were done by Government employees”).

<sup>104</sup> Western military experience is emphasized as the most important axis. This consideration is largely a proxy for a belief that the contractor has been immersed in tenets of military discipline. See Luis Gómez del Prado, *supra* note 68, at 4 (noting that hiring former military and police is common and necessary for the viability of private contractors).

<sup>105</sup> See Schmitt, *supra* note 75, at 515 (stating that Blackwater has admitted that thirty percent of its employees do not have any military training). Of course, any percentage below 100% of military service could place PMCs at a disfavored position. In that vein, it is important to remember that nearly all of the remaining contractors possess experience within domestic law enforcement or other related contexts.

<sup>106</sup> Steve Fainaru, *Private Armies: Security Contractors in Iraq*, WASHINGTONPOST.COM, July 30, 2007 (on file with author). Recent revelations have also indicated that contractors in Iraq often act in tandem with U.S. Special Forces in support roles. See R. Jeffrey Smith & Joby Warrick, *Blackwater Tied to Clandestine CIA Raids*, WASH. POST, Dec. 11, 2009, at A2.

<sup>107</sup> See *Contractor Training of Afghan National Security Forces: Hearing Before the Commission on Wartime Contracting* (2009) (statement of Ambassador (Ret.) Kenneth Moorefield, Assistant Inspector General for Special Plans & Operations for the GWOT and Southwest Asia), available at [http://www.wartimecontracting.gov/docs/hearing2009-12-18\\_transcript.pdf](http://www.wartimecontracting.gov/docs/hearing2009-12-18_transcript.pdf) (“I would note that, for



PMC job preparedness is likely greater than these numbers indicate, due to the limited scope of services that PMCs provide. Individuals who have never received formal training within the context of a public military receive more focused, job-specific training in a shorter time period than typically experienced by public soldiers. Soldiers are purposefully trained on a variety of tasks and responsibilities and then often rotated through numerous different posts.<sup>108</sup> In contrast, unmanned vehicle operators, weapon maintenance and personal security contractors can sacrifice the breadth of training in order to accumulate and hone a specific skill set required for accomplishing specific job requirements.<sup>109</sup>

Other demographic factors also tend to indicate that PMCs—especially security contractors—are no more likely to engage in unlawful violence in their employment. Demographic factors of age, education, marital status, and the presence of children correlate with a lower likelihood to engage in crime generally, and unlawful violence in particular.<sup>110</sup> PMCs serving abroad are on average 54% older than their public soldier counterparts (averaging 40 years old in comparison to 26 years old for public soldiers in the Army).<sup>111</sup> Contractors are more than twice as likely to have a post-high school diploma (67% of civilian contractors possess a post-high school diploma, compared to 32% of soldiers in the Army).<sup>112</sup> PMCs are also more than twice as likely to be married at the time of their service (73% to 44%)<sup>113</sup> and are almost twice as likely to have children than those in the public military (1.2% to 0.64%).<sup>114</sup>

One might think that the overarching profit-motive aspect of private actors may somehow create selection effects that would render traditional gauges of violence propensity inapplicable. Specifically, the idea that PMCs work for monetary gain is manifestly different than the motivating factors for public troops.<sup>115</sup> Such analysis ignores empirical evidence that pecuniary gain also serves as the predominant reason for individuals to join (and remain in) the armed forces. Similarly, the desire to serve the public good represents an equivalent reason for PMCs to become public soldiers

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example, in the police training mission, they bring uniquely necessary skill sets to the table. Obviously, our military personnel . . . generally [lack] . . . civilian police experience.”)

<sup>108</sup> *Id.* (statement of Michael Strain, Program Executive, Counter Narcoterrorism Technology Program Office, Department of Defense).

<sup>109</sup> See KELTY, *supra* note 89, at 21 (noting that “outsourcing is motivated by a desire to increase flexibility by targeting qualified labor for specific project goals without carrying long term costs for training and maintaining personnel”).

<sup>110</sup> See generally RONALD BARRI FLOWERS, DEMOGRAPHICS AND CRIMINALITY: THE CHARACTERISTICS OF CRIME IN AMERICA (1989) (discussing certain offender characteristics).

<sup>111</sup> *Id.* at 113.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 6.

and enlist.<sup>116</sup>

#### IV. MILITARY EFFICACY AND DEMOCRATIC ACCOUNTABILITY

The distinctions in character between private contractors and public employees prove ambiguous, and the theory upon which scholarly critiques of national security privatization rely is substantively untenable. The belief that contractors create an insuperable obstacle to democratic accountability<sup>117</sup> (as opposed to contractor or PMC accountability) represents the core concern that must be judged in examining the legitimacy of private actor force. In the context of national security privatization, democratic accountability encompasses a concern that the use of private actors inappropriately or unlawfully insulates government officials, intentionally or unintentionally, from the political consequences of their decisions. The democratic accountability concern must be judged within a larger context of the democratic benefits and normative advantages provided by private actors.

##### A. *Transparency and Democratic Accountability as Constitutional and Democratic Norms*

Democratic accountability asks whether a government practice, such as the use of privatized force, effectively short-circuits proper democratic checks on government power and simultaneously precludes the ability of the electorate to recognize and respond to that practice. Democratic accountability is inextricably tied to legitimacy because its purpose is to keep policy decisions by political officials roughly in line with and responsive to the policy preferences of the public.<sup>118</sup> In a constitutional system, democratic accountability requires those in power to accept responsibility for their actions and the consequences of their policy choices.<sup>119</sup> Its effectiveness is dependent on answerability (public access to information and justification for government actions and decisions) and

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<sup>116</sup> The desire to serve one's country through contracting is consistent with the fact that such large numbers of PMCs previously served in the national armed forces. Private military contracting offers additional flexibility to a contractor to commit to a reduced period of service, rather than the several years of service required for reenlistment. This flexibility is most likely of particular importance in the United States to individuals who serve for more than twenty years, and consequently have already accrued the full panoply of retirement benefits.

<sup>117</sup> Several terms refer to democratic accountability, including government accountability and political accountability, which I use interchangeably throughout this Article.

<sup>118</sup> See Delmer D. Dunn, *Accountability, Democratic Theory, and Higher Education*, 17 EDUC. POL'Y 60, 61 (2003) ("Accountability is the price citizens extract for conferring substantial administrative discretion and policy responsibility on both elected and appointed government personnel.").

<sup>119</sup> See Robert O. Keohane, *Global Governance and Democratic Accountability*, in TAMING GLOBALIZATION: FRONTIERS OF GOVERNANCE 130, 140 (David Held & Mathias Koenig-Archibugi eds., 2003) (describing the accountability relationship of power wielders to broad publics).

enforcement (the capacity of the public to punish officials for policy choices the public does not endorse).<sup>120</sup>

As discussed in the Introduction, commentators have criticized the “lack of transparency” of PMC action,<sup>121</sup> coupled with the dominion of the executive over PMC action, as creating a threat to the separation of powers and limited governance.<sup>122</sup> The democratic accountability test possesses some synergy with the criticism that the use of PMCs inhibits governmental transparency and invokes separation of powers issues. The requirement of governmental accountability in using private forces is not concerned with the actions of the private sector as the private sector, but rather, as the ability of the public to gauge how its government is using private forces and whether that usage is consistent with democratic will. Peter Singer, of the Brookings Institution, argues that the use of contractors “lets policymakers dodge tough, politically costly decisions” and thus avoid the full costs of having the country at war.<sup>123</sup> The political ease of using contractors is presumably a by-product of the lessened political damages their deaths cause when (or if) they are reported at all.<sup>124</sup>

The question of democratic accountability in privatizing force has been heightened by indications that the government has used PMCs in order to shield itself from political fire. For example, some officials have indicated that PMCs could be used for specific operations because they do not wear American uniforms.<sup>125</sup> PMCs can also be used to effectuate U.S. policy goals by allowing them to train and coordinate with allied militaries when the U.S. is unwilling to provide troops (for political reasons).<sup>126</sup> Unwilling

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

<sup>121</sup> Minow, *supra* note 3, at 999.

<sup>122</sup> Michaels, *supra* note 5, at 1052–53.

<sup>123</sup> Peter Singer, *Sure, He's Got Guns for Hire. But They're Just Not Worth It*, WASH. POST, Oct. 7, 2007, at B1.

<sup>124</sup> See *Private Armies Also Fight; Hired Help Globally Eases Strain on Overworked U.S. Forces*, GRAND RAPIDS PRESS, Nov. 2, 2003, at A5 (“[T]he use of contractors also hides the true costs of war. Their dead aren’t added to official body counts.”). The belief that contractor deaths are mourned less by the U.S. population, however, is questioned by the limited empirical data on the subject. In a recent study, individuals responding to news of a contractor death found it equally as sad as the death of a soldier, despite being prone to viewing the contractor’s participation in the conflict as motivated by pecuniary gain. See Deborah Avant & Lee Sigelman, *Globalization, Private Security, and the Democratic Peace*, in *GLOBALIZATION AND TRANSATLANTIC SECURITY* 7, 27–28 (Rachel A. Epstein & Pascal Vennesson eds., 2006).

<sup>125</sup> See David Isenberg, *Dogs of War: Who Protects the Protectors?*, UNITED PRESS INT’L, Aug. 1, 2008 (noting how the absence of a military uniform allows private contractors to work beyond the scope of military personnel).

<sup>126</sup> See Bradley Graham, *Ex-GIs Work To Give Bosnian Force a Fighting Chance*, WASH. POST, Jan. 29, 1997, at A1 (referencing President Clinton’s military aid plan to Bosnians with the use of retired military personnel); Bradley Graham, *U.S. Firm Exports Military Expertise: Role in Training Croatian Army Brings Publicity and Suspensions*, WASH. POST, Aug. 11, 1995, at A1 (noting how private contractors can be used for projects that the U.S. military is unwilling to do); Renae Merle, *More Civilians Accompanying U.S. Military: Pentagon Is Giving More Duties to Contractors*, WASH. POST, Jan. 22, 2003, at A10 (highlighting the Defense Department’s acknowledgement of the use of private contractors for undesired assignments).

to formally ally the U.S. with Croatia, this was exactly the practice President Clinton followed when he wanted to assist the Croats' military effort against Slobodan Milosevic.<sup>127</sup>

Democratic accountability is agnostic to the question of how the public ought to weigh the sacrifice of public soldiers and private troops.<sup>128</sup> A public preference approving or disapproving the use of private force is only relevant to the extent that the public is able to acquire the necessary information to make its judgment and effectuate that judgment through its elected officials, both in the presidency and legislature.

Does privatizing national security short-circuit the democratic accountability of the government in foreign policy? The use of private force reduces transparency through increased layers of removal of governmental policy that occur when private actors are brought into the fold and operate, independent of public troops and the lifting of formal information-forcing devices designed to facilitate public disclosure. As private actors, PMCs are specifically exempt from Freedom of Information Act ("FOIA") requests<sup>129</sup> and can object to other formal mechanisms designed to force disclosure of commercial information as an infringement of proprietary interests.<sup>130</sup>

Inhibited transparency alone, however, is insufficient to delegitimize private force. For example, it would be a legal fiction to posit that the Executive Branch controls the actions of a Private First Class soldier in the execution of military missions. Every additional bureaucratic layer fosters less transparency, but does not create a constitutional dilemma.

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<sup>127</sup> See Montgomery Sapone, *Have Rifle with Scope, Will Travel: The Global Economy of Mercenary Violence*, 30 CAL. W. INT'L L.J. 1, 25 (1999) (describing the Pentagon's decision to refer the Croatian Defense Minister to private contractors); Esther Schrader, *U.S. Companies Hired To Train Foreign Armies*, L.A. TIMES, Apr. 14, 2002, at A1 (noting the impact of the U.N. arms embargo on the decision to license MPRI's work in Croatia); Mark Thompson, *Generals for Hire: Confronted With Its Trickiest Task in Bosnia, the U.S. Has Made Plans To Pay Someone Else To Do It*, TIME MAG., Jan. 15, 1996, at 34 (referencing the Clinton administration's refusal to send military personnel to assist in rearming the Bosnians and turning to private contractors for assistance).

<sup>128</sup> See Andrew Petter, *Look Who's Talking Now: Dialogue Theory and the Return to Democracy*, in THE LEAST EXAMINED BRANCH: THE ROLE OF LEGISLATURES IN THE CONSTITUTIONAL STATE 519, 524 (Richard W. Bauman & Tsvi Kahana eds., 2006) (noting that democratic accountability theory is "normatively agnostic").

<sup>129</sup> FOIA applies only to the government and not to private companies. See 5 U.S.C. § 551(1) (2006) (defining "agency" as a government entity); Freedom of Information Act, 5 U.S.C. § 552 (2006) (applying the definition of "agency" under 5 U.S.C. § 551(b) to FOIA requests); see also Craig D. Feiser, *Privatization and the Freedom of Information Act: An Analysis of Public Access to Private Entities Under Federal Law*, 52 FED. COMM. L.J. 21, 31 (1999) (noting that an entity is only held accountable under a FOIA request if it can be subjected to the specific terms of the Act).

<sup>130</sup> See Singer, *supra* note 3, at 214 (referencing the "wall of silence" that private contractors can create by denying information, as well as the general difficulty in the oversight of private contractors).

B. *Weighing the Benefits of National Security Privatization—Policy Preferences and International Norms*

Reticence toward privatized national security flows from an overriding concern that the private sector compromises the safety of the State and its citizens. If the concern is that privatizing national security compromises safety, mainly due to reduced democratic accountability, then we also have to very robustly consider the aspects of privatization that enhance safety.<sup>131</sup>

While the layer of removal that privatization necessarily inserts between government and state action reduces transparency, it is also a reaction to underlying democratic normative judgments as to both the role of the military and the values inextricably linked to international legal norms. Privatized force facilitates the pursuit of consistency with international legal norms and efficiency desired by public policy judgments.

PMCs alleviate the problem of limited state resources to fight a desired war, whether the war is one of aggression or defense. Understanding the basics of the demand for private force by states and other parties (i.e., NGOs and other corporations) is a crucial component to appreciating how (and why) PMCs are used, and if they are effective in meeting their stated ends.

State use of PMCs necessarily reflects a judgment that available public forces are incapable or inadequate to fulfill the work necessary to carry out the policies of the State.<sup>132</sup> This judgment reflects both external geopolitical forces and domestic policy judgments. As demonstrated below, “growth” of the market for PMCs is less a product of new dynamics than the by-product of increased intensity (or reappearance) of externally oriented factors that have promoted the market through history, and internal judgments causing a shift away from public troops to private actors. The changing dynamics of these motivators reflect normative judgments by states as well as political restraints—both domestic and international—on state action.

Throughout history, external political factors upping the ante for quantity and expertise required to effectuate policy have compelled states to augment public troops through private means. The end of the Cold War and the public eagerness for a “peace dividend” sparked a dramatic troop

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<sup>131</sup> National security privatization differs from its more traditional predecessors because cost-effectiveness, while important, is arguably not the hallmark by which the effects of privatization is (nor should be) judged.

<sup>132</sup> Consistent with modern “state interest” theory, I use the “policy of the state” as a placeholder for the judgment of the officials empowered to effectuate a course of action that would require the deployment of the public armed forces. *See generally* JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* (2005) (examining the definition and explanation of “state interest” in an international law context).

drawdown in the West.<sup>133</sup> During the early 1990s, the U.S. reduced armed forces by thirty-five percent and cut costs by over \$100 billion.<sup>134</sup> This reduction in troops has not been matched with a reduced workload abroad. The number of armed conflicts involving Western powers during the half-century-long Cold War has already been eclipsed in the years since it ended.<sup>135</sup> The need for more troops following the bipolarity of the Cold War is not unique to the U.S. as world hegemon. Countries ranging in power from Sri Lanka to France are finding it difficult to aggregate the number of troops they require.<sup>136</sup>

The increasing advancement and dependence on technology requires states to find highly trained individuals to run and maintain the machinery of war. The correlation between technology and military privatization is underscored by evidence that the more technologically advanced the state army, the greater degree that army has been privatized.<sup>137</sup> In his testimony before the Senate Appropriations Committee, Deputy Secretary of Defense Gordon England noted that “contractors are vital in an all-volunteer military force,” which is due, in part, to technological expertise the American government cannot duplicate.<sup>138</sup> From machine guns to infrared

<sup>133</sup> See Aaron Francis O. Chan, *Public War, Private Soldiers: The Explosion of Private Military Contracts in the Bush Administration*, E-INT’L REL., Sept. 30, 2009, <http://www.e-ir.info/?p=2422>.

<sup>134</sup> See JOHN LUDDY, HERITAGE FOUNDATION, MORE NON-DEFENSE SPENDING IN THE DEFENSE BUDGET 1 (1994), available at [http://www.heritage.org/Research/NationalSecurity/upload/90680\\_1.pdf](http://www.heritage.org/Research/NationalSecurity/upload/90680_1.pdf) (“[F]unding for the military has fallen by 35 percent, from \$390 billion in 1985 to \$252 billion in 1995 (in constant 1995 dollars).”). Meanwhile, nondefense spending increased around 5% during the 1990s. See Chris Edwards, *How To Spend \$2.8 Trillion*, CATO INST. TAX & BUDGET BULL., Aug. 2006, at 2, available at [http://www.cato.org/pubs/tbb/tbb\\_0810-39.pdf](http://www.cato.org/pubs/tbb/tbb_0810-39.pdf) (reporting that nondefense spending is growing rapidly and that compensation for nondefense federal workers grew 4.8%).

<sup>135</sup> See Michael Eisenstadt, *U.S. Military Capabilities in the Post Cold-War Era: Implications for Middle East Allies*, MIDDLE EAST REV. INT’L AFFAIRS, Dec. 1998, at 37 (“Since 1991, the U.S. military has taken on an unprecedented number of overseas commitments . . .”).

<sup>136</sup> Sri Lanka, which did not qualify for U.S. assistance due to allegations of human rights abuses, put out feelers to several PMCs, including MPRI, for training assistance with the justification that “[w]e just don’t have enough troops to protect the villages.” Dexter Filkins, *Tamil Tiger Rebels ‘Ethnically Cleanse’ Parts of Sri Lanka*, L.A. TIMES, May 19, 2000, at A1.

<sup>137</sup> See ARMIN KRISHNAN, WAR AS BUSINESS 3 (2008) (finding that the American and British forces, as the most technologically advanced armed forces, also have the highest degree of privatization). China, with a rapidly developing armed forces, as well as a large and captive population, has also publicly begun seeking and assisting domestic development of private firms for the purpose of maintaining and developing military equipment. *China Issues Circular on Opening Military Industry to Private Business*, BBC MONITORING ASIA PACIFIC, Aug. 6, 2007.

<sup>138</sup> *Senator: Waste, Fraud, Neglect Hurting U.S. Soldiers*, CNNPOLITICS.COM, July 23, 2008, <http://edition.cnn.com/2008/POLITICS/07/23/contractor.hearing/index.html> (paraphrasing statements by Deputy Secretary of Defense Gordon England); see also *Examining the Effectiveness of U.S. Efforts to Combat Waste, Fraud, Abuse, and Corruption in Iraq: Hearing Before the S. Comm. on Appropriations*, 110th Cong. 125–31, 236–45 (2008) (statement of Gordon England, Deputy Secretary of Defense, Department of Defense). Technological expertise differs substantively from the limitations of a small standing army. The U.S. government possesses the legal ability to draft able-bodied men to fight war through conscription, but cannot, without the aid of contractors, maintain the complex technology the U.S. military requires to conduct war. See *Outsourcing of Security Tools Helps Contractors*, TECH. DAILY, Mar. 30, 2007 (noting that “the federal government has sought more complex technology but turned to contractors to operate some of the most key undertakings”); George

sensors and transport planes to Predator drones, PMCs with employees specialized in various weapons systems are required for public troops to operate effectively.<sup>139</sup>

The market for privatized force reflects not only external factors, but also domestic judgments of individual states that have largely been adopted across the international community. Specifically, the rejection of conscription, value of “force protection,” internalization of global threats as domestic risks, enhanced respect for international human rights, and implicit acceptance and legitimacy of humanitarian intervention have raised the workload of the public military while restricting their use.

### 1. *The Liberal-Democratic Rejection and Military Ineffectiveness of Conscription*

The forced conscription of soldiers to fight in war is more unpopular now than ever before.<sup>140</sup> In 2006, seventy percent of the American public indicated that they oppose reinstating the draft.<sup>141</sup> In the words of one commentator, “public opinion has expressed itself clearly against conscription.”<sup>142</sup>

The public rejection of conscription mirrors its distrust by military professionals, political scientists, and economists. Experts have long concluded that conscripts are less motivated, less educated, less creative, and less reliable than those in an all-volunteer army.<sup>143</sup> Their use is inefficient and potentially makes armed conflicts longer and more likely.<sup>144</sup> Further, data indicate that a draft leads those forced into service to civilian harms, including lower wages, less education, and pervasive opportunity

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Leopold, *Pentagon Urges ‘Relevant’ R&D*, ELEC. ENG’G TIMES, Oct. 23, 2006, at 1 (noting the increased reliance on technology companies by the Department of Defense).

<sup>139</sup> See KRISHNAN, *supra* note 137, at 36–39 (discussing the technology advantage of commercial companies over state development of technology).

<sup>140</sup> E.g., Brian Dickerson, *Rep. Rangel’s Draft Bill Threatens War in Iraq*, DETROIT FREE PRESS, Nov. 22, 2006, at 1; see also Christopher Jehn & Zachary Selden, *The End of Conscription in Europe?*, 20 CONTEMP. ECON. POL’Y 93, 93–95, 98 (highlighting the trend away from mandatory service in Europe).

<sup>141</sup> Dickerson, *supra* note 140.

<sup>142</sup> Rafael Ajangiz, *The European Farewell to Conscription*, in THE COMPARATIVE STUDY OF CONSCRIPTION IN THE ARMED FORCES 307, 332 (Lars Mjøset and Stephen Van Holden eds., 2002).

<sup>143</sup> See generally C.E.E. Telfer-Smollett, *The Relative Advantages and Disadvantages of Voluntary and Compulsory Service, Both from a Military and a National Point of View*, 41 J. ROYAL UNITED SERV. INST. 919 (1897) (comparing broadly conscription-based armies with all-volunteer forces).

<sup>144</sup> See Seung-Whan Choi & Patrick James, *No Professional Soldiers, No Militarized Interstate Disputes?*, 47 J. CONFLICT RESOL. 796, 798, 800–02 (2003) (contending that “conscripted soldiers would seem to run against the logic of the democratic peace in that they appear to lead to international conflict”); see also generally THE REPORT OF THE PRESIDENT’S COMMISSION ON AN ALL-VOLUNTEER ARMED FORCE (1970) (evaluating the feasibility and effects of an all-volunteer armed services).

costs.<sup>145</sup>

## 2. *The Force Protection Principle*

The memories of misbegotten military adventures over the course of the twentieth century has left the Western world with a pungent distaste for the death of public soldiers, especially in conflicts not considered vital to the national interest. Termed “Vietnam Syndrome” in the United States, based on public tumult over U.S. involvement in the Vietnam War, the term could be updated to “Somalia Syndrome,” referencing America’s horror and subsequent quick withdrawal from Somalia following the public celebration in the streets after the brutal killing of eighteen American servicemen.<sup>146</sup>

The concept of force protection guides Western military actions today.<sup>147</sup> Its effects manifest in a large percentage of budgetary costs, including more traditional protective technology of body armor and extending to billions of dollars spent on stealth technology, unmanned all-terrain vehicle robots, and unmanned drone aircraft designed to keep U.S. soldiers as far removed from harm’s way as possible.<sup>148</sup>

## 3. *Internalizing Global Threats as Domestic Risks*

Never before have the U.S. and other nations so pervasively viewed their own national interest at risk from the isolated actions of small groups thousands of miles away. In February 2003, President Bush certified fighting narcotics trafficking in Guatemala as a “vital national interest” and opened the avenue for force and military financing because a strong organized crime apparatus in the country could weaken Guatemalan governmental institutions.<sup>149</sup> Neither the certification nor any administration official contend that the organized crime referenced in

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<sup>145</sup> See Panu Poutvaara & Andreas Wagener, *To Draft or Not To Draft? Inefficiency, Generational Incidence, and Political Economy of Military Conscription*, 23 EUR. J. POL. ECON. 975, 976, 984 (2007) (finding that the introduction of a military draft harms young generations).

<sup>146</sup> See Joshua Muravchik, *Using Force as a Tourniquet*, AM. ENTER. INST., Jan. 1, 1997, <http://www.aei.org/issue/17650> (discussing the “Somalia syndrome” and its effects on U.S. domestic military interventions).

<sup>147</sup> See, e.g., Jeffrey Record, *Force-Protection Fetishism: Sources, Consequences, and (?) Solutions*, AIR & SPACE POWER J., Summer 2000, at 4, 4–6 (describing instances when American behavior “reflected a desperate unwillingness to place satisfaction of US armed intervention’s political objective ahead of the safety of its military instrument”).

<sup>148</sup> See Jeffrey Record, *Operation Allied Force: Yet Another Wake-Up Call for the Army?*, PARAMETERS, Winter 1999–2000, at 15, 16 (“Minimizing risk—force protection—has become more important than military effectiveness.”).

<sup>149</sup> See *Overview of U.S. Policy Toward the Western Hemisphere: Hearing Before the Subcomm. on the Western Hemisphere of the H. Comm. on International Relations*, 108th Cong. 15 (2003) (statement of John P. Walters, Director, Office of National Drug Control Policy) (“The President provided a vital national interest certification to Guatemala because the suspension of assistance to Guatemala would result in further deterioration of precisely those Guatemalan institutions that are essential to combating the influence of organized crime in Guatemala.”).



Guatemala possesses the means or motive to harm the United States other than supplying it with highly-demanded drugs.

Perception of increased need for strong military force is not, however, simply sparked by increased sensitivity to gravity of risk. The public perception of which risks substantively constitute a U.S. national security concern has expanded.<sup>150</sup> Globalization has caused commercial interests to become completely intertwined with a perception that far away risks possess national security implications at home. This phenomenon is not unique to the United States. In a study performed by Gary Becker and Yona Rubinstein, commercial cycles in Israel would be disrupted due to terrorist attacks inside Israeli borders.<sup>151</sup> Even minor attacks would cause substantial business losses because people became less inclined to leave their homes and engage in commercial transactions, thus harming the domestic economy.<sup>152</sup>

The trend of international interventions for humanitarian reasons is also evidence of an increasingly expansive view of U.S. interests requiring military action. At the time NATO troops began air strikes against Serbia, there was no clear indication that the Serbian regime possessed any designs against other countries, and clearly possessed neither the ability nor desire to engage in fighting with the United States.<sup>153</sup> The justification for armed intervention was couched as an affirmative responsibility to preclude an ongoing genocide. The justification was moral—not legal or strategic.<sup>154</sup>

These normative movements, prevalent among industrialized states, have led to a generalized urgency to possess the ability to project military power in short order, while simultaneously reducing the capacity to do so

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<sup>150</sup> See Brigitte L. Nacos et al., *Prevention of Terrorism in Post-9/11 America: News Coverage, Public Perceptions, and the Politics of Homeland Security*, 20 *TERRORISM AND POL. VIOLENCE* 1, 2–3, 5, 8 (2008) (arguing that Americans and the media have focused more on terror threats since September 11 as compared to before September 11); cf. Jacqueline E. Ross, *The Place of Covert Surveillance in Democratic Societies: A Comparative Study of the United States and Germany*, 55 *AM. J. COMP. L.* 493, 493 (2007) (discussing the increasing importance of undercover policing following the terrorist attacks of September 11).

<sup>151</sup> Gary S. Becker & Yona Rubinstein, *Fear and the Response to Terrorism: An Economic Analysis* 5 (Aug. 1, 2004) (unpublished manuscript), available at <http://www.ilr.cornell.edu/international/events/upload/BeckerrubinsteinPaper.pdf>.

<sup>152</sup> *Id.*

<sup>153</sup> See John Yoo, *Using Force*, 71 *U. CHI. L. REV.* 729, 773 (2004) (“Serbia posed no threat to the United States; it had neither the capability to attack the United States or its forces, nor the manifest hostility to do so.”).

<sup>154</sup> See Jonathan I. Charney, *Anticipatory Humanitarian Intervention in Kosovo*, 32 *VAND. J. TRANSNAT’L L.* 1231, 1235 (1999) (finding that “humanitarian intervention arguably provides a lawful foundation for the NATO actions,” though the U.N. Charter does not make an exception to the prohibitions on the use of force); Lawrence J. Korb, *Force Is the Issue*, *GOV’T EXECUTIVE*, Jan. 2000, at 31 (recalling President Clinton’s speech to NATO troops when he told them “[w]e should not countenance genocide or ethnic cleansing anywhere in the world”). As the NATO action was clearly counter to established international law regarding the use of force, other multi-national peacekeeping actions (for example under the auspices of the U.N.) also require public troops from sources where such troops are a rare commodity.

as other conflicts arise. The result is a demand for military capabilities that can be delivered now.

### C. *Instrumental and Strategic Efficacy and Privatization*

The instrumental and policy benefits made possible by privatization are often overlooked in favor of an analysis of purported harms. This is unfortunate because an exclusive focus on the potential normative harms of privatization represents only part of the calculus necessary to inform policy and influence law. Incorporating private actors in national security functions enables the government to save money, draw on specialized skills residing exclusively in the private sector, and retain more of its investment in training its own forces. Privatization also enhances policy flexibility that expands the possibilities of how force and foreign policy can be projected.

#### 1. *Instrumental Advantages of National Security Privatization*

The transition to an all-volunteer force in the United States (and other democracies) has changed the face of how the military is organized and how it recruits. The United States enjoys a more professional, educated, and skilled military than ever before.<sup>155</sup> Despite this, the private sector offers several dimensions in which it can enhance, augment, or supersede the government's performance of services. Privatization increases the quality and quantity of labor from which the government can draw, thus enhancing the quality of services through intellectual diversity and specialization.<sup>156</sup> Privatized force also provides the military with secondary retention benefits that allow the utilization of military-generated skills that would otherwise be lost.<sup>157</sup>

##### a. Cost Efficiency and Effectiveness

The cost efficiency and effectiveness of national security privatization have been controversial. Many claim the use of PMCs undermines the threshold question of turning to the private sector—economic savings.<sup>158</sup>

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<sup>155</sup> See David R. Segal & Mady Wechsler Segal, *America's Military Population*, POPULATION BULL., Dec. 2004, at 1, 3 ("The all-volunteer military is more educated . . . than the draft-era military."); see also Larry W. Isaac & Daniel M. Harrison, *Corporate Warriors: The State and Changing Forms of Private Armed Force in America*, 24 CURRENT PERSP. SOC. THEORY 153, 155 (2006) (outlining the transformation of military services to the current state).

<sup>156</sup> See Yusuf Alabarda & Rafal Lisowiec, *The Private Military Firms: Historical Evolution and Industry Analysis 17* (June 2007) (MBA Professional Report, Naval Postgraduate School), available at <http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA473255&Location=U2&doc=GetTRDoc.pdf>.

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

<sup>158</sup> See SINGER, *supra* note 3, at 157 (finding that the military has not substantiated its claims of the savings that result from military outsourcing); David Isenberg, *Dogs of War: Cost-Effective: Myth or Fact?*, UNITED PRESS INT'L, Apr. 25, 2008 (arguing that more oversight and accounting of contractors is needed to ensure that there are real cost savings and greater efficiency).

Some commentators have indicated that cost-savings are a lesser priority in national security and simple effectiveness should be the only gauge in assessing the value of PMCs.<sup>159</sup> The efficient utilization of monetary resources, however, even in wealthy countries, materially affects the ability to project force.<sup>160</sup> In other words, a dollar spent on a contractor who could be easily replaced by a public soldier for ninety cents is ten cents wasted, money that could have been used elsewhere.

In this vein, several scholars have argued that the cost-savings benefits of PMCs are illusory due to the high cost of securing contractors.<sup>161</sup> As an example, when MPRI was contracted to take over ROTC training, its cost per instructor was \$10,000 higher per year than the public instructors it replaced.<sup>162</sup> More recently, reports that another PMC, KBR, was charging the military tens of millions of dollars for fuel delivery presented additional anecdotal evidence that the cost-savings of PMCs were, at best, highly limited.<sup>163</sup>

Empirically, judging whether the use of PMCs is economically efficient depends entirely on the frame of reference. The United States has spent over \$85 billion for the work of military contractors since the beginning of the war and the tab was expected to climb to over \$100 billion by the end of 2008.<sup>164</sup> According to a recent Congressional Budget Office Report, the costs to support a soldier and a contractor in the field during wartime are roughly the same.<sup>165</sup>

The State, however, is not always at war. At the conclusion of a conflict, or as a conflict winds down, the State can reduce its usage of PMCs in a way unavailable with public soldiers. As public soldiers must be trained and remain prepared for action at any time, they cannot be discarded as the need for their services wanes. Those soldiers continue to draw a full salary and accrue benefits packages.<sup>166</sup> Because public soldiers remain in the force structure much longer, during peacetime the public

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<sup>159</sup> This is a claim that is effectively countered when cost-effectiveness is included as a core component of overall military efficiency. See AVANT, *supra* note 23, at 117–18 (discussing the tension between cost savings and effectiveness in the privatization of ROTC training).

<sup>160</sup> See *id.* at 259 (“Strong states that take advantage of the market buy increased power in the form of raw capacity to project their interests abroad. . . . Though US raw military power was already dominant without it, its use of private security has further enhanced its relative capacity to project military force.”).

<sup>161</sup> See, e.g., Minow, *supra* note 3, at 1011–12; Dickinson, *supra* note 33, at 149 n.45 (contending that cost savings have not been demonstrated).

<sup>162</sup> Deborah Avant, *The Privatization of Security and Change in the Control of Force*, 5 INT’L STUD. PERSP. 153, 155 (2004).

<sup>163</sup> *Id.*; see also Brett Clanton, *Audit Faults KBR Costs in Iraq*, HOUS. CHRON., June 26, 2007, at 1 (discussing findings that KBR incorrectly accounted for the amount of fuel it used, among other errors).

<sup>164</sup> See CONGRESSIONAL BUDGET OFFICE, CONTRACTORS’ SUPPORT OF U.S. OPERATIONS IN IRAQ 2 (2008).

<sup>165</sup> *Id.*

<sup>166</sup> See *id.* at 14 (discussing the costs for private security contractors compared with military resources).

soldier's cost is approximately cut in half, while contractors can be immediately dismissed, reducing costs to a negligible amount.<sup>167</sup> Over a period of ten years, half assumed to be peacetime, the privatization of security services alone is estimated to save the government over one billion dollars.<sup>168</sup>

#### b. Special Skills and Expertise

Specialized skills are expensive to produce and create value in their holder that is redeemable in the private sector in a way that is impossible to replicate through public employment.<sup>169</sup> Public pay scales are highly fixed and resist market forces even in circumstances in which the skill set sought by a civil employee is both objectively and subjectively highly valued. As a result, unsurprisingly, private contractors often possess expertise that is both highly demanded and financially under-compensated in the public sector. Under these circumstances especially, use of private sector actors can enhance the effectiveness of the military through contracting with corporate entities that have collected a labor force already skilled in the national security functions required by the government. This is even more so the case when the need for such skill sets are temporary and arise unpredictably.

Specialization and expertise benefits run across the spectrum of privatization services—technological expertise impacts all aspects of the military. The need for special expertise in intelligence is acute. Contractors operating in human intelligence gathering often possess skills in domestic law enforcement or foreign language skills. Intelligence contractors engaged in electronic surveillance and open source intelligence gathering combine technological expertise and analytical skills with proven effectiveness.<sup>170</sup> PMCs specializing in security operations operate databases that allow them to recruit from contractors with particular skills or particular experiences matching the type of mission for which they were contracted to perform—i.e., language or security details for government officials.<sup>171</sup> The greatest numbers of private contractors provide logistical

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<sup>167</sup> *Id.* at 14, 17.

<sup>168</sup> *Id.*

<sup>169</sup> See 1 MURRAY N. ROTHBARD, *1 MAN, ECONOMY, AND STATE: A TREATISE ON ECONOMIC PRINCIPLES* 80–82 (1962) (discussing the reasons behind and purpose of specialization).

<sup>170</sup> The prowess of intelligence contractors is demonstrable through published war games performed by military intelligence and the CIA. In one, contractors circumvented protections of governmental computer systems, gained root systems access and the ability to cause power outages in every major city, and disrupted military communications. SINGER, *supra* note 3, at 286 n.87. In a similar exercise, the CIA was in competition with various other organizations to gather the information necessary for a hypothetical intervention in Burundi. Not only did a PMC defeat the CIA, but the CIA finished in last place. *Id.* at 100.

<sup>171</sup> See Eugenio Cusumano, *Regulating Private Military and Security Companies: A Multifaceted and Multilayered Approach* 10 (European Univ. Inst. Working Paper, AEL 2009/11, 2008), available at [http://cadmus.eui.eu/dspace/bitstream/1814/12953/1/AEL\\_2009\\_11.pdf](http://cadmus.eui.eu/dspace/bitstream/1814/12953/1/AEL_2009_11.pdf).

and technological support to the public military. The specialization of skills necessary to run military machinery has reached the point where not only is it prohibitively expensive to do within the military, but private contractors themselves must highly specialize their skill set to be able to effectively address the complexities of the technology they maintain.<sup>172</sup> The bureaucratic strictures of the public sector do not allow the government the flexibility to identify, hire, or deploy these different skill sets as they might be needed.<sup>173</sup>

## 2. Policy Advantages of National Security Privatization

### a. Surge and Diffusion Capacity

The increased lethality of non-state insurgents and terrorist organizations enhances non-state actors' ability to influence state action through isolated, but deadly, incidents of force. Identifying these decentralized threats is difficult; effectively countering them requires a degree of deployment flexibility and expediency that would be enormously difficult and expensive for the public military to attain. Similarly, private contractors do not have to be rotated out of theater as do public soldiers. Thus, the government can hire fewer contractors and receive more full-time-equivalent service for their deployment than is possible with public troops. The ability to hire and deploy contractors quickly not only provides a needed surge capacity in the midst of armed conflict, but also facilitates the deployment of a small number of troops to parts of the world where the State has little presence.<sup>174</sup>

### b. Mission Focus

Privatizing ancillary national security functions allows the military and its soldiers to focus on developing and executing its core competencies.<sup>175</sup> The greater the ability of the military to focus on preparing and planning for combat and conflict contingencies, the more the military benefits through superior soldiers and superior planning, and execution of war

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<sup>172</sup> See, e.g., *id.* at 4.

<sup>173</sup> Deborah D. Avant, *Contracting for Services in U.S. Military Operations*, 40 PS: POL. SCI. & POL. 457, 458 (2007) (discussing how it is more difficult for the military than for a private contractor to find specific skill sets).

<sup>174</sup> See *id.* at 457 (“As quickly as these forces can appear, they can disappear; once dangers pass or local forces are trained and deployed, contracts can lapse and these personnel can be quickly demobilized.”).

<sup>175</sup> See Kyle Ballard, *The Privatization of Military Affairs: A Historical Look into the Evolution of the Private Military Industry*, in PRIVATE MILITARY AND SECURITY COMPANIES: CHANCES, PROBLEMS, PITFALLS AND PROSPECTS 48–49 (Thomas Jager & Gerhard Kummel eds., 2007) (discussing, for example, how the use of PMCs for weapon-system or military hardware expertise can allow the Department of Defense the “ability to focus on its core competencies”).

plans.<sup>176</sup> Studies indicate that the ability to focus on non-logistical, combat-oriented training and preparation is a consistent factor in soldiers reporting high job satisfaction.<sup>177</sup>

### c. Internationalization of Force

The privatized force industry's ability to draw personnel from a variety of nationalities and backgrounds affords the State opportunities to diversify its presence in a way that more closely matches indigenous culture than would public force. There is usually tension whenever a state deploys its military in another country. This tension may be uncomfortable when soldiers are placed in allied countries, but can be deadly in the context of a military occupation. In either circumstance, however, incorporating the indigenous population into military operations is an effective way to reduce tensions with the citizenry.<sup>178</sup> Similarly, the economic benefits that follow local contracting practices may reduce tension with the indigenous population.

## D. *The Alternatives to National Security Privatization*

An analysis of the congruence between PMCs and the public military would not be complete without consideration of alternative sources of force the State could and does utilize outside of each of those spheres: covert action and proxy fighters. These potential alternatives are especially important to the extent that the use of PMCs offers political advantages (whether international or domestic) that cannot be accrued through public soldiers, thus affecting our examination of the impact on democratic accountability.

### 1. *Proxy Fighters*

The U.S. has a long history of utilizing proxy fighters in order to exert influence abroad without resorting to sending U.S. troops. In the past twenty years, the U.S. has financed and aligned itself with proxy fighters in

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<sup>176</sup> See *id.* at 48 (discussing how using PMCs can free up resources, thereby allowing the Department of Defense to “fully implement its security strategy”).

<sup>177</sup> See generally Rebecca P. Sanchez et al., *Predictors of Job Satisfaction Among Active Duty and Reserve/Guard Personnel in the U.S. Military*, 16 MIL. PSYCHOL. 1 (2004).

<sup>178</sup> See David M. Edelstein, *Occupational Hazards: Why Military Occupations Succeed or Fail*, 29 INT'L SECURITY 49, 51 (2006) (noting that hiring local citizens as private contractors reduces opposition by local populations and represents part of making a “credible guarantee that [the power] will withdraw and return control to an indigenous government in a timely manner”); Marco E. Harris, *The Use of Security Professionals in Counterinsurgency Operations* 7 (Mar. 15, 2008) (unpublished M.S.S. research project, U.S. Army War College), available at <http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA480183&Location=U2&doc=GetTRDoc.pdf> (“To gain trust and legitimacy local public safety agencies and defense forces must be given training if needed and the opportunity [to] work independent of security forces.”).

Afghanistan, Colombia,<sup>179</sup> Iraq,<sup>180</sup> Iran,<sup>181</sup> Kosovo,<sup>182</sup> and others.<sup>183</sup>

Following September 11, the U.S. again relied on proxy fighters in Afghanistan to strengthen and hold their regional presences and thus reduce the pressure on U.S. and Coalition troops to occupy the whole country.<sup>184</sup> After Coalition troops surrounded Tora Bora, the area believed to contain a number of high-level Taliban and al-Qaeda leaders, the U.S. made the decision to use its Northern Alliance proxies to complete the final stage of the mission and attempt to capture or kill the al-Qaeda leaders that remained. Not only was the mission a failure, but numerous reports also indicate that local fighters facilitated the flight of the very leaders they were tasked to capture.<sup>185</sup> In addition to such specific operational breakdowns, the U.S. financing of a variety of non-state militias has created numerous paramilitaries with regional control that match or exceed the power of the Afghani central government thus compromising the very survival of the regime installed following the fall of the Taliban.<sup>186</sup>

Proxy fighters offer a source of force that requires less commitment of human and financial American resources than the deployment of an equivalent number of public soldiers or PMCs. Even more importantly, proxy fighters also possess an intrinsically local character that offers a substantially greater degree of domestic and international legitimacy than

<sup>179</sup> Colombian proxy fighters are instrumental elements of the U.S. war on drugs. See Maria Cristina Caballero, *Peace at Any Price*, NEWSWEEK, Aug. 11, 2003, at 30 (noting that “Washington has invested \$2.5 billion in Bogota’s Plan Columbia anti-drug initiative”); Kate Joynes, *Migration and Organised Crime Top Mexican-US Agenda*, GLOBAL INSIGHT, Mar. 1, 2007 (mentioning Colombia’s financial benefits of “committing itself to the U.S.-led war on drugs”); Chris Kraul, *Agents’ Deaths Reveal Problems Along Border*, STAR-LEDGER (Newark, N.J.), June 17, 2007, at 40.

<sup>180</sup> Primarily the Kurds in the north of the country. See Susan Taylor Martin, *Iraqi Kurds Optimistic in Face of Uncertainty*, ST. PETERSBURG TIMES, May 23, 2004, at A1.

<sup>181</sup> The Iran-Contra affair is the most prominent example of proxy fighters in Iran. See REPORT OF THE CONGRESSIONAL COMMITTEES INVESTIGATING THE IRAN-CONTRA AFFAIR, H.R. REP. NO. 100-433, S. REP. NO. 100-216, at 15–17 (1987) [hereinafter IRAN-CONTRA REPORT] (discussing covert operations and the utilization of “private parties and third countries to do the Government’s business”).

<sup>182</sup> The U.S. provided aid to the Kosovo Liberation Army during its conflict with the Serb national army. See Christian Jennings, *Kosovo’s Local Heroes on UN’s Wanted List*, SCOTLAND ON SUNDAY, June 11, 2000, at 22 (discussing U.S. and European aid and terming the Kosovo Liberation Army the “covert darlings of the West”).

<sup>183</sup> See Lori Fisler Damrosch, *Politics Across Borders: Nonintervention and Nonforcible Influence over Political Affairs*, 83 AM. J. INT’L. L. 1, 2 (1989) (discussing the influence of the West through, in part, covert actions in various states).

<sup>184</sup> See *Democracy’s Chance in Afghanistan*, ECONOMIST, Oct. 9, 2004, at 12 (“America fought a largely proxy war using the militias of the Northern Alliance . . .”). The relationship between the United States and the Northern Alliance was a critical part of the campaign in Afghanistan, especially in its early stages. David R. Sands, *After Zarqawi, What’s Next?*, WASH. TIMES, June 11, 2006, at A1 (noting that the “Northern Alliance played a critical role in the U.S.-led campaign that ousted the Taliban regime”).

<sup>185</sup> See Thomas Carothers, *Promoting Democracy and Fighting Terror*, FOREIGN AFF., Jan./Feb. 2003, at 84 (asserting that “the strategy [of using proxies] seems also to have been a partial military miscalculation, leading to the escape of a significant number of al Qaeda fighters at Tora Bora”).

<sup>186</sup> See *id.* (stating that the Pentagon’s initial reliance on Afghan warlords as proxy fighters “helped to entrench the centrifugal politics that threaten Afghanistan’s weak new government”).

the external use of force. This was undoubtedly a major factor in the U.S. decision to use Afghan proxies at Tora Bora.<sup>187</sup>

There are two major difficulties with proxy fighters as a legitimate choice of force for states. First, the legitimacy gain through the use of proxy fighters is compromised the more that the external funding and support is required. In other words, the greater the need for external support, the less likely that they will ultimately be able to retain power once they gain control of the land they seek to gain.<sup>188</sup> Second, proxy fighters are almost completely outside the scope of control of the sponsoring state as it relates to the manner in which they use violence to achieve their ends.<sup>189</sup> This absence of control extends to all forms of accountability of the sponsoring state to seek to rein in their proxy forces in response to democratic pressures. This is especially true when proxy fighters are in contexts in which the participation and support of the sponsoring state is achieved covertly à la Iran-Contra.<sup>190</sup> Supplementing public force with PMCs offers enormously greater transparency and normative advantages compared to using proxy fighters, who represent a likely alternative in the market for non-state force.

## 2. *Increased Covert Action*

Expanding the mission of covert governmental operatives abroad offers the possibility of achieving U.S. policy goals while ensuring that public servants carry out foreign policy plans. The use of governmental operatives already takes place without public knowledge. The United States implemented covert training and low-level combat operations in Afghanistan following September 11, but did so before public acknowledgement of military operations.<sup>191</sup> Presently, reports that the U.S. is training Iranian insurgents continue to circulate.

One might think that to the extent the question of motivation is the overriding aspect of behavior and decisions, covert operations would be an attractive option relative to the use of PMCs. Covert military operatives would presumably possess the same normative culture lauded in the military and generally emanates from the same community and education that binds all soldiers.

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<sup>187</sup> *See id.*

<sup>188</sup> Afghanistan's struggle against the Soviet Union during the 1980s, and its subsequent collapse into Taliban hands serves as a simple reminder of this principle.

<sup>189</sup> *See* Greg Travalio & John Altenburg, *Terrorism, State Responsibility, and the Use of Military Force*, 4 CHI. J. INT'L L. 97, 104 (2003) ("[A] state must direct and control the activities of the [proxy fighters] . . . before their acts will be attributable to that state.").

<sup>190</sup> *See* IRAN-CONTRA REPORT, *supra* note 181, at 15–17 (discussing how the administration covertly funded operations that lacked accountability and oversight by Congress).

<sup>191</sup> Michael Duffy & Massimo Calabresi, *Letting Up on Osama*, TIME MAG., Aug. 11, 2003, at 15; *see also* John Donnelly, *CIA Are Reportedly Active in Iraq*, KNIGHT RIDDER TRIB. BUS. NEWS, Jan. 5, 2003, at 1 (discussing supposed activities of CIA operatives in Iraq before the start of the war in 2003).



The difficulty is the inherent preclusion of public knowledge (and thus public policy assessment) of covert actions. Throughout history, covert operations tend to either originate or trend outside the confines of government limiting law.<sup>192</sup> Today there are repeated reports that government soldiers continue training groups even after congressional prohibitions of such training.<sup>193</sup>

## V. THE PRIVATIZED MILITARY AND ITS CONSEQUENCES

The prevalent theoretical and empirical tendencies outlined (and rejected) in Parts II and III have led to undue claims that PMCs possess inherent flaws, both in concept and in practice. In fact, policy surrounding privatization is the problem.

Arguments against PMCs share a foundation characterizing the motivation of the private sector—profit—as a fountainhead of harms in projecting state force.<sup>194</sup> This foundation should be unequivocally rejected. Emphasis on profit as the relevant factor of analysis ignores dimensions more directly indicative of the normative character of privatized services and, paradoxically, encourages policy makers to pass over decisions directly affecting the underlying policies that contractors are said to offend.

Eschewing the attempt to transform profit-motive into a placeholder for other intrinsic qualities, this Article encourages a view of national security privatization firmly planted upon analytic pillars of domestic accountability and national security efficacy. The rejection of profit motive as a relevant factor in favor of the observable traits of privatized service providers avoids the theoretical and empirical fallacies outlined in Parts II and III. Further, it produces a more flexible and effective utilization of privatized military service that leads to both conventionally unsurprising and counterintuitive results.

### A. *The Consequences of Prohibiting Privatizing National Security Functions*

The surge of commentary condemning privatized military functions has sparked federal legislation prohibiting certain varieties of contractors, held up high-level military appointments, and influenced Blackwater, one

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<sup>192</sup> Iran-Contra and the unauthorized bombings of Cambodia during the Vietnam War are obvious examples. See Symposium, *The United States Military Action in Cambodia, 1970, in the Light of International and Constitutional Law*, 65 AM. J. INT'L L. 1, 1–2, 26, 38 (1971) (discussing possible international law violations, the questionable constitutionality, and the legal dimensions of the Cambodia incursion); David J. Scheffer, *U.S. Law and the Iran-Contra Affair*, 81 AM. J. INT'L L. 696, 696–97 (1987) (discussing how the Iran-Contra affair raised issues of potential violations of international law).

<sup>193</sup> See AVANT, *supra* note 23, at 155 (noting that government by proxy “violates the official US line”).

<sup>194</sup> See *supra* notes 64–72 and accompanying text.

of the nation's largest military security contractors, to announce it was moving away from security work in favor of other business opportunities.<sup>195</sup>

Determining the effects of using private actors makes policy, as it should; but incorrect or poorly established determinations make bad policy. Legislation introduced in the U.S. Senate in August 2008, entitled the "Restoring America's Integrity Act" ("RAIA"), prohibits contractors from engaging in interrogation.<sup>196</sup> Announcing the legislation, Senator Diane Feinstein stated that, "I also believe that the use of contractors leads to more brutal interrogations than if they were done by Government employees."<sup>197</sup> In the same statement, Senator Feinstein noted, "We remain a nation at war, and credible, actionable intelligence remains a cornerstone of our war effort."<sup>198</sup>

The wisdom of legislation like RAIA depends on a conclusion that privatized national security providers (either as institutions or through individuals) are "different" from public troops in a way that accrues negative consequences. Not only is the data supporting this suspect, but moreover, the legislation ignores the efficacy of bringing private sector benefits to bear on a very public problem. Private intelligence contractors often possess more experience in interrogation than their military counterparts.<sup>199</sup> That experience is usually gained through work in the domestic criminal law enforcement realm, where they are trained to conduct their interrogations in accordance with heavy domestic restrictions. These intelligence contractors also tend to have specialized language skills that make their services highly profitable and portable.<sup>200</sup> A failure to address efficacy gains of the privatization represents a failure to understand the parallel tracks of efficiency in relationship to accountability. An appropriate analysis of national security privatization creates a direct comparison between the benefits accrued by privatization against the potential harms unique to privatization.

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<sup>195</sup> Elana Schor, *Blackwater To Leave Security Business Following Problems in Iraq*, GUARDIAN, July 22, 2008, <http://www.guardian.co.uk/world/2008/jul/22/usa.iraq>.

<sup>196</sup> Restoring America's Integrity Act, S. 3437, 110th Cong. § 3 (2008).

<sup>197</sup> 154 CONG. REC. S8045 (daily ed. Aug. 1, 2008) (statement of Sen. Feinstein).

<sup>198</sup> *Id.*

<sup>199</sup> See, e.g., Paul Kern et al., *Military Intelligence Activities at Abu Ghraib Prison*, FED. NEWS SERV., Aug. 25, 2004; Tony L. Thacker, *Interrogation: Is the US Army Equipped and Trained To Meet the Present Challenges in Today's Contemporary Operational Environment?* 4 (June 16, 2006) (unpublished M.M.A.S. thesis, U.S. Army Command & General Staff College), available at <http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA452049&Location=U2&doc=GetTRDoc.pdf>; but see George R. Fay, *Investigation of the Abu Ghraib Detention Facility and 205th Military Intelligence Brigade*, in THE ABU GHRAIB INVESTIGATIONS 107, 110-11 (Steven Strasser ed., 2004) (stating that civilian contractors often do not have formal training in military interrogation techniques).

<sup>200</sup> See Farah Stockman, *Civilians ID'd in Abuse May Face No Charges*, BOSTON GLOBE, May 4, 2004, at A1 (noting private contractors' technical expertise in interrogation); Fran Wood, *Unconventional Justice?*, STAR-LEDGER (Newark, N.J.), May 15, 2005, at 3 (referring to language and contractor cultural expertise in interrogations).

B. *Constitutional and Policy Consequences of the Legitimization and Incorporation of Private Force*

When a democratic government is improperly insulated from political accountability, it can act recklessly as to its policies, and in the context of war, engage in military conflict without democratic checks that ensure public awareness and accountability.

If, however, the dynamics of the market are set and the need for utilizing alternative sources of force persist, the relevant policy question revolves around which source of non-state actor force possesses a comparative advantage consistent with democratic accountability principles. Answering this requires an analysis of force projecting possibilities and the structural elements of those options through the lens of democratic principles.

1. *Setting the Standard for Democratic Accountability in Issues of National Security*

The baseline standard of processes and public access to decisions affecting policies of war and peace must be that of the public military. Democratic accountability principles contemplate, and the contours of information available to fulfill those principles reflect, an attempt to balance between openness and effectiveness based on the context of governmental action—in this case, the delicate, but fundamentally important decisions of war and peace.<sup>201</sup>

In many ways, the military is the most carefully reviewed agency of the federal government as a formal matter. As one of the largest recipients of federal dollars, the budget of the Department of Defense is subject to endless scrutiny.<sup>202</sup> The Department of Defense has been subject to more reports by the General Accounting Office (now the Government Accountability Office) than any other branch.<sup>203</sup> The breadth of these reports runs the entire gamut of military operations, from procurement, to training, to contractor oversight and military affairs.<sup>204</sup> Despite broad

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<sup>201</sup> Robert O. Keohane, *Global Governance and Democratic Accountability*, in TAMING GLOBALIZATION: FRONTIERS OF GOVERNANCE 130, 132 (David Held & Mathias Koenig-Archibugi eds., 2004) (“[Policies] are only legitimate if they conform to broadly democratic principles, appropriately adapted for the context.”).

<sup>202</sup> See Federal Budget Spending and the National Debt, <http://www.federalbudget.com/> (last visited Jan. 17, 2010) (showing that, in 2008, the Department of Defense was given the second largest amount of money by Congress, with the Department of Health and Human Services getting the most).

<sup>203</sup> According to a search on the GAO website, more than ten percent of the reports by the GAO office between October 1, 2008, and October 1, 2009, were dedicated to examining the Department of Defense. For how to run a similar search, see *infra* note 204.

<sup>204</sup> U.S. Government and Accountability Office—Reports and Testimonies, <http://www.gao.gov/docsearch/agency.php> (last visited Jan. 17, 2010) (select “Department of Defense”; then select a date range and select “Search”) (showing the variety of reports published by the Government Accountability Office).

deference in classification determinations, the Department of Defense has released millions of pages of documents since the beginning of the Iraq War documenting meetings and decisions of both high and low level officials executing the war.

Democratic accountability, however, is not only about formal accounting mechanisms, but also about whether the justifications of the military are presented to the American people to make intrinsically political judgments about the desirability and validity of government action.

The transparency and enforceability of democratic norms in this context, however, should not be overstated. Viewing the intrinsic nature of national security as a realm in which the retention of classified information is considered of paramount importance, traditional mechanisms of democratic accountability are compromised and often purposefully evaded.<sup>205</sup> To start, public military action often takes place in areas that provide limited and challenged access to independent observers, such as combat zones. Similarly, media restrictions imposed by the military during wartime, even in circumstances where a plausible security concern is difficult to discern, such as the prohibition of photographing American coffins being transported back to American soil or photographic restrictions of “identifying characteristics” of detainees at Guantánamo Bay, present obstacles inherent to contemporary military regulations.<sup>206</sup>

The public military is also insulated from formal accountability mechanisms as a policy matter due to its mission of national security. While the Department of Defense is formally encompassed within the ambit of FOIA, much of the information one might request is covered by the national security exception of the statute.<sup>207</sup> Similarly, both the CIA and the Department of Defense retain wide latitude in classifying documents at varying levels of security clearances with only cursory, and typically deferential, review in limited circumstances.<sup>208</sup>

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<sup>205</sup> See Dickinson, *supra* note 33, at 193–94 (“Privatizing military functions, in contrast, will be unlikely to make quite so big a difference in the amount of democratic oversight because even those military operations that are *not* privatized can evade many transparency norms.”).

<sup>206</sup> Posting of Aamer Madhani to The Swamp, [http://www.swamppolitics.com/news/politics/blog/2008/07/a\\_sanitized\\_picture\\_of\\_war.html](http://www.swamppolitics.com/news/politics/blog/2008/07/a_sanitized_picture_of_war.html) (July 26, 2008, 18:22 EST) (noting that “publishing photos of dead Americans is not prohibited under U.S. military [policy]”); *Day to Day: Exhibit Brings Detainees’ ‘Pictures from Home’* (National Public Radio broadcast Apr. 5, 2007), <http://www.npr.org/templates/transcript/transcript.php?storyId=9378346> (discussing photographs of Guantánamo Bay).

<sup>207</sup> 5 U.S.C. § 552b(c)(1)–(10) (2000). While a refusal to disclose can be challenged in court, courts routinely prove more deferential to the national security exception than other similar provisions within the statute. See GOLDSMITH & POSNER, *supra* note 132, at 62 (referring to the “national security exception to ambassadorial immunity”).

<sup>208</sup> See Martin E. Halstuk, *When Secrecy Trumps Transparency: Why the OPEN Government Act of 2007 Falls Short*, 16 COMMLAW CONSPECTUS 427, 428 (2008) (discussing recent doctrinal developments and caselaw regarding judicial review of classification decisions); Luppe B. Luppen, *Just When I Thought I Was Out, They Pull Me Back In: Executive Power and the Novel Reclassification*

Formal and practical obstacles to transparency may cause one to think that a principle of democratic accountability is impractical in causes of war. The ability of the State to restrict exposure of information to the public, however, does not wrestle away democratic accountability when the overarching subject matter of the policy is of high public importance and subject or available to large numbers of individuals within the government. This is because even highly restricted evidence contrary to public interests has proven likely to emerge in public due to internal competitive pressures within the bureaucracy and the anonymity associated with large government.<sup>209</sup>

Moreover, democratic accountability does not assume perfect transparency; rather, it accepts both the reality and opacity of power.<sup>210</sup> As such, its goal is not to gain the requisite modicum of control of official power in order to guide it, roughly, according to public preferences. As a roughly hewn guide to following public policy preferences and adhering to public values, democratic accountability principles simply require the availability of overarching policy choices and a normative list of values attached with each policy choice.

## 2. *Private Military Companies and Democratic Accountability*

As noted above, many of the same cultural and institutional forces in the public military are at play in the context of PMCs. In one sense, as a formal matter, PMCs are subject to less scrutiny, both by the public at large and Congress, than the public military. PMCs are not subject to FOIA requests nor can they typically be ordered to produce “sensitive” commercial information in the context of civil suits.<sup>211</sup> Moreover, Congress does not possess the more detailed oversight structure over PMCs that it possesses over the public military. Cases brought against PMCs for civil liability (other than fraud) have not yet proven successful in overcoming the industry’s defense of acting on behalf of the government.<sup>212</sup> The question of corporate criminal liability against PMCs

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*Authority*, 64 WASH. & LEE L. REV. 1115, 1117 (2007) (discussing the many publicly available records that were withdrawn by government intelligence agencies without meeting classification standards).

<sup>209</sup> See Barton Gellman et al., *Surveillance Net Yields Few Suspects*, WASH. POST, Feb. 6, 2006, at A1 (discussing the NSA wiretapping program and the enormous effort made to limit access to its existence, details, and legal justification).

<sup>210</sup> See Andreas Schedler, *Conceptualizing Accountability*, in *THE SELF-RESTRAINING STATE* 13, 20 (Andreas Schedler et al. eds., 1999) (discussing the aim to create transparent power but that agents of accountability realize that in reality “most things are not accessible to direct observation”).

<sup>211</sup> Craig D. Feiser, *Privatization and the Freedom of Information Act: An Analysis of Public Access to Private Entities Under Federal Law*, 52 FED. COMM. L.J. 21, 23, 31–32 (1999).

<sup>212</sup> See SEYMOUR M. HERSH, *CHAIN OF COMMAND: THE ROAD FROM 9/11 TO ABU GHRAIB* 33 (2004) (stating that civilian employees were not bound by the Uniform Code of Military Justice and that although they were bound by civilian law, it was unclear “whether American or Iraqi law would apply”); ANTONIO M. TAGUBA, *ARTICLE 15-6 INVESTIGATION OF THE 800TH MILITARY POLICE BRIGADE 26* (2004), available at [http://www.dod.mil/pubs/foi/detainees/taguba/TAGUBA\\_REPORT\\_](http://www.dod.mil/pubs/foi/detainees/taguba/TAGUBA_REPORT_)

for the misdeeds of their employees remains a possibility, but at this time, remains academic.<sup>213</sup>

The formal impositions of disclosures designed to encourage transparency of PMCs remains, however, within the purview of the legislative and judicial branches. Congress possesses the unquestioned ability to require PMCs to engage in more meaningful disclosures for the purposes of securing and maintaining contracts with the government. Similarly, the judicial interpretation concerning “proprietary” information is within the purview of the courts.<sup>214</sup> For purposes of this Article, however, the most relevant question is, even fully discounting these formal avenues of information disclosure, does the public possess the requisite information to make judgments as to the “appropriateness” of PMC action empowered by their elected officials?

On the other hand, there are non-formalist influences on institutional behavior that make PMCs more inclined than the public military to disclosure. The most substantial is the moderating and disciplining effect of the commercial market that encourages disclosure and the protection of reputation as a legitimate entity. PMCs are repeat economic actors. The success of their work is judged not only by the effectiveness of their work, but also whether they perform that work in a way that does not draw negative publicity to their sponsor. Like an umpire in the World Series, their name is only called when something has gone wrong. People do not care about whether a prison is privatized if it is functioning properly. The public is uninterested in Blackwater contractors who guard State Department personnel until those contractors are engaged in an incident deemed inappropriate. Thus, PMCs are highly responsive to questions impacting their larger commercial reputation. Reputational concern extends to all of a company’s operations no matter the location or client. In the words of one company official, “[w]hen we sneeze in Africa, we get a cold in Asia.”<sup>215</sup>

The hiring process of PMCs reflects a concern that the personnel utilized by those companies satisfy the highest standards of professionalism. Institutional concerns, shared by contemporary public

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CERTIFICATIONS.pdf (noting difficulties in the accountability process); Joel Brinkley & James Glanz, *Contractors in Sensitive Roles, Unchecked*, N.Y. TIMES, May 7, 2004, at A15 (“[P]rivate contractors are now carrying out highly sensitive duties that until very recently were the province of government agencies only.”).

<sup>213</sup> See 5 U.S.C. § 552(a)(4)(G) (2006) (providing that a district court may hold an employee in contempt of court for noncompliance with a court order); Freedom of Information Act, 5 U.S.C. § 552 (2006) (authorizing the heads of United States departments or agencies to “take such actions, commensurate with the sensitivity of that information, as are necessary to protect that information from disclosure”).

<sup>214</sup> See Feiser, *supra* note 211, at 35 (noting that an exemption to FOIA depends on the way federal courts define “agency record”).

<sup>215</sup> AVANT, *supra* note 23, at 221.

militaries (largely reflecting the norms of their surrounding societies), have greatly influenced how PMCs view the currency of their reputation.<sup>216</sup> In Sierra Leone, one private security firm refused to engage in offensive operations against the country's rebels due to a concern that the firm would be accepting a "mercenary" tag that would affect future employment with large Western states and the U.N.<sup>217</sup> The largest customers of PMCs and the standards that they require in the execution of their contracts shape PMC standards.<sup>218</sup> In the context of the current security situation, the United States and major international non-governmental organizations like the U.N. control corporate operating and performance standards.<sup>219</sup>

The possibility of a negative incident tainting a contractor is much higher than in the public system. When public soldiers engage in an apparent unlawful shooting of civilians, as in Haditha, their blame is individualized and generally perceived by the public as not implicating the military as a whole.<sup>220</sup> A similar incident by PMC personnel is perceived as evidence of a larger socialized problem with the use of contractors. In the context of the Abu Ghraib scandal, polls indicate that the public accepted the explanation of military and civilian assertions that the acts of prison guards reflected "a few bad apples."<sup>221</sup> The opinion of the contractors acting as interrogators was much more likely to reflect a larger concern that implicated the entire company.

## VI. CONCLUSION

The arguments that the privatization of national security represents serious constitutional and democratic harms are overblown. The core concern of privatization opponents rests upon a foundation that national security, the quintessential public good, cannot survive the taint of profit motive among those responsible for its delivery. The reality is quite different.

The legal structure governing private actors must balance a healthy concern over undemocratic manipulation by government, while

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<sup>216</sup> John W. Meyer, *The Structuring of a World Environmental Regime*, 51 INT'L ORG. 623, 633 (1997) (discussing how, in a similar vein, "[t]he institutionalization of environmental concern . . . seems to have modestly affected the character of the whole world environmental enterprise").

<sup>217</sup> AVANT, *supra* note 23, at 85–86.

<sup>218</sup> *See id.* at 220–21 (noting that larger consumers have more of an effect on PMCs and the market's ecology than weak state consumers).

<sup>219</sup> The dominance of the U.S., Europe, and (mostly prospectively) the U.N. in the development and make-up of the industry is both unmistakable and possesses a self-perpetuating element. Nationals of the U.S. and Europe compose the executives of the vast majority of PMCs, their personnel and higher ranking officials served within their militaries, they are incorporated in those states, the list goes on and on. This cultural dominance is underscored by the disparity in expenditures. Since September 11, U.S., and to a lesser extent British, forces have spent billions of dollars on PMC activity, more than hundreds of times more than any other state or INGO in the market. *See* AVANT, *supra* note 23, at 220.

<sup>220</sup> *See* Michael Duffy et al., *The Ghosts of Haditha*, TIME MAG., June 12, 2006, at 26.

<sup>221</sup> *See Just a Few Bad Apples?*, ECONOMIST, Jan. 22, 2005.

recognizing the special limitations and requirements of national security policy. Resolving the tension between these concerns enables a forward-looking legal approach that garners normative advantages that are typically not ascribed to utilizing the private sector.